

Children's Law Guide

Introduction

The purpose of this guide is to summarise the law and procedures relating to some of the Court processes and orders concerning children for those involved or about to be involved in Court proceedings. This guide covers the law relating to children where adults involved in their care cannot reach agreement on what should happen to them. It does not cover Adoption Law (see our Adoption Guide) or Care proceedings (see our Care Proceedings Guide).

It is an introduction to the law rather than detailed advice and it is sensible to seek legal advice from a Solicitor specialised in this area. We have a number of lawyers who can assist.

Why does the Court get involved?

Most of the law relating to children is governed by the Children Act 1989 with recent amendments from the Adoption and Children Act 2002 (The majority of which will come into force in September 2005). The ethos of the Acts is that when parents separate, they remain parents to the child and it is their responsibility to make suitable arrangements for their children. The Court gets involved when the adults who are responsible for decision-making are unable to agree on what is best for their children. The Court will not make any Order unless it is better for the child to do so than not. In considering what Order to make the Court will have the welfare of the child as its paramount consideration.

Parental Responsibility

Anyone with Parental Responsibility for a child can take decisions concerning that child. Parental Responsibility is all the rights, duties, powers, responsibility and authorities which by law a parent of a child has in relation to the child and his property. The mother of the child has Parental Responsibility automatically. Until recently the father of the child only had Parental Responsibility automatically if he was married to the child's mother when the child was born or conceived, or he later married the child's mother. Now, an unmarried father of a child whose birth was registered on or after 1st December 2003 will acquire Parental Responsibility by going with the mother to register the child's birth or by making a statutory declaration of paternity. Any unmarried father can acquire Parental Responsibility by executing a legally binding agreement with the mother or by court order. In addition, the Adoption and Children Act is due to be implemented in 2005 and once it is in force, step-parents will be able to acquire parental responsibility by agreement with the natural parents who hold it, or by court order.

Other people who have Parental Responsibility are adoptive parents, legal Guardians, people with a current Residence Order, Local Authorities with a care order or any person with a pre-

existing Custody or Care and Control Order. Parental Responsibility can be shared between more than one person. It is only extinguished by a Court Order or when the child is adopted.

Each person with Parental Responsibility should be consulted about major decisions, but day to day decisions are generally decided by the person caring for the child at the time. One person with Parental Responsibility can take a decision concerning the child unless the other party objects. It is where parents cannot agree that the Court will make Orders deciding the issues.

What sort of Orders can the Court make?

The Court can regulate almost all areas relating to a child's upbringing. The most common Orders that the Court can make are as follows:-

1. Residence Order: A Residence Order determines which person a child shall live with.
2. Contact Order: A Contact Order directs who the child should see and when. Contact can include indirect contact by way of telephone calls or letters etc. Contact Orders can also put conditions on the contact e.g. that it should take place at a Family Centre or with somebody else present.
3. Specific Issue Order: A Specific Issue Order is an Order determining a specific question in relation to the upbringing of a child or any aspect of Parental Responsibility e.g. it can determine which school a child should attend, what religion a child should be brought up in, whether a child should have an operation or other major issues concerning a child's life.
4. Prohibited Steps Order: This is an Order that prevents someone from doing something which they could normally do within the exercise of their parental responsibility e.g. they can be prohibited from allowing a child contact with a particular person, or from visiting a child at school, or from removing the child from the country.
5. Guardianship: The Court can appoint a Guardian for a child if there is no parent with parental responsibility for him, or someone with a Residence Order in respect of a child has died. A Guardianship Order carries Parental Responsibility for the child and can also be made by way of an appointment under a Will. An appointment under a Will only takes effect on the death of the last person with Parental Responsibility for the child, or the person with a Residence Order.

Mediation

The Court encourages parents and others involved in children's lives to work together to agree solutions for their children. To this end, mediation is encouraged. This allows parties to discuss the issues with a third party to assist them in trying to reach agreement. Mediation can offer support services to children themselves as well as families and parents in resolving

issues concerning children. Mediators usually charge for their services. If you qualify for Public Funding, you may be required to attend publicly funded mediation in an effort to resolve your case without taking it to Court. We can advise whether this will apply in your case.

What does the Court consider when reaching a decision?

The Court has to consider a number of things set out in the Children Act. The Court must consider the welfare of the child as being the paramount consideration. Therefore a decision should be taken on what is best for the child. The Court will not make an Order unless there is a positive benefit to the child in making an order. In considering what is best for the child, the Court has to have regard to the “welfare check list” which is guidance set out in the Children Act. The factors which the Court will consider are :-

1. The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding).
2. His physical, emotional and educational needs.
3. The like effect on him of any change in his circumstances.
4. His age, sex background and any characteristics of his which the Court considers relevant.
5. Any harm which he has suffered or is at risk of suffering.
6. How capable each of his parents, and any other person in relation to whom the Court considers the question to be relevant, is of meeting his needs.
7. The range of powers available to the Court under this Act in the proceedings in question.

