



# Children (Scotland) Act 1995

## 1995 CHAPTER 36

### PART I

#### PARENTS, CHILDREN AND GUARDIANS

##### *Parental responsibilities and parental rights*

#### **1 Parental responsibilities**

- (1) Subject to section 3(1)(b) and (3) of this Act, a parent has in relation to his child the responsibility—
- (a) to safeguard and promote the child's health, development and welfare;
  - (b) to provide, in a manner appropriate to the stage of development of the child—
    - (i) direction;
    - (ii) guidance,to the child;
  - (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
  - (d) to act as the child's legal representative,
- but only in so far as compliance with this section is practicable and in the interests of the child.
- (2) "Child" means for the purposes of—
- (a) paragraphs (a), (b)(i), (c) and (d) of subsection (1) above, a person under the age of sixteen years;
  - (b) paragraph (b)(ii) of that subsection, a person under the age of eighteen years.
- (3) The responsibilities mentioned in paragraphs (a) to (d) of subsection (1) above are in this Act referred to as "parental responsibilities"; and the child, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects those responsibilities.

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- (4) The parental responsibilities supersede any analogous duties imposed on a parent at common law; but this section is without prejudice to any other duty so imposed on him or to any duty imposed on him by, under or by virtue of any other provision of this Act or of any other enactment.

## **2 Parental rights**

- (1) Subject to section 3(1)(b) and (3) of this Act, a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right—
- (a) to have the child living with him or otherwise to regulate the child’s residence;
  - (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child’s upbringing;
  - (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and
  - (d) to act as the child’s legal representative.
- (2) Subject to subsection (3) below, where two or more persons have a parental right as respects a child, each of them may exercise that right without the consent of the other or, as the case may be, of any of the others, unless any decree or deed conferring the right, or regulating its exercise, otherwise provides.
- (3) Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in subsection (6) below.
- (4) The rights mentioned in paragraphs (a) to (d) of subsection (1) above are in this Act referred to as “parental rights”; and a parent, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects those rights.
- (5) The parental rights supersede any analogous rights enjoyed by a parent at common law; but this section is without prejudice to any other right so enjoyed by him or to any right enjoyed by him by, under or by virtue of any other provision of this Act or of any other enactment.
- (6) The description of a person referred to in subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right mentioned in paragraph (a) or (c) of subsection (1) above; except that, where both the child’s parents are persons so described, the consent required for his removal or retention shall be that of them both.
- (7) In this section, “child” means a person under the age of sixteen years.

## **3 Provisions relating both to parental responsibilities and to parental rights**

- (1) Notwithstanding section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 (provision for disregarding whether a person’s parents are not, or have not been, married to one another in establishing the legal relationship between him and any other person)—
- (a) a child’s mother has parental responsibilities and parental rights in relation to him whether or not she is or has been married to his father; and
  - (b) without prejudice to any arrangements which may be made under subsection (5) below and subject to any agreement which may be made under section 4 of this Act, his father has such responsibilities and rights in relation

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to him only if married to the mother at the time of the child's conception or subsequently.

- (2) For the purposes of subsection (1)(b) above, the father shall be regarded as having been married to the mother at any time when he was a party to a purported marriage with her which was—
  - (a) voidable; or
  - (b) void but believed by them (whether by error of fact or of law) in good faith at that time to be valid.
- (3) Subsection (1) above is without prejudice to any order made under section 11 of this Act or section 3(1) of the said Act of 1986 (provision analogous to the said section 11 but repealed by this Act) or to any other order, disposal or resolution affecting parental responsibilities or parental rights; and nothing in subsection (1) above or in this Part of this Act shall affect any other—
  - (a) enactment (including any other provision of this Act or of that Act); or
  - (b) rule of law,by, under or by virtue of which a person may have imposed on him (or be relieved of) parental responsibilities or may be granted (or be deprived of) parental rights.
- (4) The fact that a person has parental responsibilities or parental rights in relation to a child shall not entitle that person to act in any way which would be incompatible with any court order relating to the child or the child's property, or with any supervision requirement made under section 70 of this Act.
- (5) Without prejudice to section 4(1) of this Act, a person who has parental responsibilities or parental rights in relation to a child shall not abdicate those responsibilities or rights to anyone else but may arrange for some or all of them to be fulfilled or exercised on his behalf; and without prejudice to that generality any such arrangement may be made with a person who already has parental responsibilities or parental rights in relation to the child concerned.
- (6) The making of an arrangement under subsection (5) above shall not affect any liability arising from a failure to fulfil parental responsibilities; and where any arrangements so made are such that the child is a foster child for the purposes of the Foster Children (Scotland) Act 1984, those arrangements are subject to the provisions of that Act.

