

## The Children and Families Bill A Briefing from Resolution

### About Resolution

Resolution is an association of 6,500 family lawyers, mediators, collaborative practitioners and other family professionals, committed to a constructive, non-adversarial approach to family law and the resolution of family disputes. Resolution members adhere to a Code of Practice which encourages solutions that take into account the needs of the whole family, and the best interests of any children in particular. Our members seek to solve problems outside of court whenever possible, through negotiation, mediation, collaborative law and now arbitration. Resolution also campaigns for improvements to family law and the family justice system.

### Resolution and the Children and Families Bill – some headline points

- Resolution is concerned that separating couples are potentially uncertain from the outset about the purpose of **mediation information and assessment meetings**. It should be clearer from the name of the meeting that the purpose is to provide information on all alternatives to courts, as mediation is not the only way to resolve family disputes.
- Although the proposed move to child arrangements orders should assist in focusing parents on effective co-parenting and making parenting time arrangements in the interests of their children, Resolution remains concerned about how the **proposed statutory presumption** that both parents should be involved with a child's upbringing after they have separated will be perceived by separating parents.
- The Bill introduces a statutory **26 week time limit for completing care cases**. We agree that making decisions – and communicating final decisions to the child – without delay and within 26 weeks will be in the interests of most children. The government needs to ensure, however, that there is continued emphasis on the needs of the child rather than simply imposing time limits, and that there are appropriate resources made available to help meet this target.
- Resolution believes Part 2 of the Bill on family justice presents some missed opportunities. In particular, a move to a simplified divorce process must, in our view, be accompanied by legislative change on the grounds for divorce so that it is no longer fault-based. Otherwise, conflict and distress will continue to be the default position for those going through the divorce process.

We set out below more detail on our position in relation to these points.

### Options for dealing with family matters

- Clause 10 rightly states that the purpose of family mediation information and assessment meetings is to provide information about mediation and ways in which disputes may be resolved other than by the court, and the suitability of any of those. It is unfortunate that the title of the information and assessment meetings continues to refer to family mediation only rather than all family dispute resolution options. Assessment and Information Meetings, or "AIMs", would be a better title. This would better describe the purpose of such meetings, and make clearer to those who assume or feel that their dispute is unsuitable for mediation that there may be other options to help them settle their matter and avoid making an unnecessary application to the court.

### Parental involvement

- Resolution welcomes the Bill removing references to shared parenting, the term previously mooted, which can in itself give the impression that the child's time should be equally split between both parents on separation. The Bill does require the court to presume, in considering certain private law applications, that a child's welfare will be furthered by the involvement of each of the child's parents in the child's life, unless it can be demonstrated otherwise.

- There is nothing wrong with the principles behind this. Resolution's view is that, where it is safe to do so, **it is almost always in the best interests of children to have a relationship with and retain involvement with both their parents**. This has always been at the heart of the advice that Resolution family lawyers provide: our Code of Practice requires members to encourage parents to put the best interests of their children first, and the advice given can help parents avoid unnecessary visits to the courts.
- However, considering the needs of the child can be incredibly challenging for parents who are, inevitably, going through a **difficult, highly emotionally-charged time**, perhaps without the benefit of legal advice. There is a real danger that the amendment to section 1 of the Children Act 1989 as drafted could cause misunderstanding when parents are making their own agreements, or build false hope among separated parents of unrealistic legal outcomes – particularly for those where there is already an imbalance of power or understanding about what is in the child's best interests.

### Child Arrangements Orders

- Resolution supports the introduction of child arrangements orders to replace residence and contact orders under section 8 of the Children Act 1989. We believe that it is right for the orders available, including the name of the order, to be clearly focused on the child. A move to child arrangements orders, encompassing the practical arrangements for children in private law, should support the objective of encouraging the involvement of both parents in the child's life after separation.
- We appreciate there are concerns about replacing the current concepts of residence and contact, which in reality will only be relevant to the minority of parents who do not make their own arrangements, with the equivalent of the current orders. However, residence and contact are concepts related to parenting time, and inevitably become emotive labels, inherently implying a winner and a loser. Removing these labels will help many children as part of a wider and sustained effort to change attitudes and culture; and will reflect the advice our members already provide to parents. Matters are often easier to resolve if discussions or negotiations are about co-parenting and parenting time in the interests of the child. Otherwise some cases have been known to fight around the label when there is in fact agreement on parenting time and the arrangements for the child. Where the issue of parenting time is disputed, a child arrangements order should be able to deal with that.
- However, the provisions of the new orders will need to be sufficiently precise and clear to ensure both understanding and enforceability, including across other jurisdictions. Resolution will be looking at these provisions in more detail as the Bill progresses through Parliament.

