



BRIEFING PAPER

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Children: residence and contact court orders and related matters for parents, grandparents and others

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1. Summary

This House of Commons briefing paper looks at child arrangements orders for residence and contact under the *Children Act 1989* as amended. These court orders can be applied for by anyone, although some people (including grandparents in most cases) first require the leave of the court to apply.

Topics covered in this paper include the factors that a court takes into account, the legal presumption that both parents should be involved in a child's life, and mediation.

Child arrangements orders were introduced by the *Children and Families Act 2014* in April 2014 to replace the previous framework of contact and residence orders.

It should be noted that the Library can only provide general information, and that should a constituent wish to obtain legal advice they should contact a solicitor. The Library note [Legal help: where to go and how to pay](#) sets out information about where to seek legal help or advice.

This note applies to England and Wales.

There are related briefing papers which might be of interest:

- [Children: Enforcement of child arrangements orders relating to contact](#),
- [Children: Grandparents and others who require leave of the court to apply for access](#).

2. General principles applicable to child arrangement orders

Child arrangements orders are orders regulating arrangements relating to:

- with whom a child is to live, spend time or otherwise have contact; and
- when a child is to live, spend time or otherwise have contact with any person.¹

¹ *Children Act 1989*, s 8(1) as amended by the *Children and Families Act 2014*, s 12

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2.1 Mediation

Under the new Child Arrangements Programme (CAP) families are encouraged to use dispute resolution services, including mediation, as alternatives to court proceedings. Applicants are required to attend a Mediation Information and Assessment Meeting (MIAM) prior to making an application to the court for a child arrangements order unless an exemption applies.² Exceptions to the general rule are set out in full in the [Family Procedure Rules 2010](#).³ They include cases where:

- there is evidence of domestic violence;
- there are child protection concerns;
- the application must be heard urgently because delays would, for example, risk the safety of the child or the applicants, cause miscarriages of justice or hardship to the applicant;
- there has been previous MIAM attendance or a MIAM exemption; or
- circumstances mean that MIAM attendance may not be a reasonable or appropriate requirement.

It is the responsibility of the prospective applicant or that person's legal representative to contact a family mediator to arrange attendance at a MIAM. Information on how to find a family mediator is available on the www.familymediationcouncil.org.uk website.

2.2 Who can apply

As was the case with contact and residence orders, any person can apply for a child arrangements order made under section 8 of the *Children Act 1989* (as amended).⁴ There are two categories of people who can apply for such orders: those who are entitled to apply, and those who require leave of the court in order to apply.

A form to apply for a child arrangements order is available on the [gov.uk website](#).

Those who may apply as of right

Under the *Children Act 1989*, the following are entitled to apply for a child arrangements order:

- Under section 10(4)
 - any parent, whether or not they have parental responsibility for the child (but not such a parent after a child has been freed for adoption i.e. a 'former parent'); guardian or special guardian of the child;⁵
 - any person named, in a child arrangements order that is in force with respect to the child, as a person with whom the child is to live.⁶
- Under section 10(5)
 - any party to a marriage (whether or not subsisting) in relation to whom the child is a child of the family—this allows step-parents (including those in a civil partnership) and former step-parents who fulfill this criteria to apply as of right;⁷

² *Children and Families Act 2014*, s 10; [Practice Direction 12B: Child Arrangements Programme](#)

³ Family Procedure Rules 2010, r 3.8(1) and 3.8(2)

⁴ By [Children and Families Act 2014](#), s 12.

⁵ *Children Act 1989*, ss 10(4)(a) and (aa). A person with parental responsibility includes a step-parent or civil partner

⁶ *Ibid*, s 10(4)(b)

⁷ *Ibid*, s 10(5)(a)

- any person with whom the child has lived for a period of at least three years—section 10(10) of the Children Act 1989 states this period ‘need not be continuous but must not have begun more than five years before, or ended more than three months before, the making of the application’; or
- any person—
 - (i) in any case where a child arrangements order in force with respect to the child regulates arrangements relating to with whom the child is to live or when the child is to live with any person, has the consent of each of the persons in named in the order as a person with whom the child is to live ;
 - (ii) in any case where there is an existing order for care in force, has the consent of each person in who favour the order was made;⁸
 - (iii) in any case where the child is in the care of a local authority, has the consent of that authority;
 - (iv) who has parental responsibility for the child by virtue of provision made under section 12(2A); or
 - (v) in any other case, has the consent of each of those (if any) who have parental responsibility for the child;⁹
 - (vi) a local authority foster parent is entitled to apply for a child arrangements order relating to whom the child is to live, and/or when the child is to live any person, if the child has lived with him for a period of at least one year immediately preceding the application;¹⁰
 - (vii) a relative of a child is entitled to apply for a child arrangements order relating to whom the child is to live, and/or when the child is to live any person, if the child has lived with the relative for a period of at least one year immediately preceding the application.¹¹

