

ADOPTION AND CHILDREN (SCOTLAND) ACT 2007

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2

Permanence Orders

284. A permanence order is a new type of court order which will regulate the exercise of parental responsibilities and parental rights in respect of children who cannot reside with their parents but where contact or shared exercise of parental responsibilities and parental rights is or may be appropriate. A permanence order may remove some or all parental responsibilities and parental rights and grant them to other persons specified in the order.

Section 80 - Permanence orders

285. Under subsection (1), on the application by a local authority a court can make a permanence order in respect of a child. Only a local authority can apply for a permanence order.

286. Subsection (2) defines a permanence order by reference to the contents of such an order. All permanence orders will contain the “mandatory provision” set out at section 81. Additionally, the order may contain such of the “ancillary provisions” listed at section 82 as the court thinks fit. Such an order may also grant authority for the child to be adopted, but only where the conditions in section 83 are met.

287. Subsection (3) provides that in making a permanence order, the court must ensure that each parental responsibility and right in respect of the child vests in a person.

Section 81 - Permanence orders: mandatory provision

288. **Section 81** specifies the mandatory provision. The mandatory provision will vest in the applicant local authority for the appropriate period (defined by subsection (2)), the following parental responsibilities and parental rights:

the responsibility to provide, in a manner appropriate to the stage of development of the child, guidance to the child (as set out at section 1(1)(b)(ii) of the Children (Scotland) Act 1995) (subsection (1)(a)); and

the right (as set out at section 2(1)(a) of the 1995 Act) to regulate the child’s residence (subsection (1)(b)).

289. These will be the core elements of the permanence order: all permanence orders will confer these parental responsibilities and parental rights upon the local authority in whose favour the permanence order is made.

290. Subsection (2) defines the ‘appropriate period’ for which the permanence order will last. For the responsibility set out at subsection (1)(a) (provision of guidance) the appropriate period begins with the making of the permanence order and ends on the child’s 18th birthday. For the right set out in subsection (1)(b) (to regulate residence), the appropriate period begins with the making of the permanence order and ends on the child’s 16th birthday.

Section 82 - Permanence orders: ancillary provisions

291. Section 82(1) sets out the ancillary provisions which, in addition to the core responsibilities and rights provided by the mandatory provision, section 80(2)(b) allows the court to vest in a person. Under paragraph (a) the court may vest in the applicant local authority for the appropriate period such of the parental responsibilities listed in section 1(1)(a), (b)(i) and (d) of the Children (Scotland) Act 1995 (to promote and safeguard the child’s health, development and welfare; to provide direction to the child; and to act as the child’s legal representative) and such of the parental rights listed in section 2(1)(b) and (d) of that Act (to control, direct or guide the child; to act as the child’s legal representative) as the court considers appropriate.
292. Under paragraph (b) of section 82(1) the court may also vest in a person other than the applicant local authority, for the appropriate period, such of the parental responsibilities listed in section 1(1) of the 1995 Act and such of the parental rights listed in section 2(1) (b) to (d) of the 1995 Act in relation to the child as it considers appropriate.
293. Under section 82(1)(c) the ancillary provisions also allow the court, as it sees fit, to extinguish parental responsibilities which, immediately before the making of the permanence order, vested in a parent or guardian of the child and which vest in the local authority (by virtue of section 81(1)(a) or paragraph (a)(i) of section 82(1)) or in a person other than the applicant (by virtue of paragraph (b)(i) of section 82(1)).
294. Subsection (1)(d) of section 82 enables the court to extinguish any parental rights in relation to the child which immediately before the making of the order, vested in a parent or guardian of the child and which by virtue of paragraph (a)(ii) of section 82(1) vest in the local authority or by virtue of paragraph (b)(ii) vest in a person other than the authority.
295. Subsection (1)(e) of section 82 allows the court to specify arrangements relating to contact between the child and any other person the court considers appropriate and as the court considers to be in the best interests of the child.
296. In making a permanence order, the court may also determine any question which has arisen in connection with any parental responsibilities or parental rights in relation to the child or any other aspect of the welfare of the child (section 82(1)(f)).
297. Subsection (2) defines the ‘appropriate period’ referred to in subsection (1). For the responsibility set out at subsection 1(1)(b)(ii) of the 1995 Act (responsibility to provide guidance), the appropriate period begins with the making of the permanence order and ends with the child’s 18th birthday. For any other case, the appropriate period begins with the making of the permanence order and ends on the child’s 16th birthday.

