



Briefing for the Public Petitions Committee

Petition Number: [PE1589](#)

Main Petitioner: Stewart Currie

Subject: Independent review of child contact and financial provision post-separation

Calls on the Parliament to urge the Scottish Government to carry out an independent review of all the processes involved in arranging post-separation child contact and financial provision.

Background

Parental rights and responsibilities (PRRs)

What are PRRs?

The Children (Scotland) Act 1995 ('the 1995 Act') (as amended) provides for a range of parental rights and responsibilities ('PRRs') in respect of children living in Scotland. Parental responsibilities exist where practicable and in the best interests of the child.

PRRs include the right to have the child reside with the person having PRRs and, where the child does not live with that person, the right to have contact with that child. A range of day to day decisions about a child's life also fall within the scope of PRRs, such as those related to the child's education, religious upbringing or medical treatment.¹

Who has PRRs?

A range of people automatically have PRRs in respect of a child, including: 1) the child's mother; 2) the child's father where he is married to the mother at the time of the child's conception or subsequently; and 3) the child's father where he is registered as the father of a child on or after 4 May 2006.²

PRRs can also be acquired by several methods, including by application to the court under section 11 of the 1995 Act for a court order granting the applicant some or all of the PRRs.

¹ For more information on PRRs in the context of education issues, in particular access to school reports, see the SPICe Briefing [Parenting when Parents Live Apart](#), at pp 12–14.

² 1995 Act, section 3, as amended by section 23 of the Family Law (Scotland) Act 2006; Registration of Births, Deaths and Marriages (Scotland) Act 1965, section 18.

What happens when more than one person has PRRs

Under section 2 of the 1995 Act, if two or more people have PRRs each can generally exercise a parental right without the consent of the other. However, under section 6 of the 1995 Act, the views of the child and anyone else with PRRs must be taken into account, so far as practicable, in relation to major decisions about PRRs.

In the event of a dispute between parents on a particular matter which cannot be resolved amicably (e.g. where the child should go to school) it is possible to apply to the court under section 11 of the 1995 Act for a 'specific issue order' where the court will reach a decision on the matter.

Residence and contact

It is also possible to apply specifically under section 11 of the 1995 Act for a 'residence order', determining who a child should live with. A parent can also apply for a 'contact order', regulating contact arrangements for the child in respect of the parent the child does not live with.

There is no specific provision in the legislation for 'shared residence', i.e. where the child lives for a significant or equal portion of the week with each parent. However, it is possible for a court to grant a residence order making such provision in a specific case.

The welfare of the child

In considering whether to grant any court order under section 11, the court will have regard to a number of principles, with the welfare of the child being the paramount consideration.

Breaches of contact orders

If a parent breaches a contact order (or indeed any other order under section 11) the court can consider imposing a fine or custodial sentence in an appropriate case. The child's living arrangements can also be altered, although again the welfare of the child is the paramount consideration.

Financial provision on divorce

The current law

The Family Law (Scotland) Act 1985 ('the 1985 Act') sets out the system for financial provision on divorce. Section 9 of the Act sets out the five principles which the courts must apply when dividing up the spouses' money, family home and other assets on divorce (known collectively as 'matrimonial property'). Matrimonial property usually includes all property belonging to either spouse when the relationship ends, as well as property owned jointly by the spouses.

The first principle contained in section 9 is one of the most important in practice. It provides that the net value of the matrimonial property should be shared fairly between the parties to the marriage. Fair sharing is usually equal sharing, unless special circumstances justify an unequal division. The other principles contained in the 1985 Act aim to take account of factors including an economic disadvantage suffered by one of the parties during the marriage (such as giving up a job to care for the children of the marriage).

This area of law has recently been the subject of a research study carried out jointly between the University of Glasgow and the Centre for Research on Families and Relationships between April 2014 and October 2015. Its findings are expected to be published shortly. See further:

<http://www.cfr.ac.uk/projects/current-projects/principles-in-practice-financial-provision-on-divorce-under-the-family-law-scotland-act-1985/>

Private agreements between parties

Whilst the Scottish courts will make decisions relating to i) contact between parents and their children; and ii) the division of matrimonial property on divorce, it is also open to the parties to reach an agreement on these matters themselves without resort to the courts.

There is no compulsion to attempt to do this, nor is there a requirement to use mediation or seek legal advice. However, it is recognised that mediation can be helpful and legal advice is recommended where seeking to convert a verbal understanding into a legally binding written agreement.

Financial support for children

Note that the framework created in the 1985 Act, relating to the division of matrimonial property on divorce, applies to spouses. Financial support for children is separate.

