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Children

When you and your partner separate, you will have to decide what the care arrangements are going to be for your children. In some circumstances parents are able to sort these arrangements directly between them by agreeing what is in the best interests of their child(ren). On occasion, parents can have different points of view and this can make it difficult to reach agreement resulting in uncertainty and stress. If you are struggling to agree on matters relating to your children then we can help you in order to provide a more certain future for you and family.

Legal Position- PARRR

The law gives parents parental responsibilities and rights (PARRR). What PARRR include are a wide variety of things including being able to make choices about how your children are brought up, and where your children should live. You also have a responsibility to care for and look after your children.

All biological mothers have PARRR as soon as they give birth to a child. A father will have PARRR from the birth of the child where he is the child's biological father and was married or in a civil partnership with the child's mother when the child was conceived or subsequently or where (if unmarried/not in a civil partnership) he is jointly registered on the child's birth certificate. If those circumstances a father can gain PARRR either via the biological mother voluntarily agreeing to give those (via what is called a 'section 4 Agreement' or they can be awarded by the court.

A same-sex partner has PARRR from the birth of the child if they were married or in a civil partnership with a woman at the time they have the egg donation, embryo transfer or donor insemination which produces a child. Alternatively, a same-sex partner can acquire PARRR if the biological mother voluntarily agrees to giving those rights (via what is called a 'section 4A Agreement' or where they are named on the child's adoption order; or are named on the child's parental order.

No other relative of a child will automatically have PARRR so, for example, a step-parent does not have PARRR even where the child lives with them. However, any person with an interest or involvement in the care of a child can apply to the court to be given them.

Once acquired, any parent or holder of PARRR will continue to have PARRR in connection with a child until the child reaches the age of sixteen (at which time they are deemed to be an adult) or where they are removed by a court order (which can be as part of an adoption).

Options to Sort Care Arrangements

If you and your ex-partner are having difficulty in reaching an agreement directly between you there are various options, not just court. Your choices are:

1. Mediation
2. Collaboration
3. Negotiation
4. Court

Mediation is a process that both you and the other parent attend. No other parties (including solicitors) are typically involved in the mediation other than the Mediator themselves. Depending on

the mediation chosen the Mediator may be a Family Solicitor but will not be acting on behalf of either parent and is instead neutral. The role of the Mediator is to facilitate discussion but not to make decisions. This leaves the decision-making power in the hands of you the parents.

Collaboration is a process where you and the other parent agree at the outset that you are not going to go to court. Each parent has their own Solicitor (who has been specially trained) and collectively, all four parties agree to a certain set of 'rules' at the outset which are focused around amicable resolution. Typically, in a collaborative process there is a series of joint meetings which move matters towards an overall resolution.

Negotiation can take different forms. Often where we are most able to assist here is to act as a 'buffer' between you and the other parent. Where we are acting on your behalf we would take your instruction and then put that to the other parent either directly or via their solicitor. This process allows us to talk to you directly and privately in order to take your instruction. Most negotiations are done via writing- either email or letter - but in some circumstances may be by way of direct meetings.

The last option available for resolution is Court. Typically, this is not our starting point but, in some circumstances it is unavoidable. In those circumstances, you can ask the Sheriff to make a determination about what should happen in relation to the care of your child(ren). Sheriffs can make a range of different types of court orders but the main two orders to consider are residence orders which decide where the child(ren) ought to be live, contact orders deciding how often the children should spend time with the non-resident parent. The Sheriff can also make what are known as 'specific issue orders' which regulate very specific matters such as, what school child(ren) should go to or what religion they should be brought up in. Other types of orders the court can make are known as 'interdicts' which are orders which prevent something from happening such as the child being removed from a certain area or from the care of a particular individual.

When the Court is considering these types of orders, the welfare of the children is the primary concern. The Court will try and promote a relationship between a child and both parents so far as is possible. They will have regard to what the current circumstances are at the point of a decision being made and how the children are coping with those circumstances. For that reason, if there is an arrangement in place which you feel is not in the children's best interests it is important that we discuss and raise this urgently.

