

	<p><b>CHAPTER 2</b> <b>PRIVATE LAW</b> <b>INTRODUCTION</b></p>
<p>CYPA 2001 Part 1 CYPA 2001 Part 2</p>	<p>1 "Private law" is about legal rights and responsibilities in relation to children, if necessary through the intervention of the court. It does not concern the intervention of the State unless the court decides that is necessary for the welfare of the child.</p> <p>2 The Act includes the following concepts and definitions:</p> <ol style="list-style-type: none"> <li>a. 'parental responsibility' imposed on parents and guardians.</li> <li>b. 'guardianship'; and the circumstances under which non-parents can be appointed to bring up a child <i>in loco parentis</i>.</li> <li>c. 'family proceedings' in court and the range of orders available to the court in family proceedings. These orders are intended to resolve specific areas of dispute in the child's interests rather than to allocate legal rights. They are designed to encourage both parents to maintain their involvement.</li> <li>d. These orders are also available to the court in care proceedings if they best suit the needs of the child in a particular circumstance.</li> </ol>
<p>CYPA 2001 s.2  CYPA 2001 s.2(5)(a) &amp; (5)(b). Legitimacy Act 1985 Section 8  CYPA 2001 s.3(1)&amp;(2)</p>	<p><b>PARENTAL RESPONSIBILITY</b></p> <p><b>The meaning of parental responsibility</b></p> <p>3 'Parental responsibility' is defined in this section as:</p> <ul style="list-style-type: none"> <li>• the rights, duties, powers, responsibilities and authority</li> <li>• (of a parent or guardian)</li> <li>• to a child and his property.</li> </ul> <p>4 Parental responsibility is concerned with bringing the child up, caring for him and making decisions about him, but doesn't affect other aspects of the relationship. Whether or not a parent has parental responsibility does not affect any obligation towards the child, such as a statutory duty to maintain him; nor does it directly affect succession rights.</p> <p>5 In reading the Act it is necessary to be aware of the implication of the word "parent" in different provisions. In the next paragraph "parent" always means "mother" but only includes "father" if he shares parental responsibility.</p> <p><b>Married and unmarried parents</b></p> <p>6 The natural mother automatically has parental responsibility for her child. If the parents have been married to one another at any time</p>

<p>CYPA 2001 s.4 (1) CYPA 2001 s.11(a)</p> <p>CYPA 2001 s.4 (2)</p>	<p>since the child's conception both have parental responsibility.</p> <p>7 If the child's father has not married the mother in accordance with the previous paragraph he does not have parental responsibility, but can acquire it in one of four ways:</p> <ol style="list-style-type: none"> <li>a. He can apply to the court for a parental responsibility order,</li> <li>b. He can have a residence order made in his favour.</li> </ol> <p>For more detail on this read the passage on residence orders later in this chapter on page 10.</p> <ol style="list-style-type: none"> <li>c. He can make legally binding agreement with the mother to share parental responsibility. To be recognised under the Act such an agreement must follow the form prescribed in the court rules. Once made it is legally binding and can only be brought to an end by a court order.</li> <li>d. He can be appointed guardian, either by the mother or by a court, to assume parental responsibility after the mother's death.</li> </ol> <p>8 All these orders place the father in the same position as a married father. Shared responsibility thus acquired does not come to an end even if the parents are not living together.</p> <p>9 If the parents are living apart a father who obtains an order that the child is to live with him is automatically granted a parental responsibility order. A parental responsibility order in the father's favour without a residence order is possible.</p>
	<p><i>For example, the child might be looked after by someone else; by another member of the family or by the Department. But the court might decide in the particular case that both parents should have overall responsibility for him.</i></p>
<p>CYPA 2001 s.4(5) &amp; 16(1)</p> <p>CYPA 2001 s.11(1)(a)</p> <p>CYPA 2001 s.33</p>	<p>10 All parental responsibility orders and agreements remain in force until the child reaches the age of eighteen unless a court order revokes them. Someone who has parental responsibility may apply for such an order or agreement to be brought to an end. A child affected by one can also apply but only if the court is satisfied that he or she understands the implications of doing so.</p> <p>11 A father who does not have parental responsibility is nevertheless a "parent" for the purposes of the Act. He:</p> <ul style="list-style-type: none"> <li>• can apply to the court for any type of order,</li> <li>• is entitled to reasonable contact with a child in care,</li> </ul> <p>But</p> <ul style="list-style-type: none"> <li>• He cannot remove a child from accommodation provided by the Department, and</li> </ul>

