

# Child contact and residence





# CHILD CONTACT AND RESIDENCE

When an abusive relationship between you and the father of your children breaks down, it is very important that you consider how your children will be cared for.

There are options for arrangements to care for your children, which can include: one parent has residence and the other has contact with the children, or both parents share a residence.

When you cannot agree care arrangements for your children, then the Court can get involved.

To help you make decisions about your children's care, this guide explains:

- What are parental rights and responsibilities
- Who has (and can get) parental rights and responsibilities for the children
- What decisions the court can make about those rights and

responsibilities

- What process the court would follow
- What documentation/evidence the court would consider
- What the outcome could be.

**Remember that this is just a guide and not a replacement for legal advice specific to your situation. Please make sure to get legal advice to help you decide what your options are.**

You can call our **helpline** to speak to one of our solicitors or make an appointment at one of our **legal surgeries**.

The Law Society of Scotland can also suggest solicitors in Scotland who may be able to assist you. You may also find our **Getting Legal Representation** guide helpful.

# CONTENTS

What are parental rights and responsibilities?	3
Who has parental rights and responsibilities?	4
Applying to court to get parental rights	4
Getting legal representation	5
What is the court process?	6
What does the court look at?	9
Child Welfare Report	9
Curator	10
Domestic abuse	10
What is the possible outcome?	11
What happens after the final order is made?	11
What if an order is breached?	12
Glossary of terms	13
About us	14
Support agencies and useful contacts	15

# WHAT ARE PARENTAL RIGHTS AND RESPONSIBILITIES?

**In Scotland, the interests of the child are the most important consideration.**

The Court considers this their most important concern. In general, parental rights exist so parents can carry out their responsibilities. The law describes what these parental responsibilities are and who has those responsibilities for a child.

The Court can also grant an order to give parental responsibilities over a child to someone who does not have them automatically.

According to the law, **parental responsibilities** are:

- To protect their child and promote their health, development and welfare
- To provide guidance and direction to their child
- To maintain contact on a regular basis and their relationship with their child if they do not live with them.

**Parental rights** are:

- To have the child living with them or to regulate where the child lives
- To control, direct or guide the child's upbringing
- To maintain their relationship and contact on a regular basis if the child is not living with them.

# WHO HAS PARENTAL RIGHTS AND RESPONSIBILITIES?

A mother has parental rights and responsibilities automatically when a baby is born.

A father automatically gets parental rights and responsibilities if he is:

(a) Married to the child's mother

**or**

(b) His name is on the birth certificate (this only applies if your child was born after 4 May 2006).

If a father is not married to the mother and not registered as the baby's father (after 4 May 2006), he can get parental rights and responsibilities by:

(a) applying to court

(b) entering into a "parental rights and responsibilities agreement" with the mother. In this case, the

mother would need to give her consent.

It is possible for the court to remove a parent's rights and responsibilities. However, this is very unusual and it only happens in extreme circumstances.

## APPLYING TO COURT TO GET PARENTAL RIGHTS

If your child's father does not have parental responsibilities automatically, he would have to make an application to the court to ask for these. The only other option would be for you to agree that he should have these rights and responsibilities and enter into an agreement with him.

If both of you have parental responsibilities but cannot agree on decisions relating to the child, you may need to try to reach agreement in other ways. For example, you could try negotiation through your solicitors or mediation.

However, if you have been a victim of gender-based violence, mediation may not be safe. You should make sure you get advice about this process before agreeing to enter the mediation process.

Most often, the decisions that can be difficult are:

- where your child should live (this is called residence)
- when and how often your child should see the parent that they do not live with (this is called contact).

If you and the father cannot agree on these decisions, you will usually need to ask the court to decide.

## GETTING LEGAL REPRESENTATION

**The court process can be stressful and it can be difficult to navigate. It is usually best for you to find a solicitor to help you with the court process.**

Your solicitor might be paid for through **legal aid**, if you are eligible. If you are not eligible for legal aid, you would need to pay for a solicitor or represent yourself.

