

Children and the Law: When families can't agree





Background

In 2007 Action for Prisoners' Families (APF) produced a booklet for women prisoners called 'Staying Close'. The booklet provided information on letters, telephone calls, visits, etc. and the idea was that it would be given out on reception and at induction. In 2008, in a collaboration between APF and Clean Break, 'Missing Out', a play by Mary Cooper was toured to many women's prisons. The play and workshop which accompanied it were well received by staff and women prisoners. Having access to women's prisons gave us the opportunity to find out whether 'Staying Close' was being given out. We found that it rarely was and that many prisons didn't even know about it despite information about it having been sent to all prisons. It has now been distributed across the women's estate.

In talking to the women about the issues which arose from the play, we found there was little or no written information about their rights and entitlements regarding their children. To this end we are producing four guides – this is the fourth – to bridge that gap and to give prisoners (and staff themselves) the information they need about their children. The guides have been written by the organisation Rights of Women. Rights of Women is an organisation committed to informing, educating and empowering women concerning their legal rights.

About this guide

The issues relating to children can be complex and we have provided a very basic overview of the words used, law and court practice and procedure. We would also strongly advise you to seek legal advice by either telephoning the Rights of Women legal advice line on 020 7251 6577 Tues, Wed and Thurs 2-4 and 7-9, and Fri 12-2, or a solicitor.

Please note that the law as set out in this briefing is the law as it stood at the date of publication in June 2010. The law may have changed since then so it would be best to take up to date legal advice. Rights of Women cannot accept responsibility for any action taken on the legal information contained in this briefing. It is designed to give general information only.

Using this Guide

We are aware that there are often difficulties for women in accessing information and getting support in prison. We have included web addresses in the 'Useful Contacts' section at the end of this guide although we are aware that prisoners do not have access to the internet. However, the guides will be available to staff as well as prisoners and they will also be available to download on our website, so staff, friends or family, who are more likely to have internet access, may be able to help out with accessing information.

The list of people who might be able to help you in prisons is a very general one, and it may be that someone totally different can help you out, or a representative from an outside organisation. It is by no means an exhaustive list.





Introduction

While you are in prison decisions will have to be made about your child's upbringing, including, where your child will live; who your child will live with; when, and if, you will see your child in prison; as well as decisions about education and health.

Whilst you are in prison your child may live with his or her father, a friend or a relative. Alternatively, he or she may be placed with foster carers by the social services department of your local authority (for more information see APF / Rights of Women's Guide: **Children and the Law: When Social Services are Involved.**)

You may not agree with all the decisions that are made by the people caring for your child while you are in prison, or you may want your child returned to your care on your release, or you might not be happy with the level of contact you have with your child while you are in prison. This leaflet provides general legal information about your rights with regard to your child and orders that the court can make in relation to children.

As the biological (birth) mother of your child you will automatically have parental responsibility (PR) for your child (for further information see APF / Rights of Women's **Guide to Parental Responsibility** in this series.)

PR is the legal term which describes the rights and responsibilities that a parent has for a child.

Those who have PR can make or be involved in the important decisions necessary in your child's life including education, health, medical treatment, and the day to day care provided to your child. (For further information see APF / Rights of Women's **Guide to Parental Responsibility**). You will still have PR for your child if you are in prison, but the extent to which you can exercise PR will be limited by the fact you are not physically there to look after your child. In certain situations your PR can be limited, for example, if the court makes a special guardianship order (see Special Guardianship Orders) the local authority can limit your right to exercise PR for example by deciding where the child should live (for more information see APF and Rights of Women's briefing **Children and the Law: When Social Services are Involved**). The **only** way you can **lose** PR is if an Adoption Order is made (for more information see APF / Rights of Women's **Guide to Adoption**.)

Residence

Residence means where, or more precisely, who your child will live with. This used to be called custody. A **residence order** states the person who the child will live with on a permanent basis and who should be the child's primary carer. A residence order is usually made in favour of one or other parent, but it can be made in favour of another person, such as a friend, relative or foster parent.

While you are in prison you will be prevented from living with your child and providing day to day care, unless your child is a baby. If you have a baby under 18 months old your baby may be able to live with you in a mother and baby care unit in prison. For more information on mother and baby units please contact Action for Prisoners Families (see **'Useful Contacts'**).

