A handbook on family law relating to children in Scotland and in England & Wales

For use by judges in operating the Judicial Protocol regulating direct judicial communications between Scotland, and England & Wales, in children's cases

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Contributors: *Lynda Brabender QC (Sc.); Alex Verdan QC (Eng. & Wales); Ruth Henke QC (Eng. & Wales)*

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ENGLISH PUBLIC CHILD LAW ORDERS AND PROCEDURE

Alex Verdan QC, 4 Paper Buildings, London

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I. Introduction: English Courts and Concepts

1. From 22 April 2014 significant family justice reforms were introduced pursuant to the Children and Families Act 2014 and the Crime and Courts Act 2013. Changes included the establishment of a new court[1], the abolishment of certain private children law orders and the creation of new orders[2], and time limits for the determination of certain public law proceedings[3].

II. English Courts

2. Since April 2014, there has been one unified Family Court in England and Wales. 'The family court' combines the previous Family Proceedings Courts and County Courts insofar as they deal with family matters.

3. In addition to this, there is the Family Division of the High Court of Justice[4]. This is the highest first instance court in England and Wales.

4. As the name suggests, the Family Procedure Rules 2010 ('FPR 2010') govern procedure in the Family Court and in the Family Division of the High Court, for example concerning applications for putting expert evidence before a court[5]. The FPR 2010 imposes a duty on the court[6] and on parties[7] to further the 'overriding objective' to "*deal with cases justly, having regard to any welfare issues involved*"[8] and its rules are aimed to achieve that objective.

5. The Public Law Outline contained in FPR 2010, Practice Direction 12A consists of case management provisions for applications by local authorities for orders under Part IV of the Children Act 1989. It sets out:

    1) the different stages of the application process;
    2) matters to be considered at case management hearings; and

[1] Crime and Courts Act 2013, section 31A
[2] For example, 'Child Arrangement Orders' in private child law proceedings: Children and Families Act 2014, section 12
[3] See below. Children and Families Act 2014, section 14
[4] The Family Division is reserved for two classes of cases which fall outside the subject of this guide: cases invoking the inherent jurisdiction of the High Court; and international cases involving applications for relief under either the Hague Convention or Brussels II Revised
[5] FPR 2010, Part 25
[6] FPR 2010, rule 1.2 and 1.4
[7] FPR 2010, rule 1.3
[8] FPR 2010, rule 1.1(1)

3) timescales within which stages of the process should take place.

Key Concepts

6. ***Welfare Principle*** – also known as the paramountcy principle, this concept derives from s.1(1) of the Children Act 1989:

"When a court determines any question with respect to—

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration."

7. ***Welfare Checklist*** – this is a list of factors set out in section 1(3) of the Children Act 1989, to which the court must have regard when considering whether to make a range of both public and private law orders:

"In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(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;

(g) the range of powers available to the court under this Act in the proceedings in question."

8. ***No Order Principle*** – as set out in section 1(5) of the Children Act, this prevents the court from interfering where to do so would confer no benefit on the child:

"Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all."

9. ***Least interventionist approach*** – derived from section 1(3) of the Children Act read in conjunction with section 1(5) of the Children Act, courts should adopt ''*the least interventionist approach*''[9].

10. ***Delay*** – Section 1(2) of the Children Act sets out the principle that in proceedings concerning the upbringing of a child, delay is considered to be harmful to the child:

    "*In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.*"

11. Practitioners and the court have a duty to avoid delay, and courts must proactively timetable cases to determine proceedings without delay[10]. Public children law proceedings must be disposed of within twenty-six weeks[11].

12. ***Parental Responsibility*** – whilst a child's mother will always have parental responsibility, a father will have parental responsibility only if he is married to the child's mother or has gained parental responsibility through other provisions of the Children Act (most commonly, through registration on the child's birth certificate)[12]. Where a Child Arrangements Order provides for a person who is not the child's parent or guardian to spend time with or have contact with (but not live with) the child, pursuant to section 12(2A) of the Children Act a court may make an order for the person to have parental responsibility for the duration of that Child Arrangements Order.

13. Parental responsibility is defined in section 3(1) of the Children Act as:

    "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."

14. ***Legal Parent*** –a child's legal mother is the gestational mother[13]. A child's legal father is presumed to be the legal mother's husband, unless this presumption is displaced by evidence that another person is the biological father of the child[14].

III. Public Children Law Proceedings

[9] *Re B-S (Children) (Adoption: Application of s 47(5))* [2014] 1 FLR 1035 [23]
[10] Children Act 1989, section 32(1)(i)
[11] Children Act 1989, sections32(1)(ii)
[12] Children Act 1989, sections 2(1) and (2)
[13] *Ampthill Peerage* [1977] AC 547 (also see Human Fertilisation and Embryology Act 2008, section 33(1))
[14] *Re G (No 2) (A Minor) (Child Abuse: Evidence)* [1988] 1 FLR 314

15. A Local Authority commences care proceedings upon filing form C110A. Pursuant to section 31(1) of the Children Act 1989, a Local Authority may be seeking:
    (a) A Care Order; and/or
    (b) A Supervision Order.

16. Upon disposal of public law proceedings the court may make a range of orders:
    a. Supervision Order
    b. Care Order
    c. Placement Order
    d. Special Guardianship Order
    e. Child Arrangements Order

IV. Care and Supervision Orders

Effect of Care and Supervision Orders

17. A Care Order grants parental responsibility to the relevant Local Authority[15]. This does not remove the parental responsibility of any other person (though the Local Authority can determine the extent to which those other persons are permitted to exercise their parental responsibility) and does not affect the legal parental status of the child's parents.

18. Where a child is subject to a Care Order, the Local Authority has a duty to safeguard and promote the child's welfare and to provide the child with accommodation and maintenance[16].

19. A Supervision Order does not confer parental responsibility upon the Local Authority. Instead, as a result of section 35 of the Children Act, duties are conferred upon the Local Authority which aim to ensure that the Local Authority is involved in the child's life for a finite period of time:

> *"While a supervision order is in force it shall be the duty of the supervisor –*
> *(a) to advise, assist and befriend the supervised child;*
> *(b) to take such steps as are reasonably necessary to give effect to the order; and*
> *(c) where –*
> *(i) the order is not wholly complied with; or*
> *(ii) the supervisor considers that the order may no longer be necessary,*
> *to consider whether or not to apply to the court for its variation or discharge."*

[15] Children Act 1989, section 33(3)
[16] Children Act 1989, section 22, 22A and 22B

20. The supervisor cannot give directions to the child or to its parents under a Supervision Order, unless these powers are specifically included in the order pursuant to Schedule 3 of the Children Act.
21. A Supervision Order can be made with respect to a child who is subject to a private children law order, such as a Child Arrangements Order or a Special Guardianship Order and it does not end those orders. Rather, the Supervision Order is expected to offer support and assistance, with issues such as contact.

22. Conversely, the making of a Care Order discharges the section 8 order[17].

When are Care and Supervision Orders made?

23. A court should not hear an application for a Care or Supervision Order in England and Wales if the relevant child is already subject to a Compulsory Supervision Order[18].

24. Care and Supervision Orders can only be made for children who are 16 years old or younger[19].

25. Before a Care or Supervision Order can be made, the Local Authority must satisfy the court that the threshold criteria in section 31(2) of the Children Act are met:

> *"A court may only make a care order or supervision order if it is satisfied –*
> *(a) that the child concerned is suffering, or is likely to suffer, significant harm; and*
> *(b) that the harm, or likelihood of harm, is attributable to –*
> *(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or*
> *(ii) the child's being beyond parental control."*

26. This test is assessed as at the date on which the Local Authority issued their application or first took protective measures in relation to the child[20].

27. To obtain an Interim Care or Supervision Order, the court must be satisfied of the interim threshold criteria set out in section 38(2) of the Children Act:

[17] Children Act 1989, section 91(2)
[18] Children Act 1989, section 33(7)
[19] Children Act 1989, section 31(3)
[20] *Re M (A Minor) (Care Order: Threshold Conditions)* [1994] 2 FLR 577

"A court shall not make an interim care order or interim supervision order under this section unless it is satisfied that there are reasonable grounds for believing that circumstances with respect to the child are as mentioned in section 31(2)."

28. Establishing the threshold criteria does not necessitate the granting of a Care or Supervision Order. Once the threshold is crossed, the court will conduct a welfare analysis to decide which order is best for the child. It may be, for example, that matters have improved significantly since the proceedings were commenced, such that it is in the child's best interests to return home with no order of the court.

29. In deciding what is in the child's best interests, the welfare principle and welfare checklist will be applied. The court will also consider the no order principle.

When do Care and Supervision Orders cease to have effect?

30. Interim Care and Interim Supervision Orders last until the disposal of the proceedings[21].

31. A Care Order (other than an Interim Care Order) remains in force until the child reaches age 18, unless it is brought to an end earlier[22]. A Care Order is discharged by the court making a Child Arrangements Order which regulates who the child lives with[23] and a Care Order has effect subject to an Emergency Protection Order where such an order is made in respect of a child who is in care[24].

32. Pursuant to schedule 3 paragraph 6(1) of the Children Act the duration of a Supervision Order is one year from the date on which it was made, though a Supervision Order may be made for a shorter period of time[25]. Upon the supervisor making an application, the court may extend or further extend the Supervision Order for a maximum of three years from the date on which the Supervision Order began[26].

[21] Section 14(4)(a) of the Children and Families Act 2014 removed the time limit by omitting sections 38(a) and (b) of the Children Act 1989
[22] Children Act 1989, section 91(12)
[23] Children Act 1989, section 91(1)
[24] Children Act 1989, section 91(6)
[25] *M* v *Warwickshire County Council* [1994] 2 FLR 593
[26] Children Act 1989, schedule 3 paragraphs 6(3) and 6(4). The court has no jurisdiction to make an extended Supervision Order for three years at the outset: *Wakefield Metropolitan District Council* v *T* [2008] 1 FLR 1589

33. If a court makes a Care Order in respect of a child who is the subject of a Supervision Order, the Supervision Order is discharged[27]. However, a Supervision Order shall remain in force when a Child Arrangements Order is made.

Enforceability of Care and Supervision Orders in Scotland

34. Where a Local Authority has a Care Order and wishes to place the child in Scotland, the Care Order can be converted into a Compulsory Supervision Order.

35. Such a transfer can only occur where:
    (a) The English court has given its consent to the Local Authority placing the child in Scotland;
    (b) The Scottish Local Authority has notified the court in writing that it is willing to take over the care and supervision of the child; and
    (c) The relevant English Local Authority has notified the court that it agrees to the Scottish Local Authority taking over the care of the child[28].

36. An English Local Authority is not permitted to place a child in care in Scotland without the consent of the court[29].

37. It is also possible for an English Local Authority to transfer a Supervision Order to a Scottish Local Authority, so long as the receiving Local Authority has consented to this transfer in writing[30].

V. Placement Orders

38. Once a child is subject to care proceedings, the only procedure by which it can be adopted is through the Local Authority applying for, and obtaining a Placement Order[31]. There is hence a two stage process, where placement is followed by adoption.

39. A Local Authority applies for a Placement Order on form A50.

[27] Children Act, section 91(3)
[28] Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland - Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013/99, regulation 3
[29] Children Act 1989, schedule 2, paragraph 19(1)
[30] Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland - Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013/99, regulation 4
[31] Adoption and Children Act 2002, section 19(3)

Effect of Placement Orders

40. A Placement Order authorises a Local Authority to place a child for adoption with any prospective adopters who may be chosen by that authority[32].

41. A Placement Order will remain in effect unless it is revoked by the Court, an Adoption Order is made, or the child marries or turns 18[33].

When are Placement Orders made?

42. A Placement Order will only be made where a child is subject to a Care Order, where the court is satisfied that the threshold criteria (as above) are made out, or where the child has no parent or guardian[34].

43. A Placement Order will only be granted if the Court is satisfied in respect of every parent with parental responsibility or guardian of the child that either:
    (a) He has consented to the child being placed for adoption and not withdrawn that consent; or
    (b) The Court should dispense with his consent[35].

44. The Court can only dispense with a person's consent to a Placement Order in accordance with the provisions of section 52(1) of the Adoption and Children Act 2002:

    "The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that –

    (a) the parent or guardian cannot be found or lacks capacity (within the meaning of the Mental Capacity Act 2005) to give consent, or
    (b) the welfare of the child requires the consent to be dispensed with."

45. As before, as well as being satisfied that the above criteria is met, the court must be satisfied that it is in the child's best interests for a Placement Order to be made. The standard welfare principle is modified in proceedings under the Adoption and Children Act 2002 to read:

[32] Adoption and Children Act 2002, section 21(1)
[33] Adoption and Children Act 2002, section 21(4)
[34] Adoption and Children Act, section 21(2)
[35] Adoption and Children Act 2002, section 21 (3)

"The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life"[36].

46. Placement Orders can only be made in respect of children under 18 years of age[37].

Enforceability of Placement Orders in Scotland

47. Pursuant to section 77(2) of the Adoption and Children (Scotland) Act 2007:

"An order made under section 21 of that Act (placement orders), and the variation or revocation of such an order under section 23 or 24 of that Act, have effect in Scotland as they have in England and Wales but as if any reference to the parental responsibility for the child were to the parental responsibilities and parental rights in relation to the child."

48. As such, upon the making of an English Placement Order, any residence order, contact order, specific issue order, or interdict relating to parental responsibility made pursuant to the Children (Scotland) Act 1995 will cease to have effect[38].

VI. Adoption Orders

49. An application for an Adoption Order is made on form A58.

Effect of Adoption Orders

50. The legal effect of an Adoption Order is extreme. It takes away both the legal parental status and the parental responsibility of the biological parents and vests these in the adoptive parents. As such, an Adoption Order is the only order in the English courts which affects a person's legal parental status.

51. An Adoption Order is considered to be final and can only be revoked in very specific circumstances (such as when the Adoption Order was granted by way of fraud).

When are Adoption Orders made?

52. The Court may grant an adoption order where:
    (a) All of the child's parents with parental responsibility or guardians consent to the making of an Adoption Order;

[36] Adoption and Children Act 2002, section 1(2)
[37] Adoption and Children Act 2002, section 144
[38] Adoption and Children (Scotland) Act 2007, section 79(3)

(b) The above consent is dispensed with pursuant to section 52(1);
(c) An adoption agency placed the child for adoption with the parents' consent and no parent has leave to oppose the application; or
(d) The child was the subject of a Placement Order and no parent has leave to oppose the application.[39]

53. An English Court can also grant an Adoption Order where a child is the subject of a Scottish Permanence Order which includes a grant of authority for the child to be adopted[40]. In these circumstances, there is no need to reconsider the question of parental consent[41].

54. An Adoption Order can only be granted to applicants who are over the age of 21 and at least one of the applications must be domiciled in one part of the British Isles. Furthermore, all of the applicants (whether a couple or an individual) must have been habitually resident in a part of the British Isles for at least one year prior to the application being made[42].

55. An Adoption Order can only be made in respect of a person who has not yet reached the age of 19[43].

56. An Adoption Order will only be made if the court determines that "*nothing else will do*"[44]. For the court to reach that conclusion, to make a non-consensual Placement Order or a non-consensual Adoption Order, and to approve a care plan for adoption, it must have evidence which addresses all of the options which are realistically possible[45].

Enforceability of Adoption Orders in Scotland

57. Pursuant to section 77(1) of the Adoption and Children (Scotland) Act 2007:

> *"An adoption order (within the meaning of section 46(1) of the 2002 Act) has effect in Scotland as it has in England and Wales but as if any reference to the parental responsibility for the child were to the parental responsibilities and parental rights in relation to the child."*

[39] Adoption and Children Act 2002, section 47
[40] Adoption and Children Act 2002, section 47(6)(a)
[41] *Re A (Children: Scottish Adoptions)* [2017] EWHC 35
[42] Adoption and Children Act 2002, section 49
[43] Adoption and Children Act 2002, section 47(8)
[44] *Re B (Care proceedings: appeal)* [2013] 2 FLR 1075 [198]
[45] *Re B-S (Children) (Adoption: Application of s 47(5))* [2014] 1 FLR 1035 [33-34]

58. When an English Adoption Order is made, this will have the effect of extinguishing any order under the Children (Scotland) Act 1995, save for orders made under sections 9, 11(1)(d), or 13, or exclusion orders made under section 76(1)[46].

59. A Scottish Adoption Order will be recognised in England and Wales and will also have the effect of revoking an English Placement Order[47].

VII. Secure Accommodation Orders

60. A Local Authority cannot place a child in accommodation in England for the purposes of restricting their liberty unless an order is made authorising the child to be placed in secure accommodation ('a Secure Accommodation Order').

61. The application should be made on form C1 with a supplemental C20.

Effect of Secure Accommodation Orders

62. A Secure Accommodation Order has the effect of permitting a Local Authority to place (or keep) a child in secure accommodation.

63. In *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180, 'secure accommodation' was defined as accommodation which is *"designed for, or having as its primary purpose, the restriction of liberty"*. As a result, a clinic for the treatment of eating disorders was deemed not to be secure accommodation, as the restriction on liberty was incidental to the primary purpose of the clinic.

64. As a result of guidance issued by the Secretary of State, if a child's liberty is to be restricted in a children's home, this must be in an approved 'secure children's home'[48].

65. Without a Secure Accommodation Order, a Local Authority is only permitted to place a child in secure accommodation for a maximum of 72 hours in each 28 day period[49].

When are Secure Accommodation Orders made?

66. Pursuant to section 25(1) of the Children Act 1989, a Court will make a Secure Accommodation Order in respect of a child if it appears:
"(a) that –

[46] Adoption and Children Act 2002, section 46(2)
[47] Adoption and Children Act 2002, section 21(4)
[48] Children Act 1989 – Guidance and Regulations, Volume 5, paragraph 2.108
[49] Children (Secure Accommodation) Regulations 1991, regulation 10

(i) he has a history of absconding and is likely to abscond from any other description of accommodation; and

(ii) if he absconds, he is likely to suffer significant harm, or

(b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons."

67. When making a Secure Accommodation Order, the court must specify a maximum period for which it applies[50]. This can be for an initial period of up to three months, which can then be extended for periods of up to six months at a time[51].

68. It is clear from the wording of section 25 that a Secure Accommodation Order must be made if the section 25(1) criteria are made out. As such, the welfare principle does not apply[52].

69. It is possible to make an interim Secure Accommodation Order where proceedings are adjourned, though an application for a stand alone interim order cannot be made[53].

Enforceability of Secure Accommodation Orders in Scotland

70. Secure Accommodation Orders cannot be made in respect of placements in Scotland, as the wording specifically refers to placements in England.

71. As such, if a Local Authority wishes to place a child in secure accommodation in Scotland, they should seek an order under the inherent jurisdiction which authorises the placement[54].

72. There is currently no mechanism by which to directly enforce such an order in Scotland. A mirror order should therefore be obtained in the Court of Session, pursuant to the *'nobile officium'* jurisdiction[55].

[50] Children Act 1989, section 25(4)
[51] Children (Secure Accommodation) Regulations 1991, regulations 11 and 12
[52] *Re M (Secure Accommodation Order)* [1995] 1 FLR 418
[53] Children Act 1989, section 25(5)
[54] *Re X and Y (Secure Accommodation: Inherent Jurisdiction)* [2016] EWHC 2271
[55] *Cumbria County Council* [2016] CSIH 92

VIII. Private Law Orders in Public Law Proceedings

73. In addition to key concepts being applicable irrespective of the public or private nature of the application[56], the court may make a private law order in public law proceedings at an interim stage and at the conclusion of proceedings.

74. A private law order at an interim stage might include, for example, a child being placed with one parent subject to a 'lives with' order pursuant to section 8 of the Children Act[57] and an Interim Supervision Order whilst assessments are carried out.

75. The court may dispose of public law proceedings with a private law order if it considers such an order to be in the child's best interests. Such an order might be a Child Arrangements Order pursuant to section 8 which stipulates who the child is to live with and spend time with, or a Special Guardianship Order pursuant to sections 14A-F[58]. However, the Local Authority is not permitted to apply for a Child Arrangements Order and the court cannot make such an order in favour of a Local Authority[59].

[56] See Chapter 2, Part X
[57] See Chapter 2, Part II
[58] See Chapter 2, Part XI
[59] Children Act 1989, section 9

CHAPTER 2

ENGLISH PRIVATE CHILD LAW ORDERS AND PROCEDURE

Alex Verdan QC, 4 Paper Buildings, London

Contents

I. Introduction to the Private Law System

1. Since April 2014, there has been one unified Family Court in England and Wales. 'The Family Court' combines the Family Proceedings Courts and County Courts insofar as they deal with family matters. In addition to the Family Court, there is the Family Division of the High Court which deals with matters invoking the inherent jurisdiction of the High Court (see part IX below) and certain cases with an international element, including applications under the 1980 Hague Convention.

2. Private law children matters are, for the most part, governed by the Children Act 1989 (the "CA 1989"). The Family Procedure Rules 2010 (the "FPR 2010") outline the relevant procedures employed in both the Family Court and the Family Division of the High Court. The rules impose a duty on the Court and the parties to further the overriding objective and *"deal with cases justly, having regard to any welfare issues involved"*.[60]

II. Orders under Section 8 of the Children Act 1989

3. Over the years, orders under section 8 of the CA 1989 have been described in a number of different ways but broadly speaking the purpose of such orders have remained the same: to regulate the arrangements for children whose parents cannot agree.

4. Following the Children and Families Act 2014, the terms 'residence' and 'contact' have been replaced with 'lives with' and 'spends time with'. Together, they are 'child arrangements orders' ("CAO"). In addition to CAOs, the Court can make prohibited steps and specific issue orders under the CA 1989. The following table illustrates the purpose and function of this suite of orders:

Type of order	Child arrangements order	Prohibited steps order	Specific issue order
Purpose	Governs with whom a child lives and spends time.	Restricts the exercise of parental responsibility.	Decides a particular issue where parents disagree.
Example	A child may 'live with' one parent and 'spend time with' another, or may 'live with' both parents according to specified times.	Removal from the jurisdiction.	Schooling, religion, a holiday abroad, medical treatment.

