

Briefing for the Citizen Participation and Public Petitions Committee on petition [PE2057](#): Promote shared parenting and prevent the separation of children from their parents, lodged by John McMaster

An overview of issues raised by the petition

The Children (Scotland) Act 1995: parental responsibilities and rights ('PRRs')

When parents separate or divorce, Part 1 of the [Children \(Scotland\) Act 1995](#) ('the 1995 Act') is key to resolving any disputes that arise between the parents relating to the care of their children.

Part 1 sets out a range of parental responsibilities and rights ('PRRs') in respect of all children living in Scotland.

PRRs include the right to have the child live with a person having PRRs (**residence**). Furthermore, where the child does not live with that person, there is both the right and the responsibility to have **contact** with that child.

Reaching agreement amicably

In 2018, the Scottish Government [published guidance](#) designed to help parents agree a **Parenting Plan** after separation or divorce, that is, a voluntary agreement relating to the future care of their children.

A key caveat is that [use of a parenting plan is not recommended where there is a history of violence or abuse](#).

Parents can also reach a legally binding agreement relating to their arrangements for their children, known as a **minute of agreement**.

The Children (Scotland) Act 1995

If parents cannot agree the arrangements for the care of their children, section 11 of the 1995 Act is a key provision. Section 11 enables the court to make a range of court orders relating to PRRs. For example:

- a court can make a **residence order**, setting out where the child is to live, which can be with one parent or with both parents

- a **contact order** sets out the arrangements for a child to have contact with a person he or she does not live with, for example, a parent or grandparent.

When a child is to live with both parents this is sometimes referred to as **joint residence**, although this term does not appear in the legislation.

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, that is, the most important and overriding one.
2. Taking account of the child's age and maturity, the child shall, so far as practicable, be given an opportunity **to express their views**. The court must consider, although not necessarily follow, any views expressed.
3. The court will not make any court order unless it considers that to do so would be better than making no order at all.

The courts also must "have regard in particular to":

- the need to protect the child from actual or possible abuse
- the effects of such abuse on a child
- the ability of the abuser to care for the child
- the effects of abuse on a person's capacity to fulfil PRRs.

Abuse includes abuse of a parent, as well as abuse of a child.

The 1995 Act has been the subject of two significant sets of reforms since the creation of the Scottish Parliament. The first set of reforms was in the [Family Law \(Scotland\) Act 2006](#) ('the 2006 Act'), the second set of reforms was in the [Children \(Scotland\) Act 2020](#) ('the 2020 Act'). Both Acts are discussed below.

The Family Law (Scotland) Act 2006

When the Bill which became the 2006 Act was being considered at Stage 1, the lead committee, the Justice 1 Committee, considered arguments about whether there should be a statutory presumption (that is, a legal starting point for the courts) of 'equal parenting time'. Broadly, this is a 50/50 split of time for the child between the two parents.

In its [Stage 1 report](#), [the Justice 1 Committee said](#) that there should be a policy emphasis placed on the importance of joint parenting, as generally being in the child's best interests. However, a presumption about parenting time should not be added to the legislation. The Committee wanted to retain discretion for the courts to decide that an equal split of time was not in the child's best interests in an individual case.

The Children (Scotland) Act 2020

The 2020 Act, **most of which is not yet in force**, [contains a wide range of reforms to Part 1 of the 1995 Act](#).

For example, section 16 of the 2020 Act (not in force) adds to the statutory factors which the courts must consider when deciding an individual case. Specifically, the 2020 Act says the court must look at the impact of any court orders on the child's relationships with i) their parents; and ii) other important people in their life.

When the Bill which became the 2020 Act was being considered at Stage 1, the lead committee, the Justice Committee, considered arguments that a statutory presumption for the courts should be added to the legislation. This presumption was in favour of 'shared parenting'. This presumption was about parental involvement rather than a particular allocation of parental time. In its [Stage 1 report](#), the Justice Committee [commented as follows](#):

“We note that the courts in Scotland currently apply a broad assumption (or general principle) that it will normally be beneficial for children to have an ongoing relationship with both parents. On balance, we are not persuaded that the Bill should include a presumption in favour of shared parenting. The welfare of the child must remain the paramount consideration. Any shared parenting presumption could cut across that key principle.”

[Delays in cases under the 1995 Act have previously been flagged by senior judges as an important issue](#). Related to this, section 30 of the 2020 Act (not in force) says that, in certain family cases, including those under the 1995 Act, the court must consider the risk to a child's welfare that delay would pose.

New court rules

In September 2023, [new court rules](#) (which determine the procedure followed by courts in cases) came into effect for family cases, including those under the 1995 Act. The rules seek to encourage the courts to actively manage cases. [The hope among the legal profession is that the new rules will provide a means to encourage the speedier resolution of cases](#).

Sarah Harvie-Clark

15/11/23

The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at spice@parliament.scot

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

Published by the Scottish Parliament Information Centre (SPICe), an office of the Scottish Parliamentary Corporate Body, The Scottish Parliament, Edinburgh, EH99 1SP