Section 83 - Order granting authority for adoption: conditions

298. An application for a permanence order may also include a request for authority for the child to be adopted. Where sought, this can only be granted where the conditions set out at section 83(1) are met. These conditions are: that the applicant has sought such authority in their application for a permanence order; that the court is satisfied that the child has already been placed for adoption or is likely to be so placed; that the court is satisfied that each parent or guardian of the child has understood the effect of the making of an adoption order and has consented to its making; or that the court has dispensed with their consent on one of the grounds mentioned in subsection (2); and that the court

considers that it would be better for that child for the authority to be granted than for it not to be granted.

299. Subsection (2) provides for the grounds on which a parent's or guardian's consent can be dispensed with. These are the same as the grounds set out at section 31 in relation to adoption order. The grounds are that the parent or guardian is dead; that the parent or guardian cannot be found or is incapable of giving consent; that subsection (3) or (4) applies; or, where neither of those subsections applies, the welfare of the child otherwise requires the consent to be dispensed with.
300. Subsection (3) applies where the parent or guardian has parental responsibilities or parental rights in relation to the child, other than those mentioned in sections 1(1)(c) and 2(1)(c) of the 1995 Act (maintaining contact with the child on a regular basis); where, in the opinion of the court, the parent or guardian is unable satisfactorily to discharge those responsibilities or exercise those rights and is likely to continue to be unable to do so.
301. Subsection (4) applies where the parent or guardian has, by virtue of the making of a permanence order which does not include authority for the child to be adopted, no parental responsibilities or parental rights in relation to the child and it is unlikely that he or she will obtain such parental responsibilities or parental rights.
302. Subsection (5) defines 'parent' for the purposes of subsections (1)(c) and (2) (those who must give their consent or have it dispensed with) as meaning a parent who has any parental responsibilities or parental rights in relation to the child, or a parent who has lost such responsibilities and rights by virtue of a previous permanence order which did not include authority to adopt.

Section 84 - Conditions and considerations applicable to making of order

303. Subsection (1) (as read with subsection (2)) provides that a permanence order may not be made in respect of a child who is aged 12 or over unless the child consents, except where the court is satisfied that the child is incapable of consenting to the order. Under subsection (3) a court may not make a permanence order unless it considers that it would be better for the child that the order be made than not. By virtue of subsection (4), when considering whether or not to make a permanence order and what provision the order should make, the court's need to safeguard and promote the welfare of the child throughout childhood must be its paramount consideration.
304. Under subsection (5), the court must consider particular factors before making a permanence order. Under subsection (5)(a), the court must, after taking account of the child's age and maturity, as far as is reasonably practicable, give the child the opportunity to indicate whether he or she wishes to express his or her views on the making of a permanence order, and if so, to give the child the opportunity to express those views.
305. Where the child does express views subsection (5)(b) places a duty on the court to have regard to such views. In addition, when considering whether or not to make a permanence order, the court must have regard to 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. Subsection (5)(c) requires that the court must also be satisfied that there is no person who has the parental right to have the child living with them or otherwise to regulate the child's residence, or, where there is such a person, the court must be satisfied that the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child.
306. Subsection (6) provides that a child who is aged 12 or over is presumed to be of sufficient age and maturity to form a view for the purposes of subsection (5)(a).

Section 85 - Child in respect of whom order may be made

307. Section 85(1) provides that a permanence order may be made even in respect of an adopted child. Section 85(2) specifies the only category of child in respect of whom an order may not be made, namely a child who is or has been married or a civil partner.

Section 86 - Representations

308. Subsection (1) allows persons specified in subsection (2) to make representations to the court in relation to an application for a permanence order. The court must allow these people to make representations should they wish to do so.
309. The persons specified in subsection (2) are the local authority making the application; the child or the child's representative; anyone who has parental responsibilities and parental rights in relation to the child; and any other person who claims an interest.

