

A photograph of four children (two boys and two girls) running happily in a grassy field. The children are in the foreground, slightly out of focus, with a wooden post and green foliage in the background. The image is partially covered by a dark blue rectangle on the left and a red rectangle on the right.

Complete Guide to Divorce and Children

Paris Smith Family
Team

 **Paris Smith**
LEGAL EXCELLENCE



Introduction

When there are children involved in divorce, the most difficult issues and arguments can arise. Emotions run high, but the child's best interests should always be the first and main consideration.

Below, we have summarised some of the issues that may arise with children in divorce and how you might successfully navigate them.

Our Family team are experts in advising on all aspects of divorce and children. They can help you navigate difficult situations with compassion.

Guide to Divorce and Children

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CHAPTER 1

PARENTAL RESPONSIBILITY

Parental Responsibility

Parental responsibility means all the rights, duties, powers and responsibilities a parent has for their child. The child's mother will automatically have parental responsibility. The father will also have parental responsibility if he is married to the mother at the time of birth or subsequently marries her or he is named on the child's birth certificate.

Parental responsibility includes decisions about:

- the name by which the child will be known;
- the child's education;
- the child's religious upbringing;
- ongoing and non-urgent medical treatment;
- where the child lives, with whom and how to share time between the parents; and
- taking the child out of the jurisdiction - this normally means England and Wales.

This is not an exhaustive list but sets out the sort of decisions that should be made through discussion and by agreement between the parents.

It does not include the right to micro-manage the other parent's care of the child when the child is with the other parent. This can be difficult to accept when there are strongly differing opinions between the adults about how the child should be cared for on a day-to-day basis.

Parental Responsibility Agreements

A father who does not have automatic parental responsibility as described above can gain parental responsibility through a parental responsibility agreement with the mother.

The necessary [parental responsibility agreement form](#) can be obtained from the Government website.

Both parents will need to complete it, and sign it at court. Once it is signed, it must be filed at the Central Family Court. The father will then enjoy all the same rights and responsibilities for the child as the mother does.

Court Order and Parental Responsibility

If there is no agreement, a father can apply to the court for a parental responsibility order. Unless there are very good reasons why the father should not acquire parental responsibility for the

child, he may expect the court to grant his application.

He may not succeed if, for example:

- he has no real attachment to the child; or
- his motive for applying is considered an attempt to undermine the mother's care of the child.

Normally only the biological mother and father of the child acquire parental responsibility. However, if a person other than the mother or father (such as a grandparent) obtains an order for a child to live with them, they will automatically be given parental responsibility for so long as the order lasts.

Sharing Parental Responsibility

When sharing parental responsibility with another person, there are certain decisions that do not require discussion with the other person. These include:

- how the children spend their time during contact
- personal care for the children
- activities undertaken
- continuation of prescribed medications

Certain decisions will require one parent to inform the other, but not take into consideration their views. These are:

- Emergency medical treatment
- Planned visits to the GP and reasons for this

There are also decisions that you need to inform the other parent about and consult them on what they think before you make the decision. These are:

- schools that the children will attend including admissions applications
- contact rotas in school holidays
- booking holidays and taking children abroad
- planned medical and dental treatment (including therapy and psychological services)
- stopping prescribed medications
- attendance at school functions (you might want to plan these to avoid meeting whenever possible)
- the age a child should be when allowed to have a mobile phone and watch or play video games

CHAPTER 2

SPECIFIC ISSUE AND PROHIBITED STEPS ORDERS

Specific Issue and Prohibited Steps Orders

If parents cannot agree and there is a dispute over a major issue, it is possible for anyone with parental responsibility to apply to the court to resolve the issue. You can apply for a specific issue order and/or a prohibited steps order. This is usually only necessary in very serious situations.

Specific Issues Order

Examples of when a specific issue order may be appropriate are:

