Chapter 7

State intervention and child protection measures in Scotland

1 INTRODUCTION

Until recently, as in South Africa, the main source of Scottish family law was the common law. However, since the late 1960s there has been a steady programme of statutory activity, driven by the Scottish Law Commission. This has led to the transformation of Scottish family law into that area of Scottish private law which is the most extensively regulated by statute.¹

The most significant step in this “quasi-codification” of Scottish family law thus far has been the introduction of the Children (Scotland) Act 1995 (hereafter “the 1995 Act”). Part I of this Act deals with general aspects of the law of parent and child (ie the meaning and acquisition of parental responsibilities and parental rights),² and Part II deals with state intervention into child welfare.³

One of the goals underlying the 1995 Act was the desire to bring Scottish law into compliance with the United Nations Convention on the Rights of the Child 1989,⁴ especially with regard to article 12 of the Convention, which deals with the participation rights of children.

¹ Edwards in Davel (ed) Children’s rights 38.
² See ch 7 par 2 below.
³ See ch 7 par 3 below.
⁴ See ch 9 par 2 below.
2 PARENTAL RESPONSIBILITIES AND PARENTAL RIGHTS IN BROAD OUTLINE

Since Part I of the 1995 Act deals with general aspects of the law of parent and child, and the purpose of this study is to investigate child protection and state intervention measures (which are dealt with in Part II), this discussion of the general aspects of the 1995 Act will be synoptic.

2.1 What are parental responsibilities and rights?

In line with legislation in other counties,\(^5\) the Children (Scotland) Act 1995 attempts to reform the relationship between parent and child in various ways. One of the areas of reform is that parents are seen to owe responsibilities to the child, rather than only having rights over the child. Parental rights still exist in terms of the 1995 Act, but the Act expressly provides that these rights are given to parents only in order to enable the fulfilment of parental responsibilities, and should be exercised in the best interests of the child.\(^6\)

For purposes of Part I of the 1995 Act, a parent is defined as the child’s genetic mother or father.\(^7\) The father of an extra-marital child is not a parent for these purposes.\(^8\) A person is also a parent if parentage is established by the Human Fertilisation and Embryology (Scotland) Act 1990\(^9\) (which deals with artificial insemination), in spite of the absence of

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\(^6\) S 2(1).

\(^7\) 1995 Act s 15(1).

\(^8\) S 3(1)(b). Also see ch 7 par 2.2 below.

\(^9\) Ss 27-30.
a genetic relationship. An adoptive parent is also a parent.

A parent has the following responsibilities to a child:

“(a) to safeguard and promote the child’s health, development and welfare;
(b) to provide, in a manner appropriate to the stage of development of the child -
(i) direction;
(ii) guidance,

to the child;
(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
(d) to act as the child’s legal representative.”

The responsibility to safeguard and promote the child’s health, development and welfare is sufficiently amorphous to cover a wide range of matters: the child’s education, health, religion, discipline, et cetera. Similarly, the parent’s responsibility to provide direction and guidance to the child is a wide one: the provision of counsel for the child in every aspect of the child’s life. As the 1995 Act proceeds on the basis that it is in the child’s best interests to have the benefit of two parents, the responsibility, if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis is of the utmost importance.

These responsibilities supersede any analogous duties imposed on a parent at common

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10 1995 Act s 15(1).
11 Ibid.
12 In Part I of the 1995 Act, “child” means a person below 18 years of age (s 15(1)).
13 S 1(1)(a)-(d).
14 S 1(1)(a).
15 S 1(1)(b).
16 S 1(1)(c).
law, but they do not replace specific statutory duties,\textsuperscript{17} for example the duty to support the child\textsuperscript{18} and to ensure the child’s education.\textsuperscript{19} The parental responsibilities have to be carried out to the extent that it is practicable and in the interests of the child to do so.\textsuperscript{20} Parental responsibilities end when the child reaches the age of 16, except the responsibility to give the child guidance, which lasts until a young person reaches the age of 18.\textsuperscript{21}

In order to fulfil these responsibilities, a parent has the following rights:\textsuperscript{22}

\begin{itemize}
  \item \textit{“(a) to have the child living with him or her or otherwise to regulate the child’s residence’}
  \item \textit{(b) to control, direct or guide in a manner appropriate to the stage of development of the child, the child’s upbringing;}
  \item \textit{(c) if the child is not living with \[the parent\], to maintain personal relations and direct contact with the child on a regular basis; and}
  \item \textit{(d) to act as the child’s legal representative.”}
\end{itemize}

These parental rights supersede any analogous right enjoyed by a parent at common law,\textsuperscript{23} but they do not replace specific statutory rights.\textsuperscript{24} Parental rights end when the child reaches the age of 16.\textsuperscript{25}

\begin{itemize}
  \item \textsuperscript{17} S 1(4).
  \item \textsuperscript{18} in terms of the Family Law (Scotland) Act 1985.
  \item \textsuperscript{19} in terms of the Education (Scotland) Act 1980.
  \item \textsuperscript{20} S 1(1).
  \item \textsuperscript{21} S 1(2).
  \item \textsuperscript{22} S 2(1).
  \item \textsuperscript{23} S 2(5).
  \item \textsuperscript{24} eg the right to education protected by the Education (Scotland) Act.
  \item \textsuperscript{25} S 2(7).
\end{itemize}
When reaching any major decisions in fulfilling parental responsibilities or exercising parental rights, the parent must have regard as far as practicable to the views of the child (if the child wishes to express them). The child’s age and maturity should be taken into account. It is presumed that a child of 12 or over is of sufficient age and maturity to form a view. However, the views of younger children are relevant if they in fact have sufficient maturity.\(^{26}\)

Thompson\(^{27}\) warns that this obligation to consult the child arises only in respect of major decisions. He adds that the importance of a decision will be determined objectively rather than from the child’s or parent’s perspective.

The parental responsibility and right to act as the child’s legal representative\(^{28}\) enables a parent to enter into transactions on behalf of a child where the child lacks active legal capacity.\(^{29}\) In terms of the Age of Legal Capacity (Scotland) Act 1991, a person under the age of 16 years has no legal capacity to enter into any transaction.\(^{30}\) However, children over the age of 12 years have testamentary capacity, and the capacity to consent to adoption orders in relation to them.\(^{31}\)
2.2 Who has parental responsibilities and rights?

A child’s birth mother automatically has parental responsibilities and rights in relation to her child whether or not she has been married to the child’s father.\textsuperscript{32} Her age is also irrelevant.\textsuperscript{33} A child’s father automatically obtains parental responsibilities and rights only if he is or was married to the child’s mother at the date of the child’s conception “or subsequently”.\textsuperscript{34} Where a father never marries the child’s mother, he \textit{prima facie} has no parental responsibilities and rights.

There are two ways in which he can obtain parental responsibilities and rights without marrying the child’s mother. First, if the mother has not previously been deprived of some or all of her parental responsibilities and rights (eg as a result of the child being adopted), she may conclude an agreement with the father in terms of which he obtains all the responsibilities and rights which he would have got had he married the mother, from the date stipulated in the agreement.\textsuperscript{35} It is important to note that no court is involved, and it is irrelevant that a court would take the view that it was not in the child’s interests that the father should have parental responsibilities and rights.\textsuperscript{36}

Secondly, the father can apply to the sheriff court\textsuperscript{37} or Court of Session\textsuperscript{38} in terms of section

\textsuperscript{32} S 3(1)(a) of the 1995 Act.
\textsuperscript{33} Age of Legal Capacity (Scotland) Act s 1(3)(g).
\textsuperscript{34} S 3(1)(b). The phrase “or subsequently” in the Act indicates that the father will obtain parental responsibilities and rights even if he marries the child’s birth mother after the child’s birth.
\textsuperscript{35} S 4(1).
\textsuperscript{36} Thompson \textit{Family law} 219.
\textsuperscript{37} The judge of first instance in civil proceedings in Scotland is known as a sheriff (analogous to our magistrate), and thus the court is known as a sheriff court - see Edwards in Davel (ed) \textit{Children’s rights} 43.
\textsuperscript{38} The Court of Session is the Scottish High Court.
11 for an order giving him parental responsibilities and rights.\(^{39}\) He has title to sue as a person who “not having, and never having had, parental responsibilities and rights in relation to the child, claims an interest”.\(^{40}\) His genetic and/or emotional ties with the child are *per se* sufficient to constitute an interest.\(^{41}\) The welfare of the child is the paramount consideration in deciding whether to grant such an order.\(^{42}\) As a matter of fact, any person, for example the child’s grandparents or a stepparent, can apply under the aforementioned provision to obtain parental responsibilities and rights; again their genetic and/or emotional ties would constitute sufficient interest.\(^{43}\)

Thompson\(^{44}\) states that the fact that a father does not automatically acquire parental responsibilities and rights in Scottish law may be in contravention of article 8 (respect of private and family life) and may amount to discrimination against unmarried fathers (prohibited by article 13) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. However, the matter has not been challenged.

### 2.3 The section 11 orders

Another area of reform brought about by the 1995 Act is the abolition of the common-law concepts of rights of custody and access.\(^{45}\) The awarding of sole custody of a child to one parent (usually the child’s mother) upon divorce, was seen at common law as conferring the right to regulate most areas of the child’s life. This effectively excluded the non-
custodian parent from the child’s life after divorce (except in cases where the non-
custodian parent had access right to the child).\textsuperscript{46} The 1995 Act replaced this with a child-
centred model where both parents (if married) are encouraged to play a continuing role in
the child’s life after divorce. It is presumed that this joint responsibility will continue after
divorce unless there is a good reason to alter it by court order (eg to replace it with an
order depriving one of the parents of his or her parental responsibilities or rights).\textsuperscript{47}

The heart of these new rules relating to the parent-child relationship is found in section 11
of the 1995 Act. Instead of applying for an order of custody or access, parents can now
only apply for one or more of a number of specialised but flexible orders. A residence
order, for example, can be sought. This order regulates where a child under 16 should
live.\textsuperscript{48} A contact order regulates the arrangements for maintaining personal relations with
a child.\textsuperscript{49} A “specific issue order” regulates any specific issue relating to parental authority,
such as in what religion the child should be raised.\textsuperscript{50} Finally an order can be sought from
the court to deprive any other person of aspects of parental rights or responsibilities.\textsuperscript{51}

3 THE ROLE OF LOCAL AUTHORITIES IN THE UPBRINGING OF CHILDREN

3.1 Introduction

\textsuperscript{46} Edwards in Davel (ed) \textit{Children’s rights} 40.
\textsuperscript{47} S 11(2)(a) read with S 11(7)(a).
\textsuperscript{48} S 11(2)(c).
\textsuperscript{49} S 11(2)(d).
\textsuperscript{50} S 11(2)(e).
\textsuperscript{51} S 11(2)(a).
This section (par 3) deals with the state intervention measures regulated in Part II of the 1995 Act.\(^\text{52}\)

In Scottish law, local authorities have a statutory role to play in the upbringing of children in various circumstances. At one extreme, this role may simply take the form of advice and guidance to the family; at the other, it might involve the compulsory removal of the child from the family.

It is the duty of every local authority to safeguard and promote the welfare of children in its area who are in need,\(^\text{53}\) and so far as is consistent with that duty, promote the upbringing of such children by their families, by providing a range and level of services appropriate to the children’s needs.\(^\text{54}\) In addition to this, local authorities owe various duties, described below,\(^\text{55}\) to those children they look after.

A child who is “looked after” by a local authority, is a child\(^\text{56}\)

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(a) for whom they are providing accommodation under section 24 of this Act;\(^\text{57}\)

(b) who is subject to a supervision requirement and in respect of whom they are the relevant local authority\(^\text{58}\)

\(^{52}\) See ch 7 par 1 above.

\(^{53}\) ie children who are in need of care and attention because they are unlikely to achieve or maintain, or have the opportunity of achieving or maintaining, a reasonable standard of health or development unless the local authority provides them with services; children whose health or development is likely to be significantly impaired or further impaired unless such services are provided; children who are disabled; or children who are affected adversely by the disability of any other person in their families (s 93(4)).

\(^{54}\) S 22(1).

\(^{55}\) See ch 7 par 3.2 below.

\(^{56}\) S 17(6).

\(^{57}\) in terms of ch 1 of Part II of the 1995 Act. See ch 7 par 3.5 below.

\(^{58}\) in terms of ch 2 & 3 of Part II of the 1995 Act. See ch 7 par 3.6 below.
It is important to note that provision of accommodation by local authorities (category (a) above)\(^60\) is non-compulsory.\(^61\) In the case of children who are the subjects of supervision requirements (category (b) above),\(^62\) on the other hand, the need of the child is for guidance, treatment or control which can only be achieved by compulsory intervention. In the case of a “parental responsibilities order” (category (c) above)\(^63\) the parental rights and responsibilities in respect of the child are transferred to the local authority, and the parent is barred from exercising any of these rights and responsibilities. The purpose of this transfer is a protective one.

A child who is “looked after”\(^64\) by a local authority is therefore not necessarily a child who lives in accommodation provided by a local authority, or accommodation away from his or her parents. Regulations expressly provide that a local authority looking after a child may make arrangements for the child to be cared for by his or her own parents or other person who has parental responsibility in respect of the child.\(^65\) Norrie indicates that the presumption may be that, notwithstanding that a local authority is looking after a child, the

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\(^{59}\) in terms of ch 4 of Part II of the 1995 Act. See ch 7 par 3.7 below.

\(^{60}\) See ch 7 par 3.5 below.

\(^{61}\) See ch 7 par 3.5.3 below.

\(^{62}\) See ch 7 par 3.6 below.

\(^{63}\) See ch 7 par 3.7 below.

\(^{64}\) The pre-1995 legislation dealt with children “in care”.

\(^{65}\) Arrangements Regulations 1996 reg 16(1) (promulgated in terms of the Children (Scotland) Act). The reference in this regulation to “a person who is not a parent of his but who has parental responsibility for him” refers to a person who has legally acquired parental responsibility in respect of a child in terms of s 11(3)(a)(i) of the 1995 Act, ie a person who “not having, and never having had, parental responsibilities or parental rights in relation to the child, [who] claims an interest”. See ch 7 par 2.2 above.
child should remain at home. This is because most children who are being looked after by a local authority will satisfy the definition of a child “in need”, and local authorities have a duty, as indicated above, to promote the upbringing of children “in need” by their families.66

3.2 Duties of local authorities to children they are looking after

Where a child is looked after by a local authority, it has the duties to67

“(a) safeguard and promote [the child’s] welfare (which shall, in the exercise of their duty to [the child], be their paramount concern);
(b) make such use of services available for children cared for by their own parents as appear to the authority reasonable in [the particular child’s] case;
(c) take such steps to promote, on a regular basis, personal relations and direct contact between the child and any person with parental responsibilities in relation to [the child] as appear to them to be both practicable and appropriate.”

