

Adoption and the Law: Some key terms explained

The child's legal status

Children should be brought up by and cared for by their parents within their birth families without intervention from the State. However, where this is not possible or appropriate there are a number of legal mechanisms designed to promote the best interests of the child. These will be applied proportionately following the general principle of minimum intervention and taking account of the child's views. They may be put in place by a Children's Hearing or by the Courts.

The following explains some of the most common legal terms used in adoption and fostering. There are a number of legal Orders which can secure a child's accommodation away from home.

Under the Children's Hearing Scotland (Act) 2011

Compulsory Supervision Order (CSO)

This will be put in place by a Children's Hearing and can last for a maximum of one year before being reviewed by a Hearing. Measures can be attached to the Order, determining most typically, where the child resides or what contact arrangements should be made in respect of the birth parents. While parental rights and responsibilities remain with the birth parents, this Order legitimately suspends the exercise of these.

The Order can be appealed as well as reviewed and Hearings can make a range of decisions including returning the child to the birth parent(s) care. This makes it a less secure means of planning for the child and is not seen as an appropriate mechanism for securing long terms plans.

A child whose ultimate plan is permanent fostering or adoption will often be subject of a CSO which will secure their residence away from the birth parent(s) while longer term plans are being progressed.

Interim Compulsory Supervision Order (ICSO)

This Order is similar to a CSO in that it can suspend the exercise of parental rights and responsibilities, allowing for Children's Hearings to determine where a child should reside. As the name suggests, this is a short-term provision, often in place while Grounds for Referral are being considered at Court or until the local authority is in a position to make a longer-term plan and recommendation. An ICSO lasts for a maximum of 22 days and can be renewed by Hearings, but after 66 days, a Court would need to consider the need for its continuation. If a CSO is made, the ICSO is no longer needed.

Child Protection Order (CPO)

While anyone may apply to the Sheriff for a CPO, it is almost always the local authority who will apply where there is urgency and they believe the child is or is likely to suffer significant harm. The CPO can authorise that the child be “produced”, removed to a place of safety, not removed from a place, e.g. a hospital or for an assessment to be carried out. A CPO can last for only a few days until a Children’s Hearing is arranged to make a longer-term decision. A child may be placed with a foster carer under this Order on an emergency basis. If an ICSO is made, a CPO is no longer needed.

The local authority could seek a PO or POA or the prospective adopter(s) could petition the Court for an AO to be granted in their favour.

Children (Scotland) Act 1995 Voluntary Reception into Care Section 25

When a person with PRRs has consented to the child’s reception into care, or if that person cannot be found or is unable to give consent, the child can be received into care on a voluntary basis. The voluntary aspect of this arrangement means that the parent may ask for the child to be returned to them at any time. Once the child has been accommodated by the local authority for more than 6 months, the parents have to give notice that they wish the child returned to them. If the child is already placed for adoption, the Court will consider whether or not such a change is reasonable. The local authority could during this notice period, apply for a CPO to prevent the child’s return to the parents’ care, which could be granted if the criteria for a CPO are fulfilled.

While a child is subject to a Section 25 Order the local authority could seek a Permanence Order or Permanence Order with Authority to Adopt or the prospective adopter(s) could petition the Court for an Adoption Order. (see below)

Kinship Care Order (KCO) Section 11

Kinship carers are those who are related to the child or who have known the child and with whom the child has a pre-existing relationship. They are distinct from, for example, a foster carer or someone not otherwise known to the family. Under a KCO, the Court grants Parental Rights and Responsibilities to kinship carers.

The important point is that the PRRs are not automatically removed from the parents; they are shared with the kinship carers. This can really only work effectively, where there is agreement by the parents in terms of the kinship carers’ right to make decisions for the child. Otherwise, in the event of a disagreement between those with PRRs, it may require the Sheriff to make a decision, requiring the inconvenience and expense of court proceedings.

Where there is an absence of agreement among the adults, the local authority may consider applying for a Permanence Order so that effective planning for the child can take place. Thereafter, the child could be placed with the kinship carer under a Permanence Order.

