



## Relationship breakdown and children - a whistle-stop tour of the law and practical considerations for separating parents

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There is no doubt that relationship breakdown can be a difficult and traumatic experience for those it affects. It is often a time when emotions run high, with people concerned for what their future may hold, particularly if they have become entwined with one another from a financial perspective or if they have children with one another, regardless of if they are married or not. With regard to children, those going through relationship difficulty or ultimately breakdown, may find themselves wanting answers to the following (and by no means exhaustive) questions:-

- 1 Who will our children live with?
- 2 How often will I see our children?
- 3 What happens if we cannot agree on where the children will live and how often they see each parent?
- 4 What happens if we cannot agree on matters such as where the children should go to school?
- 5 Does my ex have to consent for me to travel abroad with the children?
- 6 How do I go about resolving any issues that may arise?
- 7 Do I have to go to Court to agree child arrangements?

This short guide is aimed at helping you navigate what can often be perceived as a minefield of uncertainty when it comes to how a relationship breakdown impacts you and your children.

### Parental responsibility: what it is and who has it?

#### *What is it?*

The primary piece of legislation that governs the welfare of children has been around since 1989. Section 3 of the Children Act 1989 ("**the Act**") states that parental responsibility ("**PR**"):

*"means 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."*

An easier way to think of PR is the day-to-day decisions that parents make regarding the welfare of their children and includes, amongst a variety of other things:-

- 1 What the children should be known as;
- 2 Where they should go to school;
- 3 Matters relation to the provision of medical treatment;
- 4 Whether a child should be brought up to follow a particular religion; and
- 5 Whether a child should be able to travel internationally.

If a parent has PR, they have the ability to have a say in these matters. PR can be, and more often than not is, held by more than one person.

Where more than one person holds PR, a decision relating to a child's welfare cannot be made without the joint agreement of all PR holders. So, at this point, it is important to consider who can, in fact, acquire PR.

### **Who has it?**

Section 2 of the Act provides an extensive list of people or entities that can hold PR for children.

The most common way to acquire PR for a child is for the mother and father to be married at the time of a child's birth. The mother will, automatically, be considered as a holder of PR by virtue of having given birth to a child. If the father was married to the mother at the time of a child's birth then he will acquire PR upon the child's birth by virtue of the operation of marriage.

However, the situation is slightly different for unmarried fathers. Whilst an unmarried mother will continue to acquire PR automatically by virtue of having given birth to a child, an unmarried father will only acquire PR if either he is registered as the child's father on their birth certificate (provided the child was born after 1 December 2003), or by entering into a PR agreement with the mother, or by way of a Court Order.

With the evolution in how modern families are built, the Act has since been modified on a number of occasions to take into account the fact that a number of children are born in non-traditional circumstances, and that they may not live with their biological parents. For example, those who have children as a result of surrogacy or adoption can also acquire PR, regardless of if they are in a heterosexual or homosexual relationship. Similarly, step-parents can acquire PR, as can relatives or special guardians who look after children as a result of certain familial dynamics. The State, via the Local Authority, can also acquire and exercise PR with regard to children.

If you are in any doubt as to whether you may or may not have PR, you should seek specialist advice.

### **The principles of child arrangements on relationship breakdown**

Many parents may fear that upon their relationship coming to an end that a *battle royal* may ensue, with Court involvement being required. This is absolutely not the case. The Court will not, upon a relationship breaking down, involve itself in matters relating to the children's welfare or whom they live with and spend time with unless it is specifically invited to do so by way of an application to the Court being made by either parent. So, if a married couple are divorcing, they are able to dissolve their marriage and deal with the resulting claims for financial provision without the Court ever having to involve itself in resolving matters relating to the children's welfare. Put another way, the Court expects parents to be able to agree the division of the children's time between themselves as parents. However if there is no agreement, then the Court's involvement may be required to resolve the matter.

There is no provision within the Act that specifies how much time a child should spend with a parent and the mother is not favoured over the father in statute. The law assumes that a child is entitled to have a full, deep and committed relationship with each parent provided there are no safeguarding or

welfare concerns in respect of either parent to the contrary. Whilst in times gone by, it may be true to say that some fathers were relegated to the role of a secondary parent by way of being a “weekend only” dad, it is certainly not the case today. Judicial attitudes have moved on and now are grounded firmly in the 21<sup>st</sup> century principles that a child will spend equal amounts of time with both parents, provided it is in their “best interests” to do so.

So, before we consider what is meant the term “best interests”, now is a convenient time to provide an important point to recap – provided that you and your ex can decide how much time the children will spend between you, there is no need for any Court involvement.

### **What are a child's "best interests"?**

This is, in children law, the proverbial £1million question. When an application to the Court is made in respect of children, the Court's paramount consideration is the child's welfare, as provided for in Section 1 of the Act. So, a Court can only make an Order in relation to a child, if that Order seeks to serve, promote and prioritise the child's best interests. This is *the* fundamental cornerstone of the law relating to children in the jurisdiction of England and Wales.

In determining whether a decision to be made, such as how much time a child will spend with either parent, the Court must have regard to what has become known as the “welfare checklist”, as set out in Section 3 of the Act, as replicated below:

- (a) the ascertainable wishes and 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 which 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 this Act in the proceedings in question.*

It is trite to say that a child's best interests will vary from case to case. There is no formula or tick-box exercise that can provide a solution to each and every family. What may be in one child's best interests may not be in another. It all depends, to use an age-old saying, on the circumstances of each and every individual case, child and family.