[60] FPR 2010, rules 1.1-1.3

5. As well as bestowing parental responsibility on the person named in the order (if they do not already have it),[61] a 'lives with' order allows that individual to take the child out of the country for up to a month out of the time without the permission of the other holders of parental responsibility or the Court.

III. Parties in applications for a Section 8 Order

6. Only persons with parental responsibility for a child may apply for a section 8 order as of right,[62] otherwise the Court's permission is required.[63] The respondents will be any person whom the applicant believes to have parental responsibility for a child.

IV. Parental responsibility

7. Parental responsibility comprises of: *"all of the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".*[64]

8. Whilst a child's birth mother always has parental responsibility, fathers only acquire parental responsibility if: (1) they were married to the child's mother at the time of birth; (2) are named on the child's birth certificate;[65] (3) by agreement with the mother; or (4) on an application to the Court. Where both parents are female, section 4ZA extends the avenues which enable unmarried fathers to acquire parental responsibility to the non-birth mother.

9. Where a child arrangements order provides for an individual without parental responsibility to 'spend time with' that child, the Court may grant parental responsibility to that person for the duration of that order.[66]

V. The definition of 'child'

10. Although the definition of a 'child' under section 105(1) of the CA 1989 is *"a person under the age of eighteen"*, section 9(6) restricts the Court from making section 8 orders *"which will end after the child has reached the age of sixteen, unless it is satisfied that the circumstances of the case are exceptional".*

[61] Children Act 1989, sections 12(1) and 12(2)
[62] Children Act 1989, sections 10(4)-(7)
[63] Children Act 1989, section 10(2)(b)
[64] Children Act 1989, section 3(1)
[65] Children Act 1989, section 4(1A) but only where the child was born after 1 December 2003
[66] Children Act 1989, sections 12(1A) and (2A)

VI. Basis upon which Section 8 Orders are made

11. The Court's paramount consideration when making an order under section 8 is the subject child's welfare (s 1(1) of the CA 1989). The 'Welfare Checklist' sets out the matters the Court shall have regard to when making, varying or discharging an order under section 8.[67] These include:
    (a) The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
    (b) Their physical, emotional and educational needs;
    (c) The likely effect on them of any change in circumstances;
    (d) Their age, sex, background and any characteristics which the court considers relevant;
    (e) Any harm they have suffered or are at risk of suffering;
    (f) How capable each of their parents and any other person in relation to whom the court considers the question to be relevant is of meeting their needs;
    (g) The range of powers available to the court under this Act in the proceedings in question.

12. In addition to the welfare checklist, the Court must consider the following:

    i. **Avoidance of delay:** "*the Court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child*" (section 1(2) of the CA 1989).

    ii. **Parental involvement:** *"the Court shall presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare […] this means involvement of some kind, either direct or indirect, but not any particular division of a child's time"* (section 1(2A)-(2B) of the CA 1989).

    iii. **No order principle:** *"the Court shall not make [any order] unless it considers that doing so would be better for the child than making no order at all"* (section 1(5) of the CA 1989).

    iv. **Domestic violence and harm:** pursuant to Practice Direction 12J, which in its revised form came into force in October 2017, requires the Court to pay particular attention to any relevant allegations of domestic abuse raised by any of the parties. Where the allegations are disputed, the Court may embark on a fact-finding exercise and if the allegations are subsequently proven and / or admitted, *"the Court*

[67] Children Act 1989, section 1(3)

must be satisfied that any contact ordered with a parent who has perpetrated domestic abuse does not expose the child and/or other parent to the risk of harm and is in the best interests of the child."[68]

VII. Procedure and the Child Arrangements Programme

13. Unsurprisingly, the Court's emphasis in private law proceedings is on parents exercising their parental responsibility to reach agreement with each other about what is best for their children. For that reason, the cornerstone of the Child Arrangements Programme (the "CAP") is dispute resolution. Whilst there is no statutory time limit in respect of private law proceedings, the delay principle, combined with the overriding objective (see above) requires that matters be concluded in a timely fashion.

14. The CAP contained within Practice Direction 12B sets out all of the key steps in resolving a private law children dispute. The flowchart setting out those steps is provided at the end of this chapter.

15. In broad terms: parties must attend a mediation information and assessment meeting ("MIAM") before hearing. Then there is a First Hearing Dispute Resolution Appointment ("FHDRA"), followed by a Dispute Resolution Appointment ("DRA") and then a Final Hearing if necessary. Further review hearings / DRAs may be listed as necessary to ensure efficient and proportionate case management. CAFCASS (the Children and Family Court Advisory and Support Service) should prepare safeguarding checks in advance of the FHDRA, and may be directed to prepare a report under section 7 of the Children Act 1989 to assist the Court with the questions before it.[69] Typically, a section 7 report will be directed if there are questions that go to welfare (e.g. the amount of time a child should spend with each parent), rather than adult conflict (e.g. whether that time should be on a particular day).

16. If, throughout the course of private law proceedings, the Court is concerned that a child may be at risk of significant harm, it may direct that a local authority conducts a report pursuant to section 37 of the CA 1989. However, the Court cannot make a care or supervision order of its own initiative should a local authority decide not to issue proceedings following its section 37 report.[70]

[68] PD12J, para. 5
[69] Where a family is known to a local authority, the Court may direct they complete the section 7 report instead of CAFCASS if the case remains open to them.
[70] *Nottinghamshire County Council* v *P* [1993] 2 FLR 134

VIII. Recognition and enforcement of Section 8 Orders in Scotland

17. By virtue of section 1(a) of the Family Law Act 1986 (the "FLA 1986"), a section 8 order is a 'Part I' order and therefore has the *"same effect"* in Scotland as it would had it been made in Scotland.[71] However, for the order to be enforceable, it must be registered under section 27 of the FLA 1986, in accordance with section 29.

18. Registration under section 27 must comply with r. 32.25 of the FPR 2010:

> ***Application for the registration of an order made by the High Court or the family court***
>
> *1. An application under section 27 of the 1986 Act for the registration of an order made in the High Court or the family court may be made by sending to a court officer at the court which made the order –*
>
> *a. a certified copy of the order;*
>
> *b. a copy of any order which has varied the terms of the original order;*
>
> *c. a statement which –*
>
> *i. contains the name and address of the applicant and the applicant's interest under the order;*
>
> *ii. contains –*
>
> *aa. the name and date of birth of the child in respect of whom the order was made;*
>
> *bb. the whereabouts or suspected whereabouts of the child; and*
>
> *cc. the name of any person with whom the child is alleged to be;*
>
> *iii. contains the name and address of any other person who has an interest under the order and states whether the order has been served on that person;*
>
> *iv. states in which of the jurisdictions of Scotland, Northern Ireland or a specified dependent territory the order is to be registered;*
>
> *v. states that to the best of the applicant's information and belief, the order is in force;*
>
> *vi. states whether, and if so where, the order is already registered;*
>
> *vii. gives details of any order known to the applicant which affects the child and is in force in the jurisdiction in which the order is to be registered;*
>
> *viii. annexes any document relevant to the application; and*
>
> *ix. is verified by a statement of truth; and*
>
> *d. a copy of the statement referred to in paragraph (c).*

[71] Family Law Act 1986, section 25(1)

2. *On receipt of the documents referred to in paragraph (1), the court officer will, subject to paragraph (4) –*
   a. *keep the original statement and send the other documents to the appropriate officer;*
   b. *record in the court records the fact that the documents have been sent to the appropriate officer; and*
   c. *file a copy of the documents.*
3. *On receipt of a notice that the document has been registered in the appropriate court the court officer will record that fact in the court records.*
4. *The court officer will not send the documents to the appropriate officer if it appears to the court officer that –*
   a. *the order is no longer in force; or*
   b. *the child has reached the age of 16.*
5. *Where paragraph (4) applies –*
   a. *the court officer must, within 14 days of the decision, notify the applicant of the decision of the court officer in paragraph (4) and the reasons for it; and*
   b. *the applicant may apply to the court in private for an order that the documents be sent to the appropriate court.*

19. Once the order is registered, it can be enforced. The Scottish Court's powers of enforcement in respect to an English or Welsh order are the same as if it had made the order itself, and at an interim stage, the Court may give such directions as it thinks fit *"for the purpose of securing the welfare of the child concerned or preventing changes in the circumstances relevant to the determination of the application."*[72]

IX. Orders under the inherent jurisdiction

20. Where issues cannot be resolved under the CA 1989, the Court may make orders to protect a child (or vulnerable adult) under the inherent jurisdiction, including making such individuals wards of Court. Practice Direction 12D explains the nature of proceedings under the inherent jurisdiction:

1.1 It is the duty of the court under its inherent jurisdiction to ensure that a child who is the subject of proceedings is protected and properly taken care of. The court may in exercising its inherent jurisdiction make any order or determine any issue in respect of a child unless limited by case law or statute. Such proceedings should not be commenced unless it is clear that the issues concerning the child cannot be resolved under the Children Act 1989.

[72] Family Law Act 1986, section 29

1.2 The court may under its inherent jurisdiction, in addition to all of the orders which can be made in family proceedings, make a wide range of injunctions for the child's protection of which the following are the most common –

a. orders to restrain publicity;

b. orders to prevent an undesirable association;

c. orders relating to medical treatment;

d. orders to protect abducted children, or children where the case has another substantial foreign element; and

e. orders for the return of children to and from another state.

1.3 The court's wardship jurisdiction is part of and not separate from the court's inherent jurisdiction. The distinguishing characteristics of wardship are that –

a. custody of a child who is a ward is vested in the court; and

b. although day to day care and control of the ward is given to an individual or to a local authority, no important step can be taken in the child's life without the court's consent.

21. Insofar as an order under the inherent jurisdiction gives the care of a child to a person, provides for contact or education,[73] it is recognisable, registerable and enforceable in Scotland in the same way as a section 8 order (see part VIII above).

X. Private Law Orders made in Public Law Proceedings

22. The Court may make private law orders in public law proceedings both at an interim stage and at the conclusion of those proceedings. For example, a Court may place a child with a family member at an interim stage pursuant to a CAO (possibly alongside an interim supervision order) whilst assessments are carried out. The Court may also dispose of public law proceedings with a CAO (or a supervision order in addition to a CAO) if it considers such an order to be in the child's best interests. However, notwithstanding the overlap between the two arenas, the local authority is not permitted to apply for a CAO and the Court cannot make such an order in favour of a local authority.[74]

23. Although supervision orders and child arrangements orders may exist alongside each other, the same is not true of care orders. Where a child arrangements or special guardianship order (see part XI below) is made with respect to a child subject to a care order, that care order will be automatically discharged.[75] Similarly, a care order will

[73] Family Law Act 1986, section 1(d)
[74] Children Act 1989, section 9
[75] Children Act 1989, section 91(1)

discharge any child arrangements order ('lives with' and 'spends time with') in operation at that time,[76] and will bring wardship to an end.[77]

XI. Special Guardianship Orders

24. The provisions governing special guardianship orders ('SGOs') are contained in sections 14A-F of the CA 1989.

25. When an SGO is made, the child will live with a 'special guardian'. Whilst the legal ties between the subject child and his parents are preserved when the Court makes an SGO, the special guardian has parental responsibility which they can exercise to the exclusion of others with parental responsibility (save for another special guardian).[78] The aim, and indeed benefit, of an SGO is that it provides children who cannot live with their birth parents and for whom adoption is not suitable greater permanence and security than long-term fostering. If it is not discharged earlier, an SGO ceases when the subject child attains age eighteen years old.[79]

26. A special guardian must be a person aged eighteen years or older and cannot be the subject child's parent.[80]

27. Where an SGO is sought in private law proceedings, section 14A(5) prescribes who is entitled to make an application for an SGO without leave of the Court; it includes a relative of the subject child with whom the child has lived with for at least one year immediately preceding the application. In such circumstances, section 14A(7) requires an applicant to give the local authority three months' notice in writing of their intention to apply for an SGO. The local authority to which notice must be given is that which the child is being looked after by, or if the child is not being looked after by a local authority, the local authority in whose area the applicant is resident. When an individual applies for an SGO the local authority must investigate and prepare a report on the suitability of the applicant before the Court can make the SGO.[81]

28. Where permission to apply for an SGO is required, the criteria is the same as for section 8 orders (see part III above).[82]

[76] Children Act 1989, section 91(2)
[77] Children Act 1989, section 91(3)
[78] Children Act 1989, section 14C(1)
[79] Children Act 1889, section 91(13)
[80] Children Act 1989, section 14A(2)
[81] Children Act 1989, section 14A(8)
[82] Children Act 1989, section 14(A)(4) and 14(A)(12)

29. When granting an SGO the Court must, in accordance with section 14B, consider whether to vary or discharge an existing section 8 order and whether to make a spends time with order (for example, to maintain contact with a birth parent).

30. Unlike an adoption order, an SGO can be varied or discharged.[83] Leave is required for such an application to be made by the child, any parent or guardian, any step-parent who has parental responsibility and any other person who had parental responsibility before the SGO was made.[84] The Court will not grant leave to those persons, save for the child, *"unless it is satisfied that there has been a significant change in circumstances since the making of the special guardianship order."*[85]

31. Pursuant to section 1(1)(aa) of the FLA 1986, SGOs are recognisable, registrable and enforceable in the same way as section 8 orders (see part VIII above).

[83] Children Act 1989, section 14D
[84] Children Act 1989, section 14D(3)
[85] Children Act 1989, section 14D(5)

CHILD ARRANGEMENTS PROGRAMME: FLOWCHART

[CAP:X] = reference to relevant paragraph or section in the Child Arrangements Programme

DISPUTE OVER ARRANGEMENTS FOR CHILDREN

Cases of Exceptional/Extreme Urgency *[CAP:12]*
where injunction/prohibited steps orders are sought, go straight to issue and consider without notice application
NB: paperwork must be in order

Signposting *[CAP:2]*
Seek advice from sortingoutseparation.org.uk, a lawyer or a Dispute Resolution Service

Dispute Resolution Services *[CAP:5]*
Parties attend for Mediation/SPIP or other Dispute Resolution Service . Parties to consider Parenting Plan. Self-referral to Contact Centre if required.

Attendance at MIAM *[CAP:5.3]*
(Compulsory for Proposed Applicant unless exemption applies. Proposed Respondent notified and encouraged to attend)

Application *[CAP:8]*
Form C100 and form C1A (if required) to be completed and submitted to the Court, accompanied by any existing Parenting Plan if available (Case will NOT be issued if paperwork not in order)

Allocation/Gatekeeping *[CAP:9]*
Case allocated within Family Court (in accordance with Guidance and Rules). Papers submitted to CAFCASS (Day 1 after issue)

Safeguarding checks *[CAP:13]*
Completed by Cafcass (Day 17 after receipt of application)

Directions on Issue (where necessary) *[CAP:9.4]*
If the Applicant has not attended MIAM and an exemption has not been validly claimed, the Gatekeeping Judge may direct attendance of the parties (or either of them) at MIAM before the FHDRA (below). Other directions may be given.

MIAM *[CAP:9.4(1)]*
Both or either party may be referred to MIAM (where not complied with requirement to attend)

First Hearing Dispute Resolution Appointment (FHDRA) *[CAP:14]*
Attended by parties. Cafcass in attendance (In week 5-6)

Interim Order
If necessary in the interests of the child

Where issues of domestic or child abuse arise and fact finding is necessary, filing of statements/ schedule of issues in dispute.

Fact Finding Hearing *[CAP:20]*
(Issues of Domestic or child abuse). In accordance with PD12J

Filing of statements - where ordered

Welfare (**section 7**) report?

MIAM
Either party may be directed to attend

Mediation/Dispute Resolution
Attend for Mediation /SPIP or other Dispute Resolution Service. Parties to consider Parenting Plan

Dispute Resolution Appointment (DRA) *[CAP:19]*

Final welfare hearing

FINAL ORDER

AGREEMENT

Orders to monitor / support contact *[CAP:15.5]*
i.e. Section 11H CA 1989, Section 16, CA 1989

Enforcement of Court Order *[CAP:21]*
(Where order is not complied with). Consider (1) swift return before Judge (2) s.11J CA89 (3) Further safeguarding checks (4) determination of any facts on issue

Chapter 3

SCOTTISH PUBLIC CHILD LAW ORDERS AND PROCEDURE

Lynda Brabender, QC, Westwater Advocates, Edinburgh

Contents

I. Overview

1 The Court of Session and the sheriff courts in Scotland make public law orders in respect of children (adoption orders and permanence orders). In addition to the Court's jurisdiction, children's hearings have jurisdiction to make certain orders in respect of children (compulsory supervision orders).

2 The Court of Session has all-Scotland civil jurisdiction. It sits only in Edinburgh. The Court of Session is divided into the Outer House (hearing cases at first instance) and the Inner House (effectively the appeal court). The Outer House is the highest first instance civil court in Scotland. Senators of the College of Justice sit as single judges in the Outer House. In the Inner House, the majority of cases are heard by three Senators. Senators also sit as judges in the High Court of Justiciary presiding over the prosecution of the most serious crime in Scotland. There are presently 35 Senators of the College of Justice, augmented with temporary judges from time to time.

3 There is no family division or family court within the Outer House of the Court of Session. Presently one Senator is appointed as the Family Judge (currently Lord Brailsford). He is supported by the second Family Judge (currently Lady Wise).

4 Most of the public law and private law actions relating to families and children are heard in the sheriff court. There are 39 sheriff courts across Scotland, divided into six sheriffdoms which are arranged geographically. Sheriffs and summary sheriffs, sitting alone, preside over civil and criminal business in the sheriff court. There are presently 157 permanent or resident sheriffs and summary sheriffs sitting in the sheriff courts of Scotland. There is no family division in the sheriff court. In the largest sheriff courts (Glasgow, Edinburgh and Aberdeen), there are particular sheriffs who are dedicated to family actions and hear the majority of family cases in those courts.

5 The children's hearing hears cases where children are in need of protection, guidance, treatment or control. That can include cases where it is alleged that the child has committed a criminal offence. Three lay members of the Children's Panel hear cases in the children's hearing. The Reporter to the Children's Hearing makes referrals to the children's hearing and provides administrative support. Children's hearings are held in every local authority area in Scotland (there are currently 32 local authorities in Scotland. All have education and social work functions for their local authority area).

6 This chapter is intended to give an explanation of Scottish adoption orders, permanence orders and compulsory supervision orders and, in respect of each of those orders:

6.1. The nature and effect of the orders each court or the hearing has the power to make;
6.2. The legal basis upon which orders may be made including jurisdiction;
6.3. The powers of each court or the hearing to make such orders;
6.4. Recognition and enforcement;
6.5. Procedure in each court or the hearing and timescales for the making of orders and interim orders.

II. Adoption Orders

The nature and effect of Adoption Orders

1 The making of adoption orders in Scotland, either in the Court of Session or in the sheriff court, is provided for by the Adoption and Children (Scotland) Act 2007 ("the 2007 Act"). While there are similarities between the provisions of the 2007 Act and the provisions of the Adoption and Children Act 2002 ("the 2002 Act"), they are not the same.

2 In 2015[86], 504 adoptions were registered in Scotland[87]. Of those, 115 were step-parent adoptions, 1 was adoption by grandparents of the child, 18 were adoption by other relatives of the child and 368 were adoptions by persons with no previous relationship to the child[88]. Of those 368 adoptions, 315 were by heterosexual couples and 22 were by same sex couples (11 by two males and 11 by two females)[89].

3 An adoption order is an order *"vesting the parental responsibilities and parental rights in relation to a child in the adopters or adopter"*. An adoption order may be made in respect of a person aged 18 or over if the application for the order was made when the person was under 18. An adoption order may be made even if the child to be adopted is already an adopted child but may not be made in respect of a person who is or has been married or a civil partner[90]. An adoption order may not be made in respect of a child who is aged 12 or over unless the child consents or the court is satisfied that the child is incapable of consenting[91].

4 Except in step-parent adoptions, the making of an adoption order extinguishes any parental responsibilities and parental rights relating to the child which were vested in any person immediately before the making of the adoption order[92] and extinguishes

[86] The most recent year for which statistics are published
[87] National Records of Scotland, Vital Events Reference Tables 2015
[88] As above, National Records of Scotland, Vital Events Reference Tables 2015
[89] As above, National Records of Scotland, Vital Events Reference Tables 2015
[90] Section 28 of the 2007 Act
[91] Section 32 of the 2007 Act
[92] Section 35 of the 2007 Act

any duty owed to the child immediately before the making of the adoption order to make payment or provide aliment or to make payment arising out of parental responsibilities or parental rights[93]. In step-parent adoption, the existing parent retains parental responsibilities and parental rights and the duty to aliment and make payments for the child in terms of those responsibilities and rights.

5 An adopted person is to be treated in law as if born as the child of the adopters or adopter and not being the child of any other person other than the adopters or adopter[94].

The legal basis upon which Adoption Orders may be made

6 Except in the case of step-parent adoption, an adoption order may be made on an application by a couple aged 21 or over where one of them is domiciled in a part of the British Islands or where both of them have been habitually resident in a part of the British Islands for at least one year ending with the date of the application. The couple must be married to each other, civil partners of each other or persons who are living together as if husband and wife or civil partners *"in an enduring family relationship"*[95].