The child support system (reserved to the UK Parliament) has an important role in financial support for children, although it is still possible for parents to reach agreement on maintenance for their children by way of a private agreement.

In some limited circumstances the law of 'aliment' (devolved to the Scottish Parliament and contained in the 1985 Act) may apply in relation to financial support for children after separation or divorce. The Scottish courts have powers to determine disputes relating to the law of aliment.

Scottish Government Action

The Family Law (Scotland) Act 2006

The law relating to PRRs was last reviewed as part of the policy development process which led to the Family Law (Scotland) Act 2006 ('the 2006 Act').

The 2006 Act amended the principles which the court must take into account when deciding whether to grant an order under section 11 of the 1995 Act. In particular, section 11 now requires the courts to “have regard in particular” to the need to protect the child from actual or possible abuse, the effects of such abuse on children, the ability of the abuser to care for the child, and the effects of abuse on a person’s capacity to fulfil PRRs.

As referred to above, the 2006 Act also changed the law so that the effect of an unmarried father’s name appearing on the birth certificate of his child is that it confers PRRs on that father. The change was not retrospective in effect.

Shared parenting and the Parenting Agreement

At the time the 2006 Act was undergoing its parliamentary passage in Scotland, some stakeholders argued that the 1995 Act required further amendment relating to fathers’ rights. Specifically, these stakeholders wanted to create a presumption of equal parenting time (i.e. a 50/50 split of time between parents) in the legislation.

The then Scottish Executive did not accept the argument for legislative change but did introduce the [Parenting Agreement](#) (and the associated [Guide](#)) as a tool designed to promote shared parenting, that is to say the involvement of both parents in the lives of their children.

As part of its [National Parenting Strategy](#) the Scottish Government is committed to updating the Parenting Agreement. Several meetings of a working group convened by the Scottish Government have taken place. Following these meetings, the Scottish Government is considering various options which could be taken forward.

Child welfare reporters

The Scottish Government is also chairing a working group to examine the role of child welfare reporters (formerly known as ‘bar reporters’) in cases involving contact and residence with children. More information on the work of this group can be found here:

<http://www.gov.scot/Topics/Justice/law/17867/reporters>

The Scottish Government circular published early in November 2015 gives the latest information on the work of the group:

<http://www.gov.scot/Topics/Justice/law/17867/reporters/circular-1-2015>

The Courts Reform (Scotland) Act 2014

The civil courts in Scotland, in particular the local sheriff courts, play an important role in applying and interpreting the areas of family law described earlier in this briefing.

The Courts Reform (Scotland) Act 2014 made provision for wide-ranging reforms to the structure of the civil courts system, its organisation and its procedures. One of the policy aims of the Act is to facilitate greater specialisation amongst the judges who sit in the sheriff courts (e.g. in family law). The Act also provides for a new level of judge to sit in the local sheriff courts to be known as the “summary sheriff”.³ Summary sheriffs will be able to hear disputes relating to family law matters. The first summary sheriffs are expected to be in post by May 2016.⁴

The Scottish Government’s current position

The Scottish Government has no plans for a general review of the law relating to PRRs in Scotland or the law relating to financial provision on divorce.

Scottish Parliament Action

In 2014 the [Equal Opportunities Committee](#) carried out an inquiry into fathers and parenting, including consideration of issues around PRRs. Its report was published in May 2014. More information on this inquiry can be accessed here:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/71633.aspx>

The Public Petitions Committee has considered a number of petitions in recent years relating to parenting and fathers’ rights. These include:

- [PE01528](#): this sought amendment of the child contact laws to provide that there should be near to 50/50 contact for both parents if parents are fit and proper to parent. The petition was closed in May 2015 on the basis that there was opposition to the legislative changes sought by the petitioners
- [PE01529](#): this related to the enforcement of court orders relating to child contact. It was closed in November 2014 on the basis that the Scottish Government was not supportive of the change sought, i.e. the establishment of a new government agency to oversee enforcement
- [PE01513](#): this petition sought to ensure that unmarried fathers had guaranteed rights to be part of their children’s lives if they are deemed fit parents. It was considered along with PE1528 (above) and was closed in May 2015 on the same grounds as PE1528
- [PE01570](#): this petition is still open. It is seeking a review of the law that governs PRRs and its implementation in practice. The Public Petitions

³ Summary sheriffs will be a more junior rank of judge compared to sheriffs.

⁴ See further: <http://www.scotland-judiciary.org.uk/24/1454/Office-of-Summary-Sheriff-Vacancies>

Committee took [evidence](#) from the petitioner in September of this year and has written to various stakeholders.

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25 November 2015

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