Section 87 - Effect of order on existing parental right

310. By virtue of section 87, the making of a permanence order extinguishes the parental right mentioned in section 2(1)(a) of the 1995 Act (the right to have the child live with them or otherwise to regulate the child's residence) which immediately before the making of the order was vested in a parent or guardian of the child in respect of whom the order is made.

Section 88 - Effect of order on existing orders

311. Section 88 provides that, where a person has parental responsibilities or parental rights in relation to a child through the making of an existing permanence order or an order under section 11 of the 1995 Act (court orders relating to parental responsibilities etc) then, on the making of a new permanence order, these responsibilities and rights are lost and the earlier order is revoked. Under subsection (3), a court must ensure that any parental responsibilities and parental rights which were vested in a person by virtue of the earlier order are vested in a person by virtue of the new permanence order thereby preventing any parental responsibilities or parental rights from being unallocated and leaving the child without protection.

Section 89 - Revocation of supervision requirement

312. By virtue of this section, where a child in respect of whom a permanence order is to be made is subject to a supervision requirement, and the appropriate court is satisfied that the making of the permanence order would render any compulsory measures of supervision unnecessary, the court must make an order providing that the supervision requirement ceases to have effect on the making of the permanence order.

Section 90 - Precedence of court orders and supervision requirements over order

313. This section provides that where a local authority has, by virtue of a permanence order, parental responsibilities or parental rights in relation to a child, the authority must not act in any way which would be incompatible with any other court order relating to the child or the child's property or any supervision requirement to which the child is subject.

Section 91 - Exercise of parental right under order

314. This section provides that where, by virtue of section 82(1)(a) or (b) (ancillary provisions in a permanence order) a parental right is vested in two or more persons, those persons may exercise the right without the consent of any other person who has the parental right. This section does not apply if the permanence order vesting the right or regulating its exercise specifies otherwise.

Section 92 - Variation of ancillary provisions in order

315. This section relates to the variation of ancillary provisions in a permanence order. It specifies those who can request such a variation, the power of the court when making a variation and the effect of a variation.
316. Subsection (2) provides that the court may, on an application, vary any ancillary provisions in a permanence order.
317. Subsection (3) lists those who can apply for variation of the ancillary provisions of a permanence order. These are the local authority which made the original application for a permanence order; the child who is subject to the permanence order (if aged 12 or over or, where under 12, is considered by the court to be mature enough to understand the effect of the order); anyone who was granted parental responsibilities and parental rights by the permanence order; anyone who lost parental responsibilities and parental rights by virtue of the permanence order or a variation of it; and any other person who claims an interest. In practice those who have lost parental responsibilities and parental rights by virtue of the making of the permanence order are likely to apply for a variation of an order in order to secure or vary contact arrangements with the child. However, such people may apply to vary any aspect of the permanence order. Anyone other than the local authority which made the original application for the permanence order will be required to obtain the leave of the court before such an application can be made (see section 94(4) and (5) of the Act).
318. Subsections (4) and (5) apply where a court varies the ancillary provision of a permanence order so as to vest in a person a parental responsibility or parental right that before the variation vested in another person. In this case, the court may include in the variation a provision extinguishing the parental responsibility or parental right that was vested in the other person.
319. Subsection (6) provides that section 84(4), (5)(a) and (b) and (6) (considerations applicable to the making of an order) apply to the variation of a permanence order as they do to the making of a permanence order. A court considering an application for variation of a permanence order must therefore apply the considerations contained in those provisions in this context too.
320. By virtue of subsection (7), “ancillary provisions” in subsections (1) and (2) has the same meaning as in section 82 of the Act (permanence orders: ancillary provisions).
321. Subsection (8) defines a variation for the purposes of this section as including adding to, omitting or amending any of the provisions of the permanence order.

