



Briefing for the Public Petitions Committee

Petition Number: [PE1635](#)

Main Petitioner: Emma McDonald

Subject: Review of section 11 of the Children (Scotland) Act 1995

Calls on the Parliament to urge the Scottish Government to review the current system and operation of child contact centres and the procedure under section 11 of the Children (Scotland) Act 1995 so that the rights, safety and welfare of children are paramount in relation to child contact arrangements where domestic abuse is an issue, and to ensure that section 11 of the Act is consistently implemented across Scotland.

Background

Parental rights and responsibilities (PRRs)

The Children (Scotland) Act 1995 ('the 1995 Act') sets out 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 live with a person having PRRs. Furthermore, where the child does not live with that person, there is a PRR relating to contact with that child (1995 Act, section 1(1)(c) and section 2(1)(a) and (c)).

Who has PRRs?

Some people automatically have PRRs in respect of a child. These include the child's mother and, in some circumstances, the child's father.¹ Otherwise all (or some of) the PRRs can be acquired by several methods, including by application to the court under section 11 of the 1995 Act.²

¹ The father either 1) has to be married to the child's mother at the time of conception or subsequently; or has to be registered as the child's father (on or after 4 May 2006).

² He can also enter into a legally binding agreement with the child's mother under section 4 of the 1995 Act.

Residence and contact

Under section 11 of the 1995 Act, a parent can apply 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 principles applied by the court in relation to section 11 orders

Three key principles

In considering whether to grant any court order under section 11 of the 1995 Act, the court will have regard to three principles, namely:

- 1) the welfare of the child is the paramount consideration;
- 2) taking account of the child's age and maturity, the child shall, so far as practicable, be given an opportunity to express his or her views;³ and
- 3) the court will not make any order unless it considers that to do so would be better than making no order at all (1995 Act, section 11(7)).

Amendment relating to abuse

The Family Law (Scotland) Act 2006 (section 24) also amended section 11 to require 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 (1995 Act, section 11(7A)–(7E)).

No presumption relating to contact

A legal presumption is an assumption that the court makes that something should happen a particular way or that something is true. It may be overturned by the court, as a result of evidence led by one of the parties to the litigation.

The 1995 Act does **not** contain a legal presumption in favour of contact with the child by the parent who the child does not live with. Instead, the 1995 Act says a case should be decided according to the three key principles described above.

³ When the court is considering the views of the child under section 11(7), a **child aged 12 years or older** is presumed in law to have sufficient maturity to form a view (1995 Act, section 11(10)).

Contact orders in practice

Where a contact order in favour of one parent is breached by the other parent the court's remedies include finding the latter parent in contempt of court, leading to fine or imprisonment. Imprisonment for contempt used to be very rare in practice in this context. However, there have been several high profile examples from the last few years where the Court of Session has criticised the initial decision to imprison made by the sheriff courts.⁴

On the topic of delays in the court system, there have been a couple of significant Scottish contact cases, including that of **NJDB against JEG**⁵ which was ultimately considered by the UK Supreme Court. The Supreme Court criticised the delays which had been associated with the particular court proceedings and referred to the recommendations contained in the report of the [Scottish Civil Courts Review](#) relating to the management of family cases (see below).

Child contact centres

A child contact centre is a place where a child can go to see the parent who he or she does not live with.

Although contact centres are not explicitly referred to in the 1995 Act, the court's discretion under section 11 is wide enough that contact through a contact centre can be a condition of a contact order. Parents can also self-refer to a centre or they can be referred by a professional such as a mediator or a solicitor.

The member organisations of [Relationships Scotland](#) are the main providers of such centres, with 45 centres across Scotland. [Relationships Scotland](#) receives annual funding from the Scottish Government (£1.5 million for 2016/17).⁶ [Relationship Scotland](#)'s website identifies child contact centres as:

“being useful in a variety of circumstances, including where the relationships between the parents are particularly acrimonious, or where the non-resident parent does not have much of an established relationship with the child or where there is some concern about the parent's ability to ensure the child's safety in the absence of the support of the centre (e.g. drug or alcohol problems).”

⁴ A very recent example is the case of SM against CM ([2017] CSIH 1) considered by the Court of Session in January of this year. The Court of Session quashed the sheriff court's original finding of contempt, with effect that the sentence of imprisonment fell away. However, the Court of Session said that, in any event, the prison sentence of three months was “excessive” (para 62). See: <https://www.scotcourts.gov.uk/search-judgments/judgment?id=434c27a7-8980-69d2-b500-ff0000d74aa7>

⁵ 2012 SC (UKSC) 293. In SM against CM ([2017] CSIH 1) the court also criticised the delays associated with the case in question, as the original court action relating to contact had begun in 2010. The Court of Session made various recommendations relating to court procedure to try and prevent such delays occurring in future (paras 67–68).

⁶ Email from the Scottish Government to SPICe, dated 5th October 2016.

Child contact centres are not regulated by statute. All [Relationships Scotland](#) child contact centres operate under Office of the Scottish Charity Regulator requirements and undergo an internal quality assurance audit every three years. The child contact centres also adhere to Relationships Scotland's: Quality Assurance Framework; National Policies and Procedures; and Standards and Practice Procedures for Child Contact Centres. SPICe understands that these documents will be publicly available soon.⁷

Scottish Parliament Action

Petitions

The [Public Petitions Committee](#) has considered a number of petitions in recent years relating to PRRs. 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.
- [PE01570](#): the petitioner wanted a **review of the law that governs PRRs and its implementation in practice**. The petition was closed in February 2016 on the basis that the Scottish Government is committed to undertaking a review of the issues raised in the petition within the context of the Family Justice Modernisation Strategy (see below).
- [PE01589](#): this petition sought an **independent review of all the processes involved in arranging post-separation child contact** (and financial provision on divorce). It was closed in February 2016 on the same grounds as PE01570 above.
- [PE01631](#): this petition is open. The petitioner wants a change to the laws that govern the **recording of discussions at Child Welfare Hearings** (a preliminary court hearing in section 11 cases) so that presiding sheriffs have access to such records.

