McKenzie Briefing

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FAMILIES NEED FATHERS®

because both parents matter

The Children and Families Act came into effect on April 22nd 2014. The Act changes procedure and terminology across a wide range of areas including family law, children in care and education. It can be quite confusing to find out what has changed, and what the effects of these changes might be.

The main features are:

A Single Family Court

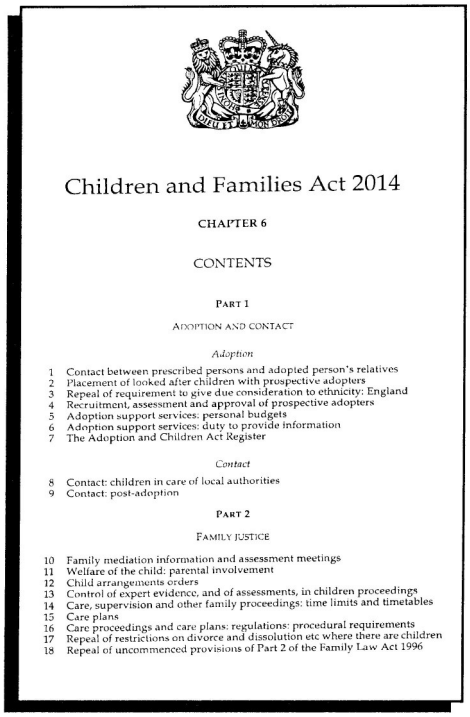
The 'single family court' means that in England and Wales, there is now a single network of application points for parents who need to go to Court to resolve disputes about their children.

The intention is that this will make it easier for parents to navigate the court system, and reduce delays created by the court system rather than the parties.

In practical terms the effect will be that a parent need only submit an application to the Family Court in your local area, where it will then be allocated to the right level of judge in a suitable location.

Mediation

Before making an application to court, parents will have to attend a Mediation Information and Assessment Meeting (MIAM). This meeting will give parents information about mediation, and assess whether they may be able to resolve their disagreement outside of court.



Children and Families Act 2014

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The aim is to encourage parents to resolve their disagreements without going to court wherever possible. The Government intends to provide a range of resources to help parents work better together after separation.

Legal aid is available for mediation for parents that are eligible, and can cover the MIAM.

Child Arrangement Orders

Contact' and 'residence' orders have been replaced by Child Arrangement Orders (CAOs). This single order will cover issues such as who any children will live with, and how their time will be split between the parents.

The aim of removing terms such as 'residence' and 'contact' is to reduce the perception of winners and losers in family court proceedings.

Where previous court forms referred to applications for residence and/or contact, these have now been replaced by applications for a Child Arrangement Order. Application documents such as the C100 have all been updated and are available via the HM Courts and Tribunal Service.

Presumption of Parental Involvement

Section 11 of the Act (the 'presumption of parental involvement') states that courts are to presume that, unless there is evidence to suggest otherwise, the involvement of both parents after separation is in the child's best interests. This does not provide an automatic 'right' to contact, or a guaranteed minimum time or form of contact. (Implementation of this section is delayed until Autumn 2014.)

The Government's intention is to spell out an expectation to parents that both should remain involved in the child's life wherever possible.

Families Need Fathers has long campaigned for a presumption of shared parenting in family justice. This is our 40th Anniversary year. The Children and Families Act is a significant milestone along the way. It is the first time that the rights of children to a relationship with both parents has been recognised in primary legislation.

Time and members' experience will tell the extent to which these reforms will have an impact upon individual cases or alter the culture of family separation among lawyers, judges and other professionals. We will continue to monitor developments.

Further information and links to online resources are at www.fnf.org.uk

INTERVIEW: Lady Elizabeth Butler-Sloss

Lady Elizabeth Butler-Sloss is a former President of the Family Division. She has been an active and outspoken crossbench member of the House of Lords since 2006. Her interventions in the debates on the Children and Families Bill drew heated and occasionally personal criticism from some non resident parents who saw the prize of 'shared parenting' slipping away .

In an exclusive interview with FNF Policy and Communications Manager, Ross Jones, Lady Butler-Sloss explains her thinking behind the amendments, but also calls for the courts to take a much harder view of parents with care who wilfully sabotage relationships between children and their non resident parent.

Anita Corbin

RJ: Section 11 of the Children and Families Act for the first time created a legal presumption of parental involvement into the Children Act 1989. Your amendment to the Bill introduced a definition of involvement as "any direct or indirect involvement that promotes the welfare of the child", and making it explicit that it should not be taken to mean any particular division of the child's time. Why did you feel it was necessary to introduce this amendment?

LB-S: The Government originally had a heading that was not technically part of the future Act, which said 'shared parenting'. The press picked it up, and 'shared parenting' began to be considered as giving each parent equal rights. Now my view is that no parent has the right to anything. What they have is a responsibility to play a part in the future life of their children. I recognise the absolute tragedy for children whose parents, whose father, leaves the house and he has nothing more to do with them. That is a tragedy and a disgrace. But there are others who have parted from the parent who ends up with primary care and want to play too great a part in the future of the child. The arrangements for contact has to be what's best for the child.

