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Parenting Disputes & Unnecessary Litigation

All significant decisions relating to a child's welfare, including their education, upbringing, accommodation and medical needs, must be taken by those with parental responsibility. The definition of parental responsibility is set out at section 3 (1) Children Act 1989 as *"all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".* However, separated parents can find it challenging to exercise their joint parental responsibility or reach agreement on key issues relating to their shared children, not least if parents have diverging views as to how their children's best interests ought to be served. This can particularly be true for separated parents where there are different cultural norms and societal expectations at play, as is the case with many separated international families.

There is a near limitless list of parental decisions which could have life-changing implications for a child. They could include a potential international relocation, a change of name, a possible change of school, or even an issue of substantive contact arrangements across borders. When parents are unable to reach a consensus about substantive issues, it may be that an application to the court for a section 8 order is required. Attempts should be made to resolve these matters outside of court before a court application is filed. Section 8 (1) Children Act 1989 sets out the orders that the court can make to assist parents in resolving these disputes which include:

- Child Arrangements Orders, considering issues of where a child lives and with whom a child spends time;
- Specific Issue Orders, determining a particular issue or question;
- Prohibited Steps Orders, an order stopping a parent or another person from doing something in particular.

The court will consider the welfare checklist set out at section 1(3) Children Act 1989 when determining whether these orders should be granted or not.

Separated parents may also disagree on smaller decisions for their child such as the specific timings for a handover, or the particular location for drop-offs. International travel can be fraught with challenges, and schooling disputes are no stranger to the family court. There might even be a dispute surrounding the *choice* of activity for a child: one parent might consider that their child prodigy should, for example, attend gymnastics classes; whilst the other might think their child's talents are best met by dance classes. With a child's time being finite, and a parent's ability to argue about their children's time occasionally being infinite, what are parents to do? One natural consequence that many parents contemplate could be to seise the court. However, as the case of *Re B (a child) (Unnecessary Private Law Applications)* demonstrates, parents who pursue litigation on narrow issues ought to tread extremely cautiously, and may well find themselves the subject of judicial criticism and even costs orders.

***Re B (a child) (Unnecessary Private Law Applications)* [2020] EWFC B44**

In the case of Re B (a child) (Unnecessary Private Law Applications), HHJ Wildblood sends a clear warning shot to any parent who is considering bringing what he described as 'unnecessary' applications to court.

By way of brief summary, the mother in this case was appealing against an order that had been made by a legal advisor to disclose five years of her medical records. Notably, the subject child of the proceedings was not yet two years old at the time and substantive disclosure had already been ordered in the case. The mother's appeal was successful, and it was held that ordering the disclosure of five years of medical records would have been a disproportionate infringement of the mother's right to a private and family life .

However, aside from the issue of medical disclosure, the judge made his thoughts clear as to the merits of potential applications to the court. HHJ's Wildblood's warning is summarised as follows:

'Do not bring your private law litigation to the family Court here unless it is genuinely necessary for you to do so. You should settle your differences (or those of your clients) away from Court, except where that is not possible. If you do bring unnecessary cases to this Court, you will be criticised, and sanctions may be imposed upon you. There are many other ways to settle disagreements, such as Mediation.'

The clear message is that parents should not resort to court in respect of each and every parenting dispute they have. Whilst a forum does exist for the settling of disputes, it must be considered carefully. Crucially, the court will expect parents to engage in meaningful attempts to resolve parenting disputes prior to bringing any application for court. A parent who brings an application to court for a minor logistical issue, or a minor dispute about parenting techniques, should expect to receive criticism from the court. If the court does deem the application to be unnecessary, cost orders might also follow.

More to the point, there is a clear public interest argument to be made in respect of taking a stringent approach to applications for micro-management of parenting issues. The courts simply do not have the resources to deal with such requests. Indulging parents in their requests for micro-decision making would risk opening the doors to an unmanageable avalanche of litigation at a time when the courts are already under-resourced. Ultimately, this would lead to even further delays on other cases where the court is tasked with dealing with issues that are in fact life-altering for the children involved such as cases involving international relocation or substantive child arrangements; the same judge goes on to highlight this very point:

"not only is unnecessary litigation wasteful, it clogs up lists that are already over-filled – in terms of the over-riding objective, it amounts to an inappropriate use of limited court resources (see Rule 1.2 (e) of The Family Procedure Rules 2010), it amounts to an inappropriate use of limited court resources".

Moreover:

"the Judges (in the Family Courts) have an unprecedented amount of work. We wish to provide members of the public with a legal service that they deserve and need. However, if our lists are clogged up with unnecessary high conflict litigation we will not be able to do so."

Unnecessary Litigation

There is no exhaustive list of what would constitute ‘unnecessary’ litigation. The examples set out within HHJ Wildblood’s judgment as to what would constitute *‘unnecessary’* private law litigation include:

1. At which junction of the M4 should a child be handed over for contact;
2. Which parent should hold the children’s passports (in a case where there was no suggestion that either parent would detain the children outside the jurisdiction); and
3. How should contact be arranged to take place on a Sunday afternoon.

It must be acknowledged that there are some circumstances where seemingly trivial parenting disputes do in fact raise legitimate concerns. In particular, consideration must be given to cases where there is an underlying context of domestic abuse and where one party is exerting coercive and controlling behaviour over the other parent in the guise of a seemingly minor parenting request. In particular cases, the logistics for handovers may raise an extremely important issue involving a background of domestic abuse and it might be that a particular handover location is traumatic for one parent. However, there are also cases where one parent may be perpetuating coercive and controlling behaviours through ongoing litigation on trivial practical issues associated with child arrangements. As such, the circumstances of each individual case itself will determine whether an application will be deemed appropriate or not by the court. Consideration must also be given to practice direction 12J in any private law children matter involving allegations of domestic abuse.

Resolving children disputes outside of court

There are certain children matters where urgent litigation will be necessary, such as casesinvolving international child abduction or where the court's protection is required. However, inabsence of circumstances of urgency, litigation should usually be a last resort and the court willexpect parents to have explored alternative forms of dispute resolution prior to making a courtapplication. For example, mediation or child-inclusive mediation, solicitor correspondence, orarbitration could assist parties in reaching a resolution to their matter. It is essential for parentsstruggling to resolve practical issues relating to their children to make meaningful attempts toresolve their matters before proceeding with an application to court. Significantly, resolvingdisputes wherever possible outside of court has the benefit of minimising conflict between parents,which is ultimately in the child's best interests.

Resources

The Resolution parenting through separation guide can be a useful reference point for parents attempting to resolve their parenting disputes.

- https://resolution.org.uk/publications-books/parenting-through-separation-guide-10-copies/

References

- https://www.legislation.gov.uk/ukpga/1989/41/contents
- https://www.bailii.org/ew/cases/EWFC/OJ/2020/B44.html

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