En el ámbito de la justicia civil, los procesos y procedimientos pendientes iniciados antes del final del período transitorio proseguirán con arreglo a la legislación de la UE. El Portal de e-Justicia mantendrá la información relativa al Reino Unido, sobre la base de un acuerdo mutuo con este país, hasta el final de 2024.

Parental responsibility - child custody and contact rights

Escocia

1 What does the legal term "parental responsibility" mean in practical terms? What are the rights and obligations of a holder of parental responsibility?

In Scotland, the rights and obligations of a parent are called "parental responsibilities and parental rights", or PRRs.

A person with parental responsibilities for a child should, so far as it is practicable and in the interests of the child:

- safeguard and promote the child's health, development and welfare;
- provide the child with direction and guidance in a manner appropriate to the child's stage of development
- if the child is not living with the parent, maintain personal relations and direct contact with the child on a regular basis
- act as the child's legal representative.

A person has rights in order to fulfill his or her responsibilities. The parental rights are:

- to have the child living with him or otherwise to regulate the child's residence;
- to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;
- if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis;
- to act as the child's legal representative.

2 As a general rule, who has the parental responsibility over a child?

A child's mother has PRRs automatically. A child's father will have PRRs if:

- He was married to the mother at the time of conception or subsequently
- On or after the 4 May 2006, he jointly registered his child's birth with the mother
- He and the mother completed and registered an agreement in a prescribed form (see the answer to question 5 below)
- A court gave them to him.

Anyone with an interest in a child can ask the court for PRRs.

3 If the parents are unable or unwilling to exercise parental responsibility over their children, can another person be appointed in their place?

Yes. A court can give a person other than a parent PRRs or can appoint a person as a child's guardian.

4 If the parents divorce or split up, how is the question of parental responsibility determined for the future?

If parents divorce or separate, this does not, of itself, affect who has PRRs. If parents cannot agree about what is best for their child, one or both can ask the court to decide matters. The court must regard the welfare of the child concerned as its paramount consideration. It must not make an order unless to do so would be better for the child than to make no order. The court must also, taking account of the child's age and maturity, have regard to any views the child wishes to express.

5 If the parents conclude an agreement on the question of parental responsibility, which formalities must be respected to make the agreement legally binding?

In the case of an agreement giving the father PRRs, the agreement must be in a prescribed form and must be registered in order to have legal effect. The form is available on the Scottish Government's website.

Each parent must sign the agreement in the presence of one witness who must be aged 16 or over and who must also sign the agreement. The same person can witness both signatures. The agreement must be registered in the Books of Council and Session while the mother still has the PRRs she had at the time of signing the agreement.

6 If the parents cannot come to an agreement on the issue of parental responsibility, what are the alternative means for solving the conflict without going to court?

There are a variety of methods of "alternative dispute resolution". These include:

- Family mediation (where a mediator gives family members the opportunity to talk about their concerns, explore options, and agree a way forward)
- Lawyer mediation (where the mediator is a lawyer who also holds a qualification in mediation)
- Arbitration (where the parties agree to appoint a person called an "arbitrator" to resolve a dispute and to be bound by the arbitrator's decision)
- Collaborative law (where both parties have a lawyer and the lawyers agree to attempt to resolve the dispute outside of court)

7 If the parents go to court, what issues can the judge decide upon relating to the child?

The judge can make orders in relation to:

- parental responsibilities;
- parental rights;
- guardianship;
- the administration of a child's property.

8 If the court decides that one parent shall have sole custody of a child, does this mean that he or she can decide on all matters relating to the child without first consulting the other parent?

Everyone with PRRs in relation to a child should be involved in decisions about that child. Where only one parent has PRRs, that parent can decide on all matters without consulting the other parent.

9 If the court decides that the parents shall have joint custody of a child, what does this mean in practice?

If both parents have full PRRs in relation to a child, they both have the right to have the child living with him or her, or to otherwise regulate the child's residence. Where the child lives with one of them, the other has the right to maintain personal relations and direct contact with the child on a regular basis.