Adoption and Children (Scotland) Act 2007

Adoption Order (AO)

Prospective adopter(s) can petition the Court to adopt a particular child and for the Court to grant an Adoption Order in their favour. This method of adoption is sometimes called “direct adoption” The prospective adopter(s) will instruct their own solicitor to act on their behalf. Often, the local authority will meet some or all the legal costs and this should be clarified at the outset.

Those who hold PRRs must consent to the adoption or the Court may dispense with the necessity for consent. This will be where the birth parent(s) is dead, cannot be found, is incapable of consenting or cannot in the court’s opinion satisfactorily discharge their parental rights and responsibilities and are likely to continue to be unable to do so. The Court may dispense with the consent where the child’s welfare otherwise requires it. Where the child is 12 years of age or over, their consent must be given before the adoption can be granted. Once the adoption order is granted, the child will be as though born into the adoptive family and the child’s birth certificate will be changed to reflect this.

Permanence Order (PO)

Before the Court can grant a PO, it first needs to be satisfied that if the child lived with someone who does hold PRRs, it is likely to be seriously detrimental to the welfare of the child. Under a PO, the Court removes PRRs from the child’s birth parents and invests them in the local authority. This means that up until the child is 18, the local authority will have responsibility to provide guidance to him appropriate to his stage of development and up until he is 16, regulate his residence.

There will be ancillary provisions attached to the PO which are tailored to the circumstances of each child. Typically these will be decisions about what school the child attends, who receives report cards and attends parents’ evenings; what medical treatments the child can have; whether the child can go on holiday, for sleepovers or have her ears pierced. Sometimes the local authority will be granted these rights and delegate them to the foster carers and other times, they will be granted to the foster carers directly by the Court.

The birth parents may maintain some contact with the child, either face-to-face or indirectly where they can send and receive letters and photographs. Where the child is over the age of 12, he needs to consent to the granting of the PO by the Court. The local authority can at a later stage go back to the Court and have the PO amended to add authority for the child to be adopted.

Permanence Order with Authority to Adopt (POA)

This is the same as a Permanence Order but with the additional provision of granting authority to adopt. The Local Authority will petition the Court for this authority. The Court will need to be satisfied that those who hold PRRs consent to this or dispense with the necessity for consent. This will be where the birth parent(s) is dead, cannot be found, is incapable of consenting or cannot in the court’s opinion satisfactorily

discharge their parental rights and responsibilities and are likely to continue to be unable to do so. The Court may dispense with the consent where the child's welfare otherwise requires it. Once a POA is granted, the issue of parental consent to the adoption will therefore have been dealt with and the solicitors for the prospective adoptive parent(s) will lodge a petition in Court asking that the Court grants the adoption naming the prospective adopters) as the child's parent(s). Again, the birth parent(s) may retain certain rights of contact with the child.

This method of achieving adoption does introduce another stage to the process but it means that the contentious part will have been handled by the local authority.

Types of Adoption

Agency Adoption – *Sometimes referred to as S.17 adoption*

Where a local authority places a child for adoption, the plan will have been reviewed by an Adoption Panel to ascertain that it is the best option for the child. The child must be at least 19 weeks old before the adoption may be granted and have lived with the adopters for the previous 13 weeks. Applications may be made before this time, but can only be granted as above. The placing Agency must prepare and lodge a report for the Courts in terms of S.17.

Non-Agency Adoption – *Sometimes referred to as S.19 adoption*

Where a child has not been placed with the prospective adopter by the Agency with the specific intention of adoption by the carers, then this is a non-agency adoption.

This includes intercountry adoptions and adoptions by relatives, step parents or foster carers. Even where the Agency may have placed the child with relatives or carers, unless it was done with adoption in mind, these will be categorised as non-agency adoptions.

The prospective adopters must notify the local authority that they intend to adopt the child and this notification must be made at least 3 months before the Adoption Order may be granted. The local authority will investigate the matter and prepare and lodge with the Court a report about the family, the child and all the circumstances of the case.

For a step-parent or relative adoption, the child, as in the case of an agency adoption, must be at least 19 weeks old before the adoption may be granted and have lived with the adopters for the previous 13 weeks. Applications may be made before this time, but can only be granted as above. Otherwise, the child must be at least one year old before the order is made and have lived with the adopter for at least one year.