<p>CYPA 2001 s.3</p>	<ul style="list-style-type: none"> <li>• He cannot withhold his agreement to the child's adoption.</li> </ul> <p><b>Delegation of parental responsibility</b></p> <p>12 Someone with parental responsibility can make an informal arrangement to delegate it for a time to another carer. But such an arrangement leaves the ultimate responsibility in place. That remains the case even where the person to whom responsibility is delegated has parental responsibility him or herself.</p>
	<p><i>For example a parent may delegate responsibility for their child on a temporary basis to a babysitter or on a school trip or a holiday. But it is still be the parent's duty to ensure that the arrangements made for the temporary care of the child are satisfactory.</i></p>
<p>CYPA 2001 s.2(6)</p>	<p>13 The Act also covers the responsibility of the carer to who the parent has entrusted the child to exercise reasonable care.</p> <p>14 This subsection also applies to anyone who is looking after a child accommodated by the Department.</p> <p>15 The key phrase in both cases is that the person should "do what is reasonable in all the circumstances."</p>
	<p><b>GUARDIANSHIP</b></p>
	<p>16 The object of guardianship is to provide someone to take parental responsibility for a child whose parents have died. Thus, with the rare exception mentioned in paragraph 7 d above, all guardians will be non-parents. A guardian must be an individual rather than an institution or a corporation. Once appointed, he or she has full parental responsibility.</p> <p><b>Appointing a guardian</b></p> <p>17 He or she may be appointed by:</p> <ul style="list-style-type: none"> <li>• any parent with parental responsibility,</li> <li>• an existing guardian,</li> <li>• the High Court (but not a court of summary jurisdiction).</li> </ul> <p>18 With one exception, the appointment does not take effect while there is still a surviving parent with parental responsibility.</p>
<p>CYPA 2001 s.6</p>	<p>19 The High Court can appoint a guardian either on application or in any family proceedings but only in either of the following circumstances:</p> <ol style="list-style-type: none"> <li>a. the child has no parent with parental responsibility,</li> <li>b. the child still has a parent with parental responsibility, but there was a residence order in force in favour of a parent or guardian who has died but not the one who survives. The assumption here is that the residence order is made on the grounds of the surviving parent's unsuitability to care. If that is not the case the he or she will assume sole responsibility for</li> </ol>

CYP A 2001 s.7	the child.
	20 These circumstances may arise when a child is already the subject of a care order or being looked after in accommodation provided by the Department. The Department may consider whether it would be in the best interests of the child for someone to be appointed to take the place of the parent who has died.
	21 In the case of a care order he or she would share parental responsibility with the Department and would be entitled to reasonable contact with the child. In the case of a child looked after he or she would assume sole parental responsibility.
	22 This may be a way to demonstrate the continued commitment of a child's extended family, even though the child is in the Department's care. The person appointed would have full parental responsibility and could, for example, apply for the care order to be discharged or withhold agreement to the child's adoption.
	23 The appointment of a guardian by someone with parental responsibility is subject to the same limits as appointments by the High Court (paragraph 39). They are normally made as part of a will to take effect on the death of the person making the appointment.
24 The appointment does not need to be made by deed or will. Provided it is in writing and signed and dated by the person making the appointment it is valid. A blind or physically disabled person may direct someone else to sign on his behalf in the presence of him or herself and two witnesses who each attest the signature.	

