

CHAPTER 2: LEGAL FRAMEWORK FOR SIBLING CARE

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1. Introduction

When siblings take on the care of their brother or sister, the arrangement may be made privately between the sibling and the parent(s) or former carer or it may be made more formally with the court and/or local authority being involved. In either situation, the sibling carer is in much the same position legally as many other relatives and friends who take on the care of children who cannot live with their parents, for whatever reason. Therefore s/he will almost certainly want to know the answer to two key questions:

- Do I have the authority to make decisions about the child who is in my care? and
- Am I entitled to any support for the child I am now raising and if so, from whom?

In short, the answer to both questions is that it depends on the legal status of the child. This chapter explores the possible legal arrangements for sibling care and the implications of each arrangement for decision-making and support for the carer. However the information in this chapter should not be used as a substitute for legal advice about an individual case. Those seeking such advice should either contact a solicitor specialising in childcare law¹ or Family Rights Group's free advice service².

2. Parental responsibility and decision-making

2.1 Who has authority to make decisions about the child's care?

The concept of parental responsibility was introduced by the Children Act 1989 to include '*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*'³. In effect, it means that a person with parental responsibility has the right to make all major decisions relating to raising a child (subject to a few specified restrictions⁴) including contact, without having to consult anyone else with parental responsibility⁵.

Sibling carers have parental responsibility if they have obtained a residence or special guardianship order in their favour or if they have been appointed as testamentary guardian and the parents with parental responsibility have both died. In these circumstances, they can make almost all the major decisions relating to the child's care such as consent to medical treatment, school trips etc. and they do not have to consult the parents or anyone else with parental responsibility. The exceptions to this are that

- when it comes to taking a child outside the United Kingdom, for more than a month in the case of a residence order, 3 months in the case of a special guardianship order or one day in the case of guardianship, the consent of every person with parental

¹ Solicitors can be found by contacting the Solicitors Regulation Authority, Ipsley Court, Redditch, Worcestershire B98 0TD, Phone: 0870 606 2555, <http://www.lawsociety.org.uk/choosingandusing/findasolicitor.law>. If you are on a low wage or receiving welfare benefits, you should be able to get free advice under the legal aid scheme. Ask your solicitor to advise you about this.

² Contact details for Family Rights Group advice service at the end of this chapter

³ s.3(1) Children Act 1989

⁴ For example, the consent of every person with parental responsibility or the permission of the court, is required, to take the child outside the United Kingdom otherwise the remover will commit an offence unless s/he residence order or special guardianship order which case s/he can remove the child for up to one/three months respectively without such consent. For further information on restrictions on the exercise of parental responsibility see FRG advice sheet on parental responsibility http://www.frg.org.uk/advice_sheets.html

⁵ s.2 (7) Children Act 1989

responsibility or the permission of the court is required⁶, otherwise they will commit an offence under the Child Abduction Act⁷;

- the consent of every person with parental responsibility or the leave of the court is required to change a child's name⁸ and
- where there is a dispute about the exercise of parental responsibility in relation to the particular child, the court may make a specific issue order or a prohibited steps order to resolve the dispute⁹, in which case this order would need to be followed.

If the sibling carer does not have a residence or special guardianship order, s/he will not have parental responsibility which means that s/he will need to ask the parents or anyone else with parental responsibility to agree all major decisions about the child's care. This can be difficult where relationships between the sibling carer and the parents/others with parental responsibility are strained or they've disappeared off the scene. Those others with parental responsibility include the following:

- The mother who has parental responsibility for the child from birth;
- The father if:
 - He is, or has been, married to the mother at any time since the child's birth; or
 - he is registered as the child's father on the birth certificate if the registration took place after 1st December 2003; or
 - he has been re-registered on the child's birth certificate subsequently jointly with the mother or alone and she has provided him with a signed statutory declaration that he is the child's father¹⁰; or
 - the mother and father have both signed an authorised agreement giving the father parental responsibility; or
 - there is an order of the Court giving the father parental responsibility¹¹; or
- A step-parent if s/he is married to one of the parents and has made an authorised agreement with both parents with parental responsibility or has a court order¹².
- Other people who also have a residence order, special guardianship order or an adoption order in their favour for the child¹³;
- The local authority if the child is subject to a Care Order¹⁴, Interim Care Order or Emergency Protection Order; and
- Guardians if they have been formally appointed¹⁵ by a parent who has parental responsibility or by a guardian or special guardian of the child and both parents with parental responsibility have died¹⁶.

