

ADOPTION AND CHILDREN (SCOTLAND) ACT 2007

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Chapter 2

The Adoption Process

Section 14 - Considerations applying to the exercise of powers

62. This section places various duties on the court or adoption agency when coming to a decision in relation to the adoption of a child including a duty to ensure that the welfare of the child is the paramount consideration, and to ensure that an adoption order is granted only if there is no better alternative for the child.
63. By virtue of subsection (2), the court or adoption agency must consider all of the circumstances of the case before coming to a decision to place the child for adoption or to make an adoption order.
64. By virtue of subsection (3), when making a decision about whether or not to place a child for adoption or whether or not to make an adoption order, the court or adoption agency must have as its paramount consideration the best interests of the child throughout his or her life (including after childhood).
65. In addition to this overarching principle, under subsection (4) the court or adoption agency must, as far as is reasonably practicable, take into account a number of specific considerations. These are (a) the value of a stable family unit in the child's development; (b) the child's own ascertainable views regarding adoption (taking into account the age and maturity of the child); (c) the child's religious persuasion, racial origin and cultural and linguistic background; and (d) the likely effect on the child, throughout his or her life, of the making of the adoption order.
66. The requirements of paragraph (c) mean that a court or adoption agency must have regard to these factors when placing a child, but do not mean that a child cannot be placed with adopters of other religious persuasions, racial origins and cultural and linguistic backgrounds.
67. Subsection (5) places a duty on an adoption agency which is placing a child for adoption to have regard, so far as is reasonably practicable, to the views of the child's parents, guardians and other relatives. "Relative" is defined for the purposes of the Act in section 119(1).
68. In carrying out these duties an adoption agency has a further duty under subsection (6) to consider whether adoption is the best way to meet the interests of the child or whether there is a better alternative. If it considers that there is a better alternative it must not make arrangements for the adoption of the child (subsection (7)).

69. Subsection (8) provides that a child who is at least 12 years old will be presumed to be capable of expressing his or her views for the purposes of subsection (4)(b). This is without prejudice to the generality of that subsection and therefore allows the court or adoption agency to take into account the views of a child below that age.

Section 15 - Child to live with adopters before adoption order made

70. By virtue of subsections (1), (2) and (3), where a person applying for an adoption order is a parent, step-parent or relative of the child, or the child was placed with the applicant by an adoption agency, the adoption order cannot be made unless the child is at least 19 weeks old and that the child's home was with the applicants at all times during the 13 weeks immediately prior to the making of the adoption order.
71. Where the child was not so placed or neither of the applicants is a parent, step-parent or relative of the child, an adoption order cannot be made unless the child lived with the prospective adopters at all times during the 12 month period immediately preceding the making of the adoption order.
72. Subsection (5) applies to adoptions by way of Convention adoption orders (as defined by section 119) and to adoptions of children who are habitually resident outwith the British Islands, otherwise than by that type of order. In these cases the reference to the period of 13 weeks referred to above is read as a reference to a period of 6 months.

Section 16 - Home visits

73. By virtue of subsections (1) and (2), where a child has been placed with prospective adopters by an adoption agency, an adoption order cannot be made unless the court is satisfied that the adoption agency has been given sufficient opportunities to see the child with the prospective adopters in their home environment.
74. By virtue of subsections (3) and (4), where the child was not so placed, an adoption order cannot be made unless the court is satisfied that the local authority in whose area the prospective adopters have a home has been given sufficient opportunities to see the child with the prospective adopters in their home environment. Where the prospective adopters do not have a home in Scotland, any Scottish local authority must be given such opportunities.
75. In practice, the local authority to which such opportunity must be given at subsection (4) will normally be the local authority which has been notified of the prospective adopters' intention to adopt under section 18(2).

Section 17 - Reports where child placed by agency

76. By virtue of subsection (2) of this section, where an adoption application relates to a child who has been placed for adoption by an adoption agency, the agency must submit to the court a report concerning the suitability of the applicants and any other matters relevant to the operation of section 14 (considerations applying to the exercise of powers). In addition, the agency must assist the court in any way which the court directs.

Section 18 - Notification to local authority of adoption application

77. By virtue of this section, where a child was not placed for adoption by an adoption agency, an adoption order cannot be made unless the prospective adopters have given notice of their intention to apply for such an order at least 3 months before the date on which the order is made. Notice must be given to the local authority within whose area they have their home, or, where the applicants do not have a home in Scotland, to any local authority.

Section 19 - Notice under section 18: local authority's duties

78. Where, under section 18, a local authority receives notice of intention to apply for an adoption order, it must, by virtue of subsection (2), investigate the matter and submit a report of the investigation to the court.
79. Subsection (3) specifies the factors which the local authority must, in particular, investigate, which are, as far as is reasonably practicable, the suitability of the applicants and any other matters relevant to the operation of section 14; any contravention of section 75; and any failure to comply with section 76(2) of the Act.
80. By virtue of subsection (4), if a local authority receives a notice under section 18, and it is aware that the child is being looked after by another local authority, it must give a copy of the notice to that local authority within seven days of receipt.