### **What happens if we cannot agree the arrangements?**

As alluded to above, the law and the Courts are keen for parents to be able to resolve matters between themselves directly. This has never been truer than in the current times, with the Court system overwhelmed with a deluge of work, caused by a backlog of applications and hearings as a result of the Covid-19 pandemic.

Of course, not every separating family will be able to resolve matters on a consensual and amicable basis. Separating parents may fundamentally disagree on what they consider to be better for a child in terms of whom they spend time with and, if that impasse is arrived at, the Court can be asked to decide the matter by way of an application being brought for a "Child Arrangements Order" pursuant to Section 8 of the Act. Prior to reform, applications would be brought for "residence" and "contact" Orders, but now the Court adopts a more child-orientated approach by making Orders as to whom a child will "live with" and "spend time with".

It is beyond the scope of this article to set out the process that will ensue once an application for a Child Arrangements Order is made. However, in summary, the framework will require both parents to put forward their positions as to what they say is in the child's best interests in terms of their living arrangements and how much time they spend with the other parent, by reference to the welfare checklist as set out in Section 3 and the relevant facts that pertain to the case at the relevant time.

Most cases will often settle during the course of litigation and an Order will be made, by consent, defining how much time the children live with, or alternatively spend with, each parent. If a consensus cannot be reached then a Judge will, after a trial, impose a decision on both parents as to how a child's time should be divided between them.

### **Are there alternatives to Court?**

Yes, there are many.

There has been a significant shift by the judiciary to direct parents towards mediation with regard to children. The reasons for this are twofold. Firstly, Judges often, and not incorrectly, take the view that the best people to make decisions about the children are the parents themselves, and not a Judge sitting in a stale Court room that has never, and most likely will never, meet the children. The second reason is that the Court, like most public services, has insufficient time and resources to devote to applications such as these.

Mediation is a process whereby both parents jointly appoint an independent third party to act as a negotiator between them. The mediator will encourage and facilitate discussions and seek to find a resolution and compromise on both sides. The mediator cannot impose a decision on the parents: they have to agree to it themselves. Mediation can be a successful tool in the right circumstances, but it is not a "one size fits all" solution.

Given the pressures on the Court systems, some parents are turning to other forms of dispute resolution, such as arbitration, to determine their disputes relating to children. Arbitration is best thought of as private Court proceedings. The parties hire an arbitrator, normally a highly-experienced and specialised barrister, to act as a Judge to determine the matters in hand. Upon embarking on arbitration the parents sign up to an arbitration agreement, which essentially provides that they agree and accept that the decision of the arbitrator will be final and binding upon them.

If you are experiencing difficulties in relation to the arrangements for children, and want to consider an alternative forum than a Court-based solution, you should seek specialist advice from an experienced family law solicitor.

### **What if my ex does not agree to the school I want to send my children to, or they are stopping me from going on holiday with the children?**

Both of these topics, as well as a whole host of others, require both parents to exercise PR jointly and agree with one another. If agreement cannot be reached, then it is open to either party to make an application to the Court for a different type of Order pursuant to Section 8 of the Act – a Specific Issue Order.

Let's say you want to go on holiday with your children to visit your family to Spain but your ex, for

whatever reason, refuses to provide permission. In the event you have a “lives with” Order in your favour, then you are able to take the children out of the jurisdiction without the consent of the other parent for a maximum of 28 days. This is the only situation, save for in situations of extreme and dire medical emergencies, where PR can be exercised on a unilateral basis.

If, however, you do not have a “lives with” Order in your favour, you are required to obtain the other parent’s consent. If consent is not given, the Court (or an arbitrator) can be asked to determine whether your desire to travel internationally is in the best interests of the children, after consideration of a significant amount of factors, which are beyond the scope of this article.

### **Concluding remarks and practical considerations**

There is no reason for you and your estranged husband, wife or partner to fear relationship breakdown when it comes to the arrangements for your children. As set out at the beginning of this article, the profound principle is, that provided you and your ex can come to an agreement between you, in terms of schooling, education, travel and who the children live and spend time with, then no Court ever need be involved. No Orders need be made. You and your ex can go on parenting your children together, just like you always did, albeit you will likely be doing it from two separate homes.

Whilst the pain, upset, anxiety and anguish that parents may feel upon their relationship breaking down may last for some time, it is vital to remember at all times that children are the innocent bystanders when families separate. Whatever feelings the parent may be experiencing, they are likely to be significantly worse for children, regardless of their age. Whilst the temptation to point score, blame and pick at the other parent may be present and exceedingly tempting, it is imperative to bear in mind that, although your love for your ex may have extinguished, you will remain bound to one another for the rest of your lives by virtue of you being parents to the same children. There will be birthdays, graduations, weddings and family gatherings for many years to come. It is for these reasons that a separating parent would be well-advised to always bear their children’s best interests at the forefront of their minds and to seek to resolve and negotiate the child arrangements with their spouse insofar as it is reasonable to do so.

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Article by Alex Curran, Senior Associate in the Family Department and a specialist on the financial issues arising from the breakdown of marriage and in matters involving children. For further information, please contact Alex by email or your usual contact in the Family Department or, alternatively, telephone on 020 7465 4300.

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