
STATUTORY INSTRUMENTS

1996 No. 2587

Act of Sederunt (Rules of the Court of Session Amendment No.5) (Family Actions and Miscellaneous) 1996

Amendment of the Rules of the Court of Session

2.—(1) The Rules of the Court of Session 1994⁽¹⁾ shall be amended in accordance with the following sub-paragraphs.

(2) In rule 1.3 (interpretation etc.), in paragraph (7), after the word “within”, insert the words “or not later than”.

(3) In rule 40.1⁽²⁾ (application and interpretation of this Chapter), in paragraph (2)(c)(ii), after the word “sheriff”, insert the words “with respect to judgments or interlocutors to which section 28 of the Sheriff Courts (Scotland) Act 1907⁽³⁾, or section 38(b) of the Sheriff Courts (Scotland) Act 1971⁽⁴⁾, applies.”

(4) In rule 40.4 (time and method of appeal), in paragraph (2)–

(a) after the words “note of appeal”, insert the words “in Form 40.4”; and

(b) in paragraph (a), omit the words “in Form 40.4”.

(5) After rule 40.19 (amendment of pleadings in appeals), insert the following rule:–

“Referral to family mediation in appeals from sheriff court

40.20. In an appeal from the sheriff court in which an order in relation to parental responsibilities or parental rights under section 11 of the Children (Scotland) Act 1995⁽⁵⁾ is in issue, the court may, where it considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation.”.

(6) Part IV of Chapter 43 (management of money payable to children) shall be omitted.

(7) In rule 49.1 (interpretation of this Chapter)–

(a) in paragraph (1), for sub-paragraph (j), substitute the following sub-paragraph:–

“(j) an action or application for, or in respect of, an order under section 11 of the Children (Scotland) Act 1995 (court orders relating to parental responsibilities etc.) except a petition for the appointment of a judicial factor;”;

(b) in paragraph (2)–

(i) after the definition of “the Act of 1985”, insert the following definitions:–

““the Act of 1995” means the Children (Scotland) Act 1995;

“contact order” has the meaning assigned in section 11(2)(d) of the Act of 1995;”;

(1) S.I.1994/1443.

(2) Rule 40.1 was amended by S.I. 1996/1756.

(3) 1907 c. 51.

(4) 1971 c. 58; section 38 was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73), section 18(4).

(5) 1995 c. 36.

- (ii) omit the definition of “child”;
- (iii) for the definition of “local authority”, substitute the following definition:–
 - ““local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994(6);”;
 - and
- (iv) for the definition of “parental rights”, substitute the following definitions:–
 - ““parental responsibilities” has the meaning assigned in section 1(3) of the Act of 1995;
 - “parental rights” has the meaning assigned in section 2(4) of the Act of 1995;
 - “residence order” has the meaning assigned in section 11(2)(c) of the Act of 1995;
 - “section 11 order” means an order under section 11 of the Act of 1995.”;
 - and
- (c) in paragraph (3), for the word “custody”, substitute the words “section 11 order”.
- (8) In rule 49.3 (averments where custody sought)–
 - (a) for the heading to the rule, substitute the following heading:–
 - “*Averments where section 11 order sought*”;
 - (b) in paragraph (1), for the words from “action for a custody order” to “Family Law Act 1986”, substitute the words “action for a section 11 order”; and
 - (c) in paragraph (1)(a) and paragraph (2), for the words “custody order” wherever they occur, substitute the words “section 11 order”.
- (9) In rule 49.8(7) (warrants for intimation in family actions)–
 - (a) in paragraph (1)–
 - (i) at the beginning of the paragraph, for the words “In the summons”, insert the words “Subject to paragraphs (5) and (8), in the summons”;
 - (ii) in sub-paragraph (e), for the words “an order for any parental rights”, substitute the words “a section 11 order”;
 - (iii) for head (iii) in sub-paragraph (e), substitute the following head:–
 - “(iii) in relation to whom a third party in fact exercises care or control, to that third party in the following terms:– “Warrant to intimate to (*name and address*) as a person who in fact exercises care or control of (*name and address of child*).””;
 - (iv) in sub-paragraph (f) for the words “the custody of a child”, substitute the words “a section 11 order”;
 - (v) in sub-paragraph (g), for the words “the custody”, substitute the words “a residence order in respect”; and
 - (vi) for sub-paragraph (h), substitute the following sub-paragraph:–
 - “(h) in an action which includes a conclusion for a section 11 order, to the child to whom the section 11 order would relate, if not a party to the action, in the following terms:–“Warrant to intimate to (*name and address*) as a child who may be affected by the action.””;
 - (b) in paragraph (3), for sub-paragraphs (e), (f), (g) and (h), substitute the following sub-paragraphs:–

(6) 1994 c. 39; section 2(2) was amended by the Environment Act 1995 (c. 25), Schedule 22, paragraph 232(1).