Section 20 - Restrictions on removal: child placed for adoption with consent

81. Where a child has been placed for adoption by an adoption agency, with consent of the child's parents, subsection (2) provides that the parents cannot remove the child from the care of the prospective adopters without the leave of the adoption agency or the appropriate court.
82. Subsection (3) makes it an offence to remove a child in breach of subsection (2). The offence is punishable by imprisonment for a term not exceeding 3 months, a fine not exceeding level 5 on the standard scale, or both.

Section 21 - Restrictions on removal: notice of intention to adopt given

83. This section applies where, under section 18, prospective adopters give notice of intention to adopt and the child has lived with the prospective adopters for the five years immediately preceding the adoption application.
84. Subsections (2) and (3) provide that, between notice being given under section 18 and the occurrence of a "relevant act" specified at subsection (4), a child may not be removed from the care of the prospective adopters, unless the prospective adopters consent to the removal; a court with jurisdiction to make adoption orders grants leave for the child to be removed; the child is arrested; or the removal is authorised by virtue of any enactment.
85. Subsections (4) and (5) specify the "relevant act" as the making of an application for an adoption order where the application is made within 3 months of the date on which the local authority received notice under subsection (1). Where prospective adopters have not made an application for adoption within that 3 month period, the "relevant act" is the expiry of that 3 month period.
86. By virtue of subsection (6), where, during the 3 month period mentioned above or during the 28 day period immediately after the expiry of the 3 month period, prospective adopters give further notice of their intention to apply for an adoption order in respect of the same child, the prohibition on removing the child under subsection (2) does not apply.
87. Subsection (7) provides that it is an offence for a person to contravene the terms of this section. Such an offence is punishable by imprisonment for a period of up to 3 months or a fine not exceeding level 5 on the standard scale or both.

Section 22 - Restrictions on removal: application for adoption order pending

88. By virtue of subsections (1), (2) and (3), where an application for an adoption order has been made to the court, but the court has not yet made a determination, and where the child's home during the 5 year period preceding the adoption application has been with the prospective adopters, a child cannot be removed from the home of the prospective

adopters unless the prospective adopters agree to the removal; the court grants leave for removal; the child is arrested; or removal is authorised by an enactment. Subsection (4) makes it an offence to remove a child in breach of subsection (2). Such an offence is punishable by imprisonment for a term not exceeding 3 months, a fine not exceeding level 5, or both.

Section 23 - Restrictions on removal of child looked after by local authority

89. Subsection (2) applies where an application for an adoption order has been made but not yet determined or prospective adopters have given notice of intention to adopt and, in each case, the child's home has been with the prospective adopters for the previous 5 years, and the child was looked after by the local authority before he or she lived with the prospective adopters, and the child remains a looked after child.
90. By virtue of subsection (2), the local authority must not remove the child from the care of the prospective adopters, except where subsection (3) applies, namely, where the removal is made in accordance with section 25 or 26, an appropriate court grants leave for removal, or where the removal is authorised by virtue of Chapter 2 or 3 of Part II of the Children (Scotland) Act 1995. "Appropriate court" is defined at section 118 of the Act.

Section 24 - Return of child removed in breach of certain provisions

91. By virtue of subsection (1), a person who has removed a child in breach of the provisions listed in subsection (4) can, on application by the person from whom the child was removed, be ordered by the court to return the child.
92. Under subsection (2), a court can order a person not to remove a child from another's home. This can be done when the court receives an application from a person who has reasonable grounds to believe that another person intends to remove a child in breach of the provisions listed in subsection (4).
93. The provisions set out in subsection (4) are sections 20, 21, 22 and 23 of the Act, sections 30 (general prohibitions on removal), 34 (placement orders: prohibition on removal), 35 (return of child in other cases) and 36 (restrictions on removal) of the Adoption and Children Act 2002 and Articles 28 (restriction on removal where adoption agreed or application made) and 29 (restrictions on removal where applicant has provided home for 5 years) of the [Adoption \(Northern Ireland\) Order 1987 \(S.I. 1987/2203\)](#).

Section 25 - Return of child placed for adoption by adoption agency

94. This section applies where a child has been placed with prospective adopters under arrangements made by an adoption agency or registered adoption society, but where no adoption order has been made.
95. By virtue of subsection (2), prospective adopters with whom a child has been placed can notify the adoption agency or society of their intention to cease caring for the child.
96. By virtue of subsection (3), the adoption agency or society can notify prospective adopters with whom a child has been placed of their intention to remove the child from their care. Where an application for an adoption order has been made, then, by virtue of subsection (4), an adoption agency or society can only do so if leave of the court has been given.
97. Under subsections (5) and (6), where notice is given under subsection (2) or (3) or where an application for an adoption order is refused or withdrawn, prospective adopters must, before the expiry of the "relevant period", return the child to the adoption agency or society or to a person nominated by the adoption agency or society.
98. Subsection (7) defines the "relevant period". Where notice is given by virtue of subsection (2) or (3), the relevant period is 7 days beginning with the day on which

notice was given. Where an application for an adoption order is refused or withdrawn, the relevant period is 7 days beginning with the day on which the application was refused or withdrawn. Where the court refuses the application for an adoption order it may, before the relevant period expires, make an order extending the period for the return of the child by a period not exceeding 6 weeks.

