



Breastfeeding and family break up in the UK

Family break up raises emotional and stressful questions about childcare arrangements, which couples sometimes find difficult to agree upon. This leaflet provides information about the legal framework surrounding arrangements for children following a family break-up, and how these relate to a breastfeeding child.

Handling disputes

After a break up, many couples are able to voluntarily agree childcare arrangements. If you are unable to sort out arrangements directly, then you may wish to consider mediation. This involves meetings with a trained mediator, who will help the parents try to agree arrangements for their children. Mediation is purely voluntary, so it can only take place if both parents agree. Mediation is not free (although legal aid may be available), but the cost of mediation will usually be substantially less than the cost of contested court proceedings.

If you are able to come to an agreement about the arrangements for the children, you may wish to formalise those arrangements in a *Parenting Agreement*; these are not legally binding or enforceable by a court, but are a written agreement between the parents. A *Parenting Agreement* helps parents stay out of court because the arrangements are worked out and agreed by both of you; agreeing in this way means you have control over the process and you won't need to fight things out in court. Wikivorce offers a free parenting agreement available as a download.

You can find a local mediator by contacting the Family Mediation Council:
<https://www.familymediationcouncil.org.uk/find-local-mediator/>

If you aren't able to agree childcare arrangements with your former partner and mediation is unsuccessful or cannot take place, then you or your former partner can apply to the court for a *Child Arrangements Order*, whereby the court will decide the arrangements. A *Child Arrangements Order* will state with whom the child concerned is to live, when the child is to live with any person, and the party with whom the child visits or otherwise has contact.

Legal Aid in these applications is subject to very limited conditions: <https://www.gov.uk/check-legal-aid>. If you are not eligible for Legal Aid but cannot afford your own legal advisor, you can ask a charity such as Citizen's Advice Bureau for help: <https://www.citizensadvice.org.uk> or visit www.wikivorce.com – they have a free helpline and a busy Q&A forum.

Other resources that can provide legal information for parents include:

Gingerbread: <https://www.gingerbread.org.uk>

Coram Children's Legal Centre: <https://www.childrenslegalcentre.com>

Rights of Women: <https://rightsofwomen.org.uk>

Sorting Out Separation: <https://www.sortingoutseparation.org.uk>

Families Need Fathers: <https://fnf.org.uk>

Volunteers on the National Breastfeeding Helpline (0300 100 0212) and the ABM helpline (0300 330 5453) can offer information and support with the practicalities of managing breastfeeding during difficult circumstances. This can include information on expressing milk using a pump or by hand, milk storage and transport, managing engorgement and discomfort or adjusting the routine of a breastfeeding child. They would not be able to answer questions that do not focus on breastfeeding support.

This is not an easy time for anyone involved and acknowledging the need for emotional support is also a valuable part of the process. For opportunities to talk about your situation, RELATE can be a useful resource <https://www.relate.org.uk/>. You may also wish to speak to your GP about other counselling or therapy options.

What are the legal principles considered when determining child arrangements in the UK?

The overriding principle in all cases is the welfare of the child – each case is dealt with on an individual basis, with the child’s best interests being at the very core of decisions. The Welfare checklist in *s1 Children Act 1989* is the only basis on which English and Welsh Courts are permitted to make decisions in child arrangement cases.

The information gathered is checked against the welfare checklist; this is a (non-exhaustive) list of what the court will consider and factors relating to breastfeeding are relevant to a number of categories:

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding) – this is usually only relevant to older children who can express their desires but may be relevant to natural term breastfeeding.

(b) his physical, emotional and educational needs – breastfeeding can be seen as both a physical and emotional need. The court is more likely to recognise the physical need in younger infants who rely on breastmilk for nutrition, although the significance of longer-term breastfeeding should not be ignored. The detrimental emotional impact of causing breastfeeding to cease could also apply to any aged child. Arrangements which negatively impact the breastfeeding relationship such as long term stays away from the breastfeeding mother should be avoided if at all possible. This may hold more weight if the child has any medical condition which could be exacerbated from the introduction of formula or other breastmilk alternatives. There is an overview of the latest research here: <http://www.unicef.org.uk/BabyFriendly/News-and-Research/Research/>

(c) the likely effect on him of any change in his circumstances – the consequences of a reduction in breastmilk available and the risk of breastfeeding ceasing completely if arrangements which prevent breastfeeding or impact supply are made would be considered here. Although indirect, it is possible the court would consider any impact on the mother’s physical and mental health in preventing breastfeeding from taking place insofar as the mother’s health could impact the child. This could include her increased risk of engorgement, blocked ducts, mastitis or abscesses.

