
STATUTORY INSTRUMENTS

1986 No. 1955 (S. 149)

COURT OF SESSION, SCOTLAND

Act of Sederunt (Rules of Court Amendment No. 10)
(Miscellaneous Amendments) 1986

Made - - - - 18th November 1986

Coming into Operation 8th December 1986

The Lords of Council and Session, under and by virtue of the powers conferred on them by section 16 of the Administration of Justice (Scotland) Act 1933(a), sections 10 and 24 of the Child Abduction and Custody Act 1985(b) and all other powers enabling them in that behalf, do hereby enact and declare:—

Citation and commencement

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of Court Amendment No. 10) (Miscellaneous Amendments) 1986 and shall come into operation on 8th December 1986.

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

Amendments to the Rules of the Court of Session

2.—(1) The Rules of the Court of Session(c) shall be amended in accordance with the following provisions of this paragraph.

(2) In rule 95A (application under section 1 of the Administration of Justice (Scotland) Act 1972(d))(e), at the end, insert the following paragraph:—

“(d) An application for an order under section 1(1A) of the Administration of Justice (Scotland) Act 1972 —

(i) in an existing process, shall be made by motion; and

(ii) in any other case, shall be made by petition presented to the Outer House.”.

(3) After rule 104A (transmission on contingency)(f), insert the following rule:—

(a) 1933 c.41.

(b) 1985 c.60.

(c) S.I. 1965/321; relevant amending instruments are S.I. 1972/2021, 1973/540, 1976/1994, 1984/472 and 499 and 1986/515.

(d) 1972 c.59; section 1(1A) was inserted by section 19 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c.73).

(e) Inserted by S.I. 1972/2021.

(f) Inserted by S.I. 1984/472.

“104B. Transmission to sheriff court

(1) Where a motion to remit a cause to the sheriff court under section 14 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985(a), has been granted, the Deputy Principal Clerk shall, within 4 days after the interlocutor remitting the cause has been pronounced, transmit the process to the sheriff clerk of the sheriff court specified in the interlocutor.

(2) When transmitting a process under paragraph (1), the Deputy Principal Clerk shall, at the same time —

- (a) send written notice of the transmission to the parties to the cause; and
- (b) certify on the interlocutor sheet that such written notice has been given.

(3) Failure of the Deputy Principal Clerk to comply with paragraph (2) shall not affect the validity of the remit under paragraph (1).”.

(4) After 106A (warrant for citing witnesses)(b), insert the following rule:—

“106B. Party litigants to find caution before instructing citation of witnesses

(1) Where a party to a cause is a party litigant, he shall, before instructing a Messenger-at-Arms to cite a witness, find caution for such expenses as can reasonably be anticipated to be incurred by the witness in answering the citation.

(2) The party litigant shall, not later than 3 months before the diet of proof, apply to the court by motion to fix caution in such sum as the court shall consider reasonable according to the number of witnesses he proposes to cite and the period for which they may be required to attend at court.”.

(5) In section 3 of Chapter III (consistorial actions)(c) —

(a) in the cross heading before rule 170B, for the words “custody, aliment”, substitute the words “parental rights”;

(b) in rule 170B(1) (interpretation), for sub-paragraph (a), substitute the following sub-paragraph:—

“(a) ‘parental rights’ has the meaning assigned to it by section 8 of the Law Reform (Parent and Child) (Scotland) Act 1986(d);”;

(c) paragraph (2) shall be omitted;

(d) for the word “custody”, wherever it occurs in rule 170B, substitute the words “parental rights”;

(e) in rule 170B (8), omit the words from “(a) In every defended action” to “(b)”.

(6) In rule 189, at the end, insert the following paragraph:—

“(c) An application for rectification of a deed under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 may be made by petition presented to the Outer House, or by summons, where ancillary to other conclusions.”.

(a) 1985 c.73.

(b) Inserted by S.I. 1984/472.

(c) Substituted by S.I. 1976/1994 and as amended by S.I. 1984/499.

(d) 1986 c.9.

(7) After section 15 of Chapter IV (petitions for custody of children)(a), insert the following sections:—

“SECTION 16

PETITIONS IN RELATION TO PARENTAGE

260F. Applications to court for consent to take blood sample

Where there is no cause in dependence before the court in which an application under section 6(3) of the Law Reform (Parent and Child) (Scotland) Act 1986 may be made by motion, the application shall be made by petition presented to the Outer House.

