

5. CHILDREN – RESIDENCE AND CONTACT

Custody and Access

Residence and Contact Orders were introduced by Children Act 1989. Before that, instead the Court would make Custody and Access Orders. It was assumed that the parent, who had custody of the child, also had the right to make **all** the decisions about the child. It was also assumed that the parent with an Access Order only had the right to visit the child. This is no longer the case. 'Custody and Access' have been replaced since October 1991 by the new ideas of 'Residence and Contact' explained below.

Residence

A **Residence Order** can be made by the Court, stating that the child lives with one parent. Married parents will retain joint Parental Responsibility, but of course in reality, the parent caring for the child will be responsible for the day-to-day decisions which have to be made as to the child's upbringing.

There is nothing stopping the Court making a Residence Order in favour of **both** parents, to cover situations where it is intended that the child should live with both parents, but spend more time with one than the other, for example a child at Boarding School who spends part of the holiday with one parent and part with the other. However, this is less usual.

Factors to be taken into account

Where either party is proposing that the child be moved from the former family home, we shall need to take instructions on the following points:-

- a) The nature of the accommodation where it is proposed the child will live
- b) How permanent these arrangements are
- c) Whether or not this will involve a change of school
- d) The degree of understanding or maturity of the children
- e) The existence of other children in the family unit or extended family
- f) The existing contact arrangements and how they are working
- g) The likely or perceived effects of the child of the change of arrangements
- h) (Where appropriate) what arrangements may be made for the care of the child during work days and school holidays.

The Court will expect the parent with care of a child, to co-operate in order to preserve a role for the absent parent in parenting.

A shared Residence order. The court's current approach favours a shared Residence Order if this can be practically possible. The first main case was in D v D where the children were living for 38% of time with the father and 62% with the mother. In the case of Re A the court was anxious to draw the line on the fact that the law said that the parents already have shared parental responsibility but a Residence Order is about where the child should live. The court's order has to be designed to reflect the real position on the ground. A shared Residence Order can also be made where the children do not divide their time equally between the parents.

The most recent cases seem to outline that a shared Residence Order can have the benefit of conveying to the parents that neither is control and therefore that both are expected to cooperate for the benefit of the child. The court is more willing to agree to a shared Residence Order particularly where there is extensive already contact. The Court of Appeal has only recently emphasised that both parents are equal in the eyes of the court and have the same duties and responsibilities.

Contact

A **Contact Order** can be made by the Court, requiring the person with whom the child lives to allow the child to visit or stay with the person named in the Order or for some other form of contact.

If the contact arrangements break down, then it is open to a parent to apply to the Court for a **'Defined Contact Order'** where the Court will make a decision on what contact there should be between parent and child.

Other forms of contact can include contact by letter or telephone.

Factors to be taken into account

We shall need to take instructions on the following points:-

- a) Both parents' attitudes to contact visits
- b) (Unless the children are very young) the child's attitude to such visit
- c) When you would like the visits to take place
- d) What aspects of the arrangements are agreed and which are likely to cause disagreement
- e) Arrangements for the collection and return of the children
- f) The current arrangements

Disclosure of Address

If your spouse or partner has taken the child to an unknown address, the Court can be asked to order anyone with the address to reveal the child's whereabouts to the Court.

Prohibited Steps and Specific Issues

A **prohibited Steps Order** can be made by the Court which **prevents** a parent from taking a particular course of action, and a **Specific Issues Order** can be made by the Court, which **obliges** a parent to take a particular course of action. For example, if a parent refused to consent to a Life-Saving blood transfusion for a child, then at the application of the other parent, the Court could Order this consent to be given.

To repeat the point, the Court would rather make **no** Order at all and hope that the parents, even after the breakdown of the relationship, can agree how to share parental responsibility.

Family Assistance Order

If both parents agree, a **Family Assistance Order** can be made by the Court allocating a Family Court Welfare Officer (or other officer) for a short period in helping the family to overcome the problems and conflicts associated with the breakdown of the relationship.