Hershman and McFarlane’s *Children Law and Practice (CL&P)* notes that: “The court, nevertheless, has power to require a person who otherwise would be entitled to apply for an order, without the need to obtain the leave of the court, to obtain leave before making a particular application”.¹² Section 91(14) of the *Children Act 1989*, which gives the courts this power, states:

On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court.

Those who require the leave of the court to apply

Any person who is not automatically entitled to apply for a child arrangements order may nevertheless make such an application if they obtain the leave of the court to do so.

Importantly, the granting of leave does not raise any presumption that the application will succeed.¹³ When a court considers an application for leave to apply for a child arrangements order, the welfare of the child is not its paramount consideration—this is a

⁸ *Ibid*, s 10(5)(c)

⁹ *Ibid*, s 10(5)(c)(iii)

¹⁰ *Ibid*, s 10(5A)

¹¹ *Ibid*, s 10(5B)

¹² Hershman and McFarlane, *Children Law and Practice*, para B582

¹³ *Ibid*, para B600

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matter, assuming that leave is granted, for the substantive hearing to consider.¹⁴ Instead, the criteria set out in section 10(9) of the *Children Act 1989* apply, which states that the court “shall ... have particular regard to”:

- a) the nature of the proposed application for the section 8 order;
- b) the applicant’s connection with the child;
- c) any risk there might be of that proposed application disrupting the child’s life to such an extent that he would be harmed by it; and
- d) where the child is being looked after by a local authority—
 - (i) the authority’s plans for the child’s future; and
 - (ii) the wishes and feelings of the child’s parents.

More information can be found in the Library briefing paper, [Children: Grandparents and others who require leave of the court to apply for access](#).

Grandparents

A grandparent would normally require leave of the court to apply for a child arrangements order, although there are exceptions to this rule; for example, if the child had lived with the grandparent for a period of at least three years (see above).

For a number of years, the Labour Government had contended that the current law acted as an ‘early filter’ for those applications which were in the best interests of the child and did not make it unduly difficult for grandparents to gain contact with their grandchildren.¹⁵ In response to a Parliamentary Question in 2008, the then Government made clear that it had no intention of revising its policy on grandparents’ access rights:

Lindsay Hoyle: To ask the Secretary of State for Children, Schools and Families, what research the Government have (a) commissioned and (b) evaluated on grandparental access to grandchildren in the last 10 years; if he will take steps to commission research on the role of parents in governing grandparent-grandchild relations; and if he will make a statement.

Kevin Brennan: We have not commissioned or evaluated any research on grandparental access to grandchildren in the last 10 years, and we have no immediate plans to commission research on the role of parents in governing grandparent/grandchild relations. We believe that parents are usually best placed to make decisions about their children’s relationships with grandparents and other relatives. However, with leave of the court, it is possible for grandparents to apply for a contact order under section 8 of the Children Act 1989, to enable them to maintain a relationship with their grandchildren.¹⁶

However, in 2010, in its [Support for All: the Families and Relationships Green Paper](#),¹⁷ the Labour Government reversed its policy intention:

The Government will improve the information available for grandparents about the legal and other options available to them in seeking to maintain their relationships with their grandchildren, working in partnership with expert organisations and making this information widely available online.

At present, grandparents who wish to obtain a contact order in respect of their grandchildren have to seek the leave of the court before doing so. The Government intends to remove the requirement for grandparents to obtain the leave of the court before making an application for a contact order and would be interested in views as

¹⁴ *Ibid*, para B606

¹⁵ [HC Deb 29 January 2003 cc913-4W](#)

¹⁶ HC Deb 23 June 2008 c65-6W

¹⁷ DCSF, January 2010. Cm 7787

to how far this acts as a barrier for other family members, particularly step family members.¹⁸

Subsequently, the issue of grandparents' access rights was examined as part of the independent Family Justice Review that reported to the Government. The Review board was established in March 2010 by the then Labour Government to carry out a review of the family justice system, and also supported by the Coalition Government that took office shortly afterwards. The Review published its [final report](#) in November 2011.¹⁹ The Review recommended that grandparents' rights to contact remain as they are, and the Government [accepted](#) this recommendation.²⁰

Restrictions on the making of child arrangements orders

Section 9 of the *Children Act 1989* states that if a child is in care, a child arrangements order cannot be made in relation to a child unless it relates to whom the child is to live with or when the child is to live with any person. Further, no application may be made by a local authority for a child arrangements order (instead, the local authority can apply for a care order), and no court shall make such an order in favour of a local authority.