⁶ s.13 & s.14C(3) Children Act 1989

⁷ s.1 Child Abduction Act 1984

⁸ s.13 & s.14C(3) Children Act 1989

⁹ s.8 Children Act 1989

¹⁰ For further information contact the General Register Office see: <http://www.gro.gov.uk/gro/content/births>

¹¹ s.4 Children Act 1989

¹² s.4A Children Act 1989

¹³ s.8 & s.14A Children Act 1989

¹⁴ s.33(3) Children Act 1989

¹⁵ The appointment is only valid if it is in writing, signed in the presence of two witnesses and dated.

¹⁶ For further information see Family Rights Group's advice sheet on parental responsibility http://www.frg.org.uk/advice_sheets.html

In effect this means that, unless the local authority is involved:

- it is a private arrangement if there is no court order in force in favour of the carer or the local authority. In this situation, the parents/others who have parental responsibility have the basic right to make decisions about the child's care and the sibling carer has to defer to them for all decisions including things like consenting to school trips and medical or dental treatment;
- if the sibling carer has a residence, special guardianship order (or even an adoption order) in their favour or has been appointed as testamentary guardian by the parents and the appointment has taken effect, then s/he will have parental responsibility and can make most decisions about the child's care subject to the restrictions outlined above.

2.2 What happens if the local authority was involved in making the sibling care arrangement?

If there are, or have been, concerns about the safety and well-being of a child such that the local authority has become formally involved, then the freedom of the person with parental responsibility (whether it be the parent or the sibling carer) to make decisions about the child is inevitably restricted by the need to take account of safety concerns identified by the local authority. The extent of such restrictions will depend on the nature of the local authority's involvement:

- ***If there are child protection concerns***, whether the sibling carer has parental responsibility or not, any decisions about how the child is cared for will need to take account of the requirements of the child protection plan so as to ensure the child is not being put at risk otherwise, the local authority may initiate care or emergency protection proceedings to remove the child into care¹⁷.
- ***If the child is looked after¹⁸ by the local authority by voluntary agreement with the parents or others with parental responsibility and has been placed with the sibling carer*** then the parents (and others with parental responsibility) retain their parental responsibility and the local authority does not acquire it, throughout the time the child is in looked after on a voluntary basis. In such circumstances, the sibling carer will need to be assessed and approved as a local authority foster carer¹⁹ for the placement to continue lawfully. Under such an arrangement, the details of how the child will be cared for must be agreed between the local authority and the parent/other person with parental responsibility and the details of those arrangements that the sibling carer will be expected to follow will be set out in the child's care and placement plans²⁰. A sibling who is a foster carer already caring for the child would be consulted in the review process.
- ***If the local authority has an emergency protection order or an interim or full care order and the child is then placed with a sibling carer***, the child will also be looked after. The local authority has parental responsibility and will be able to decide the details of how the child will be raised, although it must consult with parents and anyone else with parental responsibility and the carer about any decision it makes about the

¹⁷ It is also important to note case law which has established that when the local authority has been involved in making an arrangement for a child to live with a relative or friend including a sibling carer within a child protection context, the placement will be treated as that of a looked after child unless the local authority has discussed otherwise with the family and friends carer at the time of placement making it clear that they will not be responsible financially or otherwise for the child (Southwark-v-D; SA -v- A local authority.

¹⁸ A child is looked after when they are in care under a care or emergency protection order or when they are in accommodation by voluntary agreement with the parents/those with parental responsibility.