Removal of a Child from the United Kingdom

No one is allowed to remove a child from the United Kingdom without the consent of the Court **or** the written consent of everybody with parental responsibility, so long as a residence order is in force. However, a person with a residence order (but no one else) **may** do so for a period of less than one month without the consent of the other parent or the consent of the Court.

If you wish to prevent this step being taken, then you would apply for a Prohibited Steps order.

If you are the parent seeking to take such a step and you are being prevented by the other parent, then you would seek a Specific Issue Order, as outlined above.

Where there is no residence order in force, a parent should seek permission to remove the child by way of a specific issue order or the express permission of the other parent. The person who is looking after a child, can only take the child to **live** abroad with the written consent of every person who has Parental Responsibility or with specific permission from the Court. The proposal for removal must be "realistic and sensible", and must be fully supported by evidence.

Abduction

If a parent removes the child from the Jurisdiction of the Court (i.e England and Wales) without the consent of the other parent or the permission of the Court, this may be a Criminal Offence, and the Court has power to order the return of the child pursuant to the Child Abduction and Custody Act. (see separate fact sheet).

Change of a Child's surname

Where there is a residence order in force, a child's surname cannot be changed without the written consent of both parents (or an order of the court).

Sorting out arrangements for the children

As long as parents are broadly agreed what is appropriate for the children, the Court would rather make no Order at all. This is known as the "no order principle".

It may be possible to agree arrangements for the children, either by negotiation or through Mediation. Please refer to Fact Sheet number 1 on the topic of Mediation. We also have leaflets from a number of approved Quality Mark Mediation Agencies which we can give you upon request.

Should all attempts at agreement fail, then we can take matters to Court on your behalf.

Factors taken into account by the Court in making a decision

In the absence of agreement, the Court will make a decision. However what factors does the Court take into consideration when deciding what Order to make? These are:

- a. The wishes and feelings of the child (depending on age and understanding).
- b. The needs of the child (physical, emotional and educational).
- c. The likely effect of any change in his or her circumstances on the child.
- d. His or her age, sex, background and any characteristics of the child which the Court considers important.
- e. Any harm which the child has suffered or is at risk of suffering.
- f. How capable each of his or her parents or any other carer is, of meeting his or her needs.
- g. The powers available to the Court.

These factors are known as the "welfare checklist".

There is nothing in the Act which states the belief that all else being equal a child should live with his or her mother. Having said this, this in reality is what often happens.

The Court's paramount consideration in deciding any question concerning a child's upbringing is the welfare of the child.

CAFCASS Officer

Where the parties are in dispute, the Court will be guided in making decisions by an independent Child and Family Court Reporter from an organisation called CAFCASS (Children and Family Court Advisory and Support Service). CAFCASS interview the parties (and sometimes the children) and any other relevant persons, assess the situation, and guide the Court as to where the interests of the child lie. The welfare of the child is paramount for the CAFCASS reporter and the wishes of the parties will be treated as secondary.

CAFCASS may be called upon to produce a written report to guide the Court. This confidential report would be disclosed to you, but must not be disclosed to anyone who is not a party to the case.

Non-parents and Contact

The following persons can apply for Residence or Contact Orders:

- a. Step parents
- b. Any person with whom the child has lived for a period of at least 3 years in the last 5 years.
- c. Any one who has the consent of a person with a Residence Order.
- d. Any one who has the consent of all the people who have Parental Responsibility
- e. Grand parents.
- f. Any one who successfully obtains permission of the Court (any one not listed above with a particularly strong and worthwhile claim on the child, who can justify such an application to the Court).

Contact Orders and Residence Orders will normally last until the child is 16, unless there are exceptional circumstances justifying the Order continuing after that age.

Please note that **existing Orders** for custody, care and control and access continue after 14th October 1991. However any variation made will be made under the new Law.

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Disclaimer: The material contained in this fact sheet is for general guidance only. It is specific to the law of England and Wales, and represents a brief outline of the law current as at the date of the fact sheet. It is not intended to constitute, or to be a substitute for, legal advice specific to your case. Dunn and Baker will be responsible only for advice specifically given to you.