7 An adoption order may be made on the application of one person[96] if:

7.1 The person and a parent of the child are married, civil partners or living together as if husband and wife or civil partners in an enduring family relationship (step-parent adoption) and the parent of the child is domiciled in a part of the British Islands or has been habitually resident in a part of the British Islands for a period of at least one year ending with the application; or

7.2 The person is domiciled in a part of the British Islands or has been habitually resident in a part of the British Islands for a period of at least one year ending with the date of the application and is not married, not in a civil partnership and not living together with another person as if husband and wife or civil partners in an enduring family relationship; or

7.3 The person is domiciled in a part of the British Islands or has been habitually resident in a part of the British Islands for a period of at least one year ending with the date of the application and is married or a civil partner but their spouse or civil partner is not a parent of the child and cannot be found, or is incapable by reason of ill-health of making an application or they have permanently separated and are living apart; or

[93] As above, section 35 of the 2007 Act
[94] Section 40 of the 2007 Act
[95] Section 29 of the 2007 Act
[96] Section 30 of the 2007 Act

7.4 The person is domiciled in a part of the British Islands or has been habitually resident in a part of the British Islands for a period of at least one year ending with the date of the application and is living together with another as if husband and wife or civil partners in an enduring family relationship but the partner is not a parent of the child and is incapable by reason of ill-health of making an application.

8 Where a court or an adoption agency is coming to a decision relating to the child, section 14 of the 2007 Act prescribes the considerations which apply. Those considerations are more limited than the considerations which are prescribed by section 1 of the 2002 Act. The section 14 considerations are as follows:

8.1 The court or adoption agency must have regard to all the circumstances of the case;

8.2 The court or adoption agency is to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration;

8.3 The court or adoption agency must, so far as is reasonably practicable, have regard in particular to:

(a) the value of a stable family unit in the child's development;

(b) the child's ascertainable views regarding the decision (taking account of the child's age and maturity)[97];

(c) the child's religious persuasion, racial origin and cultural and linguistic background; and

(d) the likely effect on the child, throughout the child's life, of the making of an adoption order.

8.4 In carrying out those duties, an adoption agency must, before making any arrangement for the adoption of a child, consider whether adoption is likely to meet the needs of the child or whether there is some better practical alternative for the child. If there is a better practical alternative, the adoption agency must not make arrangements for the adoption of the child[98].

9 The conditions for the making of an adoption order in terms of the 2007 Act are similar but, again, not the same as those set out in sections 47 and 52 of the 2002 Act. As will be seen from the difference between the respective conditions, Scots law has retained a "fault" ground for the dispensing of parental consent to the making of an adoption order. Section 31 of the 2007 Act provides that an adoption order may not be made unless one of five conditions is met. Those conditions are:

9.1 The first condition is that, in the case of each parent or guardian of the child, the appropriate court is satisfied:

[97] A child of 12 or over is presumed to be of sufficient age and maturity to form a view – section 14 (8) of the 2007 Act

[98] Section 14 (6) and (7) of the 2007 Act

(a) that the parent or guardian understands what the effect of making an adoption order would be and consents to the making of the order (whether or not the parent or guardian knows the identity of the persons applying for the order)[99], or

(b) that the parent's or guardian's consent to the making of an order should be dispensed with on one of the following grounds[100]:

(i) that the parent or guardian is dead;

(ii) that the parent or guardian cannot be found or is incapable of giving consent;

(iii) that the parent or guardian has parental responsibilities or parental rights in relation to the child other than the parental responsibility and parental right, where the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis[101] and is, in the opinion of the court, unable satisfactorily to discharge those responsibilities or exercise those rights and is likely to continue to be unable to do so[102];

(iv) that the parent or guardian has, by virtue of a permanence order without authority to adopt[103], no parental responsibilities or parental rights in relation to the child and it is unlikely that such responsibilities will be imposed on, or such rights given to, the parent or guardian[104];

(v) that, where neither of the grounds set out at (iii) and (iv) above apply, the welfare of the child otherwise requires the consent to be dispensed with[105].

9.2 The second condition is that a permanence order granting authority for the child to be adopted is in force[106].

9.3 The third condition is that each parent or guardian of the child has consented under section 20 of the 2002 Act (advance consent to adoption), has not withdrawn the consent and does not oppose the making of the adoption order.

9.4 The fourth condition is that the child has been placed for adoption by an adoption agency (within the meaning of section 2 (1) of the 2002 Act) with the prospective adopters in whose favour the adoption order is proposed to be made **and** the child was placed for adoption either under section 19 of the 2002 Act with the consent of each parent or guardian and the consent of the mother was given when the child was at least 6 weeks old or under an order made under section 21 of the 2002 Act

[99] Section 31 (2) (a) of the 2007 Act
[100] Section 31 (2) (b) of the 2007 Act referring to section 31 (3) of the 2007 Act
[101] Those being the parental responsibility in section 1 (1) (c) and the parental right in section 2 (1) (c) of the Children (Scotland) Act 1995
[102] Section 31 (4) of the 2007 Act
[103] See below for an explanation of permanence orders
[104] Section 31 (5) of the 2007 Act
[105] Section 31 (3) (d) of the 2007 Act. The approach of the court to the grounds for dispensing with parental consent in section 31 is set out in *S* v *L* [2002] UKSC 30
[106] Again, see below for an explanation of permanence orders

(placement orders) and the child was at least 6 weeks old when the order was made **and** no parent or guardian of the child opposes the making of an adoption order.

9.5 The fifth condition is that an order under Article 17 (1) or 18 (1) of the Northern Ireland Order (orders declaring children free for adoption) is in force in relation to the child.

10 Consent of a mother given when the child is less than 6 weeks old is ineffective[107]. A parent or guardian may not oppose the making of an adoption order under the third or fourth conditions without the leave of the court[108] and the court must not grant leave unless satisfied that there has been a change of circumstances since the consent of the parent was given or the order was made[109].

11 A parent is defined in terms of the 2007 Act for the purposes of consent to the making of an adoption order (or dispensing with consent) as *"a parent who has any parental responsibilities or parental rights in relation to the child"* or *"a parent who, by virtue of a permanence order which does not include provision granting authority for the child to be adopted, has no such responsibilities or rights"*[110].

The powers of each court to make Adoption Orders in Scotland

12 The provisions of sections 29 and 30 of the 2007 Act provide the jurisdictional basis for the Scottish courts to make adoption orders. Essentially, one or more of the applicants must be domiciled in a part of the British Islands or habitually resident in a part of the British Islands for a period of at least one year ending with the application.

13 If the terms of sections 29 or 30 of the 2007 Act are met, section 118 of the 2007 Act determines which of the courts in Scotland may make adoption orders.

13.1 If the application relates to a child who is in Scotland when the application is made, both the Court of Session and the sheriff courts of the sheriffdom within which the child is have jurisdiction to hear the application. For example, if the child is in Glasgow when the application is made, both the Court of Session and Glasgow Sheriff Court could competently hear the application for an adoption order.

13.2 If the application relates to a child who is not in Scotland when the application is made only the Court of Session can competently hear the application for an adoption order.

[107] Section 31 (11) of the 2007 Act
[108] Section 31 (12) of the 2007 Act mirroring the terms of section 47 (5) of the 2002 Act
[109] Section 31 (13) of the 2007 Act mirroring the terms of section 47 (7) of the 2002 Act
[110] Section 31 (15) of the 2007 Act

Recognition and enforcement

14 From the terms of section 105 (1) of the 2002 Act, a Scottish adoption order has effect in England and Wales as it has in Scotland, but as if references to the parental responsibilities and the parental rights in relation to a child were to parental responsibility for the child.

15 Similarly, in terms of section 77 of the 2007 Act, an adoption order within the meaning of section 46 (1) of the 2002 Act has effect in Scotland as it has in England and Wales but as if any reference to the parental responsibility for the child were to the parental responsibilities and parental rights in relation to the child.

16 Sections 78 and 79 of the 2007 Act ensure that the effects of placing a child for adoption under the 2002 Act and the effects of placement orders are recognised and enforced in Scotland. Reciprocal arrangements are made in section 105 of the 2002 Act to ensure that similar orders made in Scotland are recognised and enforced in England and Wales.

Procedure

17 The procedure followed in the Court of Session and the sheriff court is broadly the same in applications for adoption orders. In the Court of Session, the procedure is prescribed by Chapter 67 of the Rules of the Court of Session[111]. In the sheriff court, the procedure is prescribed by The Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009 SSI 2009/284.

18 In both courts, the application must be accompanied by an extract birth certificate of the child, an extract or certified copy marriage certificate (where applicable), an extract or certified copy civil partnership certificate, a report by a local authority who has received notice of an intention to apply for an adoption order (where applicable) and a report by the adoption agency on the suitability of the applicants (where applicable). Certified copies of consents obtained under the 2002 Act or orders made under the 2002 Act (e.g. placement orders) also require to be lodged. The matters to be addressed in the local authority report and the adoption agency report are also prescribed in terms of the relevant rules.

[111] Act of Sederunt (Rules of the Court of Session 1994) 1994 SI 1994/1443. These can be found in updated form on the Scottish Court and Tribunal Service website at http://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/court-of-session-rules

19 The identity of the applicants may be protected on application to the court. In those cases a serial number is assigned to the application and the names of persons to whom a serial number is assigned are treated as confidential.

20 On an application being lodged, the judge or sheriff will appoint a curator *ad litem* and reporting officer. This is usually the same person and appointees are drawn from lists of (usually) solicitors and advocates maintained by the clerk of court. The curator *ad litem* and reporting officer is ordered to produce a report to the court within 4 weeks unless a different period is specified in the interlocutor or order of the court making the appointment. It is unusual for a different period to be specified. The curator *ad litem's* duties are prescribed in the rules. The reporting officer is principally appointed to ascertain whether the parents (and the child) consent to the making of the adoption order and, if so, to obtain and witness that consent. Once the curator *ad litem* has reported to the court, they have discharged their duties. The court must take the contents of the curator *ad litem's* report into consideration. The court can, at any time in the process, appoint the curator *ad litem* to make further inquiries and report to the court. It is extremely rare for the curator *ad litem* to remain in the process. On those rare occasions, the curator *ad litem* seeks to enter the process. It is a matter for the court whether the curator *ad litem* is permitted to do so. The curator *ad litem* will usually only be permitted to enter the process if he or she can satisfy the court that the child's welfare will not otherwise be sufficiently protected by the parties to the process.

21 At the same time as the curator *ad litem* is appointed, the judge or sheriff will order intimation of the application and the date of the first hearing of the case on:

21.1 Every person who can be found whose consent to the making of the order is required to be given or dispensed with;

21.2 If no such person can be found, a relative of the child, meaning a grandparent, brother, sister, uncle or aunt including the civil partner of any of those persons[112];

21.3 Every person who has consented in terms of section 20 of the 2002 Act (unless they have given notice they do not wish to be informed);

21.4 Every person who, if leave were granted by the court, would be entitled to oppose the making of an adoption order;

21.5 Where a local authority report has not yet been lodged, to the father of the child if he does not have, and has never had, parental responsibilities or parental rights in relation to the child and if he can be found.

22 The first hearing takes place before the judge or sheriff (or summary sheriff). In practice the hearing takes place around 6 to 8 weeks following the application being lodged, by which time the curator *ad litem* and reporting officer's reports will have been received.

[112] As defined in section 119 of the 2007 Act

At the hearing, the judge or sheriff ascertains whether the application is opposed. The majority of applications for adoption orders are not opposed. If the application is not opposed, the judge or sheriff may make the adoption order or, where required, order further information to be provided by any party or the curator *ad litem*.

23 If the application is opposed, the judge or sheriff will fix a proof which is a hearing on the evidence. In both the Court of Session and the sheriff court, the rules prescribe that the proof shall be fixed to be heard not less than 12 and not more than 16 weeks after the date of the first hearing. On cause shown, the proof will be fixed for a longer period after the first hearing. The judge or sheriff will make further orders for the preparation of the case including orders in relation to expert witnesses, evidence by affidavit and the lodging of a joint minute of admissions[113]. The judge or sheriff will also fix a pre proof hearing not less than 2 and not more than 6 weeks before the diet of proof. Further hearings may be fixed between the first hearing and the pre proof hearing.

24 At the conclusion of the proof, the judge or sheriff may pronounce the decision or reserve his or her decision until a later date. In the sheriff court, the rules prescribe a period of 4 weeks in which the decision must be pronounced unless the sheriff considers a different period is reasonable. There is no period prescribed in the Court of Session.

25 In practice, where the application for an adoption order is not opposed, the order is usually made around 6 to 8 weeks after the application is lodged. Where the application is opposed, the timescales in the rules anticipate a decision around 6 months after the application is lodged. In many cases in the Court of Session, the said timescale is adhered to. In the sheriff court, opposed applications are likely to take longer than the 6 months anticipated and may take up to a year.

III. Permanence Orders

The nature and effect of Permanence Orders

1 The making of permanence orders in Scotland, either in the Court of Session or in the sheriff court, is provided for by the 2007 Act. Such orders can only be made on the application of a local authority.

2 To understand the nature and effect of permanence orders, it is necessary to understand the definition of parental responsibilities and parental rights in Scotland.

[113] A document entered into by the parties in which admitted relevant facts are agreed and which can only be departed from in very limited circumstances

3 Section 1 (1) of the Children (Scotland) Act 1995 ("the 1995 Act") defines "parental responsibilities" as the responsibility:

"(a)to safeguard and promote the child's health, development and welfare;

(b) to provide, in a manner appropriate to the stage of development of the child, direction and guidance to the child;

(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and

(d) to act as the child's legal representative."

Parental responsibilities endure until the child is 16, except the responsibility to provide guidance which endures until the child is 18.

4 Section 2 (1) of the 1995 Act defines "parental rights" thus:

"a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right:

(a) to have the child living with him or otherwise to regulate the child's residence;

(b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;

(c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and

(d) to act as the child's legal representative."

Parental rights endure until the child is 16.

5 A permanence order[114] is an order consisting of the mandatory provision, such of the ancillary provisions as the court thinks fit and, if certain conditions are met, provision granting authority for the child to be adopted.

6 In making a permanence order, the court must secure that each of the parental responsibilities listed above and each of the parental rights listed above vests in a person[115]. The parental responsibility and parental right to maintain personal relations and direct contact with the child on a regular basis cannot be vested in a local authority[116]. The combined effect of those provisions is that the majority of permanence orders granted, whether with or without authority to adopt, leave the natural parent or parents with the parental responsibility and parental right to maintain personal relations and direct contact with the child on a regular basis. The retention of that parental responsibility and parental right by the natural parent has been considered in

[114] As defined in section 80 of the 2007 Act
[115] Section 80 (2) of the 2007 Act
[116] By reason of section 82 (1) (a) of the 2007 Act

the context of the recognition of a permanence order with authority to adopt in England and Wales in the case of *In re A (Children)* [2017] EWHC 35 (Fam).

7 The mandatory provision, defined in section 81 of the 2007 Act, is provision vesting in the local authority:

7.1 the parental responsibility to provide, in a manner appropriate to the stage of development of the child, guidance to the child (which responsibility vests in the local authority until the child is 18); and
7.2 the parental right to regulate the child's residence (which right vests in the local authority until the child is 16).

8 Ancillary provisions are defined in section 82 of the 2007 Act as:

8.1 Provisions vesting in the local authority all other parental responsibilities and parental rights except those to maintain personal relations and direct contact with the child on a regular basis;
8.2 Provisions vesting in a person other than the local authority all parental responsibilities and all parental rights except the right to have the child living with him or otherwise to regulate the child's residence. In practice, such parental responsibilities and parental rights are vested in long term foster carers or prospective adopters;
8.3 Provisions extinguishing any parental responsibilities or parental rights which, immediately before the making of the permanence order, vested in the parent or guardian of the child and which, by reason of the permanence order, will vest in the local authority or another person;
8.4 Provisions specifying arrangements for contact between the child and any other person;
8.5 Provisions determining any question which has arisen in respect of any parental responsibility or parental right or any other aspect of the welfare of the child.

9 Provision granting authority for the child to be adopted can only be made in the permanence order if the conditions in section 83 of the 2007 Act are met. Those are discussed below.

10 A permanence order can only be made in respect of a child who is under the age of 16 (by virtue of the definition of the mandatory provision). A permanence order may be made in respect of a child who is an adopted child but may not be made in respect of a child who is or has been married or a civil partner[117]. A permanence order cannot be

[117] Section 85 of the 2007 Act

made in respect of a child who is 12 or over unless the child consents or the court is satisfied that the child is incapable of consenting to the order[118].

11 The making of a permanence order automatically extinguishes the parental right to regulate the child's residence vested in any person immediately before the making of the permanence order[119]. Other parental responsibilities and parental rights of a parent or guardian may be extinguished by the making of ancillary provisions[120]. Parental responsibilities and parental rights which vest in a person other than a parent immediately before the making of a permanence order will be extinguished on the making of the permanence order[121].

12 Where a permanence order is made in respect of a child who is the subject of a compulsory supervision order made by the children's hearing[122], on the making of the permanence order the judge or sheriff must order that the compulsory supervision order cease to have effect if he or she is satisfied that the child is no longer in need of protection, guidance, treatment or control[123].

13 The court may make such interim permanence order as it thinks fit[124].

14 A permanence order may be varied or revoked. The ancillary provisions included in the permanence order may be varied[125]. Where a permanence order has been made which does not include provision granting authority for the adoption of the child, an application can be made to vary the terms of the permanence order to include such authority[126]. The court may revoke a permanence order whether or not it includes provision granting authority for the child to be adopted[127]. The local authority who applied for the permanence order in the first instance has a duty to make an application for variation of the terms of the permanence order or revocation of the permanence order if there has been a material change of circumstances directly relating to any of the order's provisions and the local authority considers the order ought to be varied or revoked[128].

[118] Section 84 (1) and (2) of the 2007 Act
[119] Section 87 of the 2007 Act
[120] Section 82 of the 2007 Act
[121] Section 88 of the 2007 Act
[122] See below
[123] Section 89 of the 2007 Act
[124] Section 97 of the 2007 Act
[125] Section 92 of the 2007 Act
[126] Section 93 of the 2007 Act
[127] Section 98 of the 2007 Act
[128] Section 99 of the 2007 Act

15 When a permanence order is in force, a court cannot make private law orders (whether interim or otherwise) in terms of section 11 of the 1995 Act as follows: vesting in any person parental responsibilities or parental rights, extinguishing any parental responsibilities or parental rights vested in any person, a residence order, a contact order or a specific issue order[129].

16 A permanence order ceases to have effect on the making of an adoption order in respect of the child[130]. For example, on the making of an adoption order in terms of the 2002 Act in respect of a child who is the subject of a permanence order including provision granting authority for the child to be adopted, the permanence order ceases to have effect.

17 A permanence order containing only the mandatory provision or the mandatory provision and ancillary provisions is usually made where the care plan for the child is to remain accommodated by the local authority either with a permanent substitute family in the form of a foster placement or in residential care. A permanence order which includes provision granting authority for the child to be adopted is usually made where the care plan is for the child to be adopted. An application for an adoption order may not be possible because prospective adopters have not yet been identified, have not yet been matched with the child or where there is a high conflict situation and it is considered better for litigation to be pursued by the local authority rather than by the prospective adopter or adopters.

The legal basis upon which Permanence Orders may be made

18 The jurisdiction of the Scottish courts to make permanence orders flows from the Council Regulation 2201/2003 of 27 November 2003, commonly known as Brussels II bis. The scope of Brussels II bis covers both courts and tribunals dealing with matters of parental responsibility[131]. It is thereby applicable to the exercise of jurisdiction by both the Scottish civil courts and the children's hearing in Scotland. It does not apply to measures taken as a result of criminal offences committed by children[132]. It does not apply to decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption[133]. Accordingly, jurisdiction to make a permanence order need first be founded on Brussels II bis even where the local authority requests the court to include provision granting authority for the child to be adopted.

[129] Section 103 of the 2007 Act
[130] Section 102 of the 2007 Act
[131] Recital 7
[132] Recital 10 and see below
[133] Article 1 (3) (b)

19 Before making a permanence order, the court must be satisfied that there is no person who has the parental right to have the child living with him or otherwise to regulate the child's residence **or** where there is such a person, the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child[134]. If the court is not so satisfied, the application will fail. If the court is so satisfied, the court must go on to consider the following:

19.1 The court may not make a permanence order in respect of the child unless it considers that it would be better for the child that the order be made than that it should not[135]. It follows that, before including any ancillary provisions, the court must consider it is better for the child to include the ancillary provisions than not.

19.2 In considering whether to make a permanence order and, if so, what provisions the order should make, the court shall regard the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration[136].

19.3 Before making a permanence order, the court must, after taking account of the child's age and maturity, so far as reasonably practicable give the child the opportunity to indicate whether the child wishes to express any views and, if the child so wishes, give the child the opportunity to express those views[137]. In practice, the court relies on the curator *ad litem* to make those investigations and report any views of the child to the court.

19.4 Before making a permanence order, the court must have regard to any views the child may express, the child's religious persuasion, racial origin and cultural and linguistic background, and the likely effect on the child of the making of the order[138].

20 As above, where the local authority has applied for the permanence order to include provision granting authority for the child to be adopted, the test set out above at paragraph 19 must first be satisfied and considered and a permanence order made. The court must then be satisfied that the conditions in section 83 of the 2007 Act are met. When considering whether to include provision granting authority to adopt in the permanence order, the court will have regard to the considerations in section 14 of the 2007 Act, set out above at paragraph 8 of part II.

21 The conditions in section 83 are:

21.1 That the local authority has requested that the permanence order include provision granting authority for the child to be adopted;

[134] Section 84 (5) (c) of the 2007 Act
[135] Section 84 (3) of the 2007 Act
[136] Section 84 (4) of the 2007 Act
[137] Section 84 (5) (a) of the 2007 Act
[138] Section 84 (5) (b) of the 2007 Act

21.2 That the court is satisfied that the child has been, or is likely to be, placed for adoption;

21.3 That, in the case of each parent or guardian of the child, the court is satisfied that the parent or guardian understands what the effect of making an adoption order would be and consents to the making of such an order in relation to the child or that the parent's or guardian's consent to the making of such an order should be dispensed with on one of the grounds mentioned in section 83 (2) of the 2007 Act; and

21.4 That the court considers it would be better for the child if it were to grant authority for the child to be adopted than if it were not to grant such authority.