(7) Rule 49.8 was amended by S.I. 1996/1756.

- (e) under paragraph (1)(e)(i) or (ii) (where section 11 order may be made in respect of a child in care of local authority or accepted as a child of the marriage), in Form 49.8-E;
 - (f) under paragraph (1)(e)(iii) (where section 11 order may be made in respect of a child in relation to whom a third party in fact exercises care or control), in Form 49.8-F;
 - (g) under paragraph (1)(f) (section 11 order sought by guardian), in Form 49.8-G;
 - (h) under paragraph (1)(g) (residence order sought by non-parent resident in Scotland), in Form 49.8-H.”;
- (c) in paragraph (3), omit sub-paragraph (i);
- (d) in paragraph (4), for sub-paragraph (a), substitute the following sub-paragraph:–
 - “(a) concludes for a residence order in respect of a child;”;
- (e) for paragraph (7), substitute the following paragraphs:–
 - “(7) In relation to paragraph (1)(h) (action which affects a child), a copy of the summons shall not be intimated to the child but a notice of intimation shall be intimated to him in Form 49.8-N.
 - (8) Where a pursuer considers that a warrant for intimation to a child under paragraph (1)(h) is inappropriate, he shall–
 - (a) apply by motion to dispense with intimation to that child; and
 - (b) include in the condescendence of the summons averments setting out the reasons why such intimation is inappropriate,and the court may dispense with such intimation or make such other order as it thinks fit.”.
- (10) In rule 49.10 (productions in action of divorce or where order for custody may be made)–
 - (a) in the heading to the rule, for the words “**order for custody**” substitute the words “**section 11 order**”; and
 - (b) in paragraph (1)(b), for the words “an order in respect of the custody of a child”, substitute the words “a section 11 order”.
- (11) In rule 49.11 (execution of service on, or intimation to, local authority)–
 - (a) in paragraph (1), for the word “custody”, wherever it occurs, substitute the words “residence order”;
 - (b) paragraph (3) shall become paragraph (4);
 - (c) after paragraph (2), insert the following paragraph:–
 - “(3) In any family action, the court may, if it thinks fit, order intimation to a local authority, and such intimation shall be in Form 49.8-H.”;
 - (d) in paragraph (4) as renumbered, for the words “rule 49.8(1)(g), 49.8(4) or 49.15(2), intimation of an application for custody”, substitute the words “paragraph (3) of this rule or rule 49.8(1)(g), 49.8(4) or 49.15(3), intimation of an application for a section 11 order”.
- (12) For rule 49.15 (orders for intimation by the court) substitute the following rule: –

“Orders for intimation by the court

49.15.—(1) In any family action, the court may, at any time–

- (a) subject to paragraph (2), order intimation to be made to such person as it thinks fit;

- (b) postpone intimation, where it considers that such postponement is appropriate and in that case, the court shall make such order in respect of postponement of intimation as it thinks fit; or
- (c) dispense with intimation, where it considers that such dispensation is appropriate.

(2) Where the court is considering whether to make a section 11 order by virtue of section 12 of the Act of 1995 (restrictions on decrees for divorce, separation or annulment affecting children), it shall, subject to paragraph (1)(c) and without prejudice to paragraph (1)(b) of this rule, order intimation to the child to whom the section 11 order would relate unless—

- (a) intimation has been given to the child under rule 49.8(7); or
- (b) the court considers that the child is not of sufficient age or maturity to express his views.

(3) Where a party makes an application or averment in a family action which, had it been made in a summons when presented for signing, would have required a warrant for intimation under rule 49.8, that party shall apply by motion for a warrant for intimation or to dispense with such intimation; and rule 49.8 shall, with the necessary modifications, apply to a warrant under this paragraph as it applies to a warrant under that rule.”.

(13) For rule 49.20 (consents to grant of custody) substitute the following rule:—

“Procedure in respect of children

49.20.—(1) In a family action, in relation to any matter affecting a child, where that child has—

- (a) returned Form 49.8-N, or
- (b) otherwise indicated to the court a wish to express views on a matter affecting him,

the court shall not grant any order unless an opportunity has been given for the views of that child to be obtained or heard.