Section 93 - Amendment of order to grant authority for child to be adopted

322. By virtue of subsection (1), this section applies where a permanence order is in place in respect of a child, but it does not include authority for the child to be adopted. Under subsection (2), an appropriate court may, on application by the local authority which applied for the original permanence order, grant authority for the child to be adopted if the court considers that it is better for the child that the measure be granted, if the court is satisfied that the child has already been placed for adoption or will soon be placed for adoption and if the condition in subsection (3) or (4) is met.
323. Under subsection (3), dealing with parental consent, the parent or guardian of the child must fully understand what the effect of an adoption order would be and must consent to such an order being made in respect of the child. By virtue of subsection (4), the court can dispense with the consent of the child’s parent or guardian on any of the grounds in section 83 of the Act, which apply to the inclusion of such authority on the grant of a permanence order.

324. Subsection (5) provides that the conditions and considerations in section 84(4), (5)(a) and (b) and (6) of the Act apply to the amendment of a permanence order as they do to the making of a permanence order.
325. Subsection (6) defines “guardian” and “parent” for the purposes of this section as being a guardian or parent who has parental responsibilities or rights or who had such responsibilities or rights but as a result of a previous permanence order no longer has such responsibilities or rights.

Section 94 - Proceedings

326. Under subsection (1), in any proceedings relating to an application by a local authority for the variation of a permanence order, the appropriate court must permit any person who is affected by the permanence order and who wishes to make representations to the court, to do so.
327. By virtue of subsection (2), in any proceedings relating to an application for the variation of a permanence order, by anyone other than the local authority which made the original permanence order application, those persons specified at subsection (3) have a right to make representations to the appropriate court. Those persons are: the local authority which made the original application for the permanence order; the child who is subject to the order (if aged 12 years or over or, where under 12, is considered by the court to be capable of understanding the effect of the order); any person who has parental responsibilities and parental rights in relation to the child; anyone who has a duty or power by virtue of the permanence order; any person who had parental responsibilities and parental rights immediately before the making of the order, which the order then vested in another person; any person who had parental responsibilities and parental rights conferred by virtue of the original permanence order but which have been vested in another person by virtue of any variation of the order; and anyone else who claims an interest.
328. By virtue of subsection (4), if a person other than the local authority which made the original permanence order application seeks to apply for a variation to a permanence order they must obtain leave of the court to do so. Subsection (5) provides that the court must grant leave if there has been a material change in circumstances directly relating to the provisions of the order or that for any other reason it is proper to allow the application to be made.
329. Subsection (6) sets out the issues to which a court must have particular regard in determining whether there has been a material change in circumstances. These are any aspect of the welfare of the child and the circumstances of his or her parent(s) or guardian or any persons mentioned in subsection (3)(e) or (f) (being those who had parental responsibilities or rights but which the order or a variation of it vested in another person).
330. Subsection (7) makes clear that any references to an application for variation of a permanence order also include references to an application to amend the order to include authority for the child to be adopted.

Section 95 - Duty of children’s hearing to prepare report for court

331. This section concerns the interaction between the children’s hearing and the court to which an application to make or vary a permanence order has been made. It provides that where there is a ‘live’ application for a permanence order in relation to a child, or for variation of such an order and where a children’s hearing proposes to make or modify a supervision requirement in respect of that child, the children’s hearing must prepare a report for the court to which application has been made. The report must contain such information as Scottish Ministers may prescribe in regulations (subsections (1) and (2)).

332. Subsection (3) makes clear that the reference to variation of a permanence order also includes a reference to amendment of the order to include authority for the child to whom the order relates to be adopted

Section 96 - Application: effect on supervision requirement

333. By virtue of this section, where an application has been made for a permanence order to be made in respect of a child or for a variation or amendment of a permanence order, no supervision requirement in respect of the child may be made or modified until the application is determined (or withdrawn or abandoned). This does not apply where the court to which the application is made for the order, or variation or amendment of it, refers the matter to the Principal Reporter, whether following receipt of a report under section 95 or not. .

Section 97 - Interim orders and revocation of supervision requirement

334. Under this section, where an application has been made for a permanence order in respect of a child or for a variation of a permanence order, the court may make such interim orders as it thinks fit. Where the child is subject to a supervision requirement and the court is satisfied that, were it to make an interim order, compulsory measures of supervision would be rendered unnecessary, the court must make an order providing that the supervision requirement ceases to have effect on the making of the interim order.
335. Subsection (5) provides that, if the child in respect of whom the interim order is made is subject to a supervision requirement and the provisions of the order conflict or are inconsistent with the requirement, the provisions of the interim order prevail.
336. Subsection (6) makes clear that the reference to variation of a permanence order also includes a reference to amendment of the order to include authority for the child to whom the order relates to be adopted.