⁷ Email from Relationships Scotland to SPICe, dated 2nd February 2017.

Parliamentary Questions

The following PQs, asked by Neil Findlay MSP, were lodged on 26th January 2017:

[S5W-06615](#) To ask the Scottish Government when it will introduce regulation of child contact centres.

[S5W-06616](#) To ask the Scottish Government what the requirements are for a property to be deemed appropriate as a child contact centre.

[S5W-06617](#) To ask the Scottish Government how many child contact centre staff and volunteers are trained in child protection.

[S5W-06618](#) To ask the Scottish Government what the minimum qualification is for staff and volunteers working in child contact centres.

[S5W-06619](#) To ask the Scottish Government how many child contact centres are fitted with (a) CCTV, (b) panic alarms and (c) safe rooms.

[S5W-06620](#) To ask the Scottish Government what health and safety standards child contact centres are required to meet.

[S5W-06621](#) To ask the Scottish Government how often sheriffs are required to update their training in relation to domestic abuse.

Post-legislative scrutiny of the Family Law (Scotland) Act 2006

Towards the end of the last parliamentary session the then Justice Committee carried out a short inquiry involving post-legislative scrutiny of the Family Law (Scotland) Act 2006 ('the 2006 Act'). As discussed above, the 2006 Act amended section 11 of the 1995 Act.⁸

The Committee received mixed views as to how well the amended section 11 was working in practice. In particular, on whether children were being put at risk of abuse by the current approach of the courts. One of the Committee's conclusions in its report (at para 87) was as follows:

“Overall, the way in which the Scottish legal system handles family law cases involving children raises strong and conflicting views. With the main legislation over 20 years old, we note views that it may be time for a wholesale review, focussed as much on how the law is applied, and the mechanism used to resolve disputes, as on what the law says. We consider that cases would benefit from increased use of mediation and, if necessary, from being heard by specialist family law sheriffs.”

⁸ More information about the Committee's inquiry can be accessed here:
<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/97604.aspx>

Scottish Government Action

The Gill Review – management of family cases

The [Scottish Civil Courts Review](#) (often referred to as the ‘Gill Review’) was initiated in 2007 by the then Scottish Executive. Its remit was to “review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods.” Its final report was published in 2009 (see [volume 1](#) and [volume 2](#)) but, probably due to constraints on public sector finances and the scale of the necessary work, **significant parts of it remain unimplemented.**

The Gill Review made a number of recommendations relevant to family cases in Scotland. For example, in chapter 5 of the final report, a **new case management system** was proposed for cases heard in sheriff courts. The aim was to give greater powers to sheriffs to control the conduct and pace of litigation. A key feature of the system which was proposed was “the docket system” whereby a case is allocated to a sheriff at the first case management hearing. Thereafter, where possible, all subsequent court hearings would be dealt with by the same sheriff.

Related to the proposed new case management system, the Family Law Committee of the [Scottish Civil Justice Council](#) has commissioned research on case management in family actions, due at the end of March 2017.⁹ Once the Scottish Government has seen the research report, it will consider producing a policy paper on case management in family actions.¹⁰

The latest policy update from the Scottish Government

On 25 January 2017, the Scottish Government updated SPICe in relation to current policy work of relevance to the subject matter of the petition:

“The Scottish Government is committed to a **review of Part 1 of the 1995 Act** and to publishing a **Family Justice Modernisation Strategy**¹¹ [FJMS]. The FJMS is likely to address issues such as ensuring the voice of the child is heard and improving how family cases are dealt with, including tackling delay.¹²

It is likely that there will be a consultation paper covering both these topics and that this paper may revisit issues addressed in the Gill Review. As yet, there is no publicly available timescale associated with a possible consultation paper.

⁹ See: <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-10-october-2016-meeting/draft-minutes--awaiting-approval.pdf?sfvrsn=2>

¹⁰ Email from the Scottish Government to SPICe, dated 20th December 2016.

¹¹ Emphasis added by SPICe.

¹² To help the development of the FJMS, the Government held a summit in March 2016 to hear views from key stakeholders. The Government has published the points raised at the summit: <http://www.gov.scot/Topics/Justice/law/17867/fjms>.

There is some relevant work already being undertaken in the Family Law Committee of the Scottish Civil Justice Council, which advises on court rules and procedures. For example the Family Law Committee has started to review how the voice of the child is heard in family cases.”^{13 14}

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2nd February 2017

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¹³ In relation to the final paragraph of the Scottish Government’s email, one of the main ways in which the opinion of a child in section 11 cases is captured is via a [Form F9](#). The Family Law Committee of the Scottish Civil Justice Council has been undertaking some work, in consultation with interested bodies and individuals, to develop a revised Form F9. Email from the Scottish Government to SPICe dated 25 January 2017.

¹⁴ The Scottish Government also answered a relevant PQ in the Chamber ([S5O-00603](#)) on 26 January 2017. For the response see (at col 8):

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10752&mode=pdf>