#### **4 Acquisition of parental rights and responsibilities by natural father**

- (1) Where a child's mother has not been deprived of some or all of the parental responsibilities and parental rights in relation to him and, by virtue of subsection (1) (b) of section 3 of this Act, his father has no parental responsibilities or parental rights in relation to him, the father and mother, whatever age they may be, may by agreement provide that, as from the appropriate date, the father shall have the parental responsibilities and parental rights which (in the absence of any order under section 11 of this Act affecting those responsibilities and rights) he would have if married to the mother.
- (2) No agreement under subsection (1) above shall have effect unless—
  - (a) in a form prescribed by the Secretary of State; and
  - (b) registered in the Books of Council and Session while the mother still has the parental responsibilities and parental rights which she had when the agreement was made.

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- (3) The date on which such registration as is mentioned in subsection (2)(b) above takes place shall be the “appropriate date” for the purposes of subsection (1) above.
- (4) An agreement which has effect by virtue of subsection (2) above shall, subject only to section 11(11) of this Act, be irrevocable.

## **5 Care or control of child by person without parental responsibilities or parental rights**

- (1) Subject to subsection (2) below, it shall be the responsibility of a person who has attained the age of sixteen years and who has care or control of a child under that age, but in relation to him either has no parental responsibilities or parental rights or does not have the parental responsibility mentioned in section 1(1)(a) of this Act, to do what is reasonable in all the circumstances to safeguard the child’s health, development and welfare; and in fulfilling his responsibility under this section the person may in particular, even though he does not have the parental right mentioned in section 2(1)(d) of this Act, give consent to any surgical, medical or dental treatment or procedure where—
  - (a) the child is not able to give such consent on his own behalf; and
  - (b) it is not within the knowledge of the person that a parent of the child would refuse to give the consent in question.
- (2) Nothing in this section shall apply to a person in so far as he has care or control of a child in a school (“school” having the meaning given by section 135(1) of the Education (Scotland) Act 1980).

## **6 Views of children**

- (1) A person shall, in reaching any major decision which involves—
  - (a) his fulfilling a parental responsibility or the responsibility mentioned in section 5(1) of this Act; or
  - (b) his exercising a parental right or giving consent by virtue of that section,have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child’s age and maturity, and to those of any other person who has parental responsibilities or parental rights in relation to the child (and wishes to express those views); and without prejudice to the generality of this subsection a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.
- (2) A transaction entered into in good faith by a third party and a person acting as legal representative of a child shall not be challengeable on the ground only that the child, or a person with parental responsibilities or parental rights in relation to the child, was not consulted or that due regard was not given to his views before the transaction was entered into.

## *Guardianship*

## **7 Appointment of guardians**

- (1) A child’s parent may appoint a person to be guardian of the child in the event of the parent’s death; but—