Section 98 - Revocation

337. By virtue of subsection (1), a court may revoke a permanence order when it is satisfied that it is appropriate to do so, on the application of any of those people listed at subsection (2). In particular, the court should consider whether there has been a material change in circumstances directly relating to the provisions of the order and any wish by the parent or guardian of the child to have parental responsibilities or rights reinstated.
338. Subsection (2) lists those persons who can apply for revocation of the permanence order as the local authority which applied for the permanence order and anyone else affected by the order who has obtained the leave of the court to apply for a revocation.
339. The conditions and considerations in section 84(4), (5)(a) and (b) and (6) of the Act apply to the revocation of a permanence order under this section as they apply to the making of a permanence order.

Section 99 - Duty of local authority to apply for variation or revocation

340. Where a permanence order has been made, the local authority on whose application the order was made must apply to the appropriate court, as soon as is reasonably practicable, for the variation or revocation of the order where it determines that there has been a material change of circumstances directly relating to the provisions of the order and, consequently, that the order should be varied or revoked. The term 'variation' includes amendment of the order and therefore includes seeking provision granting authority for the child to be adopted.

Section 100 - Revocation: order under section 11 of 1995 Act

341. This section applies where a court has revoked a permanence order in respect of a child. When a court revokes the order, it must, by virtue of subsection (2), consider whether to make an order under section 11 of the 1995 Act (court orders relating to parental responsibilities etc) imposing on a particular person parental responsibilities and parental rights in regard to the child.

Section 101 - Local authority to give notice of certain matters

342. This section applies (a) where a permanence order is in force which includes provision granting authority for the child to be adopted, and (b) following the making of the order (or, if applicable, the amendment of it to include authority for the child to be adopted) one of the following events occurs. Those events are that the child is placed for adoption, an adoption order is made in respect of the child or the child ceases to be placed for adoption otherwise than on the making of an adoption order. When any of these events occur, the local authority must, as soon as is reasonably practicable, give notice of the event to persons falling within subsection (4), namely those who consented to the making of the order under section 83(1)(c)(i) or section 93(3) of the Act and those whose consent to the making of the order was dispensed with under section 83(1)(c)(ii) or 93(4). The local authority does not need to give such notice if the person who would receive the notice has indicated that they do not want to be notified.

Section 102 - Effect of subsequent adoption order on permanence order

343. By virtue of this section, where a child who is subject to a permanence order becomes subject to an adoption order, the permanence order ceases to have effect.

Section 103 - Restriction on making of orders under section 11 of 1995 Act

344. This section inserts a new section 11A (restrictions on making of orders under section 11) into the Children (Scotland) Act 1995.
345. When a permanence order is in force, the court may not make an order such as is mentioned in section 11(2)(a) to (e), of the 1995 Act in respect of a child who is subject to the permanence order.

Section 104 - Permanence orders: rules of procedure

346. This section allows rules of court to be made which make provision in relation to applications for permanence orders, applications for variation or revocation of permanence orders (including, by virtue of subsection (5), an application to amend a permanence order to include authority for the child to be adopted) and applications for leave to apply for variations or revocations.
347. Subsection (2) provides that where an application is made for a permanence order containing a request that the order include provision granting authority for the child to be adopted, or where an application is made under section 93(2), rules must require certain persons to be notified of certain matters. By virtue of subsection (3) these are every person who can be found and whose agreement or consent to the making of the order is required to be given or dispensed with or, if no such person can be found, any relative prescribed by rules who can be found (subsection (3)(a)). These people must be notified that the application has been made; of the date on which and the place at which the application will be heard; that the person is entitled to be heard on the application; and that the person does not need to attend the hearing if they do not wish to do so, unless required by the court (subsections (3)(a) and (4)).
348. Under subsections (2)(b) and (3)(b), the father of the child, if he has never had parental responsibilities and parental rights in relation to the child, and if he can be found, must be informed of the date on which and the place at which the application will be heard.