

A GUIDE TO RESIDENCE ORDERS



After separation, parents need to decide where their children should live. This legal guide provides general information about the law relating to residence orders and the factors the court considers when making a decision about which parent a child should live with. We acknowledge that grandparents, stepparents or others may also want to be involved in caring for a child after separation. This can be more complex and you should seek legal advice if this is your situation.

Language

Whilst in this legal guide we refer to the child's other parent as 'he' we recognise that this may not be the case. The law set out in this legal guide is generally the same regardless of whether your child's other parent is a man or a woman, but if your child's other parent is a woman you may also wish to read this guide alongside our **Guide to Lesbian Parenting** and seek legal advice.

What is residence?

Residence means where, or more precisely, with whom, a child will live after separation. This used to be called custody. A **residence order** states which parent a child should live with on a permanent basis and who should be the child's primary carer. A child can spend time living with both parents (a shared residence order) if this is practicable and of benefit to the child. A residence order is about

the person a child lives with and not the address.

If you can agree where your child should live between yourselves, you will not need to ask the court to become involved. Reaching your own agreement about residence does not prevent you going to court later if arrangements break down or if one of you changes their mind.

What if we cannot agree residence?

If you cannot agree on arrangements for where your child should live you could consider attending **mediation**. Mediation is a voluntary process which aims to help parents negotiate with the help of a mediator. Mediation is not appropriate if you have experienced domestic violence. It may also not be appropriate if you have a disability or if English is not your first language. You may be eligible for free mediation if you are on benefits or a low income. For

further information about legal aid for mediation contact the Community Legal Service (contact details are at the end of this legal guide). There is now a requirement that you attend mediation if you want to apply for a court order, with certain exceptions (see below).

You could also **consult a solicitor** to try and negotiate arrangements. A solicitor can write to your former partner setting out your suggestions for where your child should live and help you reach an agreement. You may be eligible for free legal advice if you are on benefits or a low income. For further information about legal aid contact the Community Legal Service.

If you are not able to reach an agreement about residence either you or your child's other parent can make an application to the court for a residence order. Even if your child's other parent does not have **parental responsibility** for your child he still has the right to apply to the court for a residence order. (For more information about parental responsibility see our **Guide to Parental Responsibility**).

Requirement to attend mediation before an application to court is made

If one of you makes an application for residence you will both be required to attend a **family mediation information and assessment meeting (FMIAM)** prior to the application being made, unless you fall within certain exceptions (see below). The person wishing to apply for residence is expected to find a mediator and arrange an FMIAM.

At the FMIAM the person who has made the application for residence has to consider with a mediator whether the dispute may be capable of being resolved through mediation. Both

parents will be invited to attend the meeting. If you or your child's other parent are setting up a meeting and you don't want to attend a joint meeting for any reason, explain this to the mediator when you are contacted by them and a separate meeting can be arranged. If the reason you do not want to attend a joint meeting is because you have experienced domestic violence then explain this, and you may not have to attend at all (see below).

In some circumstances you will not have to attend an FMIAM. These circumstances are:

- A mediator is satisfied that mediation is not suitable because another party to the dispute is unwilling to attend the meeting e.g. your child's other parent is refusing to attend.
- A mediator decides that an FMIAM is not suitable, for example because there has been domestic abuse or an imbalance of power in the relationship.
- A mediator has decided within the last 4 months that the case is not suitable for an FMIAM or for mediation.
- The applicant does not know the whereabouts of the other parent.
- There has been an allegation of domestic violence against a party to the proceedings (e.g. your child's other parent) **which has resulted** in a police investigation, or an application for a non-molestation or occupation order, or an injunction under the Protection from Harassment Act 1997, has been made within the last 12 months (for more information see our **Guide to Domestic Violence Injunctions**).

It is therefore important you mention concerns you have to the mediator in order to ensure they do a full assessment of whether mediation is appropriate.

If you cannot agree after the FMIAM, or in the circumstances above a meeting is not appropriate, then you can apply to court for residence. Alongside the application you must file an **FM1 form** regarding the FMIAM. If you do not attend an FMIAM and if you do not have a completed FM1 form, then this could delay your application and could affect what court costs you may be asked to pay.