If you agree who your child will live with while you are in prison the court may not need to become involved. However, a residence order might be necessary to give a non-parent PR, such as a grandparent, who is looking after your child so that they can be involved in making important decisions regarding your child's upbringing. Reaching an agreement does not prevent you from going to court later if you are released from prison or if you change your mind.



What if we cannot agree residence?

If you cannot agree on arrangements for where your child will live you should consult a solicitor who can negotiate arrangements on your behalf whilst you are in prison. A solicitor can write to the other party setting out your suggestions for where your child should live and help you reach an agreement. You may be eligible for free legal advice. For further details about legal aid see **'Useful Contacts'**.

If you are not able to reach an agreement about where your child will live, the person who is looking after your child or a person with PR might apply for a residence order. You will not be able to get a residence order for your child while you are in prison, but you can apply for a residence order for your child on your release or shortly before your release if you would like to secure residence of your child on your release from prison.

When making a decision on residence the court must consider all your child's circumstances and in particular the welfare checklist. **See paragraphs a-e overleaf.**





Who can apply for a residence order?

- **Anyone who has PR** (for example the biological - birth - mother).
- **The child's biological father.** (Even if your child's father does not have PR for your child he still has the right to apply to the court for a residence order).
- **Anyone who has been living with your child for 3 out of the last 5 years** will automatically be able to make an application for a residence order.
- **Anyone with the permission of everyone with PR** (to apply for a residence order).
- **Anyone who has been given the court's permission.** A friend or a relative who is caring for your child while you are in prison can make an **application for leave (permission)** to apply for a residence order. To obtain the court's permission they would have to satisfy the court that they have a sufficient connection to your child and that the application would not disrupt the child's life.

What type of residence order?

A **full residence order** states who the child will live with. The court will often make an order for contact at the time of making this order (see 'Contact').

A **shared residence order** is an order in favour of more than one person, usually parents who do not live together. It will specify the period of time the child will live with each parent. Shared residence does not necessarily mean your child will spend half of his or her time with each parent. The amount of time spent can be equal or unequal.

An **interim residence order** can be made when making the decision about whether to make a residence order which states who the child should live with until the court makes a final decision.

Effects of a residence order

If the court makes a residence order the person who the order is made in favour of will automatically gain PR. For example, if a residence order is made in favour of your child's father and he does not have PR he will get it, or if a residence order is made in favour of your child's grandmother, she will automatically acquire PR. If a father gains PR in this way he will have PR until your child is 18 years old. If a non-parent acquires PR by way of a residence order, they will normally have PR until your child reaches 16 and in some situations until the child is 18, unless the residence order comes to an end before this time. (For more information on PR see APF / Rights of Women's **Guide to Parental Responsibility**.)

Someone who has a residence order is not allowed to change your child's surname or remove the child from the United Kingdom permanently without the written consent of everyone else who has PR or permission from the court. The only exception is if you have a residence order you may take the child out of the United Kingdom temporarily (for example on holiday) for a period of up to one month without consent. (For more information see section on **Specific Issue Orders** and **Prohibited Steps Orders** overleaf.)

How long does a residence order last?

A residence order will end when the child reaches the age of 16, unless the court considers that there are exceptional circumstances that require the order to continue until the child reaches 18. A residence order will also end if the court makes a new residence order in favour of someone else, if the court discharges the order, if the court makes a care order in favour of the local authority (for more information see APF and Rights of Women's briefing **Children and the Law: When Social Services are Involved**) or if the parents live together for a period of 6 months after the order is made.



Special guardianship order

The Adoption and Children Act 2002 created a new type of order called a special guardianship order (SGO) as an alternative to adoption (see APF/Rights of Women's **Guide to Adoption**).

A **special guardianship order (SGO)** is often made in situations where your child cannot live with you, but there is a family member or person close to the family who is able to care for the child. It is appropriate where your child would benefit from a permanent relationship with their day to day carer(s) and also some continued contact and links with his or her birth parents (although sometimes only limited contact is possible). When making a SGO the court must consider whether an order for you to have contact with your child should be made (see **Contact**). If the court is considering making an SGO the possible special guardian will have to undertake an assessment.

When making a decision on a special guardianship order the court must consider all your child's circumstances and in particular the welfare checklist. **See paragraphs a-e below.**

Who can apply for a special guardianship order?

