



NEW ZEALAND
LAW SOCIETY

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WHAT HAPPENS TO YOUR CHILDREN WHEN YOU PART?

When parents have difficulties in their relationship, it affects the children. Your lawyer, local Relationship Services, Family Court Coordinator or Citizens Advice Bureau can put you in touch with counselling services. If your problems are such that you decide to part, this guide explains what happens to your children and what help is available.

SOME SUGGESTIONS

If you separate, it will help your children if they feel secure and loved by both of you. A lot depends on your attitude.

During and after separation it is normal to feel upset – and possibly angry and resentful. But whatever your feelings about your former partner, your children need your love and care.

You should each be careful not to undermine their relationship with the other parent. It is important that children realise they are allowed (in fact, usually encouraged) to have a relationship with each parent despite any differences you may have.

Here are some suggestions:

- *Do* tell your children honestly but simply what is happening, allowing them to express their feelings.
- *Don't* encourage your children to take sides in the disagreement.
- *Do* encourage your children to love and respect you both. This is basic to their security and sense of identity and self-worth.
- *Don't* criticise the other parent, or make comments such as “Daddy doesn't love you any

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more” or “Mummy doesn’t want you”.

- *Do* tell your children clearly that both of you will continue to love them and want to have regular contact.
- *Don’t* strain your children’s loyalties by expecting them to choose between you.
- *Do* realise that there are bound to be difficulties. At the beginning, your children may be upset or difficult to handle after contact with the other parent. Time and patience will be needed for family life to settle into a new pattern.
- *Do* avoid angry disagreements and threatening conversations in front of the children.
- *Do* make clear arrangements about picking up and returning your children, and stick to the arrangements. Don’t leave it to your children to make the arrangements or encourage them to become involved in making those arrangements.
- *Don’t* go into each other’s homes when collecting or returning your children unless you’re invited in.
- *Do* recognise that it is up to your children and your former partner how they spend their time together. Avoid being inquisitive or critical.

TELLING YOUR CHILDREN

Don’t hide the truth from your children.

They are likely to feel confused if they are told that “Mummy has gone away for a while” or that “Daddy and I still love each other but we don’t want to live together”.

It is better to say: “Your father/mother and I have agreed not to live together. We both love you, and you will be able to spend lots of time with each of us.”

You will have to decide how and when to tell your children that you are going to separate. If you are together when you tell them, be polite to each other and do not blame the other parent for the separation: your children may then feel more secure and able to deal with the situation.

FAMILY VIOLENCE

Some of the information in this pamphlet will not be appropriate in cases where children are at risk of harm from one of their parents. If there has been physical abuse, sexual abuse, psychological abuse, financial or economic abuse, harassment, or if you fear for your safety or the safety of your children, talk to your lawyer about protection orders.

You and your children do not have to live with any of these forms of violence. However, you should not misuse these orders to get back at a partner who has hurt you.

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If a court is satisfied that a parent, step-parent or caregiver has physically or sexually abused their partner or a child of the family, the court will only allow that person to have contact that the court is satisfied is safe for the child. This may mean that contact has to be supervised.

In an emergency, the police may issue a Safety Order, which enables a police officer to remove a violent person from the household.

This is a temporary safeguard for up to five days. For more information about protection orders, refer to our *Family Violence* guide.

BE AN INVOLVED PARENT

If you don't have the day-to-day care of the children, you may begin to feel like an outsider unless you stay involved in your children's lives.

If you're an "outsider parent", you may lose interest and stop having regular contact with your children.

Joanna was aware of this danger and was keen to keep her husband Craig involved. She told him of school activities and encouraged him to go along. She made sure their children showed him their school reports. Craig took their children to music lessons and sports activities on Saturdays. Joanna reminded their children of their dad's birthday. Joanna was pleased when their children asked Craig to mend their bicycles or help with their maths homework. If their children were away from school sick, Joanna would ask Craig to stay with them because it was easier for him to take time off work.

LEGAL ISSUES

Listed below are some of the legal issues involved in caring for children whose parents do not live together.

While there are references to decisions that the Family Court can make, this should be a last resort. By far the best option is for the parents to come to their own agreement about what is best for their children. If at all possible, you should try to set aside any anger and resentment so that you can make good decisions for your children without needing to involve the court.

(1) GUARDIANSHIP

Guardianship is the term used to describe the bundle of rights and responsibilities of a parent. Every child in New Zealand has at least one natural guardian (the mother).

Most children in New Zealand have two guardians (the other guardian being the father).