The general principle is that where possible, both parents should contribute to the upbringing of their children, where this is practicable and in the interests of the child. If parents cannot agree, the court can determine with whom a child resides, and when. It is possible for the court to order that a child should reside with different people at different times.

10 To which court or authority should I turn if I want to lodge an application on parental responsibility? Which formalities must be respected and which documents shall I attach to my application?

i. An action concerning parental responsibilities can be raised in either the Court of Session or in the Sheriff Court. The application can be made within an ordinary action for divorce or separation.

ii. Which court to use is a matter of personal choice. Where no such action for divorce or separation is pending, the Court of Session has jurisdiction to deal with an application for a parental responsibilities order where the child is habitually resident in Scotland and the Sheriff Court has jurisdiction to entertain such an action where the child is habitually resident within the Sheriffdom in which the Court is geographically situated. The Scottish Courts and Tribunals Service website contains a map showing court locations and lists addresses and contact details.

iii. An application concerning parental responsibilities and rights requires to be made in the form of a Summons in the Court of Session and by Initial Writ in the Sheriff Court. As in the case of divorce actions each Court has its own set of rules which set out the form such application should take. See paragraph 11 (6) of the page on divorce.

Formalities and documentation

iv. A fee will be payable in either Court on the lodging of such an application. See paragraph 11(8) of the page on divorce concerning possible fees exemptions.

v. With any of these types of application you will require to present an extract entry of the child's birth. A photocopy will not be accepted by the court nor will an abbreviated form of certificate.

11 Which procedure applies in these cases? Is an emergency procedure available?

There is no simplified procedure available in applications of this type. The rules referred to in paragraph 11(6) of the page on divorce set out the procedures. It is possible to seek an interim order where this is thought to be necessary.

12 Can I obtain legal aid to cover the costs of the procedure?

Advice and Assistance is available on parental responsibility matters subject to the normal statutory financial tests. Civil Legal Aid is also available on parental responsibility matters, subject to the three normal statutory tests of financial eligibility, reasonableness and probable cause.

13 Is it possible to appeal against a decision on parental responsibility?

Yes.

14 In certain cases, it may be necessary to apply to a court to have a decision on parental responsibility enforced. Which court should I use in such cases and which procedure applies?

It may be possible to bring proceedings in the same action for failure to comply with a court order. If there is a failure to comply, contempt of court proceedings could be taken.

15 What should I do to have a decision on parental responsibility that is issued by a court in another Member State recognised and enforced in this Member State?

If you wish to enforce a judgment from another Member State, the matter is regulated by Council Regulation (EC) 2201/2003 (commonly known as Brussels IIa). A judgment of another Member State on the exercise of parental responsibility relating to a child is enforceable in Scotland where (1) an application has been lodged and (2) in consequence, the judgment has been declared enforceable in Scotland.

The procedure for lodging this application is set out in Scots law. Application must be made to the Court of Session and must be accompanied by specific documents (which are set out in Brussels IIa). You may find it helpful to get legal advice on this matter.

Under Brussels IIa, there are certain judgments that are enforceable in other Member States without the need for a declaration of enforceability.

16 To which court in this Member State should I turn to oppose the recognition of a decision on parental responsibility issued by a court in another Member State? Which procedure applies in these cases?

If you wish to challenge the recognition of a judgment from another Member State, the matter is regulated by Council Regulation (EC) 2201/2003 (commonly known as Brussels IIa). Brussels IIa lists the grounds on which the judgment shall not be recognised.

An application requires to be lodged according to the procedure set out in Scots law. The application must be made to the Court of Session and must be accompanied by specific documents (which are set out in Brussels IIa). You may find it helpful to get legal advice on this matter.

Under Brussels IIa, there are certain judgments that are enforceable and recognised in other Member States without the need for a declaration of enforceability.

17 Which law does the court apply in a proceeding on parental responsibility where the child or the parties do not live in this Member State or are of different nationalities?

If the court in Scotland has jurisdiction, it will generally apply Scots Law. If it is thought that a particular question is governed by a relevant foreign law which is different from Scots law, that law must be averred and proved. There may be unusual circumstances where foreign law is pleaded by the parties in a case in which circumstances the Scottish court may take this into consideration.

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