

## Child law team

### Residence and contact - private law

We have considerable experience in representing parents in disputes in respect of their children. As well as pursuing matters through the Courts, we can refer parents and children on to mediation if appropriate. We are keenly aware of the child's increasing say in these matters.

Issues in respect of a child's home, visiting relatives and parental rights are not just dealt with within a divorce setting. Free-standing applications can be made to a Court on the question of any child's welfare at any time. A parent, or a person with parental responsibility can apply at any time for Orders from the Court. Other relatives, for example, grandparents, can apply to the Court at any time for an Order if they obtain the leave of the Court to do so.

Parental Responsibility replaces the old concept of custody. Parental Responsibility means all the rights, duties, powers, responsibilities and authority which, by law, a parent of a child has in relation to the child.

Where the child's mother and father were married to each other at the time of the child's birth, they should each have Parental Responsibility for the child. Where the parents were not married to each other at the time of the birth the mother will have Parental Responsibility for the child and the father shall not unless he acquires it by Order of the Court, by a Parental Responsibility agreement with the mother or by subsequently marrying the mother, or by being registered as the child's father (where the birth of the child is registered after 1st December 2003).

An Order for Parental Responsibility or a Parental Responsibility Agreement can only be brought to an end by Order of the Court

on the application of any other person who has Parental Responsibility or with leave of the Court on the application of the child himself/herself. The Court will only give the child leave if it is satisfied that the child has sufficient understanding to make the application.

Other people who can have Parental Responsibility for a child include :

- 1 the person appointed as the child's guardian or special guardian,
- 2 any person in whose favour the Court makes a Residence Order,
- 3 the Local Authority if a Care Order has been made.

An Adoption Order gives Parental Responsibility for a child to the adopters and the rights, powers and obligations of the natural parent and any other person with Parental Responsibility are extinguished.

Various areas of child law were codified in the Children Act 1989 which set out the following principles :

Firstly, the child's welfare is the paramount consideration and the Court must have regard, in particular, to the Section 1 (3) Factors (see below).

Secondly, the Court must also consider whether to make the Order will be better for the child than making no Order at all. Where the parties to any proceedings are agreed on matters relating to a child it would be usual for the Court not to make any Order.

#### Head Office

3 Lonsdale Gardens  
Tunbridge Wells  
Kent TN1 1NX  
T 01892 510000  
F 01892 549884

#### Thames Gateway

The Old Rectory  
St. Mary's Road  
Greenhithe  
Kent DA9 9AS  
T 01322 623700  
F 01322 623701

## Child law team

### Residence and contact - private law (continued)

Thirdly, **Delay** : any delay in determining any question in respect of a child's welfare is likely to prejudice the welfare of the child.

Fourthly, matters to which Court must have regard when making any Order which relates to a child's upbringing under the Children Act ("Section 1 (3) Factors"):-

- a The ascertainable wishes and the feelings of the child concerned (considered in the light of his age and understanding).
- b His physical, emotional and educational needs.
- c The likely effect on him of any change in his circumstances.
- d His age, sex, background and any characteristics of his which the Court considers relevant.
- e Any harm he has suffered or is at risk of suffering.
- f 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
- g The range of powers available to the Court under the Act and the proceedings in question.

A child's views in private law are usually established by the Court appointing a CAFCASS Officer to prepare a report. He will interview the children, parents and possibly the schools before submitting his report.

### Residence

A Residence Order replaces the old idea of care and control. The Order designates with whom a child is to live. It automatically confers the right of the person with a Residence Order to take the child abroad for the purposes of a holiday for up to one

month, unless the Court orders to the contrary. Residence may be shared amongst more than one person. A Residence Order expires on the child's sixteenth birthday (eighteen in exceptional circumstances) or if both parents, both having parental responsibility, live together for a continuous period exceeding six months.

Any person who has a Residence Order granted in his favour also obtains parental responsibility in respect of the child. Breach of a Residence Order can be dealt with by the Court holding a party in contempt. Where a Residence Order is in place no person can change the surname of the child without the written consent of every person who has parental responsibility or leave of the Court. Further no person may remove the child from the United Kingdom without the written consent of every person with parental responsibility or the leave of the Court.

Duration of a Residence Order:

- a This will continue until the child reaches 16 unless the Court made the Order to have effect after that date in exceptional cases
- b Until the parents reconcile.
- c Until further Order of the Court.
- d Until the making of a Care Order in respect of the child.

### Contact

Contact replaces the old idea of access but there are differences. A Contact Order requires the person with whom the child is living to allow the child to visit or stay with or otherwise have contact with a named person. The Contact Order expires on the child's sixteenth birthday unless there are

## Child law team

### Residence and contact - private law (continued)

special circumstances and also if the parents, with prime responsibility, live together for a continuous period exceeding six months. Directions and conditions may be attached to the Order.

**Principles Determining Contact:** The Court will be slow to deprive a parent of all contact with his child, because it is believed to be a child's right to have contact with their parent. There is no principle that there should be no contact in cases of sexual abuse, each case must be decided upon its own facts, although it would be an extremely important factor in the Court determining what would be in the child's interest.

**Opposition to Contact:** Where the carer remains opposed to allowing contact, the Court will have to decide whether the welfare of the child requires that the child should be removed to live elsewhere.

**Who can apply for a Residence or Contact Order?**

- The parent or guardian of a child
- Anyone with a Residence/Contact Order already
- A party to a marriage or registered Civil Partnership in relation to whom the child is a "child of the family"
- Any person who the child(ren) has lived with for 3 years
- Any person who has the consent of all parties who have a Residence Order for the child; the consent of the Local Authority where a Care Order is in force; or the consent of all parties who have Parental Responsibility for the child

The following can apply with leave of the Court :

- A grandparent
- The child himself/herself - if the Court is satisfied that the child has sufficient understanding
- Other relatives or persons who have a connection with the child

### Other Orders

There are two other major types of order which can be made under the Children Act 1989. A Prohibited Steps Order is an order to the effect that no step which could be taken by a parent in meeting his or her parental responsibilities of a specific types shall not be taken without leave of the Court. Conditions and directions may be included in the Order.

A Specific Issue Order enables a parent and/or others to bring a particular question relating to the exercise of parental responsibility to be determined by a Court. An example of this is for the future of the child's schooling or medical treatment, religious up-bringing, change of surname or removal of the child permanently from the jurisdiction of England & Wales. Directions and conditions may also be made with this order.

Other orders may be applied for, for example, a non married father may apply for a Parental Responsibility Order, or an application may be made to appoint or terminate the position of a guardian or special guardian. The child may wish to make an application under the Children Act, for example, if he/she feels that the Court Welfare Officer has investigated matters but has not listened to his views properly. A

## Child law team

### Residence and contact - private law (continued)

child can also now make applications for financial orders for himself as can his parent on his behalf under the Children Act

#### Note

Under the new Part IV Family Law Act 1996 that came into force on 1 October 1997 it is possible for a child to apply for an Injunction Order to exclude a violent abusive adult from a home. This is very much untested but shows the increasing awareness of the law for the rights of the child.

This information sheet has been prepared to highlight some key issues relating to residence and contact. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at January 2001 and may be affected by subsequent changes in the law.

#### Key Contacts:

Desmond O'Donnell

on 01892 510000

Email: [des.odonnell@ts-p.co.uk](mailto:des.odonnell@ts-p.co.uk)

©Thomson Snell & Passmore All Rights Reserved