(2) Where a child has indicated his wish to express his views, the court shall order such steps to be taken as it considers appropriate to ascertain the views of that child.

(3) The court shall not grant an order in a family action, in relation to any matter affecting a child who has indicated his wish to express his views, unless due weight has been given by the court to the views expressed by that child, having regard to his age and maturity.”.

(14) Rule 49.21 (reports by local authorities under section 49(2) of the Act of 1975 shall be omitted.

(15) In rule 49.22 (appointment of local authority or reporter to report on a child)—

- (a) for sub-paragraph (a) of paragraph (1), substitute the following sub-paragraph:—

“(a) a local authority, whether under section 11(1) of the Matrimonial Proceedings (Children) Act 1958(8) (reports as to arrangements for future care and upbringing of children) or otherwise, or”; and

- (b) in paragraph (6), for the words “the custody”, substitute the words “a section 11 order in respect”.

(16) In rule 49.23(9) (referral to family mediation)—

- (a) for the words “the custody of, or access to, a child is in dispute”, substitute the words “an order in relation to parental responsibilities or parental rights is in issue”; and

(8) 1958 c. 40; section 11(1) was amended by the Social Work (Scotland) Act 1968 (c. 49), Schedule 8, paragraph 43, the Law Reform (Parent and Child)(Scotland) Act 1986 (c. 9), Schedule 2, the Family Law Act 1986 (c. 55), Schedule 1, paragraph 7 and by the Children (Scotland) Act 1995 (c. 36), Schedule 4, paragraph 9.

(9) Rule 49.23 was amended by S.I. 1996/1756.

- (b) for the words “that dispute”, substitute the words “that issue”.
- (17) In rule 49.25 (applications in relation to removal of children), in paragraph (1), for the word “custody”, substitute the words “a residence order”.
- (18) In rule 49.26 (intimation to local authority before supervised access)—
- (a) in the heading, for the word “**access**” substitute the words “**contact order**”;
 - (b) in paragraph (1)—
 - (i) for the words “an award of access or interim access”, substitute the words “a contact order or an interim contact order”;
 - (ii) for the words “for access or interim access”, substitute the words “for such an order”; and
 - (iii) in sub-paragraph (b), for the word “access”, substitute the words “the contact order”.
- (19) In rule 49.27 (joint minutes)—
- (a) in sub-paragraph (a), for the words “any parental rights in respect of a child”, substitute “a section 11 order”; and
 - (b) for the words “and the court”, substitute the words “and, subject to rule 49.20(3) (no order before views of child expressed), the court”.
- (20) In rule 49.28 (evidence in certain undefended family actions), in paragraph (1)(a)(i), for the words “any parental rights or”, substitute the words “a section 11 order or for”.
- (21) In rule 49.31 (defences in family actions), in paragraph (1)(b)(iii), for the words “an order relating to parental rights”, substitute the words “a section 11 order”.
- (22) In rule 49.35 (application and interpretation of this Part)—
- (a) after “**49.35.**”, omit “—(1)”; and
 - (b) omit paragraph (2).
- (23) In rule 49.36 (applications in actions to which this Part applies), in paragraph (2)(a), for the words “any parental rights”, substitute the words “a section 11 order”.
- (24) Rule 49.37 (intimation before committal to care or supervision) shall be omitted.
- (25) Rule 49.38 (care or supervision orders) shall be omitted.
- (26) Rule 49.39 (intimation of certain applications to local authorities or other persons) shall be omitted.
- (27) For rule 49.40 (applications in depending actions by motion), substitute the following rule:—

“Applications in depending actions by motion

49.40. An application by a party in an action depending before the court to which this Part applies for, or for variation of, an order for—

- (a) interim aliment for a child under the age of 18, or
- (b) an interim residence order or an interim contact order,

shall be made by motion.”.

