

NATIONAL REPORT: ENGLAND & WALES

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A. GENERAL

1. Having regard to the concept of parental responsibilities as defined by the Council of Europe (see above), explain the concept or concepts used in your national legal system.

So far as English law is concerned the controlling statute, the Children Act 1989, refers to 'parental responsibility' rather than 'parental responsibilities'. The English concept of parental responsibility very much accords with Principle 18 of the Council of Europe's White Paper on Parental Responsibility. As Lord MACKAY LC said¹ when introducing the Children Bill to Parliament, the concept of 'parental responsibility':

'emphasises that the days when a child should be regarded as a possession of his parent – indeed when in the past they had a right to his services and to sue on their loss are now buried forever. The overwhelming purpose of parenthood is the responsibility for caring for and raising the child to be a properly developed adult both physically and morally'.

The comment is echoed by the Department of Health's introductory guide to the Children Act² which states that parental responsibility:

'emphasises that the duty to care for the child and to raise him to moral, physical and emotional health is the fundamental task of parenthood and the only justification for the authority that it confers'.

Both these comments reflect in turn the earlier landmark decision of *Gillick v West Norfolk and Wisbech Area Health Authority*³ in which, at any rate, Lords FRASER and SCARMAN emphasised that parental power to control a child exists not for the benefit of the parent but for the benefit of the child.

As well as embracing the idea that parents must behave dutifully towards their children, the English concept of responsibility also embodies the concept that responsibility for child care belongs to parents and not to the state. By providing that responsibility should continue despite, for example, a court order that the child should live with one of them, parents 'are to understand that the state will not

¹ 502 HL Official Report (5th series), col 490.

² 'Introduction to the Children Act 1989', HMSO 1989, para 1.4.

³ [1986] AC 112, [1985] 3 All ER 402, HL.

relieve them of their responsibilities'.⁴ This is underscored by the fact that responsibility cannot be voluntarily surrendered to a public body⁵ and that even where a care order is made compulsorily placing the child in local authority care parents still retain their responsibility. In short the Children Act 1989 through the concept of parental responsibility emphasises the idea that 'once a parent, always a parent' and that prima facie responsibility for deciding what should happen to their children even upon their separation should rest with the parents themselves.

This enduring aspect of parental responsibility is in marked contrast to the concept of 'rights of custody' espoused by many continental European legal systems inasmuch as under English law it is not possible following divorce, for example, to divest a married parent of parental responsibility and thus to vest sole responsibility in the other. Any dispute between the parents over the upbringing of their child can be solved by the making of an appropriate court order.⁶

2. Explain whether your national concept or concepts encompass:

(a) Care and protection

There is no doubt that parental responsibility embraces care and protection of the child and it is undoubtedly an aspect of parental responsibility to afford physical protection to the child.⁷ Whether the duty exists in any given case depends *inter alia* upon the necessity of protection. A crippled mother, for example, would not be under any duty to protect a healthy son aged 17.⁸

This common law of protection has largely been replaced by the Children and Young Persons Act 1933, Pt I, which makes certain forms of behaviour criminal offences. The offences are dependent on the likelihood of the child being caused unnecessary suffering or injury. Sec. 1(1) of this Act provides:

'If any person who has attained the age of 16 and has responsibility for any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed in a

⁴ CRETNEY, 'Defining the Limits of State Intervention: The Child and Courts' in: FREESTONE, (ed.), *Children and the Law*, 1990, p. 67.

⁵ *I.e.* where the child is 'accommodated' by a local authority under Sec. 20 of the 1989 Act parental responsibility is not acquired by the authority, see the discussion by EEKELAAR 'Parental Responsibility. State of Nature of Nature of the State?' [1991] 37 *JSWFL* 4042.

⁶ The courts have powers under s 8 of the Children Act 1989 to make residence, contact, prohibited steps and specific issue orders. These powers are wide enough to cover virtually any kind of dispute over a child's upbringing. For a discussion of these powers see *e.g.* LOWE/DOUGLAS, *Bromley's Family Law*, 1998, 9th Ed, Ch. 12.

⁷ In fact the common law duty is owed by anyone who willingly undertakes to look after another who is incapable of looking after himself. It can therefore continue after the child's majority, see *R v Chattaway* (1922) 17 Cr App Rep 7, CCA (starvation of a helpless daughter aged 25), and can extend to a stepchild or foster child, see *R v Bubb* (1850) 4 Cox CC 455; *R v Gibbons and Proctor* (1918) 13 Cr App Rep 134, CCA.

⁸ *Cf R v Shepherd* (1862) Le & Ca 147 where a girl aged 18 (the age of majority was then 21), who normally lived away in service but who returned home from time to time, died in childbirth. It was held that her mother was under no duty to send for a midwife because the girl was beyond the age of childhood and was entirely emancipated.

manner likely to cause him unnecessary suffering or injury to health...
that person should be guilty of [an offence]...'

This is subject to Sec. 1(7) under which parents' right⁹ to administer corporal punishment is preserved. Among those expressly made liable for a Sec. 1 offence is by Sec. 17(a)(i) any person who "has parental responsibility for him (within the meaning of the Children Act 1989)".

(b) Maintenance of personal relationships

Parental responsibility encompasses seeing or otherwise having contact with the child. While not an absolute right since in any litigation it will be contingent upon the child's welfare, nevertheless as Lord OLIVER said in *Re KD (A Minor)(Ward: Termination of Access)*:¹⁰ 'As a general proposition a natural parent has a claim to [contact with] his or her child to which the court will pay regard and it would not I think, be inappropriate describe such a claim as a "right"'. This 'claim' is protected to the extent that there is a statutory presumption of reasonable contact between a child in local authority care or under emergency protection and, *inter alia*, those with parental responsibility.¹¹ These latter provisions were enacted following the European Court of Human Rights ruling¹² that the absence of any right to challenge a termination of contact by a local authority amounted to a breach of Art. 8 and 13 of the Convention.

Given that it is a normal assumption that a child will benefit from continued contact with both parents¹³ it may be that parental responsibility properly encompasses the prima facie duty to allow the child to have contact with either or both parents. Whether such responsibility extends to a parent having an obligation him or herself to maintain contact with the child can be debated.¹⁴

(c) Provision of education

As WARD LJ has observed¹⁵ 'arranging for education commensurate with the child's intellectual needs and abilities is [an] incident of the parental responsibility which arises from the duty of the parent to secure the child's education'. This responsibility derives from the common law right of a parent to determine what education the child should receive.¹⁶ Parents' rights to determine their children's

⁹ This right can be delegated but corporal punishment is now forbidden in schools, see the s 548 (as substituted by Sec. 548, Education Act 1996, (as substituted by Sec. 131, School Standards and Framework Act 1998), children's homes (Reg. 17(5)(a), Children's Homes Regulations 2001, SI 2001/3967, and foster placements (Reg. 28(5)(b), Fostering Services Regulations 2002, SI 2002/57.

¹⁰ [1988] AC 806 at 827. Cf *Sanderson v McManus* 1997 SLT 629, sub nom *S v M (Access Order)* 1997 1 FLR 980, HL (Scotland) in which Lord HOPE held that the onus was on the unmarried father to establish that continued contact was for the child's welfare.

¹¹ Sec. 34(1) and 44(13), Children Act 1989.

¹² See *R v UK* [1988] 2 FLR 445.

¹³ See e.g. Lord OLIVER in *Re KD* [1988] AC 806 at p. 827 and *M v M (child: access)* [1973] 2 All ER 81, per WRANGHAM J at p. 85 and per LATEY at p. 88.

¹⁴ In Scotland, Sec. 1(1)(d), Children (Scotland) Act 1995, clearly states that a parent has a responsibility to maintain personal relations and direct contact with the child.

¹⁵ *Re Z (A Minor)(Identification: Restrictions on Publication)* [1997] Fam 1 at 26, CA.

¹⁶ For a striking example, see *Tremain's Case* (1719) 1 Stra 167. See also *Andrews v Salt* (1873) 8 Ch. App. 622 – father's wishes to be respected after his death.

education are also protected by the European Convention on Human Rights to the extent of respecting their religious and philosophical convictions.¹⁷

At common law, because the duty was unenforceable,¹⁸ parents could formerly choose not to have their children educated. However, since the Education Act 1944 (now consolidated by the Education Act 1996) parents of every child between the ages of five and 16 have had to ensure that the child receives 'efficient full-time education suitable (a) to his age, ability, aptitude and (b) to any special education needs he may have, either by regular attendance at school or otherwise'.¹⁹ 'Parent' for these purposes includes any person who is not a parent but who has parental responsibility for the child or who has care of the child.²⁰ Failure to perform this duty can result in a criminal prosecution²¹ and the child may be subject to an education supervision order.²²

(d) Legal representation

Based on common law and practice rather than statute²³ a parent (and presumably any person with parental responsibility) has the right to act as a legal representative of the child²⁴ though this might be challenged.²⁵ Children of sufficient age and understanding, however, can effectively litigate for themselves when seeking a Sec. 8 order or an order under the High Court's inherent jurisdiction.²⁶

(e) Determination of residence

Based upon the common law right of a person to possession of his child,²⁷ it now seems better to say that those with responsibility have a *prima facie*²⁸ responsibility to provide a home for the child and the power to determine where the child should live.²⁹ This responsibility is protected by the criminal law to the extent that persons

¹⁷ Art. 2, Protocol No. 1.

¹⁸ *Hodges v Hodges* (1796) Peake Add Cas 79.

¹⁹ Sec. 7 and 8, Education Act 1996.

²⁰ Sec. 576(1), Education Act 1996.

²¹ Sec. 443, Education Act 1996. Formerly, parents could be fined but not imprisoned for a breach of a school attendance order for failure to secure regular attendance at school. However, under Sec. 444(8A), Education Act 1996, parents can now be imprisoned for up to three months where they know that their child is failing to attend regularly at the school and fail without reasonable justification to cause him to do so.

²² Sec. 36, Children Act 1989.

²³ *Cf* in Scotland where Sec. 2(1)(d), Children (Scotland) Act 1995, expressly confers the right of a parent to act as the child's legal representative.

²⁴ In general a child can only bring legal proceedings by an adult acting on his behalf. Such persons were generally known as "next friends" but now, ironically outside the context of family proceedings, they are known as "litigation friends": Civil Procedure Rules 1998, Pt 21.

²⁵ *Woolf v Pemberton* (1877) 6 Ch D 19. There is a power of removal if a proper case is made out, see *Re Taylor's Application* [1972] 2 QB 369.

²⁶ Family Proceedings Rules 1991, Rule 9.2A, on which see *Re T (A Minor)(Child: Representation)* [1994] Fam 49 and SAWYER, 'The competence of children to participate in family proceedings' (1995) *CFLQ* 180.

²⁷ See *e.g. Re Agar-Ellis* (1883) 24 Ch D 317.

²⁸ *I.e.* unless a court order (*viz* a residence, care or emergency protection order) has been made giving someone else that *prima facie* right.

²⁹ See *Re M (Minors)(Residence Order: Jurisdiction)* [1993] 1 FLR 495 at 499 per BALCOMBE LJ.

without responsibility commit the crime of child abduction if they remove the child without lawful authority.³⁰ As between individuals with parental responsibility the right is qualified to the extent that removal of a child outside the United Kingdom without the consent of other individuals with parental responsibility can amount to a crime.³¹ Associated with providing a home is the necessary accompanying power, *inter alia*, physically to control children at any rate until the years of discretion. As Lord LANE CJ once commented, restraint of a child's movement is usually well within the realms of reasonable parental discipline.³² Responsibility also includes the power to control the child's movements whilst in someone else's care.³³ On the other hand a parent and, presumably therefore, any other person with parental responsibility, can commit the common law crime of kidnapping³⁴ or unlawful imprisonment³⁵ if a child (old enough to make up his own mind) is forcibly taken or detained against his will.

(f) Administration of property

Sec. 3(1), Children Act 1989 provides that parental responsibility means "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child *and his property*" (emphasis added). While, according to Sec. 3(2), Children Act 1989 parental responsibility includes the rights, powers and duties which a guardian of the child's estate (appointed before the 1998 Act came into force)³⁶ would have had in relation to the child and his property. Such rights include, pursuant to Sec. 3(3), the right "to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover". Parental responsibility does *not* include rights of succession to the child's property.³⁷

3. In what circumstances (e.g. child reaching majority or marrying) do parental responsibilities automatically come to an end?

The duration of parental responsibility depends in part on how it is initially acquired but in all cases it automatically ends upon the child attaining his majority. This is because responsibility can only exist in respect of a "child" which Sec. 105(1), Children Act 1989 defines as "a person under the age of eighteen". It will clearly end upon the child's death.³⁸ There is pre-Children Act 1989 authority for saying that the right of custody ended upon the child's marriage³⁹ and that it was

³⁰ Sec. 2, Child Abduction Act 1984.

³¹ Sec. 1, Child Abduction Act 1984. Certain defences, however, are provided for by Sec. 1(5).

³² *R v Rahman* (1985) 81 Cr App Rep 349 at 353, CA. See also *Re K (A Child)(Secure Accommodation: Right to Liberty)* [2001] Fam 377. CA (but *cf* BUTLER-SLOSS P and THORPE LJ applying *Nielson v Denmark* (1989) 11 EHRR 175. E Ct HR), *Hewer v Bryant* [1970] 1 QB 357 at 373, CA, per SACHS LJ.

³³ *Fleming v Pratt* (1823) 1 LJ OS KB 194.

³⁴ *R v D* [1984] AC 778, HL.

³⁵ *R v Rahman*, *supra*.

³⁶ *Viz* 14 October 1991.

³⁷ Sec. 3(4)(b), Children Act 1989.

³⁸ Though parents retain the right to dispose of the child's corpse, see *R v Gwynedd County Council ex p B* [1992] 3 All ER 317, CA.

³⁹ *Hewer v Bryant* [1970] 1 QB 357 at 363, CA, per SACHS LJ; *R v Wilmington Inhabitants* (1825) 5 B Ald 525 at 526 and *Lough v Ward* [1945] 2 All ER 338 at 348.

suspended whilst the child was serving in the armed forces⁴⁰ but it remains to be seen whether a similar position will be taken with regard to parental responsibility.

The making of a parental order⁴¹ or an adoption order⁴² operates to extinguish the parental responsibility of existing holders and to transfer it to the person or persons in whose favour the order is made. This in fact is the only means by which mothers and married fathers can be deprived of their responsibility during the child's minority since the courts have no general divesting powers. The position is different with respect to unmarried fathers for regardless of how responsibility is acquired it can be ended by a court order.⁴³ Non-parents who have responsibility by reason of a residence order and local authorities that have responsibility by reason of a care order only have responsibility for the duration of the order.⁴⁴ In other words in these cases responsibility automatically ends upon the cessation of the residence or care order.

4. What is the current source of law for parental responsibilities?

The main controlling statute is the Children Act 1989 which came into force in October 1991, a key aim of which was to replace the concept of parental rights of and duties with the concept of parental responsibility. However, the Act itself does not contain a comprehensive definition. Sec. 3(1) merely states that:

‘parental responsibility’ means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property’.

This admittedly disappointing definition means that reference must also be made to the pre-Children Act position⁴⁵ including the common law (i.e. case-law going back to at least the eighteenth century) bearing in mind that that law concerned notions of parental rights and duties rather than responsibilities. Reference of course must also be made to post-Children Act 1989 case-law on parental responsibility.

5. Give a brief history of the main developments of the law concerning parental responsibilities.

English child law was fundamentally reformed by the Children Act 1989 which came into force in October 1991. Prior to that the law was governed by a mixture of

⁴⁰ *R v Rotherfield Greys Inhabitants* (1823) 1 B & C 345 at 349-50.