CYPA 2001 s.8, 9 & 10

### **Termination of guardianship**

- 25 Guardianship may come to an end because:
- a. the High Court revokes the guardianship order or appointment in the interests of the child. It may do this in any family proceedings, whether brought for this purpose or not,
  - b. the clear intention of a later private appointment is to revoke an earlier one made by the same person in respect of the same child. This can be done by:
    - i. revoking the relevant will or codicil,
    - ii. revoking or destroying the document of appointment,
    - iii. ending the marriage between the person who made the appointment and the person appointed, unless there is a clear intention otherwise,
  - c. the person appointed as guardian formally disclaims the appointment. The disclaimer must be made in writing, "in reasonable time" and in accordance with any rules of court in force at the time,
  - d. Because there is a clear intention to revoke the appointment without alternative.
- 26 A court in any family proceedings may restrict any further applications for guardianship without leave of that court.
- 27 All guardianship orders cease once the child is 18 years old

### **COURT ORDERS IN PRIVATE LAW**

CYPA 2001 s.11

- 28 The courts have five types of order available to them: residence orders - contact orders - prohibited steps orders - specific issue orders - revocation orders.
- a. **RESIDENCE ORDERS:** arrangements about the person with whom a child is to live,
  - b. **CONTACT ORDERS:** the person with whom a child must be allowed to have contact, to visit or stay,
  - c. **"PROHIBITED STEPS" ORDERS:** the steps, as a parent, which someone with parental responsibility may not take without the consent of the court,
  - d. **"SPECIFIC ISSUE" ORDERS:** to determine a specific question about any aspect of parental responsibility,
  - e. **REVOCATION ORDERS:** of any of the other four kinds of order.

<p>CYPA 2001 s.11(3) &amp; s.12(7)</p>	<p>29 The court may make a section 11 order in any family proceedings in the interests of the child, whether under an application to do so or not. It has the power to include directions and impose conditions on:</p> <ul style="list-style-type: none"> <li>a. a person in whose favour the order is made,</li> <li>b. a parent or anyone with parental responsibility,</li> <li>c. a person with whom the child is living,</li> </ul> <p>and about</p> <ul style="list-style-type: none"> <li>d. the length of the order,</li> <li>e. the length and frequency of any provision in the order,</li> <li>f. such "incidental, supplemental or consequential provisions" as it thinks fit.</li> </ul>
<p>CYPA 2001 s.16</p>	<p><b>Residence orders</b></p> <p>30 Residence and parental responsibility are separate concepts under the Act. The making of a residence order does not take away parental responsibility from anyone who already has it; even though the making of the order also gives parental responsibility to the person in whose favour it is made.</p>
<p>CYPA 2001 s.3(3)</p>	<p>31 Parental responsibility gives each parent equal and independent responsibility. A residence order obviously gives greater day to day care and control to one parent in practice. But when the non-residential parent has the care of the child that parent must discharge parental responsibility in full. And he or she is not obliged to consult the other parent about how that should be done.</p> <p>32 But when a residence order is in force:</p> <ul style="list-style-type: none"> <li>a. the child cannot be given a new surname,</li> <li>b. the person in whose favour the order is made may not take him or her off the Island for more than a month without the consent of everyone with parental responsibility or leave of the court.</li> </ul> <p>33 There are some other circumstances where the consent of more than one person is expressly required by statute, for example agreement to an adoption order.</p> <p>34 Any order under this Act also remains in force irrespective of who has care the child at a particular time.</p>
<p>CYPA 2001 s.16</p>	<p>35 A residence order also confers parental responsibility while it remains in force. But if the person is not a parent or guardian there are certain limits to its effect. They may not:</p> <ul style="list-style-type: none"> <li>a. agree or refuse an adoption order,</li> <li>b. appoint a guardian</li> </ul>

CYP A 2001 s.12 (6)	<p>36 Parental responsibility which is conferred on an unmarried father by a residence order continues unless it is specifically revoked and will not be revoked while the residence order remains in force.</p> <p>37 A residence order may be made in favour of more than one person at the same time even though they do not live together. The order may specify the periods during which the child is to live in the different households.</p>
	<p><i>For example a shared residence order could be made for the child to spend: weekdays with one parent and weekends with the other, term time with one parent and school holidays with the other specified large block of time with each parent.</i></p> <p><i>In reaching its decisions the Court will be bound as always by the paramount interest of the child's welfare.</i></p>
CYP A 2001 s.15 (4)	<p>38 Residence orders will lapse if the parents (if they both have parental responsibility) subsequently live together for a period of more than six months.</p>