- (28) In rule 49.41 (applications after decree relating to parental rights or care)—
- (a) in the heading to the rule, for the words “**parental rights or care**”, substitute the words “**a section 11 order**”;
 - (b) for paragraph (1), substitute the following paragraph:—

- “(1) An application after final decree for, or for the variation or recall of, a section 11 order other than a contact order shall be made by minute in the process of the action to which the application relates.”; and
- (c) in paragraph (2), for the word “where”, substitute the word “Where”.
- (29) In rule 49.42 (applications after decree relating to access or supervision)–
- (a) in the heading, for the words “**access or supervision**”, substitute the words “**a contact order**”; and
- (b) for paragraph (1), substitute the following paragraph:–
- “(1) An application after final decree for, or for the variation or recall of, a contact order shall be made by motion in the process of the action to which the application relates.”.
- (30) In Part IX of Chapter 49, for the cross-heading to the Part, substitute the following cross-heading:–

*“APPLICATIONS FOR ORDERS UNDER SECTION
11 OF THE CHILDREN (SCOTLAND) ACT 1995”*

- (31) For rule 49.58 (application and interpretation of this Part), substitute the following rule:–

“Application of this Part

49.58. This Part applies to an application for a section 11 order in a family action other than in an action of divorce, separation or declarator of nullity of marriage.”.

- (32) In rule 49.59 (form of applications relating to parental rights)–
- (a) in the heading, for the words “**parental rights**”, substitute the words “**section 11 orders**”;
- (b) for the words “an order for any parental rights in respect of child”, substitute the words “a section 11 order”; and
- (c) in paragraph (a), for the words “parental rights”, substitute the words “a section 11 order”.
- (33) For rule 49.60 (defenders in actions for parental rights), substitute the following rule:–

“Defenders in actions for a section 11 order

49.60. In an action for a section 11 order, the pursuer shall call as a defender–

- (a) the parents or other parent of the child in respect of whom the order is sought;
- (b) any guardian of the child;
- (c) any person who has treated the child as a child of his family;
- (d) any person who in fact exercises care or control in respect of the child; and
- (e) in any case where there is no person falling within paragraphs (a) to (d), the Lord Advocate.”.

(34) In rule 49.61 (applications relating to interim orders in depending actions), in paragraph (1), for the words “an order for interim custody or interim access”, substitute the words “an interim residence order or an interim contact order”.

- (35) Rule 49.62 (care and supervision by local authorities) shall be omitted.
- (36) In rule 49.63 (applications after decree)–
- (a) for paragraph (1), substitute the following paragraph:–

“(1) An application after final decree for the variation or recall of a section 11 order other than a contact order shall be made by minute in the process of the action to which it relates.”; and

(b) for paragraph (3), substitute the following paragraph:–

“(3) An application after final decree for, or for the variation or recall of, a contact order shall be made by motion; and rule 49.43 (applications after decree relating to aliment) shall apply to a motion under this paragraph as it applies to a motion under that rule.”.

(37) After Part XII of Chapter 49 (Child Support Act 1991), insert the following Parts:–

“PART XIII

REFERRALS TO PRINCIPAL REPORTER

Application and interpretation of this Part

49.85.—(1) This Part applies where the court, in a family action, refers a matter to the Principal Reporter under section 54 of the Act of 1995 (reference to the Principal Reporter by court).

(2) In this Part, “Principal Reporter” has the meaning assigned in section 93(1) of the Act of 1995.

Intimation to Principal Reporter

49.86. Where a matter is referred by the court to the Principal Reporter under section 54 of the Act of 1995, the clerk of court shall give written intimation of the interlocutor making the reference to the Principal Reporter; and that intimation shall specify which of the conditions in section 52(2)(a) to (h), (j), (k) or (l)(10) of that Act it appears to the court have been satisfied.

Intimation of decision by Principal Reporter

49.87.—(1) Where a matter has been referred by the court to the Principal Reporter under section 54 of the Act of 1995 and the Principal Reporter, having made such investigation as he thinks appropriate and having reached the view that compulsory measures of supervision are necessary, arranges a children’s hearing under section 69 of that Act (continuation or disposal of referral by children’s hearing), the Principal Reporter shall give written intimation to the court which referred the matter to him of–

- (a) the decision to arrange such children’s hearing;
- (b) where there is no appeal made against the decision of that children’s hearing once the period for appeal has expired, the outcome of the children’s hearing; and
- (c) where such an appeal has been made, that an appeal has been made and, once determined, the outcome of that appeal.

(2) Where a matter has been referred by the court to the Principal Reporter under section 54 of the Act of 1995 and the Principal Reporter, having made such investigation as he thinks appropriate and having considered whether compulsory measures of supervision are necessary, decides not to arrange a children’s hearing under section 69 of that Act, the Principal Reporter shall give written intimation of that decision to the court which referred the matter to him.

(10) 1995 c. 36; section 52(2) was amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c. 40), Schedule 4, paragraph 97(4).