260G. Consent by mother to petition

Where, in a petition by the father of an illegitimate child to be appointed tutor or curator of his child, the mother of that child consents to the appointment, there shall be lodged with the petition a form of consent by the mother signed by her and witnessed.

SECTION 17

APPLICATIONS UNDER THE CHILD ABDUCTION AND CUSTODY ACT 1985

260H. Application and interpretation

(1) This section applies to applications under the Child Abduction and Custody Act 1985.

(2) In this section —

“the Act of 1985” means the Child Abduction and Custody Act 1985;

“the Hague Convention” means the convention defined in section 1(1) of the Act of 1985;

“the European Convention” means the convention defined in section 12(1) of the Act of 1985;

“relevant authority” means a sheriff court, a children’s hearing within the meaning of Part III of the Social Work (Scotland) Act 1968(b), the High Court, a county court or magistrates’ court in England and Wales, the High Court, a county court or a magistrates’ court in Northern Ireland, or the Secretary of State.

(3) Words and expressions used in this section which are also used in the Act of 1985 have the same meaning as in that Act.

260J. International child abduction (the Hague Convention)

(1) An application for return of a child to which Part I of the Act of 1985 applies shall be made by petition presented to the Outer House, and —

(a) shall include averments about —

(i) the identity of the petitioner and the person alleged to have removed or retained the child;

(ii) the identity of the child and his date of birth;

(a) Inserted by S.I. 1986/515.

(b) 1968 c.49.

- (iii) the whereabouts or suspected whereabouts of the child;
 - (iv) the date on which the child is alleged to have been wrongfully removed or retained;
 - (v) the grounds on which the petition is based; and
 - (vi) any civil cause in dependence before any other court or authority in respect of the child, or any proceedings specified in section 9 of the Act of 1985 relating to the merits of the rights of custody of the child in or before a relevant authority;
- (b) there shall be produced with the petition —
- (i) a certified or authenticated copy of any relevant decision or agreement; and
 - (ii) a certificate or affidavit from a Central Authority or other competent authority of the Contracting State of the habitual residence of the child concerning the relevant law of that State.
- (2) An application for access to a child to which Part I of the Act of 1985 applies shall be made by petition presented to the Outer House, and —
- (a) shall include averments about —
- (i) the identity of the petitioner;
 - (ii) the identity of the child and his date of birth;
 - (iii) the parents or guardians of the child;
 - (iv) the whereabouts of the child;
 - (v) the factual and legal grounds on which access is sought; and
 - (vi) any civil cause in dependence before any other court or authority in respect of the child, or any proceedings specified in section 9 of the Act of 1985 relating to the merits of the rights of custody of the child in or before a relevant authority;
- (b) there shall be produced with the petition a certified copy of any relevant decision or agreement.
- (3) An application for declarator that removal or retention of a child was wrongful under section 8 of the Act of 1985 shall be made by petition presented to the Outer House, and —
- (a) shall include averments about —
- (i) the identity of the pursuer and of the person who is alleged to have removed or retained the child;
 - (ii) the identity of the child and his date of birth;
 - (iii) the whereabouts or suspected whereabouts of the child;
 - (iv) the date on which the child is alleged to have been wrongfully removed or retained;
 - (v) the proceedings which gave custody to the pursuer; and
 - (vi) the proceedings under the Hague Convention in relation to which this action is necessary;
- (b) there shall be produced with the summons any relevant document.
- (4) The *induciae* in a petition under this rule shall be 4 days.

(5) The persons upon whom service shall be made in a petition under this rule shall be —

- (a) the person alleged to have brought the child into the United Kingdom;
- (b) the person with whom the child is presumed to be;
- (c) any parent or guardian of the child if he or she is within the United Kingdom and not otherwise a party; and
- (d) any other person who may have an interest in the child.

(6) Where a document lodged is in a language other than English, there shall be lodged in process a translation into English certified by a person qualified as a translator.

(7) Where a petition is presented under paragraph (1) and there are proceedings specified in section 9 of the Act of 1985 relating to the merits of the rights of custody of the child in dependence in or before a relevant authority, the court shall give notice to the relevant authority of the petition, and in due course of the outcome of the petition.

(8) Where the court receives a notice equivalent to that under paragraph (7) from the High Court in England and Wales or Northern Ireland, all proceedings in any cause specified in section 9 of the Act of 1985 relating to the merits of the rights of custody of the child shall be sisted by the court until the dismissal of the proceedings in that other court under the Hague Convention; and the Deputy Principal Clerk shall notify the parties to the cause of the sist and of any such dismissal.