What will the Judge consider at court?

The law relating to children 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 a decision the court must consider all your child's circumstances and in particular the following factors:

- **your child's wishes and feelings** depending on her or his age and understanding (generally the older your child is the more attention the court will pay to those wishes and feelings)
- **your child's physical, emotional and educational needs** (this includes practical needs such as accommodation and food as well as love and affection)
- **the likely effect on your child of any change in her or his circumstances** (this is particularly important in relation to residence as the court will want to make a decision that disrupts your child's life as little as possible. So far as possible the court will want arrangements for your child to remain in the same place with the same person)
- **your child's age, sex, background and any characteristics the court thinks relevant** (this could include any cultural or

religious needs or if your child has any special needs or disability that might affect residence arrangements)

- **any harm your child has suffered or is at risk of suffering** (this includes risk of physical, sexual or emotional abuse and also includes any domestic violence your child has seen or heard)
- **how capable both parents are of meeting your child's needs** (the court can consider whether the child's father has skills to look after your child and can consider whether these are impaired, for example, by substance misuse)
- **the range of powers available to the court** (the court can choose from a very wide range of different orders to make and sometimes decides that it is not necessary to make an order at all. See **What type of residence order?** below.)

Residence and domestic violence

When making a decision about residence the court must consider the effect on your child of seeing or hearing domestic violence. If you have experienced domestic violence, whether or not your child was directly involved, you should tell your solicitor or the judge at the earliest opportunity. **CAFCASS** (the **Children and Family Court Advisory and Support Service**) should screen for domestic violence in **all** cases and **investigate any risks** to you and your children's safety.

The Court may order CAFCASS to prepare a **welfare report** (see below) which should consider:

- the domestic violence you and / or your child have experienced;
- the harm which your child has suffered or is at risk of suffering;

- whether the safety of you and your child can be secured before, during and after any contact ordered (see our **Guide to Child Contact**); and,
- your child's wishes.

It is also important to tell the **CAFCASS officer** writing the report if you have informed anyone else or any other organisation about the abuse, like the police, Women's Aid or your GP.

What happens at court?

The court proceedings can take place in the **Family Proceedings Court** (part of the Magistrates Court) or in the **County Court**. The initial court appointment will be a **First Hearing Dispute Resolution Appointment** ('FHDRA'). At this hearing a judge, legal advisor, or magistrates (most likely accompanied by a CAFCASS officer) will discuss with you and the other parent the nature of the dispute and whether it could be resolved by mediation or other alternative means. The hearing may then be used as a conciliation appointment where both parents will speak to a CAFCASS officer or the court may refer you to mediation. In some courts, a child over the age of nine will also be expected to attend court to speak to the CAFCASS officer. Ask your solicitor or the court whether your child should attend. Do not bring your child to court unless you are told to do so. If you are able to reach agreement with the help of the CAFCASS officer the judge can make a residence order.

If you cannot reach agreement the judge will decide what evidence she or he needs to make a decision about residence and make **directions**. This could include both parents writing statements setting out their views on residence. The court may also order a **CAFCASS officer** to prepare a **report** and make a

recommendation. The CAFCASS officer will see the court file, read your statements, will meet both parents and the child individually, and any other professionals involved with the child as necessary. It is important to cooperate with the CAFCASS officer as their recommendation is very significant in the court's decision making. You may also want the judge to consider the views of experts such as social services or a child psychologist in making the decision. If this is the case you need to ask the judge to make a direction for them to write a report for the court.

If you have experienced domestic violence and the court considers this to impact upon your child's relationship(s) with their parents, the court will decide whether domestic violence occurred at a **finding of fact hearing** where you may be required to give evidence. The judge will decide whether there has been violence and, if so, what effect this will have on who the child will live with.

At the **final hearing** each parent and anyone else who has done a report for the court, such as the CAFCASS officer, may have to give evidence. The judge will then make a decision about residence.

What type of residence order?

There are two basic types of residence orders that the court can make: a **full residence order** and **shared (or joint) residence order**.

A **full residence order** states which parent the child will live with. The court may also make an order for contact between the child and the other parent (see our **Guide to Child Contact**).

