

Legal framework and determinants of residence and contact

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Summary

Research indicates that changes in the legal framework with regard to joint legal custody have not succeeded in reducing litigation concerning residence and access. On the contrary, there has been a dramatic increase in litigation over residence and contact orders.

Residence

In many countries, the trend has been to favour shared legal parental authority. When both parents have parental responsibility, they have to settle the child's usual residence between them. Custodial parents with sole custody, by contrast, may determine the usual residence themselves.

The ratio of shared parental responsibility decreases when joint legal custody is consensus-based. This is especially the case when separated parents have never been married. France is the only country to have abolished the legal difference between married and non-married parents (in 2002).

England and Wales, on the other hand, deconstructed parental responsibilities into particular components of parental authority: A residence order is no longer linked to a parental responsibility order and in some ways replaces custody orders.

Most parental residence decisions are consensual – only a small proportion is litigious.

Regardless of the legal framework, the majority of children (80-90%) live with their mother, with the exception of in California.

Only a minority of parents opt for alternate residence or split residence. Changes in residence are caused by changes in living arrangements of parents: relocation, remarriage and repartnering. Mothers are preferred as residential parents with regard to residence changes. Alternate residences are abandoned by juveniles in favour of a living arrangement with the mother.

Parents with joint legal custody or joint physical custody may dispute the actual residence of the child even with regard to alternate residence. When joint legal custody is consensus-based, the dispute over the child's residence may bring about the implementation of sole custody.

Residence orders are determined according to the best interest of the child with regard to their need for a stable, consistent environment, attachment, the child's wishes, social circumstances and the competences of each parent. A person or persons granted custody might not necessarily have the right to determine where the child lives. A number of decisions

relating to specific questions about the right to determine the residence of a child are concerned when this particular right is given to the non-resident parent or a third party (mainly the local authority) regardless of joint legal custody or sole custody with the reason to:

1. Prevent relocation
2. Prevent kidnapping
3. Facilitate access
4. Protect the child

This is carried out in order to increase the control by the non-resident parent or by the local authority (with the exception of England and Wales, where residence orders cannot be made in favour of a local authority).

Contact

There is no difference between marital and non-marital children with regard to the treatment of access. Both parents settle contact:

1. In the case of joint legal custody or joint physical custody based on the shared parental rights and responsibilities in the best interest of the child,
2. In the case of sole custody based on the custodial and residential parent's obligation to accord access to the other parent in the best interest of the child.

The UN convention decrees that – in the child's best interest – parties shall respect the right of the child who is separated from one parent to maintain personal relations and direct contact with that parent. The assumption is based on the view that it is beneficial for children to have contact with both parents. The best interest of the child, embedded in the right of children to be in contact with both parents, is transformed in many countries into the right of parents to access. Arguments based on equity and fairness empower the non-residential parent.

The right to access has been broadened and now embraces all caretakers and many relatives in order to preserve relationships with:

1. The biological parents
2. The social parents: step-parents, cohabitants, foster parents
3. Grandparents etc.

Countries differ with regard to the broadening of access rights of these caretakers. Recent family law reforms include more access persons.

Access normally consists of alternate weekends and half of the holiday period. Half of the non-resident parents have access once a week.

Most separate parents make arrangements for child contact without external help or recourse to the judicial system.

Access disputes vary in many countries according to sex and custody status.

Resident parents raise more concerns with welfare-related issues: fear of violence, children being upset by contact or not wanting to have contact; while contact parents report issues of control over contact activities and threats to stop contact. The majority of applicants for contact orders are fathers.

The principles applied by different jurisdictions in common law and civil law countries converge. The assumptions applied are:

1. The welfare of the children will be best served by having regular contact with both parents.
2. Only in exceptional cases is contact denied.
3. Parents' hostility to contact is treated mainly as unreasonable because many enforcement disputes involve relationship rather than contact issues.
4. A gender bias focuses on resident parents as opposing.
5. Obstructing parents are sanctioned by penalties from fines to the use of force and the transfer of parental responsibilities.
6. The friendly parent rule imposes restraints on the resident parent.

Countries differ mainly with regard to the following assumptions:

6. The adoption of PAS arguments,
7. The consideration of the child's voice,
8. The consideration of domestic violence in relation to supervised or denial of contact.

Synopsis

Residence and contact research focuses on divorcees and often neglects non-married parents. Residence and the amount of contact differ according to the type of parental union at the time of separation. This applies with respect to consensus regarding parental responsibility and access. Children whose parents separate from a common law union are more likely to live with their mother under sole custody.

Residence and contact disputes are classified according to gender-specific social evaluations.