⁴¹ Viz an order made under Sec. 30, Human Fertilisation and Embryology Act 1990. The effects of such orders are governed by the Parental Orders (Human Fertilisation and Embryology) Regulations 1994, SI 1994/2767.

⁴² See Sec. 12(3), Adoption Act 1976 (prospectively Sec. 46, Adoption and Children Act 2002).

⁴³ See Sec. 4(3), Children Act 1989.

⁴⁴ Sec. 12(2) and 33(3), Children Act 1989. A similar position obtains in respect of parental responsibility acquired by reason of an emergency protection order, see Sec. 44(4)(c).

⁴⁵ For which see EEKELAAR, ‘What are Parental Rights?’ (1973) 89 *LQR* 210, HALL, ‘The Waning of Parental Rights’ [1972B] *CLJ* 248, MAIDMENT, ‘The Fragmentation of Parental Rights’ [1981] *CLJ* 135 and LAW COMMISSION, *Working Paper No. 91: Guardianship*, para. 2.25 *et seq.*

common law and statute. Among the key substantive changes made by the 1989 Act and most relevant to this report was to replace the concept of parental rights and duties with the concept of parental responsibility.

Before the Children Act 1989 statutes referred to 'parental rights and duties' or 'parental power and duties' or to the 'rights and authority' of a parent. Not only were these terms inconsistent with one another but, as the Law Commission commented:⁴⁶ "It can be cogently argued that to talk of 'parental rights' is not only inaccurate as a matter of juristic analysis but also a misleading use of ordinary language". In their Report on *Guardianship and Custody*⁴⁷ the Commission were concerned that because of the continued use of such terms the law did not adequately promote the view that parenthood is a matter of responsibility rather than of rights. Accordingly, they recommended the introduction of the concept of 'parental responsibility' to replace all the ambiguous and misleading terms employed in statutes. The Government accepted this recommendation and 'parental responsibility' has become a pivotal concept of the 1989 Act.

Since the Children Act 1989 further reform in relation to the allocation of parental responsibility both to unmarried fathers (see further Q 22b) and step-parents (see further Q 27) has or will be made by the Adoption and Children Act 2002 which is currently being brought into force in phases and the position is also affected by the recently enacted Civil Partnership Act 2004 (see Q 27b).

B. THE CONTENTS OF PARENTAL RESPONSIBILITIES

7. Describe what the contents of parental responsibilities are according to your national law including case law.

Sec. 3(1), Children Act 1989 defines 'parental responsibility' as meaning:

'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.

This is a generic rather than a specific definition.⁴⁸ Indeed, the English Law Commission did not consider it practicable to include a list of what parental responsibility comprises, pointing out,⁴⁹ that such a list would have to change from time to time to meet differing needs and circumstances and would have to vary with the age and maturity of the child and circumstances of the case.

⁴⁶ Law Com. Report No. 118 *Illegitimacy* (1982), para 4.18.

⁴⁷ Law Com. Report No. 172 (1988).

⁴⁸ It was described as a 'non definition' by Lord MESTON in the debate on the Children Bill: HL Debs Vol. 502, Col 1172.

⁴⁹ Law Com Report No. 172, *Guardianship and Custody* (1988), para 2.6. For a critique of this approach see e.g. LOWE/DOUGLAS, *Bromley's Family Law*, 1998, 9th Ed., p. 348-349 and LOWE, 'The Meaning and Allocation of Parental Responsibility – A Common Lawyer's Perspective' (1997) 11 *IJLPF* 192.

However, on the basis of now both pre and post Children Act, law commentators⁵⁰ generally agree that while it may not be possible to state with certainty the precise ambit of responsibility, it comprises at least the following aspects:

- Providing a home for the child;
- Having contact with the child;
- Protecting and maintaining the child;
- Disciplining the child;
- Determining and providing for the child's education;
- Determining the child's religion;
- Consenting to the child's medical treatment;
- Choosing the child's name and agreeing to its subsequent change;
- Consenting to the child's marriage;
- Agreeing or withholding agreement to the child's adoption;
- Applying for or vetoing the issue of a child's passport;
- Taking the child outside the United Kingdom and consenting to the child's emigration;
- Administering the child's property;
- Representing the child in legal proceedings;
- Appointing a guardian for the child; and
- Disposing of the child's corpse.

As most of these aspects are discussed in other answers it is not proposed to say much more about them here. The one exception, however, is choosing the child's name and agreeing to its subsequent change, and particularly since English law is different to that of continental European legal systems it is proposed to discuss the English position on names.

Naming a child and most certainly changing a child's surname is an aspect of parental responsibility. By convention a child born to married parents takes his father's surname though it would seem that the father cannot insist upon this.⁵¹ Conversely, a child whose parents are not married normally takes his mother's name but he may be registered in his father's name⁵² although the unmarried father has no right to insist upon this.⁵³

It is well established that once the child's name has been registered then neither married parent (a similar position obtains between unmarried parents where each has parental responsibility) may change it without the other's consent or leave of

⁵⁰ See e.g. CRETNEY/MASON/BAILEY-HARRIS, *Principles of Family Law*, London: Sweet & Maxwell, 2002, 6th Ed., §18-010 *et seq*, HERRING, *Family Law*, Pearson, 2nd Ed., 2004, p. 356 *et seq*, LOWE/DOUGLAS, *Bromley's Family Law*, 1998, p. 350 *et seq* and WHITE/CARR/LOWE, *The Children Act in Practice*, Butterworths, 3rd Ed., 2002, §3.18 *et seq*.

⁵¹ There is nothing in the Registration of Births and Deaths Regulations 1987 SI 1987/2088 requiring the father's name to be given priority and it seems that a mother is entitled to register the child in her name: *D v B (Surname: Birth Registration)* [1979] Fam 38. See also *Re H (Child's Name: First Name)* [2002] EWCA Civ 190, [2002] 1 FLR 973.

⁵² For an example see, *Re P (Parental Responsibility)* [1997] 2 FLR 722.

⁵³ See *Dawson v Wearmouth* [1999] 2 AC 308, HL.

the court, save where the parent is dead.⁵⁴ Where only one person has parental responsibility then that person has a unilateral right to change the child's name.⁵⁵

A person in whose favour a residence order (*i.e.* an order determining with whom the child is to live) has been made is *not* entitled to change the child's surname unless he has the written consent of every person who has parental responsibility for the child or the leave of the court.⁵⁶

8. What is the position taken in your national law with respect to:

(a) Care

As stated in answer to Q 2e those with parental responsibility have a *prima facie* responsibility to provide a home for the child and to determine where the child should live. In other words such persons will normally have both the right and the responsibility to care for the child. Where responsibility is jointly held, as it will automatically be the case as between married parents (see Q 15) and will commonly be the case between unmarried parents (see Q 20), then in the absence of any court order or agreement this right/responsibility to care for the child will be jointly held. In the event of a dispute over this then application needs to be made to court for what is known as a residence order which is an order determining with whom the child is to live.⁵⁷ The granting of a residence order to one person only determines with whom the child is to live and in particular does not deprive the other person of parental responsibility. It does, however, limit the other person's ability to exercise their parental responsibility for not only will the child not live with them but neither are they entitled to interfere with the day to day decisions associated with the child's upbringing, at any rate while the child is living with the residence holder.⁵⁸

(b) Education

As stated in answer to Q 2c providing for a child's education is an incident of parental responsibility. One consequence of this is that there is a duty to ensure that the child receives 'efficient full-time education'.⁵⁹ This duty can be discharged by ensuring that children attend independent rather than state schools or even by educating them at home, provided in this latter instance the local education authority is satisfied that the child is receiving efficient and full-time education suitable to his age etc.

Disputes between individuals (usually divorcing parents) about appropriate schooling can be resolved by an appropriate court order, namely, either a specific issue order (under which the court will direct the appropriate school) or a

⁵⁴ *Re PC (Change of Surname)* [1997] 2 FLR 730, *Re T (A Minor)(Change of Surname)* [1998] 2 FLR 620, CA and *Re W, Re A, Re B (Change of Name)* [1999] 2 LFR 930, CA.

⁵⁵ *Re PC (Change of Surname)*, *ibid.*

⁵⁶ Sec. 13(1)(a), Children Act 1989.

⁵⁷ Sec. 8(1), Children Act 1989.

⁵⁸ *Cf Re S (Parental Responsibility)* [1995] 2 FLR 648, CA and *Re A (a minor)(parental responsibility)* [1996] 1 FCR 562.

⁵⁹ See Sec. 7 and 8, Education Act 1996, discussed at Q 2(c).

prohibited steps order (under which a party will be prohibited from continuing the child's education at a particular school).⁶⁰

A child's schooling is regarded as belonging to a small group of important decisions that ought not to be carried out by one holder of parental responsibility without the agreement of other holders.⁶¹

(c) Religious upbringing

A person with parental responsibility has a right to determine the child's religious education, though there is no duty to give a child a religious upbringing. As WALL J said in *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)*⁶² 'Parental responsibility... clearly includes the right to bring up children in a particular religious faith, or in none'. Based on the common law,⁶³ this right to determine the child's religious education is protected to the extent that a local authority cannot cause a child in their care 'to be brought up in any religious persuasion other than that in which he would have been brought up if the order had not been made.'⁶⁴ Adoption agencies must also, when placing a child for adoption have regard, so far as practicable, to any wishes of the child's parent or guardian as to the child's religious upbringing.⁶⁵ Parents with parental responsibility and those caring for the child can require a child's exclusion from religious studies lessons and school assembly.⁶⁶

(d) Disciplinary measures and corporal punishment

A person with parental responsibility may lawfully chastise and inflict reasonable corporal punishment upon the child.⁶⁷ What is reasonable is a question of fact and will depend upon the age and strength of the child and the nature and degree of punishment.⁶⁸

⁶⁰ Specific issue orders and prohibited steps orders are provided for by Sec. 8(1), Children Act 1989.

⁶¹ See *Re G (Parental Responsibility: Education)* [1994] 2 FLR 964.

⁶² [1999] 2 FLR 678 at 685 – upheld by CA see [2001] 1 FLR 571.

⁶³ *Andrews v Salt* (1873) 8 Ch App 622. The rule, see e.g. *Hawksworth v Hawksworth* (1871) LR Ch App 539, that unless there were exceptional circumstances, children had to be brought up in the religion of their father, was abolished by Sec. 1, Guardianship of Infants Act 1925.

⁶⁴ Sec. 33(6)(a), Children Act 1989.

⁶⁵ Sec. 7, Adoption Act 1976. But, note under the Adoption and Children Act 2002, there will be a more general requirement upon adoption agencies to have regard to the child's religious persuasion when placing the child for adoption, rather than specifically having to have regard to parental wishes, see Sec. 1(5).

⁶⁶ Sec. 71, School Standards Framework Act 1998.

⁶⁷ See the review by ELIAS J, *The Queen on the Application of Williamson v Secretary of State for Education and Employment* [2001] EWHC Admin 900, [2002] 1 FLR 493 at 498, para. 19 *et seq*, decision upheld on appeal at [2002] EWCA Civ 1820, [2003] 1 FLR 726, *R v Hopley* (1860) 2 F & F 202; *R v Woods* (1921) 85 JP 272, CYPA 1933, s 1(7).

⁶⁸ Where reasonable chastisement is raised as a defence to criminal charges, a judge should direct the jury to consider the following: '(i) the nature and context of the defendant's behaviour; (ii) the duration of that behaviour; (iii) the physical and mental consequences in respect of the child; (iv) the age and personal characteristics of the child; (v) the reasons given by the defendant for administering the punishment.' *R v H (Assault of Child: Reasonable Chastisement)* [2001] EWCA Crim 1024, [2001] 2 FLR 431, CA.

If it goes beyond what is reasonable it is unlawful and renders the individual criminally liable for assault, or, depending on the gravity, for more serious offences. If it amounts to degrading punishment,⁶⁹ or is inflicted without parental consent it is in breach of the European Convention on Human Rights.⁷⁰ The power to discipline a child may be delegated⁷¹ but it seems it can only be exercised by those *in loco parentis* to the child.⁷² However, corporal punishment is forbidden in all schools,⁷³ children's homes⁷⁴ and foster placements.⁷⁵

(e) Medical treatment

Any person over the age of 16 who has responsibility (in the sense of having de facto control) for a child under the age of 16 has a duty to obtain essential medical assistance for that child.⁷⁶

As a general rule anyone with parental responsibility, including a local authority,⁷⁷ can give a valid consent to the child's surgical, medical or dental treatment. Indeed, unless of sufficient age and understanding to consent for him or herself, if the child is under 16 the consent of a person with parental responsibility will normally be required for each treatment.

This general power, however, is subject to a number of qualifications. First, not all those with parental responsibility are in the same position. In particular those having responsibility by virtue of an emergency protection order only have authority to take such action 'as is reasonably required to safeguard or promote the welfare of the child'.⁷⁸ Hence, while such persons can give a valid consent to day-to-day treatment they cannot agree to major elective surgery. In these cases, however, the applicant can seek a court direction.⁷⁹

Secondly, although the power of consent vested in those with parental responsibility extends to most forms of surgical, medical or dental treatment including treatment of drugs or for drug abuse and, by analogy with Sec. 8(2),

⁶⁹ *Cf Costello-Roberts v UK* [1994] ELRI – slipping a seven-year-old held not be 'degrading'.

⁷⁰ See e.g. ECtHR, *A v United Kingdom (Human Rights: Punishment of Child)* [1988] 2 FLR 959, and ECtHR, *Campbell and Cosans v UK* (1982) 4 EHRR 293.

⁷¹ Either expressly as in *Sutton London Borough Council v Davis* [1994] 1 FLR 737, or impliedly, as in the case of schools.

⁷² See e.g. *R v Woods* (1921) 85 JP 272 – unlawful for an elder brother to administer corporal punishment on his sibling where both were living with their father.

⁷³ Sec. 548, Education Act 1996, as substituted by Sec. 131, School Standards and Framework Act 1998 which removes the defence of justification which is necessary if the intentional infliction of physical harm is not to be considered unlawful, rather than prohibits corporal punishment as such.

⁷⁴ Re. 17(5)(a), Children's Homes Regulations 2001 (SI 2001/3967), which simply prohibits the use of any form of corporal punishment.

⁷⁵ Reg. 25(5)(b), Sch 5, point 8, Fostering Services Regulations 2002 (SI 2002/57) which requires foster parents in England to make a written agreement not to administer corporal punishment.

⁷⁶ Sec. 1, Children and Young Persons Act 1933.

⁷⁷ *T v Kirklees Metropolitan Borough Council, ex p C* [1992] 2 FLR 117.

⁷⁸ Sec. 44(5)(b), Children Act 1989.

⁷⁹ Sec. 44(6)(b).