I was concerned as a result of the original wording of 'shared parenting' and the involvement of the press, which was in my view unhelpful. It was very important that on the ground, parents understood what was meant by this Clause. I started as a lawyer by objecting to the word 'presume'. Lawyers don't like presumptions. There is one presumption: the welfare of the child is paramount. I didn't want a second presumption.

Judges or the magistrates can understand this. But it is also important that it is understood by the people involved. Where you are without legal aid, where there are no lawyers to advise the parents, there will very often be a dominant parent, sometimes the mother, sometimes the father - either parent can be dominant - saying to the other parent ' this means we can have half and half, or whatever it may be. And I wanted it absolutely clear on the face of the Bill that anyone who read it could see that it was no particular amount of time, and it isn't necessarily direct contact unless it is in the best interests of the child.

… there are all too many families where the parent who has, what I might call a dominant role, is preventing the other parent from having a sufficient relationship.

Children are entitled to the relationship with both parents.

The Government accepted it, and they are going to put guidance up on the net, and they are going to put guidance in the information packages that they give to families.

RJ: Some members of Parliament expressed concern that your amendment may actually prevent non resident parents who are interested only in the welfare of their children from maintaining a meaningful relationship with both parents. Do you think that is a valid criticism?

LB-S: No I don't. I don't believe the amendment that I've put in, the Government has now put in its own, is going to make the slightest difference to what the Government intended under Clause 11. All this was explanatory. It has had no affect on the underlying significance of Clause 11. It is purely and simply explaining what Clause 11 means. What the Government is wanting to signal, and I support it, is that both parents have an importance in the child's life, and there are all too many families where the parent who has, what I might call a dominant role, is preventing the other parent from having a sufficient relationship. Children are entitled to the relationship with both parents.

RJ: So what do you think the effect of Clause 11 will be? Do you think that it will achieve the Government's objectives?

LB-S: I'd like to hope so. At the end of the day the emotions between separated parents are such that its very difficult. However, I would like the parent who hasn't perhaps got quite the same strength of character at least to be able to say that if I'm the non residential parent in terms of clause 11, I nonetheless have the responsibility to take an interest in my child. To that extent I have the right to see the child, unless you can show that there is a good reason why I cannot.

That's where I think judges and magistrates will continue to make orders, and the judges and magistrates will be given a greater degree of influence, because they will read out that this clause is actually intended to benefit the child from the involvement of both parents. It may be that the Children Act 1989 was not sufficiently specific, and that's what this Government is trying to remedy here. So I think it gives a big tool to mediators, a tool to the welfare officer, if the child gets to a welfare officer, a tool to the judge and the magistrates, to beat the head of the custodial parent and say you can't just take the child yourself.

So the first important message for parents is, assuming that they are reasonable people – as they probably are outside of the unhappy circumstances of their separation - they can be knocked into shape, into accepting that both of them must play a part in the life of the child in the future. But the second important message is, that if for some reason one of the parents really shouldn't see too much of the child, for whatever reason that may be, that also comes out of this Clause.

RJ: The Government decided not to pursue the introduction of new sanctions for the breaching of contact orders last year. Sir James Munby has said recently that the breaching of orders is far too prevalent and should not be tolerated. Do you see enforcement as a concern for the family justice system? What changes are needed to ensure better enforcement of orders?

LB-S: I would like to see I must say, mothers who flout contact orders required to do all sorts of things that don't actually send her inside. I can see absolutely no reason why she shouldn't do community service. I should like to see her penalised in all sorts of inconvenient ways as long as it doesn't have any impact on her care of the child. So as long as the child is over 5 or goes to a child minder, then there is no reason why she shouldn't be required to go and clean the streets, whatever it may be. I would make her do something really unpleasant so that she understands the consequences of this. But to send her to prison is counter productive, because the child will not want to know the man who has sent his mother to prison, particularly when she comes back and tells him about it.

"I would like to see I must say, mothers who flout contact orders required to do all sorts of things that don't actually send her inside. "

RJ: Clause 12 of the Bill will replace contact and residence orders with child arrangement orders. Do you think that this is a positive move?

LB-S: I laugh, I'm afraid, because it's a good try. We previously changed 'custody' and 'access' to, 'residence' and 'contact'. It didn't do the slightest good. Why should Child Arrangement Orders do any good? The possible advantage of Child Arrangement Orders is that it doesn't give an obvious, public priority to one parent over the other. But people will quickly suss out the reality, who actually has the custody. So it's capable of being a positive move, but I'm sceptical, because of the past. But I think it's a brave effort by this Government who really care, and in fairness so did the last Government. I've been very impressed with the commitment of each Government to family issues.