- Any guardian of a child
- Anyone who holds a residence order with respect to the child
- Anyone with whom the child has lived for three out of the last five years
- Anyone who has the consent of all those with parental responsibility for the child
- Any person, including the child, who has the permission of the court to apply.
- A foster carer that the child lived with for one year immediately before the application for the SGO (See APF and Rights of Women's briefing **Children and the Law: When social**

services are involved).

- Where the child is in the care of a local authority, any person who has the consent of the local authority (See APF and Rights of Women's briefing **Children and the Law: When social services are involved**).

Effect of a Special Guardianship Order

If a special guardianship order is made your child will not live with you, and will be cared for by the special guardian(s) who is usually someone that you know, for example, a grandparent or friend who has been caring for your child. The special guardian(s) will have PR until the child is 18 years old unless the SGO is varied or discharged by the court and will be responsible for all the day to day decisions involved in caring for your child and for making decisions about his or her upbringing, for example your child's education. In law you will remain your child's parent and you will continue to have PR but the extent to which you can exercise PR will be very limited. A special guardian can take the child out of the country for 3 months without the consent of the other people with PR, but cannot change your child's name without the agreement of you and anyone else with PR or with the permission of the court.

How long will a Special Guardianship Order last?

The special guardian(s) will have PR until the child is 18 years old unless the SGO is changed or ended by the court.

You can apply to end an SGO, but you will need to have the permission of the court to do this. In order to secure the court's permission you will have to show the court that there has been a significant change in circumstances since the special guardianship order was made. If you would like to apply to end a SGO please seek legal advice from a solicitor (see 'Useful Contacts').



Contact

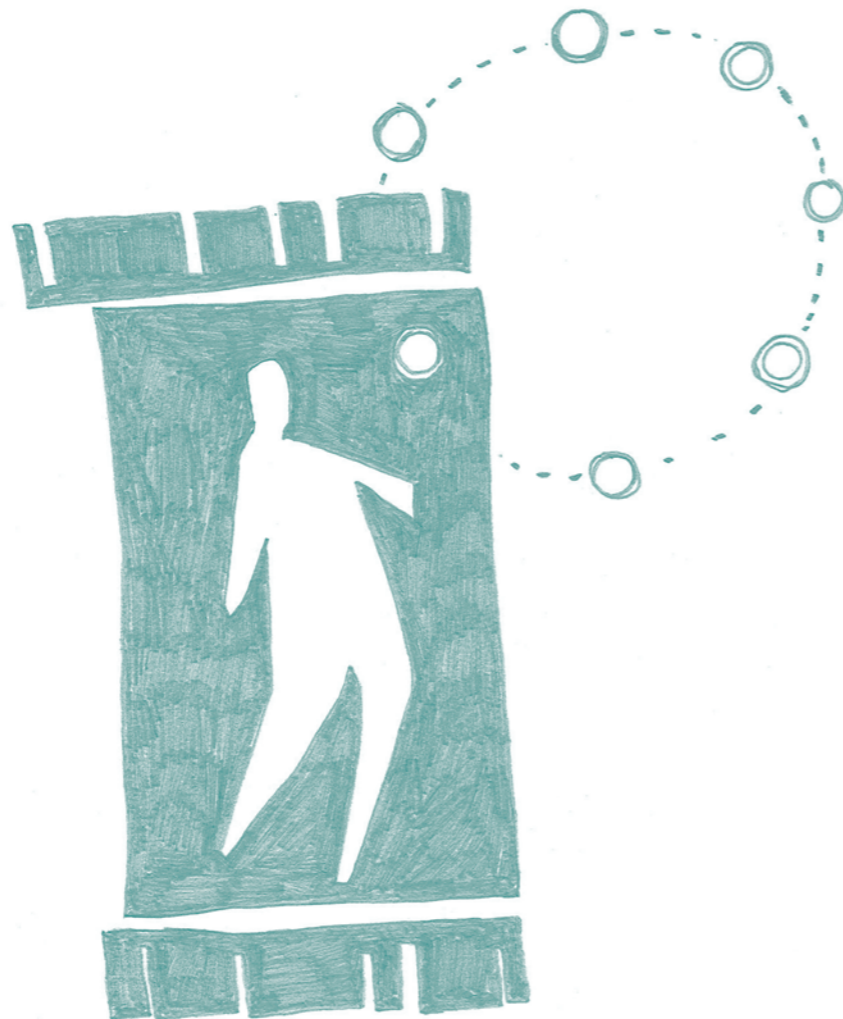
What is contact?