Family Law Reform Act 1969, diagnostic procedures such as HIV testing and, by reason of Sec. 21(3) of that Act, (as amended), the taking of bodily samples from the child to be used in tests to determine paternity, and ritual male circumcision,⁸⁰ even parents with parental responsibility are not empowered to consent to all forms of treatment. According to Lord TEMPLEMAN in *Re B (A Minor)(Wardship: Sterilisation)*,⁸¹ sterilisation of a girl under 18 should only be carried out with the leave of a High Court judge. In other words, even parents, with parental responsibility cannot give a valid consent. Notwithstanding that Lord TEMPLEMAN was the only Law Lord to suggest this, as Lord DONALDSON MR subsequently put it in *Re W (A Minor)(Medical Treatment)*⁸² parties might be well advised to apply to the court for guidance. Whether a similar requirement extends to other forms of treatment has yet to be decided.⁸³ However, High Court leave is not required to perform an operation for therapeutic reasons even though a side effect (but not the main purpose) will be to sterilise the child.⁸⁴ Furthermore, it has been held that notwithstanding that a decision as to sterilisation is a matter for the judge, parents (or others with parental responsibility) nevertheless retain the responsibility for bringing the issue before the High Court.⁸⁵

A third qualification on the power of consent of those with parental responsibility is the age of the child. Although according to *Re W (A Minor)(Medical Treatment: Court's Jurisdiction)*⁸⁶ those with parental responsibility retain their power to give a valid consent throughout the child's minority, it seems clear⁸⁷ that

- a child aged 16 or 17⁸⁸ or who is 'Gillick competent'⁸⁹ if under the age of 16 can give a valid consent which cannot be countermanded by an adult;⁹⁰
- although in theory a valid consent may be given by an adult with parental responsibility notwithstanding the opposition of the 'Gillick competent' or 16 or 17-year-old child, in practice no treatment should be given without prior court sanction;⁹¹ and

⁸⁰ *Re J (Specific Issues Order: Child's Religion Upbringing)* [2000] 1 FLR 571, CA.

⁸¹ [1988] AC 199 at 205.

⁸² [1993] Fam 64, CA.

⁸³ It might conceivably cover all irreversible treatment for non-therapeutic reasons.

⁸⁴ *Re E (Medical Treatment)* [1991] 2 FLR 585, per Sir BROWN P. Note that in *Re B (A Minor)(Wardship: Sterilisation)* [1988] AC 199, the Law Lords rejected the legal relevance of the notion of a non-therapeutic sterilisation.

⁸⁵ *Re HG (Specific Issue Order: Sterilisation)* [1993] 1 FLR 587. See also *Practice Note* [1993] 3 All ER 222.

⁸⁶ [1993] Fam 64, CA.

⁸⁷ The view was most clearly expressed by Lord DONALDSON MR but seemed also to be accepted by BALCOMBE LJ, both of whom expressly rejected the contention that Lord SCARMAN should have been taken to be saying in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, HL that parents of a 'Gillick competent' child had no right at all to consent to medical treatment of the child.

⁸⁸ See Sec. 8, Family Law Reform Act 1969.

⁸⁹ This was a phrase first coined in *Re R (A Minor)(Wardship: Medical Treatment)* [1992] Fam 11.

⁹⁰ See Lord DONALDSON in *Re W*, above [1993] Fam at 83-84. The child's consent can, however, be overridden by the court.

⁹¹ This, at any rate, was NOLAN LJ's view in *Re W*, above [1993] Fam at 94. Lord DONALDSON MR, at 84, thought that a child's refusal was a very important consideration for parents deciding whether themselves to give consent.

- any decision by a parent can subsequently be overridden by the High Court.⁹²

Disputes about a child's medical treatment can be resolved by a court order, namely, a specific issue or prohibited steps order.

(f) Legal representation

As stated in answer to Q 2d it is an aspect of parenthood and presumably, therefore, of parental responsibility to act as the legal representative of the child. It may be that as an exception to the general rule that children cannot conduct their own legal proceedings they can do so in the magistrates' courts.⁹³ There is also an express right for children of sufficient age and understanding to seek in their own name a Sec. 8 order under the Children Act 1989.⁹⁴

9. What is the position taken in respect of the child's right to be heard with regard to the issues mentioned under Q8 ((a)-(f)). What relevance is given to the age and maturity of the child?

Outside the context of court proceedings the child has no right to be heard. Consequently insofar as the issues mentioned in Q 8a-8f are the automatic consequence of having parental responsibility and so long as the issues are not contested the child will have no voice. However, where the issue is contested and a Sec. 8 order under the Children Act 1989 (*viz* a residence order, contact order, specific issue order or a prohibited steps order) is being sought then, pursuant to Sec. 1(3)(a), Children Act 1989, it is mandatory for the court to have regard to

'the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)'.

In any event, according to Sec. 7 of the 1989 Act the court when considering any question with respect to a child under the 1989 Act ask either CAFCASS⁹⁵ officer, or a local authority to report to the court "on such matters relating to the welfare of that child as are required to be dealt with in the report". The officers concerned do not represent the child but merely report on the circumstances.

Although it is established that judges have the power to interview children in private⁹⁶ the general view seems to be that it is a practice that should not be readily undertaken. In any event it is a matter entirely at the judge's discretion.⁹⁷ If a judge

⁹² See *e.g. Re D (A Minor)(Wardship: Sterilisation)* [1976] Fam 185 overriding parental consent to a child's sterilisation and *Re A (Children: Conjoined Twins: Surgical Separation)* [2001] Fam 147, overriding parental refusal to the surgical separation of conjoined twins.

⁹³ See LOWE/DOUGLAS, *Bromley's Family Law*, 1998, 9th Ed., p. 363.

⁹⁴ Rule 9.2A, Family Proceedings Rules 1991, added by Rule 6, Family Proceedings (Amendment) Rules 1992.

⁹⁵ *I.e.* the Children and Family Court and Advisory Service which, as from April 2001, has been responsible for providing what were formerly known as welfare officers and who are now known as children and family reporters.

⁹⁶ See *e.g. Re W (Child: Contact)* [1994] 1 FLR 843, and *Re M (A Minor)(Justices' Discretion)* [1993] 2 FLR 706.

⁹⁷ See *Re R (A Minor)(Residence: Religion)* [1993] 2 FLR 163, CA.

does interview a child in private he cannot promise confidentiality and for that very reason should be cautious in agreeing to see the child in such circumstances.⁹⁸

So far as children being directly heard by the court is concerned the normal rule is that a child may begin and prosecute family proceedings only by a next friend and may defend proceedings only by a guardian *ad litem*.⁹⁹ However, in any family proceedings where it appears to the court that the child should be separately represented,¹⁰⁰ the child can be made a party to the proceedings. In such a case the court will normally refer the matter to CAFCASS Legal.

As mentioned in answer to Q 2d and Q 8f a child may bring or defend proceedings him or herself where he has obtained leave of the court to do so, or where a solicitor considers that the child is able, having regard to his understanding to give instructions in relation to the proceedings and has accepted instructions from the child to act for him or her.¹⁰¹ Before granting leave to the child the court has to be satisfied that the child has sufficient understanding to participate as a party to the particular proceedings.¹⁰²

Despite being placed first in the welfare checklist, the child's view is not expressed to be determinative. In other words the court's obligation is to consider the child's wishes and feelings but not necessarily to give effect to them. Clearly, however, the older the child the more weight is likely to be placed on those wishes. As BUTLER-SLOSS LJ put it in *Re P (minors)(wardship: care and control)*¹⁰³

'How far the wishes of children should be a determinative factor in their future placement must of course vary on the particular facts of each case. Those views must be considered and may, but not necessarily must, carry more weight as the children grow older'.

10. Do(es) the holder(s) of parental responsibilities has(have) the right to administer the child's property?

As stated in answer to Q 2f holders of parental responsibility have, pursuant to Sec. 3(1), Children Act 1989 "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child *and his property*" (emphasis added) and, pursuant to Sec. 3(2), to such rights as the guardian of the estate, would have had in relation to the child's property.

11. If yes, explain the content of this right

Although it is generally said that parental responsibility includes the right to administer the child's property the precise extent of this right is obscure. Indeed, at common law there is confusion as to position of a parent *qua* parent and a parent as

⁹⁸ *B v B (Minors)(Interviews and Listing Arrangements)* [1994] 2 FLR 489, 496, CA.

⁹⁹ Rule 9.2, Family Proceedings Rules 1991.

¹⁰⁰ See the leading case, *Re A (Contact: Separate Representation)* [2001] 1 FLR 715.

¹⁰¹ Rule 9.2A, Family Proceedings Rules 1991 and *Practice Direction* [1993] 1 FLR 668. See also *Re T (A Minor)(Child Representation)* [1994] Fam 49, CA.

¹⁰² See *e.g. Re S (A Minor)(Representation)* [1993] 2 FLR 437, CA.

¹⁰³ [1992] 2 FCR 681 at 687.

guardian of the estate.¹⁰⁴ So far as the former is concerned while there may be a right to administer the child's property it is reasonably clear there are no rights as such in the child's property.¹⁰⁵ The Law Commission concluded¹⁰⁶ that 'It may be that the father's powers of control over the child's person would include the power to direct the child in the management of property in the child's possession'.

The position of guardians of the estate was well summarised by the Law Commission. They commented as follows:¹⁰⁷

"A guardian of the estate has, subject to the rights and powers of statutory owners, personal representatives and trustees for sale, the right to recover rents and profits from the minor's land and to manage his personal estate for the duration of the guardianship, *i.e.* he can control the income due to the infant and any of the personal profit to which the infant is legally as well as beneficially entitled, but is not entitled to receive or exercise powers over property to which the infant has only beneficial title, except income as it becomes payable. He must account to the minor for the profits and income of the estate received by him".

It might be added that property of any value will normally be derived under a settlement or will and legal ownership usually vests in trustees.

12. Are there restrictions with respect to:

(a) Certain goods and/or values (inherited property, gift...)

The law is by no means clear on this but generally it would seem that the responsibility to administer the child's property is a general one. However, one commentary¹⁰⁸ explains that property brought by a child out of his own income remains exclusively that of a child and clothes (and presumably other types of gifts) bought for an older child belongs to that child.

(b) Salary of the child

Again the law is rather under developed but there is some authority for saying that those with parental responsibility have no claim on a child's salary/wages.¹⁰⁹

(c) Certain transactions

There is no authority to suggest that there are any such restrictions.

13. Are there special rules protecting children from indebtedness caused by the holder(s) of parental responsibilities?

¹⁰⁴ See the discussion in Law Com Working Paper Report No. 91, *Guardianship*, 1985 at para. 2.32 *et seq.*

¹⁰⁵ See BROMLEY, *Bromley's Family Law*, Butterworths, 3rd Ed., 1966, p. 463.

¹⁰⁶ Law Com Working Paper Report No. 91 at para. 2.32.

¹⁰⁷ Law Com Working Paper Report No 91 at para. 2.23.

¹⁰⁸ See BROMLEY, *Bromley's Family Law*, Butterworths, 3rd Ed., 1966, p. 463.

¹⁰⁹ See *Williams v Boulton* [1948] 1 All ER 603, cited by BROMLEY, *Bromley's Family Law*, Butterworths, 3rd Ed., 1966, p. 463.

As stated in answer to Q12 holders of parental responsibility are under a duty to account to the child for the profits and income of the child's estate received by him. Beyond this there are no special rules protecting children from indebtedness caused by parental responsibility holders, although in the normal course of events children are not liable for their parents' debts.

14. Do the contents of parental responsibilities differ according to the holder(s) of parental responsibilities (e.g. married, unmarried, parents not living together, step-parents, foster parents or other persons). If so, describe in some detail how it differs.

There is some difference in the scope of parental responsibility according to who has it and how it is acquired. It is widest when enjoyed by parents or guardians inasmuch as their agreement is required for the child's adoption,¹¹⁰ they can appoint a guardian¹¹¹ and they have a right to bury or cremate the deceased child.¹¹² It will be noted, however, that there is no difference in the scope of parental responsibility enjoyed by each married parent or, once the unmarried father has acquired it (see Q 22), between each unmarried parent.¹¹³

Individuals who acquire parental responsibility by means of a residence order (see Q 31) do not have the right to agree or to refuse to agree to the making of an adoption order or to appointing a guardian for the child.¹¹⁴ A similar position obtains where a local authority acquires parental responsibility by virtue of a care order,¹¹⁵ but in addition the local authority cannot 'cause the child to be brought up in any religious persuasion other than that in which he would have been brought up if the order had not been made'.¹¹⁶

As the law currently stands step-parents are treated like any other individual non parent but this position will change when the Adoption and Children Act 2002 comes fully into force. Under that Act, step-parents (*i.e.* a person who is married to the child's parent with parental responsibility)¹¹⁷ will be placed in a similar position to unmarried fathers inasmuch as they will be able to acquire parental responsibility by a formal agreement or a court order.¹¹⁸ The responsibility thus vested will co-extensive with that that enjoyed by the parent.¹¹⁹

¹¹⁰ Sec. 16, Adoption Act 1976, prospectively Sec. 47(2), Adoption and Children Act 2002.

¹¹¹ The power of guardians themselves to appoint guardians is conferred by Sec. 5(4), Children Act 1989.

¹¹² *Cf R v Gwynedd County Council ex p B* [1991] 2 FLR 365, CA.

¹¹³ There is, however, one key difference in the case of unmarried fathers in that no matter how he has acquired it, the courts have the power, upon application, to end parental responsibility pursuant to Sec. 4(3), Children Act 1989 (see Q 51).

¹¹⁴ Sec. 12(3), Children Act 1989.

¹¹⁵ Sec. 33(6)(b).

¹¹⁶ Sec. 33(6)(a).

¹¹⁷ Sec. 4(A)(1), Children Act 1989, as prospectively substituted by Sec. 112, Adoption and Children Act 1989.

¹¹⁸ Sec. 4A, Children Act 1989, as substituted by Sec. 112, Adoption and Children Act 2002.

¹¹⁹ But as with the case of unmarried fathers the court retains the power upon application to end step-parent's parental responsibility pursuant to Sec. 4(3), Children Act 1989.

A similar strategy is to be adopted in the case of a registered partner of a parent with parental responsibility.¹²⁰ Parental responsibility is narrowest for those in whose favour an emergency protection order has been made inasmuch as for the duration of the order (*viz* 8 days with the possibility of one extension of up to 7 days) there is authority only to take 'such action in meeting his parental responsibility for the child as is reasonably required to safeguard or promote the welfare of the child (having regard in particular to the duration of the order).¹²¹

C. ATTRIBUTION OF PARENTAL RESPONSIBILITIES

I Married Parents

15. Who has parental responsibilities when the parents are:

(a) Married at the time of the child's birth

According to Sec. 2(1), Children Act 1989 where the father and mother of the child were married to each other at the time of the child's birth, they *each* have parental responsibility. The phrase 'married to each other at the time of the child's birth', however, has to be interpreted in accordance with Sec. 1, Family Law Reform Act 1987.¹²² Consequently the phrase refers to a child whose parents were married to each other at any time during the period beginning with insemination or (where there is no insemination) conception and ending with the birth and also a child who is legitimate notwithstanding that the marriage is void,¹²³ legitimated by the parents' subsequent marriage,¹²⁴ adopted, or is otherwise treated in law as legitimate.

(b) Not married at that time but marry later

Provided they married before the child reaches the age of 18, the parents' subsequent marriage will confer full parental responsibility upon the father so that each parent will have parental responsibility.¹²⁵

16. How, if at all, is the attribution of parental responsibilities affected by:

(a) Divorce

Under English law the attribution of parental responsibility is not affected by divorce.

(b) Legal separation

Under English law the attribution of parental responsibility is not affected by legal separation.

(c) Annulment of the marriage

¹²⁰ See the amendments to be introduced by Sec. 75, Civil Partnership Act 2004. NB civil partnerships will be restricted to same-sex couples, see Sec. 1, Civil Partnership Act 2004.

¹²¹ Sec. 44(5)(b), Children Act 1989.

¹²² Sec. 2(3), Children Act 1989.

¹²³ *I.e.* provided both or either of the parties reasonably believed that the marriage was valid – see Sec. 1(1), Legitimacy Act 1976.

¹²⁴ As provided for by Sec. 10, Legitimacy Act 1976.

¹²⁵ Sec. 2(1) and (3), Children Act 1989 and Sec. 1(3)(b), Family Law Reform Act 1987.

