
SCOTTISH STATUTORY INSTRUMENTS

2010 No. 137

Act of Sederunt (Child Care and Maintenance Rules) Amendment (Human Fertilisation and Embryology Act 2008) 2010

Citation, commencement and interpretation

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Child Care and Maintenance Rules) Amendment (Human Fertilisation and Embryology Act 2008) 2010 and comes into force on 6th April 2010.

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

(3) In this Act of Sederunt, the “1997 Act of Sederunt” means the Act of Sederunt (Child Care and Maintenance Rules) 1997(1).

Amendment of the 1997 Act of Sederunt

2.—(1) Subject to paragraph 3, the 1997 Act of Sederunt is amended in accordance with subparagraphs (2) and (3).

(2) Substitute the following for Part VI of Chapter 2 (applications for parental orders under the Human Fertilisation and Embryology Act 1990):—

“PART VI

HUMAN FERTILISATION AND EMBRYOLOGY

Interpretation

2.45. In this Part—

“2007 Act” means the Adoption and Children (Scotland) Act 2007(2);

“2008 Act” means the Human Fertilisation and Embryology Act 2008(3);

“parental order” means an order under section 54 of the 2008 Act; and

“the Regulations” means the Human Fertilisation and Embryology (Parental Orders) Regulations 2010(4).

Form of application and productions

2.46.—(1) An application for a parental order is to be made by petition in Form 22.

(1) S.I. 1997/291. Amended by S.S.I. 1998/2130, 2000/388, 2002/560, 2005/190, 2006/75, 2007/468, 2009/29, 2009/284 and 2009/449.
(2) 2007 asp 4.
(3) 2008 c.22.
(4) S.I. 2010/985.

- (2) The following documents must be lodged in process along with the petition—
 - (a) an extract or a certified copy of the entry in the Register of Births relating to the child who is the subject of the application;
 - (b) extracts or certified copies of any entries in the Register of Births relating to the birth of each of the petitioners;
 - (c) in the case of an application under section 54(2)(a) of the 2008 Act, an extract or a certified copy of the entry in the Register of Marriages relating to the marriage of the petitioners;
 - (d) in the case of an application under section 54(2)(b) of the 2008 Act, an extract or a certified copy of the entry in the Register of Civil Partnerships relating to the civil partnership of the petitioners; and
 - (e) any other document founded on by the petitioners in support of the terms of the petition.

Confidentiality

2.47.—(1) Unless the sheriff otherwise directs, all documents lodged in process (including the reports by the curator *ad litem* and reporting officer) are to be available only to the sheriff, the curator *ad litem*, the reporting officer and the parties; and such documents must be treated as confidential by all persons involved in, or party to, the proceedings and by the sheriff clerk.

- (2) The reporting officer and the curator *ad litem*—
 - (a) must treat all information obtained in the exercise of their duties as confidential; and
 - (b) must not disclose any such information to any person unless disclosure of such information is necessary for the purpose of their duties.
- (3) This rule is subject to rule 2.53.

Orders for evidence

2.48.—(1) The sheriff may, before determining the cause, order—

- (a) production of further documents (including affidavits); or
- (b) parole evidence.

(2) A party may apply by motion for the evidence of a person to be received in evidence by affidavit; and the sheriff may make such order as the sheriff thinks fit.

Protection of identity of petitioners

2.49.—(1) Where persons who propose to apply for a parental order wish to prevent their identities being disclosed to any person whose agreement to the parental order is required, they may, before presenting the petition, apply by letter to the sheriff clerk for a serial number to be assigned to them for all purposes connected with the petition.

- (2) On receipt of an application under paragraph (1), the sheriff clerk must—
 - (a) assign a serial number to the applicants; and
 - (b) enter a note of the number opposite the name of the applicants in a register of serial numbers kept by the sheriff clerk.

(3) The contents of the register of serial numbers and the names of the persons to whom each number relates must be treated as confidential by the sheriff clerk and must not be disclosed to any person other than the sheriff.

(4) Where a serial number has been assigned under paragraph (2)(a), any form of agreement to a parental order under section 54(6) of the 2008 Act—

- (a) must refer to the petitioners by means of the serial number assigned to them;
- (b) must not contain the names and designation of the petitioners; and
- (c) must specify the year in which and the court by which the serial number was assigned.

Appointment of a curator *ad litem* and reporting officer

2.50.—(1) The sheriff must on the lodging of a petition under rule 2.46, appoint a curator *ad litem* and reporting officer.

(2) The same person may be appointed as curator *ad litem* and reporting officer in the same petition, if the sheriff considers that doing so is appropriate in the circumstances.

(3) The sheriff may appoint a person who is not a member of a panel established under regulations made by virtue of section 101(1) of the 1995 Act⁽⁵⁾ to be curator *ad litem* or a reporting officer.

(4) The sheriff may, on cause shown, appoint a reporting officer prior to the lodging of such a petition.

(5) An application for an appointment under paragraph (4) is to be made by letter addressed to the sheriff clerk specifying the reasons for the appointment, and shall not require to be intimated to any other person.