- (a) such appointment shall be of no effect unless—
    - (i) in writing and signed by the parent; and
    - (ii) the parent, at the time of death, was entitled to act as legal representative of the child (or would have been so entitled if he had survived until after the birth of the child); and
  - (b) any parental responsibilities or parental rights (or the right to appoint a further guardian under this section) which a surviving parent has in relation to the child shall subsist with those which, by, under or by virtue of this Part of this Act, the appointee so has.
- (2) A guardian of a child may appoint a person to take his place as guardian in the event of the guardian's death; but such appointment shall be of no effect unless in writing and signed by the person making it.
- (3) An appointment as guardian shall not take effect until accepted, either expressly or impliedly by acts which are not consistent with any other intention.
- (4) If two or more persons are appointed as guardians, any one or more of them shall, unless the appointment expressly provides otherwise, be entitled to accept office even if both or all of them do not accept office.
- (5) Subject to any order under section 11 or 86 of this Act, a person appointed as a child's guardian under this section shall have, in respect of the child, the responsibilities imposed, and the rights conferred, on a parent by sections 1 and 2 of this Act respectively; and sections 1 and 2 of this Act shall apply in relation to a guardian as they apply in relation to a parent.
- (6) Without prejudice to the generality of subsection (1) of section 6 of this Act, a decision as to the appointment of a guardian under subsection (1) or (2) above shall be regarded for the purposes of that section (or of that section as applied by subsection (5) above) as a major decision which involves exercising a parental right.

## **8 Revocation and other termination of appointment**

- (1) An appointment made under section 7(1) or (2) of this Act revokes an earlier such appointment (including one made in an unrevoked will or codicil) made by the same person in respect of the same child, unless it is clear (whether as a result of an express provision in the later appointment or by any necessary implication) that the purpose of the later appointment is to appoint an additional guardian.
- (2) Subject to subsections (3) and (4) below, the revocation of an appointment made under section 7(1) or (2) of this Act (including one made in an unrevoked will or codicil) shall not take effect unless the revocation is in writing and is signed by the person making the revocation.
- (3) An appointment under section 7(1) or (2) of this Act (other than one made in a will or codicil) is revoked if, with the intention of revoking the appointment, the person who made it—
  - (a) destroys the document by which it was made; or
  - (b) has some other person destroy that document in his presence.
- (4) For the avoidance of doubt, an appointment made under section 7(1) or (2) of this Act in a will or codicil is revoked if the will or codicil is revoked.

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- (5) Once an appointment of a guardian has taken effect under section 7 of this Act, then, unless the terms of the appointment provide for earlier termination, it shall terminate only by virtue of—
- (a) the child concerned attaining the age of eighteen years;
  - (b) the death of the child or the guardian; or
  - (c) the termination of the appointment by a court order under section 11 of this Act.

### *Administration of child's property*

## **9 Safeguarding of child's property**

- (1) Subject to section 13 of this Act, this section applies where—
- (a) property is owned by or due to a child;
  - (b) the property is held by a person other than a parent or guardian of the child; and
  - (c) but for this section, the property would be required to be transferred to a parent having parental responsibilities in relation to the child or to a guardian for administration by that parent or guardian on behalf of the child.
- (2) Subject to subsection (4) below, where this section applies and the person holding the property is an executor or trustee, then—
- (a) if the value of the property exceeds £20,000, he shall; or
  - (b) if that value is not less than £5,000 and does not exceed £20,000, he may,
- apply to the Accountant of Court for a direction as to the administration of the property.
- (3) Subject to subsection (4) below, where this section applies and the person holding the property is a person other than an executor or trustee, then, if the value of the property is not less than £5,000, that person may apply to the Accountant of Court for a direction as to the administration of the property.
- (4) Where the parent or guardian mentioned in subsection (1)(c) above has been appointed a trustee under a trust deed to administer the property concerned, subsections (2) and (3) above shall not apply, and the person holding the property shall transfer it to the parent or guardian.
- (5) On receipt of an application under subsection (2) or (3) above, the Accountant of Court may do one, or (in so far as the context admits) more than one, of the following—
- (a) apply to the court for the appointment of a judicial factor (whether or not the parent or guardian mentioned in subsection (1)(c) above) to administer all or part of the property concerned and in the event of the court making such an appointment shall direct that the property, or as the case may be part, concerned be transferred to the factor;
  - (b) direct that all or part of the property concerned be transferred to himself;
  - (c) direct that all or, in a case where the parent or guardian so mentioned has not been appointed by virtue of paragraph (a) above, part of the property concerned be transferred to the parent or guardian,
- to be administered on behalf of the child.
- (6) A direction under subsection (5)(c) above may include such conditions as the Accountant of Court considers appropriate, including in particular a condition—

- (a) that in relation to the property concerned no capital expenditure shall be incurred without his approval; or
  - (b) that there shall be exhibited annually to him the securities and bank books which represent the capital of the estate.
- (7) A person who has applied under subsection (2) or (3) above for a direction shall not thereafter transfer the property concerned except in accordance with a direction under subsection (5) above.
- (8) The Secretary of State may from time to time prescribe a variation in any sum referred to in subsections (2) and (3) above.
- (9) In this section “child” means a person under the age of sixteen years who is habitually resident in Scotland.

