

CHILDREN AND FAMILIES ACT 2014

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – FAMILY JUSTICE

Section 10: Family mediation information and assessment meetings

101. *Subsection (1)* provides that any person who wishes to make a relevant family application must first attend a family mediation information and assessment meeting (a “MIAM”) to find out about and consider mediation, or other forms of non-court based dispute resolution. *Subsection (1)* does not make a distinction between applicants who are publicly funded and applicants who are not.
102. *Subsection (2)* enables provision to be made in Family Procedure Rules for how the requirement in *subsection (1)* is to work in practice. This may include provision:
 - Setting out circumstances in which the requirement to attend a MIAM before making an application to court will not apply (*subsection (2)(a)*). For example, Family Procedure Rules may provide that the requirement to attend will not apply in cases where the application is urgent or where a MIAM cannot be arranged within a specified time, or where there is evidence of domestic violence.
 - About how attendance at a MIAM is arranged and how a MIAM is to be conducted (*subsection (2)(b)*).
 - For the court to refuse to issue or otherwise deal with an application if the requirement to attend a MIAM should have, but has not, been complied with (*subsection (2)(c)*).
 - About the evidence which is to be considered when determining whether the requirement to attend a MIAM applies and, if so, whether it has been complied with (*subsection (2)(d)*).
103. *Subsection (3)* defines various terms used in *subsections (1)* and *(2)*. For example, it provides that a “relevant family application” is an application made in family proceedings that is of a description specified in Family Procedure Rules. The Government invited the Family Procedure Rule Committee to make provision in prospective Family Procedure Rules for the types of proceedings to which the MIAM requirement should apply. For example, that the requirement to attend a MIAM will apply (unless an exemption applies) in relation to an application for a child arrangements order. The FPRC is considering prospective draft rules.
104. *Subsection (4)* makes it clear that the powers in the section to make provision in Family Procedure Rules have no limiting effect on sections 75 and 76 of the Court Act 2003 (which provide the general power to make Family Procedure Rules, being rules regulating practice and procedure in family proceedings).

Section 11: Welfare of the child: parental involvement

105. The purpose of this amendment to section 1 of the Children Act 1989 is to reinforce the importance of children having an ongoing relationship with both parents after family separation, where that is safe and in the child's best interests. The new subsection (2B) of section 1 is explicit that it is not the purpose of this amendment to promote the equal division of a child's time between separated parents. The effect is to require the court, in making decisions on contested section 8 orders, the contested variation or discharge of such orders or the award or removal of parental responsibility, to presume that a child's welfare will be furthered by the involvement of each of the child's parents in his or her life, unless it can be shown that such involvement would not in fact further the child's welfare. Involvement means any kind of direct or indirect involvement but not any particular division of the child's time. . (A "section 8 order" is one of the orders defined by section 8 of the Children Act 1989 - child arrangements orders (which replace contact orders and residence orders), prohibited steps orders and specific issue orders.)
106. The presumption can only apply in the case of a parent falling within the new section 1(6)(a) of the Children Act 1989. A parent falls within section 1(6)(a) if that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm. A parent is to be treated (by virtue of the new section 1(6)(b)) as someone whose involvement will not give rise to a risk of harm to the child unless the court has evidence before it that involvement of that person would give rise to such a risk, whatever the form of the involvement.
107. If a parent can be involved in the child's life in a way that does not put the child at risk of suffering harm (whether that be through direct, indirect or supervised contact) the presumption applies to that parent and the court must then go on to consider whether the presumption is rebutted on the basis that it is shown that the involvement of that parent would not in fact further the child's welfare.
108. Therefore, even where a parent can be involved without posing a risk of harm to the child, the presumption will be rebutted if the court believes that the parent's involvement is not consistent with the child's welfare.
109. In a case where the presumption stands in respect of either or both of the child's parents, the court will be required to presume that the child's welfare will be furthered by the involvement of that parent (or those parents) in the child's life. This will be a consideration for the court to weigh in the balance when deciding whether to make an order (and if so what order to make) in a particular case, along with the other considerations in section 1 of the Children Act 1989, subject to the overriding requirement that the child's welfare remains the court's paramount consideration.
110. A process map and examples are set out at Annex A in order to further explain how the presumption is expected to fit with the decision making process.