A **shared residence order** is an order made in favour of both parents who do not live together. It will specify the period of time that the child

will spend with each parent. Shared residence does not necessarily mean that the child will spend half her or his time with one parent and half with the other. The amount of time that a child spends with each parent could be equal or unequal. The courts say that shared residence will be appropriate where children are spending significant amounts of time with both parents. The court will not automatically make a shared residence order in every case. Each family's circumstances will be different and it is the courts' responsibility to make a decision that reflects the best interests of each child.

Whilst making the decision about what order to make the court can make an **interim residence order** which states which parent the child should live with until the court makes the final decision.

Effects of a residence order

Apart from stating with whom the child will live, there are some other implications of a residence order being made:

- If the court makes a residence order in favour of someone (e.g. a biological father or same-sex co-parent) who does not already have **parental responsibility** (PR) the order will automatically give him or her PR. For more information about parental responsibility see our **Guide to Parental Responsibility**.
- If you have a residence order you are able to take the child out of the UK for a period of up to one month **without** the consent of anyone else who has PR. There is no restriction on the number of trips that may be taken. You will still need permission, or a court order, if you want to live abroad permanently or go away for a longer period. For more information about taking your child abroad

see our legal guide **When Parents Separate**.

- If you have a residence order you can **appoint a guardian** for your child whose appointment will take effect immediately on your death and will have priority over the surviving parent (although this can be challenged by the other parent asking the court to make a residence order in his or her favour).
- If you have a residence order and your child is removed from your care within the UK by someone else who has PR for your child (e.g. the child's other parent), then you can ask the police to return your child to you or go back to court and ask for the residence order to be enforced and your child returned to your care. If this happens, seek legal advice.

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 a local authority or if the parents live together for a period of more than six months after the order is made.

The issues relating to residence can be complex and we have provided a very basic overview of terminology, law and court practice and procedure. We would also strongly advise you to seek legal advice by either telephoning our legal advice line or contacting a solicitor.

For free, confidential, legal advice on family law issues including divorce and relationship breakdown, children, domestic violence and lesbian parenting call our Family Law Advice Line on 020 7251 6577 (telephone) or 020 7490 2562 (textphone) on Mondays 11am–1pm, Tuesdays and Wednesdays 2–4pm and 7–9pm, Thursdays 7–9pm and Fridays 12noon–2pm.

For free, confidential, legal advice on criminal law issues including domestic and sexual violence call our Criminal Law Advice Line on 020 7251 8887 (telephone) or 020 7490 2562 (textphone) on Tuesdays 11am–1pm and Thursdays 2–4pm.

For free, confidential, legal advice on immigration and asylum law, including in relation to financial support issues call our Immigration and Asylum Law Advice Line on 020 7490 7689 (telephone) or 020 7490 2562 (textphone) on Mondays 2–4pm and Wednesdays 11am–1pm.

Other useful contacts

Child Support Agency	08457 133 133	www.csa.gov.uk
Community Legal Service (for finding a family solicitor)	0845 345 4345	www.legaladvisorfinder.justice.gov.uk/ AdviserSearch.do
Gingerbread (advice for single parents)	0808 802 0925	www.gingerbread.org.uk
National Domestic Violence Helpline	0808 2000 247	www.nationaldomesticviolence helpline.org.uk
National Family Mediation	0300 4000 636	www.nfm.org.uk
Relate (to access family counselling)	0300 100 1234	www.relate.org.uk
Resolution (for finding a family solicitor)	01689 820 272	www.resolution.org.uk
Reunite (for advice on child abduction)	0116 255 6234	www.reunite.org

Rights of Women, 52-54 Featherstone Street, London EC1Y 8RT

Office/Admin: 020 7251 6575 Textphone: 020 7490 2562

Fax: 020 7490 5377 Email: info@row.org.uk

Website: www.rightsofwomen.org.uk

Industrial and Provident Society No: 23221R



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Please note that the law as set out in this legal guide is the law as it stood at the date of publication. The law may have changed since then and accordingly you are advised to take up to date legal advice. Rights of Women cannot accept responsibility for any reliance placed on the legal information contained in this legal guide. This legal guide is designed to give general information only.

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