2.3 Age of the child

Under section 105(1) of the *Children Act 1989*, a child is defined as a person under the age of eighteen years of age. However, child arrangements orders relating to contact between a child and any person cannot be made to have effect after the child reaches sixteen years of age unless the circumstances of the case are exceptional. Similarly, a court cannot make a child arrangements order concerning contact or residence arrangements for a child who has reached sixteen years' of age unless the circumstances of the case are exceptional.²¹

2.4 Factors to be taken into consideration by the court

CL&P notes that:

A court which is considering making, varying or discharging a s [section] 8 order, including making any directions or conditions which may be attached to such an order(1), must have regard to the following principles:

- the paramountcy of the child's welfare;
- that delay in determining the question is likely to prejudice the welfare of the child;
- the welfare check-list;
- the presumption against making an order unless to do so would be better for the child than making no order at all.²²

¹⁸ *Ibid*, paras 4.39-9

¹⁹ The [Family Justice Review: final report](#), November 2011

²⁰ Department for Education and Ministry of Justice, [The Government Response to the Family Justice Review](#), February 2012, p69

²¹ *Children Act 1989*, ss 9(6)-(7)

²² Hershman and McFarlane, *Children Law and Practice*, para B266

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The paramourcy principle and the welfare check-list

Section 1(1) of the *Children Act 1989* states that “When a court determines any question with respect to the upbringing of a child ... the child’s welfare shall be the court’s paramount consideration”.

The *Children Act 1989* does not define the term “welfare” used in section 1(1). However, when a court is considering whether to make, vary or discharge a child arrangements order, and the making, variation or discharge of the order is opposed by any party to the proceedings, the court shall have particular regard to a number of factors stated in section 1(3)—this list has become known as the ‘welfare check-list’ and, as *CL&P* notes, “The matters on the check-list are each potentially relevant to the future welfare of a child in a particular case”.²³

The welfare check-list that the court “shall have regard in particular to” is as follows:

- the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- his physical, emotional and educational needs;
- the likely effect on him of any change in his circumstances;
- his age, sex, background and any characteristics of his which the court considers relevant;
- any harm which he has suffered or is at risk of suffering;
- 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;
- the range of powers available to the court under this Act in the proceedings in question.²⁴

CL&P notes:

The list is not intended to be comprehensive, and is more of an aide-memoire for courts to ensure that the basic elements of a child’s welfare are considered. A judge does not need expressly to highlight each matter in the check-list when giving reasons, but the check-list can ensure that all relevant matters in a case are considered and balanced. [However,] Magistrates should always refer to the check-list and build their findings of fact and reasons around it.²⁵

The avoidance of delays

Section 1(2) of the *Children Act 1989* states that:

In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

CL&P observes that this means that “In general ... the avoidance of delay will be given priority by any court dealing with a decision regarding the upbringing of a child”, although it adds that it is only a general, rather than overriding, principle.²⁶

Presumption of parental involvement

The *Children Act 1989* now also requires a court, when considering:

²³ *Ibid*, B197

²⁴ *Children Act 1989*, section 1(3)

²⁵ Hershman and McFarlane, *Children Law and Practice*, para B201

²⁶ Hershman and McFarlane, *Children Law and Practice*, para B180

- whether to make, vary or discharge a child arrangements order and the making of the order is opposed, or
- applications to award or remove parental responsibility,²⁷

to presume, unless the contrary is shown, that the involvement of each parent in the life of the child concerned will further the child's welfare. There are exceptions to the provision where parental involvement would put the child at risk of suffering harm.

The provision was inserted into the *Children Act 1989*²⁸ by section 11 of the *Children and Families Act 2014* and came into force in October 2014.