Section 12: Child arrangements orders

111. *Subsection (2)* removes the definitions in section 8(1) of the Children Act 1989 of a residence order and a contact order. These orders are replaced by a child arrangements order, in line with the recommendation made by the Family Justice Review.
112. *Subsection (3)* inserts into section 8(1) of the Children Act 1989 the definition of the new child arrangements order. A child arrangements order is an order regulating arrangements relating to with whom a child should live, spend time, or have other types of contact, or when they should do so. The "other types of contact" a child arrangements order may provide for could include indirect contact such as a telephone call by the parent. As previously, specific matters which arise in connection with the exercise of parental responsibility for a child (including matters giving rise to a need to limit the exercise of that parental responsibility), and that do not relate to who the child should live with or have contact with, will be dealt with by means of a specific issue order

or a prohibited steps order (as defined in section 8(1) of the Children Act 1989) as appropriate.

113. Entitlement to apply for a child arrangements order in general mirrors the previous entitlement in respect of section 8 orders. But there is one extension of that entitlement, which arises as a result of consequential amendments to sections 10 and 12 of the Children Act 1989, detailed further below.

Schedule 2 – Child arrangements orders: amendments

114. **Schedule 2** consists of two Parts, each containing amendments to legislation that relate to section 12 (child arrangements orders) and, in particular, the replacement of the “residence order” and the “contact order” by the child arrangements order. In addition, certain of these amendments reflect a shift in focus in order to achieve a particular policy aim. For those provisions where this is the case, a more detailed explanation is provided below.
115. Many of these amendments are those which replace the words “residence order” or “contact order” with “child arrangements order”. For many of those provisions which previously referred either to residence or contact orders, the distinction remains, but the language now reflects that the order in question will be a specific type of child arrangements order.
116. Whilst the name of the order in question will change, the rights that flow from the order will remain. If, for example, the order provides that a child shall live with a particular person, that person (or others seeking confirmation that the child lives with that person), can rely on that child arrangements order as confirmation that the child should be living with that person, in the same way as was previously the case in relation to a residence order. The content of the order will set out with whom the child is to live. From an international perspective, it is the content of an order rather than the name of the order that is important. A child arrangements order which regulates arrangements about whom the child concerned is to live with will operate in the same way as a residence order does at present. Parental responsibility that results from the making of such an order will remain.

Schedule 2, Part 1: Amendments of the Children Act 1989

117. **Part 1** of Schedule 2 contains the amendments to the Children Act 1989 that relate to section 12 (child arrangements orders). Several amendments to the Children Act 1989 have the aim of replicating, in so far as possible, the current position as regards residence orders and contact orders. However, some amendments have required additional provisions to be inserted into sections in that Act or an alteration to the focus of such sections. This is to ensure that the amendments reflect the policy aim of moving away from terminology that implies that there is a winner or loser in disputes concerning children (the perception often being that the parent with residence is the winner while the parent with contact is the loser). Where more detailed amendments have been required, further explanation is provided below.
118. Of particular note in this regard are the amendments made by *paragraphs 7 to 11* of Schedule 2 which amend sections 11A to 11E of the Children Act 1989. Sections 11A to 11E relate to “contact activity directions”, which are directions that the court is able to make where it is considering making provision about contact, and “contact activity conditions”, which can be imposed in a contact order. Contact activity directions and contact activity conditions have the aim of promoting contact. The amendments to sections 11A to 11E mean that the activities directed or imposed are able to relate to more than just promoting the contact provided for in the child arrangements order (or provision about contact which the court is considering). Instead the activities directed or imposed will be about helping to establish, maintain or improve the involvement of a person in a child’s life. As such, these directions and conditions will no longer be

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referred to as “contact activity directions” or “contact activity conditions”, but will be “activity directions” and “activity conditions”.