It is important to note that, in terms of section 17(6), this duty to look after the child arises in respect of all children who are “looked after” by local authorities, in other words not only when the child has been provided with accommodation in terms of s 25 of the 1995 Act,68 but also when the child is in local authority accommodation as a result of a supervision requirement,69 or any order, warrant or authorisation made under the 1995 Act, as a result of which the local authority has responsibilities in respect of the child.70

With regard to duty (c), “personal relations and direct contact” is broader than mere physical contact and might include, in appropriate circumstances, contact by telephone,

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66 Norrie Parent and child 510.
67 S 17(1).
68 See ch 7 par 3.5 below.
69 See ch 7 par 3.6.9.4 below.
70 See ch 7 par 3.7 below.
letters or the exchange of gifts and photographs. The purpose of contact is to preserve the bond between the child and those with parental responsibilities and parental rights, and to ease the eventual return home of the child.\textsuperscript{71} The contact decision may, however, not be within the competence of the local authority, if, for example, the child is subject to a supervision requirement which contains a condition as to contact.\textsuperscript{72}

Before making any decision in respect of a child whom it is looking after, or is proposing to look after, a local authority must, as far as reasonably practicable, ascertain the views of the child, his or her parents, any person who is not the child’s parent but who has parental rights\textsuperscript{73} in respect of the child, and any other person whose views the authority considers to be relevant.\textsuperscript{74} There is no presumption here, as there is in various other statutory provisions, that a child of 12 years of age or more is capable of forming a view. The child’s capacity to do so is a question of fact. Of course, an incorrect assessment of that fact leaves any decision open to challenge.\textsuperscript{75}

In making such decision, the local authority must have regard\textsuperscript{76}

\begin{quote}
(a) to the views (if he [or she] wishes to express them) of the child concerned, taking account of [the child’s] age and maturity;
(b) to such views [of any of the other persons whose views had to be sought] as they have been able to ascertain; and
(c) to the child’s religious persuasion, racial origin and cultural and linguistic background."
\end{quote}

\begin{flushleft}
\textsuperscript{71} Norrie \textit{Parent and child} 518.
\textsuperscript{72} See ch 7 par 3.6.9.4 below.
\textsuperscript{73} The fact that this s 17(3)(c) only mentions parental rights ("any person who is not a parent of his but who has \textit{parental rights} in relation to him" (my emphasis)) and not parental responsibilities seems to be an oversight.
\textsuperscript{74} S 17(3).
\textsuperscript{75} Norrie \textit{Parent and child} 519.
\textsuperscript{76} S 17(4).
\end{flushleft}
Although the duty is to have regard to these matters, the decision is, of course, governed by the child’s welfare. Most children who satisfy the criteria for becoming children who are looked after by a local authority will also fall within the definition of children who are “in need”.\(^77\) This will impose the additional duties on local authorities referred to above.\(^78\)

Further, if the child remains “looked after” at the time when he or she cease to be of school age or at any subsequent time, then once that child is no longer “looked after” by the local authority the latter is bound (unless satisfied that the child’s welfare does not require it) to advise, guide and assist that child until the age of 18, and it may do so until the child is 21.\(^79\) That assistance may include assistance in kind or in cash.\(^80\)

### 3.3 Care plans

Even before a child begins to be looked after\(^81\) by local authority, the authority must, as far as reasonably practicable, make a care plan to address the immediate and longer-term needs of the child with a view to safeguarding and promoting the child’s welfare.\(^82\)

In making the care plan, the local authority must have regard to the nature of the service to

\(^77\) See ch 7 fn 53 above.

\(^78\) See ch 7 par 3.2 above.

\(^79\) S 29(1) & (2).

\(^80\) S 29(3).

\(^81\) For a discussion of the circumstances in which children are looked after by local authorities, see ch 7 par 3.1 above.

\(^82\) Arrangements Regulations 1996 reg 3(1).
be provided, alternative courses of action, whether the local authority should seek a change in the child’s status (through adoption), the arrangements which need to be made for the time when the child will no longer be looked after by the local authority, the views of the child, the child’s religious persuasion, racial origin and cultural and linguistic background, and any further matters relating to the child that appear to be relevant to the making of the care plan. 83 If the child is to be accommodated by the local authority, issues of contact, health, education and the appropriateness of any residential establishment must be addressed in the care plan. 84

3.4 Reviews

If a child is being looked after and accommodated by a local authority, the case of the child must be reviewed within six weeks of the date of the placement. There must be a second review within three months of the first review, and thereafter the child’s case must be reviewed within six months of the previous review. 85 If the child is being looked after by a local authority but is not being accommodated by it, the first review of the child’s case must be within three months of the date on which the authority began to look after the child, with subsequent reviews within six months of the previous review. 86

3.5 Provision of accommodation by local authorities in terms of section 25 of the Children (Scotland) Act 1995

In broad terms, section 25 is designed to provide for cases in which parental care, or the care of guardians, has failed, whether permanently or temporarily, and there is no one else able and willing to look after the child. However, the non-compulsory nature of these

84 Arrangements Regulations 1996 reg 5.
85 Arrangements Regulations 1996 reg 9(1).
86 Arrangements Regulations reg 9(2).
provisions should be emphasised. Means for taking compulsory measures of supervision are provided for in chapters 2 and 3 of Part II of the 1995 Act, and will be dealt with below.\textsuperscript{87} The provisions of chapter 1, with which this section deals, contain no authority to remove a child or keep him or her against the wishes of the parents.

3.5.1 Provision of accommodation

A local authority \textit{may} provide accommodation for any child within its area if it considers that it would safeguard or promote the child’s welfare to do so.\textsuperscript{88} However, section 25(1) of the 1995 Act imposes upon local authorities \textit{the obligation} to provide accommodation\textsuperscript{89} for any child\textsuperscript{90} who appears to it to require this due to one or more of the following conditions being satisfied:

- No one has parental responsibility for the child.\textsuperscript{91}

- The child has been lost or abandoned. Since the child must be found within the area of the local authority, “lost” means lost to the parent or guardian (ie the parent or guardian has physically lost the child). “Abandoned” means left to his or her fate. However, it is not required that the circumstances create

\textsuperscript{87} See ch 7 par 3.6 below.

\textsuperscript{88} S 25(2).

\textsuperscript{89} which means accommodation for a continuous period of more than 24 hours (s 25(8)).

\textsuperscript{90} ie person under the age of 18 (s 93(2)(a)). It is interesting to note that parental rights end when the child reaches the age of 16 (s 2(7)). Parental responsibilities (including the responsibility to safeguard the child’s welfare (which includes the responsibility to provide accommodation)) also end when the child reaches the age of 16, except the responsibility to give the child guidance, which lasts until a young person reaches the age of 18 (s 1(2)(a) & (b)). Yet local authorities may provide certain children under the age of 18 years with accommodation, and in some cases has the obligation to provide certain children under the age of 18 with accommodation (s 25). This may be construed as contradictory. Also see ch 7 par 2.1 above.

\textsuperscript{91} See ch 7 par 2.1 above.
a likelihood of physical harm to the child. Consequently, it is regarded as abandonment to leave a child at a hospital (ie not to collect the child after his or her discharge) or with a local authority or with any other person who has no duties towards the child.92

- The person who has been caring for the child is prevented, whether permanently or not and for whatever reason, from providing the child with suitable accommodation or care. Although the word “prevented” suggests some external influence on the person, the words “for whatever reason” widen out this condition so that it covers any circumstance in which the person is unable to provide suitable accommodation or care. The condition is satisfied if the person is imprisoned, or made homeless, or falls ill, or is no longer able to cope with the child.93

In addition to falling within one or more of these conditions, the circumstances must indicate that the child, as a result of the condition, “requires” to be accommodated. Thus there must be a degree of necessity before the local authority’s duty arises. The local authority’s duty does not arise, for example, if the person who has been caring for the child can no longer do so but another person with parental responsibilities and parental rights is willing and able to do so.94

3.5.2 Type of accommodation

The local authority may choose which type of accommodation is to be provided for the child, but that decision, like any decision to be made in respect of a child whom it is looking after, must be made after considering the views of the child and various other persons, as

92 Norrie Parent and child 512.
93 Ibid.
94 Norrie Parent and child 512. See ch 7 fn 65 above.
well as the child’s religious persuasion, racial origin and cultural and linguistic background. The obligation here is to be sensitive to the fact that the child’s needs and welfare are invariably influenced by these matters.

The child may be placed in a domestic setting with a family other than his or her own. The local authority is prevented from placing a child with his or her parents or with a person who has parental responsibilities for the child under section 25. If it would be appropriate to do so the provision of accommodation by the local authority would not be necessary. Further, the child may be placed with foster parents, a relative or with any other suitable person, on such terms as to payment (by the authority or otherwise) as the authority may determine.

Alternatively, the local authority may maintain the child in a residential establishment, or make such other arrangements as appear to be appropriate. Where for any reason it appears to the local authority that it is no longer in a child’s best interests to remain in a placement, the local authority must make arrangements to terminate the placement as soon as practicable in the interests of the child.

3.5.3 Nature of duty and power to accommodate, and circumstances under which it exists

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95 S 17(3) & (4). See ch 7 par 3.2 above.
96 S 26(1)(a)(i).
97 Arrangements Regulations 1996 reg 16(2).
98 26(1)(a)(ii) & (iii).
99 S 26(1)(b).
100 S 26(1)(b) & (c).
Section 25(1) of the 1995 Act obliges local authorities to provide accommodation to children. However, it does not oblige parents and guardians to allow their children to be so accommodated. The voluntary nature of the provision of accommodation is preserved by the rule that a local authority may not provide accommodation under section 25 if any person objects, where that person has parental responsibilities in relation to [the child] and the parental rights mentioned in subsections 2(1)(a) and (b) of this Act, and is willing and able to provide, or to arrange to have provided, accommodation for [the child].”

The objection of any other person, however willing and able to provide accommodation for the child, is irrelevant. So, for example, a local authority is not prohibited from providing accommodation to a child whose mother has abandoned him or her by the objection of his or her father, where the father has no parental responsibilities and parental rights in relation to his child.

If the person with parental responsibilities and rights in respect of the child wishes to take over the provision of accommodation for the child, the local authority's duty and power to do so is terminated, but only if such person is willing and able immediately to take over the provision of accommodation. “Ability” in this context refers to the physical possibility of providing accommodation and the absence of any legal constraint in doing so. It does not entitle a local authority to do an assessment of the suitability of the accommodation that the parent proposes to provide. However, it should be kept in mind that such an

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102 S 25(6)(a).
103 The right to have the child living with him or her or otherwise to regulate the child's residence. See ch 7 par 2.1 above.
104 The right to control, direct and guide the child's upbringing. It should be kept in mind that parental rights end when the child reaches the age of 16 (s 2(7)), as do parental responsibilities, except the responsibility to give the child guidance, which lasts until a young person reaches the age of 18 (s 1(2)(a) & (b)). Also see ch 7 par 2.1 above.
assessment was implicit in the local authority’s original acquisition of the duty to provide accommodation.\textsuperscript{105}

The prohibition on providing accommodation to a child when a person entitled to do so objects, does not apply in two circumstances. First, when the child is at least 16 years old and he or she agrees to be provided with accommodation, the local authority may do so even against the objection of a person with parental responsibilities and parental rights who is willing and able to provide the child with accommodation.\textsuperscript{106} It is considered that at that time the child’s wishes to be accommodated are more important than a parent’s wishes to terminate the provision of accommodation, and should be given precedence. However, according to Norrie,\textsuperscript{107} this rule is redundant, as, once the child reaches the age of 16 years there is no person with the parental right to have the child living with him or her or otherwise to determine the child’s residence, or the parental right to control, direct or guide the child’s upbringing.\textsuperscript{108} Consequently, there is no person who is able relevantly to object to the local authority providing accommodation to the child.\textsuperscript{109}

Secondly, the local authority may provide accommodation in the face of a relevant objection when a person in whose favour a residence order has been made under section 11 of the 1995 Act so agrees.\textsuperscript{110} A person “in whose favour” a residence order has been made means a person who would not otherwise than under such order have the parental right to determine the child’s residence, for a residence order is never made “in favour” of a person with the right of residence. Rather, a residence order in respect of a person with

\begin{itemize}
\item \textsuperscript{105} Norrie \textit{Parent and child} 515. See ch 7 par 3.5.1 above.
\item \textsuperscript{106} S 25(7)(a).
\item \textsuperscript{107} Norrie \textit{Parent and child} 516.
\item \textsuperscript{108} See ch 7 par 3.2 above.
\item \textsuperscript{109} Norrie \textit{Parent and child} 516.
\item \textsuperscript{110} S 27(7)(b).
\end{itemize}
a right of residence regulates how that pre-existing right is to be exercised.\(^{111}\)

### 3.6 Children in need of compulsory measures of supervision

#### 3.6.1 Introduction

Sometimes circumstances can arise where it is not possible to provide support for a child on a voluntary basis and the only way to safeguard the child’s welfare is through supervision requirements, which are compulsory in nature.\(^{112}\) In Scottish law, children in need of compulsory measures of supervision are dealt with by a children’s hearing.\(^{113}\)

The children’s hearing system was initially introduced by Part III of the Social Work (Scotland) Act 1968. The 1995 Act substantially re-enacts Part III of the 1968 Act. Though some important revisions were made, the underlying philosophy of the system was not changed. In particular, the procedures to be followed and the possible outcomes available remain applicable both to children who, through neglect or ill-treatment, are in need of care and protection and to children who have committed offences. The underlying premise is that in both categories the fundamental need of the child is for guidance, treatment or control which can be achieved only by compulsory intervention.\(^{114}\)

#### 3.6.2 The children’s hearing and the reporter

The two key elements in the children’s hearing system are a lay tribunal (known as the children’s hearing), and an official charged with arranging and bringing cases before the

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\(^{111}\) Norrie *Parent and child* 516. Also see ch 7 par 2.3 above.

\(^{112}\) S 70.

\(^{113}\) See ch 7 par 3.6.2 below.

\(^{114}\) Norrie *Parent and child* 566.
children’s hearing (known as the reporter).\textsuperscript{115} A children’s hearing consists of a chairperson and two other members, and must include both a man and a woman.\textsuperscript{116} The members of a children’s hearing are chosen from the members of children’s panels constituted for each local authority area (comprising lay members of the public).\textsuperscript{117} The members of children’s panels are appointed by the Secretary of State, who has an unfettered discretion as to whom he or she may appoint.\textsuperscript{118} In practice, however, appointments are made from those nominated by Children’s Panel Advisory Committees (CPACs).\textsuperscript{119} CPACs have a duty to submit names of possible panel members and to advise the Secretary of State as required on the suitability of persons referred to him or her as possible members.\textsuperscript{120}

Reporters are employed by the Scottish Children’s Reporter Administration (SCRA),\textsuperscript{121} and act independently of the local authority.\textsuperscript{122} The term “reporter” means the Principal Reporter and any officer of the SCRA to whom the Principal Reporter has delegated any of his or her functions.\textsuperscript{123} The SCRA is responsible for the management of reporters, including their discipline and removal from office and their deployment throughout Scotland for the purposes of performing their duties.\textsuperscript{124} Reporters must comply with any instructions

\begin{itemize}
  \item \textsuperscript{115} Norrie Parent and child 567.
  \item \textsuperscript{116} S 39(5).
  \item \textsuperscript{117} S 39(1).
  \item \textsuperscript{118} Sch 1, par 1 of 1995 Act.
  \item \textsuperscript{119} Formed in terms of Sch 1, par 3-7.
  \item \textsuperscript{120} Sch 1, par 6.
  \item \textsuperscript{121} Local Government etc (Scotland) Act 1994 s 128(4) & (5).
  \item \textsuperscript{122} 1995 Act s 40(2).
  \item \textsuperscript{123} S 40(5).
  \item \textsuperscript{124} Local Government etc (Scotland) Act s 128(7).
\end{itemize}
3.6.3 Investigation and transmission of information

The children’s hearing system in Scotland hinges on the question whether compulsory measures of supervision may be necessary in respect of a child. The satisfactory operation of any system of care and protection of children depends on the adequacy of the following processes: \(^{126}\)

- First, the means for ascertaining in which cases compulsory measures of supervision may be necessary.
- Secondly, the means for conveying information to the appropriate authorities so that action can be taken.

The role of the so-called “reporter”\(^ {127}\) is central in these processes. However, although the reporter has certain duties of investigation,\(^ {128}\) he or she is almost always dependent initially on information supplied by others. As will be seen below, this information can be supplied by

- “any person”
- a local authority, or
- a court.

First, the 1995 Act provides that where any person has reasonable cause to believe that

\(^{125}\) Local Government etc (Scotland) Act s 131(2).

\(^{126}\) Norrie *Parent and child* 570.