The independent [Family Justice Review](#) had recommended there should not be a legislative presumption of equal or shared parenting.²⁹ However, the Coalition Government did not accept the recommendation and consulted on options to introduce a presumption that parental involvement would further a child's welfare. During consultation on, and the passage of *Children and Families Bill* through its Parliamentary stages, the wording of the provision proved controversial and a number of amendments were made.³⁰

The [Explanatory Notes](#) to the 2014 Act make it clear that the purpose of the new parental involvement provision is not to promote an equal division of a child's time between separated parents but to:

... reinforce the importance of children having an ongoing relationship with both parents after family separation, where that is safe and in the child's best interests. [...] The effect is to require the court, in making decisions on contested section 8 orders, the contested variation or discharge of such orders or the award or removal of parental responsibility, to presume that a child's welfare will be furthered by the involvement of each of the child's parents in his or her life, unless it can be shown that such involvement would not in fact further the child's welfare. Involvement means any kind of direct or indirect involvement but not any particular division of the child's time.³¹

Determining whether it would be better to make an order than not

Section 1(5) of the *Children Act 1989* states:

Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

Conditions that can be attached to child arrangements orders

Section 11(7) of the *Children Act 1989* states that a child arrangements order may:

- a) contain directions about how it is to be carried into effect;
- b) impose conditions which must be complied with by any person—
 - (i) who is named in the order as a person with whom the child concerned is to live, spend time with or otherwise have contact;
 - (ii) who is a parent of the child;
 - (iii) who is not a parent of his but who has parental responsibility for him; or

²⁷ Further information on parental responsibility is set out in the Library note on the subject: [SN 2827](#)

²⁸ Section 11 amended section 1 of the *Children Act 1989*

²⁹ The [Family Justice Review: final report](#), November 2011

³⁰ Further details of how the provision developed are set out in Library papers written during the passage of the Bill: [RP13/11](#); [RP13/32](#)

³¹ *Children and Families Act 2014*, [Explanatory Notes](#), section 11

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- (iv) with whom the child is living, and to whom the conditions are expressed to apply;
- c) be made to have effect for a specified period, or contain provisions which are to have effect for a specified period;
- d) make such incidental, supplemental or consequential provision as the court thinks fit.

Official supervision and contact (Family Assistance Orders)

If the court wishes to ensure that a child arrangements order related to contact with a child is supervised by a local authority Children and Family Court Advisory Support Service (Cafcass) officer, or a Welsh family proceedings officer, then the court can make a “family assistance order” under section 16 of the *Children Act 1989*. The court may make an order, either alternatively or additionally to a child arrangements order, requiring a Cafcass or Welsh family proceedings officer, or a local authority officer (provided the authority agrees and the child concerned lives or will live within their area) to advise, assist and (where appropriate) befriend any person named in the order.

The purpose of a family assistance order is to provide expert assistance and advice to a family for a short-term period. A court can make a family assistance order only if:

- to do so accords with the principle that the child’s welfare is paramount; and it is better for the child than making no order at all;³² and
- it has obtained the consent of every person to be named in the order other than the child.³³

Unless a shorter period is specified in the order, a family assistance order will have effect for 12 months from the day on which it was made.³⁴

2.5 Interim child arrangements orders

A court may make an interim child arrangements order even though it may not be in a position to dispose finally of the proceedings. Section 11(3) of the *Children Act 1989* provides:

Where a court has power to make a section 8 order, it may do so at any time during the course of the proceedings in question even though it is not in a position to dispose finally of those proceedings.

CL&P describes this as a “far-reaching provision going much further than providing a power to make interim orders of the type which are being sought in the application”, and notes that it may be invoked during, for example, an adoption hearing.³⁵

2.6 Variation or discharge of a child arrangements order

Who can apply

A child arrangements order may be varied or discharged by the court either in any family proceedings in which a question arises with respect to the welfare of the child, or on a free-standing application for its variation by an individual, subject, if necessary, to gaining leave to apply.

In particular, under section 10(6) of the *Children Act 1989*, a person who would not otherwise be entitled to apply for a variation or discharge of a child arrangements order

³² *Children Act 1989*, s1(1),(5)

³³ *Ibid*, s16(3)

³⁴ *Ibid*, s16(5)

³⁵ Hershman and McFarlane, *Children Law and Practice*, para B254-5

relating to contact arrangements with a child may do so if they are named in the order. Any person in whose favour a children arrangements order is in force with respect to the living arrangements in relation to the child may apply as of right for a variation, discharge or for any other section 8 order.³⁶

Variation of an order

CL&P notes that on a variation application, the court has the full range of orders available to it, including the power to give directions or impose conditions. The court will approach the matter on the same basis as an original application for a child arrangements order i.e. making the child's welfare the paramount consideration.³⁷

Termination of an order

A child arrangements order may come to an end because:

- it ceases to have effect due to the age of the child;
- it ceases because the parents of the child live together for longer than six months;
- it is discharged by an order of the court;³⁸
- it is discharged automatically upon the making of a care order with respect to the child;³⁹ or
- for a child arrangements order concerning the living arrangements of a child only, it ceases when a new such child arrangements order is made.