General Information about adoption

Who may adopt – S29 & 30

- A couple, where they are married or within a civil partnership with one another or living together in an “enduring family relationship”;
- Step-parent who is in such a relationship with a parent who has PRRs;
- anyone aged 21 or over;
- a step-parent aged 21 or over where the relevant birth parent is at least 18;
- anyone domiciled in the UK, even if they do not currently reside here but regard it as their long-term permanent residence or have been habitually resident in the UK for more than 1 year prior to the Court application. There are more detailed rules for couples.

Who may be adopted – S.28

A child under the age of 18 and unmarried or not in a civil partnership; if the adoption application is lodged in Court before the child’s 18th birthday, adoption may be granted even where the child is older than 18; the child may be of any nationality; where the child is 12 years of age their consent to adoption must be Obtained—the child would need to be considered incapable of giving consent for adoption to be otherwise granted.

Regulations for placing children away from home

Fostering Panel [Looked After Children (Scotland) Regulations 2009]

Every local authority or independent fostering provider will have a fostering panel. There will be an independent Chair, medical advisor, access to a legal advisor, someone with an educational background and someone with experience of fostering either as a carer or as a previously cared for child.

The local authority will make a recommendation to the Agency Decision Maker (ADM) about the need for a child to be permanently accommodated away from home. The independent fostering provider or local authority will make recommendations to the ADM about the suitability of individuals to foster a child. The Panel will make recommendations in term of whether a prospective or existing carer is suitable to be or continue as a foster carer; sometimes what categories of children the carer is suitable to care for and the maximum number of children whom the carer may look after at any one time.

The approval of foster carers will be reviewed at least every 3 years and often will be reviewed annually. The ADM will then make a final decision taking account of the recommendation. There are review rights for foster carers and prospective carers who are not approved and for existing carers whose approval has been terminated or varied.

Adoption Panel [Adoption Agencies (Scotland) Regulations 2009]

Every local authority and every voluntary adoption agency (VAA) which is carrying out or proposes to carry out adoptions will have an adoption panel. There will be an independent Chair, medical advisor, and legal advisor, someone with an educational background and someone with experience of adoption either as an adopter or adoptee. The panel will consider plans for prospective placements, prospective and approved adopter, linking and matching children with prospective adopters and any other matters, e.g. adoption allowance.

The VAA or local authority will make recommendations to the ADM who will then make a final decision taking account of the recommendation.

Kinship Carers [Looked After Children (Scotland) Regulations 2009]

Approval of kinship carers is not mandatory so local authorities do not have to approve kinship carers. Many local authorities do refer their kinship carers to a panel, sometimes their fostering panel and sometimes a specially constituted kinship carer panel. The information about a prospective kinship carer is largely the same as that required for assessing a foster carer. The recommendation will be made to the ADM.

There is no provision for kinship carers to ask for appeal reviews if the ADM decides not to approve them, but it is good practice for local authorities to make provision similar to that for foster carers.

Other persons involved in the process

Curator ad litem and Reporting Officer

The curator ad litem is an independent person appointed by the Court to complete a report and investigate matters on behalf of the Court to provide a view of the case from the child's perspective. Where the child wants him to do so, the curator will give the child's views to the Court. The curator will promote the child's best interests.

The Reporting Officer will be responsible for ascertaining whether the consent has been given for the adoption by those with PRRS and the child (where the child is over the age of 12). He will then report back to the Court. Often the curator and reporting officer are one and the same.

Safeguarder

The safeguarder is an independent person appointed to a child's case by a Children's Hearing or Court. The appointment will be made in circumstances where the Court or Children's Hearing require independent information to assist them in coming to a decision which represents the best interests of the child.

The safeguarder may meet with everyone involved in the case, normally parents, carers, social worker, school and the child. They will then submit a report to the Hearing or Court and attend the hearing of the case to speak to their report and

answer questions. The Safeguarder will also be a party to any Court proceedings following on from their appointment, even where the Children's Hearing has made the appointment.