

POLICY NOTE

THE ADOPTION AND CHILDREN (SCOTLAND) ACT 2007 (AMENDMENT OF THE CHILDREN (SCOTLAND) ACT 1995) ORDER 2016

SSI 2016/xxx

The above instrument was made in exercise of the powers conferred by section 116 of the Adoption and Children (Scotland) Act 2007 (“the 2007 Act”). The instrument is subject to affirmative procedure.

Policy Objectives

Section 11 of the Children (Scotland) Act 1995 (“the 1995 Act”) provides that the court may grant a range of orders in respect of a child, including a contact order permitting an applicant to have contact with a child. A recent case in the Sheriff Court has highlighted that certain persons may be inadvertently excluded from applying for a contact order, by virtue of an amendment that was made to section 11(3) of the 1995 Act by section 107 of the 2007 Act. This amendment repealed section 11(3)(a)(iii) of the 1995 Act and replaced it with section 11(3)(ab) of the 1995 Act.

Section 11(3)(ab) of the 1995 Act has the effect that persons who have had their parental responsibilities or parental rights removed in a way other than by an adoption order under section 28 of the 2007 Act or a parental order under section 55(1) of the Human Fertilisation and Embryology Act 2008 (“the 2008 Act”) are not permitted to apply for a contact order. Such persons were not excluded from applying for a contact order before the amendment (and can still apply for other orders, such as a residence order).

Prior to the amendment by section 107 of the 2007 Act, section 11(3)(iii) of the 1995 Act allowed a person whose parental responsibilities or parental rights had been removed other than by virtue of an adoption order or a parental order to apply for a contact order.

Section 107 of the 2007 Act amended section 11(3) of the 1995 Act for the sole purpose of allowing a person to apply for a contact order where their child had been adopted. This had not been possible before the section 107 amendment. However, it has transpired that section 107 may have also had the unintended consequence of removing the rights of parents to apply for a contact order when their parental responsibilities or rights had been removed by an order other than an adoption order or a parental order.

The question of whether the amendment did remove those rights is the subject of on-going litigation in an appeal from the Sheriff Court to the Inner House of the Court of Session. A devolution issue was served on the Lord Advocate in respect of the potential European Convention on Human Rights implications if the rights have been removed. The Lord Advocate intimated to the court on 15 October 2015 that he intended to take part in the proceedings. On 22 October 2015, the Lord Advocate lodged submissions for the purpose of advising the court that whatever the correct interpretation, the 2007 Act was not intended to affect the ability of persons in this situation who have lost their parental responsibilities or rights. The Lord Advocate advised the court in his submissions that Scottish Ministers will make an order under section 116 of the 2007 Act to put beyond doubt that a person in this position may still apply for a contact order.

The Order amends the 1995 Act so as to ensure that persons who have had their parental responsibilities or parental rights removed other than by virtue of an adoption order under the 2007 Act or by virtue of a parental order under the 2008 Act can apply for a contact order.

The Order also makes an amendment to section 11(6) to add a cross-reference to section 11(3)(aa). Section 11(6) defines “adoption order” and section 11(3)(aa) includes a reference to the making of an adoption order.

Consultation

The Scottish Government did not consult on the Order. The Order ensures that persons who have had their parental responsibilities or parental rights removed for reasons other than adoption under the 2007 Act or by a parental order under the 2008 Act can apply to the court for contact orders. This clarifies that the amendment made by the 2007 Act was not intended to have an effect on the existing rights of other people.

Impact Assessments

The purpose of the Order is to ensure that it is clear that the amendment made by the 2007 Act in relation to adoption was not intended to have an effect on the existing rights of other people. It will remain for the court to decide whether or not contact should be ordered in a specific case. The paramount consideration for the court remains the welfare of the child. No changes have been made to this fundamental principle. Given this, no Equality Impact Assessment, Child Rights and Wellbeing Impact Assessment or Business and Regulatory Impact Assessment have been prepared.

Financial Effects

No significant financial effects arise from this Order. Any increase in the number of applications to the court for contact orders is expected to be low.

Scottish Government
Children and Families Directorate
9 November 2015