¹⁹ Fostering Services Regulations 2011

²⁰ Regs 5 & 9 and schedules 1 & 2, Care Planning, Placement and Review Regulations 2010

child. Again, this should be recorded both in the child's care plan and in the placement plan. The sibling will need to be assessed as a local authority foster carer and will need to abide by the care and placement plans in terms of how the child is raised.

2.3 What are the placement duties on the local authority when a child is looked after?

When a child is looked after in the care system, there is a duty on the local authority to place a child with a parent or other person with parental responsibility but where that is not practicable or consistent with the child's welfare, they must place the child in the most suitable placement, first priority being given to placing the child with a relative/friend or other connected person, again, provided it is reasonably practicable and consistent with the child's welfare²¹. This is consistent with the aims of government guidance (issued in conjunction with the Public Law Outline²²) to consider wider family options before issuing care proceedings²³ and the right to respect for family life in Article 8 of the European Convention on Human Rights. Siblings wishing to take on the care of children who are looked after should consider approaching the local authority Children's Services department to offer to care for the child by referring to this duty.

Placements with relatives/friends/other connected people, including siblings, can be made in an emergency with minimal checks²⁴ being carried out for up to 16 weeks (with a possible further extension of 8 weeks); thereafter, the sibling carer must be formally assessed and approved as a local authority foster carer in accordance with the Fostering Services Regulations 2011 for the placement to continue lawfully. A sibling who is caring for a child in this context is required to enter into a fostering agreement with the local authority which sets out mutual expectations and terms of the placement, including social work and other support to be provided so as to ensure the child's needs are met. The sibling would be able to make decisions about day to day care but, in relation to important decisions about the child's upbringing, must refer back to the local authority.

In every case concerning a child who is looked after, the local authority must consult with the child's parents/significant others in relation to all decisions about the child²⁵ and, where the child is accommodated, the local authority must also obtain the consent of a person with parental responsibility to the care plan and all important decisions about the child. This can seem quite onerous for a sibling carer as s/he has little autonomy but it reflects the fact that in such an arrangement, it is others, not s/he who has parental responsibility for the child.

2.4 What about the child's wishes?

Whenever plans are made for any child, it is essential that to find out the child/young person's wishes and feelings and that these are taken into account, especially in the case of a teenager who will simply vote with their feet if they do not like the plans that have been made for them. Specifically, when the local authority is involved, it is under a duty to find out and give 'due consideration' to the wishes and feelings of the child when child protection enquiries are being made²⁶. There is a similar duty in relation to all decisions about a child who is looked after by the local authority²⁷.

²¹ s.22C Children Act 1989

²² http://www.hmcourts.service.gov.uk/cms/files/public_law_outline_PD_April_2010.pdf

²³ <http://media.education.gov.uk/assets/files/pdf/c/children%20act%201989%20guidance%20and%20regulations.pdf>

²⁴ As specified in Regulation 24&25 and Schedule 4 Care Planning, Placement and Review Regulations 2010

²⁵ s.22 (4) & (5) Children Act 1989

²⁶ S.47(5)A Children Act 1989

²⁷ S.22 (4)&(5) Children Act 1989; Care Planning, Placement and Review Regulations 2010

3. Access to support services

3.1 How can sibling carers access support services?

Even more than other family and friends carers, our research suggests that sibling carers often struggle to obtain the practical and financial support they need to help them raise the children in their care. As from September 2011, all local authorities must have a policy of family and friends care which should outline the support available to sibling and other relative/friends caring for children, whether they are looked after or not, and how such support can be accessed²⁸. However subject to what is available in each local authority policy, the broad position is that the entitlement of sibling carers to support will depend on the legal status of the child:

Private arrangements or where siblings are a testamentary guardians:

In a private arrangement where there is no court order in force, mothers and most fathers have parental responsibility and the sibling carer does not. In these circumstances, the parents are legally liable to support the child²⁹; conversely the sibling is not legally liable to maintain the child although they may do so in practice. However, the very nature of these placements, which commonly arise out of parental tragedy, trauma or abuse, means that the parents are often unable to provide. Typically, the carers' only other sources of financial support are

- state benefits, including child benefit and child tax credit depending on their means, and,
- where the child is assessed as being in need, discretionary support from the local authority under s.17 (6) Children Act 1989.