\(^{127}\) The reporter is the official charged with arranging and bringing cases before the children’s hearing (Norrie *Parent and child* 567).

\(^{128}\) See ch 7 par 3.6.6.1 below.
compulsory measures of supervision may be necessary in respect of a child, he or she may (and if a police officer he or she must) give to the reporter\textsuperscript{129} such information about the child as he or she has been able to discover.\textsuperscript{130}

Secondly, where a local authority receives information, for example from social workers, which suggests that compulsory measures of supervision may be necessary in respect of a child, it is obliged to cause inquiries to be made into the case.\textsuperscript{131} If it appears from these inquiries that compulsory measures of supervision may be required in respect of the child, the local authority is obliged to give to the reporter such information about the child as it has been able to discover.\textsuperscript{132}

From the above it is clear that there may be a delay in information reaching the reporter while the local authority investigates the information and considers measures alternative to compulsory measures of supervision. However, if the statutory requirement that information must be transmitted whenever it appears that compulsory measures of supervision “may” be necessary in respect of the child is strictly observed, that consequence will be less severe. The local authority has to decide, in cases in which it receives information, whether there “may be” a need for compulsory measures but not whether there is an actual need. Accordingly, it has the obligation to transmit information if it is of the view that compulsory measures of supervision may be needed, even if in its judgment alternative measures, or no action, would be preferable.\textsuperscript{133} The wording used is in contrast with that applied to the reporter, who has to take a preliminary decision on

\begin{itemize}
\item\textsuperscript{129} See ch 7 par 3.6.6.1 below.
\item\textsuperscript{130} S 53(2).
\item\textsuperscript{131} This obligation is incumbent on the local authority as such and therefore on all its agencies which may come in possession of such information, such as the social work department, the education department, local authority schools and local authority medical services (Norrie \textit{Parent and child} 570).
\item\textsuperscript{132} S 53(1).
\item\textsuperscript{133} Norrie \textit{Parent and child} 570.
\end{itemize}
whether compulsory measure of supervision “are” necessary in respect of the child.\(^{134}\)

It follows that the central role of the reporter is preserved in cases in which information is first received by a local authority, as well as in other cases, but only if the limitations on the functions of the local authority are adhered to.

Thirdly, where it appears to a court in relevant proceedings\(^{135}\) that any of the conditions for referral\(^{136}\) (except that the child has committed an offence) are satisfied in respect of a child, it may refer the matter to the reporter, specifying the condition.\(^{137}\) The reporter must then make such investigations as he or she thinks appropriate and, if he or she considers that compulsory measures of supervision are necessary, arrange a children’s hearing at which the condition specified will be treated as if it were a ground of referral established in an application to the sheriff.\(^{138}\)

If a child has been arrested on suspicion of committing an offence and detained in a place

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\(^{134}\) S 56(6). See ch 7 par 3.6.6.1 below.

\(^{135}\) “Relevant proceedings” are defined in s 54(2) of the 1995 Act. They are a) an action for divorce or judicial separation or for declarator (ie a declaratory order made by the Court of Session) of marriage, nullity of marriage, parentage or non-parentage; b) proceedings relating to parental responsibilities or parental rights within the meaning of Part I of the 1995 Act; c) proceedings for an adoption order under the Adoption (Scotland) Act 1978 or for an order under section 18 of that Act declaring a child free for adoption; and d) proceedings for an offence under section 35 (failure by parent to secure regular attendance by his or her child at a public school), 41 (failure to comply with an attendance order) or 42(3) (failure to permit examination of the child) of the Education (Scotland) Act (1995 Act s 54(2)). In addition, a criminal court which has convicted a person of certain offences (ie vagrants preventing children from receiving education, sexual offences, and offences in respect of persons aged 17 years or over which constitute the crime of incest) may refer the child victim or any child who is or is likely to become a member of the same household as the offender to the reporter and certify that the offence is a ground established for the purpose of a referral to the children’s hearing (Criminal Procedure (Scotland) Act 1995 s 48(1)).

\(^{136}\) See ch 7 par 3.6.5 below in this regard.

\(^{137}\) S 54(1).

\(^{138}\) S 54(3).
of safety, but it is decided that criminal charges are not to be proceeded with, the reporter must be informed. Unless he or she considers that compulsory measures of supervision are not required in relation to the child,\textsuperscript{139} he or she must arrange a children’s hearing to which the case will be referred.\textsuperscript{140} That children’s hearing must begin not later than the third day after the reporter received the information,\textsuperscript{141} during which time the child may be kept in the place of safety.\textsuperscript{142}

\subsection*{3.6.4 Children and relevant persons}

For the purposes of the children’s hearing system, a child is a person who\textsuperscript{143}

\begin{itemize}
  \item has not attained the age of 16 years, or
  \item if currently subject to a supervision requirement, is less than 18 years of age, or
  \item has been referred to a children’s hearing in terms of regulations made under section 33 of the 1995 Act, by a court in England and Wales or in Northern Ireland.
\end{itemize}

The “relevant person” in relation to the child has various duties and powers, including the duty to attend at all stages of the children’s hearing, the right to deny grounds of referral, the right to call for a review of a supervision requirement, and the power to appeal against

\textsuperscript{139} In which case the reporter must direct that the child shall no longer be kept in a place of safety (s 63(3)).

\textsuperscript{140} S 63(1).

\textsuperscript{141} S 63(2).

\textsuperscript{142} S 63(4).

\textsuperscript{143} S 93(2)(b) of 1995 Act.
any decisions of the hearing. The “relevant person” is defined as follows:144

“(a) any person enjoying parental responsibilities or parental rights under Part I of this Act;145
(b) any person in whom parental responsibilities or rights are vested by, under or by virtue of this Act;
(c) any person who appears to be a person who ordinarily (and other than by reason only of his or her employment) has charge of, or control over, the child.”

Whether a person falls under either category (a) or category (b) will be determined by examining the legal relationship between the referred child and the relevant person.146 Since category (c) contains factual elements, it is more problematic. This category was designed to give an interest in the proceedings to those persons who play a significant part in the child’s upbringing, such as the unmarried father, grandparent or other relative who lives with the child and shares in his or her upbringing.147 However, Thompson148 argues that the father of an extra-marital child is not a relevant person, unless he has obtained parental responsibilities and rights or has de facto care of the child. In my view, Thompson’s statement applies to any person not falling under categories (a) and (b) (ie any person who not vested with parental responsibilities or rights), such as a grandparent of the child, and not only to the father of an extra-marital child. In order to qualify as a “relevant person” in terms of the 1995 Act, the person has to be vested with parental responsibilities, or have de facto care of the child.

Category (c) does not require any pre-existing legal or genetic relationship between the

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144 Ibid.
145 See ch 7 par 2.2 above.
146 Norrie Parent and child 568.
147 Ibid.
148 Thompson Family law 320.
person and the child, and is solely a question of fact. Norrie\textsuperscript{149} submits that the test is factual, and that a person is a relevant person if, in fact, that person ordinarily looks after or controls (other than by reason of employment) the child’s day-to-day upbringing. From this it follows that a person may move in and out of the category of “relevant person” depending on whether the test is satisfied at the appropriate time.

It should be noted that the term “parent” is not defined for the purposes of Part II of the 1995 Act.

3.6.5 \textit{Conditions for compulsory measures of supervision: grounds of referral}

The question whether a child is in need of compulsory measures of supervision arises only if certain conditions specified in the 1995 Act are satisfied.\textsuperscript{150} It is important to note that the satisfaction of any of the conditions does not in itself answer this question, but merely requires the following:\textsuperscript{151}

\begin{itemize}
  \item It firstly requires the reporter to decide whether or not to arrange a children’s hearing.
  \item Secondly, it requires the hearing to decide whether or not compulsory measures of supervision are required in the particular circumstances of the case.
\end{itemize}

\textsuperscript{149} Norrie \textit{Parent and child} 568-569. Also see \textit{S v Lynch} 1997 SLT 1377.

\textsuperscript{150} S 52(1) read with s 52(2). S 52(1) provides that the question of whether compulsory measures of supervision are necessary in respect of a child arises if at least one of the conditions mentioned in s 52(2) is satisfied.

\textsuperscript{151} Norrie \textit{Parent and child} 572.
There is no presumption that compulsory measures of supervision are required simply because one or more of the conditions in section 52(2) have been satisfied. Norrie considers the conditions to be exhaustive of the circumstances in which compulsory measures of supervision may be applied.\textsuperscript{152} There is no residual power to hold a child to be in need of compulsory measures of supervision on grounds extraneous to the specified conditions.\textsuperscript{153} These conditions are dealt with in what follows.

3.6.5.1 The child is beyond the control of any relevant person - s 52(2)(a)

Relevant persons\textsuperscript{154} have the right and responsibility to safeguard and promote the child’s health, development and welfare and to provide appropriate guidance and direction to the child.\textsuperscript{155} In order to do so, the relevant person must be able to control the child. An inability on the part of the relevant person to exercise that control, for whatever reason, is potentially harmful to the child, giving rise to the question whether compulsory measures are required. The control that should be exercised varies from one case to the next, depending on the particular needs and circumstances of the individual child.\textsuperscript{156}

Norrie indicates that problems may arise in applying this condition to older children,\textsuperscript{157}

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\textsuperscript{152} Norrie \textit{Parent and child} 572.

\textsuperscript{153} \textit{H v Harkness} 1998 SLT 1431.

\textsuperscript{154} See ch 7 par 3.5.4 above.

\textsuperscript{155} Ss 1 & 2. Also see ch 7 par 2.1 above.

\textsuperscript{156} \textit{D v Kelly} 1995 SLT 1220.

\textsuperscript{157} although still under the age of 16 - the parental right to control the child’s upbringing lapses at the age of 16 (see ch 7 par 2.1 above).
since the extent of control which a parent or other relevant person may exercise over a
cchild becomes progressively more uncertain as the child gets older. He argues that, in
cases of older children, the child’s conduct must not only show that there is an absence of
ccontrol, but must also be actually or potentially harmful to the child or to others so as to
make the exercise of parental control appropriate.\textsuperscript{158}

3.6.5.2 The child is falling into bad associations or is exposed to moral danger - s
52(2)(b)

Previously, it was required that the above should be caused “through lack of parental care”,
but these words were removed in 1975,\textsuperscript{159} and they do not appear in the 1995 Act. Bad
associations are not defined, nor is moral danger. Norrie suggests that any association
which may be harmful to the child’s welfare in any (not only in its moral) aspect may be
regarded as bad. Moral danger is usually equated with the risk of sexual corruption,\textsuperscript{160} but
Norrie indicates that there is no justification for limiting it to such cases.\textsuperscript{161} The mere
commission of an offence does not indicate moral danger, but exposure to circumstances
from which a habitual pattern of criminal conduct is likely to follow probably does.\textsuperscript{162}

Although there are obvious dangers in going beyond recognised categories such as

\textsuperscript{158} Norrie \textit{Parent and child} 572.
\textsuperscript{159} Children (Scotland) Act 1975, Sch 3 par 54(a).
\textsuperscript{160} See eg \textit{Sloan v B} 1991 SLT 530 and \textit{F v Kennedy (No 2)} 1993 SLT 1284.
\textsuperscript{161} Norrie \textit{Parent and child} 572.
\textsuperscript{162} \textit{D v Kelly} 1995 SLT 1220.
sexual corruption and criminality, a wide scope is clearly intended. Thus, exposure of a child to scenes of habitual drunkenness may involve moral danger, or at least indicate that the child is falling into bad associations. Similarly, circumstances in which the child is likely to indulge in solvent, drug or alcohol abuse may be regarded as harmful.¹⁶³

The question of moral danger should be approached in a practical way with reference to all the circumstances, including the conduct of the child (actual or anticipated) and the existence of arrangements for the care of the child or their absence. The question whether those circumstances create a reasonable risk of harm to the child should be considered.¹⁶⁴ Although some regard must be had to the way of life in the community in which the child has been brought up,¹⁶⁵ it is wrong to regard it as necessarily conclusive. The question is not one of what is permitted by the way of life in which the child has been brought up, but whether the circumstances alleged to constitute exposure to moral danger are regarded as morally unobjectionable by the community in which the child has been brought up. Even if that question can be answered in the affirmative (ie the circumstances are regarded as morally unobjectionable), it is merely an element to be taken into account. In some cases the fact that the conduct is morally unobjectionable to the values of the forum may be a strong factor and even conclusive, whereas in others the conduct in question may be so repugnant to the moral values generally prevailing in the forum that the latter must prevail.¹⁶⁶

3.6.5.3 The child is likely (i) to suffer unnecessarily; or (ii) to be impaired seriously in his or her health or development, due to a lack of parental care - s 52(2)(c)

¹⁶³ as well as being a ground of referral in itself under s 52(2)(j) or (k). See ch 7 par 3.6.5.10 & 3.6.5.11.

¹⁶⁴ Constanda v M 1997 SLT 1396 at 1400I-J; 1997 SC 217 at 222A-B.

¹⁶⁵ Thus the English court held that a 13-year-old-girl domiciled in Nigeria, who lived in England with a Nigerian to whom she had been married in Nigeria under a potentially polygamous form of marriage, was not thereby regarded as exposed to moral danger (Mohamed v Knott [1968] 2 All ER 563).

¹⁶⁶ Norrie Parent and child 573.
Parental care is not defined in the 1995 Act. Norrie\textsuperscript{167} submits that parental care should be understood as the care that is required to be provided to a child by a person (whether a parent or not) who is subject to the parental responsibilities listed in section 1 of the 1995 Act,\textsuperscript{168} in particular the responsibility to safeguard and promote the child’s health, development and welfare. The whole condition hinges on the concept “likelihood”. It thus follows that where it is likely that a child will experience a lack of parental care which is in turn likely to cause him or her to suffer unnecessarily or to be impaired seriously in his or her health or development, the condition is satisfied even if the child has never been in the care of his or her parents. The likelihood of lack of parental care may be inferred from past habits and lifestyle of the parents which resulted in the neglect of other children if these habits and lifestyle still persist.\textsuperscript{169}

The House of Lords has held in a different context that the word “likely” does not mean “probable” or “more likely than not”, but rather a “real possibility”.\textsuperscript{170} It may be difficult to forecast the precise form of damage which may be caused by a lack of care but the ground is established if some serious impairment is likely to follow the lack of parental care.\textsuperscript{171} Impairment of health or development is apt to cover mental or emotional as well as physical conditions. Parental refusal of consent to necessary medical or surgical treatment clearly falls within this condition.\textsuperscript{172}

Lack of parental care should be assessed objectively from the viewpoint of its effect on the child. The question is whether the child is likely to be harmed because he or she was being

\textsuperscript{167} Ibid.

\textsuperscript{168} See ch 7 par 2.1 above.

\textsuperscript{169} McGregor v L 1981 SLT 194. Also see D (A Minor) v Berkshire County Council [1987] 1 All ER 20.

\textsuperscript{170} Re H & Ors (Minors) (Sexual Abuse: Standard of Proof) [1996] 1 All ER 1.

\textsuperscript{171} Norrie Parent and child 573.

\textsuperscript{172} Norrie Parent and child 574.
deprived of the care that was reasonably to be expected of a reasonable parent.\textsuperscript{173} The mental disposition of the parent or relevant person need not be considered. Norrie puts it as follows:\textsuperscript{174}

“The condition is concerned with defining circumstances in which a child may be in need of compulsory measures of supervision and that need is not affected by the fact that the lack of care does not flow from a blameworthy disposition on the part of the parent or relevant person.”

Accordingly, this condition may be invoked where the parent is unable to provide the appropriate care due to incapacities or circumstances beyond his or her control, such as psychosis, mental deficiency or illness. Lack of parental care in this context should be distinguished from “wilful neglect” which is the criterion for the commission of a criminal offence relating to neglect of children under section 12 of the Children and Young Persons (Scotland) Act 1937.