Our **Getting Legal Representation guide** has some useful information.

# WHAT IS THE COURT PROCESS LIKE?

The solicitor for the parent starting court proceedings would submit a document called an **Initial Writ** at court. An Initial Writ is a document that sets out what orders you are asking the court to make about the child and why. Once the court receives that document, the process is:

- The Initial Writ would be sent to the other parent
- A form might also be sent to the child to ask the child to state their views and how they feel about the orders requested by their parents. This will usually depend on how old the child is and whether they would be able to understand the process. The child can get help from a teacher or other person when completing the form. If the child is able to understand the process, they can instruct their own solicitor.
- The other parent would then normally have a 21 day notice period of time to tell the court that they want to defend the application and get involved in the court process. To do this, their solicitor would submit a form called a “Notice of Intention to Defend.” It is important to understand that, during this period, nothing can happen until the notice period expires, unless there is an emergency.
- The court will issue a timetable. The timetable will state a date by which the other parent’s solicitor would need to submit written defences. Written defences are the other parent’s answers to the Initial Writ, and they usually describe what that other parent thinks is best for the child, what they want to happen about the child and why they disagree.
- The timetable will give a period of time when both sides can make changes to the documents that they have submitted to the court. This usually lasts for 8 weeks.
- A **Child Welfare Hearing** will be scheduled. This is a hearing where the Sheriff decides what is

best for the child at that point. It is unlikely that any final decisions will be made at this hearing, but it is a chance for the Sheriff to consider the best way forward. At a Child Welfare Hearing, the Sheriff may put in place an “interim” contact or residence order, this is a temporary order which is issued before they make a final decision.

The Sheriff may then choose to place the case on hold, which is called “sisting” the case, to monitor any orders that have been put in place about a child. Alternatively, the Sheriff may set a second Child Welfare Hearing to review the case again.

The Sheriff may also decide that they need more information before they can make a decision and they may order a Child Welfare Report. This is where an independent solicitor or social worker would be appointed to speak to the parents, the child (if they are old enough) and other people involved in the child’s life. This is so that the Sheriff has more information they can use to come to a final decision.

If the Sheriff orders a Child Welfare Report, they will usually continue the case for around 6 to 8 weeks so the report can be prepared. You would then have a chance to consider the report with your solicitor before the next Child Welfare Hearing.

To consider matters of contact or residence, there is often more than one Child Welfare Hearing. If contact has stopped between the child and one parent, and the Sheriff decides to allow them to have contact with each other again, then the Sheriff will often want to gradually re-introduce contact. The Sheriff may also wish to review and monitor the decisions made for the child to ensure the welfare of the child.

A procedural hearing called an **Options Hearing** will also be scheduled. This is a hearing for the court to decide what type of full hearing is best to make a final decision on the case. There are different types of hearings that could be scheduled after this, including:

- **A Proof:** this is the most common type of hearing and it is about the evidence in the case.
- **A Debate:** this type of hearing focuses only on the legal arguments in the case.
- **A Proof Before Answer:** this hearing is about evidence and it is followed by a hearing on the legal arguments in the case.
- The **Options Hearing** can also be continued on one occasion.

Your solicitor will be able to advise you about all of these options. The court process can be a long one. It can be very stressful for you and for your children. Courts will give priority to cases involving children. However, the type and volume of evidence that the court may have to consider means that it could take 6 months or more before they make a decision. Some cases are in court for many years.

There can also be other procedures if one parent seeks an emergency order which cannot wait for the process to follow the normal timetable or until a full hearing. For example, if the father removes

the child from the mother's care, or refuses to return the child after an agreed period of contact.

In these situations, the mother may wish to seek emergency orders to have the child returned to her care. The solicitor for the parent who started the Court action can ask the Court to assign an **emergency type hearing** before the other parent receives notice of the court application. At this emergency type hearing, a temporary emergency order called **interim order** can be requested for the return of the child.