119. The shift in focus here is to recognise that where the child lives with more than one person or lives with one person and spends time or otherwise has contact with another person, there may be issues that relate to the time spent by the child with the person with whom he or she lives, that affect the smooth operation of the arrangements for the care of the child. In such circumstances, these issues could be addressed by an activity direction or condition.
120. In addition, various amendments in Schedule 2 mean that the court will be able to make activity directions when it is considering whether a person has failed to comply with a provision of a child arrangements order, or what steps to take in consequence of such a failure, but where the court is not considering whether to vary or revoke the child arrangements order itself. These amendments will ensure that where there is an alleged or actual failure to comply with a child arrangements order, the court can consider whether it would help in resolving any dispute to require one or more of the adults involved to attend an activity such as a parenting information programme.
121. Sections 11F and 11G of the Children Act 1989 are supplementary to sections 11A to 11E. Sections 11H to 11P make provision as to the enforcement of contact orders and the payment of compensation where one person is in breach of an order and the other person suffers financial loss. Amendments made to these sections are to ensure that where a child arrangements order is in force with respect to a child and the provisions setting out the living arrangements (not just arrangements about contact) are sufficiently precise so that it is clear when a person is in breach of the order, the sanctions currently available to the court by virtue of sections 11H to 11P are available for breaches of a child arrangements order by any person who the child is to live with.
122. *Paragraph 21* amends section 12 of the Children Act 1989 and relates to the entitlement to parental responsibility as a result of being named in a child arrangements order. New subsection (1A) gives the court the power to give parental responsibility to the child’s father or second female parent (by virtue of section 43 of the Human Fertilisation and Embryology Act 2008) in cases where the father (or second female parent) is named in the order as a person with whom the child is to spend time or otherwise have contact.
123. New subsection (2A) enables the court to give parental responsibility to a person who is not a child’s parent or guardian, in cases where a child arrangements order provides for the child concerned to spend time with or otherwise have contact (but not live) with that person. As for subsection 12(2), parental responsibility is limited to the duration of the relevant provision.
124. As a result of new section 12(2A) and new section 10(5)(d) the entitlement to apply for a child arrangements order will be extended. New paragraph (d) of section 10(5) of the Children Act 1989 (see *paragraph 5(3)(c)* of Schedule 2) provides that a person who has parental responsibility by virtue of provision under new section 12(2A) is entitled to apply for a child arrangements order. The Government considers that the extension of entitlement that would be effected by new section 10(5)(d) is narrow because there are likely to be only a few cases in which the court considers it appropriate to give parental responsibility to a person with whom a child spends time or otherwise has contact but does not live.
125. Section 14 of the Children Act 1989, which relates to measures for the enforcement of residence orders under section 63(3) of the Magistrates’ Courts Act 1980, is repealed by *paragraph 23*. No equivalent is needed because the enforcement powers of the family court established by the Crime and Courts Act 2013 are sufficient.

Schedule 2, Part 2 – Child arrangements order – amendments in other legislation

126. **Part 2** of Schedule 2 contains amendments to legislation other than the Children Act 1989 that relate to section 12 (child arrangements orders). Many of these amendments replace references to a “residence order” or “contact order” with a references to a “child arrangements order”, and all are made either with the intention of preserving the original policy effect of the legislation concerned, or to reflect the new intentions referred to above (for example, in relation to the ability to make activity directions where there has been an alleged or actual failure to comply with a provision of a child arrangements order).

Section 13: Control of expert evidence, and of assessments, in children proceedings

127. This section makes provision about when expert evidence may be sought or put before the court in children proceedings. It is intended that, in so far as children proceedings are concerned, these measures will replace similar provisions which are contained in the new Part 25 of the Family Procedure Rules 2010 which is inserted into the 2010 Rules by the **Family Procedure (Amendment) (No.5) Rules 2012 S.I. 2012/3061** and came into force on 31 January 2013. The new Part 25 is largely a consolidation of new and old rules relating to the control of expert evidence.
128. *Subsection (1)* requires that any person wishing to instruct an expert to provide evidence for use in children proceedings must first seek the permission of the court to do so; *subsection (3)* similarly requires the court’s permission for a child to be medically or psychiatrically examined or otherwise assessed by an expert for the purpose of preparing expert evidence for the court; and *subsection (5)* likewise requires the court’s permission for expert evidence, whether in the form of a written report or oral evidence, to be put before the court. Similar restrictions are well established in court rules and are now all set out in Part 25 of the Family Procedure Rules.
129. *Subsections (2) and (4)* provide for what is to happen where an expert is instructed or a child medically or psychiatrically examined or otherwise assessed to provide expert evidence for use in children proceedings without first obtaining the court’s permission. In these circumstances evidence resulting from the instructions or examination or assessment is inadmissible in children proceedings unless the court rules that it is admissible.
130. *Subsection (6)* sets out the test for permission. The court will only be able to give permission as mentioned in *subsections (1), (3) and (5)* if it is satisfied that the expert evidence is necessary to assist the court in resolving the proceedings justly. In reaching that decision, the court has to consider the factors specified in *subsection (7)*, and any additional factors which may be prescribed by way of Family Procedure Rules. The factors have the effect, among other things, that the court will need to consider how the child might be affected if it is likely that the instruction of an expert would lengthen the timetable for the proceedings.
131. *Subsection (8)* excludes certain types of evidence from the ambit of expert evidence so they are not subject to the restrictions set out in the section. These include any evidence given by a person who is a member of staff of a local authority or of an authorised applicant. The purpose is to ensure, for example, that local authority social workers are not captured within the definition of expert evidence and permission is not required before they can provide a report or give evidence. Similarly, evidence given by officers of the Children and Family Court Advisory and Support Service (Cafcass) or Cafcass Cymru, and any evidence provided in connection with determining the suitability of a child for adoption, is not expert evidence and will not be subject to these restrictions.
132. *Subsection (9)* enables “children proceedings” to be defined in the Family Procedure Rules for the purposes of the section.