The local authority also has discretion to provide other practical and emotional support, for example social work support, if the child is deemed to be in need, following an assessment, under s.17 Children Act 1989³⁰. However, in reality many family and friends carers, including sibling carers, cannot access such support, despite the child often having acute emotional and behavioural problems because the local authority's eligibility criteria for children in need are restricted to cases which border on child protection, which, ironically, excludes them because the carers are now providing safe care for the child. Carers in this position may like to seek further advice about how to obtain such support from Family Rights Group's advice service.

Residence orders

Where a residence order is in force in favour of a sibling carer, his/her access to support is similar to a private arrangement in that the parents are legally liable to support the child financially and the person with the residence order is not although they may end up having to do so in practice. As with private arrangements, where the parents are unable to provide, the person with the residence order may be entitled to state benefits including child benefit and tax credits, depending on his/her circumstances. If the child is assessed as being in need, the carer and the child may also receive discretionary financial and

²⁸ Family and friends care statutory guidance for local authorities 2011 <http://education.gov.uk/publications/eOrderingDownload/Family%20and%20Friends%20Care.pdf>

²⁹ s.1 Child Support Act 1991

³⁰ The definition of a child in need is set out in s.17(10) CA and includes a child who is aged under 18 and:

- who is unlikely to achieve or maintain a reasonable standard of health or development without the provision of appropriate services by a local authority; or
- whose health or development is likely to be significantly impaired or further impaired without the provision of appropriate services by a local authority; or
- who is disabled.

other support from the local authority under s.17 Children Act 1989³¹, although again, the strict eligibility criteria for a child being determined as being in need often precludes many children and family and friends carers from receiving such support.

In addition the carer may also ask the local authority to be assessed for a residence order allowance which the local authority may, but isn't required to, pay³². Recent case law confirms that this can be paid by the local authority even if it was requested by the carer after the residence order was applied for³³.

Special guardianship orders

Again, access to support for sibling carers who, are have a special guardianship order is similar to private arrangements and residence orders, in that the parents are liable to support the child financially, and the special guardian is not, from a legal point of view, although they are likely to be doing so in practice. Where the parents are unable to provide, the special guardian may be entitled to state benefits, including child benefit and tax credits, depending on his/her circumstances and where the child is assessed as being in need, s/he and or the child may also receive discretionary support from the local authority under s.17 Children Act 1989³⁴.

The local authority is under a duty to establish special guardianship support services³⁵ although this does *not* equate to carers having a right to having their individual needs met. The support services that the local authority must establish include financial support to provide regular income to support the placement³⁶, subject to a means test, and where this is payable, it should be at the level of fostering allowances rather than adoption allowances³⁷. Other support services that the local authority should provide include help with contact, support groups and assistance with legal costs, none of which is means tested³⁸. If the child was looked after immediately before the special guardianship order was made, the carer and child have a right to have their support needs assessed but in all other cases, although there is a strong expectation that the local authority will carry out an assessment, this is identified in statutory guidance as being discretionary³⁹. However, whether or not services are provided to meet the identified needs is a matter for the local authority's discretion, informed by their assessment of need and detailed statutory guidance⁴⁰. In other words, there is no obligation on the local authority to provide support services in an individual case.

Child is looked after and placed with the sibling carer by the local authority

A sibling carer of a child looked after by the local authority, who is approved as a local authority foster carer (or has had the child placed with them in an emergency and is undergoing assessment⁴¹) is *entitled* to be paid⁴² and indeed, has the same *right* to financial and other support as unrelated foster carers. This is confirmed by the

³¹ As discussed above, this can currently only be provided in exceptional circumstances. However, this restriction will be removed when s.24 Children and Young Person's Act 2008 is implemented.