22 The grounds in section 83 (2) of the 2007 Act mirror those in section 31 of the 2007 Act discussed above at paragraph 9 of part II. They include the same "fault" ground for dispensing with the consent of a parent. The grounds are:

(a) that the parent or guardian is dead;

(b) that the parent or guardian cannot be found or is incapable of giving consent;

(c) that the parent or guardian has parental responsibilities or parental rights in relation to the child other than the parental responsibility and parental right, where the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis[139] and is, in the opinion of the court, unable satisfactorily to discharge those responsibilities or exercise those rights and is likely to continue to be unable to do so;

(d) that the parent or guardian has, by virtue of a permanence order without authority to adopt, no parental responsibilities or parental rights in relation to the child and it is unlikely that such responsibilities will be imposed on, or such rights given to, the parent or guardian;

(e) that, where neither of the grounds set out at (c) and (d) above apply, the welfare of the child otherwise requires the consent to be dispensed with[140].

23 "Parent" is defined for the purposes of section 83 of the 2007 Act as a parent who has any parental responsibilities or parental rights in relation to the child or a parent who, by virtue of a permanence order which does not include provision granting authority for the child to be adopted, has no such responsibilities or rights.

[139] Those being the parental responsibility in section 1 (1) (c) and the parental right in section 2 (1) (c) of the Children (Scotland) Act 1995

[140] The Supreme Court's decision in *S* v *L* [2002] UKSC 30 applies equally to the grounds in section 83 of the 2007 Act

The powers of each court to make Permanence Orders in Scotland

24 If the Scottish civil courts have jurisdiction in terms of Brussels II bis, section 118 of the 2007 Act determines which of the courts in Scotland may make permanence orders.

24.1 If the application relates to a child who is in Scotland when the application is made, both the Court of Session and the sheriff courts of the sheriffdom within which the child is have jurisdiction to hear the application. For example, if the child is in Stirling when the application is made, both the Court of Session and Stirling Sheriff Court could competently hear the application for a permanence order.

24.2 If the application is for a permanence order including provision granting authority for the child to be adopted and relates to a child who is not in Scotland when the application is made, only the Court of Session can competently hear the application for the permanence order.

Recognition and enforcement of Permanence Orders

25 The courts of England and Wales can rely upon permanence orders granting authority for the child to be adopted in making adoption orders in terms of the 2002 Act. If the child, in respect of whom an application is made for an adoption order in terms of the 2002 Act, is the subject of a Scottish permanence order which includes provision granting authority for the child to be adopted, the third condition of section 47 of the 2002 Act is met. This was applied by the High Court in the case of *In re A (Children)* [2017] EWHC (Fam). On the making of the adoption order, the permanence order will cease to have effect.

26 Where the permanence order does not include provision granting authority for the child to be adopted, reciprocal arrangements are in place as between Scotland and England or Wales but to a limited extent.

27 Where a child who is the subject of a permanence order is moving from Scotland to England or Wales, and the Scottish local authority is transferring responsibility to a willing local authority in England or Wales, the Children (Reciprocal Enforcement of Prescribed Orders etc. (England and Wales and Northern Ireland)) (Scotland) Regulations 1996 (SI 1996/3267) apply. Regulation 4 of those Regulations provides:

"(1) A permanence order, as described and listed in column 1 of Schedule 4 (appearing to the Secretary of State as generally corresponding in effect to a care order as described and listed in column 2 of that Schedule) shall, in the circumstances described in paragraphs (2)

and (3) have effect for all purposes of the 1989 Act as if it were a care order made under the 1989 Act placing the child in the care of the local authority in whose area the child is to live.
(2) The circumstances referred to in paragraph (1) are that where a child is subject to a permanence order, the local authority with responsibility for the child has notified the local authority in England or Wales under whose care order and whose area it is proposed the child will reside.
(3) The circumstances referred to in paragraph (1) are that the local authority in England or Wales, under whose care and in whose area it is proposed the child will reside, has consented to the proposed transfer in writing, directly to the local authority in Scotland in whose area the child has resided and in respect of whom the permanence order has been made.
(4) The permanence order referred to in paragraph (1) shall cease to have effect for the purposes of the law of Scotland in the circumstances prescribed in paragraph (2) and (3)."

28 More difficult is the situation where the Scottish local authority intends to retain responsibility for the child but the child is placed in England or Wales. There is an argument that the registration, recognition and enforcement provisions of the Family Law Act 1986 apply to a permanence order which does not include provision granting authority for the child to be adopted. If the 1986 Act does not apply, Scottish local authorities may have to make applications to the High Court of England and Wales to exercise the inherent jurisdiction of the High Court to recognise and enforce the permanence order.

Procedure

29 The procedure followed in the Court of Session and the sheriff court is broadly the same in applications for permanence orders including applications for authority for the child to be adopted. In the Court of Session, the procedure is prescribed by Chapter 67 of the Rules of the Court of Session[141]. In the sheriff court, the procedure is prescribed by The Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009 SSI 2009/284.

30 In both courts, the application must be accompanied by an extract birth certificate of the child and a report by the local authority making the application The matters to be addressed in the local authority report are prescribed in terms of the relevant rules.

31 The address of the child may be protected on application to the court. In those cases a serial number is assigned to the application and the address of the child to whom a serial number is assigned is treated as confidential.

[141] Act of Sederunt (Rules of the Court of Session 1994) 1994 SI 1994/1443. These can be found in updated form on the Scottish Court and Tribunal Service website at *Rules and Practice / Court of Session Rules*

32 On an application being lodged, the judge or sheriff will appoint a curator *ad litem* and reporting officer. This is usually the same person and appointees are drawn from lists of (usually) solicitors and advocates maintained by the clerk of court. The curator *ad litem* and reporting officer is ordered to produce a report to the court within 4 weeks unless a different period is specified in the interlocutor or order of the court making the appointment. It is unusual for a different period to be specified. The curator *ad litem's* duties are prescribed in the rules. The reporting officer is principally appointed to ascertain whether the parents (and the child) consent to the making of an adoption order and, if so, to obtain and witness that consent. Once the curator *ad litem* has reported to the court, they have discharged their duties. The court must take the contents of the curator *ad litem's* report into consideration. The court can, at any time in the process, appoint the curator *ad litem* to make further inquiries and report to the court. It is rare for the curator *ad litem* to remain in the process. On those rare occasions, the curator *ad litem* seeks to enter the process. It is a matter for the court whether the curator *ad litem* is permitted to do so. The curator *ad litem* will usually only be permitted to enter the process if he or she can satisfy the court that the child's welfare will not otherwise be sufficiently protected by the parties to the process.

33 At the same time as the curator *ad litem* is appointed, the judge or sheriff will order intimation of the application and the date of the first hearing of the case on certain persons. Those persons are determined by whether or not the local authority is requesting provision granting authority for the child to be adopted. In all permanence order applications, the judge or sheriff will order intimation on:

33.1 Any person who has parental responsibilities and parental rights in relation to the child **and** any person who claims to have an interest. Where the application requests provision granting authority for the child to be adopted, in addition to the persons above, intimation will be ordered on:

33.2 Every person who can be found whose consent to the making of an adoption order is required to be given or dispensed with;

33.3 If no such person can be found, a relative of the child, meaning a grandparent, brother, sister, uncle or aunt including the civil partner of any of those persons[142].

33.4 In the sheriff court, there is a requirement to intimate to the father of the child if he does not have, and has never had, parental responsibilities or parental rights in relation to the child.

34 The first hearing takes place before the judge or sheriff (or summary sheriff). In practice the hearing takes place around 6 to 8 weeks following the application being lodged, by

[142] As defined in section 119 of the 2007 Act

which time the curator *ad litem* and reporting officer's reports will have been received. At the hearing, the judge or sheriff ascertains whether the application is opposed. If the application is not opposed, the judge or sheriff may make the permanence order or, where required, order further information to be provided by any party or the curator *ad litem*. It is for the local authority applying for the permanence order to satisfy the court that the permanence order should be made together with ancillary provisions and, where applicable, provision granting authority for the child to be adopted.

35 If the application is opposed, the judge or sheriff will fix a proof which is a hearing on the evidence. In both the Court of Session and the sheriff court, the rules prescribe that the proof shall be fixed to be heard not less than 12 and not more than 16 weeks after the date of the first hearing. On cause shown, the proof will be fixed for a longer period after the first hearing. The judge or sheriff will make further orders for the preparation of the case including orders in relation to expert witnesses, evidence by affidavit and the lodging of a joint minute of admissions[143]. The judge or sheriff will also fix a pre proof hearing not less than 2 and not more than 6 weeks before the diet of proof. Further hearings may be fixed between the first hearing and the pre proof hearing.

36 At the conclusion of the proof, the judge or sheriff may pronounce the decision or reserve his or her decision until a later date. In the sheriff court, the rules prescribe a period of 4 weeks in which the decision must be pronounced unless the sheriff considers a different period is reasonable. There is no period prescribed in the Court of Session.

37 In practice, where the application for a permanence order is not opposed, the order is usually made around 6 to 8 weeks after the application is lodged. Where the application is opposed, the timescales in the rules anticipate a decision around 6 months after the application is lodged. In many cases in the Court of Session, the said timescale is adhered to. In the sheriff court, opposed applications are likely to take longer than the 6 months anticipated and may take more than a year.

IV. Compulsory Supervision Orders

The nature and effect of Compulsory Supervision Orders

1 Compulsory supervision orders are orders made by the children's hearing in respect of a child who is in need of protection, guidance, treatment or control.

[143] A document entered into by the parties in which admitted relevant facts are agreed and which can only be departed from in very limited circumstances

2 A compulsory supervision order is defined in section 83 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") as an order:

2.1 Including any of the following measures:

2.1.1 A requirement that the child reside at a specified place;

2.1.2 A direction authorising the person who is in charge of a specified place to restrict the child's liberty to the extent that the person considers appropriate having regard to the measures included in the order;

2.1.3 A prohibition on the disclosure (whether directly or indirectly) of a place specified;

2.1.4 A movement restriction condition;

2.1.5 A secure accommodation authorisation;

2.1.6 A requirement that the implementation authority arrange a specified medical or other examination of the child or specified medical or other treatment for the child;

2.1.7 A direction regulating contact between the child and a specified person or class of person;

2.1.8 A requirement that the child comply with any other specified condition;

2.1.9 A requirement that the implementation authority carry out specified duties in relation to the child; **and**

2.2 Specifying a local authority which is to be responsible for giving effect to the measures included in the order. Such a local authority is referred to as the implementation authority.

3 A compulsory supervision order has a maximum duration of one year. If a review takes place before the expiry of the compulsory supervision order, and the child remains in need of protection, guidance, treatment or control, the compulsory supervision order can be continued with or without variation. A continued compulsory supervision order has a maximum duration of one year from the date on which it was continued[144].

4 A child can be the subject of a compulsory supervision order until they attain the age of 18.

5 The implementation authority must give effect to a compulsory supervision order[145]. If the implementation authority fails to do so and is in breach of a duty to a child imposed by the terms of a compulsory supervision order, the sheriff principal may order the implementation authority to carry out the duty[146].

[144] Section 83 of the 2011 Act
[145] Section 144 of the 2011 Act
[146] Section 148 of the 2011 Act

6 A child who is the subject of a compulsory supervision order is a looked after child, as defined by section 17 of the Children (Scotland) Act 1995 ("the 1995 Act"). If the compulsory supervision order includes a requirement for the child to reside at a specified place which is not the child's home, the child is looked after and accommodated in terms of the said section 17. A local authority for the area in which the child is habitually resident or with which the child has the closest connection owes duties to a looked after child and a looked after and accommodated child which extend beyond the child attaining the age of 18.

Legal basis upon which compulsory Supervision Orders may be made

7 The jurisdiction of the children's hearing to make compulsory supervision orders flows from the Council Regulation 2201/2003 of 27 November 2003, commonly known as Brussels II bis. The scope of Brussels II bis covers both courts and tribunals dealing with matters of parental responsibility[147]. It is thereby applicable to the exercise of jurisdiction by the children's hearing in Scotland. It does not apply to measures taken as a result of criminal offences committed by children[148]. It does not apply to decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption[149].

8 Where the Principal Reporter to the children's hearing (hereafter "the Reporter") receives information from which it appears to the Reporter that the child might be in need of protection, guidance, treatment or control, the Reporter must determine whether one of the following grounds applies to the child and, if so, whether the Reporter considers that it is necessary for a compulsory supervision order to be made in respect of the child[150]. The grounds, specified in section 67 of the 2011 Act are as follows:

8.1 The child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired, due to a lack of parental care.

8.2 A schedule 1 offence has been committed in respect of the child. A schedule 1 offence is a criminal offence listed in schedule 1 to the Criminal Procedure (Scotland) Act 1995. The offences listed in schedule 1 are sexual and other offences against children under the age of 17.

8.3 The child has, or is likely to have, a close connection with a person who has committed a schedule 1 offence.

[147] Recital 7
[148] Recital 10 and see below
[149] Article 1 (3) (b)
[150] Section 66 of the 2011 Act

8.4 The child is, or is likely to become, a member of the same household as a child in respect of whom a schedule 1 offence has been committed.

8.5 The child is being, or is likely to be, exposed to persons whose conduct is (or has been) such that it is likely that the child will be abused or harmed or the child's health, safety or development will be seriously adversely affected.

8.6 The child has, or is likely to have, a close connection with a person who has carried out domestic abuse.

8.7 The child has, or is likely to have, a close connection with a person who has committed an offence under Part 1, 4 or 5 of the Sexual Offences (Scotland) Act 2009. Such offences are sexual offences against persons who are not children.

8.8 The child is being provided with accommodation by a local authority under section 25 of the 1995 Act and special measures are needed to support the child. Section 25 of the 1995 Act provides for the voluntary accommodation of children by local authorities with the agreement of the child's parents or guardian.

8.9 A permanence order is in force in respect of the child and special measures are needed to support the child. Permanence orders are discussed above in part III.

8.10 The child has committed an offence.

8.11 The child has misused alcohol.

8.12 The child has misused a drug (whether or not a controlled drug).

8.13 The child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person.

8.14 The child is beyond the control of a relevant person. The definition of relevant person is discussed below.

8.15 The child has failed without reasonable excuse to attend regularly at school.

8.16 The child has been, is being, or is likely to be, subjected to physical, emotional or other pressure to enter into a civil partnership or is, or is likely to become, a member of the same household as such a child.

8.17 The child has been, is being, or is likely to be forced into a marriage or is, or is likely to become, a member of the same household as such a child.

9 A child is to be taken to have a close connection with a person if the child is a member of the same household as the person or the child has significant contact with the person[151].

10 In the period between 1 April 2015 and 31 March 2016[152], there were 27,240 referrals to the children's hearing in respect of 15,329 children. 6,663 of those referrals were in respect of a child who had committed an offence. The remainder were divided between the other, essentially care and protection, grounds[153].

[151] Section 67 (3) of the 2011 Act
[152] The most recent period for which statistics have been published
[153] Scottish Children's Reporters Administration Online Statistics 2015/2016

11 If the Reporter determines that one of the grounds above applies in relation to the child and that a compulsory supervision order is necessary, the Reporter must arrange a children's hearing for the purpose of deciding whether a compulsory supervision order should be made in respect of the child[154]. The Reporter prepares a statement of the grounds in relation to the child for the children's hearing. The statement includes which of the grounds listed above the Reporter believes applies and the facts on which that belief is based.

12 Children's hearings are held in the local authority area where the child lives or with which the child has the closest connection.

13 The following persons have a duty to attend the children's hearing:

13.1 The child, unless he or she is excused from attending by the children's hearing.
13.2 Each relevant person who is notified of the children's hearing unless excused from attending by the children's hearing or excluded by the children's hearing for as long as is necessary[155]. A relevant person who is required to attend and fails to do so commits an offence[156]. The children's hearing can proceed in the absence of a relevant person if the relevant person fails to attend[157].

14 The following persons have the right to attend a children's hearing[158]:

14.1 The child, whether or not they have been excused;
14.2 A person representing the child;
14.3 A relevant person in relation to the child unless that person is excluded;
14.4 A person representing a relevant person unless that relevant person is excluded;
14.5 The Reporter;
14.6 If a safeguarder has been appointed to the child (a person to safeguard the interests of the child in the children's hearing process), the safeguarder;
14.7 A member of the children's hearing support team;
14.8 A representative of a newspaper or news agency although such a person can be excluded by the children's hearing.

15 A relevant person is[159]:

[154] Section 69 of the 2011 Act
[155] In terms of section 76 of the 2011 Act
[156] Section 74 of the 2011 Act
[157] Section 75 of the 2011 Act
[158] In terms of section 78 of the 2011 Act
[159] Defined in section 200 of the 2011 Act

15.1 A parent or guardian having parental responsibilities or parental rights in relation to the child.

15.2 A person in whom parental responsibilities or parental rights are vested by virtue of a Scottish private law order or by virtue of a permanence order.

15.3 A parent or person having parental responsibility for the child under the Children Act 1989 or the Adoption and Children Act 2002.

16 A person may be deemed by the children's hearing to be a relevant person if they do not fall within the definition in section 200 of the 2011 Act but have, or recently have had, a significant involvement in the upbringing of the child[160].

17 At the children's hearing arranged by the Reporter, the statement of grounds prepared by the Reporter is put to the child and all of the relevant persons[161]. If the child is of sufficient age to understand the grounds and the child and the relevant persons all accept the statement of grounds, the children's hearing can proceed to determine whether or not to make a compulsory supervision order[162].

18 If the grounds are not accepted or if the child or relevant person is unable to understand the grounds, the children's hearing must direct the Reporter to lodge an application to the sheriff to determine whether the ground is established.

19 If the children's hearing does direct the Reporter to lodge an application with the sheriff, the children's hearing must consider whether to make an interim compulsory supervision order in respect of the child. Interim compulsory supervision orders continue in force for a maximum period of 22 days. Once the application is before the sheriff for determination, he or she may make interim compulsory supervision orders if he or she is unable to determine the application before the expiry of an existing interim compulsory supervision order.

20 In determining the application by the Reporter, the sheriff may hear evidence. The standard of proof where the ground of referral is that the child has committed an offence is the criminal standard – beyond reasonable doubt. For all other grounds, the standard of proof is the civil standard – on the balance of probabilities.

21 If the sheriff determines that the grounds have not been established, he or she will dismiss the referral to the children's hearing and no further procedure will take place. If the sheriff determines that the grounds have been established, he or she will remit the

[160] The mechanism is provided in section 81 of the 2011 Act
[161] Section 90 of the 2011 Act
[162] Section 92 of the 2011 Act

referral back to the children's hearing to decide whether to make a compulsory supervision order.

The powers of the children's hearing to make Compulsory Supervision Orders

22 As above, jurisdiction for all grounds of referral except the ground where the child has committed an offence flows from Brussels II bis. The children's hearing is held in the local authority area where the child lives.

23 For all grounds, except the ground that the child has committed an offence, the application by the Reporter to the sheriff is lodged at the sheriff court in the sheriffdom where the child lives. Where the ground is that the child has committed an offence, the application by the Reporter is lodged at the sheriff court of the sheriff who would have had jurisdiction to hear a criminal case based on the offence committed by the child.

24 The children's hearing is the primary decision making tribunal for compulsory supervision orders and only the children's hearing has the power to make such orders. The sheriff has a limited power to make interim compulsory supervision orders but only if he or she has been asked to determine whether grounds have been established. The sheriff also has a limited power, when hearing an appeal from the children's hearing, to confirm a compulsory supervision order made by the children's hearing.

Recognition and enforcement

25 A compulsory supervision order can be enforced in England and Wales (and Northern Ireland) in terms of the Children's Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013 (SI 2013/1465).

26 In terms of the said Order, a constable may enforce the Order in England and Wales[163] and a constable may enforce a warrant to secure the attendance of a child who is in England and Wales at a children's hearing[164].

27 In terms of paragraph 7 of the said Order, if a place is specified in the compulsory supervision order at which the child is to reside, that place may be a place in England and Wales and the person in charge of that place may restrict the child's liberty if such a requirement is included in the compulsory supervision order.

[163] Paragraph 5 of the Order
[164] Paragraph 6 of the Order

28 If the child is to be transferred to the responsibility of a local authority in England or Wales, paragraph 13 of the Order applies and the Children Act 1989 applies to the child as it applies in relation to a care order, a supervision order or an education supervision order. On the transfer being effected, the compulsory supervision order ceases to have effect for the purposes of the law of Scotland.

29 By virtue of the Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England, Wales and Northern Ireland) Regulations 2013 (SSI 2013/99) and the above said Order, if a child who is subject to a care order, supervision order or education supervision order is transferred to Scotland, once the transfer is effected, the said order ceases to have effect for the purposes of the law of England and Wales[165].

Procedure

30 The procedure followed by the children's hearing is set out in the 2011 Act and in the Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997/291) as amended.

31 A detailed consideration of the procedures of the children's hearing is unnecessary for the purposes of this chapter.

32 The procedures before the children's hearing (and before the sheriff on applications arising from the children's hearing) are designed to enable determinations within short timescales. It is for that reason that interim compulsory supervision orders have a maximum lifespan of 22 days. Although multiple interim compulsory supervision orders may be made, the circumstances of the child will be reviewed at least every 22 days during the period when such multiple orders are being made.

