

# Private law children act proceedings

The Children Act 1989 governs the law relating to children. Any disputes over the welfare of a child which are not brought by a local authority social services department are termed private law Children Act proceedings.

Parents who are separating or already separated and who cannot agree the arrangements for the children should consider attending mediation together to discuss the dispute between them. Mediation will involve the parties attending meetings together with a trained mediator. The mediator is impartial and will not be able to advise the parties individually. Some mediation services facilitate the attendance of the child concerned in order that their wishes and feelings can be ascertained.

If parties do not wish to attend mediation we can be instructed to help negotiate an agreement. If agreement cannot be reached an application to the court for one of the following orders may need to be made.

## Type of orders

### Parental responsibility

Parental Responsibility (PR) is defined by Section 3 of the Children Act 1989 as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property". This means that a person with parental responsibility is responsible for the care and well being of a child and will include providing a home for the child, arranging the child's education, determining the religion of the child, consenting to the child's medical treatment or school trips, appointing guardians and choosing names.

The following people will automatically have parental responsibility:-

- mothers;
- fathers if:-
- they are or have been married to the mother at any time since the birth of the child;
- they are registered jointly with the child's mother on the birth certificate (for births since the 1st December 2003);

- they have acquired it by formal legal agreement with the mother or by court order;
- step parents, if they have acquired parental responsibility by formal agreement with both parents with parental responsibility;
- anyone else who has been granted parental responsibility under a court order;
- a local authority where there is a care order in force;
- guardians who have been formally appointed in accordance with Section 5 of the Children Act 1989.

If a parent does not automatically have parental responsibility to obtain it they will need to either enter into a parental responsibility agreement with the mother or apply for an order from the court.

Section 8 of the Children Act enables the following orders to be applied for:-

### Contact order

This is an order requiring the person with whom the child lives, or is to live to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.

### Prohibited steps order

This is an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order shall be taken by any person without the consent of the court.

### Residence order

This is an order settling the arrangements to be made as to the person with whom the child is to live. A residence order will automatically confer parental responsibility on any person in whose favour it is made for as long as the order is in force. Where the court makes a residence order in favour of a father it shall, if the father would not otherwise have parental responsibility, also make an order giving him that responsibility.

Where a residence order is in force, no person may cause the child to be

known by a new surname or removed from the United Kingdom without the written consent of every person who has parental responsibility for the child or permission of the court. This does not however prevent the removal of a child for a period of less than one month by the person in whose favour the residence order is made.

### Specific issue order

This is an order giving directions for the purpose of determining a specific question which has arisen, or which may arise in connection with any aspect of parental responsibility for a child. An application for a specific issue order would for example be made if a dispute arises between parents as to the child's schooling or religion.

The court is not able to make a section 8 order which will end after a child has reached the age of 16 unless it is satisfied that the circumstances of the case are exceptional.

### Persons who can apply for a section 8 order

- A parent or guardian
- A residence order holder
- Either party to a marriage
- A person with whom a child has lived for 3 of the last 5 years and within the preceding 3 months
- A person with consent of those with parental responsibility
- Any person with leave of the court

## Appointment or removal of a guardian

A guardian usually stands in the shoes of a parent when a child no longer has a parent with parental responsibility living (although one may also be appointed where a parent who has the benefit of a residence order dies regardless of whether the non resident parent survives). Under the Children Act 1989 Section 5, a guardian may be appointed in writing by a parent with parental responsibility, the appointment to take effect when he dies (if he has a residence order) or when the last surviving parent with parental responsibility dies. In default (or in addition) the court has a concurrent right of appointment. The court may also terminate the appointment of a guardian, whether they have been appointed by the court or by a parent.

Any person can apply for an order to be named as a guardian. In relation to an application for removal of a guardian, this can be applied for by any person with parental responsibility or, with leave, the child.

## Disclosure of information as to the whereabouts of a child

This enables the court to order any person to disclose information to the court as to the whereabouts of a child. The order will direct that the information is given to the court and therefore not to a party. Where it is likely that the person who has the child may remove the child to frustrate the order, an application can be made without prior notice to that party. It is a pre-condition of an application that the child is the subject of proceedings or an order within The Family Law Act 1986.

## Factors considered by the court when deciding whether to make an order

The child's welfare will always be the court's paramount consideration.

The court will also have regard to a general principle that any delay in determining the question is likely to prejudice the welfare of the child and the court will not make an order unless it considers that doing so would be better for the child than making no order at all.

When the court is considering whether to make, vary or discharge a Section 8 Order (contact, prohibited steps,

residence and specific issue orders) the court has to have regard to:-

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

## Order for financial relief for a child

Section 15 and Schedule 1 of the Children Act 1989 set out the provisions whereby the court can order financial provision for a child. Schedule 1 enables the following orders to be made:-

- (a) an order requiring either or both parents to pay to the applicant or child periodical payments (maintenance) for such term as specified in the order.
- (b) an order requiring either or both parents to secure to the applicant or child such periodical payments for such term as specified in the order.
- (c) an order requiring either or both parents to pay to the applicant or child such lump sum as may be specified.
- (d) an order requiring a settlement to be made for the benefit of the child and to the satisfaction of the court property to which either parent is entitled and which is specified in the order.
- (e) an order requiring either or both parents to transfer to the applicant or the child such property to which the parent is entitled.

'Parents' includes a child's natural mother and father and also any party to a marriage (whether or not

subsisting) in relation to whom the child concerned is a child of the family. A child of the family is defined as a child of both parties, or any other child (not being a child who is placed with those parties as foster parents by local authority or voluntary organisation) who is being treated by both of those parties as a child of their family.

## Persons who can apply

- a parent or guardian of a child
- holder of a residence order
- a child over the age 18

In deciding whether to make an order the court shall have regard to all the circumstances including:-

- (a) the income, earning capacity, property and other financial resources which each parent of the child, has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibility which each of the parents has or is likely to have in the foreseeable future;
- (c) the financial needs of the child;
- (d) the income, earning capacity (if any), property and other financial resources of the child;
- (e) any physical or mental disability of the child;
- (f) the manner in which the child was being, or was expected to be, educational or trained.

## GORVINS FAMILY LAW

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