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Family Law

news and advice from Birkett Long

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Residence and Contact - An Update

In recent years there has been a defined shift in the attitude of the courts in relation to contact disputes whereby the parent with care shows "implacable hostility" towards the other parent, and seeks to frustrate the terms of a Contact Order as a consequence of that hostility.

The court's approach to contact is based upon a child's right to know both parents. A child has a right, in the absence of any justifiable and exceptional reason, to have contact with both parents. The courts are faced with a very difficult situation when a parent with care tries to stop a child from seeing their other parent without a good reason.

In the recent case of Re C (A Child) [2007] the Court of Appeal was faced with the mother who had consistently failed to comply with a Contact Order despite a warning that she could be sent to prison for breaking the terms of the Order. The Court of Appeal held that it was correct for the child to live with the father based on a balancing exercise as to what was in the child's best interests. Moving the child from residing with the mother to residing with the father would cause less harm and disruption to the child than the child living with the mother when she was stopping contact with the father.

This approach should enable the child to maintain a relationship with both parents and to reduce the level of stress on the child by removing him from the environment of the hostile parent. It is being adopted more and more frequently by the courts in situations where one parent constantly breaks the terms of a Contact Order.

Financial Claims of Unmarried Parents

The financial claims that couples have against one another on divorce are well known, and include claims for maintenance, lump sums, property and pensions.

Some may assume that for unmarried parents, the extent of the absent parent's financial liability for their child begins and ends with the CSA. It may therefore come as a surprise to learn that actually, that is not necessarily the case.

Under Schedule 1 of the Children Act 1989 the court has the power to make a range of orders against an absent parent which include maintenance and lump sums as well as the settlement or transfer of a property.

The Children Act makes no provision for any claim against pensions and unlike the law which applies to divorcing couples, the financial needs of the child are not given first priority. However, the courts' powers under the Children Act are very similar to those which the court has under divorce.

So far, the cases that have been published in this area of the law all relate to unmarried couples where the absent parent is extremely wealthy. There is nothing within the Children Act however that prevents it from being used in more modest cases. In modern British society, where so many children are being born outside of marriage, it is likely that more and more financial cases will be brought under these Children Act provisions.

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Things You Might Not Know About the Child Support Agency (CSA)

The CSA's role is to ensure that parents who live apart from their children contribute financially to their upkeep by paying child maintenance. Here are a few little known facts:

- **The CSA takes the number of children who live with the payer into account when calculating child maintenance.**
- **The CSA caps the payer's net income at £104,000 per annum.**
- **The parent with care can apply to the court for a top up.**
- **If the payer fails to give the necessary information to the CSA, payment will be at a default rate.**
- **The payer is responsible for the difference between the default rate and the amount they should be paying.**
- **If the payer has certain assets in excess of £65,000, the CSA can treat those assets as generating an income.**
- **In 2010/2011 it is intended that CSA cases will begin to transfer to the "Child Maintenance and Enforcement Commission".**

Clean Break? Not Necessarily!

Most divorced couples are loath to think that their spouse could inherit their estate. What if a parent dies in the same accident as their children, where they have a will leaving everything to their children alone? The law says that because the children are deemed to have died after their parent, they will inherit the estate. The estate will then pass to their nearest living relative, their surviving parent. This means that all the assets which the deceased parent retained following the acrimonious divorce are back in the hands of the surviving parent; an outcome which the deceased parent never foresaw and would never have wanted. Our Probate, Tax and Trust team can draft the appropriate provision in a will to avoid this situation.

Taking Children to Live Abroad

When a relationship breaks down and there are children, life gets difficult. Emotions come to the fore and different attitudes to parenting can come into conflict. There is no more significant example of this than when one parent wants to take the children to live permanently abroad.

Most parents, married or unmarried, share legal responsibility for their children. Where this is the case, the parent wanting to emigrate needs written consent from the other to take the children. Where such consent is not forthcoming, an application has to be made to the court for permission.

It is often assumed that the resident parent will always get their own way and that there is a presumption in favour of permission being granted. Whilst many cases do result in such permission being given by the court, the commonly held view of the law is wrong. The Court of Appeal has made it clear that the points a judge should consider carefully are as follows:

1. The welfare of the children will always be the most important consideration.
2. There is no legal presumption in favour of the parent who is applying to emigrate with the children.
3. That parent's wishes will carry great weight provided the plans are both realistic and genuine. Motive is an important factor.
4. The effect that a refusal might have on the applicant parent is very important as is the effect upon the children that less contact with the other parent will have. What opportunities there are for continuing contact may be very significant.

Although it may sound trite, it is true to say that each case will turn on its own facts. The Court of Appeal's views, given more than seven years ago now, have been tested in recent cases and found to be still the appropriate test for cases of this kind. Our experience is that early objective advice can be crucial in this most emotional area of law.

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