



# Children (Scotland) Act 1995

## 1995 CHAPTER 36

### PART II

#### PROMOTION OF CHILDREN'S WELFARE BY LOCAL AUTHORITIES AND BY CHILDREN'S HEARINGS ETC.

### CHAPTER 3

#### PROTECTION AND SUPERVISION OF CHILDREN

#### *Exclusion orders*

#### 76 Exclusion orders.

- (1) Subject to subsections (3) to (9) below, where on the application of a local authority the sheriff is satisfied, in relation to a child, that the conditions mentioned in subsection (2) below are met, he may grant an order under this section (to be known as “an exclusion order”) excluding from the child’s family home any person named in the order (in this Part of this Act referred to as the “named person”).
- (2) The conditions are—
  - (a) that the child has suffered, is suffering, or is likely to suffer, significant harm as a result of any conduct, or any threatened or reasonably apprehended conduct, of the named person;
  - (b) that the making of an exclusion order against the named person—
    - (i) is necessary for the protection of the child, irrespective of whether the child is for the time being residing in the family home; and
    - (ii) would better safeguard the child’s welfare than the removal of the child from the family home; and
  - (c) that, if an order is made, there will be a person specified in the application who is capable of taking responsibility for the provision of appropriate care for the child and any other member of the family who requires such care and

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who is, or will be, residing in the family home (in this section, sections 77 to 79 and section 91(3)(f) of this Act referred to as an “appropriate person”).

- (3) No application under subsection (1) above for an exclusion order shall be finally determined under this section unless—
- (a) the named person has been afforded an opportunity of being heard by, or represented before, the sheriff; and
  - (b) the sheriff has considered any views expressed by any person on whom notice of the application has been served in accordance with rules making such provision as is mentioned in section 91(3)(d) of this Act.
- (4) Where, on an application under subsection (1) above, the sheriff—
- (a) is satisfied as mentioned in that subsection; but
  - (b) the conditions mentioned in paragraphs (a) and (b) of subsection (3) above for the final determination of the application are not fulfilled,
- he may grant an interim order, which shall have effect as an exclusion order pending a hearing by the sheriff under subsection (5) below held within such period as may be specified in rules made by virtue of section 91(3)(e) of this Act.
- (5) The sheriff shall conduct a hearing under this subsection within such period as may be specified in rules made by virtue of section 91(3)(e) of this Act, and, if satisfied at that hearing as mentioned in subsection (1) above, he may, before finally determining the application, confirm or vary the interim order, or any term or condition on which it was granted, or may recall such order.
- (6) Where the conditions mentioned in paragraphs (a) and (b) of subsection (3) above have been fulfilled, the sheriff may, at any point prior to the final determination of the application, grant an interim order.
- (7) An order under subsection (5) or (6) above shall have effect as an exclusion order pending the final determination of the application.
- (8) Where—
- (a) an application is made under subsection (1) above; and
  - (b) the sheriff considers that the conditions for making a child protection order under section 57 of this Act are satisfied,
- he may make an order under that section as if the application had been duly made by the local authority under that rather than under this section.
- (9) The sheriff shall not make an exclusion order if it appears to him that to do so would be unjustifiable or unreasonable, having regard to—
- (a) all the circumstances of the case, including without prejudice to the generality of this subsection the matters specified in subsection (10) below; and
  - (b) any requirement such as is specified in subsection (11) below and the likely consequences in the light of that requirement of the exclusion of the named person from the family home.
- (10) The matters referred to in subsection (9)(a) above are—
- (a) the conduct of the members of the child’s family (whether in relation to each other or otherwise);
  - (b) the respective needs and financial resources of the members of that family;
  - (c) the extent (if any) to which—
    - (i) the family home; and

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- (ii) any relevant item in that home,  
is used in connection with a trade, business or profession by any member of the family.
- (11) The requirement referred to in subsection (9)(b) above is a requirement that the named person (whether alone or with any other person) must reside in the family home, where that home—
- (a) is or is part of an agricultural holding within the meaning of the <sup>M1</sup>Agricultural Holdings (Scotland) Act 1991; or
  - (b) is let, or is a home in respect of which possession is given, to the named person (whether alone or with any other person) by an employer as an incident of employment.
- (12) In this Part of this Act—
- “caravan” has the meaning given to it by section 29(1) of the <sup>M2</sup>Caravan Sites and Control of Development Act 1960;
- “exclusion order”, includes an interim order granted under subsection (4) above and such an order confirmed or varied under subsection (5) above and an interim order granted under subsection (6) above; except that in subsection (3) above and in section 79 of this Act, it does not include an interim order granted under subsection (4) above;
- “family” has the meaning given in section 93(1) of this Act;
- “family home” means any house, caravan, houseboat or other structure which is used as a family residence and in which the child ordinarily resides with any person described in subsection (13) below and the expression includes any garden or other ground or building attached to and usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure.
- (13) The description of person referred to in the definition of “family home” in subsection (12) above, is a person who has parental responsibilities in relation to the child, or who ordinarily (and other than by reason only of his employment) has charge of, or control over him.