## **10 Obligations and rights of person administering child’s property**

- (1) A person acting as a child’s legal representative in relation to the administration of the child’s property—
- (a) shall be required to act as a reasonable and prudent person would act on his own behalf; and
  - (b) subject to any order made under section 11 of this Act, shall be entitled to do anything which the child, if of full age and capacity, could do in relation to that property;
- and subject to subsection (2) below, on ceasing to act as legal representative, shall be liable to account to the child for his intromissions with the child’s property.
- (2) No liability shall be incurred by virtue of subsection (1) above in respect of funds which have been used in the proper discharge of the person’s responsibility to safeguard and promote the child’s health, development and welfare.

### *Court Orders*

## **11 Court orders relating to parental responsibilities etc**

- (1) In the relevant circumstances in proceedings in the Court of Session or sheriff court, whether those proceedings are or are not independent of any other action, an order may be made under this subsection in relation to—
- (a) parental responsibilities;
  - (b) parental rights;
  - (c) guardianship; or
  - (d) subject to section 14(1) and (2) of this Act, the administration of a child’s property.
- (2) The court may make such order under subsection (1) above as it thinks fit; and without prejudice to the generality of that subsection may in particular so make any of the following orders—
- (a) an order depriving a person of some or all of his parental responsibilities or parental rights in relation to a child;
  - (b) an order—
    - (i) imposing upon a person (provided he is at least sixteen years of age or is a parent of the child) such responsibilities; and

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- (ii) giving that person such rights;
  - (c) an order regulating the arrangements as to—
    - (i) with whom; or
    - (ii) if with different persons alternately or periodically, with whom during what periods,
 a child under the age of sixteen years is to live (any such order being known as a “residence order”);
  - (d) an order regulating the arrangements for maintaining personal relations and direct contact between a child under that age and a person with whom the child is not, or will not be, living (any such order being known as a “contact order”);
  - (e) an order regulating any specific question which has arisen, or may arise, in connection with any of the matters mentioned in paragraphs (a) to (d) of subsection (1) of this section (any such order being known as a “specific issue order”);
  - (f) an interdict prohibiting the taking of any step of a kind specified in the interdict in the fulfillment of parental responsibilities or the exercise of parental rights relating to a child or in the administration of a child’s property;
  - (g) an order appointing a judicial factor to manage a child’s property or remitting the matter to the Accountant of Court to report on suitable arrangements for the future management of the property; or
  - (h) an order appointing or removing a person as guardian of the child.
- (3) The relevant circumstances mentioned in subsection (1) above are—
- (a) that application for an order under that subsection is made by a person who—
    - (i) not having, and never having had, parental responsibilities or parental rights in relation to the child, claims an interest;
    - (ii) has parental responsibilities or parental rights in relation to the child;
    - (iii) has had, but for a reason other than is mentioned in subsection (4) below no longer has, parental responsibilities or parental rights in relation to the child; or
  - (b) that although no such application has been made, the court (even if it declines to make any other order) considers it should make such an order.
- (4) The reasons referred to in subsection (3)(a)(iii) above are that the parental responsibilities or parental rights have been—
- (a) extinguished on the making of an adoption order;
  - (b) transferred to an adoption agency on the making of an order declaring the child free for adoption;
  - (c) extinguished by virtue of subsection (9) of section 30 of the Human Fertilisation and Embryology Act 1990 (provision for enactments about adoption to have effect with modifications) on the making of a parental order under subsection (1) of that section; or
  - (d) transferred to a local authority by a parental responsibilities order.
- (5) In subsection (3)(a) above “person” includes (without prejudice to the generality of that subsection) the child concerned; but it does not include a local authority.
- (6) In subsection (4) above—
- “adoption agency” and “adoption order” have the same meanings as they are given, in section 18 of the Adoption (Scotland) Act 1978, by section 65(1) of that Act; and



“parental responsibilities order” has the meaning given by section 86(1) of this Act.