<p>CYPA 2001 s.11(1)(b)</p>	<p><b>Contact orders</b></p> <p>39 The contact order provides that the person with whom the child lives must allow him or her to visit or stay with the person named in the order. It may be with anyone the court decides and there may be more than one order. 'Contact' may include long or short visits and contact by letter or telephone. As with other orders under Section 11 the court will be able to attach the conditions or directions it deems necessary.</p>
<p>CYPA 2001 s.15 (5)</p>	<p>40 Contact orders will lapse if the parents subsequently live together for a period of more than six months.</p> <p>41 Contact orders under private law cannot be made if the child is the subject of a care order. The Department already has a statutory duty to allow the child reasonable contact with:</p> <ul style="list-style-type: none"> <li>a. his parents (whether or not they both have parental responsibility),</li> <li>b. a guardian,</li> <li>c. anyone with whom the child lived under a residence order in force immediately before the care order or under the inherent jurisdiction of the High Court.</li> </ul>
<p>CYPA 2001 s.11</p>	<p>For more information on contact with children subject to a Care Order, see CYPA Section 33</p> <p><b>"Prohibited steps" and "specific issue" orders</b></p> <p>42 Prohibited steps and specific issues orders are concerned with single issues. The "prohibited steps" order imposes a specific restriction on the exercise of parental responsibility. Specific issue orders may be made in conjunction with other orders or on their own. . They provide the court with the capacity to decide a particular dispute between the parents and to give detailed directions where necessary.</p>
	<p><i>These two kinds of orders are very flexible and allow the court to impose or prohibit a specific requirement which is not available in any other way. The following list illustrates a few of the options.</i></p> <p><i>prohibiting a child's removal from the Island,</i></p> <p><i>preventing a child's removal from his home,</i></p> <p><i>directing where a child must be educated in the case of parental dispute,</i></p> <p><i>directing specific medical intervention.</i></p>
<p>CYPA 2001 s.14(3)</p>	<p>43 But there are restrictions on the court:</p> <ul style="list-style-type: none"> <li>a. A "prohibited steps" order may be made against anyone but can only prohibit "a step which could be taken by a parent in</li> </ul>

<p>CYPA 2001 s.19</p>	<p>meeting his parental responsibility",</p> <ul style="list-style-type: none"> <li>b. Neither "prohibited steps" nor "specific issue" orders may be made with a view to achieving a result which could be achieved by making a residence or contact order,</li> <li>c. Neither can be used to put the child in the care of, nor be accommodated by, the Department.</li> </ul> <p>44 The court may make a section 11 order with respect to a child in any family proceedings in which a question arises about his or her welfare.</p> <p>45 "The Court" means the High Court and the courts of summary jurisdiction (the High Bailiff and magistrates' courts). The latter have more limited powers and, in particular may not deal with applications concerning the property of the child.</p>
<p><b>APPLICATIONS FOR ORDERS WITH RESPECT TO CHILDREN</b></p>	
<p>CYPA 2001 s.11</p>	<p><b>How orders may be made</b></p> <p>46 The court may consider an order under three circumstances:</p> <ul style="list-style-type: none"> <li>a. There is a direct application for an order,</li> <li>b. An application arises during the course of other family proceedings,</li> <li>c. The court itself decides to make an order.</li> </ul>
<p>CYPA 2001 s.12</p>	<p><b>Who can apply for an order</b></p> <p>47 There are four categories of applicant. People who:</p> <ul style="list-style-type: none"> <li>a. may apply as of right for any order,</li> <li>b. may apply as of right for a residence or contact order,</li> <li>c. may apply for an existing order to be varied,</li> <li>d. anyone else (who may apply with the leave from the court).</li> </ul>
<p>CYPA 2001 s.12 (1)</p>	<p>48 People who may apply for any order are parents, guardians and those named in a residence order under the Act.</p>
<p>CYPA 2001 s.12 (2)</p>	<p>49 People who may apply for a residence or contact order include:</p> <ul style="list-style-type: none"> <li>a. any party to a marriage (past or present) where the child is a member of the family,</li> <li>b. any person with whom the child has lived for at least three years. The three years residence must have been within the past five years and part of it must have been within the past three months,</li> <li>c. when a residence order in exists: anyone who has the consent</li> </ul>

