



The Scottish Parliament  
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# Contact between grandparents and their grandchildren

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This briefing aims to support MSPs with their constituency casework relating to contact between grandparents and their grandchildren. It outlines the current law relating to this topic in Scotland and some possible sources of support for grandparents.



**22 May 2018**  
**SB 18-38**

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# What this briefing is about

Grandparents can experience difficulties in relation to obtaining contact with their grandchildren in a range of situations.

A common example is where the **parents separate or divorce acrimoniously** and the children continue to live wholly or mainly with one parent. In these circumstances, the grandparents on the other side of the family can find maintaining contact challenging.

This briefing explains the current law relating to grandparents' contact rights in Scotland, as contained in **Part 1 of the Children (Scotland) Act 1995**. It also suggests some possible **sources of support** for grandparents.

## A note on terminology

This briefing explains the current law relating to grandparents' contact rights in Scotland, as contained in **Part 1 of the Children (Scotland) Act 1995**.

Note that day to day, people still tend to talk about **access** and **custody** in relation to disputes about children, in keeping with the legislation that predated the 1995 Act.

However, the terms used in the 1995 Act are actually **contact** and **residence**. Residence relates to who the child lives with. Contact relates to the child's relationships with people he or she does not live with.

## What is not covered by this briefing

SPICe is aware that MSPs also receive enquiries from constituents relating to the distinct situation where grandparents are looking after their grandchildren on a full-time basis (**kinship care**). This complex area of law and policy is not covered by this briefing.

Also not covered by this briefing is the content of the Scottish Government's 2018 [consultation](#) on the relevant legislation associated with contact rights.<sup>1</sup> This contains a section on grandparents' contact rights (paras 4.28 - 4.32 and question 8) meaning future reform to the law is possible.

Please note that SPICe can only provide general information relating to the law of Scotland. If a constituent wishes to receive legal advice in relation to the circumstances of his or her individual case, he or she should contact a solicitor.

# Parental responsibilities and rights (PRRs)

To understand the legal position of grandparents trying to maintain contact with their grandchildren, it is necessary to understand the broader legal framework of **parental responsibilities and rights (PRRs)**.

## What are PRRs?

**Part 1 of the Children (Scotland) Act 1995** provides a range of PRRs in respect of all children living in Scotland. Parental responsibilities exist where practicable and in the best interests of the child (1995 Act, section 1). Parental rights exist to enable those with parental responsibilities to fulfil those responsibilities (1995 Act, section 2).

PRRs include the **right to have the child live with a person having PRRs**. Furthermore, where the child does not live with that person, there is both the right and the responsibility to have **contact with that child** (1995 Act, section 1(1)(c) and section 2(1)(a) and (c)).

There is also a responsibility to safeguard and promote a **child's health, development and welfare** (1995 Act, section 1(a)). Furthermore, there is a PRR to **direct or guide the child's upbringing in an age appropriate way** (1995 Act, section 1(1)(b) and 2(1)(b)).

Consequently, a range of day to day decisions about a child's life fall within the scope of PRRs, such as those to do with his or her **education, religious upbringing or medical treatment**.

## Who has PRRs?

A range of people have automatic PRRs in respect of a child. These include (1995 Act, section 3; Registration of Births, Deaths and Marriages (Scotland) Act 1965, section 18):

1. the **child's mother**
2. the **child's father** where he was **married to the child's mother** - at the time of conception or subsequently; and
3. the **child's father** where he is **registered as the father of the child** on or after 4 May 2006.

Fathers can also register an **agreement** with the child's mother in order to get PRRs (1995 Act, section 4).

**Raising a court action in order to acquire PRRs** is also possible, as discussed in more detail in the next section of this briefing (1995 Act, section 11).

# The application of the 1995 Act to grandparents

## Grandparents have no automatic right to see their grandchildren

A grandparent does **not** have an automatic right to see his or her grandchild. This is because they do not fall into the category of people who have automatic PRRs under the 1995 Act.

## Applying for a section 11 order relating to contact

Any person who does not have (and never has had) PRRs in respect of a child but who **claims an interest** can apply for a court order granting them contact with that child (1995 Act, section 11(2)(d) and 11(3)).

Accordingly, if an amicable agreement cannot be reached about contact, a grandparent could make such an application to the court.