3.6.5.4 The child is a child in respect of whom any of the offences mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act has been committed - s 52(2)(d)

It makes no difference that the offence was committed outside Scotland and could not, therefore, found a competent criminal charge in a Scottish court: the ground of referral is established when there has been conduct amounting to a scheduled offence.\textsuperscript{175} The

\textsuperscript{173} D v Kelly 1995 SLT 1220.

\textsuperscript{174} Norrie Parent and child 574.

\textsuperscript{175} The scheduled offences are the following:

“(i) any offence under Part I of the Criminal Law (Consolidation) (Scotland) Act 1995 (ie sexual offences)
(ii) any offence under sections 12, 15, 22 or 33 of the Children and Young Persons (Scotland) Act 1937 (ie wilful neglect of children)
(iii) any other offence involving bodily injury to a child under the age of 17 years
(iv) any offence involving the use of lewd, indecent or libidinous practice or behaviour towards a child under the age of 17 years.”
statutory reference to Schedule 1 is not a reference to particular crimes but a means of identifying or characterising the relevant conduct.\textsuperscript{176} Where any person is convicted of having committed a Schedule 1 offence or the offence of incest with a person aged 17 years or over\textsuperscript{177} or an offence under section 21 of the Children and Young Persons (Scotland) Act 1937,\textsuperscript{178} the court may refer the child victim to the reporter and certify that the commission of the offence shall be treated as a ground established for the purposes of referral to the children’s hearing.\textsuperscript{179}

However, a conviction is not a prerequisite for the existence of this ground and a child may be referred under this paragraph as in need of compulsory measures of supervision even though a prosecution is pending,\textsuperscript{180} or is not brought, or is brought and fails.\textsuperscript{181}

For the purpose of establishing this ground (and the following two grounds), the standard of proof is the civil and not the criminal standard, notwithstanding the fact that it involves proof of a criminal offence.\textsuperscript{182} The essence of this ground is whether the offence took place in relation to the child and not who the offender was (in contrast with the ground referred to in s 52(2)(f) below). Consequently it is sufficient that the commission of the offence be proved even if the perpetrator cannot be identified.\textsuperscript{184} Since these proceedings are civil

\begin{itemize}
\item \textsuperscript{176} S v Kennedy 1996 SLT 1087 at 1093H.
\item \textsuperscript{177} This provision is tautologous - incest with a person aged 17 years or over is in itself a scheduled offence.
\item \textsuperscript{178} vagrants preventing children from receiving education.
\item \textsuperscript{179} Criminal Procedure (Scotland) Act s 48. This also applies to children who are members of the same household as the offender, which is a ground of referral (see ch 7 par 3.6.5.6 below).
\item \textsuperscript{180} Ferguson v P 1989 SLT 681.
\item \textsuperscript{181} Kennedy v B 1992 SCLR 55.
\item \textsuperscript{182} McGregor v D 1977 SC 330.
\item \textsuperscript{183} S v Kennedy 1987 SLT 667 at 669L.
\item \textsuperscript{184} Kennedy v F 1985 SLT 22; McGregor v K 1982 SLT 293.
\end{itemize}
proceedings, a husband or wife is, in principle, a compellable witness as to the commission of the offence by the other spouse.\textsuperscript{185}

3.6.5.5 The child is, or is likely to become, a member of the same household as a child in respect of whom any of the offences referred to in paragraph 3.6.5.4 (condition (d)) above has been committed - s 52(2)(e)

As with the previous ground, the identity of the offender is not in issue under this condition. Consequently it is sufficient that the commission of the offence be proved even if the perpetrator cannot be identified. However, it must in addition be proved that the child referred to “is a member of the same household” as the victim of the offence.\textsuperscript{186} In determining membership of the household for this ground of referral (and for the following two grounds), the test is membership of the household regarded as a family unit (ie a group of persons held together by a particular tie, usually a blood relationship), and not whether at a particular time the child has lived, or is likely to live, in the same house.\textsuperscript{187}

The test is “membership of” rather than “living in” the household. A household continues to be the same household even if one of the original members has separated from it permanently, and even if new members join it, through birth or otherwise.\textsuperscript{188} A child may be a member of the same household as another child even when the latter died some years before the former’s birth as long as the household remains, in essence, the same as it was before: it is a question of circumstances whether the household is the same.\textsuperscript{189}

\begin{flushleft}
\textsuperscript{185} Norrie \textit{Parent and child} 575.
\textsuperscript{186} \textit{Ferguson v S} 1992 SCLR 866.
\textsuperscript{187} \textit{McGregor v H} 1983 SLT 626.
\textsuperscript{188} Norrie 1993 \textit{SLT (News)} (1) 192.
\textsuperscript{189} \textit{Ibid}.
\end{flushleft}
3.6.5.6 The child is, or is likely to become, a member of the same household as a person who has committed any of the offences mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act - s 52(2)(f)

It is not necessary for this ground that the child be the victim of the offence. A conviction is *prima facie* evidence of the commission of an offence. For this ground to be proven, identification of the offender will normally be necessary. However, if it can be shown that the offence has been committed by someone in the household, then that will be sufficient even if the offender cannot be identified. The standard of proof to be applied in determining the existence of all grounds except that contained in section 52(2)(i) is the civil standard of proof, namely a balance of probability. It follows from this that an acquittal in a criminal trial is not conclusive proof of the absence of this ground: a failure to prove something beyond reasonable doubt does not mean that it cannot be established on a balance of probabilities.


191 “Household” is to be defined as explained in par 3.6.5.5 (with regard to the condition referred to in s 52(2)(e)) above.

192 Norrie *Parent and child* 576.

193 See ch 7 par 3.6.5.9 below.

194 *Harris v F* 1991 SLT 242 at 245F, where it was held that it is expressly provided in s 68(3)(b) that the criminal standard is to be applied in relation to s 52(2)(i). “[T]he proper inference to be drawn from that provision is that a distinction is being taken between a ground of referral based on section [52(2)(i)] and all other grounds of referral... The reasonable implication must be that a different and lesser standard of proof will be applicable in the case of all other grounds of referral... expressio unius est exclusio alterius.”

195 Norrie *Parent and child* 577. Also see *Kennedy v B* 1992 SCLR 55.
3.6.5.7 The child is, or is likely to become, a member of the same household as a person in respect of whom an offence under sections 1-3 of the Criminal Law (Consolidation) (Scotland) Act 1995 (incest and intercourse with a child by step-parent or person in position of trust) has been committed by a member of that household - s 52(2)(g)

When the 1968 Act\(^{196}\) was originally passed, it was not a ground of referral that a child was a member of the same household\(^{197}\) as a victim of a scheduled offence. This ground was added in 1975.\(^{198}\) Incest was not a scheduled offence unless committed against a child. However, since the passing of the Incest and Related Offences (Scotland) Act 1986 the offences mentioned in this ground are all scheduled offences regardless of the age of the victim. This condition therefore had practical relevance between 1975 and 1986 for children\(^{199}\) who were members of the same household as adult victims.

Consequently, any child who is a member of the same household as a child in respect of whom the crime of incest has been committed will fall under the ground mentioned in section 52(2)(e).\(^{200}\) and any child who is a member of the same household as the person who committed the crime of incest will fall under the ground mentioned in s 52(2)(f),\(^{201}\) even if the person in respect of whom the offence was committed is not a child. This ground exists if, in addition to the grounds mentioned in section 52(2)(e) or (f) or both, the victim

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196 Social Work (Scotland) Act. See ch 7 par 3.6.1 above.

197 “Household” is to be defined as in par 3.6.5.5 (with regard to the condition referred to in s 52(2)(e)) above).

198 Children (Scotland) Act 1975, Sch 3 par 54(c).

199 Until 1995, only female children.

200 See ch 7 par 3.6.5.5 above.

201 See ch 7 par 3.6.5.6 above.
and the offender are members of the same household as the referred child, which is tautologous of the grounds mentioned in either section 52(2)(e) or (f). It therefore adds nothing to the protection afforded to children in need of compulsory measures of supervision.\textsuperscript{202}

3.6.5.8 The child has failed to attend school regularly without reasonable excuse - s 52(2)(h)

Norrie submits that this ground can only apply to children of school age,\textsuperscript{203} yet the 1995 Act contains no express limitation to that effect. Normally only children of school age can be the subject of compulsory measures of supervision, but, in exceptional cases they may be older.\textsuperscript{204} According to Norrie, the ground can apply only to a child for whom attendance at school is the means selected by his or her parents for providing efficient education. It should be remembered that other options are open.\textsuperscript{205}

The onus of proving reasonable excuse probably rests on the child or relevant person. Where a child of school age has failed to attend a public school regularly the education authority may refer the child to the reporter\textsuperscript{206} who may then consider taking proceedings under this ground. In addition, where a parent is prosecuted,\textsuperscript{207} the court may, if the parent

\begin{itemize}
  \item \textsuperscript{202}Norrie Parent and child 577.
  \item \textsuperscript{203}A child is of school age if he or she has attained the age of five years and has not attained the age of 16 years (Education (Scotland) Act s 31).
  \item \textsuperscript{204}See ch 7 par 3.5.4 above.
  \item \textsuperscript{205}Norrie Parent and child 577-578.
  \item \textsuperscript{206}Education (Scotland) Act s 30.
  \item \textsuperscript{207}in respect of failure to secure the child’s regular attendance at a public school (Education (Scotland) Act s 35), or a failure to comply with an attendance order (Education (Scotland) Act s 41), or a failure to permit a medical examination where it is alleged that the child has been prevented by sickness from attending school or receiving education (Education (Scotland) Act s 42(3)).
\end{itemize}
is convicted, refer the matter to the reporter.\textsuperscript{208} If this is done, the ground specified shall be treated as if it had been a ground of referral established under section 68.\textsuperscript{209}

3.6.5.9 The child has committed an offence - s 52(2)(i)

The Children (Scotland) Act 1995 proceeds on the basis that when a child commits a criminal offence, this is merely symptomatic of the child’s failure to develop social skills. This failure is often the result of a dysfunctional family. The child who commits an offence is therefore in need of help, not punishment. In exceptional cases, for example serious crimes such as murder or when the child has committed an offence with an adult, the child may be prosecuted in the High Court or sheriff court. But as a general rule, where a child has committed an offence, the case will be referred by the reporter to a children’s hearing to determine whether the child is in need of compulsory measures of supervision.\textsuperscript{210}

This ground differs from the others in that, in proceedings before the sheriff for a finding that the ground is established,\textsuperscript{211} the standard of proof is expressly that required in criminal proceedings, namely beyond reasonable doubt.\textsuperscript{212} This higher standard of proof cannot be avoided by referring the child on the basis that his or her commission of criminal offences amounts to exposure to moral danger.\textsuperscript{213} It would be a different situation if the commission of offences by the child was merely part of a wider picture which in essence amounted to another ground of referral: in that case even the offences could be proved on the civil rather the criminal standard.\textsuperscript{214}

\textsuperscript{208} S 54(1) & (2) of 1995 Act.

\textsuperscript{209} See ch 7 par 3.6.8 below.

\textsuperscript{210} Thompson Family law 325.

\textsuperscript{211} See ch 7 par 3.6.8 below.

\textsuperscript{212} S 68(3)(b). Also see ch 7 par 3.6.5.7 above.

\textsuperscript{213} See ch 7 par 3.6.5.2 above. Also see Constanda v M 1997 SLT 1396.

\textsuperscript{214} Constanda v M 1997 SLT 1396 at 1398D-F.
Since there is a conclusive presumption in Scottish law that no child under the age of eight years can be guilty of an offence, it follows that no child under the age of eight can be referred to a children’s hearing under this condition. If a child has been prosecuted in a criminal court and pleads guilty to or is found guilty of an offence, that court may (except where the sentence for the offence is fixed by law), remit the case to a children’s hearing for disposal. If it does so, the court’s jurisdiction ceases and the case stands referred to the children’s hearing.

3.6.5.10 The child has misused alcohol or any drug, whether or not a controlled drug within the meaning of the Misuse of Drugs (Scotland) Act 1971 - s 52(2)(j)

This ground can be traced back to the United Nations Convention on the Rights of the Child 1989. The important word in this condition is “misused”. The taking of drugs for medicinal purposes and, possibly, the taking of alcohol in a responsibly supervised social environment will not satisfy the condition.

3.6.5.11 The child has misused a volatile substance by deliberately inhaling its vapour, other than for medical purposes - s 52(2)(k)

This ground is concerned with “glue sniffing” and inhaling the vapours of other intoxicating substances.
3.6.5.12 The child is being provided with accommodation by a local authority under section 25, or is subject to a parental responsibilities order obtained under section 86 of the Children (Scotland) Act 1995 and, in either case, his or her behaviour is such that special measures are necessary for his or her adequate supervision in his or her interests or the interests of others - s 52(2)(l)

In carrying out its duties to provide accommodation for children, or when a parental responsibilities order has been made in its favour, it sometimes happens that a local authority believes that special measures, such as restraining the child in secure accommodation, are called for. If this is necessary either in the child’s own interests or in the interests of others (e.g. if the child poses a danger to others), then this condition is satisfied and the question whether the child is in need of compulsory measures of supervision arises for determination in a children’s hearing.

3.6.6 Procedures before the hearing

3.6.6.1 Initial action by reporter

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220 Norrie Parent and child 579.

221 See ch 7 par 3.5 above.

222 See ch 7 par 3.7 below.

223 Norrie Parent and child 579-580.
When receiving information about a case that may require a children’s hearing to be arranged (ie a case of a child who may be in need of compulsory measures of supervision), there are several ways in which the reporter may proceed with the case (after making such initial investigation as he or she may consider necessary). As the reporter is required to proceed only with cases that may require a children’s hearing to be arranged, he or she must first decide whether a case on which information is received, falls into that category. An initial investigation is sometimes needed so as to enable the reporter to make a proper choice regarding the options which are open to him or her. No initial investigation is needed in the following cases:

- when it is clear that the information does not disclose any case appropriate for action by the reporter
- when the information is already sufficient to enable the reporter to decide how to proceed.

Having investigated the case, the reporter must decide whether or not a children’s hearing requires to be arranged. This is not the same question as whether or not grounds of referral exist in relation to the child. The reason for this is that it is open to the reporter to conclude that, even though grounds do exist, the child is not in need of compulsory measures of supervision. It is only when the reporter is satisfied both that at least one of the grounds of referral exists, and that compulsory measures of supervision are necessary in respect of the child, that he or she is obliged to arrange a children’s hearing. The case is then referred to such hearing for consideration and determination.

The reporter’s discretion is wide and unfettered. There is no means by which a case can

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224 S 56(1).
225 Norrie *Parent and child* 580.
226 S 65(1).
227 S 56(6).
be referred to a children’s hearing except by his or her decision. However, the reporter is not master of the process once his or her decision has been made. If it appears to the reporter that a child is in need of compulsory measures of supervision, he or she must arrange a children’s hearing. Once a hearing has been arranged, the case cannot be withdrawn or abandoned by the reporter.\textsuperscript{228}

3.6.6.2 Business meetings

The reporter has the discretion to arrange a so-called “business meeting”\textsuperscript{229} with members of the children’s panel from which the children’s hearing is to be constituted, in order to obtain such direction or guidance with regard to the performance of his or her functions in relation to a particular case as the panel members think appropriate.\textsuperscript{230} Neither the child nor the relevant person has a right to attend this meeting. However, they must be given notice that the meeting has been arranged, and that they have the right to make their views on the relevant matters known to the reporter, and that the reporter has the duty to present these views to the meeting.\textsuperscript{231}

There are three matters which are open to the business meeting to consider.\textsuperscript{232} First, it may give advice to the reporter as to who should be regarded as a “relevant person”. However, it should be noted that the actual decision falls to the children’s hearing, which may disagree with the advice given by the business meeting. Secondly, the business meeting may determine whether the reporter should give notice to the child that he or she is released from the obligation to attend the children’s hearing. It is not the business

\textsuperscript{228} Norrie Parent and child 581.