If a marriage is annulled on the grounds of voidability then it remains valid for all purposes prior to the decree.¹²⁶ Consequently, it does not affect the attribution of parental responsibility. Even if a marriage is held void provided either or both spouses reasonably believed the marriage was valid it will not affect the attribution of parental responsibility.¹²⁷

(d) Factual separation

Under English law the attribution of parental responsibility is *not* affected by factual separation.

17. To what extent, if at all, are the parents free to agree upon the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage? If they are, are these agreements subject to scrutiny by a competent authority.

As the attribution of parental responsibility is fixed by law parents are not free under English law to alter that attribution. However, what they can agree upon is how responsibility should be exercised (see Q 37).

18. May the competent authority attribute joint parental responsibilities to the parents of the child even against the wish of both parents/one of the parents? To what extent, if at all, should he competent authority take account of a parent's violent behaviour towards the other parent?

As the attribution of parental responsibility is fixed by law and since the courts have no power to divest married parents of parental responsibility this question has no relevance in English law.

19. Provide statistical information on the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage.

As the answer to Q 16 states, divorce, legal separation, and for the most part, annulment has no affect upon the attribution of parental responsibility. Consequently there are no statistics.

II Unmarried Parents

20. Who has parental responsibilities when the parents are not married?

Where the father and mother of the child were not married to each other at the time of the child's birth (effectively meaning where the child is illegitimate) then by Sec. 2(2), Children Act 1989 the mother but not the father has parental responsibility.

¹²⁶ Sec. 16, Matrimonial Causes Act 1973.

¹²⁷ See answer to Q 15a.

21. Does it make a difference if the parents have formalised their mutual relationship in some way (registered partnership, civil union, *pact civil de solidarité*...)

At the time of writing English law makes no provision for registered partnerships. However, this will change when the Civil Partnerships Act 2004 is brought into force. However, under Sec. 1 of that Act, partnerships will be restricted to same sex couples. Consequently, short of marriage, there is no mechanism by which the mother and father of a child can formalise their relationship.

22. Under what condition, if at all, can

(a) The unmarried mother obtain parental responsibility

By Sec. 2(2), Children Act 1989 all unmarried mothers automatically have parental responsibility.

(b) The unmarried father, obtain parental responsibilities

Apart from marrying the mother¹²⁸ the unmarried father can acquire parental responsibility in a number of different ways. The most likely means of acquiring responsibility is by being named as the father on the child's birth certificate. This is provided for in an amendment to the Children Act 1989 by the Adoption and Children Act 2002¹²⁹ which came into force in December 2003.¹³⁰ Since under English law, unmarried fathers have no unilateral right formally to register themselves as the father, registration must be done either by the mother or with her written authorisation.¹³¹ Another means by which responsibility can be acquired is by making a formal parental responsibility agreement with the mother.¹³² This has to be made on a prescribed form¹³³ and signed before a court official¹³⁴ but is not subject to a formal court scrutiny. Clearly, the need to make agreements has been substantially reduced by conferring responsibility upon those formally registered as the father. An even less common way of acquiring parental responsibility is by being formally appointed as guardian either by the child's mother or by the court in accordance with Sec. 5, Children Act 1989. Such an appointment can only take effect after the mother's death.

There are two other means for unmarried fathers to acquire parental responsibility, namely, by having a parental responsibility order made in his favour, pursuant to Sec. 4(1)(c) of the 1989 Act, or by having a residence order made in his favour in which case a separate Sec. 4 parental responsibility order must be made.¹³⁵ Effectively it is through either of these means that unmarried fathers can hope to acquire responsibility notwithstanding the mother's opposition. The key difference

¹²⁸ In which case, provided the child is under 18, the father will have brought himself within s 2(1) of the Children Act 1989 as interpreted in light of Sec. 1, Family Law Reform Act 1987 (see Q 15).

¹²⁹ See Sec. 111, Adoption and Children Act 2002, amending Sec. 4, Children Act 1989.

¹³⁰ See Adoption and Children Act 2002 (Commencement No. 4) Order 2003, SI 2003/3079.

¹³¹ See Sec. 10 and 10A, Births and Deaths Registration Act 1953.

¹³² See Sec. 4(1)(b), Children Act 1989.

¹³³ Sec. 4(2), Children Act 1989.

¹³⁴ See the Parental Responsibility Agreements Regulation 1991, SI 1991/1478, as amended.

¹³⁵ See Sec. 12(1), Children Act 1989.

between these proceedings is that in the former the applicant father is only seeking parental responsibility whereas in the latter he is primarily seeking an order by which the child is to live with him with allocation of responsibility only a consequence should the residence order be made. In both proceedings the court is governed by the welfare principle, that is, in determining whether to grant the order, the court must treat the child's welfare as its paramount consideration.¹³⁶ However, whereas in parental responsibility order proceedings the court will apply the welfare principle to determine whether parental responsibility should be granted to the father, in residence order applications the court will apply the welfare principle only to decide with whom the child is to live. As WAITE J commented in *Re CB (A Minor)(Parental Responsibility Order)*¹³⁷

'there is an unusual duality in the character of a parental responsibility order: it is on the one hand sufficiently ancillary by nature to pass automatically to the natural father without enquiry of any kind when a residence order is made in his favour; and, on the other hand, sufficiently independent, when severed from the context of a residence order, to require detailed consideration upon its merits as a free-standing remedy in its own right'.

23. How, if at all, is the attribution of parental responsibility affected by the ending of the unmarried parents' relationship?

The ending of the unmarried parents' relationship has in itself no effect upon the attribution of parental responsibility. The unmarried mother automatically has parental responsibility and the court has no power to divest her of it. Once an unmarried father has acquired parental responsibility, it can only be ended by a specific court order to that effect under Sec. 4(3), Children Act 1989. Such orders can only be made upon application by any person who has parental responsibility for the child (this will include the father himself) or, with leave of the court, the child.¹³⁸ In the latter case leave can only be granted if the court is satisfied that the child has sufficient understanding to make the application.¹³⁹

24. May the competent authority attribute joint parental responsibilities to the parents also against the wish of both parents/one of the parents? To what extent, if at all, may the competent authority take into account a parent's violent behaviour towards the other parent?

The attribution of parental responsibility to the mother is automatic and the courts have no powers to alter that attribution. As the answer to Q 22b states unmarried fathers can acquire parental responsibility in different ways. Insofar as it is acquired by reason of registration on the birth register as the father it is automatic and the courts' only power to end it is where a specific application is made to that effect under Sec. 4(3), Children Act 1989. (See Q 23). A similar position obtains in the case of parental responsibility agreements since the court has no power of scrutiny over the making of such agreements. Insofar as applications are made for a

¹³⁶ *I.e.* Sec. 1(1), Children Act 1989 applies.

¹³⁷ [1993] 1 FLR 920 at 929.

¹³⁸ Sec. 4(3), Children Act 1989.

¹³⁹ Sec. 4(4).

parental responsibility order, then the making of the order is governed by the paramountcy of the child's welfare¹⁴⁰ and in that context the parties' wishes and violent behaviour will certainly be factors that are taken into account.¹⁴¹

25. To what extent, if at all, are unmarried parents free to agree upon the attribution of parental responsibilities after the ending of their relationship?

The mother's parental responsibility is fixed by law and its attribution cannot be changed either by agreement or a court order. Once the unmarried father has acquired parental responsibility it cannot subsequently be altered by agreement. It can, however, upon application of anyone with parental responsibility or, with leave of the court, of the child, be brought to an end by a court order.¹⁴²

26. Provide statistical information available regarding the attribution of parental responsibilities for unmarried parents.

Details to be supplied.

III. Other Persons

27. Under what conditions, if at all, can the partner of a parent holding parental responsibilities obtain parental responsibilities, when he/she is:

(a) Married to that parent

In its current form the Children Act 1989 makes no special provision for step-parents (whether married or not to the parent) to acquire parental responsibility. Accordingly, they do not have parental responsibility automatically but they can acquire it principally¹⁴³ upon being granted a residence order (which is an order determining the person with whom the child is to live). In that context it is possible for the parent and sep-parent jointly to apply for a residence order. However, it is to be stressed that the principal concern of the court will be to determine whether it is in the child's interests to live with the applicant. In other words the application for a residence order should not be regarded simply as a means of allocating parental responsibility to the step-parent.¹⁴⁴

¹⁴⁰ Viz Sec. 1(1), Children Act 1989 applies, see *Re H (Parental Responsibility)* [1998] 1 FLR 855 at 859 per BUTLER-SLOSS LJ.

¹⁴¹ See e.g. *Re T (Parental Responsibility: Contact)* [1993] 2 FLR 450, CA order refused because of the father's violence towards the mother, *Re L (A Child)(Contact: Domestic Violence)* [2001] Fam 200, order refused because of the father's violence and desire to control the child and *Re H (Parental Responsibility)* [1988] 1 FLR 855, CA, order refused because of the father's violence to the child.

¹⁴² Under Sec. 4(3), Children Act 1989, on which see *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048.

¹⁴³ It can also be acquired upon a formal appointment as a guardian in accordance with Sec. 5, Children Act 1989 following the death of the parent or parents with parental responsibility (see Q 34) or upon being granted an emergency protection order under Sec. 44(4), (5) of the 1989 Act. In the latter case not only is responsibility short lived (it only lasts as long as the order, i.e. a maximum of 15 days) but it is also limited in effect, see Sec. 44(4)(c) and 44(5)(b); and the answer to Q 14.

¹⁴⁴ See *Re WB (Residence Orders)* [1995] 2 FLR 1023 but cf *Re H (Shared Residence: Parental Responsibility)* [1995] 2 FLR 883.

According to Sec. 12(2), Children Act 1989 any person (who is not a parent or guardian) in whose favour a residence order has been made has parental responsibility for the duration of the order, though, by Sec. 12(3), this will not entitle him or her to agree to the child's adoption nor to appoint a guardian.

This position will change when the Adoption and Children Act 2002 comes fully into force since that Act prospectively amends the Children Act 1989¹⁴⁵ to permit a step-parent who is married (*i.e.* cohabitation is insufficient) to the child's parent who has parental responsibility to obtain responsibility either by agreement or by a court order.

So far as agreements are concerned if both parents have parental responsibility then the agreement will have to be made with both. Presumably the formalities for making these agreements will be the same as for those made between the parents.

It may be noted that unlike for married fathers no provision is made for the automatic making of a parental responsibility order following the making of a residence order in a step-parent's favour. Consequently unless the step-parent already has a separate parental responsibility order in his favour parental responsibility will cease upon the ending of a residence order.

(b) Living with that parent in a formalised relationship (registered partnership, civil union, pact civil de solidarité...)

English law currently makes no provision for registered partnerships. However, this will change when the Civil Partnerships Act 2004 comes into force. Under that Act it will be possible for same-sex couples only to formally register their partnership.¹⁴⁶ Where an individual is the registered partner of a parent with parental responsibility he will be in the same position as a heterosexual step-parent who is married to a parent with parental responsibility and therefore such persons will be able to acquire parental responsibility by making a formal parental responsibility agreement with all those having parental responsibility or by applying for a court order.¹⁴⁷

(c) Living with that parent in a non formalised relationship?

The only way an individual living with a parent in a non formalised relationship can acquire parental responsibility is by obtaining a residence order (see Q 27a).¹⁴⁸

28. Does it make any difference if the parent holding parental responsibilities is of the same sex?

Under the current law same-sex partners of a parent with parental responsibility are treated no differently to any other individual. They can acquire parental responsibility principally by obtaining a residence order under (see Q 27a).¹⁴⁹

¹⁴⁵ Sec. 112 prospectively inserting Sec. 4A into the Children Act 1989.

¹⁴⁶ Sec. 1, Civil Partnership Act 2004.

¹⁴⁷ Sec. 75, Civil Partnership Act 2004, prospectively amending Sec. 4, Children Act 1989.

¹⁴⁸ But note the points made in Q 25 above.

¹⁴⁹ But note the points made in Q 25 above.

Under the Civil Partnerships Act 2004 (which is not yet in force) it will be possible for the same-sex partners (but no-one else) to formally register their partnership and those that do will be able to acquire parental responsibility either by making a formal parental responsibility agreement with other holders of parental responsibility or by applying to court for a parental responsibility order (see Q 27b).¹⁵⁰

29. How, if at all, is the attribution of parental responsibilities in the partner affected by the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Q27 and Q28.

The ending of the relationship with the parent does not in itself affect the attribution of parental responsibility. In the case of married parents both parents retain their responsibility notwithstanding their divorce or separation and the court has no power to divest them of that responsibility. A similar position obtains in relation to unmarried mothers.

Insofar as parental responsibility is acquired by an unmarried father living with the mother then again separation does not per se affect that allocation. However, it is open both to the mother (and indeed the father) to seek a court order under Sec. 4(3) of the Children Act 1989 to end the father's parental responsibility. A similar position will obtain in relation to step-parents¹⁵¹ and registered partners¹⁵² who (prospectively) obtain parental responsibility by a formal agreement or court order.

For those partners who acquire parental responsibility following the making of a residence order (which under the current law is effectively the only way partners whether married or not to the parent with parental responsibility can acquire such responsibility) while the ending of the relationship with the parent will not itself end responsibility, it will be open to the parent to seek to end their partner's residence order which in turn will terminate parental responsibility.

30. To what extent, if at all, is the parent holding parental responsibilities and his/her partner free to agree upon the attribution of parental responsibilities after the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Q27 and Q 28.

Since the allocation of parental responsibility is a matter of law it is not open to the parent with parental responsibility and his or her partner (of whatever status) to agree to change that formal allocation. However, what can be agreed upon is how parental responsibility should be exercised. In the case of formal relationships, namely marriage, and prospectively, civil partnerships there is power of the court upon divorce or the formal ending of the partnership to interfere with such

¹⁵⁰ Viz pursuant to the changes to be introduced by the Civil Partnerships Act 2004, see Q 27.

¹⁵¹ Viz pursuant to the changes to be introduced by the Civil Partnerships Act 2004, see Q 27.

¹⁵² Viz pursuant to the changes to be introduced by the Civil Partnerships Act 2004, see Q 27.

agreements in the interests of the child but this is a minimal power.¹⁵³ Outside this context there is no formal power of court scrutiny. However, in cases of dispute it is always open to either partner to apply to court for an appropriate order (see Q38).

31. Under what conditions, if at all, can other persons not being a parent or a partner of a parent holding parental responsibilities, obtain parental responsibilities (e.g. members of the child's family, close friends, foster parent...)? Specify, where such other persons may obtain parental responsibilities, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

Any individual who is not a parent or guardian can acquire parental responsibility upon being granted a residence order (an order determining with whom the child is to live). As stated in answer to Q 27 the application for a residence order should not be regarded as a means of allocating parental responsibility rather the principal concern of the court will be to determine whether it is in the child's interests to live with the applicant. Another means of obtaining parental responsibility is being formally appointed (by a holder of parental responsibility) as a guardian but this appointment will only take effect upon death of the parent or parent with parental responsibility.¹⁵⁴ It should be noted that without a residence order or a formal appointment as a guardian an individual, even one looking after a child, such as a foster parent does, not have parental responsibility.

The acquisition of parental responsibility by an individual through a residence order does not affect the legal position of parents who will continue to have parental responsibility. In other words, the acquisition of parental responsibility is in addition to or not in substitution of existing holders of responsibility.

