This briefing aims to support MSPs with their constituency casework relating to contact between grandparents and their grandchildren. Specifically, the briefing explores the legal and policy background to the situation where grandparents would like to have contact with their grandchildren against the wishes of one (or both) of the parents.

Please note that SPICe can only provide general information relating to the law of Scotland. If a constituent wishes to receive legal advice in relation to the circumstances of his or her individual case he or she should contact a solicitor.
CONTENTS

INTRODUCTION .................................................................................................................................................. 3
THE CURRENT LAW .......................................................................................................................................... 3
A NOTE ABOUT TERMINOLOGY ......................................................................................................................... 3
WHAT ARE PARENTAL RESPONSIBILITIES AND RIGHTS? .................................................................................. 3
WHO HAS PARENTAL RESPONSIBILITIES AND RIGHTS? .................................................................................. 4
THE APPLICATION OF THE 1995 ACT TO GRANDPARENTS ........................................................................... 4
  Grandparents have no automatic right to see their grandchildren ................................................................. 4
  Seeking a section 11 order relating to contact ................................................................................................ 4
  The guiding principles ..................................................................................................................................... 4
  Finding a solicitor .......................................................................................................................................... 5
  Help with legal costs ...................................................................................................................................... 5
  Breaches of section 11 orders ......................................................................................................................... 5
  Alternatives to court action ............................................................................................................................ 6
GRANDCHILDREN'S CHARTER ........................................................................................................................ 6
FURTHER SOURCES OF SUPPORT FOR GRANDPARENTS ........................................................................... 6
THE POLICY BACKGROUND ........................................................................................................................... 6
  SCOTLAND .................................................................................................................................................... 6
  ENGLAND AND WALES .............................................................................................................................. 7
SOURCES ......................................................................................................................................................... 8
RELATED BRIEFINGS ....................................................................................................................................... 12
INTRODUCTION

Grandparents can experience difficulties in relation to obtaining contact with their grandchildren in a range of situations. However, a common example of where it arises is after the parents separate or divorce acrimonously and the children continue to live with their mother. In these circumstances, the paternal grandparents can sometimes find maintaining contact challenging.

This briefing is divided into sections. The first section looks at the current law and practice relating to grandparents' contact rights. The second section of the briefing provides an overview of the policy background relating to this topic.

SPICe is aware that MSPs also receive enquiries from constituents relating to the distinct situation where grandparents are looking after their grandchildren on a full-time basis (‘kinship care’). This complex area of law and policy is outwith the scope of this briefing.

THE CURRENT LAW

To understand the legal status of grandparents seeking contact with their grandchildren it is necessary to understand the broader legal framework of ‘parental responsibilities and rights’ (PRRs) created by the Children (Scotland) Act 1995 (‘the 1995 Act’).

A NOTE ABOUT TERMINOLOGY

Day to day, people still tend to talk about ‘access’ and ‘custody’ in relation to disputes about children, in keeping with the legislation that predated the 1995 Act.

However, the terms used in the 1995 Act are actually ‘contact’ and ‘residence’. Residence relates to who the child lives with. As already alluded to, contact relates to the child’s relationships with people he or she does not live with.

WHAT ARE PARENTAL RESPONSIBILITIES AND RIGHTS?

The 1995 Act provides a range of PRRs in respect of all children living in Scotland. Parental responsibilities exist where practicable and in the best interests of the child (1995 Act, section 1). Parental rights exist to enable those with parental responsibilities to fulfil those responsibilities (1995 Act, section 2).

PRRs include the right to have the child live with a person having PRRs. Furthermore, where the child does not live with that person, there is both the right and the responsibility to have contact with that child (1995 Act, section 1(1)(c) and section 2(1)(a) and (c)).

There is also a responsibility to safeguard and promote a child’s health, development and welfare (1995 Act, section 1(a)). Furthermore, there is a PRR to direct or guide the child’s upbringing in an age appropriate way (1995 Act, section 1(1)(b) and 2(1)(b)). Consequently, a range of day to day decisions about a child’s life fall within the scope of PRRs, such as those to do with his or her education, religious upbringing or medical treatment.¹

¹ PRRs also include the right and responsibility to act as the child’s legal representative (1995 Act, section 1(1)(d) and section 2(1)(d)).
WHO HAS PARENTAL RESPONSIBILITIES AND RIGHTS?

A range of people have automatic PRRs in respect of a child. These include (1995 Act, section 3; Registration of Births, Deaths and Marriages (Scotland) Act 1965, section 18):

1. the child’s mother;
2. the child’s father where he was married to the child’s mother at the time of the child’s conception or subsequently; and
3. the child’s father where he is registered as the father of the child on or after 4 May 2006.

Fathers can also register an agreement with the child’s mother in the Books of Council and Session in order to get PRRs (1995 Act, section 4). Raising a court action in order to acquire PRRs is also possible, as discussed in more detail below (1995 Act, section 11).²

THE APPLICATION OF THE 1995 ACT TO GRANDPARENTS

Grandparents have no automatic right to see their grandchildren

A grandparent does not have an automatic right to see his or her grandchild. This is because they do not fall into the category of people who have automatic PRRs under the 1995 Act.