133. *Subsection (10)* is intended to ensure that any other matter relating to experts in children proceedings can continue to be determined by the Family Procedure Rules.
134. *Subsection (11)* amends section 38 of the Children Act 1989, which enables the court to give such directions as it considers appropriate relating to the medical or psychiatric examination or other assessment of the child when making an interim care order or an interim supervision order (section 38(6)). The new *subsections (7A) and (7B)* align section 38 with the new test for permission for expert evidence in children proceedings (as provided for in the previous provisions of section 14) so that the court may only make a direction for such an examination or assessment to be undertaken if it is satisfied that it is necessary to assist the court to resolve the proceedings justly (new *subsection 7A*). In reaching a decision, the court must consider a number of factors mirroring those in *subsection (7)* of the section (*new subsection (7B)*).

Section 14: Care, supervision and other family proceedings: time limits and timetables

135. *Subsection (2)* amends section 32(1) of the Children Act 1989, which relates to the timetabling of proceedings on an application for a care or a supervision order, to require the court to timetable care and supervision cases with a view to concluding them without delay and, in any event, within 26 weeks of an application being issued.
136. *Subsection (3)* inserts a series of new subsections into section 32. New subsections (3) and (4) require that particular regard is had by the court to the impact of the timetable on the welfare of the child when drawing up the timetable for a case, revising that timetable, or making any decision (excluding an extension under new subsection (5), dealt with below) which may give rise to a revision of the timetable. The starting point for the court when timetabling cases should always be that the proceedings should be disposed of without delay, and in any event within the applicable period, which will be 26 weeks in the absence of an extension.
137. New subsection (5) of section 32 allows the court to extend the maximum case duration to be observed when timetabling an application beyond the 26 week time limit, or beyond the end of any previous extension, only if the court considers that an extension (or further extension) is necessary to enable it to resolve the proceedings justly. A decision to extend the maximum case duration to be observed when timetabling the application will in almost every case be followed by a revision of the timetable for the case to take advantage of the extension, for example, by relisting the date of a hearing. When deciding whether to extend time, the court must have particular regard to the impact which any ensuing revision of the timetable would have on the welfare of the child to whom the application relates, or on the duration and conduct of the proceedings.
138. New subsection (7) of section 32 highlights, by way of guidance, that extensions should not be granted routinely, and should be seen as requiring specific justification.
139. The factors which may be relevant when the court is considering whether to extend time beyond 26 weeks, or beyond the end of a previous extension may include, for example, the disability or other impairment of a person involved in the proceedings, if that means that their involvement in the case requires more time than it otherwise would, or external factors beyond the court's control, such as parallel criminal proceedings, if that is relevant to the case.
140. New subsection (8) of section 32 provides that each separate extension of time made under *subsection (5)* is to last no more than 8 weeks (even where an extension is granted after the expiry of the period being extended).
141. New subsection (9) of section 32 gives the Lord Chancellor power by making regulations to vary the 26 week time limit or the 8 week time limit for extensions. Such regulations would be subject to the affirmative procedure by virtue of amendments contained in section 16(1).

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142. New subsection (10) of section 32 provides for rules of court (Family Procedure Rules) to be able to make certain provision relating to the matters to which the court should have regard when deciding whether to extend the time limit to be observed when timetabling for disposal of an application.
143. *Subsection (4)(a)* removes the limits on the duration of interim care orders (ICOs) and interim supervision orders (ISOs) set out in section 38 of the Children Act 1989 (8 weeks for initial orders and 4 weeks for any subsequent orders). Instead the judge will be able to set the length of ICOs and ISOs for a period which is considered appropriate in the particular circumstances of the case, although no ICO or ISO can endure beyond the cessation of the proceedings themselves. Should an ICO or an ISO expire before the proceedings have been resolved, the court will be able to make a further order.
144. It is expected that when making an ICO or ISO it will usually be appropriate to align the duration of the ICO or ISO with the timetable for the proceedings (including any extensions that may have been granted), to avoid the need for the court to make multiple ICOs or ISOs within proceedings.
145. *Subsection (7)* makes minor amendments to section 32(1) of the Children Act 1989. *Subsection (7)(b)* clarifies that a court is required to draw up a timetable in the light of any provision in rules of court that is of the kind mentioned in subsection (2)(a) or (b) (whether or not the rules themselves are made by virtue of subsection (2)).
146. *Subsection (5), (6) and (8)* are consequential upon the change in wording contained within *subsection (7)*.

