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Department of Social Policy and Intervention

Caring for children after parents separate: how will the Children and Families Act 2014 approach to parental involvement work in practice?

The new Section 11 of the Children and Families Act 2014 came into effect on October 22 2014.

Background

There has been considerable interest in the growth of shared parenting arrangements between separated parents as previous Briefing Papers 7 and 7a have outlined [Fehlberg et al, 2011 and 2012]. These have shown that although few separated parents in the UK share their children's time equally (3% according to the Understanding Society survey carried out in 2009), many more see their children almost everyday (14.6%) or several times a week (22%). Only 13% had no contact. Debates about the shared nature of child contact post-separation have been current for over ten years. "Shared parenting" however, is open to many interpretations ranging from 50/50 time with each parent to much more flexible understanding of parental involvement in the life of children after separation.

From 2010 pressure grew for legislation to create a legal presumption that shared parenting orders should be the default arrangement for litigating parents who could not agree their child arrangements unless certain exceptions applied. This was a controversial proposal. There was concern that this kind of parenting arrangement would not suit all families, and could be thought to conflict with the clear and widely understood principle of the Children Act 1989 that the court must have as its paramount consideration the welfare of that child when making any decision about the care and upbringing of a child. The Children and Families Act 2014 aims to clarify how the emphasis on parental involvement can be consistent with the continuing paramountcy of the welfare of the child.

The changes made by The Children and Families Act 2014

New subsections 2A, 2B, 6 and 7 are inserted into section 1 of the Children Act1989. Subsection 1 of that section continues to say to courts that where they decide any question with respect to (a) the upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it, the court must have as its paramount consideration the welfare of that child. The new subsection (2A) adds that '*A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare*'.

The 'involvement' is then defined (in 2B) as 'involvement of some kind, either direct or indirect, but not any particular division of a child's time.'

The 'circumstances mentioned' are when a court makes or varies an order under section 8 (which are now referred to as 'child arrangement' orders) or certain parental responsibility orders.

This new presumption (sections 6 and 7) is then limited to use in favour of a parent only '*if that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm*'; and a parent is to be so treated '*unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement*.'

Box 1 The Legal Aid Sentencing and Punishment of Offenders Act 2012

The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) took private law children matters out of scope for financial help with the cost of legal advice, except where there are safety issues or the case is exceptional. Public funding is available for help with mediation, (with a small amount for legal support with mediation) for those who are eligible on financial grounds , and under the Children and Families Act 2014 every applicant to the court on a children matter will be required to undergo a meeting to determine their suitability for mediation before proceeding with the case (a MIAM). These changes may lead to larger numbers of parents appearing in court without a lawyer (as litigants in person or LIPs).

This could lead to respondents (usually mothers as many more mothers than fathers used to apply for and be eligible for legal aid) to these applications for contact (usually from fathers) being poorly prepared to argue against an application. This would apply even where there are welfare considerations. It might also lead to them accepting proposals against their wishes to avoid the stress of a court hearing without legal help, or as a result of misunderstanding the new clauses.

The new Family Court structure has also come into effect, which should result in greater efficiencies in use of court time, but it is also possible that change of such magnitude may also have some unexpected aspects.

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The dangers of misinterpretation

There is a danger that these provisions could be misunderstood by parents and the public generally as limiting in some way the 'welfare paramountcy principle' under which the welfare of the child must be put first. It is therefore very important for advisers, lawyers and mediators, to make it clear that they do not have that effect.

This is because the presumption will only affect the application of the welfare principle if it is proposed that one parent should have no involvement at all with the child. In such a case, unless there is evidence to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement, the court must presume that some kind of involvement would benefit the child. But it is hard to imagine a case where one party could contemplate that there should be no involvement of any kind (no matter how slight) by the other parent unless there was evidence before the court suggesting that such involvement would risk harming the child.

Provided that contact of some kind, no matter how limited, by each parent is proposed, the parental involvement presumption will be satisfied and the court would then decide which proposal was in the child's best interests. If, for example, the first parent applies for weekly staying contact, and the second parent is reluctant and suggests weekly non-staying contact in the present circumstances (such as the need to get used to a new partner), everyone (legal advisers, mediators, judge) would continue, as they do now, to try to bring the parties to agreement. But if the case does not settle, the judge would, as now, look at both proposals and support the one that would best further the interests of the child. As Edward Timpson, then Minister for Children at the Department of Education, said to the Justice Committee on November 21 2013, "We are not looking to change the way a judge makes a decision based on the paramountcy principle".

Implications and concerns about how things will work in practice

There are some concerns about how things will work in practice as a result of both the complexity of the clauses and other changes affecting the family courts which have been made. It is possible that these may affect how parenting arrangements are decided for those who are not able to make their own agreements. These are outlined in Box 1 and Box 2. In particular the abolition of legal aid for most cases is likely to lead to increased litigants in person and possibly both less satisfactory arrangements for many parents with care and increased workloads for family court judges. In addition, the Child Arrangements Programme's move towards fewer interim orders which are reviewable being made before a final order is achieved may remove a source or reassurance and support for parents anxious about the arrangements being made.

Box 2. The Child Arrangements Programme

The Child Arrangements Programme (CAP) (see Family Law 2013) aims to move away from the current practice whereby courts anxious to get a contact plan up and working agree to make contact orders which they know will need to be revised as the parties settle down and anxieties hopefully recede. The CAP recommends reducing the role of the court to an interim order and then a final order. The measure is understandable in the context of trying to reduce recourse to the courts, but may be unhelpful in the context of less publicly funded legal help and the Children Act revisions which are complex in appearance and could lead to agreements based on misunderstanding which would benefit from revisions.

Conclusion

There has been a great deal of criticism of the plan to legislate on this subject. This has not arisen from any reluctance to see shared parenting in practice but from concerns that it may be interpreted as a direction that larger amounts of a child's time should be shared between the parents, or that any proposal about contact or involvement is to be presumed to be in the child's interests unless shown to the contrary. In fact subsection 2B expressly rules out those interpretations. Provided that *some* involvement (whether direct or indirect) is proposed with each parent, it remains necessary to show which particular proposed arrangement is the best one for the child.

However, as we have shown there are concerns about how the legislation will work in practice given the other changes affecting the family courts. The cut backs to legal aid in private law cases will disproportionately affect women as historically they have been much more frequent users of legal aid and as the majority of parents with care are women they will find it more difficult to challenge proposals from non-resident parents they feel are unsafe.

References

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