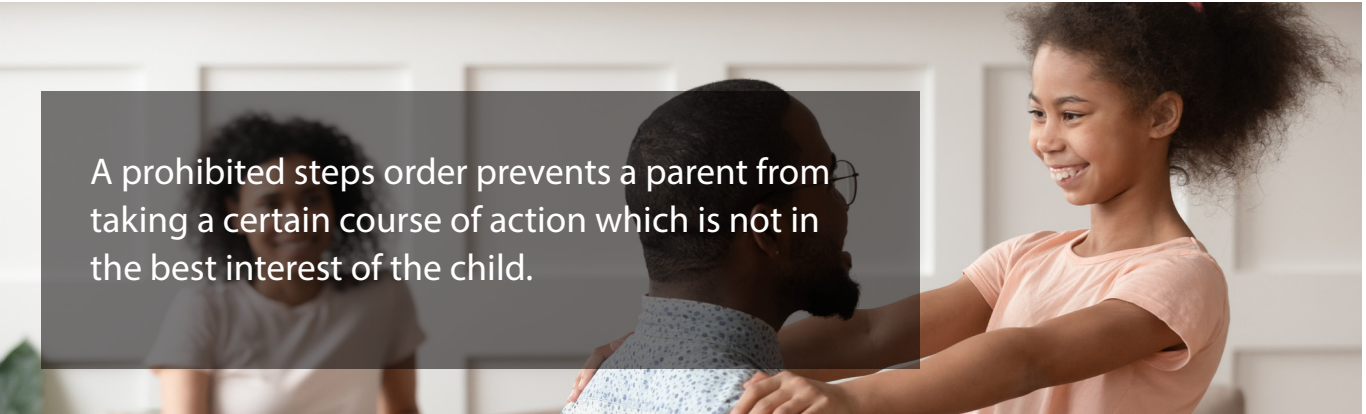
- when one parent wants to change the child's name
- when the parents can't agree where the child should go to school
- when one parent wants to be allowed to relocate with the child, either in this country or abroad

Prohibited Steps Order

A prohibited steps order prevents a parent from taking a certain course of action which is not in the best interest of the child. This usually happens if there is a risk of one parent deciding something without the consent of the other parent. For example, one parent might be concerned about the other taking the child out of the country.

The court will encourage dialogue between parents before getting involved.

Unless the situation is urgent, the applicant will need to at least consider mediation before he/she can apply to the court. The



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CHAPTER 3

SPECIAL GUARDIANSHIP


Special guardianship

A special guardianship order provides a person who is not the parent with parental responsibility on the basis that the child is cared for by that person. This does not end the parents' parental responsibility, but it does limit or suspend it.

Special guardianship is a common alternative to adoption. A special guardianship is commonly made in favour of other family members such as grandparents.

The local authority is often involved in this decision making, particularly when the child has been in care.

The local authority also has a duty to consider financial support to assist people who are willing to act as special guardians.



Special guardianship is a common alternative to adoption.

CHAPTER 4

DIVORCE AND CHILDREN: CUSTODY

Who gets custody of children in divorce?

Previously in divorce and child custody proceedings the court could:

- make residence orders determining with whom the child should live; and
- make contact orders determining when the child should spend time with the other parent.

These orders tended to favour or prioritise one parent over the other which was not intended, not required, and not helpful.

Child arrangement orders

Now, the court can make child arrangements orders, which will determine how the child's time will be shared between the parents. It may also determine with whom the child should live and when.

The important distinction between a residence order and a "lives with" order is that a lives with order may be made in favour of both parents. Both parents are therefore seen to have equality.

An advantage of having a lives with order is that it allows the parent(s) in whose favour the order is made to take the child out of the country for up to one month without the consent of the other parent or having to apply to the court for permission.

As a lives with order can be made in favour of both parents at the same time, it means that they each have the same advantage.

How long does a child arrangement order last?

A child arrangement order lasts until the child is 16 years of age, unless the court decides that there are exceptional circumstances – for example when the child has special needs.

Child custody arrangements

Parents often find it helpful to agree a detailed rota as to how the child's time should be shared between them, and of course if they can't agree, this can be the subject of a child arrangements order (what would previously have been called a contact order).

There are no guidelines as to how the child's time should be shared, as this will depend on the child's individual needs and

the particular circumstances of each family. Factors that will need to be considered include:

- the distance between the two homes;
- suitability of accommodation;
- the age of the child and where appropriate their views; and
- their relationship with each of the parents.

Divorce and older children

As the child grows older, their views will become increasingly important, until by the time they are a teenager, there would have to be some very good reasons why the court would make an order which conflicts with what the child wants. The views of younger children will be a matter for consideration, looked at in light of that child's age and understanding.

What the child wants and what is in their best interests might be two different things and difficult to unravel.

A child might say clearly that they do not wish to see the father, for example, whilst the father may say that the child has been 'brainwashed' against him by the mother. This is often known as parental alienation.

The court will need to consider the evidence sometimes from a range of experts, including psychiatrists and family therapists, before it can get to the bottom of things. Even then, re-establishing a relationship between the child and the other parent can often be difficult, or even impossible, requiring long-term therapeutic input.

What happens if a parent breaches a court order?