Section 15: Care Plans

147. This section amends section 31 of the Children Act 1989 so as to focus the court's consideration, when making its decision as to whether to make a care order, on the provisions of the care plan that set out the long term plan for the upbringing of the child. Specifically, the court is to consider whether the local authority care plan is for the child to live with a parent or any member or friend of the child's family, or whether the child is to be adopted or placed in other long term care. These are referred to as the "permanence provisions" of the section 31A plan. The court is not required to consider the remainder of the section 31A plan (subject to section 34(11) which requires the court to consider the contact arrangements for the child), although the amendments do not prevent the court from doing so.
148. New subsection (3C) of section 31 provides that the Secretary of State may by regulations amend what is meant by the "permanence provisions".

Section 16: Care proceedings and care plans: regulations: procedural requirements

149. This section is consequential on the previous two sections and provides that regulations made under either section 31(3C) (regulations about permanence provisions) or 32(9) (regulations amending time limits for disposal of care or supervision proceedings) of the Children Act 1989 are to be subject to an affirmative resolution procedure.

Section 17: Repeal of restrictions on divorce and dissolution etc where there are children

150. This section repeals section 41 of the Matrimonial Causes Act 1973 and section 63 of the Civil Partnership Act 2004 which require the court to consider whether it should exercise any of its powers under the Children Act 1989 in proceedings for a decree of divorce, nullity of marriage, or judicial separation or, in relation to a civil partnership, for a dissolution, nullity or separation order. These sections apply where there are children under the age of 16 or where there are children who have reached the age of 16 to whom the court directs that the provisions should apply.

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151. Where there are disputes over children or financial issues, the parties are able to make an application under the relevant section of the Children Act 1989 or the Matrimonial Causes Act 1973 (or the Civil Partnership Act 2004 for civil partnerships). Arrangements for children will no longer be scrutinised as part of the divorce process but can instead be resolved through separate proceedings at any time.
152. *Subsection (1)* repeals the relevant sections of the 1973 and 2004 Acts and *subsections (2) to (7)* make consequential amendments and repeals in respect of provisions in the Matrimonial Causes Act 1973, the Children Act 1989 and the Civil Partnership Act 2004.

Section 18: Repeal of uncommenced provisions of Part 2 of the Family Law Act 1996

153. This section repeals uncommenced provisions of Part 2 of the Family Law Act 1996. The Family Law Act 1996 received Royal Assent on 4 July 1996. Part 2 of the 1996 Act introduced revised divorce procedures and encouraged people to consider using mediation to resolve disputes arising on divorce.
154. *Subsection (1)* repeals the uncommenced divorce provisions contained in Part 2 of the Family Law Act 1996. Section 22 (funding of marriage support services) is in force and is not being repealed.
155. *Subsection (2)* repeals various provisions of the Family Law Act 1996 which relate to the provisions of Part 2, including the general principle in section 1(c) relating to bringing marriage to an end with minimum distress to the parties and to encouraging family mediation. A range of non-statutory initiatives pre-court and at court have been introduced to promote and encourage consideration and use of mediation and these are aimed at all separating parents, whether or not the parents are married.
156. *Subsection (3)* makes consequential repeals of other legislation.
157. *Subsections (4) and (5)* make consequential amendments.
158. *Subsections (6) and (7)* turn modifications to statutory provisions, which were contained in commencement orders and were to have effect until such time as provisions of Part 2 of the Family Law Act 1996 came into force, into permanent amendments to the modified provisions. For example, certain modifications to section 22(2) of the Matrimonial and Family Law Proceedings Act 1984 made by a commencement order are to be made permanent.
159. *Subsection (8)* makes minor amendments to section 31(7D) of the Matrimonial Causes Act 1973 which is one of the provisions for which modifications are made permanent by *subsection (7)*.
160. *Subsection (9)* defines the commencement orders referred to in this section and revokes the provisions of these orders which contain the modifications to statutes which are being turned into permanent amendments by *subsections (6) and (7)* or which are no longer needed.