- (7) Subject to subsection (8) below, in considering whether or not to make an order under subsection (1) above and what order to make, the court—
- (a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and
  - (b) taking account of the child’s age and maturity, shall so far as practicable—
    - (i) give him an opportunity to indicate whether he wishes to express his views;
    - (ii) if he does so wish, give him an opportunity to express them; and
    - (iii) have regard to such views as he may express.
- (8) The court shall, notwithstanding subsection (7) above, endeavour to ensure that any order which it makes, or any determination by it not to make an order, does not adversely affect the position of a person who has, in good faith and for value, acquired any property of the child concerned, or any right or interest in such property.
- (9) Nothing in paragraph (b) of subsection (7) above requires a child to be legally represented, if he does not wish to be, in proceedings in the course of which the court implements that paragraph.
- (10) Without prejudice to the generality of paragraph (b) of subsection (7) above, a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view for the purposes both of that paragraph and of subsection (9) above.
- (11) An order under subsection (1) above shall have the effect of depriving a person of a parental responsibility or parental right only in so far as the order expressly so provides and only to the extent necessary to give effect to the order; but in making any such order as is mentioned in paragraph (a) or (b) of subsection (2) above the court may revoke any agreement which, in relation to the child concerned, has effect by virtue of section 4(2) of this Act.
- (12) Where the court makes a residence order which requires that a child live with a person who, immediately before the order is made does not have in relation to the child all the parental responsibilities mentioned in paragraphs (a), (b) and (d) of section 1(1), and the parental rights mentioned in paragraphs (b) and (d) of section 2(1), of this Act (those which he does not so have being in this subsection referred to as the “relevant responsibilities and rights”) that person shall, subject to the provisions of the order or of any other order made under subsection (1) above, have the relevant responsibilities and rights while the residence order remains in force.
- (13) Any reference in this section to an order includes a reference to an interim order or to an order varying or discharging an order.

## **12 Restrictions on decrees for divorce, separation or annulment affecting children**

- (1) In any action for divorce, judicial separation or declarator of nullity of marriage, the court shall, where this section applies, consider (in the light of such information as is before the court as to the arrangements which have been, or are proposed to be, made for the upbringing of each child by virtue of which it applies) whether to exercise with respect to him the powers conferred by section 11 or 54 of this Act.

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- (2) Where, in any case to which this section applies, the court is of the opinion that—
- (a) the circumstances of the case require, or are likely to require, it to exercise any power under section 11 or 54 of this Act with respect to the child concerned;
  - (b) it is not in a position to exercise that power without giving further consideration to the case; and
  - (c) there are exceptional circumstances which make it desirable in the interests of that child that it should not grant decree in the action until it is in a position to exercise such a power,
- it shall postpone its decision on the granting of decree in the action until it is in such a position.
- (3) This section applies where a child of the family has not reached the age of sixteen years at the date when the question first arises as to whether the court should give such consideration as is mentioned in subsection (1) above.
- (4) In this section “child of the family”, in relation to the parties to a marriage, means—
- (a) a child of both of them; or
  - (b) any other child, not being a child who is placed with them as foster parents by a local authority or voluntary organisation, who has been treated by both of them as a child of their family.

### **13 Awards of damages to children**

- (1) Where in any court proceedings a sum of money becomes payable to, or for the benefit of, a child under the age of sixteen years, the court may make such order relating to the payment and management of the sum for the benefit of the child as it thinks fit.
- (2) Without prejudice to the generality of subsection (1) above, the court may in an order under this section—
- (a) appoint a judicial factor to invest, apply or otherwise deal with the money for the benefit of the child concerned;
  - (b) order the money to be paid—
    - (i) to the sheriff clerk or the Accountant of Court; or
    - (ii) to a parent or guardian of that child,
 to be invested, applied or otherwise dealt with, under the directions of the court, for the benefit of that child; or
  - (c) order the money to be paid directly to that child.
- (3) Where payment is made to a person in accordance with an order under this section, a receipt given by him shall be a sufficient discharge of the obligation to make the payment.