32. Under what conditions, if at all, can a public body obtain parental responsibilities? Specify where it is obtained, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

Local authorities can only acquire parental responsibility in one of two ways, namely, by having a care order or an emergency care order made in their favour. Both orders require the local authority to satisfy fairly stringent conditions before they can be made.¹⁵⁵

Upon the making of a care order, local authorities share parental responsibility with any parent or guardian (i.e. the responsibility conferred is in addition to, and

¹⁵³ In the case of divorce, pursuant to s 41 of the Matrimonial Causes Act 1973, the court must consider the proposed arrangements for the children's future after the divorce and whether it should exercise any of its powers under the Children Act 1989. A similar position will apply to the dissolution of a civil partnership, see prospectively, Sec. 63, Civil Partnerships Act 2004.

¹⁵⁴ See Sec. 5, Children Act 1989. See further Q 34.

¹⁵⁵ *I.e.* for a care order, the court must be satisfied as a minimum that the so-called threshold provisions under Sec. 31(2), Children Act 1989 have been proved, or in the case of emergency protection orders that there is reasonable cause to believe that they will be satisfied, pursuant to Sec. 44(1).

not in substitution of, existing holders of responsibility).¹⁵⁶ However, if they are satisfied that it is necessary to do so to safeguard or promote the child's welfare, however, they may determine the extent to which a parent or guardian of the child may meet his parental responsibility for him.¹⁵⁷ In no event, however, will a local authority be empowered to change the child's religion, to consent to an order freeing him for adoption, or to appoint a guardian.¹⁵⁸ Local authorities also acquire parental responsibility to the same limited extent as individuals upon being granted an emergency protection order (see Q 14).

33. To whom are the parental responsibilities attributed in the case of:

(a) The death of a parent holding parental responsibilities

Upon the death of one parent holding parental responsibility, that responsibility simply continues to be held by the other holder(s). If there are no other holders then in the absence of any appointment of a guardian (see Q 34) no-one has parental responsibility for the child. There is in short no mechanism by which upon death responsibility is automatically transferred to someone else, though as already intimated, it is open to a parent with parental responsibility to appoint a guardian to take effect after their and the surviving parent with parental responsibility's death (see Q 34) and any individual can seek to be appointed as a guardian by the court.¹⁵⁹

(b) The death of both parents of whom at least one was holding parental responsibility at the time of the death

The allocation of parental responsibility following the death of both parents is the same in principle as following the death of one of them. Accordingly, following the death responsibility will continue to be held by any other holder and in the absence of any other holder and in the absence of any appointment of a guardian (see Q 34) no-one will have parental responsibility for the child.

34. To what extent, if at all, may the holder(s) of parental responsibilities appoint a new holder(s) upon his/her/their death? If such an appointment is permitted, must it take place in a special form, e.g. will?

Parents with parental responsibility and guardians can appoint a guardian in accordance with Sec. 5, Children Act 1989. No-one else has this power under the current law¹⁶⁰ though it is open to any individual following the death of the parents or other holders of parental responsibility to apply to court to be appointed a guardian (see below).

Any parent with parental responsibility (i.e. not an unmarried father without such responsibility nor other individuals having parental responsibility by reason of a residence order being made in their favour) and any guardian may appoint an

¹⁵⁶ Sec. 33(3)(a), Children Act 1989.

¹⁵⁷ Sec. 33(3)(b) and (4), Children Act 1989.

¹⁵⁸ Sec. 33(6), Children Act 1989.

¹⁵⁹ Pursuant to Sec. 5, Children Act 1989.

¹⁶⁰ Though prospectively under the Sec. 114, Adoption and Children Act 2002, special guardians will also be able to appoint a guardian.

individual to be the child's guardian.¹⁶¹ Although reference is made to an 'individual', it is clear that more than one person may be appointed as a guardian.¹⁶² Furthermore an additional guardian or guardians can be appointed at a later date.¹⁶³ There is nothing to prevent an appointment being made by two or more persons jointly.¹⁶⁴

There is no restriction or control on who may be appointed (even another child, it seems, could be appointed)¹⁶⁵ nor are there any means of scrutinising an appointment unless a dispute or issue is subsequently brought before the court.¹⁶⁶ Appointments can be made only in respect of children under the age of 18.¹⁶⁷

Under Sec. 5(5), Children Act 1989, it is sufficient that the appointment 'is made in writing, is dated and is signed by the person making it'. This simple method of appointment is intended to encourage parents (particularly young parents who are notoriously reluctant to make wills) to appoint guardians.¹⁶⁸ Sec. 5(5) does not preclude appointments being made in a will or deed, since clearly such means will satisfy the minimum prescribed requirements.¹⁶⁹ An appointment made by will but not signed by the testator, will be valid if it is signed at the direction of the testator in accordance with Sec. 9, Wills Act 1837.¹⁷⁰ An appointment will also be valid in any other case provided it is signed at the direction of the person making the appointment, in his presence and in the presence of two witnesses who each attest the signature.¹⁷¹ These latter provisions cater for the blind or physically disabled persons who cannot write, but not for those who are absent or mentally incapacitated.¹⁷²

Under Sec. 5(7), the appointment only takes effect immediately upon the death of the appointing person where:

- following that death the child has no parent with parental responsibility¹⁷³ (but it will take effect where a non-parent has responsibility, for example, by having a residence order in their favour); or
- there was a residence order (or existing custody order)¹⁷⁴ in favour of the person making the appointment immediately before his death (unless a

¹⁶¹ Sec. 5(3) and (4), Children Act 1989.

¹⁶² This is implicit in Sec. 6(1) which refers to "an additional guardian".

¹⁶³ Sec. 6(1).

¹⁶⁴ Sec. 5(10).

¹⁶⁵ Although it may seem questionable for one child to have parental responsibility over another, there are occasions when such a power could be useful, see *Re A, J and J (Minors)(Residence and Guardianship Orders)* [1993] Fam Law 568.

¹⁶⁶ *Viz* under Sec. 6, Children Act 1989.

¹⁶⁷ Sec. 105(1).

¹⁶⁸ See the Law Commission's comments at Law Com Report No. 172, para 2.29.

¹⁶⁹ See Lord MACKAY LC's comments at 502 HL Official Report (5th Series), col 1199.

¹⁷⁰ Sec. 5(5)(a).

¹⁷¹ Sec. 5(5)(b).

¹⁷² *Cf* Guidance and Regulations, Vol 1, Court Orders, para 2.18.

¹⁷³ It will, therefore, take effect if the child's unmarried father is still alive, unless he has obtained parental responsibility.

¹⁷⁴ Sch 14, para 8(2).

residence or ‘existing custody order’ was also made in favour of the surviving parent).¹⁷⁵

In this latter instance, the surviving parent has no right to object but he can apply to the court for an order ending the appointment.¹⁷⁶ Where the child does have a parent with parental responsibility, the appointment will take effect only upon the death of that person.¹⁷⁷

For the sake on completion it should be added that the court also has power to appoint an individual to be the child’s guardian. According to Sec. 5(1), Children Act 1989 this power arises if:

- ‘(a) the child has no parent with parental responsibility for him; or
- (b) a residence order has been made with respect to the child in favour of a parent or guardian of his who has died while the order was in force.

Under Sec. 5(2) this power of appointment may be exercised in any family proceedings¹⁷⁸ either upon application or “if the court considers that the order should be made even though no application has been made for it”.

D. THE EXERCISE OF PARENTAL RESPONSIBILITIES

I *Interests of the Child*

35. In exercising parental responsibilities, how are the interests of the child defined in your national legal system?

The overarching principle of English child law is that provided by Sec. 1(1), Children Act 1989, namely

“When any court determines any question with respect to:
the upbringing of the child; or
the administration of the child’s property or the application of any income arising from it,
the child’s welfare shall be the court’s paramount consideration”.

However, this paramountcy principle only applies, if at all, in the course of litigation. It does not, therefore, directly apply¹⁷⁹ to parents or other individuals in the exercise of their parental responsibility insofar as it is not the subject of litigation. As one commentator has put it¹⁸⁰

¹⁷⁵ Sec. 5(9) and Ch. 14, para 8(2).

¹⁷⁶ Sec. 6(7).

¹⁷⁷ Sec. 5(8).

¹⁷⁸ This is widely defined by Sec. 8(3), Children Act 1989 and includes most proceedings under the 1989 Act but also adoption and domestic violence proceedings.

¹⁷⁹ Of course, if the issue does come before the court *then* the conduct of the parental responsibility holder(s) will be judged in the light of the paramountcy principle.

¹⁸⁰ A. BAINHAM, *Children: The Modern Law*, 2004, Jordans, 3rd Ed.

‘It can hardly be argued that parents, in taking family decisions affecting a child, are bound to ignore completely their own interests, the interests of other members of the family and, possibly, outsiders. This would be a wholly undesirable, as well as an unrealistic objective’.

Accordingly, parents are not bound to consider their children’s welfare in deciding, for example, whether to make a career move, to move house or whether to separate or divorce.¹⁸¹

II Joint Parental Responsibilities

36. If parental responsibilities are held jointly by two or more persons, are they held equally?

The general answer to this question is yes where responsibility is held by two or more individuals, it is held equally. This is subject to two qualifications. First, as explained in Q 14, certain individuals, namely those non parents who acquire parental responsibility by means of having a residence order in their favour do not acquire the right to agree to the child’s adoption or to appoint a guardian and clearly those rights are not shared with those of any existing parents with parental responsibility. Secondly, where a local authority acquires parental responsibility upon the making of a care order (see Q 32) then, on the one hand, while the authority does not thereby acquire the right to agree to the child’s adoption or to appoint a guardian or to change the child’s religion, on the other, ¹⁸² if they are satisfied that it is necessary to do so to safeguard or promote the child’s welfare they may determine the extent to which a parent or guardian may meet his parental responsibility for the child.¹⁸³

37. If parental responsibilities holders cannot agree on an issue, how is the dispute resolved? For example does the holder of parental responsibilities have the authority to act alone? In this respect is a distinction made between important decisions and decisions of a daily nature? Does it make any difference if the child is only living with one of the holders of the parental responsibilities?

In cases of disagreement over any issue concerning a child’s upbringing it is always an option to seek a resolution of the dispute before a court (see Q 38). According to Sec. 2(7), Children Act 1989, however, notwithstanding that parental responsibility is shared each person who has it ‘may act alone and without the other (or others) in meeting that responsibility’ except where a statute expressly requires the consent of more than one person in a matter affecting the child. This latter qualification preserves, for example, the embargo imposed by Sec. 1, Child Abduction Act 1984, against one parent taking the child (under the age of 16) outside the United Kingdom without the other’s consent and maintains the need to obtain each parent’s agreement to an adoption order as laid down by Sec. 16, Adoption Act

¹⁸¹ See B. DICKENS, ‘The Modern Function and Limits of Parental Rights’ (1981) 97 *LQR* 462 at 471, who asserts that parental responsibility is not to do positive good but to avoid harm.

¹⁸² Sec. 33(6), Children Act 1989.

¹⁸³ Sec. 33(3)(b) and (4), Children Act 1989.

1976.¹⁸⁴ Another qualification on the power to act independently is, pursuant to Sec. 2(8), a person with parental responsibility is not entitled to act in any way that would be incompatible with a court order. A final qualification is that there are a group of important decisions that ought not to be carried out or arranged by even the one-parent carer in the absence of agreement of those with parental responsibility. According to case-law this group of decisions includes, the child's schooling, changing the child's surname, male circumcision and issues of immunisation.¹⁸⁵

This general ability to act independently was intended to mean not simply that neither parent has a right of veto but also that there is no legal duty upon parents to consult each other since, in the Law Commission's view¹⁸⁶ such a duty was both unworkable and undesirable. It was expressly contemplated that even where a residence order had been granted in one parent's favour, subject to not acting incompatibly with a court order, each parent could still exercise that responsibility without having to consult the other and with neither having a right of veto over the other's action. Referring to the example of child living with one parent and going to a school nearby the Law Commission considered that while it would be incompatible for the other parent to arrange for the child to have his hair done in a way which would exclude him from the school, it would be permissible for that parent to take the child to a sporting occasion over the weekend, no matter how much the parent with whom the child lived might disapprove.¹⁸⁷ According to the Commission the intended independence of each parent was to be seen as part of the general aim of encouraging both parents to feel concerned and responsible for the welfare of the children.¹⁸⁸

On the other hand case-law concerning the granting of a parental responsibility order to unmarried fathers also establish the point that the granting of such an order does not entitle the father to interfere with the day-to-day running of affairs affecting the child at any rate whilst the child is living with another carer.¹⁸⁹

In summary, the position under English law is that where there is more than one holder of parental responsibility then, subject to some restrictions, each can act independently of the other but where the child is living with one of them that does not entitle the non carer to interfere in the day-to-day decision making.

¹⁸⁴ Prospectively Sec. 47(2), Adoption and Children Act 2002.

¹⁸⁵ See respectively, *Re G (A Minor)(Parental Responsibility: Education)* [1994] 2 FLR 964, CA; *Re PC (Change of Surname)* [1997] 2 FLR 230, *Re J (Specific Issue Orders)(Muslim Upbringing and Circumcision)* [2000] 1 FLR 571, and *Re C (Welfare of Child: Immunisation)* [2003] EWCA Civ 1148, [2003] 2 FLR 1095.

¹⁸⁶ Report on Guardianship and Custody, Law Com Report No. 172 (1988) para 2.11.

¹⁸⁷ Report on Guardianship and Custody, Law Com Report No. 172 (1988) para 2.11.

¹⁸⁸ Report on Guardianship and Custody, Law Com Report No. 172 (1988) para 2.10.

¹⁸⁹ See *Re S (a minor)(parental responsibility)* [1995] 3 FCR 564, *Re A (a minor)(parental responsibility)* [1996] 1 FCR 562 and *Re P (A minor)(Parental Responsibility Order)* [1994] 1 FLR 578.

38. If holders of parental responsibilities cannot agree on an issue, can they apply to a competent authority to resolve their dispute? If applicable, specify whether this authority's competence is limited to certain issues e.g. residence or contact.

In cases of dispute over a child's upbringing, holders of parental responsibility can always seek a remedy from the courts.¹⁹⁰ Parents, guardians and those with a residence order in their favour are entitled to apply for any s 8 order (see below) which means that they do not have to seek the leave of the court to bring an action.¹⁹¹

The Sec. 8 orders referred to above are wide ranging and application may be made to (a) determine with whom the child lives (a *residence order*), (b) determine what visiting or other contact arrangements there should be (a *contact order*) and (c) to resolve any other dispute, the example, over the child's education or medical treatment or name (a *prohibited steps order* or a *specific issue order*).

39. To what extent, if at all, may a holder of parental responsibilities act alone if there is more than one holder of parental responsibilities?

According to Sec. 2(7), Children Act 1989, notwithstanding that parental responsibility is shared each person who has it 'may act alone and without the other (or others) in meeting that responsibility' except where a statute expressly requires the consent of more than one person in a matter affecting the child. This latter qualification preserves, for example, the embargo imposed by Sec. 1, Child Abduction Act 1984, against one parent taking the child (under the age of 16) outside the United Kingdom without the other's consent and maintains the need to obtain each parent's agreement to an adoption order as laid down by Sec. 16, Adoption Act 1976.¹⁹² Another qualification on the power to act independently is, pursuant to Sec. 2(8), a person with parental responsibility is not entitled to act in any way that would be incompatible with a court order. A final qualification is that there are a group of important decisions that ought not to be carried out or arranged by even the one-parent carer in the absence of agreement of those with parental responsibility. According to case-law this group of decisions includes, the child's schooling, changing the child's surname, male circumcision and issues of immunisation.¹⁹³

40. Under what circumstances, if at all, may the competent authority permit the residence of the child to be changed within the same country and/or abroad (so called relocation) without the consent of one of the holders of parental responsibilities?

¹⁹⁰ Courts for these purposes means court of any level, viz magistrates' courts, county court or High Court: Sec. 92(7), Children Act 1989.