PART XIV

MANAGEMENT OF MONEY PAYABLE TO CHILDREN

49.88. Where the court has made an order under section 13 of the Act of 1995 (awards of damages to children), an application by a person for an order by virtue of section 11(1)(d) of that Act (administration of child’s property) may be made by minute in the process of the cause in which the order under section 13 of that Act was made.”.

(38) In the appendix—

- (a) in Form 40.4, for the rule reference “Rule 40.4(2)(a)” at the top right hand side of the form, substitute the rule reference “Rule 40.4(2)”;
- (b) in Form 49.8-E(**11**), in the paragraph beginning with the words “(*Pursuer’s name and address*)”, for the words “for parental rights”, substitute the words “under section 11 of the Children (Scotland) Act 1995”;
- (c) in Form 49.8-F(**11**)—
 - (i) in the heading, for the words “**havingde factocare**”, substitute the words “**who in fact exercises care or control**”; and
 - (ii) for the paragraph beginning with the words “(*Pursuer’s name and address*)”, substitute the following paragraph—

“(*Pursuer’s name and address*), pursuer, has brought an action against (*defender’s name and address*), defender, in the Court of Session, Edinburgh. The pursuer seeks an order under section 11 of the Children (Scotland) Act 1995 in respect of (*child’s name and address*), a child at present in your care or control. A copy of the summons in the action is attached.”;
- (d) for Form 49.8-G(**11**), substitute Form 49.8-G in the Schedule to this Act of Sederunt;
- (e) for Form 49.8-H, substitute Form 49.8-H in the Schedule to this Act of Sederunt;
- (f) Form 49.8-I(**11**) shall be omitted;
- (g) after form 49.8-M(**12**), insert Form 49.8-N in the Schedule to this Act of Sederunt;
- (h) in Form 49.14-A(**11**), for sub-paragraph (b) of paragraph 3, substitute the following sub-paragraph:—
 - “(b) to make an order under section 11 of the Children (Scotland) Act 1995 or for maintenance in respect of any child of the marriage, or any child accepted as such, who is under 16 years of age.”;
- (i) in Form 49.14-C(**13**), for sub-paragraph (a) of paragraph 3, substitute the following sub-paragraph:—
 - “(a) for an order under section 11 of the Children (Scotland) Act 1995 or for maintenance in respect of any child of the marriage, or any child accepted as such, who is under 16 years of age.”;
- (j) in Form 49.14-E(**13**), for sub-paragraph (b) of paragraph 3, substitute the following sub-paragraph:—

(11) Forms 49.8-E, 49.8-F, 49.8-G, 49.8-I and 49.14-A were amended by S.I. 1994/2901.

(11) Forms 49.8-E, 49.8-F, 49.8-G, 49.8-I and 49.14-A were amended by S.I. 1994/2901.

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(11) Forms 49.8-E, 49.8-F, 49.8-G, 49.8-I and 49.14-A were amended by S.I. 1994/2901.

(12) Form 49.8-M was inserted by S.I. 1996/1756.

(11) Forms 49.8-E, 49.8-F, 49.8-G, 49.8-I and 49.14-A were amended by S.I. 1994/2901.

(13) Forms 49.14-C, 49.14-E and 49.14-F were amended by S.I. 1994/2901.

(13) Forms 49.14-C, 49.14-E and 49.14-F were amended by S.I. 1994/2901.

- “(b) to make an order under section 11 of the Children (Scotland) Act 1995 for maintenance in respect of any child of the marriage, or any child accepted as such, who is under 16 years of age.”;
- (k) in Form 49.14-F(**13**), for sub-paragraph (a) of paragraph 3, substitute the following sub-paragraph:–
- “(a) for an order under section 11 of the Children (Scotland) Act 1995 or for maintenance in respect of any child of the marriage, or any child accepted as such, who is under 16 years of age.”;
- (l) Form 49.20 shall be omitted;
- (m) Form 49.37(**14**) shall be omitted;
- (n) Form 49.38 shall be omitted;
- (o) Form 49.62-A(**14**) shall be omitted; and
- (p) Form 49.62-B shall be omitted.

(13) Forms 49.14-C, 49.14-E and 49.14-F were amended by S.I. [1994/2901](#).

(14) Forms 49.37 and 49.62-A were amended by S.I. [1994/2901](#).

(14) Forms 49.37 and 49.62-A were amended by S.I. [1994/2901](#).