

CHAPTER 97

APPLICATIONS FOR PARENTAL ORDERS UNDER THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008

Application and interpretation

97.1.—(1) This Chapter applies to applications for parental orders under section 54 or 54A^a of the Human Fertilisation and Embryology Act 2008.

(2) In this Chapter, unless the context otherwise requires—

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

“the 2008 Act” means the Human Fertilisation and Embryology Act 2008;

“Her Majesty’s Forces” means the regular forces as defined in section 374 of the Armed Forces Act 2006^b;

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

“Registrar General” means the Registrar General of Births, Deaths and Marriages for Scotland; and

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

Disapplication of certain rules

97.2. Unless otherwise provided in this Chapter, the following rules do not apply to a petition or note:—

rule 14.5 (first order in petitions);

rule 14.6(1)(d) (period of notice for lodging answers where service by advertisement);

rule 14.7 (intimation and service of petitions);

rule 14.8 (procedure where answers lodged);

rule 14.9 (unopposed petitions).

Application for a parental order

97.3.—(1) An application for a parental order is to be made by petition in Form 97.3.

(2) The following documents must be lodged in process along with the petition—

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

Confidentiality of documents in process

97.4.—(1) Unless the court otherwise directs, all documents lodged in process (including the reports by the curator *ad litem* and reporting officer)—

^a Section 54A was inserted by S.I. 2018/1413.

^b 2006 c.52.

- (a) are to be available only to the court, the curator *ad litem*, the reporting officer and the parties; and
- (b) must be treated as confidential by any persons involved in, or a party to, the proceedings and by the clerk of court.

(2) The curator *ad litem* and reporting officer—

- (a) must treat all information obtained in the exercise of their duties as confidential; and
- (b) must not disclose any such information to any person unless disclosure of such information is necessary for the purpose of their duties.

Orders for evidence

97.5.—(1) The court may, before determining the cause, order—

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

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

Expenses

97.6. The court may make such order as to expenses, including the expenses of a reporting officer, a curator *ad litem*, or any other person who attended a hearing, as it thinks fit.

Protection of identity of petitioners

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

(2) On receipt of an application under paragraph (1), the Deputy Principal Clerk must—

- (a) assign a serial number to the applicants; and
- (b) enter a note of the number opposite the names of the applicants in a register of serial numbers.

(3) The contents of the register of serial numbers and the names of the persons to whom each number relates must be treated as confidential by the Deputy Principal Clerk and disclosed only to the court.

(4) Where a serial number has been assigned under paragraph (2)(a), any form of agreement to a parental order under section 54(6) or 54A(5) of the 2008 Act—

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

Appointment of curator ad litem and reporting officer

97.8.—(1) The court must, on the presentation of a petition under rule 97.3, appoint a curator *ad litem* and reporting officer.

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

(3) Where the court appoints a reporting officer and a curator *ad litem*, and there is an established panel of persons from whom the appointment may be made, the reporting officer and curator *ad litem* must be selected from that panel unless the court considers that it would be appropriate to appoint a person who is not on the panel.

(4) A person may, before presenting the petition, apply by letter to the Deputy Principal Clerk for the appointment of a reporting officer.

(5) An application under paragraph (4) does not require to be intimated to any person, but must—

- (a) set out the reasons for which the appointment is sought;
- (b) be accompanied by an interlocutor sheet; and
- (c) be placed by the Deputy Principal Clerk before the Lord Ordinary for his or her decision.

(6) The Deputy Principal Clerk must intimate the appointment of a curator *ad litem* and reporting officer under paragraph (1) or (4) to the petitioners and to the person or persons appointed.

(7) The decision of the Lord Ordinary on an application under paragraph (4) is final and not subject to review.

(8) The letter and the interlocutor sheet in an application under paragraph (4) must be kept in the Petition Department and subsequently placed in the process of the petition.

Duties of a reporting officer and curator ad litem

97.9.—(1) The other duties of a reporting officer appointed under rule 97.8 prescribed for the purposes of section 108(1)(b) of the 2007 Act as modified and applied in relation to applications for parental orders by regulation 4 of, and Schedule 3 to the Regulations (rules: appointment of curators *ad litem* and reporting officers) are—

- (a) to ascertain the whereabouts of all persons whose agreement to the making of a parental order in respect of the child is required;
- (b) to ascertain whether there is any person other than those mentioned in the petition upon whom notice of the petition should be served;
- (c) in the case of each person who is not a petitioner and whose agreement to the making of a parental order is required under section 54(6) or 54A(5) of the 2008 Act—
 - (i) to ascertain whether that person understands the effect of the parental order;
 - (ii) to ascertain whether alternatives to a parental order have been discussed with that person;
 - (iii) to confirm that that person understands that he or she may withdraw his or her agreement at any time before an order is made;
 - (iv) to ascertain whether that person suffers or appears to suffer from a mental disorder within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003(a);
- (d) to ascertain whether the conditions in subsections (2) to (8A) of section 54 or subsections (2) to (8) of section 54A of the 2008 Act have been satisfied;
- (e) to draw to the attention of the court any matter which may be of assistance; and
- (f) to report in writing on the matters mentioned in subparagraphs (a) to (e) to the court within 4 weeks from the date of the interlocutor appointing the reporting officer, or within such other period as the court may allow.

(a) 2003 asp 13.