	<p>of everyone in whose favour the order was made,</p> <p>d. Anyone who has the consent of the Department in respect of a child in its care. In practice this only applies to Residence Orders because other Section 11 orders cannot be made on a child subject to a Care Order.</p> <p>e. Anyone who has the consent of those who have parental responsibility in any other case,</p> <p>f. Anyone else prescribed by the rules of court.</p>
CYPA 2001 s.13	50 Anyone else can apply to the court for <u>leave</u> to make an application. The Department cannot apply for a residence or contact order, but it can of course apply for a Care or Supervision order under public law.
CYPA 2001 s.13	51 When it considers an application for leave to apply the court must consider what the application is about, the applicant's connection to the child and the risks it may pose for the child.
	52 There are two special categories: an application from the child him or herself and an application from foster parents with whom the Department has placed the child. In the first case the court must be satisfied that he or she has sufficient understanding to make the application. In the second it must take account of the Department's plans for the child's future and of the wishes and feelings of the parents.
CYPA 2001 s.12 (3)	53 People who may apply for an order to be varied or revoked are those who applied for the original order or those who are named in a contact order.

<p>CYPA 2001 s.14</p>	<p><b>The position of the Department</b></p> <p>54 Once a care order has been made the court's private law powers must not be used to interfere with the Department's exercise of its statutory parental responsibilities. Under these circumstances the only possibility is a residence order, which has the effect of discharging the care order altogether.</p>
<p>CYPA 2001 Part 4</p>	<p>55 These restrictions do not apply when the child is voluntarily looked after by the Department under Part 3 of the Act.</p> <p>56 Legal challenges to the Department concerning the way it manages a care order are not dealt with under private law (i.e. not under this section of the Act). The relevant guidance for this purpose is that which pertains to Care &amp; Supervision.</p>
<p>CYPA 2001 s.14 &amp; 15</p>	<p><b>Age restrictions and time limits</b></p> <p>57 The normal age limit for a new order is 16 years. So the court must not make an order beyond that age, nor one which is expected to have effect beyond that age. There is provision to allow for (undefined) exceptional circumstances under which the order can be extended to 18 years.</p> <p>58 The normal age for orders to end is 16 years except as indicated in the previous paragraph. All orders cease when the child reaches the age of 18 years (except certain maintenance conditions detailed in Schedule 2).</p> <p>59 All orders cease if the child becomes the subject of a care order.</p> <p>60 Contact orders cease to have effect if the parents who are affected by them live together for six month continuously. This is also true of Residence Orders as long as both parents have parental responsibility.</p>
<p>CYPA 2001 s.1</p>	<p><b>THE COURT'S DUTY UNDER THE ACT</b></p> <p>61 The general principle covering all court action involving:</p> <ul style="list-style-type: none"> <li>- the upbringing of a child,</li> <li>- the administration of a child's property or income,</li> </ul> <p>is "that (the child's) welfare shall be the court's paramount consideration".</p> <p>62 The section lists a number of supporting principles and matters to be taken into account when the court is considering an order:</p> <ul style="list-style-type: none"> <li>a. delay is likely to breach the welfare principle,</li> <li>b. the starting assumption should be that the children are best brought up within their own family,</li> <li>c. the wishes and feelings of the child, his or her family and other</li> </ul>