#### Marginal Citations

**M1** 1991 c.55.

**M2** 1960 c.62.

## 77 Effect of, and orders etc. ancillary to, exclusion order.

- (1) An exclusion order shall, in respect of the home to which it relates, have the effect of suspending the named person’s rights of occupancy (if any) and shall prevent him from entering the home, except with the express permission of the local authority which applied for the order.
- (2) The sheriff, on the application of the local authority, may, if and in so far as he thinks fit, when making an exclusion order do any of the things mentioned in subsection (3) below.
- (3) The things referred to in subsection (2) above are—
  - (a) grant a warrant for the summary ejection of the named person from the home;

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- (b) grant an interdict prohibiting the named person from entering the home without the express permission of the local authority;
  - (c) grant an interdict prohibiting the removal by the named person of any relevant item specified in the interdict from the home, except either—
    - (i) with the written consent of the local authority, or of an appropriate person; or
    - (ii) by virtue of a subsequent order of the sheriff;
  - (d) grant an interdict prohibiting the named person from entering or remaining in a specified area in the vicinity of the home;
  - (e) grant an interdict prohibiting the taking by the named person of any step of a kind specified in the interdict in relation to the child;
  - (f) make an order regulating the contact between the child and the named person, and the sheriff may make any other order which he considers is necessary for the proper enforcement of a remedy granted by virtue of paragraph (a), (b) or (c) of this subsection.
- (4) No warrant, interdict or order (except an interdict granted by virtue of paragraph (b) of subsection (3) above) shall be granted or made under subsection (2) above if the named person satisfies the sheriff that it is unnecessary to do so.
- (5) Where the sheriff grants a warrant of summary ejection under subsection (2) above in the absence of the named person, he may give directions as to the preservation of any of that person’s goods and effects which remain in the family home.
- (6) The sheriff may make an order of the kind specified in subsection (3)(f) above irrespective of whether there has been an application for such an order.
- (7) On the application of either the named person or the local authority, the sheriff may make the exclusion order, or any remedy granted under subsection (2) above, subject to such terms and conditions as he considers appropriate.
- (8) In this Part of this Act references to a “relevant item” are references to any item within the home which both—
- (a) is owned or hired by any member of the family concerned or an appropriate person or is being acquired by any such member or person under a hire purchase agreement or conditional sale agreement; and
  - (b) is reasonably necessary to enable the home to be used as a family residence, but does not include any such vehicle, caravan or houseboat or such other structure so used as is mentioned in the definition of “family home” in section 76(12) of this Act.

## **78 Powers of arrest etc. in relation to exclusion order.**

- (1) The sheriff may, whether or not on an application such as is mentioned in subsection (2) below, attach a power of arrest to any interdict granted under section 77(2) of this Act by virtue of subsection (3) of that section.
- (2) A local authority may at any time while an exclusion order has effect apply for such attachment of a power of arrest as is mentioned in subsection (1) above.
- (3) A power of arrest attached to an interdict by virtue of subsection (1) above shall not have effect until such interdict, together with the attached power of arrest, is served on the named person.

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- (4) If, by virtue of subsection (1) above, a power of arrest is attached to an interdict, the local authority shall, as soon as possible after the interdict, together with the attached power of arrest, is served on the named person, ensure that there is delivered—
- (a) to the chief constable of the police area in which the family home is situated; and
  - (b) where the interdict was granted by virtue of section 77(3)(e) of this Act, to the chief constable of the area in which the step or conduct which is prevented by the interdict may take place,
- a copy of the application for the interdict and of the interlocutor granting the interdict together with a certificate of service of the interdict and, where the application to attach the power of arrest was made after the interdict was granted, a copy of that application and of the interlocutor above granting it and a certificate of service of the interdict together with the attached power of arrest.
- (5) Where any interdict to which a power of arrest is attached by virtue of subsection (1) above is varied or recalled, the person who applied for the variation or recall shall ensure that there is delivered to each chief constable specified in subsection (4) above a copy of the application for such variation or recall and of the interlocutor granting the variation or recall.
- (6) A constable may arrest without warrant the named person if he has reasonable cause for suspecting that person to be in breach of an interdict to which a power of arrest has been attached by virtue of subsection (1) above.
- (7) Where a person has been arrested under subsection (6) above, the constable in charge of a police station may—
- (a) if satisfied there is no likelihood of that person further breaching the interdict to which the power of arrest was attached under subsection (1) above, liberate him unconditionally; or
  - (b) refuse to liberate that person.
- (8) Such a refusal to liberate an arrested person as is mentioned in subsection (7)(b) above, and the detention of that person until his appearance in court by virtue of either subsection (11) below, or any provision of the [F1Criminal Procedure (Scotland) Act 1995], shall not subject that constable to any claim whatsoever.
- (9) Where a person has been liberated under subsection (7)(a) above, the facts and circumstances which gave rise to the arrest shall be reported to the procurator fiscal forthwith.
- (10) Subsections (11) to (13) below apply only where—
- (a) the arrested person has not been released under subsection (7)(a) above; and
  - (b) the procurator fiscal decides that no criminal proceedings are to be taken in respect of the facts and circumstances which gave rise to the arrest.
- (11) A person arrested under subsection (6) above shall wherever practicable be brought before the sheriff sitting as a court of summary criminal jurisdiction for the district in which he was arrested not later than in the course of the first day after the arrest, such day not being a Saturday, a Sunday or a court holiday prescribed for that court under [F2section 8 of the said Act of 1995], on which the sheriff is not sitting for the disposal of criminal business.
- (12) [F3Subsections (1), (2) and (4) of section 15 of the said Act of 1995] (intimation to a person named by the person arrested) shall apply to a person arrested under