(6) The sheriff clerk must intimate the appointment of a curator *ad litem* and reporting officer under paragraph (1) or (4) to the petitioner and to the person or persons appointed.

(7) Where the curator *ad litem* is not also the reporting officer, the sheriff may order the reporting officer to make available to the curator *ad litem* any report or information in relation to the child.

Duties of reporting officer and curator *ad litem*

2.51.—(1) The other duties of a reporting officer appointed under rule 2.50(1) prescribed for the purposes of section 108(1)(b) of the 2007 Act as modified and applied in relation to applications for parental orders by regulation 4 of, and Schedule 3, to the Regulations (rules: appointment of curators *ad litem* and reporting officers) are—

- (a) to ascertain the whereabouts of all persons whose agreement to the making of a parental order in respect of the child is required;
- (b) to ascertain whether there is any person other than those mentioned in the petition upon whom notice of the petition should be served;
- (c) in the case of each person who is not a petitioner and whose agreement to the making of a parental order is required under section 54(6) of the 2008 Act—
 - (i) to ascertain whether that person understands the effect of the parental order;
 - (ii) to ascertain whether alternatives to a parental order have been discussed with that person;
 - (iii) to confirm that that person understands that he or she may withdraw his or her agreement at any time before an order is made;

(5) 1995 c. 36. Section 101(1) was amended by the Regulation of Care (Scotland) Act 2001 (asp 8), section 75(a); and by the Adoption and Children (Scotland) Act 2007 (asp 4), schedule 2, paragraph 9(9).

- (iv) to ascertain whether that person suffers or appears to suffer from a mental disorder within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003(6); and
 - (d) to ascertain whether the conditions in subsections (2) to (8) of section 54 of the 2008 Act have been satisfied;
 - (e) to draw to the attention of the court any matter which may be of assistance; and
 - (f) to report in writing on the matters mentioned in subparagraphs (a) to (e) to the sheriff within 4 weeks from the date of the interlocutor appointing the reporting officer, or within such other period as the sheriff in his or her discretion may allow.
- (2) A curator *ad litem* appointed under rule 2.50(1) must—
- (a) have regard to safeguarding the interests of the child as his or her paramount duty;
 - (b) enquire, so far as he or she considers necessary, into the facts and circumstances stated in the petition;
 - (c) establish that the petitioners understand the nature and effect of a parental order and in particular that the making of the order will render them responsible for the maintenance and upbringing of the child;
 - (d) ascertain whether any money or other benefit which is prohibited by section 54(8) of the 2008 Act (prohibition on gift or receipt of money or other benefit) has been received or agreed upon;
 - (e) ascertain whether it may be in the interests of the welfare of the child that the sheriff should make the parental order subject to particular terms and conditions or require the petitioners to make special provision for the child and, if so, what provision;
 - (f) ascertain whether it would be better for the child that the court should make the order than it should not make the order;
 - (g) establish whether the proposed parental order is likely to safeguard and promote the welfare of the child throughout the child's life; and
 - (h) ascertain from the child whether he or she wishes to express a view and, where a child indicates his or her wish to express a view, ascertain that view.
- (3) Subject to paragraph (4), the curator *ad litem* must report in writing on the matters mentioned in paragraph (2) to the sheriff within 4 weeks from the date of the interlocutor appointing the curator, or within such other period as the sheriff in his or her discretion may allow.
- (4) Subject to any order made by the sheriff under rule 2.53(1), the views of the child ascertained in terms of paragraph (2)(h) may, if the curator *ad litem* considers appropriate, be conveyed to the sheriff orally.
- (5) The reporting officer must, on completion of his or her report in terms of paragraph (1), in addition send to the sheriff clerk—
- (a) a copy of his or her report for each party; and
 - (b) any agreement for the purposes of section 54(6) of the 2008 Act.
- (6) The curator *ad litem* must, on completion of his or her report in terms of paragraph (3), in addition send a copy of it for each party to the sheriff clerk.

Agreement

2.52.—(1) The agreement of a person required by section 54(6) of the 2008 Act is to be in Form 23.

- (2) The form of agreement mentioned in paragraph (1) must be witnessed—
- (a) where it is executed in Scotland, by the reporting officer appointed under rule 2.50(1);
 - (b) where it is executed outwith Scotland but within the United Kingdom, by a justice of the peace or commissioner for oaths;
 - (c) where it is executed outwith the United Kingdom—
 - (i) if the person who executes the agreement is serving in Her Majesty’s Forces, by an officer holding a commission in any of those forces; or
 - (ii) in any other case, by a British diplomatic or consular official or any person authorised to administer an oath or affirmation under the law of the place where the agreement is executed.

Procedure where child wishes to express a view

2.53.—(1) Where a child to whom section 54(11) of the 2008 Act applies indicates his or her wish to express a view, the sheriff, without prejudice to rule 2.51(2)(h)—

- (a) may order such procedural steps to be taken as the sheriff considers appropriate to ascertain the views of that child; and
- (b) must not make an order under this Part unless an opportunity has been given for the views of that child to be obtained or heard.