\textsuperscript{229} The business meeting is a meeting between the reporter and three panel members, at least one of whom must be male and at least one of whom must be female (s 39(4) & (5)). Also see 1996 Rules (promulgated in terms of the Children (Scotland) Act 1995) reg 4(1).

\textsuperscript{230} S 64.

\textsuperscript{231} S 64(2) and 1996 Rules rule 4(3) and 4(4).

\textsuperscript{232} 1996 Rules rule 4(2).
meeting which has the power to release the child from that obligation, but only the children’s hearing. Consequently, it remains open to the children’s hearing to require the child’s attendance even when the child has been informed that he or she need not attend. Thirdly, the business meeting may determine whether the reporter should inform a relevant person that his or her attendance is considered unreasonable or unnecessary for the proper consideration of the case. Again, it is the children’s hearing rather than the business meeting which has the sole power to relieve the relevant person of the obligation to attend. Consequently, it remains open to the children’s hearing to disagree with the advice given by the business meeting and to require the relevant person’s attendance.

In view of the fact that the business meeting can only give advice on the abovementioned three aspects, which the children’s hearing can all overrule, the question arise what the purpose of this business meeting is.

### 3.6.7 Conduct of the hearing

#### 3.6.7.1 Persons present

A children’s hearing is conducted in private. The general rule is that no person other than one whose presence is necessary for the proper consideration of the case, or whose presence is permitted by the chairperson, shall be present. Apparently it is for the

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233 S 45(2) grants the power to “a children’s hearing”: the business meeting is limited to directing that the child should be informed of such release.

234 S 45(8).

235 S 43(1).
hearing as a whole to decide whether a person’s presence is necessary for the proper consideration of the case, should that be in dispute. The chairperson has a discretion to admit other persons. However, the general rule is subject to a number of qualifications.

3.6.7.1.1 The child

The 1995 Act confers upon the child an absolute right, and imposes upon him or her a qualified duty, to attend at all stages of the hearing. This includes those portions of the hearing at which grounds of referral are put, at which the hearing gives consideration to the case, and at which the members of the hearing make and explain their decision. The qualification to the duty is that the child may be released from the obligation to attend where the children’s hearing is satisfied in a case concerned with Schedule 1 offences that the attendance of the child is not necessary for the just hearing of that case, or, in any case, where the hearing is satisfied that it would be detrimental to the interests of the child to be present at the hearing.

Release of the child from the obligation to attend does not take away the child’s right to attend. The child’s right to attend is further protected by the requirement in the Rules that, where release is granted, the reporter must inform the child that he or she has a right to attend if he or she so wishes. Nor does release of the child from the obligation to attend relieve the chairperson of the obligation in section 65(4) to explain the grounds of referral to the child.

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236 S 45(1).
237 Criminal Procedure (Scotland) Act Sch 1.
238 S 45(2).
239 S 45(2) is expressly “without prejudice” to s 45(1)(a).
240 1996 Rules rule 6(3).
241 S 45(2) is expressly “without prejudice” to section 65(4).
3.6.7.1.2 The relevant person

Each relevant person\textsuperscript{242} has the right to attend at all stages of a children’s hearing.\textsuperscript{243} The relevant person’s right to be present carries with it a duty to attend at all stages unless the hearing is satisfied that his or her attendance would be unreasonable or unnecessary.\textsuperscript{244} The genetic father of a child who is not a relevant person\textsuperscript{245} is also entitled to attend the hearing as long as he is living with the genetic mother.\textsuperscript{246} His right to be present is designed solely to permit him to take part in the discussion of his child’s case and he has neither standing to accept or deny grounds of referral, nor title to appeal any decision made by the children’s hearing or to call for a review of any supervision requirement made or continued. Whether such a father is living with the mother or not is a question of fact. There is no requirement that they be living together “as husband and wife”.\textsuperscript{247}

The children’s hearing has the power to exclude any relevant person or that person’s representative, or both, from any part of the hearing, for as long as necessary in the interests of the child. This can be done if the hearing is satisfied that they must do so in order to obtain the views of the child in relation to the case before them, or if the presence of the person in question is causing (or is likely to cause) significant distress to the child.\textsuperscript{248} On the same grounds, they may exclude the father who is not a relevant person, who has a right to attend under Rule 12.

\textsuperscript{242} See ch 7 par 3.6.4 above.

\textsuperscript{243} S 45(8)(a).

\textsuperscript{244} S 45(8)(b).

\textsuperscript{245} Usually a father who is not and has never been married to the mother of the child. See discussion in par 3.6.4 above.

\textsuperscript{246} 1996 Rules rule 12(1).

\textsuperscript{247} Norrie Parent and child 585.

\textsuperscript{248} S 46(1).
Excluding a relevant person is entirely within the discretion of the hearing, and the decision lies with all three members and not just the chairperson alone. The child’s welfare is the paramount consideration.\textsuperscript{249}

3.6.7.1.3 Other persons

Any member of the Council on Tribunals and \textit{bona fide} representatives of a newspaper or news agency have a right to attend.\textsuperscript{250} Further, any constable, prison officer or other person duly authorised who has in his or her custody a person who has to attend a children’s hearing, is entitled to be present at the hearing for the purpose of escorting that person.\textsuperscript{251} None of these people takes an active part in the hearing. Safeguarders appointed by the hearing in terms of section 41 are entitled to be present,\textsuperscript{252} and they take an active part in the hearing. Also, any child whose case comes before a children’s hearing, and any relevant person who attends a children’s hearing, may each be accompanied by one person for the purpose of assisting the child or relevant person in the discussion of the case.\textsuperscript{253} A single person may represent both the child and a relevant person, or more than one relevant person.\textsuperscript{254}

3.6.7.1.4 Prohibition on publication

It is an offence for any person (not just newspaper publishers and broadcasters) to publish any matter in respect of proceedings at a children’s hearing which is intended to, or is likely to, identify any child concerned in the proceedings, or an address or school as being

\textsuperscript{249} S 16(1).
\textsuperscript{250} S 43(3).
\textsuperscript{251} 1996 Rules rule 12(2).
\textsuperscript{252} 1996 Rules rule 14(3). See further par 3.6.7.2 below with regard to safeguarders.
\textsuperscript{253} 1996 Rules rule 11(1) & (2).
\textsuperscript{254} 1996 Rules rule 11(3).
that of any such child.\textsuperscript{255}

3.6.7.2 Appointment of a safeguarder

In any proceedings\textsuperscript{256} at a children’s hearing, the hearing must consider the question whether it is necessary to appoint a person to safeguard the interests of the child in the proceedings, and, if they do so consider, they must make such an appointment on such terms and conditions as appear appropriate.\textsuperscript{257} This power exists in addition to any existing power to appoint a \textit{curator ad litem}.\textsuperscript{258} The 1995 Act does not specify the circumstances in which it would be appropriate to appoint a safeguarder, except that it must be necessary to safeguard the interests of the child in the proceedings. Such necessity might arise if there is a conflict of interests between the child and the relevant person, or because the child needs independent advice in the course of the proceedings (and might not otherwise get it), or because the hearing believes that a safeguarder might be able to identify wherein the child’s interests lie, or because this is the best way to allow the child the opportunity to express his or her views.\textsuperscript{259}

3.6.7.3 Commencement of the hearing: explanation of the grounds

The chairperson of the children’s hearing has the discretion to determine the procedure to be followed at the hearing. However, there is a statutory structure that must be followed. The hearing commences with an explanation given to the child and the relevant person(s)

\begin{itemize}
\item \textsuperscript{255} S 44(1).
\item \textsuperscript{256} ie any proceedings under ch 2 (ie children’s hearings) or ch 3 (ie proceedings dealing with children in need of compulsory measures of supervision), but not s 57 proceedings (ie child protection orders) (s 41(1) & (2)). Also see Thompson \textit{Family law} 332.
\item \textsuperscript{257} S 41(1).
\item \textsuperscript{258} Thompson \textit{Family law} 332.
\item \textsuperscript{259} 1996 Rules rule 15(4)(c).
\end{itemize}
of the grounds stated by the reporter for the referral of the case.\textsuperscript{260} The purpose of this explanation is to ascertain whether the grounds are accepted in whole or in part by the child and the relevant person(s). The grounds of referral in any given case are the conditions which it is claimed are satisfied in respect of the child\textsuperscript{261} together with the facts supporting the claim. They are a composite of law and fact.\textsuperscript{262}

Subsequent procedure depends on the response to the explanation of the grounds of referral. Where the child and all the relevant persons who attend the hearing accept the grounds, the hearing proceeds to consider the case.\textsuperscript{263} If either the child or any of the relevant persons do not accept the grounds, the hearing must (unless they decide to discharge the referral) direct the reporter to make an application to the sheriff for a finding as to whether the grounds are established.\textsuperscript{264}

It may happen that the grounds are accepted by one or more of the parties only in part. In that situation, the hearing has the choice of:\textsuperscript{265}

- proceeding with the hearing, if it considers it appropriate to do so, in respect of the grounds accepted by the child and relevant persons
- directing the reporter to make an application to the sheriff for a finding as to whether the grounds that are not accepted are established
- discharging the referral.

It may happen that a child is not capable of understanding an explanation of the grounds

\begin{itemize}
\item S 65(4).
\item See ch 7 par 3.6.5 above.
\item \textit{Norrie Parent and child} 589.
\item S 65(5).
\item S 65(7). See ch 7 par 3.6.8 below.
\item S 65(7).
\end{itemize}
of referral, or any explanation that has been given. In either of these events the hearing must (unless it decides to discharge the referral) direct the reporter to make an application to the sheriff for a finding as to whether any of the grounds has been established.\textsuperscript{266} A determination that the child has not understood presupposes that the chairperson has attempted to give an explanation. Consequently, such determination should not be made in the absence of an attempt to explain (or in the absence of the child).\textsuperscript{267}

3.6.8 Application to the sheriff

3.6.8.1 Introduction

The policy of the Act is to separate the body that decides what compulsory measures to take concerning the child, and the body that decides whether there are grounds on which such measures can lawfully be taken.\textsuperscript{268} Thus, if either the child or the relevant person or both do not accept the grounds of referral, or if the child did not understand the explanation of the grounds of referral, the hearing must direct the reporter to apply to the sheriff for a finding of whether or not the grounds of referral are established.\textsuperscript{269} The hearing before the sheriff must commence within 28 days of the lodging of the application,\textsuperscript{270} but thereafter, in order to allow time for further inquiry, the sheriff may continue the hearing for such reasonable time as he or she may in the circumstances consider necessary.\textsuperscript{271}

At the hearing, a reporter may appear, and the child and relevant person may be represented. Lay as well as legal representation appears to be allowed for the child and

\textsuperscript{266} S 65(9).
\textsuperscript{267} Norrie Parent and child 590.
\textsuperscript{268} Sloan v B 1991 SLT 530 at 548D-E.
\textsuperscript{269} S 65(7) and (9).
\textsuperscript{270} S 68(2).
\textsuperscript{271} Act of Sederunt 1997 rule 3.45(1).
The sheriff has the same duty and power as the children’s hearing to consider and arrange separate representation for the child where this is necessary in the child’s interests.\textsuperscript{273}

The child has a right and duty to attend the hearing of the application, unless

- the obligation to attend is dispensed with by the sheriff on the ground (in a case involving a scheduled offence\textsuperscript{274}) that the child’s attendance is not necessary for the just hearing of the application and (in all cases) that it would be detrimental to the child’s interests to be present at the hearing of the application\textsuperscript{275}
- the sheriff has excluded the child from the proceedings because the nature of the case (or of any evidence) is such that the sheriff is satisfied that it is in the interests of the child not to be present at the proceedings\textsuperscript{276}

3.6.8.2 Proof

The proceedings, which are essentially \textit{sui generis}\textsuperscript{277} and non-adversarial, are governed by the 1995 Act and the Act of Sederunt 1997.\textsuperscript{278} The proceedings are civil rather than

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\textsuperscript{272} S 68(4). Also see Lockyer in Asquith & Hill (eds) \textit{Justice} 118.

\textsuperscript{273} S 41. See ch 7 par 3.6.7.2 above.

\textsuperscript{274} See ch 7 fn 175 above.

\textsuperscript{275} S 68(4) & (5).

\textsuperscript{276} Act of Sederunt 1997 rule 3.47(5).

\textsuperscript{277} \textit{McGregor v D} 1977 SC 330 at 336; \textit{F v Kennedy} 1992 SCLR 750 at 775A.

criminal in character, though they are “civil proceedings of a special type”, and therefore the ordinary rules of civil procedure do not apply. Many of the basic rules of evidence apply. However, statute provides that in any civil proceedings (which is defined to include any hearing by the sheriff under section 68 of the 1995 Act except in so far as the ground of referral is the commission by the child of an offence) evidence shall not be excluded solely on the ground that it is hearsay. It is also provided that (except in offence based cases) facts can be held to be proved on a balance of probabilities even when the evidence is not corroborated.

3.6.8.3 Scope and effect of decisions

Where the sheriff decides that none of the grounds in respect of which the application was made has been established he or she must dismiss the application and discharge the referral in respect of those grounds. The children’s hearing can then proceed with the case only in respect of those grounds (if any) which were accepted. Where the sheriff after hearing the evidence or dispensing with the evidence finds that any of the grounds in respect of which the application was made is (or should be deemed to be) established, he or she must remit the case to the reporter to make arrangements for a children’s hearing to consider and determine the case.

3.6.9 Consideration and disposal of the case

279 Harris v F 1991 SLT 242 at 245B.
280 Kennedy v B 1973 SLT 38 at 41.
281 Civil Evidence (Scotland) Act 1988 s 2.
282 Civil Evidence (Scotland) Act s 1.
283 S 68(9).
284 S 68(10)(a).
3.6.9.1 Considering the case

If the child and the relevant persons accept the ground(s) of referral, or if the ground(s) of referral have been established in section 68 proceedings before the sheriff, the children’s hearing will then consider how it should dispose of the case. The hearing will have the social background report (discussed below) and any other relevant information at its disposal. The hearing must further consider, after discussion with the child (unless he or she is incapable of participating), any relevant person, any safeguarder appointed under section 41 of the 1995 Act, and any representative attending the hearing, what course they should decide on in the child’s best interests.

The children’s hearing, taking into account the age and maturity of the child, must as far as practicable give the child an opportunity to indicate whether he or she wishes to express his or her views. If the child indicates a wish to express such views, the children’s hearing must not make any decision unless an opportunity has been given for the child’s views to be obtained or heard, and unless they have considered those views. A child of 12 years of age or more shall be presumed to be of sufficient age and maturity to form a view.

The policy of the Act is that the hearing should explore what is in the interests of the child free from any narrow constraints. The information which the hearing must consider includes the grounds of referral accepted or established. However, it may extend well beyond what may have been stated in these grounds. The reason for this is that the hearing must consider a report obtained from the local authority under section 56(7) on the child and his or her social background. As that subsection points out, this report may contain information from any such person as the reporter or the local authority may think fit. Furthermore, the

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285 S 69(1).
286 1996 Rules rule 20(3).
287 1996 Rules rule 15(1).
hearing is entitled, in terms of section 69(1), to consider “such other relevant information as may be available to them”. Since the purpose of the children’s hearing is to determine what is in the best interests of the child, any information which is relevant to a consideration of what course should be taken in the child’s best interests is admissible. Nevertheless, the grounds of referral have a central role. They remain the “hard core of the material upon which their decision is based”.

3.6.9.2 Principles guiding decisions

In making their decisions, the children’s hearing is bound by the three overarching principles contained in section 16 of the 1995 Act:

- The welfare of the child throughout his or her childhood shall be their paramount consideration. This principle applies whenever a children’s hearing is deciding any matter with respect to the child under Part 1 of the 1995 Act.

