

ARRANGEMENTS FOR CHILDREN: THE LEGAL CONTEXT

David Hodson

“Our relationship seems at an end. So what do we do about making arrangements for our children?”

Children have very great needs at a time when their parents are separating. Yet too often, their parents have difficulty coping with their own personal, financial and other problems on the ending of the relationship. Unintentionally, the best interests of the children can be overlooked or get lost. At other times, children can be treated as substitute spouses, as confidants and friends. They can too easily be used as pawns in the disputes between their parents. Children can adopt all sorts of roles in order to cope with the parental separation. These can include trying to act as the absent parent or regressing in behaviour.

The primary task of all separating parents must be to help their children through the period of separation and all its tensions with the minimum of disturbance and distress and long term harm. Part of this task is understanding how children of different ages and gender can often react to parental separation. This can give at least assurance about a child's behaviour and reactions. See my separate note on this.

Family law is very aware of the traumas that children can go through at such a time. The law tries to do its best to minimise the disruption from the legal angle.

So what orders and interventions should be expected?

The Children Act 1989 made a radical change in the law. It abolished custody, care and control and access. Instead, it provided that the Court may make orders regarding a child including provisions as to with whom the child is to live and arrangements for contact with the parents.

Courts continually state that it is the right of a child to have a relationship with both parents and its role is generally one of finalising arrangements to enable visits to work or deciding how time should be shared.

However, the court will only make orders if it is better for the child to have a court order about arrangements than no order at all. It is called the “no order” principle. In all ordinary language, “if its working, don't try and fix it!”. In almost all cases where the parents have reached their own agreement about the arrangements for looking after their children, the Court will specifically not intervene and make an order. At any later date either parent can come back to the family court if a problem does arise which they cannot resolve.

In addition, Parliament has provided for parental responsibility for children. All married parents of children have parental responsibility for their child. This continues after any divorce. The Court does not take away parental responsibility because of a divorce. Where a child is born to unmarried parents, the mother has parental responsibility. The father can acquire parental responsibility by a written agreement with the mother or by a Court order.

Parental responsibility is generally thought to include:

- A duty to provide a home.
- A duty to educate.
- A right to determine religion and religious education.
- The duty to obtain essential medical assistance.
- The duty to maintain.
- The right to name.

- The right to domestic service.
- Consent to marriage where the child is under 18.
- Agreement to be sought before adoption.
- The right to prevent passports being issued in certain circumstances.
- The appointment of a guardian by will.
- The rights and duties over a child's property.

Responsible parenthood for these matters is to be agreed between the parents, and anyone else who may have parental responsibility. If agreement cannot be reached, and it proves impossible to resolve matters through mediation or negotiation including through lawyers, the Court will make a specific order dealing with the issue in dispute.

If there is a dispute as to whom the child should primarily live with, the court can make a residence order deciding the issue. In exceptional cases, it can make a joint residence order. If one parent has a Residence Order then the child's surname cannot be changed and apart from visits of 28 days with that parent, the child cannot be taken from the UK

The courts believe that in almost all cases, it is good for a child to have regular and satisfactory contact with both parents. It will do what it can to encourage this. If there is a dispute, the court will make a contact order. This can cover overnight contact, weekends, and holidays as well as telephone contact and by letters, cards etc. If there have been particular difficulties, contact may be supervised in the first instance. The courts emphasise that contact is the right of the child rather than a benefit to one parent or a term of any other negotiations between the parents.

Sometimes other issues can arise. The court has power to make specific issue orders and prohibited steps orders. The former deals with an issue such as where a child will be educated or religious upbringing. The latter prevents a parent taking a step which that parent could otherwise do, having parental responsibility. An example may be not taking the child abroad.

At the time of filing a divorce petition, it is necessary to file a statement setting out proposed arrangements for the children. It is good to endeavour to agree these in advance.

A guardian takes over the parenting role and can be appointed in a Will BUT the appointment is generally only legally effective after the death of the other parent.

Disputes about children need sensitive handling and an awareness of the impact on the child of not only the outcome but also the way the dispute itself is dealt with. In our experience, such disputes can often benefit very much from being discussed in mediation.

Many parents seek help in telling their children about the proposed separation. Wherever possible, it is better for both parents to tell the children together. Help and advice is often a benefit for both parents on how to deal with this sensitive subject.

My advice is "think hard before involving the court." "Fights" over residence or contact will often be tough and it may make it hard later to find good workable arrangements over contact, which will not help your child. The court can assist over contact arrangements, but often the court process encourages polarisation and these sorts of issues are sometimes better addressed in mediation.

David Hodson
+44 (0) 7973 890648
dh@davidhodson.com
© March 2007