Where a parent is found to be preventing contact from taking place in breach of a court order the court has a range of powers to encourage that parent to comply, including requiring that parent to undertake unpaid work or to pay compensation to the other parent. In the end, the court may transfer care of the child from the defaulting parent to the other.

Moving the child out of the jurisdiction: Leave to remove application

A so-called “leave to remove” application may arise when one parent wishes to relocate away from England and Wales and take the child with them. If the other parent does not agree, the parent who wants to move must apply to the court for permission. It is up to that parent to satisfy the court that it is in the best interests of the child to move.

The parent wishing to move must show that the decision has been properly considered. That parent may have to:

- provide evidence of their plans for rehousing, education and employment; and
- demonstrate how ongoing contact between the child and the “left behind” parent would work despite the distance. This may involve video calls or frequent travel. The parent moving may have to pay for this.

In the past, it was assumed that so long as the moving parent had a good plan for accommodation, education and employment, and so long as adequate contact arrangements could be put in place with the other parent, and so long as the moving parent’s motivation was “good”, rather than to cut the other parent out of the child’s life, the court would generally allow the moving parent to go, and take the child with them.

However, more recently, the courts have confirmed that the decision will be made solely on the basis of what is in the best interests of the individual child. Arguably there is now greater emphasis on the importance of maintaining the quality of the relationship between the child and the other parent. This may mean that the court is less likely now to allow the relocation to take place, particularly where care of the child is currently shared.

CAFCASS

The Children and Family Court Advisory and Support Service is independent of the court and social services. It is designed to safeguard the welfare of children and give advice and recommendations to the court concerning where the child should live and how the child’s time should be shared, and whether prohibited steps or specific issue orders are required.

Normally CAFCASS will report on the wishes and feelings of the child. Subject to the child’s age, the CAFCASS officer will meet the child – often at school – and discuss the issues in an age-appropriate way with the child. Younger children may be supported in expressing themselves through the use of pictures and drawings.

The court will – unless there are good and cogent reasons why not – follow the recommendations of the CAFCASS officer.

The [CAFCASS website](#) has a wealth of information about the services they provide.



CHAPTER 5

DIVORCE AND CHILDREN: MAINTENANCE

Maintenance

The court cannot usually make awards for child maintenance except when both parents agree. The responsibility lies instead with the Child Maintenance Service.

Child Maintenance Calculator

The Child Maintenance Service will calculate how much maintenance (or child support) the paying parent should pay, based on their gross taxable income. Information about the paying parent's gross taxable income will be obtained from HMRC. For assessment purposes, that income is reduced by a number of factors, including the amount the paying parent pays into a pension.

The remaining income is assessed at different rates, depending on how much gross weekly income there is:

Rate	Paying parent's gross weekly income
Basic	£200 to £800
Basic plus	£800.01 to £3,000 (the first £800 of income is considered using the basic rate)
Reduced	£100.01 to £199.99
Flat	£7 to £100 (or receives benefits)
Nil	Less than £7

The basic rate is:

Number of children needing support	Percentage of gross weekly income
1	12%
2	16%
3 or more	19%

This means that:

- if a paying parent has to pay child maintenance for one child, they must pay 12% of their gross weekly income;
- if a paying parent has to pay child maintenance for two children, they must pay 16% of their gross weekly income;
- if a paying parent has to pay child maintenance for three or more children, they must pay 19% of their gross weekly income.

If a paying parent's gross weekly income is more than £800 (up to a limit of £3,000), the basic plus rate of child maintenance applies to the income which exceeds £800 per week:

Number of children needing child maintenance	Percentage applied to the first £800 of gross weekly income	Percentage applied to gross weekly income over £800 (up to a limit of £3,000)
1	12%	9%
2	16%	12%
3 or more	19%	15%

Any income in excess of £3,000 per week is disregarded by the Child Maintenance Service, but may be relevant to a court application - see below.

Reducing Child Maintenance

The maintenance assessment may be reduced by reference to the average number of nights per week which the children spend with the other parent. The rates for reducing child maintenance are:

Number of nights of shared care each year	Reduction to child maintenance (for each child with shared care)
52-103 nights	1/7th
104-155 nights	2/7ths
156-174 nights	3/7ths
More than 175 nights	1/2 (50%) plus an extra £7 a week reduction for each child in this band

When does the court get involved in child maintenance arrangements?

The court's powers to order a parent to pay child maintenance are limited. Where the parents agree how much should be paid, the court may make an order by consent, reflecting that agreement. Otherwise, it can only get involved when:

- the paying parent's income exceeds £3,000 per week – the court may order additional 'top up' maintenance, which would be based on that child's individual needs;
- there is additional need for the cost of education or training;
- the child is disabled;
- the child is an adult, and in full-time education or training;
- the paying parent lives abroad; or
- the receiving parent and child live abroad.