## The guiding principles

In considering whether to grant any court order under section 11 of the 1995 Act, the court will have regard to three principles, namely:

1. **welfare:** the welfare of the child is the paramount consideration;
2. **the child's views:** the child shall be given an opportunity to express his or her views and the court shall "have regard to" those views. This principles applies so far as is practicable and taking into account the child's age and maturity.
3. **the need for a court order:** the court will not make any order unless it considers that to do so would be better for the child than making no order at all (1995 Act, section 11(7)).

In relation to 2 above, a child **aged 12 years or older** is presumed to be of sufficient age and maturity enough to form a view (1995 Act, section 11(10)). However, this does not mean that a child below that age cannot form a view. In appropriate circumstances courts do take into account the views of children below the age of 12.

The courts are also required to "have regard in particular" to:

1. the need to protect the child from actual or possible abuse
2. the effects of such abuse on children
3. the ability of the abuser to care for the child

4. the effects of abuse on a person's capacity to fulfil PRRs (1995 Act, section 11(7A)–(7E)).

Abuse is defined as including “abuse of a person other than the child” (1995 Act, section 11(7C)(b)).

## Practical points

### Finding a solicitor

SPICe recommends that anyone contemplating applying for a contact order should take the **advice of a solicitor**.

To help find a solicitor in Scotland specialising in family law, the [Law Society of Scotland's](#) website has a facility allowing you to [search by specialism and by geographical area](#). The [Family Law Association](#) has a similar [search facility](#).

### Help with legal costs

Help with legal costs may be available out of the **civil legal aid budget**. There are two main types of legal aid which might be available:

- **Advice and assistance** is available to provide legal advice from a solicitor, although not representation by a solicitor in court;
- **Civil legal aid** enables legal representation in court.

There are various tests which applicants have to meet to qualify for either type of legal aid, including **financial eligibility tests**. More information on eligibility for legal aid can be found on the [Scottish Legal Aid Board's](#) webpage entitled [Eligibility](#).

The [Scottish Legal Aid Board's](#) website allows you to [search for a firm of solicitors who offer help through legal aid](#). The [Family Law Association's](#) [search facility](#) also allows you to search specifically for a family law firm who undertake legal aid work.

## Breaches of contact orders

A person in breach of an order made under section 11 of the 1995 Act can be held in **contempt of court** with the possibility of being **fined** or **imprisoned** (or both). Judges are reluctant to imprison parents with whom the children who are the subject of a section 11 order live, but it does happen in a small number of cases.

It is also possible in theory for a court to vary the terms of an existing court order in response to a breach of a contact order. However, the principles discussed earlier will determine any decision in this regard. In particular, the **welfare of the child is the paramount consideration** (1995 Act, section 11(7)).

All these enforcement powers require the person seeking to enforce the contact order to go back to court. Additional legal expenses are likely to be incurred by that person during the process, unless he or she qualifies to have all of his or her expenses met out of the civil legal aid budget.

## Alternatives to court action

As well as being potentially expensive, court action may be stressful and there is no guarantee of success. It also has the potential to make the relationships between the parties concerned worse. In addition, court action may take some time.

Alternatives to court action include **mediation**, although the individuals involved in the dispute must be willing to participate voluntarily.

The website of the [Scottish Mediation Network](#) contains more information about family mediation, including a [search tool](#) to help interested individuals find a local mediation provider. [Relationships Scotland](#) is a voluntary organisation which is a leading provider of family mediation services.

[CALM Scotland](#) also provides mediation services across Scotland and is run by experienced solicitors specialising in family law. It has a [search tool](#) to enable access to local mediators.

# Sources of support for grandparents

Grandparents may find it helpful to have regard to the contents of the [Charter for Grandchildren](#) published by the then Scottish Executive in 2006. The Charter aims to highlight the role of the wider family in raising children. However, it is a statement of the Scottish Government's policy intentions in this area, rather than a document with legal consequences.

A possible source of practical and emotional support for grandparents is [Grandparents Apart](#). This is a UK-wide organisation which helps grandparents (including those in Scotland) and which campaigns on the issue of grandparents' rights.

[Families need Fathers Scotland](#) aims to support fathers and other family members in dealing with the practical consequences of divorce and separation. The organisation is very active in working with grandparents. Its services include [monthly group meetings](#) where group members can share their experiences. Grandparents are welcome to attend.



# Bibliography

- 1 Scottish Government. (2018, May 15). Review of Part 1 of the Children (Scotland) Act 1995 and the creation of a Family Justice Modernisation Strategy. Retrieved from <https://consult.gov.scot/family-law/children-scotland-act/> [accessed 22 May 2018]

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