Seeking a section 11 order relating to contact

However, under section 11 of the 1995 Act any person who does not have (and never has had) PRRs in respect of a child but who ‘claims an interest’ can apply for a court order granting them contact with that child (1995 Act, section 11(2)(d) and 11(3)). Accordingly, if an amicable agreement cannot be reached about contact, a grandparent could make such an application to the court.

The guiding principles

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

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

In relation to 2 above, a child aged 12 years or older is presumed to be of sufficient age and maturity enough to form a view (1995 Act, section 11(10)).

The courts are also required to “have regard in particular” to the need to protect the child from actual or possible abuse, the effects of such abuse on children, the ability of the abuser to care

² Fathers who did not originally appear on their child’s birth certificate can also apply for ‘re-registration’ in order to acquire PRRs. After re-registration, the child’s birth certificate will show the man in question as the child’s father. This process requires the co-operation of the child’s mother. More information can be found in the SPICe Briefing Parenting when parents live apart (Harvie-Clark 2015) at page 7.
for the child, and the effects of abuse on a person’s capacity to fulfil PRRs (1995 Act, section 11(7A)–(7E)). Abuse is defined as including “abuse of a person other than the child” (1995 Act, section 11(7C)(b)).

**Finding a solicitor**

SPICe recommends that anyone contemplating applying for a contact order should take the advice of a solicitor. To help find a solicitor in Scotland specialising in family law the Law Society of Scotland’s website has a facility allowing you to search by specialism and by geographical area. The Family Law Association has a similar search facility.

**Help with legal costs**

Help with legal costs may be available out of the civil legal aid budget. There are two main types of legal aid which might be available: ‘Advice and assistance’ is available to provide legal advice from a solicitor, although not representation in court. ‘Civil legal aid’ enables legal representation in court.

There are various tests which applicants have to meet to qualify for either type of legal aid, including financial eligibility tests. However, around 75% of the Scottish population now qualify financially to have all or part of their costs met from the civil legal aid budget. More information on eligibility for legal aid can be found on the Scottish Legal Aid Board’s webpage entitled Eligibility.

The Scottish Legal Aid Board’s website allows you to search for a firm of solicitors who offer help through legal aid. The Family Law Association’s search facility also allows you to search specifically for a family law firm who undertake legal aid work.

**Breaches of section 11 orders**

A person in breach of an order made under section 11 of the 1995 Act can be held in contempt of court with the possibility of being fined and/or imprisoned. Judges are reluctant to imprison parents with whom the children who are the subject of a section 11 order live but it does happen in a small number of cases.

It is also possible in theory for a court to vary the terms of an existing court order in response to a breach of a contact order. However, the principles discussed above will determine any decision in this regard. In particular, the welfare of the child is the paramount consideration (1995 Act, section 11(7)).

All these enforcement powers involve a return to court for the person seeking to enforce the contact order. Additional legal expenses are likely to be incurred by that person during the process, unless he or she qualifies to have all of his or her expenses met out of the civil legal aid budget.

---


Alternatives to court action

As well as being potentially expensive, court action may be stressful and there is no guarantee of success. It also has the potential to make the relationships between the parties concerned worse. In addition, court action may take some time.

Alternatives to court action include Alternative Dispute Resolution such as mediation, although the individuals involved in the dispute must be willing to participate voluntarily.

The website of the Scottish Mediation Network contains more information about family mediation, including a search tool to help interested individuals find a local mediation provider. Relationships Scotland is a voluntary organisation which is a leading provider of family mediation services.

CALM Scotland also provides mediation services across Scotland and is run by experienced solicitors specialising in family law. It has a search tool to enable access to local mediators.

GRANDCHILDREN’S CHARTER

Grandparents may find it helpful to have regard to the contents of the Grandchildren’s Charter published by the then Scottish Executive in 2006 (Scottish Executive 2006c). The Charter aims to highlight the role of the wider family in raising children. However, it is a statement of the Scottish Government’s policy intentions in this area, rather than a document with legal consequences.

FURTHER SOURCES OF SUPPORT FOR GRANDPARENTS

A possible source of practical and emotional support for grandparents is Grandparents Apart. This is a UK wide organisation which helps grandparents (including those in Scotland) and which campaigns on the issue of grandparents’ rights.

Families need Fathers Scotland aims to support fathers and other family members in dealing with the practical consequences of divorce and separation. The organisation is very active in working with grandparents. Its services include monthly group meetings where group members can share their experiences. Grandparents are welcome to attend.

THE POLICY BACKGROUND

SCOTLAND

The Family Law (Scotland) Act 2006

Apart from the legislation which introduced civil partnerships and same sex marriages in Scotland, the Family Law (Scotland) Act 2006 (‘the 2006 Act’) was the last piece of legislation which involved a major overhaul of family law in Scotland.

There was no provision in the bill which became the 2006 Act which related to grandparents’ contact rights (and responsibilities). However, during the parliamentary passage of the bill, the issue of whether grandparents should have such rights (and responsibilities) did come up.