Contact can take place in many different ways and it is important to remember that there are no rigid rules about what contact should take place while you are in prison or on your release.

You may have **direct contact** with your child. This can include visiting contact and staying contact (if you are not in prison). You can arrange for your child to come and visit you in prison. There can be practical difficulties with this, as you may be in a prison that is a long way from your child or your child may find it distressing. If your child is being looked after by his or her father, a relative or friend, under a residence order or by agreement, you can discuss arrangements for contact. If you are not happy with the level of contact that is being given to you, you should seek legal advice from a solicitor (see **'Useful Contacts'**).

If direct contact is not possible you may arrange **indirect contact**. This may include telephone calls or letters. There is also a scheme called 'Story Book Mums' where you can make a recording of you reading a story to your child, for details see **'Useful Contacts'**. This could be **one way** contact where you send letters to your child but the child does not write back, or **two way** contact where your child also sends letters back to you.

If you agree contact arrangements between yourselves, you do not need to ask the court to become involved. It is useful to write down arrangements you have agreed to help prevent future disagreements or misunderstandings. Reaching an agreement does not prevent you applying to the court for a contact order if arrangements break down.



What if we cannot agree contact?

You can consult a solicitor to negotiate arrangements. A solicitor can write a letter setting out proposals for contact and you may be eligible for free legal help from a solicitor (see **'Useful Contacts'**.)

If you are not able to reach an agreement about contact you can apply for a contact order.

The court generally believes that it is in the interests of the child to have contact with their mother, unless the child would be at risk of harm when having contact. If the court believes that it is in your child's best interest to have contact it can make a contact order.

What is a contact order?

A contact order is a court order requiring the person who your child lives with to allow your child to visit the non-resident parent and can require them to facilitate a visit between you and your child in prison or for you to have any other form of contact provided by the order, for example, telephone contact.

When making the decision the court must consider all your child's circumstances and in particular the welfare checklist. **See paragraphs a-e opposite.**

Varying a contact order

Usually a contact order will last until your child reaches 16. However, if your child's needs and circumstances change, you or the person looking after your child can apply to the court to vary the order. You should seek legal advice from a solicitor if you wish to vary the contact order or if you receive notification that the other party is seeking to vary the order (see **'Useful Contacts'**). The court will only make a new order if something has changed since the original order was made.

Breaches of a contact order

A warning notice is automatically applied to any contact order. A party to a contact order can apply to the court for an enforcement order if the contact order is not being complied with. If the court is satisfied that either you or the other person named in the contact order is in breach of a contact order without having a reasonable excuse it can:

- Impose an unpaid work requirement
- Impose a fine
- Order payment of compensation to the other parent (for travel expenses where contact has not occurred)
- Impose a sentence of imprisonment or a suspended sentence
- Transfer residence

If a contact order is not being followed seek legal advice from a solicitor (see **'Useful Contacts'**).

Specific issue orders & prohibited steps orders

What is a specific issue order?

A **specific issue order** (SIO) is an order the court can make when people who have parental responsibility (PR) for a child (see APF / Rights of Women's **Guide to Parental Responsibility**) cannot agree about an important decision in a child's upbringing. You can ask the court to make a specific order while you are in prison if you cannot agree about:

- Your child's education – for example, what school she or he should go to;
- Your child's religion – for example, whether your child should be brought up in one faith or another;
- Your child's health – for example, what medical treatment your child should have;
- Your child's surname.