Even when the parents have agreed the level of child maintenance and the court has made an order to confirm this, either parent may give two months' notice of intention to apply to the Child Maintenance Service for assessment. As such, a court order is no guarantee of a continuing agreement.

CHAPTER 6

DIVORCE AND CHILDREN: GRANDPARENTS' RIGHTS

Grandparents' rights

It is not unusual for grandparents to be concerned when the relationship between the parents breaks down. Will they still be able to see their grandchildren, even if their own child no longer sees them? What if neither parent is really capable of looking after the children – can they step in? What if one or both of the parents wants them to see the grandchildren?

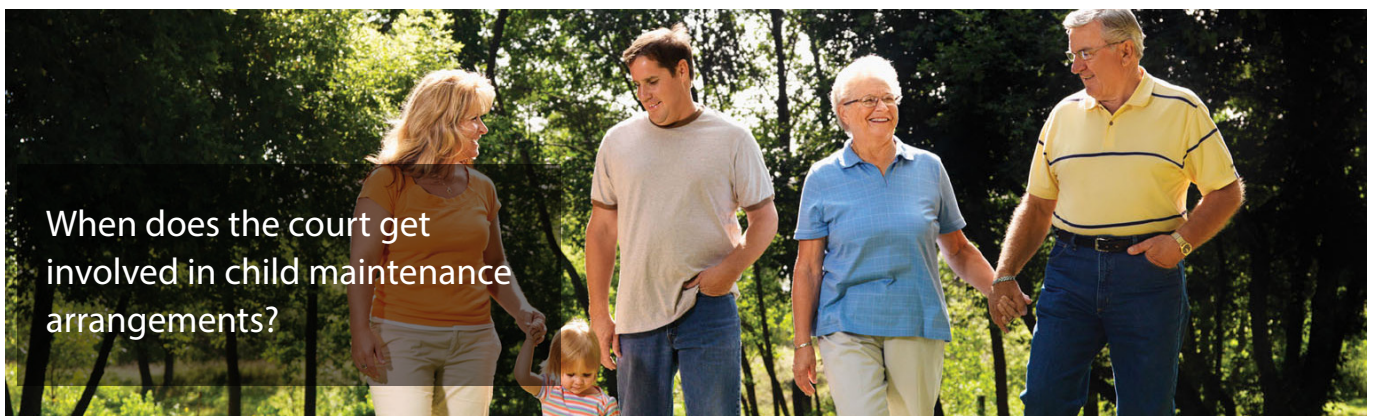
Grandparents' rights to see grandchildren

The bad news for grandparents when it comes to children and divorce is that they do not have the right to apply to the court for parental responsibility or child arrangements orders – or indeed for specific issue or prohibited steps orders.

The good news however is that they may apply to the court for permission to apply for these orders, and by and large they will be given the necessary permission.

Once through the gateway, they have many of the same rights as parents to make applications and seek orders.

Judges are quick to recognise the important role that grandparents can often play in the children's lives, particularly if they are able to provide stability at a time of turmoil.



CHAPTER 7

DIVORCE AND CHILDREN: FREQUENTLY ASKED QUESTIONS

Q: Who gets the house in a divorce with children?

A: On divorce, the children's needs will be the first consideration in any settlement between the parents. They will need somewhere to live. Often, that might be the family home, which might be transferred to the parent with the majority of care for the children. Otherwise, it might be necessary to sell the house so that each of the parties has a deposit to put down on the purchase of a new home. Our lawyers will be able to give you detailed advice about what to expect in your case.

If the parents are unmarried, the parent with majority of care may be able to apply to the court for a housing fund for the child, or for the transfer of an existing property to be used as a home for the child until he/she is an adult.

Q: How can you protect your children's potential inheritance on divorce?

A: Older couples in particular will often have their children's future in their minds when negotiating a settlement. They might be concerned that their ex-spouse will remarry, and die, leaving their new spouse to inherit everything that should have gone to their children. They might also feel under pressure from the children themselves not to allow this to happen.

Ultimately you can't control what your ex-spouse does with his estate, but you can make sure that your share of the divorce settlement goes to your children. We have a whole team of experts on hand waiting to advise on such matters and we always advise our clients on divorce to consider making a new will.

Q: When does child maintenance stop?

A: A child support assessment by the Child Maintenance Service comes to an end once the child reaches the age of 16 or, if the child continues in full-time education or training, it will stop when the child reaches the age of 20.