(d) his age, sex, background and any characteristics of his which the court considers relevant – as above, this section is likely to mean that the court are more protective of the breastfeeding

relationship with younger infants or those with a condition which could be worsened by limiting breastmilk.

(e) any harm which he has suffered or is at risk of suffering – there is risk to health and potential for emotional harm if breastfeeding is forced to cease or reduce. An infant who ‘feeds to sleep’ may be subjected to unnecessary emotional harm by ordering overnight stays with the non-feeding parent, for example.

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs – a parent who is not lactating is clearly unable to fulfil the needs of a breastfed infant to the extent of his lactating parent. However, the court will consider what alternatives to meeting the child’s needs are available, such as providing expressed milk, when balancing the criteria.

(g) the range of powers available to the court under the Children Act 1989 in the proceedings in question - The court will have to balance every category above when considering the different options. Often an arrangement can be made which allows breastfeeding to continue whilst allowing other needs to be met. There are no rules as to how much contact a non-residential parent should have, but it will usually be at least once a week and may include overnight stays and additional contact during holiday periods. Contact is for the benefit of the child, and often the court will want to see proactive collaboration between parents including ways of working out how both parents can be involved in childcare.

What international law may be considered?

The European Convention on Human Rights – This was ratified by the *Human Rights Act 1998*, meaning it is now part of UK law. Article 8 - Right to Family Life grants the right of respect for private and family life. However, this can be restricted in the interests of another’s Rights under the Act. This means that the court would have to balance the breastfeeding mother’s right to a continuing breastfeeding relationship in the family with the second parent’s right to have a family life with their child. Mothers have been unsuccessful when raising this Convention in attempts to challenge court decisions but these have related to babies being taken into care when other factors such as risk of neglect or abuse have been seen to outweigh the benefits of breastfeeding.

The Universal Declaration of Human Rights – when drafting the European Convention (above), the UK were keen to ensure it included the rights set out in the UN’s Universal Declaration, meaning we can seek guidance from this. The UN Economic and Social Council (E/C.12/1999/5) clarified Article 25 gave the right to “The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture”. It could be argued this includes the right to breastmilk where available as alternatives are not of sufficient quality to meet infant’s needs.

The Convention on the Rights of the Child – The UK agreed to follow this in 1991. Article 24 states children have the right to ‘the enjoyment of the highest attainable standard of health’. It also states that all segments of society should be informed on the advantages of breastfeeding. This implies that children have a right to breastfeed to achieve better health when possible.

Innocenti Declarations 1990 and 2005 – This supports breastfeeding until at least the age of two. There is unfortunately no power to enforce this.

How have the courts applied the law?

Many of the cases which explored breastfeeding have been in relation to children taken into local authority care. Not allowing breastfeeding in these situations would likely have had more impact than when deciding how a child should share its time between parents, but these cases are helpful as an insight into how the court feels about the importance of breastfeeding:

Re: H v S (Surrogacy Agreement) [2015] EWFC 36 Family Court. Ms Justice Russell wrote in her judgement: "It is not in the interests of any child to use breastfeeding, or co-sleeping, to curtail that child's interaction with another parent or to deny her an opportunity to develop a healthy relationship with that parent."

Salford City Council v FR, DD, JJD [2014] WL 4250019. The parents had contact with their baby three times a week and arrangements were made to enable the mother to breastfeed; her expressed breastmilk was also transported to the baby's foster carers.

R v Gloucestershire County Council [2003] EWHC 850 (Admin). Munby J pointed out in Judicial Review proceedings: "Local authorities must be sensitive to the wishes of a mother who wants to breastfeed and must make suitable arrangements to enable her to do so – and when I say breastfeed I mean just that, I do not mean merely bottle-feeding expressed breast milk. Nothing less will meet the imperative demands of the Convention. Contact two or three times a week for a couple of hours a time is simply not enough if parents reasonably want more."

Re K (a child) [2001] EWCA Civ 1427. Thorpe J sitting in the Court of Appeal refused to overrule a foster care order that allowed contact with the parents for an hour and a half each weekday, notwithstanding he had "some anxiety at upholding an order which separated a 4 week old baby from her...breastfeeding mother."

Re C (a child) [8 June 2000] Court of Appeal. A father's contact visit duration of two hours for a child who was breastfed every 4 hours was affirmed.