- The hearing must, taking account of the age and maturity of the child, as far as practicable give him or her an opportunity to indicate whether he or she wishes to express views, and if the child so wishes, give him or her an opportunity to express them, and must have regard to such views. This principle applies when the children’s hearing is considering whether to make (or are reviewing) a supervision requirement, or is considering whether to grant or continue a warrant, or is engaged

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289 O v Rae 1993 SLT 570. Also see Norrie Parent and child 603; Norrie 1995 SLT (News) (2) 353.

290 Kennedy v B 1973 SLT 38 at 40.

291 S 16(1)-(3).

292 S 16(1).
in providing advice to a sheriff who is considering whether to continue a child protection order, or is drawing up a report when it is proposed that the child be adopted.\textsuperscript{293} Note that this principle also applies when the sheriff is considering certain decisions.\textsuperscript{294}

- The hearing must make no requirement or order unless they consider that it would be better for the child that the requirement or order be made than that none should be made at all. This principle applies when the children’s hearing is considering whether to make or is reviewing a supervision requirement or is considering whether to grant or continue a warrant.\textsuperscript{295} As the previous principle, this principle also applies when the sheriff is considering certain decisions.\textsuperscript{296}

The Act expressly provides for the following qualification to the welfare test: It is provided that where, for the purpose of protecting members of the public from serious harm, a children’s hearing considers it necessary to make a decision which will not afford paramountcy to the child’s welfare, they may make that decision.\textsuperscript{297} A child who is beyond the control of his or her parents, for instance, may be in need of control, not only in his or her own interests but in the interests of the protection of the public. It is thus clear that although the welfare of the child will usually be the paramount consideration, it is not always the sole consideration. In some circumstances there may be a need to reconcile the child’s interests with other claims. In these circumstances the welfare of the child is not a subordinate consideration, but is at least as important as the other considerations (ie the interests of members of the public).\textsuperscript{298}

\textsuperscript{293} S 16(4).

\textsuperscript{294} See ch 7 par 3.7.3 & 3.7.5.7 below.

\textsuperscript{295} S 16(3) & 16(4).

\textsuperscript{296} See ch 7 par 3.7.3 & 3.7.5.7 below.

\textsuperscript{297} S 16(5).

\textsuperscript{298} Norrie Parent and child 605.
The hearing must consider the child’s welfare throughout his or her childhood, which means that the hearing must do their best to take a long-term view of what will be in the interests of the child.\textsuperscript{299}

3.6.9.3 Powers of children’s hearings after having considered the grounds for referral

Having considered the child’s case, the children’s hearing must dispose of the case before it in one of the following ways:

- They can discharge the referral. This option is appropriate where the hearing decides that no further action is required.\textsuperscript{300}

- They can continue the case to a subsequent hearing. This option is appropriate where it considers that further investigation of the case is necessary to complete the consideration of the case.\textsuperscript{301}

- They can make a supervision requirement. The option is available where the hearing decides that the child is in need of compulsory measures of supervision.\textsuperscript{302}

3.6.9.4 Making a supervision requirement

Where the children’s hearing finds, after considering the case, that the child is in need of compulsory measures of supervision, they may make a supervision requirement. That

\textsuperscript{299} Ibid.
\textsuperscript{300} S 69(12).
\textsuperscript{301} S 69(3).
\textsuperscript{302} S 70(1).
requirement may require the child to reside at any place or places specified in the requirement, and to comply with any condition contained in the requirement.\textsuperscript{303} The children’s hearing may also make a determination that the supervision requirement be reviewed at such intervals during the duration of the requirement as they determine.\textsuperscript{304}

The children’s hearing may specify in the requirement that the child must be placed and kept in secure accommodation in a residential establishment\textsuperscript{305} during such period as the person in charge of the establishment (with the agreement of the chief social work officer) considers necessary. This can only be done where the hearing is satisfied that it is necessary to keep the child in that residential establishment.\textsuperscript{306} It is further required that the child, having previously absconded, is likely to abscond again unless kept in secure accommodation, and if he or she does abscond, it is likely that his or her physical, mental or moral welfare will be at risk, or that he or she is likely to injure himself or herself or some other person.\textsuperscript{307}

A children’s hearing may require the child to reside in a place where he or she is to be under the charge and control of a person who is not a relevant person only in the following circumstances:\textsuperscript{308}

- where it has received and considered a report of a local authority on the child and his or her social background, together with recommendations from the authority on the needs of the child and the suitability of the proposed

\begin{itemize}
\item S 70(3).
\item S 70(7).
\item “Secure accommodation” means accommodation provided in a residential establishment, ..., for the purpose of restricting the liberty of children (s 93(1)).
\item S 70(9).
\item S 70(10).
\item 1996 Rules rule 20(6).
\end{itemize}
place to meet those needs, and

• where the local authority has confirmed to the hearing that in compiling the report it complied with the procedures prescribed in the Fostering of Children (Scotland) Regulations 1996 (promulgated in terms of the Social Work (Scotland) Act).

Any requirement that the child reside at a specified place prevents the exercise of any existing parental responsibility or parental right in any way that would be incompatible with the terms of the supervision requirement. A local authority may recommend that a child be required to reside with foster carers only when the requirements for approval of foster carers in the Fostering of Children (Scotland) Regulations 1996 have been complied with.

The discretion of the children’s hearing is unfettered with regard to the conditions that they may attach to a supervision requirement, except that the condition must require something of the child (eg require the child to submit to a medical examination or treatment). In every case in which a supervision requirement is made the children’s hearing is obliged to consider whether to impose a condition which regulates the contact with the child that any specified person or class of persons is to have. Any such condition supersedes any other legal right of contact enjoyed by another person, to the extent that the exercise of that right would be inconsistent with the condition in the supervision requirement.

3.6.9.5 Implementation of supervision requirements

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308 S 3(4).

310 Fostering Regulations 1996 (promulgated in terms of the Social Work (Scotland) Act) reg 15.

311 Norrie Parent and child 608.

312 S 70(2) & 705(b).

313 S 3(4).
The implementation of supervision requirements is entrusted to the relevant local authority, and a child subject to a supervision requirement is treated as being “looked after” by that local authority. This means that the local authority must comply with the statutory duties already discussed above.

3.6.9.6 Cessation of supervision requirement

It is in line with the caring purposes for which supervision requirements are designed that they should not be of an indeterminate duration. The intention is that the child should remain under supervision as long as his or her need for compulsory measures of supervision subsists. Consequently, the Act provides that subject to variation or continuation of the supervision requirement, no supervision requirement shall remain in force for a period longer than one year. In addition a supervision requirement ceases to have effect when the child attains the age of 18 years. However, the supervision requirement should not continue any longer than is necessary in the interests of the child.

3.6.9.7 Review and appeal

The hearing’s control over the operation of supervision requirements is maintained by the provisions for review. The Act provides for various circumstances in which a supervision requirement must be reviewed. Most importantly, it must be reviewed where a local

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314 S 17(6)(b).
315 See ch 7 par 3.2 above.
316 Norrie Parent and child 610.
317 S 73(2).
318 S 73(3).
319 S 73(1).
authority so recommends,\textsuperscript{320} at the request of the child or relevant person,\textsuperscript{321} or whenever the children’s hearing has required that a review be held within a specified time.\textsuperscript{322}

It is the duty of the reporter to ensure that any review is duly held and to make any arrangements incidental to that review.\textsuperscript{323} The powers of a hearing reviewing a supervision requirement are the following: They may continue the review to a subsequent hearing, terminate the requirement, vary the requirement, insert into the requirement any requirement which could have been imposed by them under section 70(3) (ie a residence or other condition), and continue the requirement (with or without such variation or insertion).\textsuperscript{324}

An opportunity to appeal to the sheriff against any decision of a children’s hearing is available to the child or the relevant person, or both, but not to the reporter.\textsuperscript{325} Despite the apparent generality of the words “any decision”, appeals may be taken only against decisions disposing of a referral or reviewing a supervision requirement.\textsuperscript{326} Decisions relating merely to steps in procedure may not be appealed. Accordingly, there is no appeal against a direction by the children’s hearing to make an application to the sheriff for a finding as to whether grounds of referral are established,\textsuperscript{327} nor against a decision to exclude a relevant person or representative from the hearing. A decision to discharge a

\begin{itemize}
\item \textsuperscript{320} S 73(8)(a)(i).
\item \textsuperscript{321} S 73(8)(a)(ii).
\item \textsuperscript{322} S 73(8)(a)(iii).
\item \textsuperscript{323} S 73(8)(b).
\item \textsuperscript{324} S 73(9).
\item \textsuperscript{325} S 51(1).
\item \textsuperscript{326} Norrie \textit{Parent and child} 613.
\item \textsuperscript{327} \textit{M v Kennedy} 1995 SLT 123 at 125L.
\end{itemize}
referral is, however, an appealable decision.\textsuperscript{328}

Where the sheriff is satisfied that the decision of the hearing is not justified in all the circumstances of the case, he must allow the appeal (ie find in favour of the appellant).\textsuperscript{329} A sheriff should not interfere with the decision simply because he would have made a different decision. A sheriff should not make a finding in favour of the appellant unless there was some flaw in the procedure adopted by the hearing, or unless he is satisfied that the hearing had not given proper consideration to some factor in the case.\textsuperscript{330}

Further, there is an appeal to the Sheriff Principal and/or the Court of Session by way of stated case, on a point of law or in respect of any irregularity in the conduct of a case, from the following:\textsuperscript{331}

- any decision of the sheriff on an appeal to him or her against a decision of a children’s hearing
- an application to the sheriff to establish the ground(s) of referral.\textsuperscript{332}

3.7 Transfer to local authorities of parental rights and responsibilities

3.7.1 Introduction

Local authorities who wish to take over the parental rights and parental responsibilities in respect of a child\textsuperscript{333} may, under certain conditions, apply to the sheriff court for a parental

\textsuperscript{328} H v McGregor 1973 SC 95 at 100.
\textsuperscript{329} S 51(5).
\textsuperscript{330} D v Sinclair 1973 SLT (Sh Ct) 47 at 48.
\textsuperscript{331} S 51(11).
\textsuperscript{332} See ch 7 par 3.6.8 above.
\textsuperscript{333} ie a person under the age of 16 years (s 93(2)(a)).
responsibilities order. This order has the effect of transferring to the local authority the parental rights and responsibilities in respect of the relevant child. Such a transfer of responsibilities has the effect of barring the parents and guardians of the child from exercising any of the parental rights and responsibilities, and of vesting in the local authority full powers in relation to the upbringing of the child. The purpose of this transfer is a protective one. It is not intended to bring an end to the parent-child-relationship, but to ensure that that relationship does not unduly prejudice the child.\footnote{334}{Norrie\textit{ Parent and child} 524.}

\subsection*{3.7.2 Making the application}

A parental responsibilities order may be made by a sheriff on application by a local authority.\footnote{335}{S 86(1).} As the effect of the order is that the child will be “looked after” by the local authority, the local authority which is considering this option must ascertain the views of the child, his or her parents, any other person with parental rights and responsibilities, and any other person whose views the authority considers to be relevant.\footnote{336}{S 17(3). Also see ch 7 par 3.2 above.}

In making its decision whether to apply for a parental responsibilities order, the local authority must have regard as far as practicable to those views, and to the child’s religious persuasion, racial origin and cultural and linguistic background.\footnote{337}{S 17(4).} It is important to note that the sheriff has a similar obligation in terms of section 16(1) to take the child’s views into account when considering whether to make a parental responsibilities order.\footnote{338}{See ch 7 par 3.6.3 below.}

\subsection*{3.7.3 Criteria for making the order}
Before making the order, the sheriff must be satisfied that one of the following two circumstances exists:

- Every relevant person\textsuperscript{339} agrees to the making of the order unconditionally, freely and with full understanding of what is involved.\textsuperscript{340} Norrie\textsuperscript{341} indicates that it will seldom be appropriate for a local authority to apply for a parental responsibilities order when there is a parent or guardian who is able to care for the child, and the policy of the law is to discourage strongly the voluntary surrender of parental responsibilities and parental rights. However, this provision might appropriately be used in the case of a child whose parents recognise and accept their own inability to fulfil their parental responsibilities.

- If the aforementioned condition does not apply, the sheriff must be satisfied that each relevant person is a person who:\textsuperscript{342}

  - is not known, cannot be found or is incapable of giving agreement, or
  - is withholding such agreement unreasonably, or
  - has persistently failed, without reasonable cause, to fulfil one or other of the following parental responsibilities in respect of the child, namely the responsibility to safeguard and promote the child's health, development and welfare or, if the child is not living with him or her, the responsibility to maintain personal relations and direct contact with the child on a regular basis, or

\textsuperscript{339} For a definition and discussion, see ch 7 par 3.7.4 below.

\textsuperscript{340} S 86(2)(a).

\textsuperscript{341} Norrie Parent and child 527.

\textsuperscript{342} S 86(2)(b).
- has seriously ill-treated the child, whose reintegration into the same household as that person is, due to the serious ill-treatment or for other reasons, unlikely.

The onus rests on the applicant to prove the existence of one or other of the conditions, but the sheriff is not obliged to make the order even when that onus is discharged. In considering whether to make the order, the sheriff must regard the welfare of the child throughout his or her childhood as his or her paramount consideration. In addition, he or she must, taking account of the age and maturity of the child concerned and as far as practicable, give the child an opportunity to indicate whether he or she wishes to express views, and if the child does wish to express views give him or her an opportunity to do so, and have regard to those views. A child of 12 years of age or more is presumed to be of sufficient maturity to form a view.

### 3.7.4 Meaning of “relevant person”

Either condition must be satisfied in respect of each “relevant person” in relation to the child. This is defined as “a parent of a child or a person who for the time being has parental rights in relation to the child”. The term “parent” is not defined for the purposes of Part II of the 1995 Act. Norrie indicates that, in the present context, the word is to be limited to those parents who have at least some parental rights and responsibilities which can be transferred. If the parents have none it is difficult to see what interest they have in attempting to prevent the local authority from acquiring parental rights and responsibilities. This interpretation would exclude any parent who has no parental responsibilities or

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343 S 86(1).
344 S 16(1).
345 S16(2).
346 S 86(4).
347 Norrie Parent and child 529-530.
parental rights, such as an unmarried father who lacks a section 11 order or a section 4 agreement granting him any such responsibility or right, or in cases where the child is over the age of 16.

3.7.5  Effect of the order

3.7.5.1  Introduction

There is no provision in either the 1995 Act or the regulations promulgated in terms of the Act spelling out in detail the effect of a parental responsibilities order. The Act gives some indication of the consequences of the order, but in various separate provisions, and some important matters are left entirely to implication.

3.7.5.2  Effect on parental responsibilities and parental rights

If a parental responsibilities order is made, the parental responsibilities and rights of a relevant person are transferred to the local authority subject to any conditions the sheriff may make. Prima facie a relevant person is denuded of all his or her parental rights and responsibilities. However, the right to agree to the child being freed for adoption or adopted is not transferred. As a relevant person is usually the child’s parent, this means that although the local authority has a duty to ascertain the parent’s views before making any decision with respect to the child, the parent has no title to challenge the merits of the local authority’s decision.

