

Children [Sark] Law 2015

A Short Guide

Introduction

This guide is intended to provide an easy introduction and reference to the main points of the draft Children (Sark) Law 2015 affecting children and their families.

The guide is a brief summary only. It should not be taken as an authoritative statement of the law. For more detailed understanding, it may be necessary to take legal advice, and/or read the laws themselves, together with the accompanying court rules, regulations and ordinances.

Copies of the law can be found on the Sark Government website
www.gov.sark.gg

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Brief guidelines to the draft law

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Background to the new laws

The Guernsey and Alderney Children Law was introduced in 2009 and in Sark we have been looking carefully at the Guernsey Law, working to develop a law that is uniquely suited to Sark and in line with the Guernsey Law.

A Policy Development Team was created to work with Guernsey Law Officers to draft a Children Law for Sark. The first part of this, dealing with parental responsibility issues is now complete and we are asking the community for their comments before the law is taken for approval to Chief Pleas.

Philosophy

The welfare of children is at the heart of the new children laws. The law also emphasises the responsibilities of parents and others caring for children. Of course welfare must be subject to considerations of public interest and safety and the laws recognise this.

Our children are our most important investment for the future, and we collectively owe it to them and to ourselves, to help them fulfil their potential, and grow up, as far as is possible, to be happy and healthy members of society, willing and able to make a positive contribution to the community in which they live.

Glossary

Below are some definitions of significant words and phrases used in the new children laws. Not included here are words/phrases that are defined in the relevant section of this guide.

Key definitions

Child is a person under 18.

Father is the genetic father of a child (whether or not he has parental responsibility) OR an adoptive father
[“father” will also include some men who are not the genetic father, but who are nonetheless treated under the law as the father of a child in the circumstances set out in Part VI of the law which deals with the parentage where a child is born following assisted reproduction or surrogacy].

Mother is the woman who gave birth to a child OR an adoptive mother.

Parent is a mother or father who has parental responsibility. [For details of who has parental responsibility and how they get it, see Part II of the children law].

Some other definitions

This is not an exhaustive list; it includes some words and phrases mentioned, but not defined in this guide.

Assisted reproduction means the use of medical techniques or treatment to enhance fertility and includes, for example, artificial insemination with donated sperm

Development means physical, intellectual, emotional, social or behavioural development.

Disability means physical or mental impairment, which has a significant adverse effect on the ability to carry out normal day to day activities.

Family home is any house or other building used as a family residence and in which the child normally lives with a person who cares for the child, (but not as part of their employment).

Guardian is a person appointed under Part III to fulfil the role of a parent who has died.

Medical treatment must have been recommended by a registered medical practitioner and includes any examination or investigation.

Person includes not only an individual, but also a body or agency such as departments of the States, committees of Chief Pleas, a court.

Regulations are like ordinances in that they fill in detail left out of the main law. Regulations need to be laid before Chief Pleas.

Rules of court are yet another way of filling in detail, which is only outlined in a law. They are made by the Royal Court or Sark's Seneschal's Court. They generally deal with how the law will operate in practice in the courts.

The Children (Sark) Law

Part I – Preliminary (sections 1-3)

Section 1 has key definitions, which are included in the glossary of this guide. Principle of these is that:

“child means a person under the age of 18..”

This follows the international definition in the UN Convention on the Rights of the Child.

Section 2 contains the child welfare principles, which must be considered by any public authority undertaking any function under the law. Most important of these (section 2(1)(b) is that:

“...the child's welfare is the paramount consideration.”

The following principles also apply (section 2(2));

- (a) children are usually best brought up within their own family and community; where this is not possible –
- (b) children should normally maintain contact with their family and community;
- (c) there should be no compulsory intervention in a child's life, unless necessary to provide care, protection, guidance or control;
- (d) any delay in making a decision about a child is likely to be detrimental to welfare;
- (e) irrespective of age, development or ability a child should have the opportunity to express their wishes, feelings and views;
- (f) from the age of 12 a child is presumed capable of forming a considered view, unless the contrary is shown;
- (g) so far as practicable, children in the care of Chief Pleas are entitled to the same level of parenting as that provided by reasonable and competent parents;
- (h) in any case involving criminal activity (or risk of), the main purpose of any intervention is to be prevention of crime;
- (i) parents and others responsible for a child's welfare should consult, co-operate and resolve matters by agreement, with formal proceedings as a last resort;
- (j) it is normally in a child's best interests to have ongoing contact with both parents and it is the responsibility of those parents and public authorities, eg a court, to promote contact;
- (k) in making decisions, there should be no discrimination on grounds of gender, marital status, ethnic or cultural origin, age, disability or sexual orientation.

When taking these principles into account, a public authority must also consider the child welfare checklist in section 2. These matters include:

- child's wishes and feelings;
- child's specific characteristics, including age and gender, cultural, ethnic, linguistic and religious background;
- harm the child has suffered or is at risk of suffering;
- physical, emotional and educational needs;
- how capable any parent (or other person caring for or with responsibility for the child) is of meeting the child's needs;
- the importance, and likely effect, of contact with the child's parents, wider family and significant others;
- the effect, or likely effect of a change in circumstances, including removal from Sark.

In exceptional circumstances any of the matters in the principles or checklist may be overridden if the child's welfare requires it, but they must all nevertheless be considered.

NB: The welfare principles have been consolidated from British and international legislation and case law.

Part II – Parental Responsibility (sections 4 -10)

What is parental responsibility? (section 4)

At its core, parental responsibility (sometimes abbreviated to "p.r.") is a set of duties towards children:

- safeguarding and promoting health, education, development and welfare;
- providing care, direction, guidance and control;
- providing a home, either directly or indirectly;
- maintaining regular contact if not living with the child;
- acting as legal representative;
- safeguarding and dealing with any property;
- determining all aspects of upbringing.