[165] Paragraph 15 of the above said Order

CHAPTER 4

SCOTTISH PRIVATE CHILD LAW ORDERS AND PROCEDURE

Lynda Brabender, QC, Westwater Advocates, Edinburgh

Contents

I. Overview

1 The Court of Session and the Sheriff Courts in Scotland make private law orders in respect of children.

2 The Court of Session has all Scotland civil jurisdiction. It sits only in Edinburgh. The Court of Session is divided into the Outer House (hearing cases at first instance) and the Inner House (effectively the appeal court). The Outer House is the highest first instance civil court in Scotland. Senators of the College of Justice sit as single judges in the Outer House. In the Inner House, the majority of cases are heard by three Senators. Senators also sit as judges in the High Court of Justiciary presiding over the prosecution of the most serious crime in Scotland. There are presently 35 Senators of the College of Justice, augmented with temporary judges from time to time.

3 There is no family division or family court within the Outer House of the Court of Session. Presently one Senator is appointed as the Family Judge (currently Lord Brailsford). He is supported by the second Family Judge (currently Lady Wise).

4 Most of the private law actions relating to families and children are heard in the sheriff court. There are 39 sheriff courts across Scotland, divided into six sheriffdoms which are arranged geographically. Sheriffs and summary sheriffs, sitting alone, preside over civil and criminal business in the sheriff court. There are presently 157 permanent or resident sheriffs and summary sheriffs sitting in the sheriff courts of Scotland. There is no family division in the sheriff court. In the largest sheriff courts (Glasgow, Edinburgh and Aberdeen), there are particular sheriffs who are dedicated to family actions and hear the majority of family cases in those courts.

5 The children's hearing in Scotland has no jurisdiction in respect of private law.

6 This chapter is intended to explain Scottish private law orders relating to children. The private law of Scotland relating to parents, children and guardians is provided for in Part 1 of the Children (Scotland) Act 1995 ("the 1995 Act"). On 15 May 2018, the Scottish Government launched a consultation on the review of Part 1 of the 1995 Act and the creation of a Family Justice Modernisation Strategy. The consultation period closes on 7 August 2018. The consultation documents can be accessed at:
http://www.gov.scot/Publications/2018/05/8539

II. Part 1 of the Children (Scotland) Act 1995

Parental responsibilities and parental rights

1 The making of private law orders relating to children in Scotland, either in the Court of Session or in the sheriff court, is provided for by Part 1 of the 1995 Act which begins by defining parental responsibilities and parental rights.

2 Subject to certain exceptions, "*a parent has in relation to his child the responsibility:*

(a) To safeguard and promote the child's health, development and welfare;

(b) To provide, in a manner appropriate to the stage of development of the child –

(i) Direction;

(ii) Guidance,

to the child;

(c) If the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and

(d) To act as the child's legal representative,

But only in so far as compliance with this section is practicable and in the interests of the child."[166]

3 Child means a person under the age of sixteen except in relation to the parental responsibility to provide guidance in terms of section 1 (1) (b) (ii) above, where a child means a person under the age of eighteen years[167].

4 A child, or any person acting on his behalf, has title to sue, or to defend, in any proceedings as respects the parental responsibilities provided for above[168]. The parental responsibilities defined in section 1 of the 1995 Act supersede any analogous duties imposed on a parent at common law[169]. However, section 1 (1) is without prejudice to duties imposed in any other enactment. For example, the duty to aliment (or maintain) a child is not included in section 1 of the 1995 Act but is imposed by section 1 of the Family Law (Scotland) Act 1985.

5 With parental responsibilities come parental rights. Subject again to certain exceptions, *"a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right –*

[166] Section 1 (1) of the 1995 Act
[167] Section 1 (2) of the 1995 Act
[168] Section 1 (3) of the 1995 Act
[169] Section 1 (4) of the 1995 Act

(a) To have the child living with him or otherwise to regulate the child's residence;

(b) To control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;

(c) If the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and

(d) *To act as the child's legal representative."*[170]

6 Subject to the one exception in relation to removing a child from the UK[171], "*where two or more persons have a parental right as respects a child, each of them may exercise that right without the consent of the other or, as the case may be, of any of the others, unless any decree or deed conferring the right, or regulating its exercise, otherwise provides."*[172] *"No person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of"* each person who has, and is exercising, the right to have the child living with him or the right to maintain personal relations and direct contact with the child on a regular basis.[173]

7 A parent, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects parental rights[174]. Parental rights, as defined in section 2 of the 1995 Act, again supersede the rights enjoyed by parents at common law[175]. For the purposes of the exercise of parental rights, a child means a person under the age of sixteen years[176].

8 A person who is sixteen or over and who has care or control of a child (except in school) but does not have parental responsibilities or parental rights has the responsibility to do what is reasonable in all the circumstances to safeguard the child's health, development and welfare. In doing so, that person may give consent to any surgical, medical or dental treatment or procedure where the child is unable to give consent on his own behalf and it is not within the knowledge of the person that a parent of the child would refuse to give the consent in question[177].

9 In reaching any major decision which involves fulfilling parental responsibilities or exercising parental rights, the person shall have regard, so far as practicable, to:

(a) the views of the child, taking account of the child's age and maturity. A child of 12 or over is presumed to be of sufficient age and maturity to form a view; and

[170] Section 2 (1) of the 1995 Act
[171] Which requires the consent of all parties with parental rights to regulate residence and maintain personal relations and direct contact in terms of section 2 (3) and (6) of the 1995 Act
[172] Section 2(2) of the 1995 Act
[173] Section 2 (3) and (6) of the 1995 Act
[174] Section 2 (4) of the 1995 Act
[175] Section 2 (5) of the 1995 Act
[176] Section 2 (7) of the 1995 Act
[177] Section 5 of the 1995 Act

(b) to the views of any other person with parental responsibilities and parental rights in relation to the child.

A transaction which is entered into in good faith by a third party and a person acting as the legal representative of the child is not challengeable on the ground only that the child or other person with parental responsibilities and parental rights was not consulted or that due regard was given to their views[178].

Acquisition of parental responsibilities and parental rights by operation of law

10 A child's mother has parental responsibilities and parental rights in relation to a child, whether or not she is or has been married to the father of the child[179].

11 A child's father has parental responsibilities and parental rights[180] in relation to a child if:

(a) He was married to the child's mother at the time of conception of the child or subsequently; or

(b) Where he is not married to the mother of the child, he is registered as the child's father on the child's birth certificate, issued in terms of the Registration of Births, Deaths and Marriages (Scotland) Act 1965, the Births and Deaths Registration Act 1953 or the Births and Deaths Registration (Northern Ireland) Order 1976.

12 Where a child has a parent by virtue of section 42 of the Human Fertilisation and Embryology Act 2008 ("the 2008 Act"), that parent has parental responsibilities and parental rights in relation to the child[181]. Where a child has a parent by virtue of section 43 of the 2008 Act, that parent has parental responsibilities and parental rights in relation to the child[182].

13 A person with parental responsibilities and parental rights by operation of law does not entitle him or her to act in a way which is incompatible with any court order relating to the child or the child's property or any order of the children's hearing relating to the child[183].

14 A person with parental responsibilities and parental rights by operation of law cannot abdicate those responsibilities or rights to another person but may arrange for some or all of them to be fulfilled or exercised on his or her behalf[184]. If such an arrangement is

[178] Section 6 of the 1995 Act
[179] Section 3 (1) (a) of the 1995 Act
[180] Section 3 (1) (b) of the 1995 Act
[181] Section 3 (1) (c) of the 1995 Act
[182] Section 3 (1) (d) of the 1995 Act
[183] Section 3 (4) of the 1995 Act
[184] Section 3 (5) of the 1995 Act

made, it does not relieve the person with parental responsibilities and parental rights from any liability arising from a failure to fulfil those parental responsibilities[185].

Acquisition of parental responsibilities and parental rights by agreement

15 An unmarried and unregistered father of a child or an unregistered second female parent of a child may acquire parental responsibilities and parental rights by entering into agreement with the mother of the child. For the agreement to be effective it must be in the prescribed form and must be registered in the Books of Council and Session. The date from which the person has parental responsibilities and parental rights is the date on which the agreement is registered. Such an agreement is irrevocable. It cannot be entered into where the mother has been deprived of her parental responsibilities or parental rights to any extent[186].

Guardianship and the administration of a child's property

16 A child's parent may appoint a person to be guardian of the child in the event of a parent's death. The appointment will be of no effect unless in writing and signed by the parent and the parent, at the time of death, was entitled to act as legal representative of the child or would have been so entitled had he survived until the birth of the child. A guardian acquires parental responsibilities and parental rights in respect of the child. Any other person with parental responsibilities and parental rights in relation to the child will continue to hold same[187].

17 Two or more persons may be appointed as guardian to a child[188]. The appointment does not take effect until accepted, either expressly or impliedly, by acts which are not consistent with any other intention[189].

18 The appointment of a guardian is a major decision which requires the appointee to take account of the views of the child and any other person with parental responsibilities and parental rights[190].

19 Section 8 of the 1995 Act provides for the revocation and termination of the appointment of a guardian.

[185] Section 3 (6) of the 1995 Act
[186] Sections 4 and 4A of the 1995 Act
[187] Section 7 of the 1995 Act
[188] Section 7 (4) of the 1995 Act
[189] Section 7 (3) of the 1995 Act
[190] Section 7 (6) of the 1995 Act

20 Sections 9 and 10 of the 1995 Act provide for the safeguarding of a child's property and the obligations and rights of a person administering a child's property.

21 Section 13 of the 1995 Act provides for the court's powers on the making of an award of damages to, or for the benefit of, a child under the age of sixteen.

Court Orders

22 Section 11 of the 1995 Act provides for the various orders which may be made by the sheriff court or the Court of Session relating to parental responsibilities and parental rights, guardianship and the administration of a child's property. Either court may make an order in terms of section 11 where an application is before it for such order or, where no application is made, the court considers it should make an order. Accordingly, the court has the power to make a section 11 private law order in a variety of proceedings, including in public law proceedings[191]. In divorce or dissolution of civil partnership proceedings, the court is required to be satisfied as to the arrangements between the parties for the upbringing of a child. If not satisfied, the court may make a section 11 order. In exceptional circumstances, the court may refuse to grant decree of divorce or dissolution pending consideration of whether to make a section 11 order[192].

23 The court may make any order relating to parental responsibilities and parental rights that it thinks fit. Section 11 (2) of the 1995 Act provides the following examples of orders the court may make but the court is not limited thereby. The court may make an interim order.

23.1 An order depriving a person of some or all parental responsibilities or parental rights in relation to a child. This is a draconian order and very rarely applied for or made.

23.2 An order imposing parental responsibilities and parental rights. Previously more common prior to unmarried fathers acquiring same by being registered on the child's birth certificate (which provision came into force on 4 May 2006).

23.3 A residence order regulating the arrangements for the residence of the child. Where the court makes a residence order which requires a child to live with a person or persons who, immediately before the making of the order, did not have parental responsibilities or parental rights in relation to the child, that person or persons will have parental responsibilities and parental rights while the residence order is in force[193].

[191] Section 11 (3) of the 1995 Act
[192] Section 12 of the 1995 Act
[193] Section 11 (12) of the 1995 Act

23.4 A contact order regulating the arrangements for maintaining personal relations and direct contact between the child and any person with whom the child does not live.

23.5 A specific issue order regulating any specific question which has arisen. The most common examples are the removal of a child from the UK on holiday, the school which the child is to attend and medical treatment.

23.6 An interdict prohibiting the taking of a step relating to parental responsibilities or parental rights. The most common interdict granted is in relation to the removal of a child to a different part of Scotland (or to England or Wales).

23.7 An order appointing a judicial factor to manage a child's property. Rarely applied for.

23.8 An order appointing or removing a person as guardian of the child.

24 There is no equivalent in Scotland to special guardianship orders in private law. Private law orders made in terms of section 11 of the 1995 Act may be categorised as "kinship care orders" for the purposes of section 72 of the Children and Young People (Scotland) Act 2014 which enables access to kinship care allowances paid by a local authority and to support services provided by a local authority.

25 In considering whether to make any order relating to parental responsibilities or parental rights and what order to make, the court shall regard the welfare of the child concerned as its paramount consideration[194].

26 The minimum intervention principle also applies. The court shall not make any order unless it considers that it would be better for the child to make the order than make no order[195].

27 The court must also, taking account of the child's age and maturity, give the child an opportunity to express his views and have regard to such views as he may express[196].

28 In considering the child's welfare and whether to make any order, the court must have regard to specific provision relating to domestic violence and abuse. The court must protect the child from any such abuse or risk of abuse, consider the effect on the child and consider the ability of an abuser to meet the needs of the child. Where the court is considering making an order which would require two or more persons to co-operate with one another in relation to the child, it must consider whether it would be appropriate to make the order having regard to any issues of domestic abuse[197].

[194] Section 11 (7) (a) of the 1995 Act
[195] As above
[196] Section 11 (7) (b) of the 1995 Act
[197] Section 11 (7A) to (7E) of the 1995 Act

29 The following persons may make an application to the court for a section 11 order[198]:

29.1 A person not having, and never having had, parental responsibilities or parental rights in relation to the child but who claims an interest;

29.2 A person who has parental responsibilities or parental rights in relation to the child;

29.3 With the leave of the court and only in respect of an application for a contact order, a person whose parental responsibilities or parental rights in relation to the child were extinguished on the making of an adoption order; and

29.4 A person who has had but no longer has parental responsibilities or parental rights in relation to the child except a person whose parental responsibilities or rights were extinguished (i) on the making of an adoption order; or (ii) by virtue of section 55 (1) of the 2008 Act on the making of a parental order in terms of section 54 of that Act.

30 An application can only be made by a natural person, including a child. It cannot be made by a local authority[199].

III. Jurisdiction, recognition and enforcement

Jurisdiction

1 Section 11 orders are Part 1 orders as defined in section 1 of the Family Law Act 1986 ("the 1986 Act"). The jurisdiction of the Scottish courts to make Part 1 orders is provided in sections 8 through 13 of the 1986 Act and is subject to the Council Regulation (EC) No 2201/2003 ("Brussels II bis"). The primary source of jurisdiction is the habitual residence of the child.

2 The sheriff's jurisdiction to make Part 1 orders is limited by the geographical boundary of the sheriffdom. The child must be habitually resident in the sheriffdom or, where jurisdiction is exercisable based on presence, present in the sheriffdom.

Recognition and enforcement

3 The same provisions of the 1986 Act apply in Scotland as they do in England and Wales. Section 25 of the 1986 provides for recognition of a Part 1 order made in Scotland across the United Kingdom as having the same effect and as if the order had

[198] Section 11 (3) of the 1995 Act
[199] Section 11 (4) of the 1995 Act

been made in the courts of the UK outside Scotland. For the order to be enforceable[200], it must be registered in terms of section 27 of the 1986 Act.

4 Chapter 71 of the Rules of the Court of Session[201] provides for the registration of Part 1 order in the Court of Session.

IV. Procedure

Court of Session procedure

1 An application for an order relating to parental responsibilities and parental rights is a family action as defined in the Rules of the Court of Session. Chapter 49 provides procedure in family actions[202].

2 In the ordinary course of a family action, the proceedings will come before one of the Family Judges[203] for a case management hearing[204] shortly after the lodging of defences. The issues relating to the application for an order relating to a child will be ventilated at that case management hearing.

3 There is no CAFCASS or similar service in Scotland. The court may appoint a child welfare reporter to report on the views of the child and/ or specific questions relating to the welfare of the child and the orders sought[205]. Child welfare reporters are appointed from a panel of members of the Faculty of Advocates and solicitors who have been subject to enhanced disclosure and are members of the PVG scheme. The panel list is maintained by the Scottish Courts and Tribunal Service on behalf of the Lord President.

4 The court may also appoint a curator *ad litem* to the child if it considers the welfare of the child cannot sufficiently be safeguarded by the parties to the action and the court. Any curator *ad litem* appointed must then consider whether it is necessary, to protect the child's interests, to enter the action.

5 Interim orders relating to children are often made following upon motion hearings. If the matter proceeds to proof (a hearing on evidence), a pre-proof hearing will be held around 8 weeks prior to the proof[206].

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[200] In terms of section 29 of the 1986 Act
[201] Act of Sederunt (Rules of the Court of Session 1994) SI 1994/1443. Chapter 71 in updated form can be accessed on www.scotcourts.gov.uk in the *Rules and Practice / Rules of the Court of Session* section.
[202] As above, in updated form on www.scotcourts.gov.uk . Chapter 49 can be found in the *Rules and Practice / Rules of the Court of Session* section.
[203] See paragraph 1.3 above
[204] Rule 49.32A of the Rules of the Court of Session
[205] Rule 49.22 of the Rules of the Court of Session
[206] Rule 49.32B of the Rules of the Court of Session

Sheriff court procedure

6 An application for an order relating to parental responsibilities and parental rights is a family action as defined in the Ordinary Cause Rules for the sheriff court[207]. Chapter 33 provides procedure in family actions[208].

7 On 30 May 2018, the Scottish Civil Justice Council launched a Consultation on the Case Management of Family and Civil Partnership Actions in the Sheriff Court[209]. The consultation period will conclude on 22 August 2018 and it is anticipated that substantial changes will be made to procedural rules in respect of family actions following thereon.

8 Under the current rules, in the ordinary course of a family action in the sheriff court which includes an application for a section 11 order, the proceedings will come before the sheriff for a child welfare hearing[210] shortly after a notice of intention to defend is lodged. At a child welfare hearing, the sheriff is required to *"seek to secure the expeditious resolution of disputes in relation to the child by ascertaining from the parties the matters in dispute and any information relevant to the dispute"*[211]. The sheriff may:

(a) "Order such steps to be taken, make such order, if any, or order further procedure, as he thinks fit, and"

(b) Ascertain whether there is or is likely to be a vulnerable witness who is to give evidence and make orders relating thereto[212].

9 All parties, including the child if he or she has indicated a wish to attend, are obliged to attend the child welfare hearing personally unless they excused from attendance on cause shown. The purpose is to enable the sheriff to hear directly but informally from the parties themselves. The majority of interim orders in terms of section 11 of the 1995 Act are made at child welfare hearings in the sheriff court.

10 Again, there is no CAFCASS or similar service in Scotland. The court may appoint a child welfare reporter to report on the views of the child and/ or specific questions

[207] Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 SI:1993/1956. The Ordinary Cause Rules can be access on www.scotcourts.gov.uk

[208] As above, in updated form on www.scotcourts.gov.uk . Chapter 33 can be accessed in the *Rules and Practice / Rules of the Court of Session* section.

[209] The consultation document can be accessed here: http://www.scottishciviljusticecouncil.gov.uk/news/2018/05/30/consultation-on-the-case-management-of-family-and-civil-partnership-actions-in-the-sheriff-court

[210] Provided for at rule 33.22 of the Ordinary Cause Rules

[211] Rule 33.22 (4) of the Ordinary Cause Rules

[212] Rule 33.22 (4) (a) and (b) of the Ordinary Cause Rules

relating to the welfare of the child and the orders sought[213]. Child welfare reporters are appointed from a panel of solicitors (and sometimes social workers) who have been subject to enhanced disclosure and are members of the PVG scheme. The panel list is maintained by the Scottish Courts and Tribunal Service on behalf of the Sheriff Principal for the sheriffdom in which the application is being heard.

11 The court may also appoint a curator *ad litem* to the child if it considers the welfare of the child cannot sufficiently be safeguarded by the parties to the action and the court. Any curator *ad litem* appointed must then consider whether it is necessary, to protect the child's interests, to enter the action.

12 Interim orders relating to children are also made following upon motion hearings. If the matter proceeds to proof (a hearing on evidence), a pre-proof hearing will normally be held in the sheriff court.

[213] Rule 33.21 of the Ordinary Cause Rules

CHAPTER 5

WELSH PUBLIC AND PRIVATE CHILD LAW ORDERS AND PROCEDURE

Ruth Henke QC, 30 Park Place, Cardiff

Contents

I. Introduction and Overview

1. England and Wales remain a single legal jurisdiction with a common court system and common court procedures. Public and private law child cases are heard in the Family Court and the FPR 2010 apply. With a few minor exceptions the Adoption and Children Act 2002 applies in Wales as it does in England. Again with one or two small exceptions all but Part 3 of the Children Act 1989 applies in Wales as it does in England. Thus the law in relation to public[214] and private law orders made under the Adoption and Children Act 2002 and the Children Act 1989 is the same in Wales as it is in England.

2. However, Part 3 of the Children Act 1989 was repealed in Wales by the Social Services and Well-being (Wales) Act 2014 (hereafter referred to as the 2014 Act). The 2014 Act came into force[215] in April 2016. The 2014 Act created a new statutory scheme which governs the provision of social care in Wales and the manner in which social services functions are delivered by Welsh local authorities. Social care in Wales is fully devolved.

3. The statutory scheme created by the 2014 Act is to be read as a whole. Within that scheme there are specific provisions setting out the duties and powers that a Welsh local authority has in relation to looked after children. Those include the duty and power to accommodate a child (S76 & 78 of the 2014 Act), the manner in which a looked after child is to be placed by a local authority (S81 of the 2014 Act), the duties and powers a Welsh local authority has to care leavers (S103-115 of the 2014 Act) and the statutory requirements which need to be satisfied by a Welsh local authority before holding a child in Welsh secure accommodation (S119 of the 2014 Act).

4. The Family Court is thus most likely to note the divergence of the law in relation to children in England and Wales when considering care planning for a child in public law proceedings. However, that is not the only difference. There are differences in relation to Special Guardianship orders and in relation to Adoption Orders.