¹⁹¹ Sec. 10(4), Children Act 1989.

¹⁹² Prospectively Sec. 47(2), Adoption and Children Act 2002.

¹⁹³ See respectively, *Re G (A Minor)(Parental Responsibility: Education)* [1994] 2 FLR 964, CA; *Re PC (Change of Surname)* [1997] 2 FLR 230, *Re J (Specific Issue Orders)(Muslim Upbringing and Circumcision)* [2000] 1 FLR 571, and *Re C (Welfare of Child: Immunisation)* [2003] EWCA Civ 1148, [2003] 2 FLR 1095.

Disputes as to with whom the child should live can be resolved by means of a residence order obtained from the court. In resolving such disputes the court must, pursuant to Sec. 1(1), Children Act 1989, treat the child's welfare as its paramount consideration and applying that principle can grant a residence in favour of one party against the wishes of the other. Before granting any order the court must, pursuant to Sec. 1(5) of the 1989 Act, be satisfied of the benefit to the particular child of any order sought, but in cases of dispute this requirement is normally satisfied. In determining the outcome of a contested residence order application (and indeed of any contested application for a Sec. 8 order) it is incumbent upon the court to apply the so-called statutory check list.¹⁹⁴ This requires the court to take into account the following:

- '(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; and
- (g) the range of powers available to the court under this Act in the proceedings in question'.

Space forbids detailed discussion of the application of the checklist etc. Instead readers are referred to the numerous commentaries on this subject.¹⁹⁵ A residence order only determines with whom the child is to live not *where* the child should live. If it is sought to limit where the child and carer should live it is necessary to seek an order to that effect (either a specific issue or prohibited steps order or, the adding of a condition to a residence order pursuant to Sec. 11(7), Children Act 1989). It is now established that a distinction should be drawn between so-called internal relocation and external relocation. So far as the former is concerned, it is established¹⁹⁶ that it is only in exceptional circumstances that the courts should restrict where a carer and child should live within the United Kingdom. In other words, it is for the person seeking the restriction to convince the court why it is in the child's interests to restrict where the carer and child should live.¹⁹⁷ In contrast,

¹⁹⁴ The checklist is contained in Sec. 1(3), Children Act 1989. The requirement to apply it in contested cases is contained in Sec. 1(4)(a).

¹⁹⁵ See e.g. CRETNEY/MASON/BAILEY-HARRIS, *Principles of Family Law*, 2003, §20-011 *et seq*, HERRING, *Family Law*, 2004, 2nd Ed., p. 440 *et seq* and LOWE/DOUGLAS, *Bromley's Family Law*, 1998, 9th Ed., Ch 12.

¹⁹⁶ See *Re S (a child)(residence order: condition)* [2001] EWCA Civ 847, [2001] 3 FCR 154 and *Re H (Children)(Residence Order: Condition)* [2001] EWCA Civ 1338, [2001] 2 FLR 1277.

¹⁹⁷ For examples see *Re S (a child)(residence order: condition)(No.2)* [2002] EWCA Civ 1795, [2003] 1 FCR 138 – mother of a child suffering from Down's Syndrome with a serious heart condition and respiratory problems and who had frequent contact and a close relationship with her father (from whom the mother was divorced) forbidden to move from Croydon to Cornwall; and *B v B (Residence: Condition Limiting Geographic Area)* [2004] 2 FLR 979 – mother seeking to move to the north of England, which was

in so-called external relocation cases it is established that the burden is on those seeking to relocate abroad to justify doing so.¹⁹⁸ The governing principle is the paramountcy of the child's welfare but the test generally applied¹⁹⁹ is that provided the request is reasonable (*i.e.* reasonably well thought out and planned)²⁰⁰ and bona fide (*i.e.* not motivated by a desire to prevent contact with the other parent)²⁰¹ then leave to remove the child will generally be granted unless it can be shown to be against the particular child's interests.

41. Under what conditions, if at all, may the competent authority decree that the child should, on an alternating basis, reside with both holders of parental responsibilities (e.g. every other month with mother/father)?

It is within the courts' powers to grant what is known as a shared residence order, that is, an order made in favour of two persons who do not live together. Shared care arrangements can take different forms, for example, the child living during term-time with one parent and school holidays with the other or spending weekdays with one and weekends with the other or spending alternative weeks or months with each of the parties. It is now accepted²⁰² that whether or not to make a shared residence order is determined solely according to the child's welfare. It is quite likely to be made in cases where the child has been happily living with each parent so that in effect all the court is doing is confirming the status quo.²⁰³

III Sole Parental Responsibilities

42. Does a parent with sole parental responsibilities have full authority to act alone, or does he/she have a duty to consult:

(a) The other parent

The short answer to this question is that a parent with sole parental responsibility has full authority to act alone in respect of all aspects of parental responsibility (including changing the child's name)²⁰⁴ and is not obliged to consult anyone.

(b) Other persons, bodies or competent authorities?

A parent with sole parental responsibility is not obliged to consult any person, body or competent authority when exercising parental responsibility.

geographically distant from the father, primarily to frustrate her child's contact with him, was forbidden to do so.

¹⁹⁸ See *Re H (Children)(Residence Order: Condition)* [2001] EWCA Civ 1338, [2001] 2 FLR 1277.

¹⁹⁹ See *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1051.

²⁰⁰ See *e.g. Re T (Removal From Jurisdiction)* [1996] 2 FLR 352, CA.

²⁰¹ See *e.g. Tyler v Tyler* [1989] 2 FLR 158, CA.

²⁰² See *D v D (Shared Residence Order)* [2001] 1 FLR 495, CA. At once time such orders were thought exceptional, see *Re H (A Minor)(Shared Residence)* [1994] 1 FLR 717 or at least unusual, see *Re H (Shared Residence: Parental Responsibility)* [1995] 2 FLR 883, but this is no longer the case.

²⁰³ As in *D v D (Shared Residence Order)* [2001] 1 FLR 495. See also *A v A (children: shared residence order)* [2004] EWHC 142 (Fam), [2004] 3 FCR 201. But note *Re F (Shared Residence Order)* [2003] EWCA Civ 592, [2003] 2 FLR 397 where neither findings adverse to one parent nor the fact that the parents were living in separate jurisdictions (*i.e.* Scotland and England) precluded the making of a shared residence order.

²⁰⁴ See *Re P C (Change of Surname)* [1997] 2 FLR 730.

E. CONTACT

43. Having regard to the definition by the Council of Europe (see above), explain the concepts of contact used in your national legal system

The English concept of contact very much accords with that embraced by the Council of Europe both in its White Paper and, more especially, in its 2003 Convention on Contact Concerning Children (ETS 192). According to Sec. 8(1), Children Act 1989 a contact order

‘means an order requiring the person with whom the child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other’.

In general terms contact orders provide for the child to visit or stay with the person named in the order the emphasis thus being on the child rather than parent. Contact orders embrace both physical and non-physical contact and may therefore range from long or short visits to contact by letter or telephone.²⁰⁵ Indirect contact can also be by email or even video recording.²⁰⁶

Orders may provide for the child to have contact with any person (including, where appropriate, a sibling) and more than one contact order may be made in respect of a child. A contact order can be the sole order even between parents and may be appropriate where there is no dispute as to the person with whom the child is to live. Orders can provide for contact to take place at Contact Centres. The role of these Centres has been said²⁰⁷ to be ‘one of the most important developments of the last ten years’. They are useful as a means of providing a temporary venue for supported contact in cases where the parents are unable to provide an alternative. Orders can also provide for contact to take place abroad.²⁰⁸ Contact orders requiring one parent to allow the child to visit the other parent²⁰⁹ will automatically lapse if the parents subsequently live together for a continuous period of more than

²⁰⁵ For examples of contact by post see *Re P (minors)(contact: discretion)* [1999] 1 FCR 566, *A v L (Contact)* [1998] 1 FLR 361 and *Re M (Contact: Conditions)* [1994] 1 FLR 272, each involving letter contact with a father in prison; *Re P (Contact: Indirect Contact)* [1999] 2 FLR 893 indirect contact with a father who had just been released from prison; *Re L (Contact: Transsexual Applicant)* [1995] 2 FLR 438 – indirect contact with a transsexual father; *Re D (Parental Responsibility: IVF Baby)* [2001] EWCA Civ 230, [2001] 1 FLR 972, CA, indirect contact with a man deemed to be the father under the Human Fertilisation and Embryology Act 1990, ss 28(3) and 29(1B). For examples of indirect contact being ordered with violent or abusive parents, see *Re S (Violent Parent: Indirect Contact)* [2000] 1 FLR 481, *Re H (Contact: Domestic Violence)* [1998] 2 FLR 42, CA and *Re M (Sexual Abuse Allegations: Interviewing Techniques)* [1999] 2 FLR 92.

²⁰⁶ See ‘Indirect Contact via Video-tape’ [1997] Fam Law 310, which might be a particularly useful way of re-establishing contact’.

²⁰⁷ See *Making Contact Work* (A Report to the Lord Chancellor by the Advisory Board on Family Law, Children Act Sub-Committee, 2002), Ch 8.

²⁰⁸ *Re F (A Minor)(Access Out Of Jurisdiction)* [1973] Fam 198.

²⁰⁹ Note: if the order is directed against someone other than a parent or if the child is permitted contact with a third party it will not lapse because of the parents’ cohabitation.

six months.²¹⁰ While the child is with a parent on a contact visit that parent may exercise parental responsibility, at any rate with respect to short term matters, without consulting the other provided he does nothing which is incompatible with any existing court order (see Q 37).

44. To what extent, if at all, does the child have a right of contact with:

(a) A parent holding parental responsibilities but not living with the child.

Although the Human Rights Act 1998 directly incorporates into English domestic law the European Convention on Human Rights, and consequently promotes the idea of rights, traditionally English law has tended to eschew developing Family Law in terms of rights and still has a tendency to think and develop in terms of remedies. Hence, although there are cases which talk about a child's "right" of contact with each of his parents²¹¹ the general approach is to consider the issue of denying contact between a child and a parent on an individual case by case basis and according to the particular child's welfare. That said, denying contact between a child and a parent is regarded as a very serious issue. As BUTLER-SLOSS pointed out in *Re R (A Minor)(Contact)*,²¹² the principle of continued contact is underlined by Art. 9(1), United Nations Convention on the Rights of the Child 1989 and endorsed in the CA 1989. Furthermore as the European Court of Human Rights held in *Glaser v UK*,²¹³ Art. 8, Human Rights Convention 'includes a right for a parent to have measures taken with a view to his or her being reunited with the child and an obligation of national authorities to take measures' both in public and private law proceedings. However, the court also acknowledged that the obligation of national authorities to take measures to facilitate contact by a non-custodial parent after divorce was not absolute and that where it might appear to threaten the child's interests or interfere with his or her Art. 8 rights, it was for those authorities 'to strike a fair balance between them'.

The general approach, established by *Re H (Minors)(Access)*,²¹⁴ is for the judge to ask himself whether there are cogent reasons why the child should be denied contact with a parent. It has since been said to be helpful to cast the relevant principles into the framework of the welfare checklist, namely, to consider whether the fundamental need of very child to have an enduring relationship with both parents is outweighed by the depth of harm that, might thereby be caused.²¹⁵

(b) A parent not holding parental responsibilities

In principle the same approach applies with regard to contact regardless of whether the parents are married to each other and regardless of whether the father has parental responsibility.²¹⁶ In other words, as the answer to Q 44a shows, it is

²¹⁰ Sec. 11(6), Children Act 1989.

²¹¹ See *M v M (Child: Access)* [1973] 2 All ER 81. See also Sec. 34, Children Act 1989 which provides: "Where a child is in the care of a local authority, the authority shall (subject to the provisions of this section) allow the child reasonable contact with [inter alia] his parents'.

²¹² [1993] 2 FLR 762 at 767.

²¹³ [2001] 1 FLR 148 at 168.

²¹⁴ [1992] 1 FLR 148 at 152C, per BALCOMBE LJ, CA.

²¹⁵ *Re M (Contact)* [1995] 1 FLR 274, CA.

²¹⁶ See also Sec. 34, Children Act 1989, under which notwithstanding a care order, there is a presumption of reasonable contact with the parents (See 'Indirect Contact via Video-

necessary to establish why in the child's interests some form of contact should not be granted. Nevertheless in practice it might be easier to persuade a court to deny contact to an unmarried father particularly where he does not have parental responsibility.²¹⁷

(c) Persons other than parents (e.g. grandparents, step-parents, siblings etc..)?

There is no presumption of contact either with step-parents²¹⁸ or with grandparents²¹⁹ and consequently in these cases it will have to be shown to be in the child's interests to preserve contact.

There is no direct authority on the position of contact between siblings though provided there is a meaningful relationship between them the court would be reluctant to cut off contact between them, though ultimately the issue will be determined according to the children's welfare.²²⁰

45. Is the right to have contact referred to in Q43 also a right and/or a duty of the parent or the other person's concerned.

Although it would be wrong to place too much emphasis on "rights" in this context (see Q 44a), the general approach of English law is to judge the issue of contact very much from the child's perspective. Nevertheless the de facto position is that the predisposition to preserve contact between a child and each of his parents even where it is disputed can equally be seen as preserving the parents' position. Furthermore, outside the context of disputes, as has been discussed (Q 26b), parental responsibility certainly embraces the notion of the "right" to have continued contact with the child.

As stated in Q 2b whether a parent has an obligation to maintain contact with the child can be debated. In theory there is clearly a case for saying there is such an obligation but as a matter of practicality it would be difficult to enforce a contact order against an unwilling parent and no authority exists for saying that such orders should be made.

46. To what extent, if at all, are the parents free to make contact arrangements? If they can, are these arrangements subject to scrutiny by a competent authority?

The general policy of English law is to encourage parents to reach agreement themselves on their child(ren)'s upbringing and this is no less true of making contact arrangements. This policy is underscored by Sec. 1(5) which enjoins the court not to make any order unless it thinks in doing so it will benefit the child.

tape' [1997] Fam Law 310, which might be a particularly useful way of re-establishing contact'), no distinction is made between those with or without parental responsibility.

²¹⁷ See e.g. the comment at [1994] Fam Law 484.

²¹⁸ *Re H (A Minor)(Contact)* [1994] 2 FLR 776. Cf *Re C (A Minor)(Access)* [1992] 1 FLR 309, CA.

²¹⁹ *Re A (Section 8 Order: Grandparent Application)* [1995] 2 FLR 153, CA. See also *Re W (Contact: Application By Grandparent)* [1997] 1 FLR 793 and *Re S (Contact: Appeal)* [2001] Fam Law 505.

²²⁰ But note *Re F (Contact: Child in Care)* [1995] 1 FLR 510 which shows that in the public law context at least the applicant's child's interests might not always be paramount.

The extent to which the court has a power of scrutiny over any agreed contact arrangements varies according to the context in which they are made. Outside the context of litigation, for example on the parent's separation, there is, in the absence of any challenge, no power of scrutiny. Even where issues over a child's upbringing are litigated then outside the context of divorce, unless the issue of contact is specifically raised, the court will not necessarily be concerned to look at the contact arrangements. In the context of divorce, however, there is a general power of scrutiny, at any rate, to consider the arrangements as to the child's upbringing, pursuant to Sec. 41, Matrimonial Causes Act 1973 (see Q 30).

47. Can a competent authority exclude, limit or subject to conditions, the exercise of contact? If so, which criteria are decisive?

Yes, the court can exclude, limit or subject to conditions the contact between a child and a particular parent or other individual. The general governing principle is the child's welfare, which by Sec. 1(1), Children Act 1989 is the court's paramount consideration.