³² Sched 1 para 15 Children Act 1989

³³ R(H) –v- Essex CC [2009] EWHC 353

³⁴ As discussed above, this can currently only be provided in exceptional circumstances. However, this restriction will be removed when s.24 Children and Young Person's Act 2008 is implemented.

³⁵ S.14F CA

³⁶ Regulation 3, 6, 8, 9, 10 & 13 Special Guardianship Regulations 2005

³⁷ R (on the application of B)(Claimant) –v- Lewisham LBC and MB [2008] EWHC 738

³⁸ Regulation 3 & 13 Special Guardianship Regulations 2005

³⁹ Regulation 11 Special Guardianship Regulations 2005

⁴⁰ Regulation 12-16 Special Guardianship Regulations 2005

⁴¹ Regulation 24 Care Planning, Placement and Review Regulations 2010

⁴² S.22C(10) Children Act 1989

Manchester case⁴³ in which Munby J held that it is unlawful to discriminate against family and friends foster carers by paying them a lesser amount as a fostering allowance than unrelated foster carers. The child is also entitled to support from the local authority when s/he leaves care, provided s/he falls into one of the categories outlined in the Children (Leaving Care) Act 2000.

However, this legal arrangement, and associated entitlement, to support is dependent on the child being *looked after* in the care system and thus accounts for only a very small minority of sibling care placements, not least because children will often have gone to live with their sibling, in an emergency, to *avoid* them having to go into care.

4. Prospective carers

4.1 How can a sibling wishing to take on the care of a child make the arrangement?

As outlined above, the steps to be followed will largely depend on the legal status of the child:

If the local authority is not involved:

- the sibling can approach the parents directly to see if the arrangement can be agreed.
- If it is not agreed but the sibling still thinks there is a need for the child to move from the parents' home and be looked after elsewhere, the sibling can ask the parents if they are willing to attend family mediation⁴⁴ to discuss it.
- If they do not agree or if this proves unsuccessful, they can apply to the court for a residence or special guardianship order⁴⁵, although it is likely they will need the leave (i.e. permission) of the court to be able to proceed with the application.

If the local authority is involved either in relation to child protection enquiries, care proceedings or the child is already looked after:

- the sibling should inform the local authority of their wish to care for the child.
- s/he should also consider asking for a family group conference⁴⁶ to be convened whereby the whole family is brought together to address the needs of the child and make a plan for him/her which will keep him/her safe.
- If the child is already looked after, the sibling should also request to be assessed accordingly, whether for an emergency placement and/or as a long term arrangement.

⁴³ The Queen on the Application of L and others –v- Manchester City Council; The Queen on the Application of R and another –v- Manchester City Council [2002] 1 FLR 43

⁴⁴ Further information about how to contact a family mediator can be found at <http://www.familymediationhelpline.co.uk/> or <http://www.nfm.org.uk/>

⁴⁵ For further information on how to apply for a residence or special guardianship order, see FRG DIY advice sheets on residence orders or special guardianship orders:

⁴⁶ Further information about family group conferences can be found at http://www.frg.org.uk/advice_sheets.html

5. Further advice and information

Readers can obtain further advice about their individual situation from:

Family Rights Group free advice service

Family Rights Group provides free advice and information to all families and carers in England and Wales who are involved with local authority children's social care services about the care and protection of their children. The service is independent of all local authorities and other statutory agencies and is non-judgmental. They help people to understand their rights and explore the issues which have arisen between the family and children's social care services, in order that they may make realistic choices about the options available to them.

Telephone advice line is open Monday – Friday 10.00am -3.30pm on 0808 801 1366

Email advice: requests should be sent to advice @ frg.org.uk

Advice sheets on all aspects of being involved with the local authority about the care and protection of a child can be downloaded for free at:
http://www.frg.org.uk/advice_sheets.html