5. This chapter intends to :-
   (a) set out briefly the evolution and impact of Devolution on areas of law effecting the Family Court;
   (b) summarise the case law which establishes the courts' expectation of practitioners when dealing with devolved areas of law ;
   (c) explain how devolved law effects the policy landscape in Wales ;
   (d) set out the main areas of Welsh "family" law which differ from English law; and

[214] Except for secure accommodation orders
[215] Save for those matters covered by Commencement Orders 1 & 2

(e) conclude with the recognition and enforcement of public law and private law orders made in relation to a child by the Family Court sitting in Wales.

II. Welsh Devolution

6. The nature of devolution in Wales has evolved over time. It is expected to continue to evolve in the future.

7. Modern day administrative devolution is said to have its origins in the end of the 19th century when certain limited administrative functions were passed to Wales. The Council for Wales and Monmouthshire was established in 1949 to advise the UK Government on matters of Welsh interest and in 1951 the post of Minister of Welsh Affairs was created. In 1964 the Welsh Office was established. Thereafter significant decisions about how Wales was run were taken in Wales albeit on behalf of the UK government[216].

8. The 1997 devolution referendum in Wales paved the way for real change. Certain functions of the UK Government were transferred to the National Assembly for Wales. The Government of Wales Act 1998 (GOWA 1998) established the National Assembly as a single body corporate, but within which there was an executive (a Cabinet or 'Executive Committee' of Assembly Members to whom functions were delegated). The National Assembly was also a limited form of legislature; Assembly Members scrutinised those bodies/persons to whom functions had been delegated and, as a body, could make subordinate legislation using the powers that had been transferred. The functions transferred were functions that fell within 20 subject areas listed in Schedule 2 to GOWA 1998. Those included education and training, health and health services, housing, local government and social services.

9. The Government of Wales Act 2006 (GOWA 2006) came into force on 25 July 2006. It replaced the 1998 Act. It has 6 parts. Part 2 of the Act together with Schedule 3 established the Welsh Assembly Government as an entity separate from, but accountable to, the National Assembly for Wales. Part 3 and schedule 5 of the Act gave the National Assembly power to pass its own primary legislation – initially by 'Assembly Measure' under a system by which limited competence was conferred (either by a Legislative Competence Order or by an Act of Parliament) on a piecemeal basis. One such Measure is the Mental Health (Wales) Measure 2010. It is primary Welsh legislation which sits alongside UK legislation, namely the Mental Health Acts 1983 and 2007 which remain in force in England and in Wales. Whilst the 1983 and 2007 Mental Health Acts are largely about compulsory powers, and admission to or discharge from hospital, the 2010 Measure is about the support that

[216] See Law.Gov.Wales

should be available for people with mental health problems in Wales wherever they may be living. The Measure became law in December 2010 but the main provisions only began to take effect between April and October 2012. The Measure is intended to ensure that where mental health services are delivered, they focus more appropriately on people's individual needs. It has four main Parts (Parts 5 and 6 are essentially about administrative issues), and each places new legal duties on Local Health Boards and Local Authorities in Wales to improve service delivery. The four Parts are as follows:

- Part 1 seeks to ensure more mental health services are available within primary care.
- Part 2 gives all people who receive secondary mental health services the right to have a Care and Treatment Plan.
- Part 3 gives all adults who are discharged from secondary mental health services the right to refer themselves back to those services.
- Part 4 offers every in-patient access to the help of an independent mental health advocate.

10. The 2006 Act also provided a mechanism for conferring greater power on the Assembly. Part 4 and Schedules 6 and 7 of the 2006 Act provided a power for a referendum to be called and for further powers to be granted to the Assembly in the event of a favourable vote. That referendum was held on 3 March 2011. As a consequence of a vote in favour of greater legislative powers, on 5 May 2011 the Assembly Act provisions of the 2006 Act came into force subject to certain transitional provisions - S.106(2) and (3). The Assembly Act provisions are defined in S.158 of the 2006 Act as S.107, 108, 110-115 of the 2006 Act. S 108(4) of the 2006 Act provides the test for competence by reference to Schedule 7 of the Act. It enabled the passing of primary Welsh legislation (Welsh Acts) in relation to all devolved areas.

11. Under the 2006 Act the following areas of law were amongst those fully devolved to Wales:-
    1. Education and training. Education, vocational, social and physical training and the careers service. Promotion of advancement and application of knowledge. Exception – research councils.
    2. Health and health services. Promotion of health. Prevention, treatment and alleviation of disease, illness, injury, disability and mental disorder. Control of disease. Family planning. Provision of health services, including medical, dental, ophthalmic, pharmaceutical and ancillary services and facilities. Clinical governance and standards of health care. Organisation and funding of national health service.
       Exceptions- abortion. Human genetics, human fertilisation, human embryology, surrogacy arrangements. Xenotransplantation. Regulation of health professionals. Poisons. Misuse of and dealing in drugs. Human medicines and medicinal

products, including authorisations for use and regulation of prices. Standards for and testing of, biological substances. Vaccine damage payments. Welfare foods. Health and Safety Executive and Employment Medical Advisory Service and provisions made by health and safety regulations.

3. Social Welfare. Social Welfare including social services. Protection and well-being of children (including adoption and fostering) and young adults. Care of children, young adults, vulnerable persons and older persons, including care standards. Badges for display on motor vehicles used by disabled persons.
   The following are, however, excepted:- Child support, Child trust funds subject to certain exceptions, Tax credits, Child benefit and guardian's allowance, Social security, Independent Living Funds, Motability, Intercountry adoption (apart from adoption agencies and their functions) and the functions of "the Central Authority" under the Hague Convention on Protection of Children and Co-operation in respect of Inter-Country Adoption, The Children's Commissioner (established under Children Act 2004), Family law and proceedings, apart from-—
   (i) Welfare advice to courts, representation and provision of information, advice and other support to children ordinarily resident in Wales and their families, and
   (ii) Welsh Family Proceedings officers.

12. The Wales Act 2017 came into force on 1 April 2018. It amends GOWA 2006. It is significant in that it changes the basis of the legislative competence of the Assembly, moving from a conferred powers model to a reserved power model – Part 1, S3. The Act also includes provisions which set out the constitutional relationship of the Assembly and the Welsh Government within the UK's constitutional arrangements- Part 1, S1-2. The 2017 Act, however, does not amend this relationship.

13. The 2017 Act replaces Schedule 7 of GOWA 2006 with two new schedules – Schedule 7A and 7B of GOWA 2006. Paragraph 8 of Schedule 7A preserves the single jurisdiction of the courts of England and Wales[217] with one notable exception; the role of the Family Proceedings officer in Wales and the advice and support provided to children ordinarily resident in Wales in relation to Family Proceedings. Paragraph 8(3) of Schedule 7A specifically states that paragraph 8(1) does not reserve—
   (a) welfare advice to courts in respect of family proceedings in which the welfare of children ordinarily resident in Wales is or may be in question;
   (b) representation in respect of such proceedings;
   (c) the provision of support (including information and advice), to children ordinarily resident in Wales and their families, in respect of such proceedings;

[217] Paragraph 164-165 of Schedule 7A reserves to the UK parliament the legal profession, legal services and claims management services . Paragraph 166 reserves the responsibility for the provision of legal aid.

(d) Welsh Family Proceedings officers.

14. Under the 2017 Act health, education and social care in Wales continue to be devolved. However, there are exceptions to that general rule and, as is befitting of an Act which moves to a reserved power model it is simpler to set out the exceptions which fall within the scope of this chapter.

15. Paragraph 146 of Schedule 7A reserves human genetics, human fertilisation, and human embryology and surrogacy arrangements. The Assembly will not be able to legislate in respect of any matter relating to human genetics; any surrogacy arrangements within the meaning of the Surrogacy Arrangements Act 1985 as amended or any matter falling within the scope of the Human Fertilisation and Embryology Act 1990 as amended.

16. The subject matter of the Mental Capacity Act including Deprivation of Liberty Safeguards ("DoLs") is reserved to the UK Parliament by paragraph 169 of Schedule 7A. The Court of Protection and the Office of the Public Guardian, both established under the 2005 Act, are thus reserved.

17. Prisons and offender management remain reserved under the 2017 Act with the exceptions of (i) accommodation provided by on behalf of a local authority for the purpose of restricting liberty of children and young persons and (ii) the provision of health care, social care, education, training and libraries which in this context are devolved matters.

18. Family relationships and children are matters specifically reserved by reason of section L12 of Schedule 7A. Section L12 contains paragraphs 176-179 of the schedule. They reserve:
    - Marriage, civil partnership and cohabitation-para 176
    - Parenthood, parental responsibility, child arrangements and adoption-para 177. "Child arrangements" includes the subject matter of Part 2 of the Children Act 1989.
    - Proceedings and orders under Part 4 or 5 of the Children Act 1989 or otherwise relating to the care and supervision of children-para 178
    - Civil remedies in respect of domestic violence, domestic abuse and female genital mutilation - paragraph 179.

    The exceptions to the above are (i) services and facilities relating to adoption, adoption agencies and their functions, other than functions of the Central Authority under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and (ii) parental discipline. "Parental discipline" includes the right to administer reasonable chastisement to a child and smacking. The Assembly has competence to ban smacking; an issue subject to recent public consultation in Wales.

III. Devolution and the Practitioner

19. What the court should expect from a practitioner when faced with a devolved area of law was addressed by Munby LJ (as he then was) in Re X (children) (serious case review: publication)[218] . He stated it would be of great assistance if, in such cases and as a matter of practice, advocates brought to the court's attention the fact that there was such a difference and were able to both identify the corresponding provisions applicable in the other country and, at least, in summary, to indicate the nature of the differences between the two regimes, namely between the law applicable in Wales and that applicable in England. This practice, he said, was not intended to encourage judges to make pronouncements obiter dicta on legislation which is not before them, but he considered it may facilitate understanding of legislation which is under scrutiny. Importantly, it will alert practitioners reading a law report of such a case that the law with which they are concerned may not be the same as that in the reported case they are considering[219]. Pill LJ in Re X agreed with Munby LJ's view adding that practitioners also needed to be aware that primary and secondary legislation in Wales are enacted both in English and Welsh and that those languages are treated as having equal standing. Whilst the need for comparison in practice may be rare, there is a possibility that cannot be excluded in all cases that Welsh words will throw a light on the proper construction of the English words, and vice versa.

IV. The Policy Landscape

20. Following the 1998 Act the Welsh Government became responsible for many policy areas having an impact on children's and young people's rights under the Convention (e.g. education, health, housing, the environment, social care). On 18 January 2011 the National Assembly passed the Rights of Children and Young Person (Wales) Measure 2011 which Measure was approved by Her Majesty in Council in March 2011. It came into full effect in May 2014. It integrates the UN Convention on the Rights of the Child into Welsh law. This is legislation is specific to Wales alone. The Measure is intended to ensure that the Convention, and the rights it guarantees to children and young people, is taken into account in policy development undertaken by Welsh Ministers. The main device to meet this objective is a statutory requirement on Welsh Ministers to have due regard to the Convention when carrying out any of their functions. The Measure thus embeds the Convention in policy development. The Measure includes a requirement on Ministers to publish a 'Children's Scheme' setting out steps they have taken to comply

[218] [2012] EWCA Civ 1500 [2013] 2 FLR 628 at [66]–[67].
[219] See also Ryder LJ in Re W (a child) (care proceedings: court's function) [2013] EWCA Civ 1227; [2014] 1 WLR 1611 [29].

with the due regard duty. The current Children's Scheme (2014) includes a template for a Children's Rights Impact Assessment (CRIA). CRIA is a policy tool to help ensure that officials think about the impact of any policy proposal on children's and young people's rights, and alternatives which better promote those rights.

21. The Measure does not provide individual children or young people with an enforceable remedy where their Convention rights are violated. Instead, the due regard duty creates obligations in public law. If the Welsh Ministers fail to have due regard to the Convention when making policy, the legitimacy of the policy concerned may be challenged by way of judicial review. Children and young people, or their representatives, could bring an action in judicial review to challenge Minsters where policy is not compliant with, or not fully compliant with, the Convention.

22. On 29 April 2015, the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Bill received Royal Assent and became an Act. This is primary Welsh legislation which aims to improve the Public Sector response in Wales to abuse and violence The Act will amongst other things:
    1. improve arrangements to promote awareness of, and prevent, protect and support victims of gender-based violence, domestic abuse and sexual violence
    2. introduce a needs–based approach to developing strategies which will ensure strong strategic direction and strengthened accountability
    3. ensure strategic level ownership, through the appointment of a Ministerial Adviser who will have a role in advising Welsh Ministers and improving joint working amongst agencies across this sector
    4. improve consistency, quality and join-up of service provision in Wales

23. The Future Generations Act 2015 came into force in Wales on 1 April 2016. It aims to make Wales a better place to live now and in the future. It applies to 44 public bodies which include Welsh Ministers, all Welsh Local Authorities, Local Health Boards, National Museums, the National Library for Wales and National Parks. The Act created as duty[220] which is imposed on each public body to carry out sustainable development. Each public body in carrying out sustainable development must include (a) setting and publishing objectives ("well-being objectives") that are designed to maximise its contribution to achieving each of the well-being goals under the Act, and (b) taking all reasonable steps (in exercising its functions) to meet those objectives. There are seven well-being goals each of which must be met. They are a prosperous Wales, a resilient Wales, a healthier Wales, a more equal Wales, a Wales of cohesive communities, a Wales of vibrant culture and thriving Welsh language and a globally responsible Wales. The Act establishes Public Service Boards for each local authority area to enable a

[220] See S 3 and 4 of the Act

collaborative approach and a Future Generations Commissioner for Wales. The Act does and is intended to affect every aspect of Welsh life

V. The Main Differences on the Ground

A. CAFCASS Cymru

24. The Children and Family Court Advisory and Support Service (CAFCASS) was established as a non-departmental public body for England and Wales by the Criminal Justice and Court Services Act 2000. Part 4 of the Children Act 2004 devolved the functions of CAFCASS in Wales to the Assembly[221]. In Wales, that non-departmental body is known as CAFCASS Cymru[222]. In respect of family proceedings in which the welfare of children ordinarily resident in Wales is or may be in question, it is the function[223] of the Service to:
    (i) safeguard and promote the welfare of children;
    (ii) give advice to any court about an application made to it in such proceedings;
    (iii) make provision for children to be represented in such proceedings;
    (iv) provide information, advice and other support for children and their families.
25. CAFCASS Cymru may authorise a Welsh family proceedings officer to conduct litigation in relation to any proceedings in any court and to exercise a right of audience in any proceedings in any court[227]. The lawyers employed by the service in Wales to provide legal advice, support and representation to Welsh family proceedings officers are known as Assembly Lawyers or as CAFCASS Legal Wales[228]. CAFCASS Legal is a division of the English service not of the Welsh service.

26. The practice note issued by CAFCASS and the Assembly in June 2006 sets out the appropriate allocation of cases to CAFCASS Cymru and to the Assembly lawyers. The practice note must be read in the light of the Family Procedure Rules 2010 which have since come into force and the continuing evolution of devolution in Wales.

B. Special Guardianship Orders

27. S14A–F of the Children Act 1989 are common to England and Wales. However, the regulations and statutory guidance which underpin that primary legislation differ in

[221] GOWA 2006, Sch 7, para 15
[222] See CAFCASS Practice Note dated June 2006.
[223] Children Act 2004, s 35(1).
[224] Children Act 2004, s 35 (4).
[225] Children Act 1989, s 7.
[226] FPR 2010, 16.3 and FPR 2010, 16.4.
[227] Children Act 2004, s 37
[228] CAFCASS Practice note dated June 2006.

Wales from that in force in England. The Special Guardianship (Wales) Regulations 2005 came into force on 30 December 2005. They do not replicate the English regulations. The Schedule to the regulations sets out the matters to be included in a report ordered by the court under s 14(A) (8) (b) of the Children Act 1989. The regulations prescribe the provision of special guardianship services, the assessment of the need for such services, the relevant assessment procedure, the circumstances in which financial support can be paid and the matters that must be taken into account when determining the amount of any financial support to be paid. Where a local authority decides to provide special guardianship services to a person on more than a single occasion, then they must draw up a plan, a special guardianship support plan, in accordance with reg 11 and must provide a copy of that plan to the persons or partner agencies specified in reg 11(4). The regulations also contain the mechanisms for review and termination of any special guardianship support services that are provided under a special guardianship support plan. In April 2006, The Special Guardianship (Wales) Regulations 2005 Guidance ('the Guidance') was issued by the Welsh Assembly Government. It is guidance issued under the Local Authority Social Services Act 1970, s 7 which requires local authorities in the exercise of their social services functions to act under the general guidance of the Welsh Assembly Government. It does not have the full force of statute but should be complied with unless local circumstances indicate exceptional reasons which justify a variation. The Guidance now needs to be read taking into account the necessary amendments made by the Social Services and Well-being (Wales) Act 2014 (SSW(W)A 2014) which came into force in Wales on 6 April 2016.

28. The Special Guardianship regulations and guidance in Wales are likely to be amended imminently. The consultation period for the Special Guardianship (Wales) Amendment Regulations 2018 and accompanying statutory guidance has concluded. The draft of the 2018 regulations states that they will come into force in 2 July 2018. They will not apply (i) where an individual has given written notice under S14A (7) of the Children Act 1989 of their intention to apply for a special guardianship order or (ii) where a court has ordered a report under S14A (9) before 2 July 2018. The 2018 regulations amend the 2005 regulations and prescribe the content of the "new" special guardianship reports. Significantly they provide for the insertion of S3A into the 2005 regulations. Regulation 3A deals with the provision of special guardianship support services for children placed outside of the local authority area by a Welsh authority and allows for those services to cease to be provided by the placing authority 3 years after the date of the special guardianship order and makes provision for notifying the host authority at least 3 months prior to that support ceasing. The new statutory guidance is also available in draft. It is expected to come into force at the same time as the 2018 regulations. The guidance is now in the form of a Code issued under S145 of the 2014 Act. The Code underpins the 2018 regulations. It contains guidance on the assessment for and the

provision of special guardianship support services including financial support. It introduces a new requirement upon Welsh local authorities to make certain categories of people aware of their entitlement to request an assessment of their need for special guardianship support services.

C. Placement and adoption orders

29. The substantive law in relation to placement orders and adoption orders is the same in England and Wales. The primary legislation applicable remains the Adoption and Children Act 2002. However, as a consequence of the Children and Families Act 2014[229], S1 (5) of the Adoption and Children Act 2002 relates only to Wales. S1(5) of the Adoption and Children Act states that:
– In placing a child for adoption, an adoption agency in Wales must give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background.
– There is no equivalent provision in relation to adoption agencies in England.

30. An adoption agency in Wales is specifically defined by S1 (9) of the Adoption and Children Act 2002 as a local authority in Wales or a registered adoption society whose principal office is in Wales.

31. There is a new Welsh Adoption Service. Welsh Ministers exercised their direction-making powers conferred by S3A of Adoption and Children Act 2005[230], to require local authorities in Wales to enter into specified arrangements with each other in relation to the provision of specified services under S3(1) Adoption and Children Act 2002 . The relevant directions are the Adoption and Children Act 2002 (Joint Adoption Arrangements) (Wales) Directions 2015 (the 2015 Directions) which came into force in March 2015.

The broad aims of the Directions are[231] as follows–
(a) the consistent delivery of high quality adoption services throughout Wales;
(b) keeping delay to a minimum in the placement of children for adoption;
(c) ensuring the widest choice possible of placements for adoption for children;
(d) ensuring that high quality and timely training and assessment for prospective adopters is consistently available;
(e) improving the process of matching children with prospective adopters;
(f) the streamlining of adoption processes and ensuring improved liaison between social workers involved in adoption cases;

[229] See CFA 2014, s 3.
[230] Inserted by SSW(W)A 2014, s 170.
[231] Paragraph 2 of the 2015 Directions

(g) keeping adoption breakdown to a minimum by the provision of comprehensive adoption support services according to assessed need; and
(h) collaborative working between local authorities, registered adoption societies, NHS Trusts and education services.

32. At a national level, the arrangements are effected through a Governance Board, an Advisory Group and a Director of Operations. At a regional level, the arrangements are effected by five regional collaboratives. Each collaborative is a partnership of local authorities working together to ensure that a good quality adoption service is provided in their region. The composition of the regional collaboratives is determined by paragraph 7(2) and is set out at Schedule 1 of the Directions. Local authorities will continue to carry out some of their adoption functions individually at local level. Collectively, these joint arrangements for the provision of adoption services are referred to as `the National Adoption Service'. Partnership agreements will set out the extent to which adoption functions are to be exercised by local authorities individually and the extent to which they are to be exercised through local authorities working in partnership through a regional collaborative.

33. Section 7 of the Children and Families Act 2014 amended s 125 of the Adoption and Children Act 2002 with the effect that s 125 no longer applies in Wales. Instead there is a Welsh Adoption Register which is now run by the Welsh Adoption Service. By reason of paragraph 16(1) of the 2015 Directions (see above) where a local authority is seeking an adoptive placement for a child and (a) three months have elapsed since the date on which the local authority was authorised to place the child for adoption; and (b) the local authority has not made a decision to match the child with prospective adopters, the local authority must provide the child's details to the Wales Adoption Register established by the Welsh Ministers. Paragraph 16(3) of the Directions provides that where a local authority has approved a person as a prospective adopter and (a) three months have elapsed since the date of approval; and (b) the local authority has not made a decision to match the prospective adopter with a child for adoption, the local authority must provide details of the prospective adopter to the Wales Adoption Register established by the Welsh Ministers.

34. There is a whole host of secondary legislation which is particular to Wales. The key Welsh regulations are as follows:
    - Adoption Agencies (Wales) Regulations 2005. These regulate local authority adoption services and were issued under the Adoption and Children Act 2002.
    - The Adoption Agencies (Wales) (Amendment) Regulations 2014 which came into force on 1 April 2014. Their aim is to provide greater flexibility for adoption agencies when constituting an adoption panel, whether or not on their own or jointly. The amendments are to give effect to the implementation of the National

Adoption Service, and in particular the operation of regional collaboratives. There is currently no statutory guidance to support the implementation of these regulations.