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However, not every father is a guardian. A father will be a guardian of a child if he was married to or in a civil union with the mother at any time during the period beginning with the conception of the child and ending with the birth of the child, or was living with the mother as a de facto partner at any time during that period. Even a father who is not automatically a guardian of the child can be appointed a guardian by the court or by agreement with the mother (which agreement must be ratified by the court).

If you are not sure whether you are a guardian or not, ask your lawyer. Even if guardians separate or divorce, they retain the rights and responsibilities of guardianship. It is very unusual for a guardian to be deprived of that status. A guardian who does not have day-to-day care of a child may feel excluded.

However, a guardian has the legal right to participate in, and have a say in, all important decisions about the child's upbringing including such matters as education, health, where they live (residence), which religion they follow and other significant issues to do with their welfare. If guardians cannot agree on these matters, there is support available to help you do so without going to Court. Asking the Family Court to sort guardianship matters is a last resort. Instead, there are out-of-court services to help you to reach agreement.

These out-of-court services are:

Parenting through Separation – this is a **free** parenting information programme about how to help your children adapt to separation. The programme can be done in one four hour session or two two-hour sessions. You can attend a separate one from your ex-partner.

Family Dispute Resolution – this is a process where an independent, approved person (known as an FDR Provider) will work with the parties to help to define the matters in dispute, discuss the issues constructively, and try to reach agreement on them. The FDR Provider is focused on helping to achieve agreements that are best for the child. They may also involve other family members such as grandparents, or the whanau.

Preparatory Counselling – the FDR Provider may arrange individual or joint counselling sessions if he or she thinks that may help you prepare for FDR. The counselling is not for the purpose of resolving the dispute itself or reconciling your relationship.

Government Funding – some parties will be eligible for FDR funding. The funding will cover the FDR process as well as any counselling the FDR provider arranges and some legal advice from a lawyer.

For more information about the out-of-court services refer to our guide *What happens when your relationship breaks up* or visit the website www.justice.govt.nz/family-justice

If you cannot reach agreement at FDR, you can apply to the Court for a Judge's decision. More information about going to Court is described further on in this guide.

(2) CARE OF CHILDREN

If you decide to live in separate households, the question arises as to which parent the

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children will usually live with. This used to be referred to as one parent having “custody” while the other had “access”.

However, under the Care of Children Act 2004, parenting orders now determine care arrangements for children. A parenting order can be made for both parents to share in the “day-to-day care” of their children in a way that best suits the needs of those children or for one to have the children the majority of the time.

If you can't agree about sharing the care of the children, discussion with a counsellor may be a first step to break the deadlock and help you reach an agreement. If agreement cannot be reached through counselling or by completing Parenting Through Separation you will need to engage in FDR. If you cannot reach agreement through FDR, you can apply to the Court for a Judge's decision. See the information about going to Court further on in this guide.

The starting point in making any parenting decision should be your children: What would be best for them?

If you accept that your children love and need both of you and that it is important that both of you have a place in your children's lives, it is usually possible to work out some practical arrangement that will let both of you have a fair share of the fun, work and worry of parenting, and to reach agreement on the important issues together.

There are many different arrangements for the care of the children. Try not to listen to others who may tell you that their solution is the best one. You need to work out an arrangement that suits the needs of your children.

In the Smith family, Lisa cares for the two children during the week. On Friday, Jason picks them up after school and takes them to his flat for the weekend, dropping them back at school on Monday morning. Every third weekend, the children stay with Lisa. School holidays and festive occasions are shared.

Aroha, who is a schoolteacher, moved to a job in Auckland after she and Eru separated. She agreed that Eru, who lived in Whangarei, should have the primary care of their children aged 12, 11 and 9. On the first weekend of each month, the children travel to Auckland and stay with Aroha. On the third weekend, Aroha travels to Whangarei, stays with a friend and sees the children on Saturday and Sunday. The children spend most of the school holidays with Aroha in Auckland.

These parents have made sure that each has an important part to play in their children's lives.

(3) CONTACT WITH CHILDREN

In some cases, a parenting order is made for one parent to have the day-to-day care, with the other parent having specified contact. This used to be called “access”.

Contact can take a number of forms from actual physical contact to telephone, emails

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or letters. It is usually best if the family can work out an arrangement that best suits the needs of the children.

Unless it is shown to be harmful to the children, the parent who does not have primary care will nearly always be granted contact. If the parents cannot agree on contact arrangements, they will need to engage in the out-of-court services outlined above. If agreement is not reached through the out-of-court processes, the parties will have to apply to the Family Court to decide the days and times of contact.