#### *Jurisdiction and choice of law*

### **14 Jurisdiction and choice of law in relation to certain matters**

- (1) The Court of Session shall have jurisdiction to entertain an application for an order relating to the administration of a child’s property if the child is habitually resident in, or the property is situated in, Scotland.

- (2) A sheriff shall have jurisdiction to entertain such an application if the child is habitually resident in, or the property is situated in, the sheriffdom.
- (3) Subject to subsection (4) below, any question arising under this Part of this Act—
- (a) concerning—
    - (i) parental responsibilities or parental rights; or
    - (ii) the responsibilities or rights of a guardian,in relation to a child shall, in so far as it is not also a question such as is mentioned in paragraph (b) below, be determined by the law of the place of the child's habitual residence at the time when the question arises;
  - (b) concerning the immediate protection of a child shall be determined by the law of the place where the child is when the question arises; and
  - (c) as to whether a person is validly appointed or constituted guardian of a child shall be determined by the law of the place of the child's habitual residence on the date when the appointment was made (the date of death of the testator being taken to be the date of appointment where an appointment was made by will), or the event constituting the guardianship occurred.
- (4) Nothing in any provision of law in accordance with which, under subsection (3) above, a question which arises in relation to an application for, or the making of, an order under subsection (1) of section 11 of this Act falls to be determined, shall affect the application of subsection (7) of that section.

### *Interpretation*

## **15 Interpretation of Part I**

- (1) In this Part of this Act—
- “child” means, where the expression is not otherwise defined, a person under the age of eighteen years;
  - “contact order” has the meaning given by section 11(2)(d) of this Act;
  - “parent”, in relation to any person, means, subject to Part IV of the Adoption (Scotland) Act 1978 and sections 27 to 30 of the Human Fertilisation and Embryology Act 1990 and any regulations made under subsection (9) of the said section 30, someone, of whatever age, who is that person's genetic father or mother;
  - “parental responsibilities” has the meaning given by section 1(3) of this Act;
  - “parental rights” has the meaning given by section 2(4) of this Act;
  - “residence order” has the meaning given by section 11(2)(c) of this Act;
  - “specific issue order” has the meaning given by section 11(2)(e) of this Act; and
  - “transaction” has the meaning given by section 9 of the Age of Legal Capacity (Scotland) Act 1991 (except that, for the purposes of subsection (5) (b) below, paragraph (d) of the definition in question shall be disregarded).
- (2) No provision in this Part of this Act shall affect any legal proceedings commenced, or any application made to a court, before that provision comes into effect; except that where, before section 11 of this Act comes into force, there has been final decree in a cause in which, as respects a child, an order for custody or access, or an order which

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is analogous to any such order as is mentioned in subsection (2) of that section, has been made, any application on or after the date on which the section does come into force for variation or recall of the order shall proceed as if the order had been made under that section.

- (3) In subsection (2) above, the reference to final decree is to a decree or interlocutor which, taken by itself or along with previous interlocutors, disposes of the whole subject matter of the cause.
- (4) Any reference in this Part of this Act to a person—
  - (a) having parental rights or responsibilities;
  - (b) acting as a legal representative; or
  - (c) being appointed a guardian,is to a natural person only.
- (5) Any reference in this Part of this Act to a person acting as the legal representative of a child is a reference to that person, in the interests of the child—
  - (a) administering any property belonging to the child; and
  - (b) acting in, or giving consent to, any transaction where the child is incapable of so acting or consenting on his own behalf.
- (6) Where a child has legal capacity to sue, or to defend, in any civil proceedings, he may nevertheless consent to be represented in those proceedings by any person who, had the child lacked that capacity, would have had the responsibility to act as his legal representative.