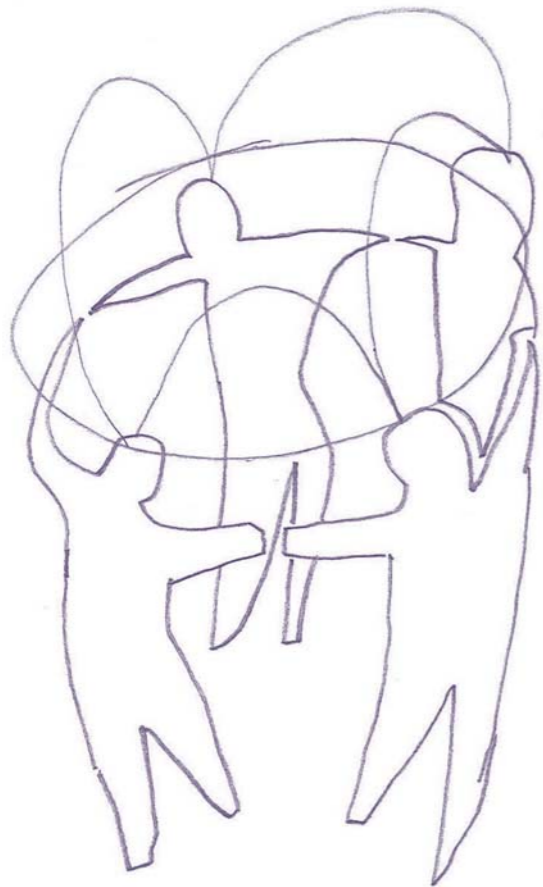
If you are not able to reach an agreement about important issues in your child's upbringing, you should seek legal advice from a solicitor. You may be eligible for free legal advice - (see **'Useful Contacts'**).

The court is unlikely to become involved in less important decisions about the way in which you bring up your children, such as the day-to-day decisions made by the person caring for your child whilst you are in prison. You are unlikely to be able to ask the court to interfere in decisions about, for example, the clothes the person with care of your child dresses your child in or the food your child eats (unless this is relevant to your child's health).

What is a prohibited steps order?

A **prohibited steps order** (PSO) is an order the court can make to forbid a person who has PR for a child from taking certain action in relation to that child. You can ask the court to make a PSO forbidding a person with PR to:

- Remove your child from your care;
- Remove your child from school;



- Take your child abroad (see also **Child abduction** opposite);
 - Bring your child into contact with certain people.
- If you are concerned about a parent or someone else taking action with regard to your child, you should seek legal advice from a solicitor. You may be eligible for free legal advice - (see **'Useful Contacts'**).

The court can make these orders in an emergency and without the other person being made aware of the hearing. The court may make a temporary or interim PSO and arrange another hearing when the other person can attend and put his or her side of the story. A PSO could be made to last indefinitely.

Moving within England and Wales

Generally the person who your child lives with is free to move within England and Wales. If the person looking after your child moves somewhere which is a distance from your prison this may have an impact on contact arrangements with your child and you may need to make alternative contact arrangements.

In most cases the court will not restrict someone moving to a new area but in a recent case the court did restrict a woman from moving to an area where the court considered that she was only doing so to frustrate contact arrangements and where she had no connection with the area or clear plans of accommodation, work or education for the children. If the person with care of your child moves or is planning to move away please seek legal advice from a solicitor (see **'Useful Contacts'**).

Taking your child abroad for a holiday

Before your child is taken abroad on a holiday the person seeking to take the child must get permission from you and everyone who has PR for your child. Your permission is required even though you are in prison and this means that the person with care of your child needs your permission and must inform you every time they are taking your child abroad or get the court's permission, unless

they have a residence order or special guardianship order. A residence order allows the person who it is made in favour of to take your child abroad for up to one month (see **residence orders** above). A special guardianship order allows a person who it is made in favour of to take your child abroad for up to 3 months (see **special guardianship order**).

Child abduction out of the UK

It is a criminal offence for a parent of a child under 16 to take or send a child out of the UK without getting the permission of either anyone else with PR for the child or the court. Scotland and Northern Ireland are within the UK.

If you are concerned that someone intends to take your child out of the UK you should contact the police and seek urgent legal advice. Someone may have threatened to take your child or you may have found out that someone is making plans to take your child abroad. The police can contact all the national police forces and the immigration authorities. If there is a **real** and **imminent** risk of your child being abducted a port alert can be issued at all ports and airports to help stop your child being taken abroad. The person who has abducted your child could be charged and arrested with child abduction.

You can apply to the court for a PSO to forbid someone from removing your child from your care and from the country (see above).

If your child has already been taken out of the country seek urgent legal advice and contact Reunite (see **'Useful Contacts'**).

The Law

The law relating to all of these issues is set out in the **Children Act 1989** (CA 89). The CA 89 says that when the court makes any decision about a child, the child's welfare must be the court's paramount consideration. This means it must consider the child's welfare above everything else.