If there are safety issues, the Family Court may be called upon to make decisions. In this case, the contact may be limited to supervised contact or restricted to non-physical contact (telephone, emails, letters). Going to court should be a last resort. If you both have a positive attitude, sharing the care of the children in a way that is appropriate to your family's situation can work well.

Sadly, some parents use changeovers to fight old battles and settle old scores. Here are some of the things to avoid:

Hand grenade: Your children are primed to cause trouble in your partner's household.

The spoiler: You spend a lot on gifts and expensive outings for the children during their time with you. Your partner, who has to scrimp on a tight budget, sees this as bribery.

Secret agent: Your children are encouraged to act as spies in the "enemy camp", gathering information you can use to embarrass your ex-partner.

Tug of war: You try to win your children's sympathy by criticising or blaming your partner or your partner's friends and family.

Foot in the door: You use changeovers as a way to get into your partner's household to carry on the battle or beg for the two of you to get back together.

White rabbit: You often arrive late for contact visits, disappointing your children and causing friction; or you return the children late.

Disappearing parent: Almost all children want and need to see both parents. If you do not keep up contact with your children, they may turn away from you – children often feel seriously let down by a parent who does not seem to make any effort to see them.

If you use your time with the children in any of these ways, your children may withdraw emotionally from one or both of you. Contact periods become stressful for both parents and, most of all, for the children. For care arrangements to work well, the move from one household to the other should go smoothly and calmly.

Michelle found caring for their pre-schooler and two other children on a benefit a real strain. When the children visited their father she began to worry about all the things that might happen. She soon realised that this was silly and she decided to enjoy the time she had to herself.

If the children said they didn't want to go to their father's, she cheerfully told them they

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would enjoy it when they got there – and they did. Although Michelle felt angry that her husband could afford to run a car, she realised he was able to give their children opportunities that she could not provide. She began to look forward to having time on her own.

(4) MOVING AWAY

What happens if the parent the children live with primarily wants to move elsewhere in New Zealand or overseas?

By far the best option is for both parents to try to agree on the issue. Residence is a guardianship issue. If both parents are guardians, then, if possible, they should decide together about where any children live.

If the guardians can't agree through assistance from the out-of-court services, they can apply to the Family Court to resolve the matter. It doesn't matter where the parent who has day-to-day care of the children wants to live, the principles are the same.

The court will consider many factors about the child's life and needs, including schooling, extended family relationships, involvement in the current local community, cultural factors, how the move will impact on the other parent's ability to maintain contact, and opportunities offered in the new community.

The court is more likely to let older children move as their relationships are more established and therefore less likely to be damaged than a younger child's. If a parent proposes moving a child without the other parent's agreement, the other parent can seek an order from the court to restrict the removal of the child.

Moves overseas may be able to be reversed by an application to the court under the Hague Convention, which is an international agreement to stop children being removed from their home countries without the consent of both parents. However, not all countries are part of the Hague Convention so in some cases it will not be of assistance.

Holidays: Normally one parent would advise the other if they were planning to take the child out of town on holiday, and it would be normal to seek the other parent's agreement if that involved a trip out of New Zealand.

GOING TO COURT

Where you are not able to reach agreement about guardianship, care and contact matters using the out-of-court services, you can apply to the court to resolve the matter for you. To do this, you need to apply for either guardianship directions or a Parenting Order (for care and contact disputes).

Recent changes to the family justice system means that there are now three clearly defined tracks for cases: simple, standard, and without notice (urgent). You and your ex-partner may be represented by lawyers for some parts of the process. Generally, your children

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will not appear in court. In some cases they may be represented by a Lawyer for the Child if the Court has concerns for the safety or well-being of the child **and** considers an appointment necessary. You will give evidence in your case. Reports from a psychologist and other experts are sometimes given to the Court. You may be asked to contribute to the cost of these reports and the costs of Lawyer for Child.

For more information about the In-court processes please refer to the website www.justice.govt.nz/family-justice

The law states clearly that the first and most important consideration is the welfare and best interests of your children, and says that there is no presumption that either men or women make the best caregivers.

Also, there is no presumption in favour of equal sharing. In deciding what is best for your children, the judge will want to know your children's views. A lot of thought and care go into decisions about the care of children. Often the court has the difficult task of choosing between two good and loving parents to decide with whom the children are to live and how often the children will have contact with the other parent.

In the past, Family Court hearings of cases involving disputes over children were not open to the public. Now accredited media representatives may be present at a hearing.