- Adoption Agencies (Panel and Consequential Amendments) (Wales) Regulations 2012, SI 2014/1410. These amendment regulations removed the adoption panels' power to make 'best interests' decisions in relation to children in care proceedings. These decisions are now made by the agency decision maker. Panels continue to make recommendations on matching children and prospective adopters.
- Voluntary Adoption Agencies (Wales) Regulations 2003. These are regulations about adoption services managed by charitable organisations such as St Davids and Barnardos in Wales.
- Adoption Support Services (Local Authority) (Wales) Regulations 2005 These are regulations for the provision of support services for adoptive families and also for birth parents of children who are being adopted. The support which may be provided includes financial support.

35. Statutory guidance has been given on the overlap between care and support planning and assessment for adoption support services in para 99 of the Code to Part 4 of the 2014 Act. It is specifically stated that the duty to prepare an adoption support plan is intended to be enhanced by the 2014 Act. Where, following an assessment, the local authority is satisfied that the conditions and eligibility for a care and support plan are met it must prepare a care and support plan in line with the relevant regulations and Code under the 2014 Act (see below).

D. The Social Services and Well-being (Wales) Act 2014

36. The 2014 Act creates a new system of social care in Wales. The Act provides the powers under which a whole host of new statutory regulations and guidance (known as Codes) have been made. This is an extensive legislative scheme. The Act is intended to integrate social services to support people of all ages, and support people as part of families and communities – the "people" approach. According to the Code[232], the Act will transform the way social services are delivered, primarily through promoting people's independence to give them a stronger voice and control. It is expected that integration and simplification of the law will provide greater consistency and clarity to people who use social services, their carers, local authority staff and their partner organisation, the court and the judiciary. The stated intention of the Act is to promote equality, improvements in the quality of services and the provision of information people receive. There is to be a shared focus on prevention and early intervention (see S14 & 15 of the Act).

37. Whilst this chapter concentrates on Part 6 which concerns looked after and accommodated children that Part cannot be read in isolation from the remainder of the Act.

38. Part 1 of the Act provides an overview of the Act and some key definitions. Within the Act an adult is aged 18 or over. A child is aged under 18 - S3 (2) & (3) of the Act. S4 of the Act defines the term "care and support", a term which is used throughout the act. It can be construed as care; as support and as both care and support. A carer is a person who provides care for an adult or a disabled child unless he/she does so by virtue of a contract or voluntary work - S3(4) & (7). That definition is subject to S3(8) which gives a local authority a discretion to treat a person as a carer depending on the purposes of the social service function and the relationship between carer and cared for person. Disabled within the meaning of the 2014 Act has the same definition as under the Equality Act 2010. A person has a disability for the purposes of the 2010 Act if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. The definition is wide enough to include chronic alcoholism, drug addiction or disease.

39. Central to the Act is the concept of well-being. Section 2 (2) of the Act provides the definition of well-being for the purposes of the Act.

[232] Part 6- Code of Practice – Preamble paragraph 15

"Well-being" in relation to a person means well-being in relation to any of the following-

a. Physical and mental health and emotional well-being;
b. Protection from abuse and neglect;
c. Education, training and recreation;
d. Domestic, family and personal relationships;
e. Contribution made to society;
f. Securing rights and entitlements ;
g. Social and economic well-being;
h. Suitability of living accommodation;

In relation to a child, "well-being" by virtue of S2 (3) of the Act also includes

a. Physical , intellectual, emotional, social and behavioural development;
b. "Welfare" as the word is interpreted for the purposes of the Children Act 1989.

In relation to an adult, "well-being" also includes according to S2 (4)

a. Control over day to day life;
b. Participation in work.

It is noteworthy that in relation to a child "well-being" includes welfare as defined by the Children Act 1989 but is not limited by that definition. There is no conflict between the two definitions. Welfare is simply included in the statutory definition of well-being for children.

When considering well-being no one factor has dominance over the other. A flexible and individual approach is intended, with some aspects of well-being being more pertinent to the individual concerned than others.

40. Part 2 defines the overarching duties under the Act. These duties apply to Welsh local authorities and their practitioners. Section 5 imposes the new Well-being duty. It provides that "*a person exercising functions under this Act must seek to promote the well-being of –*

    (a) people who need care and support, and

    (b) carers who need support"

    "People" includes both adults and children.

41. Section 6 of the Act sets out other overarching duties. By reason of S6(10) the overarching duties apply to those exercising functions under the Act in relation to an individual (child or adult) who has need for care and support, carers who have need for care and support and those exercising functions in relation to those to whom Part 6 of the Act applies. The latter category includes looked after children, accommodated

children and care leavers. A person exercising functions under Part 6 of the Act must have regard to these overarching duties in the exercise of their functions[233].

42. The four overarching duties that apply to adults and children alike are set out in S6 (2). They are:
    1. in so far as is reasonably practicable, to ascertain and have regard to the individual's views, wishes and feelings,
    2. to have regard to the importance of promoting and respecting the dignity of the individual,
    3. to have regard to the characteristics, culture and beliefs of the individual (including, for example, language), and
    4. to have regard to the importance of providing appropriate support to enable the individual to participate in decisions that affect him or her to the extent that is appropriate in the circumstances, particularly where the individual's ability to communicate is limited for any reason.

43. In addition there are two overarching duties applying specifically to adults. They are :
    1. the importance of beginning with the presumption that the adult is best placed to judge the adult's well-being; and
    2. The importance of promoting the adult's independence where possible.

44. The additional duties in relation to children are found in S6 (4) of the Act. They are:
    1. to have regard to the importance of promoting the upbringing of the child by the child's family , in so far as doing so is consistent with promoting the well-being of the child, and
    2. where the child is under the age of 16, to ascertain and have regard to the views, wishes and feelings of the persons with parental responsibility for the child, in so far as doing so is
        (i) consistent with promoting the well-being of the child, and
        (ii) reasonably practicable.

    The qualification is in so far as consistent with the well-being of the child not the welfare of the child. The wider term is used.

45. The overarching duties also include duties to pay due regard to a number of UN Rights Conventions. Section 7 of the 2014 Act provides that a person exercising specified functions – to an adult in need of care and support or a carer [234] under the Act – must have due regard to the United Nations Principles for Older Persons. A person exercising functions under the Act in relation to a child in need of care and support, or

[233] Part 6- Code of Practice – para 19
[234] Specified functions – section 6(1) (a) & (b) of the Act for Older people and S6 (1) (a) (b) & (c)

a carer, or under Part 6 of the Act must have due regard to the United Nations Convention on the Rights of the Child. Although not specified in the primary legislation, the relevant Code[235] states that when exercising social services functions in relation to disabled people (adults and children) who need care and support and disabled carers who need support, local authorities must have due regard to the UN Convention on the Rights of Disabled People.

46. The statutory duties under S6 and S7 of the Act contain a requirement to "have regard" or have "due regard" to a number of matters. The Code under Part 2 of the Act at paragraphs 54 - 58 gives guidance on the meaning to be given to those terms. For the purpose of S6 & 7 of the Act, the Code specifically states that the phrase is said to be similar to a requirement to "consider" or "take into account" that matter – chapter 1.55 & 60. Nothing more or less.

47. In addition the Code for Part 2 of the Act makes it clear that authorities and their practitioners must act compatibly with Human Rights under European Convention of Human Rights when exercising their functions under the Act.

48. Parts 3 - 5 of the 2014 Act cover assessing care and support needs of both children and adults and deciding how to meet those needs. Part 5 deals with charging for services and financial assessments. Its detail is outside the scope of this chapter.

49. The duty to assess an adult for care and support arises under S19 of the Act.

50. The duty to assess the needs of children for care and support is contained in S21 of the 2014 Act. This section contains a specific duty. Assessing the needs of children and deciding how to meet them is, according to the Code, a fundamental part of working with looked after children.

51. The duty under S21(1) of the Act applies where it appears to a local authority that a child may need care and support in addition to, or instead of, the care and support provided by the child's family, the authority must assess:
    (a) whether the child does need care and support of that kind, and
    (b) if the child does, what those needs are.

52. The assessment required under S21 of the 2014 Act is much more specific than that required under S17 of the Children Act 1989 which is no longer in force in Wales. S21(4) states
    "in carrying out a needs assessment under this section, the local authority must-

[235] Part 2- Code of Practice para 63

a) assess the developmental needs of the child

b) seek to identify the outcomes that-

i. the child wishes to achieve, to the extent it considers appropriate having regard to the child's age and understanding;

ii. the persons with parental responsibility for the child wish to achieve in relation to the child, to the extent it considers appropriate having regard to the need to promote the child's well-being, and

iii. persons specified in regulations (if any) wish to achieve in relation to the child.

c) assess whether, and if so, to what extent, the provision of

i. care and support,

ii. preventative services, or

iii. information, advice and assistance

could contribute to the achievement of those outcomes or otherwise meet the needs identified by the assessment

d) assess whether, and if so, to what extent, other matters could contribute to the achievement of those outcomes or otherwise meet those needs, and

e) take account of any other circumstances affecting the child's well-being."

53. A disabled child is presumed to have needs for care and support. The duty to assess under S21 of the 2014 Act does not apply to look after children because the duty to assess looked after children arises under S78. However the requirements of an assessment under S21 feed into the assessment required under S78 of the 2014 Act (see below).

54. The nature of any such assessment must be considered by the local authority to be proportionate to the circumstances. The Code to Part 3 makes the point that an effective assessment should be a valuable experience in itself. The assessment should build a better understanding of someone's situation, identify the most appropriate approach to addressing their particular circumstances and establish a plan for how they will achieve their personal well-being outcomes. The assessment process should be based on the principle of co-production. It should also be premised on the principle of voice and control. An assessment is intended to be dynamic. An initial assessment may deal with immediate needs whilst a more comprehensive assessment is conducted. If specialist assessment is required, it is likely that the needs are more urgent in nature. There should be minimum delay in completing that specialist assessment.

55. Under Part 3 of the Act, assessments of adults, children and carers may be combined if it is beneficial to do so and the necessary agreements have been given - paragraphs 5.21-22 Code to Part 3.

56. The Care and Support (Assessment) (Wales) Regulations 2015 came into force in April 2016. They prescribe who the assessor should be, the level of training and competence required together with the need for the assessment to be recorded in writing.

57. All assessments must include the National Minimum Core Data Set[236] which applies in Wales. The Act and the associated regulations introduce an assessment and eligibility test based on a comprehensive analysis of 5 inter-related elements –paragraphs 6.7 to 6.11 and annex 1 of the Code – to ensure that local authorities consider the person's circumstances in the round. They are:
    1. assess and have regard to the person's circumstances;
    2. have regard to their personal well-being outcomes;
    3. assess and have regard to any barriers to achieving those outcomes;
    4. assess and have regard to any risks to the person or to other persons if those outcomes and not achieved, and
    5. assess and have regard to the person's strengths and capabilities.

58. In relation to children the Code emphasises that a timely response is "vital". A completion of a comprehensive assessment is not intended to take precedence over an analysis of what is happening in a child's life and what action is needed, however difficult or complex the child's circumstances- Code to Part 3 para. 5.18. 42 days is the maximum period for a Part 3 assessment.

59. The Code has been refined to reflect and integrate the key principles and guidance for the Assessment of Children in Need and their Families (the Framework for Assessment). Accordingly it:
    1. emphasises that for children the process of assessment is about ensuring their best interests are met and that they are safeguarded so that they reach or maintain a satisfactory level of health and development or their health and development will not be significantly impaired
    2. incorporates principles underpinning the Framework for Assessment which are child centred and embed the principle of the primacy of the welfare of the child
    3. reflects that working with family members is NOT an end in itself; the object must always be to safeguard and promote the welfare of the child.
    4. notes that a refusal to be assessed can be overridden where a refusal is inconsistent with the child's well-being, and that
    5. a decision to take no action is a decision that must be recorded.

60. A key part of the assessment (according to paragraphs 8.3-4 of the Code to Part 3) must be to establish whether there is reasonable cause to suspect that a child is experiencing

[236] Found at para 59 of the Code to Part 3

or is at risk of abuse, neglect or other kinds of harm and whether any emergency action is needed. Where there is such a risk, the local authority must investigate and make enquiries into that child - S47 Children Act 1989. The Code specifically states that safeguarding must not be sacrificed on the alter of assessment. S47 of the Children Act 1989 continues to apply in Wales as it does in England.

61. The assessment required under S21 of the 2014 Act differs from the Framework for Assessment tool used in England which no longer applies in Wales. The Welsh Government has worked with ADSS Cymru to produce the first elements of an assessment tool for practitioners in Wales called the Common Recording Tool. Local authorities can use this to check that their own assessment tools and recording of assessments meets the requirements of the Act, the Codes and the regulations. However it remains up to local authorities to determine how best to collect the data required.

62. Local authorities must re-assess when there has been a change in identified personal well-being outcomes or a significant change in the individuals or family's needs or circumstances - paragraph 9.3. It is noteworthy that the transition from child to adulthood constitutes a significant change in circumstances and so creates a right to re-assess those needs - Code to Part 3 at paragraph 8.5

63. The Code makes a distinction between a re-assessment and a review of the care and support plan. The latter is about considering amongst the relevant practitioners, the carers and the family how effective the plan has been, and specific requirements in relation to such reviews are embodied in Determination of Eligibility and Care and Support Planning under Part 4 of the Act.

64. Part 4 of the 2014 Act is self-explanatory. It is headed "Meeting Needs" and sub headed *"deciding what to do following a needs assessment"*. The Act provides for eligibility criteria to be detailed in regulations. The relevant regulations are the Care and Support (Eligibility) (Wales) Regulations 2015. S32(1) of the Act states that if the eligibility criteria are met then a local authority must (a) consider what could be done to meet those needs; (b) consider whether it would impose a charge for doing those things and, if so, determine the amount of that charge. This duty applies to adults by reason of S35 of the Act; children as a consequence of S37 of the Act and to carers whether they are adult or child as a result of S40 and S42 of the Act. In relation to a child, if a child is within the local authority's area and the local authority considers it necessary to meet the assessed need in order to protect that child from (i) abuse or neglect or a risk of abuse or neglect, or (ii) other harm or risk of harm, then regardless of whether or not the eligibility criteria are met, the local authority has a duty to meet that child's assessed needs.

65. The 2014 Act has its own definitions of "harm", "abuse" and "neglect". These definitions are contained within S197 of the Act. "Abuse" means physical, sexual, psychological, emotional or financial abuse; "harm" in relation to a child means abuse or the impairment of (a) physical or mental health or (b) physical, intellectual, emotional, social or behavioural development and where the question of whether "harm" is significant turns on the child's health or development, the child's health or development is to be compared with that which could reasonably be expected of a similar child); and "neglect" means a failure to meet a person's basic physical, emotional, social and psychological needs, which is likely to result in an impairment of a person's well-being (for example, an impairment of the person's health or, in the case of a child, an impairment of the child's development).

66. S34 of the 2014 Act sets out how a local authority may meet the needs of people. S34 (2) contains a non-exhaustive list of examples of the way in which need may be met. Those examples include the provision of accommodation in a care home, children's home etc. There are exceptions and restrictions on what may be provided and to whom. S46 of the Act deals with persons subject to immigration control and S47 prohibits a Welsh local authority from meeting a person's needs by providing nursing care from a registered nurse subject to certain statutory exceptions. The Care and Support (Provisions of Health Services) (Wales) Regulations 2015 provide a mechanism for resolving disputes about whether the service provided is social care or health related.

67. Where a Welsh local authority is required to meet the needs of a person under the 2014 Act and/or to meet the needs of a carer, it must, by reason of S54 of the 2014 Act, prepare and maintain a care and support plan in relation to that person. The Care and Support (Care Planning) (Wales) Regulations 2015 make provision for the level of training and expertise of the person who prepares, maintains and revises the care and support plan. They also prescribe the content of the plan. In addition the Code to Part 4 at paragraph 87 states that where enquiries have been made in relation to a child under S47 of the Children Act 1989, the care and support plan must record the outcome of those enquiries and must state whether that child is or is not at risk and the action taken. A care and support plan can also include, if necessary, a protection plan.

68. The process of preparing, reviewing and revising a care and support plan may link into the preparation of other plans in relation to the same person - Code to Part 4 paragraph 97. There are, for example, overlapping duties in relation to :
    1. Child protection plans;
    2. Part 6 plans (see below);
    3. Pathway plans for care leavers (see below);
    4. Care and treatment plans under the Mental Health (Wales) Measure 2010;

5. Adoption support plans (see above);
6. Special Guardianship Support plans (see above); and
7. Care plans under S31A of the Children Act 1989 (see below).

Part 6 of the 2014 Act

69. Part 6 of the 2014 Act sets out the power and duties of Welsh local authorities when exercising their functions in relation to looked after and accommodated children. By reason of S74, a looked after child is defined as a child who is in care or provided with accommodation (for a continuous period of 24 hours or more) by a local authority under this Act.

70. A local authority must take steps according to S75 that secure, so far as reasonably practicable, that the local authority is able to provide looked after children and other accommodated children, with accommodation that is (a) within the authority's area and (b) meets the needs of the children. The accommodation that a local authority is under a general duty to provide under this section includes foster care and children's homes. According to the Code to Part 6[237], in order to discharge its general duty, a local authority must have regard to the benefit of having a number of accommodation providers in their area sufficient to discharge its duty, and the benefit of having a range of accommodation in its area capable of meeting different needs. The aim is to improve the quality and choice of placements, and minimise the likelihood of suitable placements not being available for looked after children in their area.

71. Section 20 of the Children Act 1989 does not apply in Wales. It has been repealed. Instead S76 of the 2014 Act places a duty on a local authority to provide accommodation for any child within its area who appears to the authority to require accommodation as a result of (a) there being no person who has parental responsibility for the child; (b) the child being lost or having been abandoned, or (c) the person who has been caring for the child being prevented (whether or not permanently, and for whatever reason) from providing the child with suitable accommodation or care. In relation to those who have reached the age of 16, the local authority now has a duty to provide that child with accommodation if it considers that the `well-being' of that child is likely to be seriously prejudiced if it does not provide that accommodation[238].

72. The principal duty of a local authority in relation to looked after children is set out in S78 of the Act. The duty under s 78(1) to safeguard and promote the well-being of a looked after child includes, by way of statutory example:

[237] New Code to Part 6 issued and in force from 2nd April 2018. It replaces the Code to Part 6 issued in 2015.
[238] S76(3) of the 2014 Act

(a) a duty to promote the child's educational achievement; and

(b) a duty

(i) to assess from time to time whether the child has care and support needs which meet the eligibility criteria under s 32 (see above); and

(ii) if the child has needs which meet the eligibility criteria, to at least meet those needs.

The statutory examples contained within s 78(2) of the Act are just that. They are not an exhaustive list. They illustrate important aspects of the duty which must be fulfilled but they do not limit the duty.

According to the Code to Part 6, S78 is intended to ensure that looked after children are treated just as any other child is treated. Hence local authorities must ensure that all services and supports are made available to the looked after child in accordance with their needs, including services in the community to enable them to participate in their community and live their lives as any other child.

73. The Code to Part 6 emphasises that a child should not become a looked after child simply because he receives care and support under Parts 3 and 4 of the 2014 Act. No child is to become a looked after child just to ensure the provision of and delivery of services under the Act. However all looked after children must have a Part 6 care and support plan regardless of whether or not they had a Part 4 care and support plan prior to becoming a looked after child.

74. A Part 6 plan is a very specific document. Part 6 plans are made, as their name suggests, under Part 6 of the Act and the Care Planning Placement and Case Review (Wales) Regulations 2015. A Part 6 plan is an overarching plan bringing together in one place all the key information about the child gathered from all assessments in relation to him and his family. The regulations require a looked after child to have a health plan, a personal education plan and a placement plan. All those plans must be incorporated into and form an integral part of the overarching Part 6 Plan[239]. When a child is placed in care through a route other than court that child must already have a Part 6 plan before placement unless it has not been reasonably practicable to do so in which case that child must have a Part 6 plan within 10 working days of his first placement[240]. When assessing a child for a Part 6 care and support plan, the local authority must assess the child's needs for services to achieve or maintain a reasonable standard of health and development. A local authority must take into account any information recorded in any existing Part 4 care and support plan but a Part 6 plan is not and must not be limited to the care and support provided under that existing Part 4 plan[4]. Rather a Part 6 plan must build on a Part 4 care and support plan[241]. The contents of a Part 6

[239] Part 6, Code of Practice, para 36.
[240] See regulation 4.
[241] Part 6, Code of Practice para 60

plan are prescribed in the Care Planning Placement and Case Review (Wales) Regulations 2015 as are the people to whom a copy is to be given.

75. Part 6 plans are distinct from care plans required under S31A of the Children Act 1989. The care plan required for care proceedings has been considered in the Code issued in relation to Part 6[242]. That Code is to be read in conjunction with Volume 1 Children Act 1989 Guidance and Regulations (Court Orders) and the PLO. A care order cannot be made until a court has considered a s 31A of the Children Act 1989 care plan. Nothing within the 2014 Act detracts from or repeals the requirements of a s 31A of the Children Act 1989 care plan. The Code states that where there are overlapping duties to prepare care plans, the preparation and delivery of a s 31A court care plan which also meets the requirements of Part 6 means that that plan can be adopted by a local authority as its Part 6 plan. However it may not be necessary to present the court with all the detail of a Part 6 plan for a local authority to fulfil the role of corporate parent.

