

Briefing for the Citizen Participation and Public Petitions Committee on [petition PE2166](#): establish a standardised timeframe for civil proceedings in child custody cases, lodged by John Watson McMaster

The Children (Scotland) Act 1995

This petition relates to court cases considered under Part 1 of the [Children \(Scotland\) Act 1995](#) ('the 1995 Act').

Part 1 provides for a range of parental responsibilities and rights ('PRRs') in respect of all children (under 16s) living in Scotland.

For example, PRRs include the right to have the child live with a person having PRRs (**residence**, sometimes called 'custody' in practice). Furthermore, where the child does not live with that person, there is both the right and the responsibility to have **contact** with that child.

Section 11 of the 1995 Act is an important provision which gives the court various powers to decide an issue in a dispute about PRRs. Section 11 says the court should follow certain key principles when making decisions. The welfare of the child is the paramount consideration, that is, the most important and overriding one.

[A detailed discussion of the law in this area](#) is set out in the SPICe briefing, [Parental Responsibilities and Rights](#).

The 1995 Act in practice

Cases under the 1995 Act are usually considered by [the local sheriff court](#), by a judge called a **sheriff** or a judge called a **summary sheriff**. Individual sheriffs do not specialise in family cases, except, to some extent, in large urban centres.

Relatively few court cases relating to section 11 of the 1995 Act ('section 11 cases') tend to get as far as a **proof**, a full hearing where witnesses give evidence and are cross-examined on it. Instead, they are typically settled during **child welfare hearings**, which are relatively informal, private proceedings. It is common for multiple such hearings to take place over the course of a case.

In section 11 cases, an important role is often played by **child welfare reporters**. These are court-appointed officials who report to the court on what the views of the child are, or what is in the interests of the welfare of the child. In 2023-24, the Scottish Parliament considered [a separate petition \(PE2069\)](#),

[now closed](#)) that sought to ensure the accuracy of statements contained in child welfare reports.

Court procedure

The detailed court procedure to be followed in family cases is generally set out in **court rules**. The [Court of Session](#) makes these rules in a form of secondary legislation known as 'Acts of Sederunt'. The [Scottish Civil Justice Council](#) has a key role in drafting rules for the Court of Session to consider.

Sometimes some provision on court procedure is made in primary legislation. Section 30(2) of the [Children \(Scotland\) Act 2020](#) ('the 2020 Act'), discussed in more detail below, is an example of this, although it is not yet in force.

Delays in section 11 cases

There have been [long-standing policy concerns about delays in cases affecting children](#), including in section 11 cases, and inconsistencies in respect of how such cases are managed.

Section 30(2) of the 2020 Act

Section 30(2) of the 2020 Act (as already mentioned, not yet in force) was part of the Scottish Government's policy response to this. It requires the court, when considering the child's welfare under a section 11 case, to consider whether any delay in proceedings would negatively affect the child's welfare.

The section does not specify the length of delay that would have a negative effect on the child's welfare. The [Explanatory Notes to the 2020 Act](#) say that the length having this impact would vary from case to case.

[The Scottish Government has said it intends to commence section 30\(2\) of the 2020 Act through regulations laid later this year.](#)

Work of the Scottish Civil Justice Council

Separately, in 2017, the Scottish Government [submitted a policy paper](#) to the [Family Law Committee](#) of the [Scottish Civil Justice Council](#) (SCJC).

Key recommendations of the policy paper included:

- **earlier and more active judicial case management**, including timetabling and regular reviews
- **greater consistency** in procedures across courts
- **use of dedicated family sheriffs** where possible
- **improved data collection** on case durations and outcomes
- **enhanced training** for legal professionals and judiciary in family law and child welfare.

On the first bullet point above, broadly, active **judicial case management** involves the judge, rather than the litigants or their solicitors, being responsible for setting the pace of, and controlling, the litigation process.

Later in 2017, a sub-committee of the SCJC's [Family Law Committee finalised a report](#) that [made a number of recommendations, including:](#)

- a new case management structure for all family cases in the sheriff court (see [para 4.8 of the report](#) for some suggested associated timescales for court proceedings)
- greater judicial control over the 'sisting' (pausing) of family court actions
- allocating these court actions to either a 'fast track' or 'proof track' court procedure, as appropriate.

On the final point, [the report of the sub-committee explained:](#)

"The initial case management hearing will function as a triage hearing. The sheriff shall seek to establish whether the case is (i) of a complex, or potentially high-conflict, nature which will require proactive judicial case management leading up to a proof ('the proof track'); or (ii) a more straightforward case where the issues in dispute appear to be capable of being resolved by a series of child welfare hearings without the need for a proof ('the fast track')."

In 2018, [a consultation was carried out by the SCJC on case management rules in family actions](#). The [report on the consultation](#) explains that a number of respondents did not like the proposed two-track structure. One of the main concerns was that it was "needlessly complex" and that it was not always possible to separate the issues raised at child welfare hearings from those raised at case management hearings.

Related court rules were later put in place aiming to improve case management in family cases, although they did not contain the two-track structure originally proposed: [Act of Sederunt \(Ordinary Cause Rules 1993 Amendment\) \(Case Management of Defended Family and Civil Partnership Actions\) 2022](#).

Key Organisations and relevant links

- [Lord President of the Court of Session](#)
- [Scottish Civil Justice Council](#)
- [Scottish Courts and Tribunal Service](#)
- [Sheriffs and Summary Sheriffs Association](#)
- [Law Society of Scotland](#)

- [Family Law Association](#)

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The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at spice@parliament.scot

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