RJ: The role of fathers has changed dramatically in recent decades, even since the Children Act 1989 came into law. Do you think family law has kept up with the changing nature of families over the years?

LB-S: The family law is up to date in the ability of the court, the judge or magistrates, to deal equally with parents. That has been so ever since 1989. I think Clause 11 will set that out more obviously , and correctly. I entirely accept the advantage of making sure in public policy that both parents matter. I don't particularly think the problem is family law. Neither do I think in 2014 the problem is magistrates or judges. I think they have grown up too. Modern magistrates and modern judges have sons who are changing the nappies, and sometimes house parents, and are certainly playing a very major role with their children.

I don't really think judges live in ivory towers. They live in the community, particularly the circuit judges and district judges who try most of the cases. They all have children, or nephews and nieces, who are having to cope with their children. So I think the law there is OK.

RJ: Finally, do you have any thoughts on the increase in litigants-in-person in family court proceedings?

Well that's the immediate result of a lack of legal aid. Every single private law case concerning the family house, the family assets (or as likely, the family debts) and children, whether the child is going abroad and so on is going to be largely dealt with without lawyers except where the parties are pretty well off. OK the legal aid bill is very expensive, but it's peanuts compared with the future of children.

COMMENTARY: The Family Courts must now deliver

CRAIG PICKERING, former CEO of Families Need Fathers, gives his assessment of the effect the Children and Families Act will have on recognising and reinforcing the role both parents should have in the life of their children after separation

THE NEW FAMILY LAW ACT:
A BIG STEP FORWARD?

The Children and Families Act is now in force.

So we know what it says. I believe it is one of the most important ever pieces of legislation for children whose parents divorce or separate; and for such parents who wish to be involved in their child's life and have previously been obstructed, or even prevented, from doing so.

First, Section 11 says explicitly, for the first time ever in English legislation, that it is usually in the best interests of the child that both parents should be involved in the child's life, unless there are specific grounds for believing that that is not the case. At present the case has to be made for a parent to be involved in the child's life. From now on the case will have to be made against a parent's involvement.

Secondly, Section 12 replaces contact and residence orders by 'child arrangements orders'. 'Contact' always sounded as something we might have with aliens from outer space. 'Residence' implied a child only lived with one parent, a huge distortion of what really happens. Many thousands of children divide their time between two homes and the language used by family law at last recognises this reality. It also helps us to get away from the idea that one parent alone is the carer.

Together, these provisions could trigger a change in our culture, towards shared parenting being the norm, not the rare exception.

Critics of the legislation take various standpoints.

Some think that current law already provides what the Bill does. The European Convention on Human Rights, the UN Convention on the Rights of the Child and case law together provide for involvement by both parents wherever appropriate. If they do, it's difficult to see why FNF continues to flourish. Every year we help thousands of parents in their attempt to get more involved in their child's life. A statute should make that easier.

Some think the law is unnecessary because the courts already deliver appropriate parenting roles. This is to forget that many parents give up the fight for greater involvement when advised by solicitors that the court will deliver no more than what the ex-partner is offering and may deliver less. The cases going to court are only part of the evidence on the way the family courts operate.

At a late stage Baroness Butler-Sloss successfully proposed an amendment to Clause 11, winning by a very small margin. It states that "Involvement is any kind of direct or indirect involvement that promotes the welfare of the child; it shall not be taken to mean any particular division of a child's time."

One letter in the 'Times' thought this weakened the bill fatally. Yet Ministers had said several times, in the House and in writing, that this was not their intention.

It does raise an important point. 'Involvement' will have to be defined more precisely. This is not a job for primary legislation and no secondary legislation is planned. There seem to be two ways it could be spelt out.

It could become clearer through case law. The trouble here is that the law will develop sporadically and unpredictably. Moreover cases vary enormously and it will often be difficult to be at all sure which precedents will be applied. Children and parents would in effect be taking part in a lottery.

Second, guidance could be issued, preferably by the President of Family Court and, as a long stop, by government. This would not guarantee consistency in court decisions, but it would be a pressure in that direction.

For if 'involvement' includes any interaction between parents and children whatsoever we will be no further forward, as some fear. The Family Courts have to bring about the change the Government clearly intended. The Children Minister Edward Timpson, a family lawyer himself, told the Commons:

"We believe that these measures will make it crystal clear to parents who are thinking about their post-separation arrangements or, further down the field, about taking these matters before the court, that the court will judge not the parents' dispute, but what is in the best interests of the child. The presumption will be that having both parents involved in the child's life is the right course where it is safe and in the child's best interests. That is particularly important given the huge number of children who no longer have any contact with one parent after a separation. We need to try to bring that number down and I believe that these measures will help do that."

So we need to see more children seeing their parents, with a deeper involvement for both wherever appropriate, with no sense that one parent is the main carer. These are important changes and the family courts must deliver.