76. Part 6 of the 2014 Act deals with the placement of looked after children. The first point made in the Code under Part 6 of the Act is that the majority of children who cannot be looked after by their own parents are not looked after children[243]. These children are often cared for by family or friends. The Code to Part 6 specifically states that these arrangements should receive the support the children and their carers need to safeguard and promote their well-being, whether or not the children are looked after children. The support should be based on the needs of the children rather than their legal status. According to the Code, no child should have to become a looked after child, whether by agreement with those holding parental responsibility or by virtue of a court order, for the sole purpose of enabling financial, practical or other support to be provided to the child's carer. However, local authorities do not have a duty to assess informal family and friends arrangements, unless it appears to the authority that there may be a need for care and support. If there is such a need, then the need for care and support must be assessed and met in accordance with Parts 3 and 4 of the Act (see above). Whether or not a child, who is cared for by a family or friends carer, should become a looked after child will need to be decided by the local authority on a case by case basis, based on the child's needs and circumstances. A key question (but not the only consideration) will be whether the child requires accommodation under S76 (1) of Act.

77. For the purposes of Part 6 of the 2014 Act, `placement' has a specific meaning. It means an arrangement by which a local authority places a looked after child in a suitable home environment in order to safeguard and promote his well-being[244]. When

[242] Code of Practice, Part 6 para 68-71 and 73-74.
[243] Code of Practice, Part 6 para 113-119
[244] S75 of 2014 Act

deciding on the best type of placement for a child, due regard must be given to the views, wishes and feelings of the child and their parents, the child's religion, culture, sexuality and any disability, including emotional and mental health and language needs. Contact arrangements with family and leisure opportunities with friends are also important.

78. Section 81 of the 2014 Act describes the manner in which children are to be placed. This section differs significantly from S23 of the Children Act 1989 which no longer applies in Wales. Equally S 22A–23ZB of the 1989 do not apply in Wales. They are applicable in England only. Section 81 contains the order of preference for the placement of children by Welsh local authorities.

79. When placing a child with a parent or someone who has parental responsibility for him, Chapter 1 of Part 4 of the Care Planning Placement and Case Review (Wales) Regulations 2015 must be observed. Those regulations replace the Placement with Parents etc Regulations 1991 in Wales. A placement of a child with his or her parent or someone who holds parental responsibility for them is not a placement with a foster parent. Whilst services and support, including financial support, can be provided under reg 21, there is no foster carer allowance payable in such circumstances.

80. Where a child cannot be placed with a parent or person with parental responsibility for him, the duty on the authority is to find the most appropriate placement available for the child. However the effect of S81 (6) of the 2014 Act is that where it is not possible for a child to live with its parents, preference should be given to placing the child with a relative, friend or connected person so that the child continues to grow up within their family or community if that is the most appropriate placement for the child.

81. Before making a decision to place a child in care (that means a child under an interim or final care order) with a relative, friend or connected person, that person will need to be registered as a local authority foster carer. The Care Planning Placement and Case Review (Wales) Regulations 2015 allow a local authority to make a temporary placement whilst that person seeks approval as a foster carer. The period of temporary approval is limited to 16 weeks but that period can be extended for a further eight weeks if the requirements of regulation 27 are met.

82. Where it is not possible to place a child with a parent or a relative, friend or connected person, the local authority may decide to place the child with an unrelated foster carer, in a children's home or in supported lodgings (the latter relating only to 16 - to 17-year olds).

83. Section 81(10)–(13) of the 2014 Act introduces new `foster to adopt' placements into Welsh law. The effect of s 81(10) and (11) is that where—

(a) the local authority is satisfied that a child ought to be placed for adoption and proposes to place the child for adoption with a particular prospective adopter; and

(b) the adoption agency has determined that that person is suitable to adopt a child; and

(c) the local authority is not authorised to place that child for adoption

the local authority must place the child with that particular prospective adopter unless the authority is satisfied that it would be more appropriate to make arrangements for the child to live with a parent or person with parental responsibility or to place a child with a foster carer or in a children's home. A decision to place a child in a `foster to adopt' placement can only take place after the local authority has taken the decision that the child ought to be placed for adoption. Before deciding to place a child in a foster to adopt placement, the nominated officer must comply with the requirements of reg 25 of the Care Planning Placement and Case Review (Wales) Regulations 2015. This includes notifying the child's parents or guardian of the child if that person can be found before the nominated officer makes the placement decision. The Code to Part 6 specifically envisages that a foster to adopt placement may take place some time after care proceedings have been issued but before they have been concluded. The child will be in a temporary placement until the decision is taken but once the decision had been made, the child should be moved to foster carers who are also prospective adopters to whom the child has been matched[245]. The foster to adopt scheme in Wales is materially different to the concurrent planning arrangements in place in England. In England a child can be placed with foster carers who are also approved adopters before the `ought to be adopted' decision has made. In Wales the foster to adopt provisions only take place where the possibility of reintegration with the birth family has been discounted and the `ought to be adopted' decision has been taken but a placement order has yet to be obtained.

84. The effect of S 81(7) (c) and 81(9) of the Act is that a child's placement must be within the local authority's area unless it is not reasonably practicable to do so. The 2014 Act makes it clear that it is important for looked after children to remain within their own area whenever it is possible and appropriate to do so. Out of area placements are specifically dealt with in the Care Planning Placement and Case Review (Wales) Regulations 2015. Regulation 12(1) states that a local authority may only place a child out of its area if it is satisfied that there is no placement available within its area capable of meeting the child's needs. A child cannot be placed out of area until a specific decision to so place the child has been taken by the placement panel. The panel's

[245] Part 2, Code of Practice, para 174

decision must be approved by the relevant nominated officer. Before the Panel and before the nominated officer make their decision, the requirements of reg 12(4) must be complied with. The decision must be based on thorough assessment and analysis of the child's needs, the decision makers must be satisfied that the placement is the most appropriate for the child and is consistent with the child's care and support plan, the child's relatives have been consulted, the IRO has been consulted, where necessary the special educational needs plan will be fulfilled and the child's health needs will be met. The Panel's decision and the nominated officer's approval must be in writing.
Regulation 12(2) of Regulations states that when seeking out of area placements, the local authority must follow this order of preference:

(1) with a local authority in Wales whose area borders that of the responsible authority;
(2) within any other authority in Wales;
(3) within an English authority or;
(4) subject to the requirements of s 124 outside England and Wales (court approval needed - see below).

According to the Code to Part 6[246], the regulations are sufficiently flexible to allow border authorities to place in neighbouring English authorities. For border authorities, the order of preference will be:

(1) within their own area;
(2) within a neighbouring Welsh authority; and failing that
(3) a neighbouring English authority.

Wherever placed, a local authority must ensure that a child's needs as delineated in his Part 6 care and support plan are met. The Code to Part 6 at paragraphs 202-207 sets out the timescales and procedures to be adopted when a child is placed out of area on an emergency basis.

85. Court approval is required to place a child outside of the jurisdiction of the courts of England and Wales[247] . The court must not give its approval to such a placement unless the requirements of S124 of the 2014 Act are met. Regulation 13 of the Care Planning Placement and Case Review (Wales) Regulations 2015 and paragraphs 209-216 Part 6 Code of Practice apply. By reason of S124(5) the court may dispense with a required person's consent to a placement out of the jurisdiction if either that person cannot be found or lacks capacity to give consent or the well-being of the child requires the consent to be dispensed with. Wellbeing is defined in S2(2) of the 2014 Act. This is different to the test under schedule 2 of paragraph 19(5)(c) of the Children Act 1989. In Wales it is no longer relevant whether the consent of a required person is being

[246] Code to Part 6, para 187
[247] S124 of the Act

withheld unreasonably. Where the child is moving to another jurisdiction within the British Islands (the United Kingdom of Great Britain and Northern Ireland, the Channel Islands or the Isle of Man), the effect of the court order may be transferred to the relevant public authority in the receiving jurisdiction[248]. Placements outside of the British Isles are likely to be rare according to the Code. When made there will need to be arrangements for the supervision and review of the placement and for the continuation of any contact arrangements[249].

86. Sometimes a secure placement is required for a child. Holding a child in secure accommodation involves a deprivation of liberty. Consequently in addition to art 6 (right to a fair hearing) and art 8 (right to private and family life), art 5 of the European Convention on Human Rights[250] (as set out in Sch 1, Pt 1 to the HRA 1998) is engaged, as is art 37b of UNCRC. Hence a child may only be detained in accordance with the law and if it is necessary and proportionate to do so. Secure placements should be kept under review and should be no longer than is necessary. Where a Welsh local authority intend to place a child in secure accommodation in Wales, the primary statutory provision is S 119 of the 2014 Act. Where a Welsh local authority wish to place a child in secure accommodation situated in England, the relevant statutory provision remains S25 of the Children Act 1989. Any local authority applying to the court for a secure accommodation order can make an application under both statutory provisions on the same form. This is particularly useful if the location of the secure establishment is not known at the time of the application or may alter before the application is heard. Where a Welsh local authority place a child in secure accommodation, be that in Wales or in England, the relevant regulations are the Children (Secure Accommodation) (Wales) Regulations 2015 and the Children (Secure Accommodation) (Wales) (Amendment) Regulations 2016. Chapter 7 of the Code to Part 6 applies. The amendments to regulations 1, 2, 9 and 12 by the 2016 regulations ensure that the requirements imposed on Welsh local authorities in relation to children placed in secure accommodation apply whether they place that child in England or Wales. The amendment to regulation 14 removes the prohibition on Welsh local authorities applying to court for secure orders in relation to 16 and 17 year olds accommodated under S76 of the Act. Under the Welsh statutory scheme as with the English scheme, a child can be held in secure accommodation for no more than the aggregate of 72 hours within a 28 day period without court order. Under court order, the maximum initial period is three months but subsequent periods of up to 6 months may be authorised by a court. By reason of the Welsh secure accommodation regulations, a child under the age of 13 cannot be held in secure

[248] The Children (Prescribed Orders – Northern Ireland, Guernsey and Isle of Man) Regulations. S.I. 1991/2032 The Children' s Hearings (Scotland) Act 2011 (Transfer of Children to Scotland - Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013
[249] Code to Part 6, para 216.
[250] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969).

accommodation without the prior approval of Welsh Ministers. The process for obtaining Ministerial approval can be found at paragraphs 721-722 of the Code to Part 6.

87. Placement in secure accommodation outside the jurisdiction of England and Wales was considered by Munby P in Re X and Y [2016] EWHC 2271(Fam), who decided that

(i) S25 of the Children Act 1989 does not enable the Family Court to make a secure accommodation order in respect of a secure placement in Scotland. That is because S25 in its amended form relates solely to a placement in England

(ii) Such a placement can now only be authorised under the Court's inherent jurisdiction ; and

(iii) There is no mechanism for the recognition or enforcement of such an Order under the inherent jurisdiction in Scotland, apart from an order of *nobile officium* before the Court of Session.

Re X and Y (above) was applied by HHJ Gareth Jones in *Re E (WX15C00482) Family Court* sitting in Wales in February 2017 to an application under S119 of the 2014 Act

88. The legislative scheme applicable to care leavers is different in Wales . S 23A-24D of the Children Act 1989 do not apply in Wales. The statutory scheme for care leavers in Wales is governed by the 2014 Act. Section 103 of the 2014 Act creates a duty upon a local authority to advise, befriend and assist a child with a view to promoting the child's well-being when it ceases to be a looked after child. By Section 104 of the Act `care leavers' or `young people who are entitled to support' as they are now to be known are placed into six categories. There are no longer any `relevant' children or `former relevant children' in Wales. In relation to those six new categories of young people a responsible Welsh local authority has powers and duties to provide advice and support as set out in the S105-115 of the Act. These duties and powers are underpinned by the Care Leavers (Wales) Regulations 2015. A responsible authority must take reasonable steps to keep in touch with category 2 and 3 care leavers whether within their area or not. All young people in categories 1–4 must have a personal advisor. A responsible local authority must safeguard and promote the well-being of young people in category 2 by making sure they have enough money to live on, have a suitable place to live and are supported in relation to education, training or employment. In relation to category 3 young people, the local authority must, as appropriate to their well-being, help with the cost of living near their place of employment or education or training, make a grant towards education or training costs, including a one-off higher education bursary, and help with university/higher education or college holiday accommodation. A responsible local authority must support a category 4 young person to the extent that his education and training needs require it by contributing to expense incurred by living near that place of education and

training and making a grant to enable that young person meet expenses connected with his education or training.

89. If a local authority considers that a category 5 or 6 young person needs support, they must help with living expenses, the cost of living near their place of education or employment and help with education or training costs or they may provide accommodation and holiday accommodation. The Special Guardianship (Wales) Regulations 2005 specify which local authority is responsible for providing services to category 5 young people. The responsible authority for categories 1–4 and 6 children is defined in S104 (5) of the 2014 Act.

90. A Pathway Plan should be developed for young people in categories 1–4. Specifically, but not exclusively, all category 2–4 care leavers must have a Pathway Plan based on an up to date and thorough assessment of their needs. All Pathway Plans must comply with the relevant requirements of S 107 and 108 of the 2014 Act and the relevant Care Leavers regulations. A Pathway Plan should reflect the wishes and feelings of the care leaver, the current carer of the young person, the designated person in school or college must be consulted. If reasonably practicable, parents, independent visitors, personal advisors, IRO and health specialists should also be consulted. A Pathway Plan must remain a `live` document and must be reviewed at regular intervals agreed at the first review either three-monthly or six-monthly. Reviews should always be brought forward if there is a risk to a young person's stability. A Pathway Plan must be reviewed before any move to leave care is made.

91. Where a young person does not qualify as a care leaver; i.e. was not looked after for a total of 13 weeks from the age of 14 which ended after they reached 16, they still may require care and support. In such circumstances, they should be assessed under Part 3 of the Act and their needs should be met in accordance with Part 4 of the Act.

92. Statutory guidance in relation to Care Leavers in Wales is found in Chapter 5 of the Code to Part 6.

93. Section 108 of the 2014 Act introduces a new duty in Wales towards young people in foster care who wish to continue living with their foster parents after the age of 18. This is known as the "When I am Ready" scheme. Under s 108 local authorities have to:
    (i) ascertain, when carrying out pathway assessments and drawing up Pathway Plans for young people aged 16–17, whether the young person and his or her foster carers wish to make a post-18 living arrangement.
    (ii) provide advice and support to facilitate post-18 living arrangements, where the young person and foster carers wish to enter into them and provided the local

authority is satisfied that this is not inconsistent with the young person's well-being.

94. The `When I am Ready' arrangements allow a young person to continue living in a stable and nurturing family environment after they turn 18 up to the age of 21 or until they have completed an agreed programme of education and training. The overall outcome of the arrangements is that the young person will have the time and support to develop the necessary skills and resilience to make a successful transition to independent living. The arrangements apply to:

(i) a young person who was looked after immediately prior to their eighteenth birthday and was living in a foster care placement arranged by the local authority;
(ii) the carers were acting as approved foster carers for that young person; or
(iii) the young person and the foster carer both wish to enter in a `When I am Ready' arrangement, the local authority considers this to be in the young person's best interests and the arrangements are set out in that young person's Pathway plan.

Young persons in residential care should be informed of the `When I am Ready' scheme as part of the Pathway planning process but they will only be eligible for an after-18 arrangement if they have moved into foster care before their 18th birthday.

95. Arrangements in accordance with `When I am Ready' have a different legal basis to children placed in foster care under the age of 18. These arrangements are not foster carer arrangements under the 2014 Act. As a matter of law, the young person becomes an `excluded' licensee.

96. Statutory guidance in relation to the `When I am Ready' scheme is contained in Chapter 6 of the Code to Part 6 of the 2014 Act. There is also a practitioners' guide, *`When I am Ready'*: Good Practice Guide which was issued in March 2016. The guide supplements the statutory code. The code sets out a local authority's legal responsibilities in respect of post-18 living arrangements for young people in foster care. Local authorities are required to set up local 'When I am Ready' schemes in line with the requirements in the code. Local authority staff who are setting up or revising local 'When I am Ready' policies and procedures should refer to the code, which sets out what a local authority must and should do to deliver the scheme.

97. Part 7 of the 2014 deals with safeguarding in Wales. S132 of the 2014 establishes a National Independent Safeguarding Board for Wales. The Act also establishes six new safeguarding areas each of which will have a Safeguarding Adults Board and a Safeguarding Children Board. The scheme prescribes the functions of the Boards. The statutory framework permits Safeguarding Adult and Children Boards to be combined. The regional boards sit alongside the National Board. The regional boards are

responsible for Adult Practice Reviews and Child Practice Reviews in Wales. The functions of the Boards, National and Regional are prescribed in the statute, in the relevant subordinate legislation and in the Code to Part 7.

98. Part 7 also introduces new duties and powers in Wales in relation to adults and children at risk. Section 126(2) of the 2014 Act defines an adult at risk as an adult who–
(a) is experiencing or is at risk of abuse or neglect;
(b) has needs for care and support (whether or not the authority is meeting any of those needs); and
(c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.

99. Where a local authority has reasonable cause to suspect that a person within its area is an adult at risk it must (a) make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken under the 2014 Act or otherwise and, if so, what and by whom and (b) decide what action should be taken. The duty is based on presence within the local authority's area not ordinary residence.

100. Section 127 of the 2014 Act introduces into Welsh law a new order, the Adult Protection and Support Order (APSO). The purposes of such an order are:
(i) to enable the authorised officer and any person accompanying him or her to speak in private with the person suspected to be an adult at risk;
(ii) to enable the authorised officer to ascertain whether that person is making decisions freely, and
(iii) to enable the authorised officer to assess whether the person is an adult at risk and to make a decision as required by section 126(2) on what, if any, action should be taken.

101. The application for an APSO is made by an authorised officer of the local authority to a justice of the peace. The requirements of an authorised officer are contained within the Adult Protection and Support Orders (Authorised Officer) (Wales) Regulations 2015.

102. The justice of the peace may only make the APSO if satisfied that the requirements of s 127(4) are met. An APSO must specify all the matters set out within that section. When applying for or executing an APSO the relevant paragraphs of the Code to Part 7 must be complied with.

103. It is anticipated that APSOs will rarely be sought. Indeed the writer is not aware of any being sought so far. Applications will only be made when other less intrusive approaches have failed or are highly likely to fail. However, authorised officers do not

have to prove the need for the APSO beyond all reasonable doubt. In part, the need for the APSO is because there is insufficient information about the adult suspected of being at risk. A particular difficulty for an authorised officer when considering applying for an APSO is that very little may be known about the adult suspected of being at risk. The lack of any reliable information on the person, coupled with concerns about their safety, will often be one of the reasons why an APSO is sought. In preparing an APSO application, an authorised officer should consider the following:

- Wherever possible the application should be discussed by agency partners in order to ensure that it will lead to a structured implementation, that the authorised officer has all the relevant information, and that there is adequate preparation for any post APSO involvement. However, the authorised officer, with the assistance of the local authority's legal team, is solely responsible for the application and implementation of the APSO.
- In making the application to the justice of the peace, the authorised officer must be able to provide evidence that alternative and less interventionist approaches have been considered, but are judged insufficient. Given the human rights implications of an APSO, they must be the last resort.

104. APSOs can be made if the authorised officer has reasonable cause to suspect that a person is an adult at risk; that it is necessary for the authorised officer to gain access to the person in order properly to assess whether the person is an adult at risk and to make a decision on what, if any, action should be taken; that making an order is necessary in order to gain access; and that exercising the power of entry conferred by the order will not result in the person being at greater risk of abuse or neglect. APSOs do not give a general power of entry. They are focussed on the specific purposes outlined in S 127(2) of the Act. The power cannot be continued unreasonably as some kind of deterrent. The use of an APSO is subject to the general principle of proportionality. This applies to the number of visits and the number of people who accompany the authorised officer.

105. Sections 128 and 130 of the 2014 Act respectively create a new duty to report in relation to adults and children. The duty is placed all relevant local authority partners in Wales to inform a local authority that it has reasonable cause to suspect that an adult or a child in its area is an adult or child at risk within the meaning of the Act. In this context the term, a relevant partner of a local authority, includes local policing bodies, a Local Health Board and an NHS trust. The duty to report in relation to children does not amend or alter in any way S47 of the Children Act 1989 which remains in force in Wales. In Wales both the duty to report and the duty to make enquiries are in force.

106. Part 8 of the Act defines social services functions and places a duty on a local authority to appoint an officer who is to be known as a Director of Social Services. This Part of

the Act also confers on Welsh Ministers the power to issue and revise Codes under this Act. Part 8 of the 2014 Act sets out the powers of Welsh Ministers to intervene in the exercise of social services functions by a local authority and the corresponding duty placed on a local authority. Part 9 sets out arrangements and duties to co-operate. Sections 162–163 of the 2014 Act impose a duty on a local authority to make arrangements to promote co-operation between local authorities and relevant partners and other bodies with a view to improving the well-being of the adults and children to whom it owes a duty under the Act. Sections 164(1) and (2) of the Act provide that if a local authority requests the co-operation of a person defined in s 164(4) in the exercise of any of its social services functions or the production of information required for the purposes of the exercise of those social services functions, then that person must comply with the request unless the person considers that doing so would:

(a) be incompatible with the person's own duties; or

(b) otherwise have an adverse effect on the exercise of the person's own functions.

The assessment of a person (child or adult) under Part 3 of the Act and the meeting of that assessed need in accordance with the Act are exercises of a local authority's social services functions under the Act. This section of the Act can, amongst other things, be used to ensure inter-agency co-operation in preparing and implementing a care and support plan.

VI. Recognition and Enforcement

107. The above paragraphs have set out the main areas of difference. Although they are increasing in number it has to be remembered that there is a common legal system in England and Wales and that the orders made by the Family Court are common to both countries. Hence public law orders and private law orders made in the Family Court sitting in Wales are recognised and enforced in the remainder of the British Isles just as they would be had they been made in England. The common legal jurisdiction in England and Wales means that there is no need for a system of recognition and enforcement between the two countries.

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