As discussed in Q 43, contact can be limited to indirect contact, for example by post,²²¹ or it can be supervised. So far as prohibiting contact altogether is concerned, this will be based on what is determined to be best for the child. Examples of where contact has been denied altogether include

- *Re C (Contact: No Order for Contact)*²²² in which indirect contact was refused with a father who had been absent over a three year period and against whom the child had an extreme adverse reaction;
- *Re F (minors)(denial of contact)*,²²³ in which contact with a transsexual father was refused primarily because of the children's (boys aged 12 and 9) own wishes;
- *Re H (children)(contact order (No 2))*,²²⁴ where, contrary to the children's wishes, no contact order was made with a father who was suffering from Huntingdon's disease and who had in the past threatened to kill himself

²²¹ See for examples of contact by post see *Re P (minors)(contact: discretion)* [1999] 1 FCR 566, *A v L (Contact)* [1998] 1 FLR 361 and *Re M (Contact: Conditions)* [1994] 1 FLR 272, each involving letter contact with a father in prison; *Re P (Contact: Indirect Contact)* [1999] 2 FLR 893 indirect contact with a father who had just been released from prison; *Re L (Contact: Transsexual Applicant)* [1995] 2 FLR 438 – indirect contact with a transsexual father; *Re D (Parental Responsibility: IVF Baby)* [2001] EWCA Civ 230, [2001] 1 FLR 972, CA, indirect contact with a man deemed to be the father under Sec. 28(3) and 29(1B), Human Fertilisation and Embryology Act 1990. For examples of indirect contact being ordered with violent or abusive parents, see *Re S (Violent Parent: Indirect Contact)* [2000] 1 FLR 481, *Re H (Contact: Domestic Violence)* [1998] 2 FLR 42, CA and *Re M (Sexual Abuse Allegations: Interviewing Techniques)* [1999] 2 FLR 92.

²²² [2002] 2 FLR 723.

²²³ [1993] 2 FLR 677, CA.

²²⁴ [2000] 3 FCR 385. This was the rehearing of the case remitted by the Court of Appeal reported as *Re H (children)(contact order)* 2[001] 1 FCR 49. Cf *Re M (Contact: Parental Responsibility: McKenzie Friend)* [1999] 1 FLR 75, CA, in which previously successful contact was overshadowed by the mother's fear of the father, though in this case, indirect contact was still granted.

(and unknown to them) the children, it being found that the mother was at risk of suffering a nervous breakdown if a contact order was made;

- *Re T (a minor)(parental responsibility: contact)*,²²⁵ in which an unmarried father was denied contact because of his violence towards the mother and his blatant disregard for the child's welfare;
- *Re C and V (Parental Responsibility and Contact)*,²²⁶ in which the child had severe medical problems requiring constant and informed medical attention which the mother, but not the father, was able to give, and
- *Re D (a minor)(contact: mother's hostility)*²²⁷ and *Re H (a minor)(parental responsibility)*²²⁸ in which respectively the mother's and the stepfather's implacable hostility towards contact with an unmarried father was held to justify prohibiting contact.

48. What if any, are the consequences on parental responsibilities, if the holder of parental responsibilities with whom the child is living, disregards the child's right to contact with:

(a) A parent

There are no consequences, as such, on the parental responsibility of a holder of parental responsibility with whom the child is living, if he or she disregards a child's "right" of contact with a parent but the issue can be taken to court and if it is then denied contrary to a court order then action can be taken to punish that person for contempt of court (that can be imprisonment and/or a fine) – see Q 58. An alternative sanction is to transfer residence.²²⁹

The disobedience or frustration of a contact order is a particularly key issue of contemporary importance in English law and has been the subject of much litigation²³⁰ and comment and the Government have promised to strengthen the sanctions.²³¹

(b) Other persons

One key difference between parents and other persons is that unlike the former, the latter have no prima claim of contact. The position is different if they have a contact order in their favour. If a holder of parental responsibility disobeys or seeks to frustrate a contact order they are liable to the sanctions for contempt of court (principally imprisonment or a fine – see Q 58) but notwithstanding that contempt, there is no direct consequence, as such, on the position with regard to parental responsibility.

²²⁵ [1993] 2 FLR 450, CA.

²²⁶ [1998] 1 FLR 392, CA.

²²⁷ [1993] 1 FLR 484. See also *Re B (a minor)(contact: stepfather's opposition)*.

²²⁸ [1997] 2 FLR 579, CA, in which the dismissal of the father's contact application was justified because of the child's stepfather's threat to reject the child and the mother.

²²⁹ See e.g. *V v V (Contact: Implacable Hostility)* [2004] EWHC 1215 (Fam), [2004] 2 FLR 851.

²³⁰ See the excellent analysis by BRACEWELL J in *V v V (Contact: Implacable Hostility)* 2004] EWHC 1215 (Fam) and by MUNBY J in *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam), [2004] 1 FLR 1226.

²³¹ See the Government Green Paper: *Parental Separation: Children's Needs and Parental Responsibilities* Cm 6273 (July 2004), discussed at Q58.

F. DELEGATION OF PARENTAL RESPONSIBILITIES

49. To what extent, if at all, may the holder(s) of parental responsibilities delegate its exercise?

Whilst preserving the previous position that a person with parental responsibility may not surrender or transfer that responsibility to another person save by a court order, Sec. 2(9), Children Act 1989 permits those with parental responsibility to delegate some or all of their responsibility to one or more persons acting on their behalf. As the Department of Health's Guidance and Regulations states:²³²

'Informal arrangements for the delegation of parental responsibility are covered by Sec. 2(9), which provides that a person with parental responsibility cannot surrender or transfer any part of their responsibility to another, but may arrange for some or all of it to be met by one or more persons acting on his behalf'.

Such delegation can be made to another person who already has parental responsibility²³³ or to those who have not, such as schools²³⁴ or holiday camps. This provision is primarily intended to encourage parents (regardless of whether or not they are separated) to agree among themselves on what they believe to be the best arrangements for their children. Sec. 2(9) does not, however, make such arrangements legally binding. Consequently, they can be revoked or changed at will. Furthermore, as Sec. 2(11) provides, delegation will not absolve a person with parental responsibility from any liability for failure on his part to discharge his responsibilities to the child.²³⁵ While the child is with a parent on a contact visit that parent may exercise parental responsibility, at any rate with respect to short term matters, without consulting with the other provided he does nothing which is incompatible with any existing court order (see Q 37).

50. To what extent, if at all, may a person not holding parental responsibilities apply to a competent authority for a delegation of parental responsibilities?

Under English law it is not possible to apply to a court or any other body for a delegation of parental responsibility. However, it is possible both to challenge a parent's exercise of responsibility and to seek authority to exercise at least some specific aspect of parental responsibility by seeking a Sec. 8 order under the Children Act. Individuals who are neither parents or guardians and who do not have a residence order in their favour, nor have provided a home for the child for three years, and who do not have the consent of every person with parental responsibility, will need the leave of the court to seek a Sec. 8 order.²³⁶

²³² 'Introduction to the Children Act 1989', HMSO 1989, para 2.10.

²³³ Sec. 2(10).

²³⁴ But note the embargo on inflicting corporal punishment in schools, see Q8(d).

²³⁵ For example, not to neglect, abandon or cause or procure a child under the age of 16 to be assaulted or ill-treated *etc.*, under Sec. 1 and 17, Children and Young Persons Act 1933.

²³⁶ Sec. 10(2) and (4), Children Act 1989.

G. DISCHARGE OF PARENTAL RESPONSIBILITIES

51. Under what circumstances, if at all, should the competent authorities in your legal system discharge the holder(s) of his/her/their parental responsibilities for reasons such as maltreatment, negligence or abuse of the child, mental illness of the holder of parental responsibilities, etc? To what extent, if at all, should the competent authority take into account a parent's violent behaviour towards the other parent?

Insofar as parental responsibility is automatically conferred at the time of the child's birth, that is in the case of each married parent (see Q 15) and the unmarried mother (see Q 20), it is not possible for the court to divest that responsibility, though in any family proceedings it is possible to limit the exercise of that responsibility by means of making a Sec. 8 order in favour of someone else.

In contrast, no matter how an unmarried father acquires parental responsibility (for which see Q 22b) nor prospectively that acquired by step-parents (see Q 27a) or civil partners (see Q 27b) by reason of a parental responsibility agreement or order the court does have power, upon application, to end that responsibility.²³⁷ In such applications the court is bound to treat the child's welfare as its paramount consideration²³⁸ and in so doing will certainly take account of any violence of the defendant either towards the parent or child.²³⁹

52. Who, in the circumstances referred to in Q51, has the right or the duty to request the discharge of parental responsibilities?

Insofar as it is possible to seek to end or discharge parental responsibility (on which see Q 51), then the following persons can apply, namely:

any person who has parental responsibility for the child (this will include the father himself) or,
with leave of the court, the child himself.²⁴⁰

In the latter case, the court may grant leave only if it is satisfied that the child has sufficient understanding to make the proposed application.²⁴¹ The court may not end a Sec. 4 order while a residence order in favour of the unmarried father

²³⁷ Sec. 4(3), Children Act 1989.

²³⁸ *Viz* Sec. 1(1), Children Act 1989 applies, see *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048.

²³⁹ See *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048, in which responsibility conferred by a parental responsibility agreement with the mother was terminated because the father had inflicted appalling injuries upon the child. Parental responsibility orders have been refused in the first place because, for example, the father's violence towards the mother, see e.g. *Re T (Parental Responsibility: Contact)* [1993] 2 FLR 450 as well as because of violence towards the child, see *Re L (A Child)(Contact: Domestic Violence)* [2001] Fam 260 and *Re H (Parental Responsibility)* [1998] 1 FLR 855, CA and there is no reason to suppose that such considerations are equally relevant to ending parental responsibility.

²⁴⁰ Sec. 4(3), Children Act 1989.

²⁴¹ Sec. 4(4).

remains in force.²⁴² While the above mentioned persons are empowered to seek an order terminating parental responsibility, they are not under a duty to do so.

53. To what extent, if at all, are rights of contact permitted between the child and the previous holder of parental responsibilities after the latter has been discharged of his/her parental responsibilities?

Unless the father (or prospectively the step-parent or registered partner) has a separate contact order in his favour, once his parental responsibility has been brought to an end in accordance with Sec. 4(3), Children Act 1989 (see Q 52) then all his rights/responsibilities including any “right” to have contact comes to an end. Where he does have a separate contact order then in theory the ending of parental responsibility does not ipso facto end the contact order but it seems inconceivable that the court would not also terminate the contact order.²⁴³

54. To what extent, if at all, can the previous holder(s) of parental responsibilities, who has been discharged of his/her responsibilities, regain the?

There is no specific embargo against an unmarried father (or prospectively a step-parent or registered partner) from seeking to regain parental responsibility after it has been terminated. However, given that a termination of responsibility is a drastic order likely to be made only in extreme circumstances, it seems unlikely that a court would be prepared subsequently to grant a parental responsibility order, but it is possible for the parental responsibility agreement with the mother to be made.

H. PROCEDURAL RULES

55. Who is the competent authority to decide disputes concerning parental responsibilities, questions of residence of the child or contact? Who is the competent authority to carry out an investigation relating to the circumstances of the child in a dispute on parental responsibility, residence or contact?

In English law there are three levels of court with original jurisdiction to hear family matters, namely, (in descending hierarchal order) the High Court (Family Division), the county court (principally divorce county courts and family hearing centres) and the magistrates’ courts (family proceedings court). No other competent authority can authoritatively adjudicate disputes concerning parental responsibility *etc.*

Each of the above mentioned courts can make Sec. 8 orders under the Children Act 1989²⁴⁴ which, as discussed in Q 38, cover all aspects of parental responsibility including residence and contact. In so-called freestanding applications, that is,

²⁴² Sec. 12(4).

²⁴³ In Sec. 4(3) proceedings, the court would have power under its own motion to terminate the contact order pursuant to Sec. 10(1)(b), Children Act 1989.

²⁴⁴ ‘Court’ for the purposes of the 1989 means the High Court, a county court or a magistrates’ court – Sec. 92(7).

proceedings solely concerning the child's upbringing, there is in general freedom of choice as to the level of court in which to bring proceedings. There are, however, some instances where in the private law context it is established that free-standing proceedings should be begun in the High Court. These include, most relevantly for the purposes of this report, applications by children for leave to apply for Sec. 8 orders,²⁴⁵ applications to sterilise the child,²⁴⁶ cases in which a blood test is being disputed²⁴⁷ and cases in which HIV tests for children are being sought.²⁴⁸ In addition there are provisions for transferring applications from one level of court to another.²⁴⁹

Where the issues relating to children are raised in the context of divorce proceedings between the parents (which will commonly be the case) then the matter must be brought in the first instance in the divorce county court,²⁵⁰ though again there is provision to transfer the case to a higher level.²⁵¹

Once legal proceedings are in train the responsibility for deciding what, if any, investigation needs to be made into the child's circumstances rests with the court. By Sec. 7, Children Act 1989 a court considering any question with respect to a child may ask either a CAFCASS officer²⁵² or a local authority "to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report". Before a welfare report is ordered consideration should be given to the court's power to refer the parties to mediation.²⁵³ The court is not bound to order welfare reports in every case and in any event should not do so where there is no live issue under the Children Act. Even where there is a live issue if delay would prejudice the child's welfare, the court will have to balance the advantages to be gained from a report against the disadvantage of the time it takes to obtain it.²⁵⁴ There are national standards of practice to be followed by a children and family reporter.²⁵⁵

²⁴⁵ *Practice Direction (applications by children: leave)* [1993] 1 All ER 820 (but only the application for leave and not necessarily the substantive application).

²⁴⁶ *Re HG (Specific Issue Order: Procedure)* [1993] 587, *Practice Note (Official Solicitor: Sterilisation)* [1996] 2 FLR 111.

²⁴⁷ *Re F (A Minor)(Blood Tests: Parental Rights)* [1993] Fam 314, CA.

²⁴⁸ *Re HIV Tests* [1994] 2 FLR 116.

²⁴⁹ See Art. 8-12, Children (Allocation of Proceedings) Order 1991 (SI 1991 11677).

²⁵⁰ Sec. 33, Matrimonial and Family Proceedings Act 1984.

²⁵¹ Sec. 38, Matrimonial and Family Proceedings Act 1984.

²⁵² *I.e.* the Children and Family Court and Advisory Service which, as from April 2001, has been responsible for providing what were formerly known as welfare officers. These officers are now known as children and family reporters.

²⁵³ *District Judge's Direction, Children: Conciliation* [2004] 1 FLR 974 by which all s 8 order applications are to be listed in the so-called conciliation list operative nationwide since 22 March 2004 (see Q 57).

²⁵⁴ *Re H (Minors)(Welfare Reports)* [1990] 2 FLR 172, CA.

²⁵⁵ First published in Children Act Advisory Committee's annual report for 1993/4 and republished in the Committee's *Handbook of Best Practice in Children Act Cases* (1997).

It is normal practice for welfare reports to contain recommendations but these are not binding on the courts although if a court departs from a recommendation it is incumbent upon the judge to state the reasons for so doing.²⁵⁶

56. Under what conditions, if any, may a legally effective decision or agreement on parental responsibilities, the child's residence or contact, be reviewed by a competent authority? Is it, e.g. required that the circumstances have changed after the decision or agreement was made and/or that a certain period of time has passed since the decision or agreement?

Formal parental responsibility agreements (see Q 22b) can be brought to an end upon a specific application²⁵⁷ to that effect made to a court pursuant to Sec. 4(3), Children Act 1989 (see Q 51). Informal agreements made in respect of the exercise of parental responsibility with respect to a child's upbringing can subsequently always be challenged in court proceedings.