The Court can also grant a court order called an **interdict** to prevent the other parent from taking certain steps. For example, an order that prevents the father from removing the child from the mother's care. It is important to remember that this kind of orders will only be issued in emergency circumstances.



# WHAT DOES THE COURT LOOK AT?

The law gives guidance about what the court should consider when making decisions about children.

There are three general principles:

1. The most important thing for the court is what is best for your child.
2. The court will only get involved if that is better for your child than making no order at all.
3. If it is possible, and depending on the child's age and maturity, the child will have the chance, if they wish, to say what they want to happen. There are different ways of doing this. The Court can make a decision that is different to the views of a child if they consider it to be in the child's best interests. Again, what is best for the child is the most important consideration.

# CHILD WELFARE REPORT

To make a decision, the Sheriff or either party can ask for an order to prepare a Child Welfare Report. The Child Welfare Reporter is usually appointed from a list the court has. The Reporter is usually an experienced family lawyer or a social worker.

If a Child Welfare Report is ordered, the Sheriff will decide what the Reporter should investigate. These can include:

- Visiting both parents' homes
- Interviewing both parents
- Interviewing others such as nursery workers, health visitors or GPs, social workers or a domestic abuse case worker
- Observing contact between the child and the parents
- Observing the child before or after that contact.

If a Report is ordered, you can ask the Reporter to investigate certain issues. If the Reporter interviews you (or the father), they will usually ask about:

- Your accommodation – whether owned or rented, how many bedrooms there are etc.
- Your employment, how often you work and your current income
- Your health and use of alcohol/ drugs
- Your relationship with the father before you separated
- Your hopes about future arrangements and how these would work in practice.

The Report will usually take 6 to 8 weeks to prepare. The cost of the report can be covered by legal aid funding but if neither party has legal aid, then the court will decide who should pay for the report or whether that cost will be split between both parents.

## CURATOR

In some cases, one of the parties in

the case will request, or the Sheriff will decide, to appoint a curator *ad litem*.

The Curator is a person appointed to ensure that the interests of the child are protected. The role of the curator is usually broader than that of a Child Welfare Reporter.

The Curator can make an application to become a party to proceedings if they think that doing so is in the best interests of the child. A curator is often appointed in more complex cases that involve younger children.

## DOMESTIC ABUSE

Some sections of the Children (Scotland) Act 1995 deal specifically with situations of domestic abuse. If domestic abuse is brought to the court's attention, the court must consider:

- The need to protect your child from any abuse or risk of abuse
- The effect that that abuse might have on any child of the family. A child can be affected by abuse

that they have witnessed and they can be victims of abuse

- The ability of the parent who has been abusive (or might be abusive) to care for or meet the needs of your child
- The effect any abuse/risk of abuse might have on your ability to look after your child
- Whether it is appropriate to order contact where you and your abusive partner would have to cooperate with each other for that contact to happen.

## WHAT IS THE POSSIBLE OUTCOME?

It is very difficult to predict the outcome of child contact proceedings. This will depend on what the court considers is best for your child in your particular circumstances.

**You should ask your solicitor for advice or you can contact us to get more information.**

Your solicitor can give you advice and information about other ways to try and come to a care arrangement for your child/children without going to court. Whether that is right for you will depend on your circumstances.

## WHAT HAPPENS AFTER THE FINAL ORDER IS MADE?

If the arrangement put in place works, then the court's involvement will come to an end.

Following the making of a final order, either parent can bring the matter back to the Court to vary the final order. To do so, that parent would need to be able to prove that there has been a material change in circumstances. The process for doing this is called a **Minute of Variation**.

A solicitor can advise you on whether proceeding with a Minute of Variation would be in your child's interests, as the court is unlikely to make any change in the arrangements unless there

has been a material change in circumstances.

The court would usually decide at the full hearing, where parties and relevant witnesses need to give evidence, whether there has been enough of a change in circumstances to justify a change to the final order. If there are urgent matters arising, the court can also set down a child welfare hearing when a parent lodges a Minute of Variation with the court.