(2) Where the views of a child, whether obtained under this rule or under rule 2.51(2)(h) have been recorded in writing, the sheriff may direct that such a written record is to—

- (a) be sealed in an envelope marked “Views of the child – confidential”;
- (b) be available to a sheriff only;
- (c) not be opened by any person other than a sheriff; and
- (d) not form a borrowable part of the process.

Hearing

2.54.—(1) On receipt of the reports referred to in rule 2.51, the sheriff must fix a hearing.

- (2) The sheriff may—
- (a) order any person whose agreement is required to attend the hearing;
 - (b) order intimation of the date of the hearing to any person not mentioned in paragraph (3)(a), (b) or (c); and
 - (c) order the reporting officer or curator *ad litem* to perform additional duties to assist him or her in determining the petition.

(3) The petitioners or, where a serial number has been assigned under rule 2.49, the sheriff clerk, must intimate the date of the hearing in Form 24 by registered post or recorded delivery letter to—

- (a) every person whose whereabouts are known to them and whose agreement is required;
- (b) the reporting officer appointed under rule 2.50(1);
- (c) the curator *ad litem* appointed under rule 2.50(1); and

- (d) any person on whom intimation has been ordered under paragraph (2)(b).
- (4) At the hearing—
 - (a) the petitioners, the reporting officer and the curator *ad litem* must, if required by the sheriff, appear and may be represented;
 - (b) any other person required by the sheriff to attend the hearing must appear and may be represented; and
 - (c) any other person to whom intimation was made under paragraph (3)(a) or (d) may appear or be represented.

Applications under sections 22 and 24 of the 2007 Act

2.55.—(1) An application under section 22(3) (restrictions on removal: application for parental order pending), section 24(1) (return of child removed in breach of certain provisions) or section 24(2) (order directing person not to remove child) of the 2007 Act all as modified and applied in relation to applications for parental orders by regulation 4 of, and Schedule 3 to, the Regulations, is to be made by minute in the process of the petition for a parental order to which it relates.

- (2) A minute under paragraph (1) must include an appropriate crave and statement of facts.
- (3) On receipt of a minute under paragraph (1), the sheriff must—
 - (a) order a diet of hearing to be fixed; and
 - (b) ordain the minuter, or where a serial number has been assigned under rule 2.49, the sheriff clerk, to send a notice of such hearing in Form 25 together with a copy of the minute, by recorded delivery letter to the curator *ad litem* in the original petition, to any person who may have care and possession of the child and to such other persons as the sheriff considers appropriate.

Amendment of parental order

2.56.—(1) An application under paragraph 7 of Schedule 1 to the 2007 Act, as modified and applied in relation to parental orders by regulation 4 of, and Schedule 3 to, the Regulations (amendment of orders and rectification of registers) is to be made by petition to the court which made the parental order.

(2) The sheriff may order the petitioners to intimate the petition to such persons as the sheriff considers appropriate.

Communication to the Registrar General

2.57. The communication to the Registrar General of a parental order required to be made by the sheriff clerk under paragraph 4(1) of Schedule 1 to the 2007 Act, as modified and applied in relation to parental orders by regulation 4 of, and Schedule 3 to, the Regulations (registration of parental orders), is to be made by sending a certified copy of the order to the Registrar General either by recorded delivery post in an envelope marked “Confidential”, or by personal delivery by the sheriff clerk in a sealed enveloped marked “Confidential”.

Extract of order

2.58. An extract of a parental order must not be issued except by order of the court on an application to it—

- (a) where there is a petition for the parental order depending before the court, by motion in that process; or

- (b) where there is no such petition depending before the court, by petition.

Final procedure

2.59.—(1) After the granting of a parental order the court process must, immediately upon the communication under rule 2.57 being made or, in the event of an extract of the order being issued under rule 2.58, immediately upon such issue, be sealed by the sheriff clerk in an envelope marked “Confidential”.

(2) The envelope referred to in paragraph (1) is not to be unsealed by the sheriff clerk or by any other person having control of the records of that or any court, and the process is not to be made accessible to any person for one hundred years after the date of the granting of the order except—

- (a) to the person who is the subject of the parental order after he or she has reached the age of 16 years; and
- (b) to a person on the granting of an application made by him or her to the sheriff setting forth the reason for which access to the process is required.

Appeals

2.60.—(1) Chapter 31 of the Ordinary Cause Rules is to apply, with any necessary modifications, to an appeal against an order of the sheriff under this Part as it applies to an appeal against an order of the sheriff under the Ordinary Cause Rules.”.

(3) In Schedule 1 (forms) for existing Forms 22, 23, 24 and 25 substitute the Forms set out in the Schedule to this Act of Sederunt.

Transitional and savings provisions

3. The provisions of Part VI of Chapter 2 of the 1997 Act of Sederunt as they applied immediately before 6th April 2010 will continue to have effect for the purpose of any application for a parental order under section 30 of the Human Fertilisation and Embryology Act 1990 made and not yet determined before that date.

Edinburgh
26th March 2010

A. C. HAMILTON
Lord President
I.P.D.