The duties are to be performed as far as is practicable, in the interests of the child and taking account of the child's own evolving capacity.

Those with parental responsibility have a right to exercise it without interference from others unless permitted by law.

Who has parental responsibility? (sections 5-7)

The woman who gives birth to a child and the father, if married to the mother at the time of the birth, will always have parental responsibility. They can only lose their parental responsibility if the child is adopted (or in some very exceptional cases of assisted reproduction).

Fathers who were married and then divorce, continue to have parental responsibility and this applies even if the divorce occurred prior to the law coming into force.

Adoptive parents have parental responsibility in place of birth parents.

Unmarried fathers may acquire parental responsibility as follows:

- by marrying the mother;
- being registered on the birth certificate (BUT ONLY if registered after the date the law comes into effect);
- entering into an agreement with the mother in the prescribed form;
- if the court makes a parental responsibility order or residence order in his favour.

Other individuals get parental responsibility:

- if they have a residence order or parental responsibility order;
- a guardian appointed under Section 12.
- Any person in whose favour a parental responsibility order is made.

How long does parental responsibility last? (section 10)

- Until 18, or the child's marriage before that.
- Any court order that ends parental responsibility.
- Where parental responsibility is an integral part of a court order (e.g. a community parenting, secure accommodation, or residence order), when that order comes to an end.

Sharing parental responsibility (section 8)

One of the law's basic principles is that those responsible for a child should consult and co-operate with one another. This may not always be necessary or possible, especially on a day-to-day basis. Section 8 therefore provides that it is essential for all those with parental responsibility to be in agreement on the following issues:

- naming the child, or changing the name;
- removing the child from the jurisdiction of Sark;
- choosing the child's school or religion;
- consenting to marriage.

Where it is not possible to obtain consent, on these or any other issues, the court can be asked to make a decision.

Some other issues on parental responsibility (sections 9)

- Parental responsibility may be delegated, but it cannot be surrendered or transferred;
- any person aged 16 or over who does not have parental responsibility but has the child in their care, has the right and the duty, to take whatever action may be necessary to safeguard the child (e.g. this would apply to a babysitter who needed to get medical attention, but could not contact the parents or others with parental responsibility);
- having, or not having, parental responsibility, does not affect any other duty a person might have towards a child (e.g. to pay maintenance).

Part III – Guardians appointed to fulfil the role of a parent in place of a parent who has died (sections 11 - 15)

'Guardian' is a term much used in Guernsey laws and has a variety of meanings. In this law, it specifically means a person who has been appointed to stand in the shoes of a parent who has died.

How are guardians appointed?

The appointment must be in writing by a parent or other guardian. Usually it will be made by will (section 11). Similar rules apply to cancelling the appointment of a guardian, although divorce or judicial separation may automatically cancel some guardian appointments.

The appointment only takes effect when the appointer has died and then only if the guardian accepts the appointment AND one of the following happens:

- i. the surviving parent consents or dies;
- ii. the court confirms the appointment; or
- iii. the appointer had a residence order in their favour immediately before they died.

The court also has wide powers to appoint or dismiss a guardian, including attaching conditions to any appointment. These powers are quite technical, will probably be used extremely rarely and so are not dealt with in detail here.

Guardians and parental responsibility

Guardians have parental responsibility, which they must exercise in accordance with the law.

Part IV – Orders with respect to children in family and other proceedings (sections 16 -20)

The section 16 orders are:

Residence order covers arrangements settling with whom a child lives and gives that individual (or individuals) parental responsibility.

Contact order requires the individual(s) the child lives with to allow the child to have contact with someone else. That contact may be direct or indirect (e.g. emails, phone calls).

Specific issue order deals with a particular question that has arisen. They are usually made when those with parental responsibility cannot agree on a particular matter, such as change of name.

Prohibited steps order prevents a specific action, such as removing a child from the jurisdiction.

Parental responsibility order gives an individual parental responsibility

Who gets section 16 orders, and how?

Anyone can be given a section 16 order if it is in the child's interests. The following have an absolute right to apply:

- anyone with parental responsibility;
- the child's father (even if he doesn't have parental responsibility).

The following have a right to apply for a residence order, contact order, or parental responsibility order:

- a person the child has lived with, within the preceding three months, for a total of one year over the past two years;
- someone with written consent of all those with parental responsibility (including the Court of the Seneschal where the child is subject to certain public law orders).

People not mentioned above can still apply, but must first get the court's consent; e.g. grandparents.

Some other points about section 16 orders

- Children can apply for orders about themselves (with court permission).
- More than one person can have a residence order, in which case they share residence.

How long do orders last?

Unless orders are varied or discharged or they specifically state otherwise, orders come to an end when:

- i. the child is 18 or marries;
- ii. an adoption order is made;
- iii. in the case of a residence order made to one parent, both parents live together for more than six months;
- iv. a similar provision to (iii) applies to contact orders if the parents resume living together more than six months.

Part V – Jurisdiction of Royal Court, Power to Vary Trusts and Appeals (sections 21 - 26)

Many of the provision of this part are quite technical and it is not necessary to go into detail here.

Part VI – Sections 27 – 37 clarify the issue of parentage in cases where a child is born as a result of egg or sperm donation.

Issues related to children born as a result of sperm donation including

- Where the woman is married at the time of the procedure
- Children born from sperm in other circumstances
- Children born from donated sperm following the death of the man providing the sperm
- Where the sperm donor is not to be treated as father
- Where the person is or is not to be treated as father
- Registration of such births

Part VII – General and Miscellaneous Provisions

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