The Court must take account of each of these factors but does not have to give them all equal weight.

CAFCASS

The Children and Family Court Advisory & Support Service (CAFCASS) was set up to enable the Court to get a fuller picture of circumstances relating to the children and to assist parents in reaching agreement about their children, and to make recommendations about what would be the best outcome for a child. The Judge/Magistrates will not come out to see the child with the family and probably will not meet the child throughout the Court case, so rely on the CAFCASS officer for more details about the situation. If they are to prepare a report, the CAFCASS Officer will see all parties to the case and will meet with the children concerned. The CAFCASS Officer will try to ascertain the child’s views and wishes, as well as the circumstances giving rise to the case. The CAFCASS Officer will report on the home conditions and provide any other information that may be relevant for the Court. They will usually contact the child’s school for further information. The CAFCASS Officer will then

write a report for the Court to provide the Court with important information in reaching decisions about the child. Their views and recommendations are very important to the Court because they are independently appointed by the Court in order to assist in making decisions. They have no reason to favour one party or the other.

How are children heard within Court proceedings?

In very rare circumstances children who are competent (mature enough) can instruct solicitors directly. However children's involvement in Court proceedings is discouraged and ordinarily their wishes and feelings are taken account of by the evidence describing their wishes and feelings from the people involved, from information provided by their school or surgery, and mostly by the CAFCASS Officer who will see them to ascertain their views and observe them with their family. Children do not normally come to Court and permission of the Judge is required if they are to come in.

Who can apply for court orders?

Parents (including fathers without Parental Responsibility) and any person in whose favour a Residence Order is in force may make applications to the Court in respect of their children. Until recently only natural fathers could obtain Parental Responsibility in respect of their children but this will change in 2005 to include step parents when the new Adoption and Children Act comes into force. Otherwise step- parents where a child has been living with them, or any person with whom a child has lived for a period of at least 3 years, or anyone with the consent of those with parental responsibility for the child or the consent of a person with a Residence Order can apply for a Residence or Contact Order. In addition, any person including other relatives, family friends etc, may apply to the Court for Leave (permission) of the Court to bring an application in respect of the child.

Notice period

Anyone applying for one of the Court Orders above should give 14 days notice to the other people entitled to be involved in the Court case, or anyone else who is entitled to be notified. People who are automatically involved in the Court case include anyone with Parental Responsibility for the child. In addition notice must be given to anyone who is caring for the child at the time that proceedings are started and anyone previously named in a Court Order with respect to the child which is still in force. A father without Parental Responsibility should also be notified of any Guardianship Application. In exceptionally urgent cases the notice period can be cut down by the Court, and in some cases, Court Orders can be made without the other party being notified. This is only in urgent cases where there is a real risk of harm to the child in the meantime. Such orders are usually made on a temporary basis until the court can consider the case again with all parties having a chance to be heard.

The process

The person making the application (the Applicant) completes the relevant forms and they are processed by the Court. There is a fee payable for starting a Court process. The Court will set a date for the first Court appointment. The forms are then delivered, together with notice of the first Hearing, to the people entitled to be involved or notified.

All parties attend at the first appointment with their legal representatives if appropriate. The parties will meet with a worker from CAFCASS (the Children & Family Court Advisory & Support Service-see below) who will discuss the case with the people involved. If an agreement is reached with the assistance of the CAFCASS Officer, the Court can make any necessary Court Orders at that time. If no agreement is reached, the Court will either reach a decision on a Final or Interim (temporary) basis or more normally the Court will delay the case and ask the CAFCASS Officers to prepare a Report with recommendations for the Court to consider. There is usually a further Court appointment to consider any Report prepared by the CAFCASS Officer. If there is still no agreement between the parties, the Court will have a final hearing to decide the case.

Interim Orders

The Court will not normally want to change arrangements concerning a child until it has all of the information it requires to reach a decision. It usually takes some time to obtain reports from CAFCASS Officers (often 3 to 5 months) and for all the information about a child to be prepared in a Court format and sent to the Court. Therefore Courts are reluctant to make decisions until they have all of that information. On average a set of contested proceedings concerning a child takes 6 to 9 months to reach a conclusion. However in urgent cases where a decision is needed on a temporary basis, the Court can make interim orders and specify how long they will be effective for. For instance where parents cannot agree with whom a child should live, the Court could make a Residence Order or temporary arrangements for contact for a specified period whilst the evidence is obtained. The Court will make it on the basis of the information available at the time and it could be changed at a later date. The Courts will only do this if it is absolutely essential.