(9) At any stage of a petition under paragraph (1), the court may, of its own motion or on the motion of any party, pronounce an interlocutor remitting the cause to the High Court in England and Wales or Northern Ireland.

(10) Where a cause is remitted under paragraph (9), the Deputy Principal Clerk forthwith shall —

- (a) transmit the process to the appropriate officer of the appropriate court;
- (b) send written notice of the transmission to the parties to the cause; and
- (c) certify on the interlocutor sheet that such written notice has been given.

(11) Where a cause is remitted under paragraph (9), the question of expenses shall not be determined by the court, but shall be at the discretion of the court to which the cause is transferred.

(12) Where a cause is remitted to the Court of Session from the High Court in England or Wales or Northern Ireland —

- (a) the Deputy Principal Clerk shall, upon receipt of the order transferring the cause and any process, notify the parties of the transfer;
- (b) the cause shall be deemed to be a petition as if it has been raised in the Court of Session; and
- (c) the cause shall be put out 'By Order' before a Lord Ordinary for further procedure within 2 court days of the transfer.

260K. Recognition and enforcement of custody decisions (the European Convention)

(1) An application under section 15 of the Act of 1985 to declare a decree for custody not to be recognised shall be made by petition presented to the Outer House.

(2) An application —

(a) for registration under section 16 of the Act of 1985;

(b) for registration under section 16, and enforcement under section 18, of the Act of 1985; or

(c) for enforcement under section 18 of the Act of 1985,

of a decision relating to the custody of a child, shall be made by petition presented to the Outer House.

(3) An application under section 17(4) of the Act of 1985 for variation or revocation of a registered decision by a person appearing to the court to have an interest in the matter, shall be made by note in the process of the petition for registration.

(4) An application by an interested person under section 23(2) of the Act of 1985 in any custody proceedings for declarator that the removal of a child was unlawful, shall be made —

(a) by minute in the process of a cause commenced by summons; or

(b) by note in the process of a cause commenced by petition.

(5) In a cause under this rule —

(a) there shall be included, averments about —

(i) the identity of the petitioner, pursuer, minuter or noter, as the case may be, and his interests in the cause;

(ii) the identity of the child and his date of birth;

(iii) the parents or guardians of the child;

(iv) the order which is required to be registered, enforced, declared unlawful declared not recognised, varied or revoked, as the case may be;

(v) the whereabouts or suspected whereabouts of the child; and

(vi) any civil cause in dependence before any other court or authority in respect of the child, or any proceedings specified in section 20(2) of the Act of 1985 in dependence in or before a relevant authority;

(b) there shall be produced with the process of the cause —

(i) a certified or authenticated copy of a decision to be registered or enforced;

(ii) where the decision to be registered was given in the absence of the person against whom the decision was made or in the absence of his legal representative, a document which establishes (subject to Article 9(1)(a) of the European Convention in Schedule 2 to the Act of 1985) that that person was duly served with the document which instituted the original proceedings;

- (iii) a certificate or affidavit to the effect that the decision to be registered is enforceable in accordance with the law of the State in which the decision was made; and
 - (iv) any other relevant document.
- (6) The *induciae* in a petition under this rule shall be 4 days.
- (7) Where a minute or note is lodged under this rule, the court shall make such order as to the *induciae*, intimation, service and the lodging of answers as it thinks appropriate.
- (8) A cause under this rule shall be served on —
- (a) the person alleged to have brought the child into the United Kingdom or removed the child from the United Kingdom, as the case may be;
 - (b) the person with whom the child is presumed to be in the United Kingdom;
 - (c) the mother and father of the child if he or she is within the United Kingdom and not otherwise a party; and
 - (d) any other person who may have an interest in the child.
- (9) Where a document lodged is in a language other than English, there shall be lodged in process a translation into English certified by a person qualified as a translator.
- (10) Where a decision relating to custody is ordered to be registered under this rule, the Deputy Principal Clerk shall enter the decree or other interlocutor in a register of decisions registered under the Act of 1985.
- (11) Where a petition is presented under paragraph (2) of this rule and there are proceedings in dependance, or proceedings commence after the petition is presented or after a decision relating to custody has been registered, in or before a relevant authority which are proceedings specified in section 20(2) of the Act of 1985 —
- (a) the petitioner shall inform the court by including averments or lodging an affidavit, as the case may be, to that effect containing a concise statement of the nature of those proceedings; and
 - (b) the court shall give notice to the relevant authority of the petition, and in due course of the outcome of the petition.
- (12) Where the court receives a notice equivalent to that under paragraph (11) from the High Court in England and Wales or Northern Ireland, the Deputy Principal Clerk shall notify the parties to any cause which is one specified in section 20(2) of the Act of 1985.
- (13) At any stage of a cause under this rule, the court may, of its own motion or on the motion of any party, pronounce an interlocutor remitting the cause to the High Court in England and Wales or Northern Ireland.
- (14) Where a cause is remitted under paragraph (13), the Deputy Principal Clerk forthwith shall —
- (a) transmit the process to the appropriate officer of the appropriate court;
 - (b) send written notice of the transmission to the parties to the cause; and

(c) certify on the interlocutor sheet that such written notice has been given.