### Time limit for care cases

- There is a risk that Clause 14 will result in a greater focus on meeting the 26 week time limit than on the needs of the child. Certain measures will have to be in place to ensure cases are completed without delay, whilst still acting in the child's interests. In our members' view, the system is not yet ready to support this time limit in the majority of cases. For example, we remain concerned about the provision of necessary expert evidence within a timescale allowing for completion of the case within 26 weeks, including the need for a workable, consistent and speedy system for the authorising of publicly funded experts' fees so that necessary expert evidence can proceed.
- Judicial continuity and effective first hearings – facilitated by local authority pre-proceedings preparation and the active involvement of Cafcass from the outset- will also be key to timetabling of cases and early identification of the issues.
- We are concerned that the Bill appears to require cases to be brought back to court every 8 weeks to permit another 8 week extension, even where the court knows that it will not be possible to complete the case in 8 weeks and this will be inconsistent with the needs of the child. The Bill should require cases to be completed without delay and within 26 weeks, **but give power to the judge to case manage matters outside of that timeframe in order to resolve the proceedings**

**justly and in the child's best interest.** At the very least, the guidance set out in Clause 14(7) should refer to extensions of the time limit in the interests of children.

### Experts

- Resolution would prefer to see reference in Clause 13 to the positive reasons for obtaining expert evidence in children proceedings, rather than focusing on factors or reasons not to obtain evidence. There should be a positive duty for the court to consider at an early stage whether expert evidence is necessary to assist it in considering and making final decisions in relation to the child's welfare, applying the criteria in subsection 7 as part of the judge's case management powers. This would also avoid the risk of a litigant producing expert evidence at the last minute and without leave; or parties realising at a late stage that expert evidence is required, both of which can cause delays.

### Divorce

- Resolution has no objection to the repeal of provisions of Part 2 of the Family Law Act 1996, which have not yet come into force, **but regrets that the introduction of no fault divorce – a core part of the Act - will be lost.** Resolution supports the retention of the underlying principles of Part 1 and proposes a new, more conciliatory divorce procedure to remove the apportionment of blame from the legal process for the benefit of couples and their children. It is to be noted that at no stage was the principle of no fault divorce said to be the problem in relation to the then government's decision to abandon Part 2 in 2001. Nearly twenty years later, it is not raised as a concern by this government in the Explanatory Notes accompanying the Bill.
- A fault-based divorce system is out of step with many other jurisdictions, and is contrary to the government's objective of diverting parties away from conflict, enabling them to focus on making arrangements for the future that put the interests of any children first, with minimal involvement of the courts. With the removal of most divorce work from the scope of legal aid, many parties will not have the benefit of explanation and advice from family lawyers. Without this advice, subsequent discussions focus on the reasons for divorce which are almost always irrelevant to the financial and children's issues that need to be resolved.

### Resolution's recommendations

Resolution makes the following recommendations to improve the Children and Families Bill.

- The name of family mediation information and assessment meetings should be changed to Assessment and Information Meetings –the non-court options available to couples are not limited to mediation.
- Parliamentarians should carefully consider the proposed amendment to section 1 of the Children Act 1989 intended to reinforce the importance of children having an ongoing involvement with both parents after family separation.
- Parliament should also carefully consider the impact of the 26 week time limit for completion of care cases.
- There should be a positive duty for the court to consider at an early stage whether expert evidence is necessary in children proceedings in order to avoid later delays.
- Parliament should consider further supporting a simplified, administrative divorce process, including for the benefit of self represented parties, with no fault divorce as a key element, as originally agreed by Parliament in 1996.

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