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subsection (6) above as they apply to a person who has been arrested in respect of an offence.

- (13) Where a person is brought before the sheriff under subsection (11) above—
- (a) the procurator fiscal shall present to the court a petition containing—
    - (i) a statement of the particulars of the person arrested under subsection (6) above;
    - (ii) a statement of the facts and circumstances which gave rise to that arrest; and
    - (iii) a request that the person be detained for a further period not exceeding two days;
  - (b) the sheriff, if it appears to him that—
    - (i) the statement referred to in paragraph (a)(ii) above discloses *prima facie* breach of interdict by the arrested person;
    - (ii) proceedings for breach of interdict will be taken; and
    - (iii) there is a substantial risk of violence by the arrested person against any member of the family, or an appropriate person, resident in the family home,
 may order the arrested person to be detained for a period not exceeding two days; and
  - (c) the sheriff shall, in any case in which paragraph (b) above does not apply, order the release of the arrested person from custody (unless that person is in custody in respect of some other matter);

and in computing the period of two days referred to in paragraphs (a) and (b) above, no account shall be taken of a Saturday, a Sunday or any holiday in the court in which proceedings for breach of interdict will require to be raised.

- (14) Where a person—
- (a) is liberated under subsection (7)(a) above; or
  - (b) is to be brought before the sheriff under subsection (11) above,
- the procurator fiscal shall at the earliest opportunity, and, in the case of a person to whom paragraph (b) above applies, before that person is brought before the sheriff, take all reasonable steps to intimate to—
- (i) the local authority which made the application for the interdict;
  - (ii) an appropriate person who will reside in, or who remains in residence in, the family home mentioned in the order; and
  - (iii) any solicitor who acted for the appropriate person when the interdict was granted or to any other solicitor who the procurator fiscal has reason to believe acts for the time being for that person,
- that he has decided that no criminal proceedings should be taken in respect of the facts and circumstances which gave rise to the arrest of the named person.

#### Textual Amendments

- F1** Words in s. 78(8) substituted (1.4.1996) by 1995 c. 40, ss. 5, 7(2), Sch. 4 para. 97(7)(a)  
**F2** Words in s. 78(11) substituted (1.4.1996) by 1995 c. 40, ss. 5, 7(2), Sch. 4 para. 97(7)(b)  
**F3** Words in s. 78(12) substituted (1.4.1996) by 1995 c. 40, ss. 5, 7(2), Sch. 4 para. 97(7)(C)

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## **79 Duration, variation and recall of exclusion order.**

- (1) Subject to subsection (2) below, an exclusion order shall cease to have effect on a date six months after being made.
- (2) An exclusion order shall cease to have effect on a date prior to the date mentioned in subsection (1) above where—
  - (a) the order contains a direction by the sheriff that it shall cease to have effect on that prior date;
  - (b) the sheriff, on an application under subsection (3) below, recalls the order before the date so mentioned; or
  - (c) any permission given by a third party to the spouse or partner of the named person, or to an appropriate person, to occupy the home to which the order relates is withdrawn.
- (3) The sheriff may, on the application of the local authority, the named person, an appropriate person or the spouse or partner of the named person, if that spouse or partner is not excluded from the family home and is not an appropriate person, vary or recall an exclusion order and any warrant, interdict, order or direction granted or made under section 77 of this Act.
- (4) For the purposes of this section, partners are persons who live together in a family home as if they were husband and wife.

## **80 Exclusion orders: supplementary provisions.**

- (1) The Secretary of State may make regulations with respect to the powers, duties and functions of local authorities in relation to exclusion orders.
- (2) An application for an exclusion order, or under section 79(3) of this Act for the variation or recall of such an order or of any thing done under section 77(2) of this Act, shall be made to the sheriff for the sheriffdom within which the family home is situated.

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