(15) Where a cause is remitted under paragraph (13), the question of expenses shall not be determined by the court, but shall be at the discretion of the court to which the case is transferred.

(16) Where a cause is remitted to the court from the High Court in England and Wales or Northern Ireland —

(a) the Deputy Principal Clerk shall, upon receipt of the order transferring the cause and any process, notify the parties of the transfer;

(b) the cause shall be deemed to be an action or petition, as the case may be, as if it had been raised in the Court of Session; and

(c) the cause shall be put out 'By Order' before a Lord Ordinary for further procedure within 2 court days of the transfer.

(17) Where a decision registered under section 16 of the Act of 1985 is varied or revoked by an authority in the Contracting State in which the decision was made, the court shall —

(a) on cancelling the registration of a decision which it has been notified has been revoked, notify —

(i) the person appearing to the court to have actual custody of the child;

(ii) the person on whose behalf the petition for registration was made; or

(iii) any other party to that petition; or

(b) on being notified of the variation of a decision, notify —

(i) the person having actual custody of the child; and

(ii) any party to the petition for registration of the decision, of the variation, and any such person may apply by note in the process of the petition for registration of the decision for the purpose of making representations before the registration is varied.

(18) A person appearing to the court to have an interest in the cancellation or variation of a decision registered under section 16 of the Act of 1985 may apply by note in the process of the petition for registration of the decision or lodge answers to a note presented under paragraph (17).

260L. General provisions

(1) An application for a certified copy or extract of a decree or other interlocutor relating to a child in respect of whom the applicant wishes to apply under the Hague Convention or the European Convention in another Contracting State, shall be made by letter to the Deputy Principal Clerk; and the certified copy or extract shall be supplied free of charge.

(2) In cause under this section, the court may, where it has reason to believe that any person may have information about the child who is the subject of the cause, order that person to disclose such information by attending before it or by lodging an affidavit.

(3) Subject to the provisions of this section, rules 191 to 198 shall apply to a petition under this section."

(8) In rule 290(a) (form of certain statutory appeals)(a), after the word "appeals" where it first occurs, insert the words "(which shall include applications for leave to appeal)".

(9) In the Appendix, in Form 2 (forms of conclusion), for form of conclusion (14), substitute the following:—

"(14)(a) *Action of declarator of illegitimacy*. For declarator that (*name and designation*) is illegitimate and is not the lawful child of (*name and designation*).

(b) *Action of declarator of parentage or non-parentage*. For declarator that (*name and designation*) is [*or was*] [*not*] the parent [*or child*] of (*name and designation*)."

Emslie,
Lord President,
I.P.D.

Edinburgh,
18th November 1986.

EXPLANATORY NOTE

(This Note is not part of the Act of Sederunt.)

This Act of Sederunt amends the Rules of the Court of Session —

- (a) by making provision for application for the disclosure of names of persons in certain proceedings under section 1(1A) of the Administration of Justice (Scotland) Act 1972 as amended by section 19 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (paragraph 2(2));
- (b) by making provisions for the transfer of a cause in the Court of Session to the Sheriff Court under section 14 of the Act of 1985 (paragraph 2(3));
- (c) by making provision for the finding of such caution as the court may consider reasonable for the expenses of witnesses cited by a party litigant to attend court (paragraph 2(4));
- (d) by making provision for the form in which an application for rectification of a deed under section 8 of the Act of 1985 may be made (paragraph 2(6));
- (e) by making minor amendments in consequence of the coming into force of the Law Reform (Parent and Child) (Scotland) Act 1986 (paragraph 2(5), (7) and (9));
- (f) by making provision for proceedings under the Child Abduction and Custody Act 1985 (paragraph 2(7)); and
- (g) by including in rule 290 (form, and time-limit, of statutory appeals for which there is no statutory time-limit), applications for leave to appeal (paragraph 2(8)).