When making decisions with regard to any of the above matters - residence / contact / PSO / SIO, the court must consider all your child's circumstances and in particular the welfare checklist:

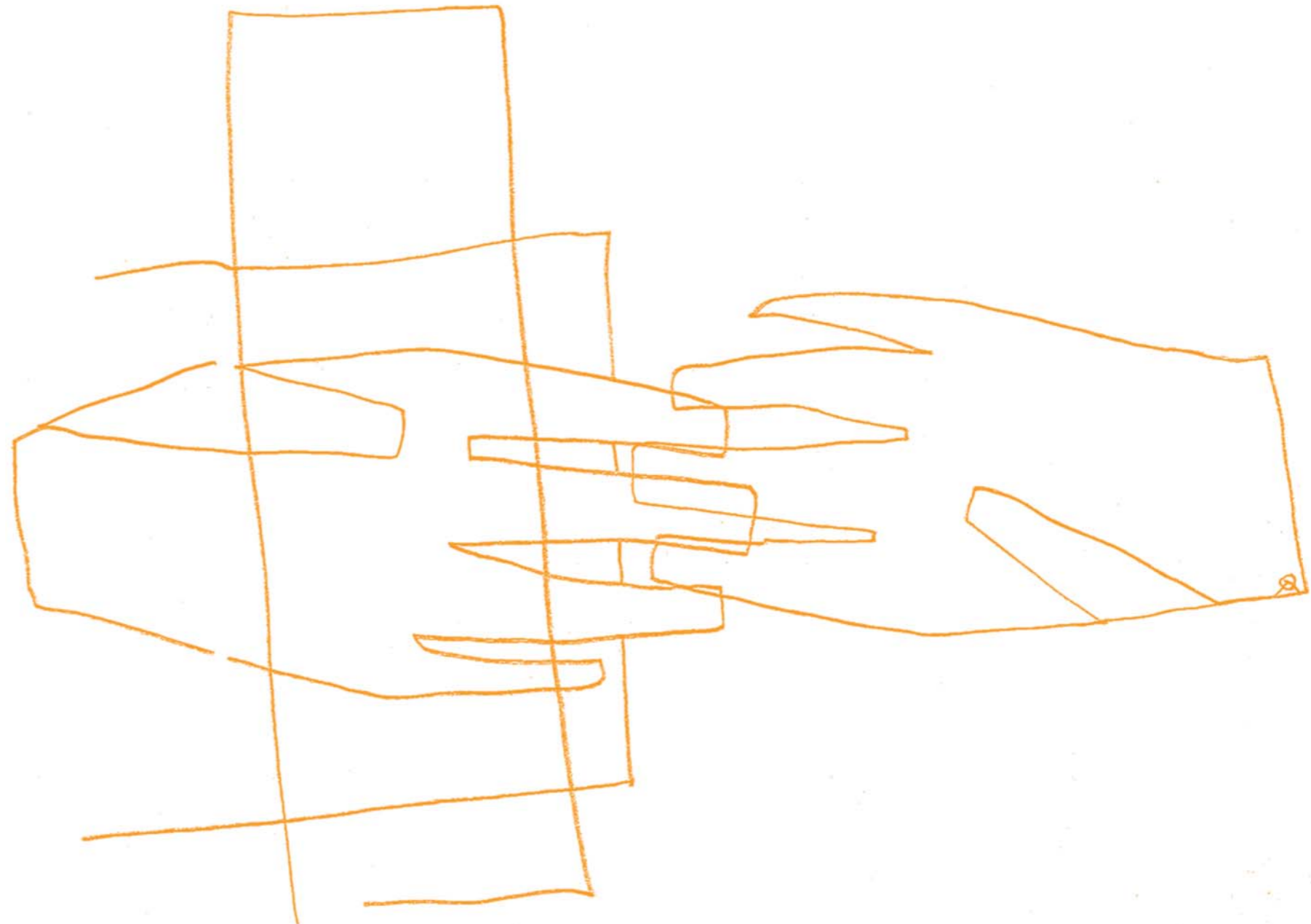
- a) your child's wishes and feelings, depending on their age and understanding (generally the older the child is, the more attention the court will pay to those wishes and feelings),
- b) your child's particular needs – physical, emotional and educational (this includes practical needs such as accommodation and food, as well as love and affection),
- c) the likely effect on your child of a change of circumstances,
- d) your child's age, sex, background and any of the other characteristics which are considered relevant (this includes your child's religious and cultural needs as well as your child's age).
- e) any harm, abuse, or neglect your child has suffered or is at risk of suffering,
- f) how capable you and anyone else with parental responsibility (or anyone the court considers relevant, such as relatives or friends who your child might live with) are of meeting your child's needs.
- g) the court must consider the range of different orders it can make and decide which is most appropriate (if an application is made for any of these orders the court has the power to grant another order, for example, if an application for a prohibited steps order is made the court might decide to make a residence order).