The Final Hearing

If there is an agreement the Court hearing will be very short. However if the parties still disagree about what should happen to a child, the Court will reach a decision and make a Court Order. In order to decide the case the Court will want to hear from the various witnesses to give oral evidence on their statement. Each witness (including the parties to the case) will be asked questions by their own legal representatives and by the legal representatives for the other parties. The representatives will then make speeches to the Judge on behalf of their client and the Judge will then reach a decision. If the case is being heard in the Family Proceedings Court, the Magistrates will give Reasons for their decisions

and if the case is being heard in the County Court or above, the Judge will give a Judgement specifying why he has reached that conclusion.

Who can come into Court?

Court proceedings concerning children take place in private with only the parties, their legal advisers, the Court staff and the Judge or Magistrates present and any others only with consent of the court. No one is allowed to tell anyone else about the content of Court Reports or what is said in Court without permission from the Judge. To do so is contempt of Court and the Court could sentence someone in contempt of Court as if they had committed a crime.

Contact where a child may be at risk

The Courts regard domestic violence seriously and will want to look at all the circumstances of the case before making Contact Orders. If a child may be at risk from a parent for whatever reason, it may be appropriate for supervised contact to take place, or for contact to take place within the confines of a Contact Centre so that the child's safety can be ensured and the quality of the contact can be monitored. The Court can make Orders requiring that this take place although there may be a charge raised by the Centre for the provision of supervision and facilities.

How long does a Court Order last?

A Residence Order, Contact Order, Specific Issue Order or Prohibited Steps Order lasts until a child is 16 unless the Court earlier changes the Order, or in exceptional circumstances it is made until the child's 18th birthday. A Guardianship Order or Parental Responsibility Order lasts until a child is 18.

Can a Court Order be changed?

Almost all Orders relating to children can be changed at any time, and the Court will simply have regard to whether or not it is in the best interests of the child to change the Order. Orders will only change on an application by someone entitled to apply to the Court.

Can the arrangements for a child change without returning to the Court?

Once the Court has made a Court Order, that is the situation that should prevail. There is nothing to stop people agreeing additional contact or alternative arrangements between themselves, but the Court Order will still exist. If people have been able to agree changes to a Court Order, it is sensible to refer the matter back to the Court to obtain a changed Court Order. Otherwise, if the agreement breaks down the position is as stated in the Court Order.

Public funding (formerly Legal Aid)

The Children's Legal Practice Ltd are approved by the Legal Services Commission to undertake Publicly Funded children's work (formerly Legal Aid) . Public Funding is granted where someone qualifies both on financial grounds and on merits criteria i.e. the person's income and capital must be within certain specified limits (after certain allowances for dependants and expenses) and it must be justified to spend public money on their case and they must be likely to win. We can advise you on whether or not you will qualify for Public Funding. In some cases, people will qualify financially but will be asked to make a contribution towards their fees. In addition, you could be asked to repay some of your legal fees if you obtain money or property as a result of the advice you receive, but this is unlikely in children's proceedings alone.

Anticipated changes

The Adoption and Children Act 2002 has been approved by Parliament, but the majority of the Act is not yet in force. It is planned to be brought into force in September 2005. It allows step parents to acquire parental responsibility for children with the agreement of all natural parents with parental responsibility, or by court order.

The new Act also introduces the concept of "special guardianship orders" for children. This is seen as an intermediate step between a residence order and an adoption order. It does not sever the links with a child's natural family, but is intended to be a long term solution for children, with the special guardian (who could be a non-parent) having parental responsibility for the child and exercising it to the exclusion of others holding parental responsibility.

Generally

This is a very brief summary of children's law and there are many more aspects that will need to be considered by a Solicitor. We would strongly recommend that you take advice from a Solicitor with expertise on your specific case.

Our Solicitors

The Children's Legal Practice Ltd has one of the largest Children's Teams in Hampshire and was set up particularly to deal with Children and family issues. Our solicitors can advise and assist in connection with all aspects of the law relating to children, care proceedings and adoption and education law. We also publish Guides on Adoption Law, Care proceedings, Parental Responsibility, and a Newsletter called Children's Legal Update. Please let us know if you need copies of any of these Guides.

The members of the Team who specialise in Children's matters are :-

Sarah Palmer

– Sarah is a member of the Law Society Children’s Panel and specialises in all aspects of Children’s work and Education Law.

Kirti Patel

- Kirti is a member of the Law Society Children’s Panel and specialises in care proceedings and all aspects of the law relating to children.