All court orders made under the Children Act 1989 (including Sec. 8 orders, and parental responsibility orders made under Sec. 4) can, regardless of the level of court that made them, be appealed.²⁵⁸ Sec. 8 orders can also, save where a specific embargo is imposed under Sec. 91(14) of the Children Act,²⁵⁹ always be subsequently varied or brought to an end.²⁶⁰ There are no formal requirements as to when a variation can be sought but clearly to justify a variation there has to have been a change of circumstances.

57. What alternative disputes solving mechanisms, if any, e.g. mediation or counselling, are offered in your legal system? Are such mechanisms also available at the stage of enforcement of a decision/agreement concerning parental responsibilities, the child's residence or contact?

English law has long recognised the importance of alternative dispute resolution mechanisms in helping to solve family problems. Such mechanisms are initially referred to as conciliation schemes but have now become known as mediation. A clear lead for having an alternative mechanism to the court for helping couples deal with the consequences of divorce was given by the Finer Report on One Parent Families,²⁶¹ which reported in 1974. Following this report and an even earlier

²⁵⁶ See e.g. *Re V (Residence: Review)* [1995] 2 FLR 1010, CA and *Re L (Residence: Justices Reasons)* [1995] 2 FLR 445.

²⁵⁷ Applications can be made by *any* person who has parental responsibility (including, therefore, the father) or, with leave of the court, the child: Sec. 4(3).

²⁵⁸ Sec. 94, Children Act 1989.

²⁵⁹ Under this provision, a court can direct that "no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court". Such orders should not be readily granted since they represent a substantial interference with a citizen's right of unrestricted access to the court's, which must be weighed in the balance against the child's welfare, see the leading case of *Re P (A Minor)(Residence Order: Child's Welfare)* [2000] Fam 15 at 37-38.

²⁶⁰ See Sec. 8(2), Children Act 1989.

²⁶¹ Cmnd 5629.

*Practice Direction*²⁶² which encouraged the courts to refer a case to the court welfare officer (now known as the children and family reporter) when it was considered that conciliation might be helpful, a scheme to incorporate this approach was launched in the Bristol County Court in 1977. Bristol also pioneered the very first out of court conciliation service in 1978. Both types of schemes were subsequently adopted in other parts of the country.

More recently in 1997 the Children Act Advisory Committee published a *Handbook of Best Practice in Children Act Cases* on which they advised²⁶³ that consideration should first be given to ‘whether the dispute between the parties could be resolved in any way other than litigation. Most areas have a mediation service which would be able to attempt to deal with disputes by way of negotiation and agreement. *There is rarely anything to be lost, and normally much to be gained, by mediation*’. (Emphasis added).

Building on a scheme first introduced in the Principal Registry in London, there is now (that is from March 2004) a nation wide scheme²⁶⁴ under which *all* applications for a Sec. 8 order (including variations) under the Children Act have to be listed in a conciliation list unless specifically removed by the district judge concerned. As stated in para. 4.2 of the *Direction*:

‘It is essential that both parties and any legal advisers having conduct of the case attend the appointment. The nature of the application and matters in dispute will be outlined to the district judge and the CAFCASS officer. The conciliation appointment will be conducted with a view to the parties reaching an agreement, and if appropriate, discussion away from the court room will be facilitated. Conciliation is a legally privileged occasion. All the discussions will be privileged and will not be disclosed on any subsequent hearing (other than at a further conciliation appointment) or upon any later application’.

Children aged 9 or over are also generally expected to attend the conciliation hearing. Where agreement is reached, the district judge will make such orders, if any, as are appropriate. If no agreement is reached then directions are given for an early hearing and disposal of the application. Neither the district judge nor the CAFCASS officer involved in the conciliation process can be involved in any subsequent substantive hearing of the dispute. It has been stressed²⁶⁵ that mediation/conciliation is vital at all stages of the court process including an appeal.

A recent Government Green Paper, *Parental Separation: Children’s Needs and Parental Responsibilities*²⁶⁶ proposes even more emphasis to be placed on mediation in children cases, including referral to information meetings *etc.*²⁶⁷

²⁶² [1971] 1 All ER 894.

²⁶³ Children Act Advisory Committee, June 1997, para 38.

²⁶⁴ *District Judge’s Direction - Children: Conciliation* [2004] 1 FLR 974. For further details see Brasse G ‘Conciliation is Working’ [2004] Fam Law 722.

²⁶⁵ Reference to be supplied.

²⁶⁶ Cm 6273 (July 2004).

²⁶⁷ For an outline of the proposals see “Contact Paper” [2004] Fam Law 630 at 632. See also Q 58.

58. To what extent, if at all, is an order or an agreement on parental responsibilities, the child's residence or contact enforceable and in practice enforced? Describe the system of enforcement followed in your national legal system. Under what conditions, if at all, may enforcement be refused?

The only binding agreement that can be made in this context is a formal parental responsibility agreement made under Sec. 4, Children Act 1989 (see Q 22b) which confers parental responsibility on the unmarried father (and prospectively step-parents and registered partners). That can only be undone by a formal court order under Sec. 4(3). As agreements cannot otherwise be bindingly made, their formal enforcement is not an issue under English law.

Court orders are enforceable either under Sec. 34, Family Law Act 1986 or more generally by the imposition of penal sanctions. Under Sec. 34 where a person is required by a Sec. 8 order to give up a child to another person (this will most commonly apply to the enforcement of a residence order) and the court that made the order is satisfied that the child has not been given up, it may make a 'search and recovery' order authorising an officer of the court or a constable to take charge of the child and deliver him to that other person.

So far as penal sanctions are concerned, these are provided by the law of contempt in the case of the High Court and county court and by Sec. 63(3), Magistrates' Courts Act 1980 in the case of the magistrates' courts.

So far as the High Court and county court are concerned the breaking of an order constitutes a contempt of court for which the contemnor may be fined (there are no prescribed maximum limits) imprisoned (up to a maximum of two years)²⁶⁸ or have their assets frozen (this remedy is known as sequestration). Magistrates have more circumscribed powers under Sec. 63(3) of the 1980 Act limited to a fine not exceeding £50 for every day in default up to a maximum of £5,000 and imprisonment for a maximum of two months.

It is recognised that in the family context that none of these penal sanctions are entirely appropriate and in any event should only be resorted to as a last resort.²⁶⁹ Nevertheless in an important ruling in *A v N (Committal: Refusal of Contact)*²⁷⁰ it was held that in considering whether to commit a mother for her persistent and flagrant breach of a contact order with the father, the child's welfare was a material but *not*

²⁶⁸ Sec. 14(1), Contempt of Court Act 1981.

²⁶⁹ See *Ansah v Ansah* [1977] Fam 138 at 143, CA and *Hale v Turner* [2000] 1 WLR 2377 at para. 25, CA. An alternative to imposing a penal penalty for breaching a contact order would be to transfer the residence order to another person but this must be in the child's interests. See e.g. *V v V (Contact: Implacability Hostility)* [2004] EWHC 1215 (Fam), [2004] 72 FLR 851 where a transfer was ordered. Note also *Re S (Uncooperative Mother)* [2004] EWCA Civ 597, [2004] 2 FLR 710 – adverse inferences can be drawn from a mother's refusal to re-engage in a process of family therapy.

²⁷⁰ [1997] 1 FLR 533, CA.

the paramount consideration. In that case the mother was committed to prison for 42 days.²⁷¹

Instances of committal to prison for disobeying a contact order are relatively unusual and there is a general recognition that the enforcement powers particularly of contact orders are often inadequate.²⁷² The Government Green Paper on *Parental Separation: Children's Needs and Parental Responsibilities*²⁷³ proposes to extend the court's enforcement power inter alia to allow a referral of a defaulting parent to information meetings, meetings with a counsellor or to parenting programmes; to impose community based orders and the award of financial compensation from one parent to another (for example where the cost of a holiday has been lost).

59. To what extent, if at all, are children heard when a competent authority decides upon parental responsibilities, the child's residence or contact, e.g. upon a dispute, when scrutinising an agreement, when appoint or discharging holder(s) of parental responsibilities, upon enforcement of a decision or agreement?

Outside the context of court proceedings the child has no right to be heard. However, where the issue is contested and a Sec. 8 order under the Children Act 1989 (*viz* a residence order, contact order, specific issue order or a prohibited steps order) is being sought then, pursuant to Sec. 1(3)(a) of the Children Act 1989, it is mandatory for the court to have regard to

'the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)'.

In any event, according to Sec. 7 of the 1989 Act the court when considering any question with respect to a child under the 1989 Act ask either CAFCASS²⁷⁴ officer, or a local authority to report to the court "on such matters relating to the welfare of that child as are required to be dealt with in the report". The officers concerned do not represent the child but merely report on the circumstances.

Although it is established that judges have the power to interview children in private²⁷⁵ the general view seems to be that it is a practice that should not be readily undertaken. In any event it is a matter entirely at the judge's discretion.²⁷⁶ If

²⁷¹ See also *F v F (Contact: Committal)* [1998] 2 FLR 237, CA – committal order for 7 days suspended for six months.

²⁷² See this trenchant criticism by MUNBY J in *Re D (Intractable Contact Dispute: Hostility)* [2004] EWHC 727 (Fam), [2004] 1 FLR 1226, in which the judge said that the father had been let down by the system. See also the valuable analysis by Bracewell J in *V v V (Contact: Implacable Hostility)* [2004] EWHC 1215 (Fam), [2004] 2 FLR 851, in which the judge called for legislation to strengthen the sanctions that can be imposed for breaching court orders.

²⁷³ Cm 6273 (July 2004).

²⁷⁴ *I.e.* the Children and Family Court and Advisory Service which, as from April 2001, has been responsible for providing what were formerly known as welfare officers and who are now known as children and family reporters.

²⁷⁵ See *e.g.* *Re W (Child: Contact)* [1994] 1 FLR 843, and *Re M (A Minor)(Justices' Discretion)* [1993] 2 FLR 706.

²⁷⁶ See *Re R (A Minor)(Residence: Religion)* [1993] 2 FLR 163, CA.

a judge does interview a child in private he cannot promise confidentiality and for that very reason should be cautious in agreeing to see the child in such circumstances.²⁷⁷

So far as children being directly heard by the court is concerned the normal rule is that a child may begin and prosecute family proceedings only by a next friend and may defend proceedings only by a guardian ad litem.²⁷⁸ However, in any family proceedings where it appears to the court that the child should be separately represented,²⁷⁹ the child can be made a party to the proceedings. In such a case the court will normally refer the matter to CAFCASS Legal.

As mentioned in answer to Q 2d and Q 8f, a child may bring or defend proceedings him or herself where he has obtained leave of the court to do so, or where a solicitor considers that the child is able, having regard to his understanding to give instructions in relation to the proceedings and has accepted instructions from the child to act for him or her.²⁸⁰ Before granting leave to the child the court has to be satisfied that the child has sufficient understanding to participate as a party to the particular proceedings.²⁸¹

60. How will the child be heard (e.g. directly by the competent authority, a specially appointed expert or social worker)?

Unless the child is made a party to proceedings or unless the child is interviewed in privately by the judge (which, as the answer to Q 59 points out, is generally discouraged) the child is not directly heard by the court at all. Instead his views will be reported to the court in a welfare report ordered under Sec. 7, Children Act 1989. In other words those views are conveyed to the court by a CAFCASS officer (the Children and Family Reporter) or by a social worker on behalf of the local authority. It is also possible that a child's views could be reported upon to the court by any expert appointed to act in the case.

If the child is made a party to the proceedings²⁸² then, unless he is of sufficient understanding to give instructions when he or she can appear in person, he will be represented by a guardian ad litem.

61. How, if at all, is the child legally represented in disputes concerning:

(a) Parental responsibilities

Unless the child is made party to proceedings, he or she will not be legally represented in proceedings concerning disputes over the exercise of parental responsibility. If the child is made a party to proceedings then he or she will be

²⁷⁷ *B v B (Minors)(Interviews and Listing Arrangements)* [1994] 2 FLR 489, 496, CA.

²⁷⁸ Rule 9.2, Family Proceedings Rules 1991.

²⁷⁹ See the leading case, *Re A (Contact: Separate Representation)* [2001] 1 FLR 715.

²⁸⁰ Rule, 9.2A, Family Proceedings Rules 1991, and *Practice Direction* [1993] 1 FLR 668. See also *Re T (A Minor)(Child Representation)* [1994] Fam 49, CA.

²⁸¹ See e.g. *Re S (A Minor)(Representation)* [1993] 2 FLR 437, CA.

²⁸² The power to do this is conferred by Rule 9.2, Family Proceedings Rules 1991 and see *Re A (Contact: Separate Representation)* [2001] 1 FLR 715.

represented by a guardian *ad litem*, unless of sufficient understanding to instruct a solicitor him or herself, when proceedings can be brought in his or her own right.²⁸³

(b) The child's residence

Unless the child is made party to proceedings, he or she will not be legally represented in proceedings concerning disputes over residence. If the child is made a party to proceedings then he or she will be represented by a guardian *ad litem*, unless of sufficient understanding to instruct a solicitor him or herself, when proceedings can be brought in his or her own right.²⁸⁴

(c) Contact

Unless the child is made party to proceedings, he or she will not be legally represented in proceedings concerning disputes over contact. If the child is made a party to proceedings then he or she will be represented by a guardian *ad litem*, unless of sufficient understanding to instruct a solicitor him or herself, when proceedings can be brought in his or her own right.²⁸⁵

62. What relevance is given in your national legal system to the age and maturity of the child in respect of Q59-61?

Clearly, the older the child the more relevant and persuasive are his or her views and wishes. Nevertheless, in all cases it is the court's responsibility to evaluate those views and wishes in the light of all the circumstances. As BUTLER-SLOSS LJ put it in *Re P (minors)(wardship: care and control)*²⁸⁶

“How far the wishes of children should be a determinative factor in their future placement must of course vary on the particular facts of each case. Those views must be considered and may, but not necessarily must, carry more weight as the children grow older”.

Other key differences according to the age and maturity of the child are that it can determine (a) whether or not a child should be given leave to bring proceedings for a Sec. 8 order²⁸⁷ and (b) whether or not a child can bring proceedings in his own right or via a guardian *ad litem* (see Q 61).

²⁸³ Rule 9.2A, Family Proceedings Rules 1991, and *Re T (A Minor)(Child Representation)* [1994] Fam 49, CA. But note even if a child is found competent leave might not always be granted see e.g. *Re H (Residence Order: Child's Application For Leave)* [2000] 1 FLR 789 in which leave was refused because it was felt that the child's views could be adequately represented in court by the father.

²⁸⁴ Rule 9.2A, Family Proceedings Rules 1991, and *Re T (A Minor)(Child Representation)* [1994] Fam 49, CA. But note even if a child is found competent leave might not always be granted see e.g. *Re H (Residence Order: Child's Application For Leave)* [2000] 1 FLR 789 in which leave was refused because it was felt that the child's views could be adequately represented in court by the father.

²⁸⁵ Rule 9.2A, Family Proceedings Rules 1991, and *Re T (A Minor)(Child Representation)* [1994] Fam 49, CA. But note even if a child is found competent leave might not always be granted see e.g. *Re H (Residence Order: Child's Application For Leave)* [2000] 1 FLR 789 in which leave was refused because it was felt that the child's views could be adequately represented in court by the father.

²⁸⁶ [1992] 2 FCR 681 at 687.

²⁸⁷ See Sec. 10(8), Children Act 1989 and *Re S (A Minor)(Representation)* [1993] 2 FLR 437, CA.