Reconciliation of parents

A child arrangements order which makes provision for contact between the child and one of the child's parents at times when the child is living with the other parent shall cease to have effect if the parents live together for a continuous period of more than six months.⁴⁰

Similarly, where a child arrangements order has been made in favour of one of two parents who have parental responsibility for the child, provision relating to the living arrangements of the child shall cease to have effect if the parents live together for a continuous period of more than six months.⁴¹

³⁶ *Children Act 1989*, s11(7)

³⁷ *Ibid*, s1(1)

³⁸ *Children Act 1989*, s 8(2)

³⁹ *Ibid*, s 91(2)

⁴⁰ *Children Act 1989*, section 11(6)

⁴¹ *Children Act 1989*, section 11(5)

2.7 Facilitating and improving parental involvement in the life of the child

Activity directions

In contested proceedings in which the court is considering whether to make a child arrangements order (or to vary or discharge a child arrangements order), the court may make an “activity direction” in connection with the provision the court is considering.⁴²

An activity direction will direct a party to the case, at any stage in proceedings prior to a final order being made, to undertake activities to establish, maintain or improve their involvement in the life of the child. The type of activities covered by this heading may include programmes, classes and counselling or guidance sessions which may assist with establishing, maintaining or improving involvement in a child’s life.⁴³ Other possible activities are programmes designed to address a person’s violent behaviour in order to facilitate involvement in a child’s life and information sessions about such arrangements, including information sessions about mediation.⁴⁴

An activity direction may only be made where there is some dispute about the provision of a child arrangements order, i.e. whether to make, vary or discharge such an order, or what its detailed provisions should be.

Activity conditions

In family proceedings where a court makes or varies a child arrangements order under section 8 of the 1989 Act, it may also impose an “activity condition” requiring an individual to take part in an activity that would help to establish, maintain or improve the involvement in the life of the child concerned of a party to the proceedings.⁴⁵ The activities that may be required by a contact activity condition are the same as those that may be required by an activity direction.

Making an activity direction or condition

A court can only make such directions or conditions if it is satisfied that:

- the activity is appropriate in the circumstances of the case;
- the provider of the activity concerned is suitable to provide it; and
- the activity is available in a place to which it is reasonable to expect the person in question to travel.

The court may ask a Cafcass officer or a Welsh family proceedings officer to monitor compliance with activity directions or conditions and to report to the court if there is a failure to comply.⁴⁶ In addition, a court may ask officers to monitor compliance with a child arrangements order, and to report to the court on such matters relating to compliance as the court may specify. The court may ask the officers to carry out this role for a period of up to a year.

⁴² *Children Act 1989*, s 11A and (2) and s 11(B)1

⁴³ *Ibid*, s11A(5)

⁴⁴ *Ibid*

⁴⁵ *Ibid*, s 11D(1)

⁴⁶ *Children Act 1989*, s11E(7)

Child arrangements orders: warning notices

Whenever the court makes or varies a child arrangements order, it must attach a notice warning of the consequences of failing to comply with the order.⁴⁷ The consequences of failure to comply may be an enforcement order, an order for financial compensation, or the use of the courts' existing sanctions for contempt.

3. Further information and advice

Information about family mediation and how to find the nearest mediation service (including those providing a MIAM) is available at www.familymediationcouncil.org.uk;

A guide about children and the family courts for separating parents (including representing yourself in court) is available on the [Cafcass website](#). Information for Wales is available on the [Cafcass Cymru](#) site.

[AdviceNow](#) can provide general advice on sorting out arrangements for children, the use of post-separation mediation and/or going to court. The organisation [Parent Connection](#) can also offer general advice about sorting out arrangements for children.

For advice about Contact Centres, which are neutral places for contact to take place between children of separated families and family members, see: www.naccc.org.uk

The Library note [Legal help: where to go and how to pay](#) sets out information about where to seek legal help or advice.

On its webpage "[Separation, divorce and contact](#)", the National Society for the Prevention of Cruelty to Children (NSPCC) lists a number of organisations under the heading "Who can help?".

⁴⁷ *Children Act 1989*, s111

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