The Court is required to take the views of the children into consideration however it is important to know that this does not mean that the child(ren) are required to attend at court or speak directly or that they are the decision makers. There are a variety of ways that the views of the child(ren) can be obtained and consideration will always be given to the best way to achieve this, taking in to account their age and maturity, without the child feeling under any pressure.

Minute of Agreement

Where you are able to reach an agreement with the other parent about what the arrangements are to be- whether that is directly between you, via mediation, collaboration or negotiation- then the details of what has been agreed can be set out in a more formal way known as a 'Minute of Agreement' which is in effect a contract between parents. The benefits of doing this are that it provides certainty to all of what has been agreed and is a point of reference for the future.

In some circumstances a Minute of Agreement can be directly enforceable- meaning that it has the same effect as a Court Order- however care arrangements for children can never be treated the

same way. If, however there is a future disagreement the terms of the Minute of Agreement should prevail unless there has been a very serious change of circumstances.

The Court Process

If you feel that the best option for you is a Court action then there are certain things that must happen. The document which starts the court process is known as an Initial Writ. It will set out what orders the person raising the action is asking the court to grant and why they feel they should be granted. Where we are raising an Initial Writ on your behalf we will want to ensure that we give details of why it is in the best interests of your child(ren) that those orders are made.

Once the Initial Writ is prepared it is sent to the Court and they then authorise it to be sent to the other parent. This process is known as warranting and serving the Initial Writ. The Initial Writ will be served upon the other parent (and anyone else named in the court papers).

Once the other parent has had a copy of the court papers they typically have twenty-one days to notify the court whether they wish to oppose the orders being sought. If no steps are taken then the Court may grant the orders sought however, you should be aware that this is not automatic and the Sheriff may still want to make further enquiries or even ask for all parties to attend a Hearing to ascertain whether it is in the child(ren)'s best interests that those orders are made.

If the other parent doesn't agree with what is being asked for then they will have a chance to lodge firstly their notice of intention to defend (often called a NID) and then their detailed response, known as Defences. It is possible for the other parent to ask the Court for alternatives orders to be granted.

A court process will then follow and ultimately, the Court will have to make a decision about what orders to grant. When the NID is received, if not already assigned, the Court will also assign a Child Welfare Hearing. This is a hearing that all parties involved in the action- so typically both parents- must attend. Whilst it is not the case that each person has a solicitor it is our strongest advice that you do so. At the Child Welfare hearing each person gets an opportunity to set out to the Sheriff about orders that should be granted. It's important to understand though that this is not a hearing that evidence is considered at and accordingly any decision made is typically an 'interim' decision.

In an action involving children there can be a number of Child Welfare Hearings. The time in between each hearing is very much dependent on each case but would normally be in the region of 8-12 weeks dependent on the orders the Sheriff has made and what is to happen in between. It is not unusual for there to be a series of Child Welfare Hearings to monitor progress and, if all parties feel that this has worked well, Final Orders can be agreed meaning that the Court gives a final written document setting out what is to happen.

Alternatively, if that cannot happen, the Court will require to hear what is known as a 'Proof' which is the civil version of a trial. At a Proof all parties have a chance to bring witnesses and documents to the court and for the Sheriff to hear each side before the Sheriff makes Final Orders.

Once Final Orders are granted the Court action is finished. The timeframe of a court action starting to that point is however one that is very variable. At its very quickest a Court action which is defended will take approximately six months however, in many cases the Court action can last for much longer and even in into years.

Undertaking a court action is something that should not be undertaken lightly. We would always recommend taking detailed advice on your individual circumstances so we can identify what is right for you and your family.

If you have separated from a spouse or civil partner, and wish to get divorced, then you should also read our Family Law Guide which provides further details on what you need to consider when getting divorced.

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