Re C (a child) (HIV test) [1999] 3 FCR 289. An HIV positive mother refusing medical tests for the baby was told the court would not grant any future application for an order to the effect that the mother not breastfeed the baby as the law could not come between the baby and the breast.

Re W (Residence Order: Baby) [1992] 2 FCR 603 Court of Appeal. Established a presumption that it is in the best interests of a young child to be with his mother - "No court can be ignorant of what would be the natural position if other things were equal. It hardly requires saying that a baby of under four weeks old would normally be with his or her natural mother." Balcombe LJ. "I think that there is a rebuttable presumption of fact that the best interests of a baby are served by being with its mother, and I stress the word "baby". When we are moving on to whatever age it may be appropriate to describe the baby as having become a child, different considerations may well apply. But, as far as babies are concerned, the starting point is, I think, that it should be with its mother. That is not to say that it is not a rebuttable presumption." - Lord Donaldson, MR.

Re D (a Minor) [9 March 1990] Court of Appeal. A mother working full time was granted residence over the father who had provided full time child care, partly due to the mother breastfeeding her daughter for over two years, establishing that she had bonded well with her daughter.

How to address potential issues which may be raised in mediation or court:

“The child is too old to breastfeed”

World Health Organisation guidelines are that an infant is exclusively breastfed for 6 months followed by continued breastfeeding alongside appropriate complementary foods up to 2 years of age or beyond. <https://www.who.int/topics/breastfeeding/en/> This guideline applies to all member countries.

The UK Department of Health places no upper limit on the duration of breastfeeding and states, “After this, breastfeed alongside other foods for as long as you and your baby wish. This might be into their second year or beyond.” (<https://www.nhs.uk/conditions/pregnancy-and-baby/problems-breastfeeding/>) Natural term breastfeeding has many benefits for mother and baby. There are links to several research studies here: <http://bit.ly/1FDPq9y>

“The baby can have formula when she’s away from her mother”

The short and long term health risks of using formula are explained further here.

<http://www.infactcanada.ca/RisksofFormulaFeeding.pdf>

And here: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2812877/>

Stopping or changing the pattern of breastfeeding suddenly can also result in blocked ducts, mastitis or breast abscesses. <https://www.lli.org/llleaderweb/lv/lvmarapr93p19.html>

Sudden reduction in breastfeeding can also result in hormonal changes in the mother which may affect a mum’s mood and mental health.

<https://www.ncbi.nlm.nih.gov/pubmed/3279831?dopt=Abstract>

“You can express milk for the baby when he’s away”

Despite modern technology and improvements in the area of breast pumps, there is a significant minority of women who find expressing milk a difficult process. The body usually ‘lets down’ the milk (also known as the ‘Milk Ejection Reflex’) in response to baby’s stimulation and the process of expression is about artificially inducing this process without the normal triggers. When a mother is stressed, this is even less likely to be a successful experience.

The majority of women who are able to pump successfully will need to do so more often than baby feeds as less milk is often produced. When too much milk remains in the breast, this leaves a mother at greater risk of blocked ducts, mastitis and the development of a breast abscess. When milk is not removed from the breast effectively, a mother’s milk supply will start to decrease.

It is important to note that time away from your child need not mean the end of breastfeeding in the vast majority of cases. Working mums who travel are able to maintain their breastfeeding with support and determination. Toddlers often find weaning more difficult emotionally at other times of change. Breastfeeding is an emotional as well as a nutritional and physical experience.

Incorrect latch and tongue positions taught during bottle-feeding can cause complications when the baby returns to the breast and there is a general understanding that young babies need time to establish breastfeeding before a bottle can be given.

During the breastfeeding process, the mother receives pathogens through the baby’s saliva and this communication between infant and breast allows for the manufacture of tailor-made antibodies and focused macrophages.

“You’re preventing the other parent from bonding with the child”

There are many ways a parent (or extended family) can bond with a breastfed child. The contribution of breastfeeding in the development of the mother/ child relationship has been shown to have a positive effect on mental health outcomes for both the mother and baby.

<http://www.1001criticaldays.co.uk> This in turn benefits the child’s social and emotional skill and facilitates their relationships with other family members.

As the Association of Breastfeeding Mothers, we believe both the breastfeeding relationship and breastmilk are significant in the long term health and wellbeing of mothers and babies. However, a father’s relationship with his children is also important, as are both parents in a same sex couple including those who aren’t breastfeeding. We hope that all parties are able to reach decisions that place the child’s needs at the heart of the process.