<p>Paragraphs 65-68 have been corrected for Manx legislation but await clarification before they are redrafted from the original (DH) text.</p>	<p>important stakeholders should be considered,</p> <ul style="list-style-type: none"> <li>d. the child's physical, emotional and educational needs should be considered,</li> <li>e. the likely impact of any change should be considered,</li> <li>f. the child's age, sex, background and other characteristics should be considered,</li> <li>g. actual harm or risk of harm should be considered,</li> <li>h. the capabilities of parents and other potential carers should be considered,</li> <li>i. no order should be made "unless it ....would be better for the child than making no order at all".</li> </ul> <p>63 These principles, with the exception of the "no order" principle, apply equally strongly to, for example, divorce and judicial separation proceedings which have a bearing on the upbringing of the child, as they do to applications whose primary purpose is to seek an order under Section 11 of this Act.</p> <p>64 The welfare principle always has primacy. For example the presumption against making an order "unless..." is overridden by the <u>paramount</u> consideration of the child's welfare.</p> <p>65 Not all proceedings affecting children's upbringing or property are governed by the welfare principle. For example, it is expressly excluded by section 105(1 ) from applications for maintenance for a child and section 12 of the Adoption Act 1984 provides that the child's welfare shall be the "first" consideration, as it is in proceedings relating to property and financial issues on divorce by section 25(1) of the Judicature (Matrimonial Causes) Act 1976. On an application for an order under section 1 of the Matrimonial Homes Act 1971 the welfare of the child is neither first nor paramount. It is merely one of the factors to which the court must have regard. It does, however, apply whenever a court is considering whether to make a section 11 order, regardless of the type of proceedings in which the issue arises. The child's welfare would, therefore, be paramount if the court were considering making a section 11 order in, for example, adoption proceedings.</p> <p>66 In determining what is in the child's best interests, the court is required, in all applications for section 11 orders, or for variation or discharge of such orders (as it is in all proceedings for orders under Part 4, or for their variation or discharge, whether contested or uncontested) to have regard to the checklist of relevant factors set out in section 1 (3).</p> <p>67 It should be noted, however, that the checklist does not apply in all 'family proceedings', but only in relation to section 11 and care and</p>
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<p>CYPA 2001 Part 4 CYPA 2001 s.11(3)(b)</p>	<p>supervision orders. Thus, although adoption proceedings are 'family proceedings', and therefore any section 8 order may be made, the court is not required to have regard to the checklist and therefore is under no duty to consider what alternatives may be available.</p> <p>68 Section 1 (2) requires the court "in any proceedings in which any question with regard to the upbringing of a child arises" to "have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child". This principle thus applies equally to private proceedings, including those brought other than under the Children Act, and public proceedings.</p> <p><b>THE RELATIONSHIP BETWEEN PRIVATE LAW ORDERS AND PUBLIC LAW PROCEEDINGS</b></p> <p>69 When it is considering a care or supervision order under public law the court must also consider whether a (Section 11) private law order might be more appropriate.</p>
	<p><i>This is an important power because the criteria in public and private law are different in some respects. Before it can make a care or supervision order the court must establish "significant harm" or "beyond control" criteria. It doesn't have to do that in order to make a residence order in private law.</i></p>
<p>CYPA 2001 s.12(5) &amp; (7) s.35(3)</p> <p>CYPA 2001 s.37</p>	<p>70 The court may also make a section 11 order as an interim measure when a care application is pending, indefinitely or for a specified period. But there is a safeguard. If the court decides to make a residence order pending an application for a care or supervision order it must also make an interim supervision order. Or it must be satisfied that the child's welfare will be safeguarded without doing so.</p> <p>71 Only someone who has parental responsibility, the child or the Department can apply directly for a care order to be revoked. If the court decides to make a residence order, an existing care order is revoked and the person in whose favour it is made gains parental responsibility.</p>
<p>CYPA 2001 s.15(2) &amp; 20(6)</p>	<p>See the section on residence orders earlier in this chapter</p> <p>72 The effect of a care order is to bring existing orders, notably those under Section 11 and wardship orders, to an end.</p>
<p>CYPA 2001 s.11(3)(b)</p>	<p><b>PRIVATE LAW ORDERS IN ADOPTION PROCEEDINGS</b></p> <p>73 A court hearing adoption proceedings can make an order under Section 11 if it concludes that to do so would be in the best interests of the child.</p>

<p>CYPA 2001 s.102(1)</p>	<p>74 There is no statutory obligation on the court to consider such a course in each case; it is simply an available option. But anyone with an interest may seek leave to apply for a Section 11 order alongside adoption proceedings. Finally there is nothing in law to stop a court making a Section 11 order in addition to an Adoption order, though the circumstances in which that might arise are not easy to envisage.</p>
<p>CYPA 2001 Schedule 1</p>	<p><b>FINANCIAL PROVISION FOR CHILDREN</b></p> <p>75 Financial provision for children is detailed in the Schedule. Applications concerning financial relief for a child only are made under family proceedings. So the court which hears the application can make a Section 11 order if it wishes. Applications may be made by a parent or guardian or by someone in whose favour a residence order is in force.</p>