



SCOTTISH LEGAL GROUP CONFERENCE 19 JUNE 2009

PERMANENCE ORDERS – HOW ARE THEY GOING TO WORK?

What is a permanence order?

- An order vesting in a local authority the right to regulate a child's residence and the responsibility to provide guidance to the child. *Sections 80(2)(a) and 81*
- Vesting other responsibilities and rights in persons considered appropriate, so that each parental responsibility and each parental right vests in someone (by operation of law or under the PO). *Section 80(2)(b) and (3)*
- In some cases, granting authority for the child to be adopted. *Section 80(2)(c)*

NB1. This contrasts with a supervision requirement which may suspend the operation of parental responsibilities and rights, but leaves the underlying responsibilities and rights untouched.

NB2. Child becomes “looked after” in terms CSA section 17(6). *Schedule 2 para 9(4)*.

When may a permanence order be made?

- When no-one has rights in relation to residence *or* Residence with any of the persons who do have rights in relation to residence is, or is likely to be seriously detrimental to the welfare of the child. *Section 84(5)(c)*.
- Child is defined as person under 18. *Section 119*.
There is an effective limitation to persons under 16 at time order is made as residence rights do not apply to over 16 year olds.
The provision excluding children who have been married or civil partners may be otiose. *Section 85(2)*.
A PO may be made for an adopted child. *Section 85(1)*.

- The child is under the age of 12 *or*
Over 12 and consents to the order *or*
Over 12 and incapable of consenting to the order.
Section 84(1) and (2).
- After the child has been given the opportunity to express a view to the court.
Children of 12 and over are presumed to be of an age and maturity to give a view
Views must be taken into account.
Section 84(5)(a)&(b)(i) and (6)
- If the order, and the provision within the order is likely to safeguard and promote the welfare of the child throughout childhood. This is the paramount consideration.
Section 84(4).
- If the making of the permanence order would be better for the child than not making such an order.
The order must be shown to be an improvement on the existing position.
Section 84(3)
- Regard must be had to:
 - The child's religious persuasion, racial origin and cultural and linguistic background
 - The likely effect on the child of the making of the order.*Section 84(5)(b)(ii) and (iii)*

What decisions need to be made in relation to parental responsibilities and rights?

Consideration has to be given to each parental responsibility and right, bearing in mind that parental rights in the Children (Scotland) Act s 2 are conferred on a parent to allow the parent to fulfil the parental responsibilities in s 1.

The following orders may be made:

CSA 1995, section 1(1)(a) Responsibility to safeguard and promote health, development and welfare

- Leave with parent or extinguish parental responsibility if this has been vested in the local authority or some other person. *Section 82(1)(c).*
- Vest in local authority. *Section 82(1)(a)(i).*
[local authority already have duty to safeguard and promote welfare under CSA 1995 section 17(1)(a)]
- Vest in some other person. *Section 82(1)(b)(i).*

CSA 1995, section 2(1)(a) Right to have the child living with him or otherwise determine residence

- Parent loses this right. *Section 87.*
 - Already vested in local authority as a mandatory provision. *Section 81(1)(b)*
 - Cannot be vested in some other person. *Section 82(1)(b)(ii).*
- Can the court direct where the child is to live or is this solely for the local authority?
Section 82(1)(f).
- Can the court interdict the local authority? *Section 103* (inserting *CSA 1995 section 11A* but not affecting interdict).

CSA 1995, section 1(1)(b)(i) Responsibility to provide direction to the child

- Leave with parent or extinguish parental responsibility if this has been vested in the local authority or some other person. *Section 82(1)(c).*
- Vest in local authority. *Section 82(1)(a)(i).*
- Vest in some other person. *Section 82(1)(b)(i).*

CSA 1995, section 1(1)(b)(ii) Responsibility to provide guidance to the child

- Already vested in local authority as a mandatory provision. *Section 81(1)(a)*
- Leave with parent (as well) or extinguish parental responsibility. *Section 82(1)(c).*
- Vest in some other person. *Section 82(1)(b)(i).*

CSA 1995, section 2(1)(b) Right to control, direct or guide the child

[This is the corollary of the responsibility to provide direction and guidance and orders should, at least in theory, be consistent with the mandatory vesting in the local authority of the responsibility to provide guidance and any orders in respect of the responsibility to provide direction or guidance]

- Leave with parent or extinguish parental responsibility if this has been vested in the local authority or some other person. *Section 82(1)(d).*
- Vest in local authority. *Section 82(1)(a)(ii).*
- Vest in some other person. *Section 82(1)(b)(ii).*

CSA 1995, section 1(1)(c) Responsibility to maintain personal relations and direct contact

- Cannot vest in local authority.
- Leave with parent or extinguish parental responsibility if this has been vested in some other person. *Section 82(1)(c).*
- Vest in some other person. *Section 82(1)(b)(i).*
- Specify arrangements for contact between the child and any other person. *Section 82(1)(e).*

CSA 1995, section 2(1)(c) Right to maintain personal relations and direct contact

This should be consistent with orders relating to responsibilities in respect of contact.

- Cannot vest in local authority.
- Leave with parent or extinguish parental responsibility if this has been vested in some other person. *Section 82(1)(d).*
- Vest in some other person. *Section 82(1)(b)(ii).*
- Specify arrangements for contact between the child and any other person. *Section 82(1)(e).*

But what happens if there is a contact order under s 11 CSA 1995? *Section 88.*

CSA 1995, section 1(1)(d) Responsibility to act as the child's legal representative

Important as covers right to consent to medical treatment, and deal with legal issues.

