

Chapter 8: The Law Relating to Children – Children’s Rights and Private Law

Question One

Explain the meaning of ‘welfare’ for the purpose of s.1(1) of the Children Act 1989 and consider whether the paramouncy principle should be abolished.

Answer Guidance

S.1(1) of the Children Act 1989 states that when a court determines a question regarding the upbringing of a child or the administration of a child’s property or income ‘the child’s welfare shall be the court’s paramount consideration.’ This principle is known as the paramouncy principle or the welfare principle. The question invites candidates to discuss the meaning of welfare and reference should be made to cases such as *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 123. Students should also explain the meaning of ‘paramount’ (*J and another v C and another* [1970] AC 668) and should consider whose welfare is paramount if a case involves more than one child (*Birmingham City Council v H (A Minor)* [1994] 1 AC 212). The answer should identify when the paramouncy principle applies and attempt to explain why it applies to some cases involving children (e.g. s.8 orders), but not others (e.g. applications for maintenance). This discussion will reveal some of the problems with the welfare principle and should contribute to the discussion as to whether the principle should be abolished and replaced with an alternative. Students should consider article 3 of the U.N. Convention on the Rights of the Child, which requires the best interests of the child to be ‘a primary consideration.’

Question Two

Jack and Kirstie have recently agreed to separate after fifteen years of marriage. They have two children called Liz and Maisie. Liz is thirteen and Maisie is seven. They have agreed to divorce amicably for the sake of the children but cannot agree as to where the children will live. Jack feels that he is better equipped to look after the children as he earns more money and works from home. Kirstie works part time and her parents are able to help her out with babysitting. In addition, Maisie has special educational needs and Kirstie feels that she is more able to deal with her needs. Last week Liz and Maisie ran away to their Granny's house; they have said that they are fed up with their parents arguing and that they want to live with their Granny, Nancy.

Advise the parties in this case.

Answer Guidance

This problem question requires candidates to consider where two children should live following their parents' separation. The answer will focus on the private law provisions of the Children Act 1989, but should also make reference to the use of mediation to resolve disputes such as this (s.10 of the Children and Families Act 2014). Students should explain child arrangements orders, which are available under s.8 of the Children Act 1989 and replaced residence and contact orders. The right to apply for a child arrangements order must be included: Jack and Kirstie can apply as of right (s.10(4) of the Children Act 1989) whereas Nancy requires leave (s.10(9)) as the children have not lived with her for one year (s.10(5B)). The welfare principle (s.1(1)), the no order principle (s.1(5)) and the welfare checklist (s.1(3)) must be considered in depth. Particular emphasis will be placed on the needs of the children, the capabilities of the parties to meet the children's needs, the children's wishes and the impact of change. Cases such as *Re B (Residence Order: Status Quo)* [1998] 1 FLR 368 on changing a child's residence and *Re R (A Child) (Residence Order): Treatment of Child's Wishes* [2009] 2 FCR 572 on the weight to attach to the wishes of a child should be included in the answer. The presumption of parental involvement (s.1(2A)) and the no delay principle (s.1(2)) should also be mentioned.

Question Three

Critically analyse the provisions of Part 2 of the Child and Families Act 2014 which impact upon applications for orders under s.8 of the Children Act 1989.

Answer Guidance

Part 2 of the Children and Families Act 2014 contains several provisions that impact upon private disputes relating to children. This essay question invites candidates to evaluate those changes. First, s.10 of the 2014 Act, which requires an applicant to attend a mediation information and assessment meeting prior to submitting an application for a s.8 order, should be explained. The advantages and disadvantages of this obligation should be considered, along with the exceptions to the rule. Secondly, s.11 of the Act, which introduced the presumption of parental involvement, (now contained in s.1(2A) of the Children Act 1989), must be evaluated. Case law that emphasises the importance of maintaining the parent / child relationship can be included in your answer e.g. *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] 1 FLR 1279 as they help to determine whether a statutory presumption of involvement was necessary. Next, the answer should discuss the abolition of contact and residence orders and the introduction of child arrangements orders (s.12 Children and Families Act 2014). Students should consider why this step was taken and what impact it will have. Additional provisions of the Children and Families Act 2014 can also be mentioned i.e. s.13, which deals with expert evidence in child law cases and s.17, which repealed s.41 of the Matrimonial Causes Act 1973 as they will impact upon applications for s.8 orders.

Question Four

Discuss the development of the use of mediation in private disputes relating to children and consider the advantages and disadvantages of mediation in cases involving children.

Answer Guidance

This essay question invites candidates to explore the development of the use of mediation in private disputes relating to children. The answer should begin by defining mediation and explaining that its use has been promoted by the Government since the Family Law Act 1996. It should then trace the development of the use of mediation since 1996 i.e. the requirement contained in the Legal Services Commission Funding Code for legally aided clients to consider mediation, the extension of this to private paying clients (Family Procedure Rules 2010 and Practice Direction 3A – Pre Application Protocol for Mediation Information and Assessment, the abolition of legal aid for most private litigation by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and finally the requirement to attend a Mediation Information and Assessment Meeting introduced by s.10 of the Children and Families Act 2014. The exceptions contained in the Family Procedure Rules 2010 should be discussed e.g. cases involving domestic violence. Students should then assess the advantages of using mediation in disputes relating to children e.g. the benefits of an amicable separation and the disadvantages of doing so e.g. the fact that the child's wishes are not considered.