The issues relating to residence, special guardianship, contact, prohibited steps orders and specific issue

orders can be complex and we have provided a very basic overview of terminology, law and court practice and procedure. We strongly advise you to seek legal advice by either telephoning our advice line or seeking advice from a solicitor.

Who can help you in the prison?

- A solicitor (see 'Useful Contacts')
- The Legal Aid Officer
- The Offender Management Unit is the link between you and social services and will also be attending Family Court
- Prison library
- Prison chaplain
- The CAB (Citizens Advice Bureaux) – they may come into the prison on a regular basis. Alternatively, you will need to get someone on the outside to contact them on your behalf, or you can telephone them.





Rights of Women offer **free confidential legal advice** on family law including divorce and relationship breakdown, children and contact issues, domestic violence and lesbian parenting. Call the **Rights of Women Advice Line** on **020 7251 6577 (telephone)** or **020 7490 2562 (textphone)** **Tuesday, Wednesday and Thursday 2pm-4pm and 7pm- 9pm Friday 12 noon – 2pm** or write to Rights of Women, 52-54 Featherstone Street, London, EC1Y 8RT.

For free confidential legal advice on criminal law, sexual violence or immigration please call Rights of Women Sexual Violence Advice Line on **020 7251 8887 (telephone)** or **020 7490 2562 (textphone)**

Useful Contacts

You may also find the following contacts useful:

(Please note, we have provided web site addresses although we realise the majority of prisoners do not have internet access. This is because prison staff may also use these booklets on your behalf and they *will* have internet access).

Action for Prisoners' Families (APF)
www.prisonersfamilies.org.uk

Tel: 0208 8812 3600.

Unit 21, Carlson Court, 116 Putney Bridge Road, London, SW15 2NQ.

APF is the national organisation for those interested in the well being of prisoners' families. It works to reduce the negative impact of imprisonment on families.

CAFCASS
www.cafcass.gov.uk/

This is the Children and Family Court Advisory and Support Service. CAFCASS is independent of the courts, social services, education and health authorities and all similar agencies.

Community Legal Advice
www.communitylegaladvice.org.uk

Tel: 0845 345 4345

(to find a family solicitor)

HM Court Service
www.hmcourts-service.gov.uk

National Family Mediation (NFM)
www.nfm.org.uk

Tel: 01392 271610

NFM is a network of local not-for-profit family mediation services in England and Wales which offers help to couples, married or unmarried, who are in the process of separation and divorce.

Gingerbread
www.gingerbread.org.uk

Tel: 0808 802 0925

Gingerbread works for and with single parent families.

Prisoners' Families' Helpline
www.prisonersfamilieshelpline.org.uk

Freephone 0808 808 2003

Reunite
www.reunite.org

Tel: 0116 2556 234

(for advice on child abduction)

Resolution
www.resolution.org.uk

Tel: 01689 820272

(for finding a family solicitor)

Samaritans
www.samaritans.org.uk

Tel: 08457 909090

Story Book Dads/Mums
www.storybookdads.co.uk

Tel: 01822 322287

Women in prison
www.womeninprison.org.uk

Freephone 0800 953 0125

Women in Prison supports and campaigns for women offenders and ex-offenders.



Rights of Women,

52-54 Featherstone Street,
London, EC1Y 8RT,

www.rightsofwomen.org.uk

Tel: 020 7251 6575

Industrial and Provident Society No: 23221R



Action for Prisoners' Families,

Unit 21, Carlson Court, 116 Putney Bridge Road,
London, SW15 2NQ.

www.prisonersfamilies.org.uk

Tel: 0208 812 3600

Charity No. 267879, Company No. 1168459

This guide is the fourth in the series 'Your Children, Your Rights'.
Three other guides are available on:

- Parental Responsibility
- Adoption
- Children and the Law: when social services are involved

Copies of these guides will be given out on reception and/or induction.
There will also be copies available in libraries. If you have any problems
getting hold of copies please contact Action for Prisoners' Families.

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