
HEARING OF THE CHILD IN FAMILY LAW DISPUTES

Existing law allows for consideration of the child's views in a family law dispute. If the Court considers it appropriate and practicable, having regard to the age and understanding of the child, it will take into account the child's wishes in the matter. However, most commonly a child will be heard when he/or she is around 12 years old.

The hearing of the child is a sensitive matter and the Court seeks to consult the child in a completely unbiased way, without the presence of parents or their solicitors. The child expresses his/her wishes in court chambers and is accompanied only by the judge and court officials.

THE NEW ACT – ACKNOWLEDGING THE MODERN FAMILY

The new Children and Family Relationships Act reinforces the concept of the voice of the child by providing that a child will be consulted by the Court in disputes regarding custody or guardianship when he/she reaches the age of 12 years.

Overall, the Act clarifies the law on parents' rights. It brings us into the 21st century by extending rights to families consisting of unmarried parents. For example it gives automatic guardianship rights to non-marital fathers. As the law stands, non-marital fathers have no right to guardianship. The right can only be given by a Court.

The provisions in the new Act mean that the father is an automatic guardian if he has lived with the mother for 12 months where at least 3 of these were following the birth of the child.

Dealing with a non-compliant parent

The Act also provides for more effective sanctions for parents who do not comply with access or maintenance orders. At the moment the only remedy for a breach of a Court order is imprisonment and this is completely inappropriate in many cases as it is rarely considered within the child's best interests.

The Act sets out a procedure for court enforcement orders where a guardian or parent of a child has been held to have unreasonably denied access to a child. It gives the Court the power to require one party to reimburse the other for expenses in attempting to exercise access, if their access has been frustrated. It also allows for the provision of security to ensure compliance for example, by way of a sum of money being paid to Court which can then be forfeited if the access is breached.

The Best Interests of the Child are Key!

It has long been the case that the Courts take the best interests of the child into account when dealing with disputes. The new Act makes this principle the cornerstone of all issues affecting children.

Factors which are usually relevant in considering "best interests" include:

- the benefit to the child of having a meaningful relationship with both parents;
- the views of the child concerned depending on their age and maturity;
- the physical, psychological and emotional needs of the child;
- the history of the child's upbringing and care, including the nature of the relationship between the child and each of their parents;
- the child's religious, spiritual and cultural upbringing and needs;
- the child's social, intellectual and educational upbringing and needs;
- the child's age and any special characteristics;
- any harm which the child suffered or is at risk of suffering.

Mediation vs Court

The best interests of the child are also well protected through the promotion of mediation by the Act. The Act seeks to promote mediation as a way of resolving issues regarding children and mandates solicitors to advise their clients of these options before taking legal proceedings.

Mediation is the process where the parties meet (usually with their solicitors) and try to agree amicably on a solution. This is a much more preferable option than going to court because of its lower cost and reduced stress on the entire family.

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