However, they will be restricted as to what they can report. In particular, they will not be able to publish anything that could identify anyone involved in the hearing without the judge's permission. With the court's permission, you may have support people attend the hearing with you.

CHILD SUPPORT

Whoever has the primary care of the children, both of you will have ongoing responsibility for their financial support. The Child Support Agency of the Inland Revenue Department administers a child support scheme. If the parent who has the day-to-day care is not on a welfare benefit, it is open to you to agree between yourselves how much the other parent will contribute towards the children's support.

The Child Support Agency does not have to be involved and usually the best solution is for parents to work out their own agreement. However, you can apply to the Child Support Agency if:

- you want the Child Support Agency to administer your agreement; or
- you cannot agree between yourselves about what to pay; or
- the parent who does not have day-to-day care stops paying the agreed amount to the other parent.

Separation and divorce may end a relationship but they don't end your roles and responsibilities as parents. It is important for your children's future happiness and adjustment that both of you continue to play a vital part in their lives. Your children should

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be able to feel that both of you love them even though you can't live happily with each other. A good arrangement will recognise the important role that each of you has to play in your children's future. The joys of parenthood can be shared, along with the work and responsibilities.

The Child Support Agency will collect payments from the liable parent and pay them to the other parent. If you are the parent who has primary or majority care and you are on a Domestic Purposes Benefit or other similar benefit, you must apply to the Child Support Agency.

In this case, the Government keeps the child support payments it collects from the other parent to help pay for the benefit. If the amount exceeds the DPB you receive, you are entitled to the surplus.

In making its assessment, the Child Support Agency uses a formula that takes into account your partner's income and circumstances, such as whom else they have to support.

Child support has to be paid until the child:

- turns 19, or
- gets married, or
- becomes financially independent, or
- starts living with the parent paying child support.

If either of you disagrees with the assessment, you can get it reviewed through the Child Support Agency (see the pamphlet *Child Support Administrative Reviews* which is freely available from the Inland Revenue Department). After a review if you still wish to have the assessment altered, you can apply to a Family Court for a "departure order".

HOW A LAWYER CAN HELP

Lawyers deal with many personal, family, business and property matters and transactions.

No one else has the training and experience to advise you on matters relating to the law. If your lawyer can't help you with a particular matter, he or she will refer you to another specialist.

Seeing a lawyer before a problem gets too big can save you anxiety and money. Lawyers must follow certain standards of professional behaviour as set out in their rules of conduct and client care.

When you instruct a lawyer, he or she must provide you with certain information, as outlined in our guide *Seeing a lawyer – what can you expect?*

This includes informing you up front about the basis on which fees will be charged, and how and when they are to be paid. The fee, which must be fair and reasonable, will take

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into account the time taken and the lawyer's skill, specialised knowledge and experience. It may also depend on the importance, urgency and complexity of the matter.

There could also be other costs to pay, such as court fees. You should discuss with your lawyer how you will pay for the work and advise if you don't want to spend more than a certain sum without the lawyer checking with you.

A lawyer is required to tell you if you might be entitled to legal aid. The guide *Seeing lawyer – what can you expect?* also outlines how you can help control your legal costs and get best value from your lawyer.

Choose your own lawyer for independent advice. You do not have to use the same lawyer as your partner or anyone else involved in the same legal matter. In fact, sometimes you must each get independent legal advice. Lawyers must have a practising certificate issued by the New Zealand Law Society.

You can call the Law Society on (04) 472 7837 or email registry@lawsociety.org.nz to see if the person you plan to consult holds a current practising certificate. You can also check this on the Register of Lawyers which is accessible through the website www.lawsociety.org.nz

OTHER INFORMATION

The Ministry of Justice publishes a range of pamphlets in various languages in the family law area – see the website www.justice.govt.nz/family-justice/about-us/documents/publications/brochure-and-pamphlets

IF YOU DON'T HAVE A LAWYER

- ask friends or relatives to recommend one;
- look in the Yellow Pages under “lawyers” or “barristers and solicitors”;
- inquire at a Citizens Advice Bureau or Community Law Centre;

CHECK THESE WEBSITES

www.lawsociety.org.nz/for-the-community/find-lawyer-and-organisation

www.familylaw.org.nz/public/find-a-lawyer

To the best of the New Zealand Law Society's knowledge, the information in this pamphlet is true and accurate as at 1 July 2014. However, the Law Society assumes no liability for any losses suffered by any person relying directly or indirectly on information in this pamphlet. It is recommended that readers consult a lawyer before acting on this information.

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