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348  See ch 7 par 2.2 above.
349  Norrie Parent and child 530.
350  S 86(5).
351  S 86(3).
352  S 17(3) & 17(6).
353  Thompson Family law 306.
Norrie\textsuperscript{354} is of the view that the rights and responsibilities that are transferred are all those incidental to, or associated with, the exercise of parental powers for the nurture and well-being of the child and the protection of his or her person or property. He adds that there are, however, other aspects of parenthood, commonly referred to as “rights” or “responsibilities” which may or may not fall within the range of rights and responsibilities transferred by the order. Norrie submits that the test is whether the right or responsibility is connected with the upbringing of the child. Thus succession “rights” of parents are unaffected, as are the rules relating to the law of incest and the forbidden degrees of marriages. Further, the order has no effect on the status of the child, whose domicile and nationality remain the same as before the order was made.\textsuperscript{355} The parent’s duty to attend a children’s hearing disappears on the making of the order.\textsuperscript{356} Norrie submits that in the absence of express provision to the contrary, the child support obligations of the parents remain.\textsuperscript{357}

### 3.7.5.3 Effect on the local authority

Where a parental responsibilities order is made regarding a child, it is the duty of the local authority which applied for it to fulfil the transferred responsibilities owed to the child while the order remains in force.\textsuperscript{358} The “transferred responsibilities” includes as a minimum the parental responsibilities listed in section 1(1) of the 1995 Act.\textsuperscript{359} The authority is thus bound:

- to safeguard and promote the child’s health, development and welfare

\textsuperscript{354} Parent and child 531.

\textsuperscript{355} Norrie Parent and child 531, 535.

\textsuperscript{356} On attendance of children’s hearings, see in general ch 7 par 3.6.7.1 above.

\textsuperscript{357} Norrie Parent and child 531-532.

\textsuperscript{358} S 87(1).

\textsuperscript{359} See ch 7 par 2.1 above.
• to provide, in a manner appropriate to the stage of development of the child, 
direction and guidance
• to maintain personal relations and direct contact with the child on a regular 
basis
• to act as the child’s legal representative.

I agree with Norrie’s statement that it is difficult to see how an artificial entity like a local 
authority can “maintain personal relations and direct contact with the child on a regular 
basis, but this may be taken to oblige the local authority to ensure that one of its officers 
or employees does so. According to Norrie, it is implicit that the local authority may also 
exercise the parental rights which section 86(1) describes as being transferred to the local 
authority.

Because a child who is the subject of a parental responsibilities order is a child who is 
“looked after” by the local authority, the local authority will also be subject to the duties in 
section 17(1). A child who is the subject of a parental responsibilities order will almost 
always be characterised as a child “in need”, resulting in the local authority also having 
the two duties in section 22.

3.7.5.4 Transfer of residence to others

Norrie Parent and child 532 fn 61.

Norrie Parent and child 532. Also see ch 7 par 3.7.5.2 above.

ie the duty to promote the child’s welfare, the duty to make use of services available for 
children cared for by their own parents, and the duty to take steps to promote personal 
relations and direct contact between the child and any person with parental responsibilities 
in relation to the child (see ch 7 par 3.2 above).

See ch 7 par 3.2 above.

ie the duty to safeguard and promote the welfare of children in its area who are in need, 
and so far as is consistent with that duty, promote the upbringing of such children by their 
families, by providing a range and level of services appropriate to the children’s needs (see 
ch 7 par 3.1 above).
Notwithstanding the making of a parental responsibilities order in respect of a child, the local authority may allow, either for a fixed period or until the authority otherwise determines, the child to reside with a parent, guardian, relative or friend. This can be done where it appears to the authority that this would be for the benefit of the child.\(^{365}\) This is in accordance with the general aim of the 1995 Act that children in need should be supported in their home environment, whenever possible.\(^{366}\)

Norrie\(^{367}\) submits that, although there is no definition of the word “parent”, there is no reason to restrict it in the present context to exclude the unmarried father. In the present context (ie in the context of transfer of residence to others), “parent” means a parent, whether adoptive or genetic or presumed\(^{368}\) or deemed\(^{369}\) and it includes the parent who previously had parental responsibilities or parental rights, but no longer does due to the making of a parental responsibilities order.

3.7.5.5 Conditions attached to the order

When making the parental responsibilities order the sheriff may impose such conditions

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\(^{365}\) S 87(2).

\(^{366}\) Thompson *Family law* 305-306.

\(^{367}\) Norrie *Parent and child* 533-534.

\(^{368}\) under the Law Reform (Parent and Child) (Scotland) Act 1986. This Act provides that a man is presumed to be the father of a child if he was married to the mother of the child at any time during the period beginning with the conception and ending with the birth of the child (s 5(1)(a)). The presumption applies in the case of a void, voidable or irregular marriage in the same way as it applies in the case of a valid and regular marriage (s 5(2)). Even if s 5(1) does not apply, a man will be presumed to be the father of a child if both he and the mother of the child have acknowledged that he is the father and the child has been registered as such (s 5(1)(b)). The presumption in s 5 of the 1986 Act may be rebutted by proof, on a balance of probabilities, that the man was not the father of the child (s 5(4)).

\(^{369}\) under the Human Fertilisation and Embryology (Scotland) Act. This Act *inter alia* deals with the parenthood of children born as a result of artificial fertilisation. If a woman carries a child born as a result of artificial fertilisation, she is treated as the child’s mother, and her husband is treated as the child’s father (ss 27 & 28).
as he or she considers appropriate. This may include, for example, conditions as to the child’s residence, education, medical treatment or even (at least in regard to younger children) the religious observances to which the child is to be exposed. A condition could determine the length of time the order is to last. The sheriff may also include conditions as to contact between the child and any other person.

3.7.5.6  Contact arrangements

During the currency of a parental responsibilities order, the local authority must allow the child reasonable contact with the following persons:

- each person who, immediately before the making of the parental responsibilities order, was a relevant person in respect of the child
- any person in whose favour a residence order or contact order was in force immediately before the making of the parental responsibilities order
- any person who was entitled to have the child residing with him or her under an order by a court of competent jurisdiction.

Thompson shows that section 88(2) is one of the few in the 1995 Act which gives a positive right to the child. The parent can apply to the sheriff to have contact with the child.

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370 S 86(5).
371 Norrie Parent and child 536. Also see ch 7 par 3.7.5.6 below.
372 S 88(2).
373 As defined in s 86(4). See ch 7 par 3.7.4 above.
374 See ch 7 par 2.3 above.
375 S 88(2).
376 Thompson Family law 306.
377 S 88(3).
However, even if no application is made, the sheriff may make a contact order *ex proprio motu.*\(^{378}\) There is nothing preventing the local authority from allowing the child contact with other persons such as siblings, grandparents, foster carers and friends, as long as the authority is of the view that this will be consistent with the welfare of the child.\(^{379}\)

### 3.7.5.7 Variation and termination of parental responsibilities order

The sheriff may vary or discharge the parental responsibilities order on the application of the local authority, the child, any person who was a relevant person immediately before the order was made, or any other person claiming an interest.\(^{380}\) The sheriff must regard the welfare of the child throughout his or her childhood as the paramount consideration, must take account of the child’s views, and must not make any order unless he or she considers that it would be better for the child that the order be made than that none should be made at all.\(^{381}\) The effect of the discharge is to restore the *status quo ante*, with the restoration of parental responsibilities and parental rights to those who possessed them immediately before the order was made.\(^{382}\)

If the parental responsibilities order has not been discharged earlier, it terminates when the child reaches the age of 18.\(^{383}\) However, it should be kept in mind that when a child reaches the age of 16 years all the parents’ and guardians’ parental responsibilities come to an end, except the responsibility to provide guidance.\(^{384}\) So too do all their parental

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\(^{378}\) S 88(4).

\(^{379}\) Norrie *Parent and child* 536-537.

\(^{380}\) S 86(5).

\(^{381}\) S 16(1)-(3) & 16(4)(b)(i).

\(^{382}\) Norrie *Parent and child* 540.

\(^{383}\) S 86(6)(a).

\(^{384}\) S 1(2).
Norrie submits that the effect of a parental responsibilities order is not to maintain on behalf of the local authority all these responsibilities and rights until the child turns 18 - to do so would result in the local authority having more rights than parents. The order may last until the child is 18, but its effect can vary with time, just as the effect of the parent-child-relationship varies with time. It follows that the local authority loses those responsibilities and rights in relation to a child that a parent would lose when the child turns 16. However, the duties of the local authority in terms of sections 17 and 22 remain until the child’s 18th birthday.

4 HEARING THE VOICE OF THE CHILD IN SCOTTISH LAW - AN EXCURSUS

4.1 Introduction

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385 S 2(7). Also see ch 7 par 2.1 above.
386 Norrie Parent and child 540.
387 namely the duties to safeguard and promote the child’s welfare, make such use of services available for children cared for by their own parents as appears to the authority reasonable in the particular child’s case, and take steps to promote, on a regular basis, personal relations and direct contact between the child and any person with parental rights and responsibilities in relation to the child. See ch 7 par 3.1 & 3.2 above.
388 S 93(2)(a).
As was indicated earlier, one of the driving forces behind the 1995 Act was the desire to bring Scottish law in line with article 12 of the United Nations Convention on the Rights of the Child 1989. The question arises whether attempts to implement participation rights for children in Scottish law have been successful. This question is considered below. The topic is dealt with with reference to the following different ways in which children can be allowed to express their views in matters that affect them:

- First, the term “participation” will be used to cover all rules which allow the voice of the child to be heard directly, without intermediary. This includes rules that demand that children be consulted about their opinion, or which enable them to become parties to legal actions.
- Secondly, the term “representation” will be used to discuss rules which allow children and young persons to instruct solicitors, seek legal advice or have other kinds of adult representation in various types of proceedings.

### 4.2 Participation

Various provisions of the 1995 Act relate to the right of the child to be consulted, for example sections 6(1), 11(7)(b), 16, 17(3) and 17(4). As was indicated above, Part

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389 See ch 7 par 1 above.

390 See ch 9 par 2.4 below.


392 It should be noted that certain other provisions can also be construed as giving the child a voice, eg s 25(7)(a), which provides that an objection to an accommodation order cannot be enforced against the will of a child over the age of 16 (see ch 7 par 3.1 above), and s 65(7), which *inter alia* provides that the child must accept the grounds of referral in order for the children’s hearing to proceed and consider the case. If the child does not accept the grounds, the hearing must direct the reporter to make an application to the sheriff for a finding as to whether the grounds are established (see ch 7 par 3.6.7.3 & 3.6.8 above).

393 See ch 7 par 1 above.
I of the 1995 Act (which includes sections 6(1) and 11(7)(b)) deals with private-law aspects of the parent-child relationship. As the scope of this chapter is child protection and state intervention measures in Scotland (as dealt with in Part II of the Act), the discussion that follows will concentrate on section 16 and 17, which relates to the child protection and state intervention provisions contained in Part II of the Act. Be that as it may, as sections 6(1), 11(7)(b), 16 and 17 contain similar provisions, the comments are relevant to all these provisions.

When a children’s hearing is considering whether to make (or is reviewing) certain decisions, *inter alia* a supervision requirement, or is engaged in providing advice to a sheriff who is considering whether to continue a child protection order, the hearing must, taking account of the age and maturity of the child, as far as practicable give him or her an opportunity to indicate whether he or she wishes to express views, and if the child so wishes, give him or her an opportunity to express them, and must have regard to such views.

This principle also applies when the sheriff is considering whether to make certain decisions, *inter alia* whether to make, vary or discharge a parental responsibilities order. A child of 12 or older is presumed to be of sufficient age and maturity to form a view, but younger children’s views must also be heard if they in fact have sufficient age

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394 which provides that, in reaching any major decision relating to fulfilling a parental responsibility or exercising a parental right, a person must have regard as far as practicable to the views of the child concerned (if the child wishes to express them), taking into account the child’s age and maturity (see ch 7 par 2.1 above).

395 which provides that a court making an order relating to parental responsibilities and rights in respect of a child, must as far as practicable give the child the opportunity to express his or her views, and have regard to such views, taking into account the child’s age and maturity (see ch 7 par 2.3 above).

396 S 16(2) & 16(4)(a). Also see ch 7 par 3.6.9.2 above.

397 S 16(2) & 16(4)(b). Also see ch 7 par 3.7.3 & 3.7.5.7 above.

398 S 16(2).
Section 17 deals with the duties of local authorities in respect of children they are looking after. It provides that, before making any decision with respect to a child whom they are looking after (or proposing to look after), a local authority must, as far as reasonably practicable, ascertain the views of the child regarding the matter to be decided. It further provides that, in making such decision, a local authority must have regard, as far as practicable, to the views of the child concerned, taking into account the child’s age and maturity.

Sections 16 and 17 are clearly intended formally to meet the demands of article 12 of the United Nations Convention on the Rights of the Child. However, it goes without saying that it is of little use to give children formal rights of consultation if there is no way they can in practice get their views heard. This concern led to the reform of the Scottish rules of court governing procedure in family proceedings in the sheriff court. The new rules demand that in any family action affecting a child, that child is to receive notice of the action by means of a form known as the “F9 form”. This form is sent to the child by registered mail.

This form contains a summary of what the action is about, in language which “a child is capable of understanding”. The form invites the child to inform the sheriff if he or she has something to say about the proceedings. This can be done either by returning the form, or by writing a separate letter to the court. The child is offered two options on the form:

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399 S 17(3). Also see ch 7 par 3.2 above.
400 S 17(4). Also see ch 7 par 3.2 above.
402 Act of Sederunt 1996 rule 33.7.
403 Part A of the form.
• First, the child has the option to speak to the court via a third party the child names. Mention is made of a friend, relative or teacher, but notably, not a parent.
• Secondly, the child has the option of writing to the sheriff directly with his or her views.

The sheriff can then choose to take whatever steps he or she feels necessary to ascertain the views of the child, including speaking directly to the child, in open court, or in private in chambers. Although the F9 form is a clear improvement on the old law, where children were offered almost no opportunity to get a say in family proceedings, it is still rife with inadequacies.

Edwards identifies three basic sets of problems: First, the form itself creates problems. Since it is mailed to the child’s address, and many children share their home with one or both parents, there is no guarantee that the child will receive it. Parents may feel threatened by the concept of their children being given the opportunity to speak in court or may fail to understand the significance of the form. Even if the child receives the form, literacy levels may not allow the child to understand it without assistance.

Secondly, Edwards poses the question whether the child will have a meaningful opportunity to communicate his or her views, even if he or she manages to return the form or otherwise communicate his or her wish to speak to the sheriff. She points out that Scottish children are often relatively inarticulate and unassertive, and sheriffs receive no special training in child interview techniques or psychology. Further, the difference in age, class and circumstances between children and sheriffs may also inhibit communication.

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404 Act of Sederunt 1996 rule 33.19.
405 Edwards in Davel (ed) *Children’s rights* 43-44.
Thirdly, Edwards asks whether children who do manage to make their views known, will be guaranteed confidentiality. The new rules of court state that if a child chooses to express views, orally or in writing to the sheriff, the sheriff must record the views expressed in writing within the court process. Usually this record will then be sealed as confidential, and kept in the file in a special envelope. However, the sheriff has a discretion to reveal what the child has said to the other parties, for example in the interests of natural justice. This lack of guaranteed confidentiality may be a powerful disincentive to the expression of opinions by children.

4.3 Representation

4.3.1 Introduction

Article 12(2) of the United Nations Convention on the Rights of the Child expressly recognises that the child may express a view directly or by means of a representative. Children are by their very nature often unable to speak on their own behalf in legal proceedings. This may be because they are simply too young to speak, too unskilled in oral presentation, or too intimidated by courtroom atmosphere. Outside the courtroom, access to legal representation is also essential if children are to take full advantage of the remedies provided by the legal system.