- (2) A curator *ad litem* appointed under rule 97.8(1) must—
- (a) have regard to safeguarding the interests of the child as his or her paramount duty;
 - (b) enquire, so far as he or she considers necessary, into the facts and circumstances averred in the petition;
 - (c) establish that the petitioners understand the nature and effect of a parental order and in particular that the making of the order will render them responsible for the maintenance and upbringing of the child;
 - (d) ascertain whether any money or other benefit which is prohibited by section 54(8) or 54A(7) of the 2008 Act (prohibition on gift or receipt of money or other benefit) has been received or agreed upon;
 - (e) ascertain whether it may be in the interests of the welfare of the child that the court should make the parental order subject to particular terms and conditions or require the petitioners to make special provision for the child and, if so, what provision;
 - (f) ascertain whether it would be better for the child that the court should make the order than it should not make the order;
 - (g) ascertain whether the proposed parental order is likely to safeguard and promote the welfare of the child throughout the child's life; and
 - (h) ascertain from the child whether he or she wishes to express a view and, where a child indicates his or her wish to express a view, ascertain that view.

(3) Subject to paragraph (4), the curator *ad litem* must report in writing on the matters mentioned in paragraph (2) to the court within 4 weeks from the date of the interlocutor appointing the curator, or within such other period as the court in its discretion may allow.

(4) Subject to any order made by the court under rule 97.11(1), the views of the child ascertained in terms of paragraph (2)(h) may, if the curator *ad litem* considers appropriate, be conveyed to the court orally.

(5) The reporting officer must, on completion of his or her report in terms of paragraph (1), in addition send to the Deputy Principal Clerk—

- (a) a copy of his or her report for each party; and
- (b) any agreement for the purposes of section 54(6) or 54A(5) of the 2008 Act.

(6) The curator *ad litem* must, on completion of his or her report in terms of paragraph (3), in addition send a copy of it for each party to the Deputy Principal Clerk.

Agreement

97.10.—(1) The agreement of a person required by section 54(6) or 54A(5) of the 2008 Act is to be in Form 97.10.

- (2) The form of agreement mentioned in paragraph (1) must be witnessed—
- (a) where it is executed in Scotland, by the reporting officer appointed under rule 97.8;
 - (b) where it is executed outwith Scotland but within the United Kingdom, by a justice of the peace or commissioner for oaths; or
 - (c) where it is executed outwith the United Kingdom—
 - (i) if the person who executes the form is serving in Her Majesty's Forces, by an officer holding a commission in those forces; or
 - (ii) in any other case, by a British diplomatic or consular official or any person authorised to administer an oath or affirmation under the law of the place where the agreement is executed.

Procedure where child wishes to express a view

97.11.—(1) Where a child to whom section 54(11) or 54A(11) of the 2008 Act applies indicates his or her wish to express a view, the court, without prejudice to rule 97.9(2)(h)—

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

(2) Where the views of the child, whether under this rule or under rule 97.9(2)(h) have been recorded in writing, the court may direct that such a written record is to—

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

Hearing

97.12.—(1) On receipt of the reports referred to in rule 97.9, the Deputy Principal Clerk shall—

- (a) cause the reports and any other documents to be lodged in process;
- (b) give written intimation to each party of the lodging of those documents and make them available to each party; and
- (c) within 7 days thereafter, cause—
 - (i) the petition to be put out on the By Order Roll before the Lord Ordinary; and
 - (ii) written intimation of the date of the hearing on the By Order Roll to be given to each party.

(2) At the hearing on the By Order Roll, the court—

- (a) must pronounce an interlocutor appointing the petition to a hearing to determine the petition; and
- (b) may, in such interlocutor—
 - (i) order any person whose agreement is required to attend such hearing;
 - (ii) order intimation of the date of the hearing to any person not mentioned in paragraph 3(a), (b) or (c); and
 - (iii) order the reporting officer or curator *ad litem* to perform additional duties to assist the court in determining the petition.

(3) The petitioners or, where a serial number has been assigned under rule 97.7(1) the Deputy Principal Clerk, must intimate a copy of the petition along with a notice of intimation in Form 97.12 to—

- (a) every person whose whereabouts are known to them and whose agreement is required;
- (b) the reporting officer appointed under rule 97.8;
- (c) the curator *ad litem* appointed under rule 97.8(1); and
- (d) any person on whom intimation has been ordered under paragraph (2)(b)(ii).

(4) At the hearing ordered under paragraph (2)(a)—

- (a) the petitioners, the reporting officer and the curator *ad litem* must, if required by the court, appear and may be represented;

- (b) any person required by the court to attend the hearing must appear and may be represented; and
- (c) any person to whom intimation was made under paragraph (3)(a) or (d) may appear or be represented.

Applications under sections 22 and 24 of the 2007 Act

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

Amendment of parental order

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

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

(3) Subject to paragraph (4), rule 97.2 does not apply to an application mentioned in paragraph (1).

(4) An application mentioned in paragraph (1) shall not be intimated on the walls of the court or advertised.

Communication to the Registrar General

97.15. The communication to the Registrar General of a parental order required to be made by the clerk of court under paragraph 4(1) of Schedule 1 to the 2007 Act, as modified and applied in relation to parental orders by regulation 4 of, and Schedule 3 to, the Regulations (registration of parental orders), is to be made by sending a certified copy of the order to the Registrar General in a sealed envelope marked “Confidential”.

Extract of order

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

- (a) where there is a petition for the parental order depending before the court, by motion in that process; or
- (b) where there is no such petition depending before the court, by petition.

Final procedure

97.17.—(1) Immediately after the communication is made under rule 97.15 or immediately upon an extract of the order being issued under rule 97.16 the clerk of court or the Extractor, as the case may be, must—

- (a) place the whole process in an envelope bearing only—
 - (i) the name of the petitioners;
 - (ii) the full name of the child to whom the process relates; and
 - (iii) the date of the order; and
- (b) seal the envelope and mark it “confidential”.

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

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