- Leave with parent or extinguish parental responsibility if this has been vested in the local authority or some other person. *Section 82(1)(c).*
- Vest in local authority. *Section 82(1)(a)(i).*
- Vest in some other person. *Section 82(1)(b)(i).*

CSA 1995, section 1(1)(d) Right to act as the child's legal representative

This should be consistent with orders relating to responsibilities in respect of legal representation.

- Leave with parent or extinguish parental responsibility if this has been vested in the local authority or some other person. *Section 82(1)(d).*
- Vest in local authority. *Section 82(1)(a)(ii).*
- Vest in some other person. *Section 82(1)(b)(ii).*

The court may make other orders determining any question that has arisen in connection with parental responsibilities or parental rights, or any other aspect of the welfare of the child.

Section 82(1)(f)

What happens if more than one person has a particular parental right?

When

- (a) two or more people have a parental right

And

- (b) a right has been conferred on one or more of those persons (ie local authority or third party) in the PO

Then each of the persons having the right may exercise that right independently, unless the PO states otherwise. *Section 91.*

What effect will a permanence order have on existing parental responsibilities and parental rights?

- Parent or guardian will lose the right to control the residence of the child. *Section 87.*
- Parental responsibilities and parental rights (held under sections 3, 4, 4A or 7 of CSA 1995 or by virtue of a previous adoption order) other than residence will remain with the persons who hold them unless they are extinguished by the permanence order.
- Any existing orders under s 11 CSA 1995 (and any previous PO) will be revoked but the parental responsibilities and parental rights under the old order must be vested in someone under the new order. *Section 88.*

If there is (say) a contact order that is considered adverse to the child's welfare, should this be discharged before a PO is made?

- Once a permanence order is granted there can be no orders under section 11 CSA 1995, other than interdict, judicial factor or guardian. *Section 103*.
Can interdict be granted to impede the operation of the PO?
What would be the effect on a PO if the court appoints a guardian?
- *If there are court orders relating to the child or the child's property, the local authority cannot act in a way that would be incompatible with such orders. Section 90(2)(a).*

What is interim position, while an application for a PO is pending?

- The court may make “such interim order as it thinks fit”. *Section 97(2)*.
- There is no statutory mechanism for addressing a conflict between an order under section 11 CSA 1995 and a PO
- If the children's hearing proposes to make or modify the supervision requirement it must prepare a report for the court. *Section 95*.
- No supervision order may be made or “modified” (it may be terminated), unless referred by the court to the Principal Reporter (whether following receipt of report or otherwise). *Section 96*.
- If the effect of an interim order is that compulsory measures of supervision are no longer necessary, the court must order that the supervision requirement “ceases to have effect” (Permanently or *ad interim*? If *ad interim* and there is no review, will supervision requirement fall?). *Section 97(3) and (4)*.
- If the court makes an interim order, this will prevail over an inconsistent provision in a supervision requirement. *Section 97(5)*.

What effect will a permanence order have on a supervision requirement?

- On granting a PO the court must terminate the supervision requirement, if supervision no longer necessary. *Section 89*.
If supervision requirement were to continue it would operate against a different regime of parental responsibilities and rights.
- After a PO has been granted, the local authority cannot act contrary to a supervision requirement. *Section 90(2)(b)*.

When can authority to adopt be included in a permanence order?

- The local authority requests such authority. *Section 83(1)(a)*.
- The child has been or is likely to be placed for adoption. *Section 83(1)(b)*.
- The parent consents or parental consent is dispensed with. *Section 83(1)(c), (2), (3), (4) and (5)*.
- It would be better for the child were authority granted than if it were not. *Section 83(1)(d)*.
- Regard should be had to the need to safeguard and promote the child's welfare throughout childhood. *Section 84(4)*.

NB1. No separate provisions for consent by child over 12.

NB2. Notice of placement, adoption or cessation of placement must be given to persons whose consent was given or dispensed with unless waived. *Section 101*.

May a permanence order be varied?

- Ancillary provisions may be varied by the court. *Section 92*.
- There is a wide list of persons who may apply for variation. All but the local authority require leave to make an application, *Section 94(4)*.
- The local authority may apply to vary a PO to include provision granting authority to adopt. *Section 93*.
- A local authority must apply for variation if there is a material change in the circumstances directly relating to the order's provisions in consequence of which it ought to be varied. *Section 99*.

May a permanence order be revoked?

- The court may revoke the order. *Section 98*.
- Anyone affected by the PO may apply for revocation. All but the local authority require leave to make an application. *Section 98(2)(b)*.
- A local authority must apply for revocation if there is a material change in the circumstances directly relating to the order's provisions in consequence of which it ought to be revoked. *Section 99*.

- On revocation the court must consider whether to make a s 11 order under CSA 1995. *Section 100.*

NB. No way back to the children's hearing, so no 'supervised' return

When does PO cease?

- If revoked (see above)
- If child is adopted. *Section 102.*
- Effect of PO will terminate for most purposes at 16, as all parental responsibilities (other than guidance) and all parental rights cease at 16. The responsibility to guide persists to 18. *CSA 1995 section 1(2) and 2(7).*

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