---

5 Civil Partnership Act 2004 (c 33); Marriage and Civil Partnership (Scotland) Act 2014 (asp 5).
Specifically, the group Grandparents Apart campaigned for grandparents to have automatic rights of contact with their grandchildren. The Justice 1 Committee (as it then was) was the lead parliamentary committee on the bill. Its Stage 1 report on the bill provides a good discussion of the issue (see volume 1, paras 149–161).

The then Scottish Executive did not support automatic rights of contact for grandparents to their grandchildren. It wanted the issue to continue to be decided according to the criteria under section 11 of the 1995 Act, i.e. what is in the best interests of the child. A range of other stakeholders giving evidence to the Justice 1 Committee also expressed views supporting the Executive’s position.

Ultimately, the law remained unchanged. However, the Scottish Executive committed itself to introducing the non-statutory Charter for Grandchildren.

Further reforms

There have been no subsequent developments since the 2006 Act relating to grandparents’ rights of contact with their grandchildren. The Scottish Government’s current position is that it is not necessary to change the law in this area.

ENGLAND AND WALES

Recently, the UK Government has been considering the issue of grandparents’ rights in relation to England and Wales.

In England and Wales, grandparents are required to take an extra step which grandparents in Scotland do not have to take when applying to the court for contact with their grandchildren. Specifically, they must ask the court for ‘leave’ (permission) to apply for the equivalent of a contact order. It was this extra step the UK Government was considering removing.

The history of these reforms is summarised in a briefing note (Gheera and Jarrett 2014a, pp 5 – 6) produced by research staff in the House of Commons Library. The UK Government ultimately decided not to proceed with any change to the current law.
SOURCES

AG v JB [2011] CISH 56. Available at:


CALM Scotland [Online]. Available at:

http://www.calmscotland.co.uk/

CALM Scotland. Find a Mediator [Online]. Available at:

http://www.calmscotland.co.uk/plugins/findmediator/


Family Law Association Scotland [Online]. Available at:

http://www.familylawassociation.org/

Family Law Association Scotland. Contact a family law solicitor [Online]. Available at:

http://www.familylawassociation.org/public/familylawassociation_memberdirectory.asp


http://www.parliament.uk/briefing-papers/SN02827/parental-responsibility


http://www.scottish.parliament.uk/parliamentarybusiness/88334.aspx

Grandparents Apart [Online]. Available at:

http://grandparentsapart.co.uk/

JDE v SDW. Note (No.2) by Sheriff George Jamieson. Available at:

https://www.scotcourts.gov.uk/search-judgments/judgment?id=46709da6-8980-69d2-b500-ff0000d74aa7
Justice 1 Committee [Online]. Available at:
http://www.scottish.parliament.uk/parliamentarybusiness/PreviousCommittees/15250.aspx
Justice 1 Committee. (2005) *Stage 1 Report on the Family Law (Scotland) Bill.* 8th Report, 2005 (Session 2). Available at:
http://archive.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-08-vol01-01.htm
http://archive.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-08-vol02-01.htm
Law Society of Scotland [Online]. Available at:
http://www.lawscot.org.uk/
Law Society of Scotland. *Find a solicitor* [Online]. Available at:
http://www.lawscot.org.uk/wcm/lssservices/find_a_solicitor/Core/directory.aspx
M v S 2011 SLT 918; 2009 Fam LR 149. Available at:
http://www.scotcourts.gov.uk/opinions/2009CSIH44.html
Registers of Scotland. *Books of Council and Session* [Online]. Available at:
Relationships Scotland [Online]. Available at:
http://www.relationships-scotland.org.uk/
Scottish Executive. (2006c) *Family Matters: Charter for Grandchildren.* Edinburgh: Scottish Executive. Available at:
http://www.scotland.gov.uk/Publications/2006/04/21143655/0
Scottish Legal Aid Board [Online]. Available at:
http://www.slab.org.uk/
Scottish Legal Aid Board. *Find a solicitor* [Online]. Available at:
Scottish Legal Aid Board. *Civil cases – am I eligible?* [Online]. Available at: 
http://www.slab.org.uk/public/civil/eligibility/

Scottish Mediation Network [Online]. Available at: 
http://www.scottishmediation.org.uk/

Scottish Mediation Network. *Find a Mediator* [Online]. Available at: 
http://www.scottishmediation.org.uk/find-a-mediator/


TAM v MJS [2009] CSIH 44:

http://www.scotcourts.gov.uk/opinions/2009CSIH44.html

Trinder, L. (2013) *Enforcing Child Contact Orders: Are the Family Courts Getting it Right?* Available at: 

Trinder, L et al. (2013) *Enforcing Child Contact Orders: Problem-Solving or Punishment?* Available at: 
RELATED BRIEFINGS

Parenting when parents live apart

Kinship Care

Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Sarah Harvie-Clark on extension 85373 or email sarah.harvie-clark@scottish.parliament.uk. Members of the public or external organisations may comment on this briefing by emailing us at SPICe@scottish.parliament.uk. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers. If you have any general questions about the work of the Parliament you can email the Parliament’s Public Information Service at sp.info@scottish.parliament.uk.

Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

www.scottish.parliament.uk