4.3.2 “Lay” representation

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408 Act of Sederunt 1996 rule 33.20.
409 Edwards in Davel (ed) Children’s rights 46.
410 See ch 9 par 2.4 below.
In certain proceedings, _inter alia_ a children’s hearing,\(^{412}\) or in an application before the sheriff court for a finding that the ground(s) of referral exist,\(^{413}\) or in an appeal to the sheriff against a decision of a children’s hearing,\(^{414}\) a safeguarder can be appointed by the children’s hearing or sheriff court.\(^{415}\) The name “safeguarder” is rather revealing, since the function of this officer is the safeguarding of the child’s interests rather than representing his or her wishes.\(^{416}\)

In addition to the safeguarder, who is not really a representative, as was pointed out above,\(^{417}\) any child whose case comes before a children’s hearing, and any relevant person who attends a children’s hearing, may each be accompanied by one person for the purpose of assisting the child or relevant person in the discussion of the case.\(^{418}\) A single person may represent both the child and a relevant person, or more than one relevant person.\(^{419}\)

The rules do not exclude lawyers from being representatives, but they are not allowed to “represent” clients, in the sense of being agents speaking for them. The rule is drafted to fit the non-adversarial or consensual model. Representation does not presume “taking sides”. The representatives can be shared by family members. As a matter of fact, this is usually the case. In practice, it is commonly a family friend or neighbour who fulfils this

\(^{412}\) See ch 7 par 3.6 above.

\(^{413}\) See ch 7 par 3.6.8 above.

\(^{414}\) See ch 7 par 3.6.9.7 above.

\(^{415}\) S 41(1).

\(^{416}\) Edwards in Davel (ed) _Children’s rights_ 51.

\(^{417}\) See ch 7 par 3.6.7.1.3 above.

\(^{418}\) 1996 Rules rule 11(1) & (2).

\(^{419}\) 1996 Rules rule 11(3).
Some authors welcome the above provisions, while others call for child advocates who can independently represent children at children’s hearings. Lockyer indicates that there are costs as well as benefits to the proposal for separate child advocates. The greatest cost of advocacy is that it detracts from the consensual model of the hearing. This is so because the need for separate advocacy presupposes a divided family. Lockyer is of the view that the best advocate for a child is a parent. According to him, the children’s hearing must remain a setting where the direct thoughts and feelings of ordinary people are expressed, without always needing to be “formalised” by official parties. However, Lockyer acknowledges that there are cases where the parents cannot be relied upon to assist children. In those cases, the child advocate would be justified.

4.3.3 “Professional” legal representation

Before the 1995 Act, Scottish children under the age of majority had no rights to litigate and instruct counsel without the assistance of their parent or guardian, unless no parent or guardian existed, or there was a conflict between the child and the parent, in which case a curator ad litem could be appointed by the court to act for the child. However, the curator is not a true representative of the child’s wishes, but rather an officer of the court whose job

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420  Lockyer in Duquette in Asquith & Hill Justice 140-141.
421  Duquette in Asquith & Hill Justice 133. Also see ch 7 par 4.3.3 below.
422  Lockyer in Asquith & Hill Justice 141-142.
423  16 years (Age of Legal Capacity (Scotland) Act).
is to determine what is in the child’s best interests. 424

Thus when the 1995 Act was drafted, it was realised that, if the demands of article 12 of the United Nations Convention on the Rights of the Child were to be met, a child should have an opportunity to have his or her wishes rather than his or her interests represented by a legal representative. Accordingly a late amendment was made to the Act, which provides that:425

- children under 16 can instruct solicitors in civil matters as long as they have a general understanding of what it means to do so426
- a person who has such legal capacity then also has the capacity to bring or defend civil proceedings.

This provision applies in relation to any civil proceedings. In S v Miller427 the Inner House428 dealt specifically with referrals to children’s hearings. The court held that, in order to avoid a violation of article 6(1)429 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, the child was entitled to legal representation (and legal aid) in children’s hearings if:

- the child might be held in secure accommodation430

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425 1995 Act Sch 4 par 53, substituting into the Age of Legal Capacity (Scotland) Act a new s 2(4A) & 2(4B).
426 This competence is presumed at the age of 12 (s 19(2)).
427 2001 SLT 531.
428 A division of the Scottish High Court, the Court of Session.
429 which protects the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
430 See ch 7 par 3.6.9.4 fn 306 above.
• the case involved difficult issues of fact and law
• because of his or her age or intelligence, it was difficult for the child to understand the issues involved
• the child could not present an effective case and therefore was unable to exercise his or her right of access to justice.

Edwards identifies various possible problems with the provision referred to above, namely that children under 16 can instruct solicitors in civil matters as long as they have a general understanding of what it means to do so.431

“For one thing, whose job is it to decide if the child has general understanding? The court? The solicitor whom the child seeks to instruct? The child’s parents? The matter is left silent. So far, the anecdotal evidence from Scotland is that solicitors have de facto taken on the role of assessment, without challenge from the courts, although what criteria solicitors are using remains opaque.”

Edwards432 shows that it is problematic to let judges and solicitors decide if the child’s right to participate is absolute, or one that should be balanced against protective criteria, or one which is always subordinate to the child’s welfare. Their training has not in general prepared them to work with children. Paternalistic attitudes embedded in the system persist. The representatives may find their role confusing and compromised by concerns for the child’s welfare. Although the official role of the solicitor is to take instructions from the child and to represent the child’s wishes, Edwards quotes from a study which found that 16 of the solicitors questioned said that they would usually act according to the child’s instructions, while 21 said that they would usually or sometimes act according to the child’s interests instead.

431 Edwards in Davel (ed) *Children’s rights* 52.
432 Edwards in Davel (ed) *Children’s rights* 53.
In view of the above, Edwards\textsuperscript{433} is of the view that it is questionable whether the Scottish provisions give effect to article 12. This view is strengthened by the fact that article 12 is interpreted by some as designed to empower children, by allowing them to participate as adults do, by according them respect for their autonomy, and by treating them as equals in the proceedings, and not merely as “objects of concern”.

5 \hspace{1em} \textbf{SUMMATIVE CONCLUSIONS}

5.1 \hspace{1em} \textbf{Summary of Scottish child protection measures}

Scottish child protection measures can broadly be summarised as follows: It should be kept in mind that the Scottish local authority has an important overarching role in Scottish child protection measures. The broad role of the Scottish local authority is twofold:

- First, it has the overarching duty to safeguard and promote the welfare of all children in its area who are in need.\textsuperscript{434} This concept includes children who are in need of care and attention because they are unlikely to achieve or maintain, or have the opportunity of achieving or maintaining, a reasonable standard of health or development unless the local authority provides them with services; children whose health or development is likely to be significantly impaired or further impaired unless such services are provided; children who are disabled; or children who are affected adversely by the disability of any other person in their families.\textsuperscript{435}

The concept “children in need” in Scottish law is a broad principle, and is not identical to the concept “children in need of compulsory measures of supervision”.

\textsuperscript{433} Edwards in Davel (ed) \textit{Children’s rights} 55. Also see Sutherland in Freeman & Veerman (eds) \textit{Ideologies} 164.

\textsuperscript{434} See ch 7 par 3.1 above.

\textsuperscript{435} \textit{Ibid.}
which is a specific term used for children who are the subject of the children’s hearing system (similar to “children in need of care” who are the subject of the South African children’s court system).\textsuperscript{436}

- Secondly, and in addition to the aforementioned duty, Scottish local authorities have certain duties in respect of children they are looking after. A child is looked after by a local authority whenever:

  - the local authority is providing the child with accommodation under section 25 of the 1995 Act\textsuperscript{437}

  - the child is subject to a supervision requirement (whether or not there is a condition of residence attached to the requirement)\textsuperscript{438}

  - the child is the subject of an order in terms of which the local authority has responsibilities towards the child (such as a parental responsibilities order).\textsuperscript{439}

A local authority may provide accommodation for a child in its area if it considers that it would safeguard or promote the child’s welfare to do so. However, a local authority has the obligation to provide accommodation for a child where no one has parental responsibilities for the child, where the child has been lost or abandoned, or where the person who has been caring for the child is prevented from providing the child with suitable accommodation or care. The chapter of the 1995 Act dealing with the provision of accommodation by local authorities contains no authority to remove a child or keep him or her against the wishes

\textsuperscript{436} See ch 7 par 3.6 above.
\textsuperscript{437} See ch 7 par 3.5 above.
\textsuperscript{438} See ch 7 par 3.6 above.
\textsuperscript{439} See ch 7 par 3.7 above.
of the parents. The provisions are thus non-compulsory in nature.

Sometimes circumstances arise where it is not possible to provide support for a child on a non-compulsory basis. Children who are found to be in need of compulsory measures of supervision by a children’s hearing may be dealt with in various ways. The children’s hearing system hinges on the question whether compulsory measures of supervision may be necessary in respect of a child. A children’s hearing is arranged by a reporter, acting on information provided by “any person”, a local authority or a court that a certain child may be in need of compulsory measures of supervision. It is only when the reporter is satisfied both that at least one of the grounds of referral exists, and that compulsory measures of supervision are necessary in respect of the child, that he or she is obliged to arrange a children’s hearing.

The hearing commences with an explanation given to the child and the relevant person(s) of the grounds stated by the reporter for the referral of the case, the purpose of which is to ascertain whether the grounds are accepted in whole or in part by the child and the relevant person(s). Where the child and all the relevant persons who attend the hearing accept the grounds, the hearing proceeds to consider the case. If either the child or the relevant person or both do not accept the grounds of referral, or if the child did not understand the explanation of the grounds of referral, the hearing must (unless they decide to discharge the referral) direct the reporter to make an application to the sheriff for a finding as to whether the grounds are established.

Where the sheriff decides that none of the grounds in respect of which the application was made has been established he or she must dismiss the application and discharge the referral in respect of those grounds. Where the sheriff finds that any of the grounds in respect of which the application was made is (or should be deemed to be) established, he or she must remit the case to the reporter to make arrangements for a children’s hearing to consider and determine the case.
Having considered the case (taking into account the s 16 principles), the children’s hearing can discharge the referral, continue the case to a subsequent hearing, or make a supervision requirement. The last-mentioned option is available where the hearing finds that the child is in need of compulsory measures of supervision. The supervision requirement may require the child to reside at any place specified in the requirement, and to comply with any condition contained in the requirement.

In certain circumstances (ie where the relevant person agrees to the making of the order, or where the relevant person is not known or cannot be found, or is unreasonably withholding such agreement, or has persistently failed to safeguard and promote the child’s health, development and welfare, or to maintain personal relations and direct contact with the child, or has seriously ill-treated the child) local authorities may apply to the sheriff court for a parental responsibilities order, which has the effect of transferring to the local authority the parental rights and responsibilities in respect of the child. The purpose of the transfer is a protective one.

5.2 The strengths and weaknesses of Scottish child protection measures

The following strengths of the Scottish child protection system should be noted: The first important strength is the high level of participation and/or representation given to children in the Scottish child protection system. This is done in the following ways:

- Emphasis is placed throughout on the views of the child. The child must be given the opportunity to express his or her views (should the child wish to express them), and the child’s views must be regarded, taking into account the child’s age and maturity. This must be done regardless of whether a local authority is considering
making a decision relating to a child it is looking after or proposing to look after,\textsuperscript{440} or whether a children’s hearing is considering how to dispose of a case before it,\textsuperscript{441} or whether a sheriff is considering whether to make a parental responsibilities order.\textsuperscript{442}

- Certain other provisions can also be construed as giving the child a voice, for example section 25(7)(a), which provides that an objection to an accommodation order cannot be enforced against the will of a child over the age of 16,\textsuperscript{443} and section 65(7), which \textit{inter alia} provides that the child must accept the grounds of referral in order for the children’s hearing to proceed and consider the case. If the child does not accept the grounds, the hearing must direct the reporter to make an application to the sheriff for a finding as to whether the grounds are established.\textsuperscript{444}

- A safeguarder can be appointed in certain proceedings by the children’s hearing or sheriff court, \textit{inter alia} a children’s hearing. Further, in addition to the safeguarder, any child whose case comes before a children’s hearing, and any relevant person who attends a children’s hearing, may each be accompanied by one person for the purpose of assisting the child or relevant person in the discussion of the case.\textsuperscript{445} The aforementioned forms of lay representation is welcomed by some, as it fits in with the non-adversary and consensual nature of the children’s hearing system, and criticised by other, as it has the function of safeguarding the child’s interest rather than representing his or her wishes.

\textsuperscript{440} See ch 7 par 3.2 above.
\textsuperscript{441} See ch 7 par 3.6.9.1. & 3.6.9.2 above.
\textsuperscript{442} See ch 7 par 3.7.2 above.
\textsuperscript{443} See ch 7 par 3.1 above.
\textsuperscript{444} See ch 7 par 3.6.7.3 & 3.6.8 above.
\textsuperscript{445} See ch 7 par 4.3.2 above.
• In response to calls that if the demands of article 12 of the United Nations Convention on the Rights of the Child were to be met, a child should have an opportunity to have his or her wishes rather than his or her interests represented by a legal representative, the 1995 Act provides that children under 16 can instruct solicitors in civil matters as long as they have a general understanding of what it means to do so.\textsuperscript{446}

The second strength of the Scottish children’s hearing system is its non-adversarial and consensual nature. This fact is borne out by various provisions. Evidence may not be excluded merely because it is hearsay. Facts can be held to be proved on a balance of probabilities even when the evidence is not corroborated.\textsuperscript{447} Lay representatives in children’s hearings can be lawyers, but they are not allowed to “represent” their clients, in the sense of being agents speaking for them.\textsuperscript{448}

The third strength of the Scottish child protection system is the wide definition of the concept “relevant person”, resulting in the fact that not only parents, but any person that plays a significant role in the child’s upbringing is part of the proceedings.

The fourth strength of the Scottish child protection system is the emphasis that is placed on contact between the child and any person with parental rights and responsibilities. The local authority has the duty, with regard to all children they are looking after, to take such steps to promote, on a regular basis, personal relations and direct contact between the child and any person with parental rights and responsibilities in relation to the child as appears to the local authority to be both practicable and reasonable, having regard to the child’s welfare. The purpose of this contact is to preserve the bond between the child and the person with parental responsibilities and rights, and to ease the eventual return of the

\textsuperscript{446} See ch 7 par 4.3.3 above.
\textsuperscript{447} See ch 7 par 3.6.8.2.
\textsuperscript{448} See ch 7 par 4.3.3 above.
The first weakness of the Scottish child protection system can also be seen as a strength, depending on the view held on the state’s role in family life.\textsuperscript{450} The 1995 Act contains an extensive list of child-centred grounds of referral, some very specific in nature (e.g., the fact that the child has failed to attend school regularly without reasonable excuse,\textsuperscript{451} or the fact that the child has misused a volatile substance by deliberately inhaling its vapour, other than for medical purposes\textsuperscript{452} (e.g., “glue sniffing’’)). The Scottish child protection system can thus be construed as a system allowing a more active role for the state in family life, a system which does not value family privacy and family integrity as primary consideration.

The second weakness relates to the first strength mentioned above. It was already mentioned that emphasis is placed on the views of the child. However, one of the mechanisms created for the purpose of ascertaining the child’s views, namely the so-called “F9 form”, is unfortunately not above criticism. It was mentioned earlier\textsuperscript{453} that the form creates various problems, some related to the fact that it is mailed to the child’s address, some related to the unassertiveness of Scottish children, and some related to the issue of confidentiality.

The third weakness of the children’s hearing system, relates to the provision that children under 16 can instruct solicitors in civil matters as long as they have a general understanding of what it means to do so.\textsuperscript{454} It appears that in Scottish law, solicitors have taken on the role of deciding whether the child has a general understanding of what is

\textsuperscript{449} See ch 7 par 3.2 above.
\textsuperscript{450} See ch 8 par 4 below.
\textsuperscript{451} S 52(2)(h). See ch 7 par 3.6.5.8 above.
\textsuperscript{452} S 52(2)(k). See ch 7 par 3.6.5.11 above.
\textsuperscript{453} See ch 7 par 4.2 above.
\textsuperscript{454} See ch 7 par 4.3.3 above.
means to instruct a solicitor. Their training has not prepared them to work with children, and paternalistic attitudes are embedded in the system. As Edwards points out, the representatives may find it difficult to decide if the child’s right to participate is absolute, or one that should be balanced against protective criteria, or one which is always subordinate to the child’s welfare.\textsuperscript{455}