At the end of the case, or at certain points during it, the court can order one party to pay the other party's "expenses" (legal costs). The normal rule is that the party that "loses" will have to pay these legal costs. However, in family actions, the court is less likely to do this, but it is possible. If you have legal aid, your solicitor can ask for any expenses awarded against you to be reduced to nil.

## WHAT IF AN ORDER IS BREACHED?

An order from the court is binding and must be enforced. This means that, if any of the parents do not follow the terms of the order, they can be held in **contempt of court**. Contempt of court is when a person intentionally or recklessly fails to comply with a court order. If a parent is in contempt of court, they could receive a fine or a prison sentence.

In child contact cases, contempt of court often happens when the parent with whom the child lives most of the time does not let the other parent see the child. It can also happen when one parent does not obey the court order, for example, if he does not return the child at the required time and place.

Whether disobeying a court order will be contempt of court will depend on the circumstances of a specific case. If one parent breaches the order, the other parent will have to go back to Court for a hearing in front of the Sheriff regarding contempt of court.

# GLOSSARY OF TERMS

<b>Gender-based violence</b>	describes crimes which are mostly, but not only, perpetrated by men against women (like domestic abuse, rape, stalking, forced marriage).
<b>Initial Writ</b>	a document that sets the orders you are asking the court to make about the child and why.
<b>Interdict</b>	a court order issued to prevent one of the parents from taking certain steps. Used only in emergency situations.
<b>Interim order</b>	a temporary emergency order used to request the return of a child to a parent.
<b>Legal aid</b>	Governmental assistance to help pay for legal representation.

# ABOUT US

The Scottish Women's Rights Centre (SWRC) is a collaborative project that provides **free legal information, advice, advocacy and representation** to women affected by violence and abuse.

## Who is involved?

We are a collaboration between Rape Crisis Scotland, JustRight Scotland and the University of Strathclyde Law Clinic.

## Need more information?

To learn more about us, visit our website and follow us on our social media channels.

[www.scottishwomensrightscentre.org.uk](http://www.scottishwomensrightscentre.org.uk)

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 @SWRC\_

 /swrc



# SUPPORT AGENCIES AND USEFUL CONTACTS

## Emergency Services

If you are in immediate danger, call: 999

## Rape Crisis Scotland

**National Helpline:** 08088 01 03 02

(open daily 6pm-midnight)

**[www.rapecrisisscotland.org.uk](http://www.rapecrisisscotland.org.uk)**

## Scottish Women's Aid

**Domestic Abuse and Forced Marriage**

**Helpline:** 0800 027 1234

(open daily, 24/7)

**[www.womensaid.scot](http://www.womensaid.scot)**

## Victim Support Scotland

**Helpline:** 0800 160 1985

(open Monday to Friday, 8am to 8pm)

**[www.victimsupport.scot](http://www.victimsupport.scot)**

## Suzy Lamplugh Trust

**National Stalking Helpline:**

08088 02 03 00

(open on weekdays, 9:30am to 4pm,  
and Wednesdays, 1pm to 4pm).

**[www.suzylamplugh.org](http://www.suzylamplugh.org)**

## NSPCC

**FGM helpline:** 0808 800 5000

open Monday to Friday, 8am to 10pm  
and at the weekends, 9am to 6pm.

**[www.nspcc.org.uk](http://www.nspcc.org.uk)**

## AMINA - The Muslim Women's Resource Centre

**Helpline:** 0808 801 0301

(open Monday to Friday, 10am to 4pm).

**[www.mwrc.org.uk](http://www.mwrc.org.uk)**

## Scottish Association for Mental Health

**Phone:** 0141 530 1000

**[www.samh.org.uk](http://www.samh.org.uk)**

Our helplines:  
**08088 010 789**

### Legal Information

Monday	2 - 5 pm
Tuesday	6 - 8 pm
Wednesday	11 am - 2 pm
Friday	10 am - 1 pm

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### Advocacy Support

Tuesday	11 am - 2 pm
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### Sexual Harassment

Thursday	5 - 8 pm
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