A court order for child maintenance will stop when the child is 16, unless the welfare of the child requires a longer term, but it will end at the age of 18 unless the child is continuing in full-time education or training, or there are other "special circumstances" (this might include disability, for example).

As many parents will be aware, an adult child will often look to the parents for financial support long into adulthood, and for so long as the child continues to study, the parents will remain liable.

An adult child can make their own application for maintenance, so long as they are in full time education or training, or other special circumstances apply. This can be distressing for both the parent and the child, particularly if they are estranged. Careful handling by expert lawyers who are concerned to minimise distress and acrimony is essential.

Q: What does child maintenance cover?

A: Child maintenance is intended to meet the needs of the child, including a contribution towards the costs of housing, heating, feeding and clothing. As such, the receiving parent is not entitled to anything more, although parents often agree to share additional costs, such as clubs, school trips and uniform.

Q: When does parental responsibility end?

A: Parental responsibility ends on:

- the child's 16th birthday; or
- the child's adoption to (an) other parent(s).

Parental responsibility will be suspended when:

- the child is taken into local authority care;
- a lives with order is made in favour of someone else; or
- a special guardianship order is made in favour of someone else.

The control which a parent is entitled to exercise over the child is, however, far more nuanced. The older the child gets, and the more able to make their own decisions, the more they are entitled to decide for themselves – for example, whether they should receive medical treatment, and whether they should see the other parent.

Q: Who gets custody of a child in divorce?

A: No-one gets custody anymore. Most parents will agree how the child will share their time, and often this may mean that the child genuinely has two homes, and moves frequently between the two. Or it may mean that the child lives predominately with one parent, and spends time with the other.

More recently there has been a move towards nesting arrangements. This is where a couple may decide that the children should remain in the family home with the parents moving back and forth. This is only possible where relations are cordial and the parents have identified a separate property for them to also live in or alternative accommodation is available. Given that this is a relatively new arrangement there is not a substantial body of evidence to indicate how well it works. Anecdotally, it would appear that it may be a sensible option in the early stages of separation so as to avoid disruption for the children but it is doubtful whether it would work as a long term option. It is also not a solution that the court could impose.

If, however, the parents can't agree, the court may make an order regulating how the child shares their time, and may order that the child lives with one, or indeed, both of the parents. The court will base its decision entirely on what is in that child's best interests, considering the individual circumstances of the case. The emphasis is always on what is deemed best for the child rather than what either parent wants or feels entitled to.

Q: How is custody decided in divorce?

A: Most parents will agree the arrangements to be made for the children, but if they can't agree they will be expected to work with a mediator to try and sort things out. A skilled mediator will be able to guide them through all the issues they need to consider and help them come to an agreement which both can accept. If that fails and the court has to step in, it will consider such matters as:

- who is better placed to look after the children? For example, does one parent work part-time or from home?

- who has tended to provide most of the care up to now?
- what is the relationship like between the child and the parents? Is there a closer bond with one parent?
- is there, or has there been, any domestic abuse?
- is there, or has there been, any substance abuse?
- are there any reasons why one or other of the parents should not provide care? For example, risk of harm to the child, mental health issues, unsuitable new partner etc.
- any preference expressed by the child, although the relevance of this will depend largely on the child's age and understanding.

Ultimately, however, the court will assume that it is in the child's best interests to maintain a meaningful relationship with both parents, and in the absence of good reason to the contrary, the judge will try to ensure that the arrangements made promote regular and meaningful contact between the child and the non-resident parent.

Q: Can custody be changed after divorce?

A: Arrangements made for children ideally remain flexible, in order to meet their changing needs as they grow older.

Many parents are able to agree changing arrangements as they go along, but for many parents, this might be impossible for any number of reasons.

In those cases, the parents might be well advised to try mediation.

If, however, they can't reach agreement, one of them may apply to the court. In those circumstances, the court will consider what new arrangements would best meet the individual needs of this child, and make an order accordingly. The court might also say that the arrangements do not need to be changed.



How is custody decided in divorce?

CHAPTER 8

DIVORCE AND CHILDREN: USEFUL RESOURCES

A number of organisations have a wealth of resources which you might find helpful, including blogs, videos and parenting plans. Here are some of our favourites:

- [Resolution](#)
- [CAFCASS](#)
- [GOV.UK](#)
- [NSPCC](#)
- [Relate](#)
- [Gingerbread](#)
- [Family Lives](#)
- [Citizens Advice](#)
- [Only Mums](#)
- [Only Dads](#)
- [Divorce Coaching Podcast](#)

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