99. By virtue of subsection (8) it is an offence for a person to fail to return a child within the relevant period and such a person is liable to imprisonment for a period of up to three months or a fine not exceeding level 5 on the standard scale or both.
100. By virtue of subsection (9), where a court convicts a person under subsection (8), it may order that the child be returned to his or her parents or guardian the adoption agency or registered adoption society.

Section 26 - Looked after children: adoption not proceeding

101. This section applies where a child who is looked after by a local authority is living with prospective adopters, but has not been placed there by an adoption agency or a registered adoption society, and the prospective adopters have given notice of intention to adopt under section 18.
102. By virtue of subsection (2), the prospective adopters can notify the local authority that they intend to cease caring for the child.
103. By virtue of subsection (3), the local authority can notify the prospective adopters that it intends to remove the child from their care. Where an application for an adoption order has been made in relation to the child then, by virtue of subsection (5), the local authority can give such notice only if leave of the court has been given.
104. By virtue of subsection (4), where notice is given under subsection (2) or (3), the prospective adopters must deliver the child to the local authority or a nominated person within 7 days of giving such notice.
105. Under subsection (6) where an adoption order in relation to a child is refused or withdrawn, the child need only be delivered to the local authority if the local authority so requires and in which case the child must be delivered before the expiry of 7 days beginning with the date of the requirement.
106. By virtue of subsection (7), where the prospective adopters are awaiting the outcome of an adoption application, a local authority cannot require the child to be delivered other than under this section.
107. Subsection (8) provides that it is an offence for a person to contravene this section. The offence is punishable by imprisonment for a period of up to 3 months or a fine not exceeding level 5 on the standard scale or both.
108. By virtue of subsection (9), where a person is convicted of an offence under this section, the court may order that the child is delivered to his or her parent or guardian or to the local authority.

Section 27 - Contravention of sections 30 to 36 of the 2002 Act

109. By virtue of subsection (1), anyone who contravenes any of the sections of the Adoption and Children Act 2002 listed at subsection (2) is guilty of an offence and is liable to imprisonment for a term not exceeding 3 months, a fine not exceeding level 5 on the standard scale, or both.
110. The provisions listed at subsection (2) are sections 30(1), (2) and (3) (general prohibitions on removal), 32(2)(b) (recovery by parent etc. where child placed and consent withdrawn), 33(2) (recovery by parent etc. where child placed and placement order refused), 35(2) (return of child in other cases), 34(1) (placement orders: prohibition on removal), 36(1) and 36(5) (restrictions on removal). These prohibit the

removal of a child in specified circumstances or provide for an order for the return of a child who has been removed.

Section 28 - Adoption orders

111. By virtue of subsection (1), an adoption order vests all parental responsibilities and parental rights in relation to the child in the adopter(s).
112. Before making an adoption order, in addition to the considerations which the court must take into account in terms of section 14 of the Act, subsection (2) requires that the court must be satisfied that it would be better for the child that the adoption order should be made than that it should not be made.
113. Subsection (3) provides that the court may attach such terms or conditions it sees fit when it makes an adoption order, although this power must be exercised in accordance with the requirements of section 14.
114. Adoption orders are generally to be made in respect of a “child”, which is defined in the Act to mean a person who has not attained the age of 18. However, subsection (4) allows an adoption order to be made in respect of a person who is 18 years or older if the adoption application was made when the person was under 18.
115. An adoption order may be made in respect of a child even if the child has already been adopted or is the subject of a permanence order (subsections (5) and (6)). This will allow a child to be “readopted” should the previous adoption break down.
116. Subsection (7) prohibits an adoption order being made in respect of a person who is or has been married or a civil partner.

Section 29 - Adoption by certain couples

117. By virtue of subsection (1), “relevant couples” may make an application for adoption where both members of the couple are at least 21 years old, and neither applicant is a parent of the child to be adopted. Further, at least one of the conditions in subsection (2) must be met, namely that at least one member of the couple must be domiciled in the British Islands or that both members of the couple have been habitually resident in the British Islands for at least 1 year before the date of the adoption application.
118. A “relevant couple” is defined in subsection (3) and means a married couple, civil partners or a couple that is living together in an enduring family relationship, whether or not that relationship is heterosexual or homosexual. The phrase “enduring family relationship” is used to indicate two people who are in a relationship that is akin to a marriage or civil partnership. The length of a relationship or financial interdependency will be relevant factors in assessing the overall strength of a relationship and the suitability of a couple to adopt.
119. The definition of enduring family relationship does not apply to two people who do not have a relationship akin to a marriage or civil partnership, such as two platonic friends or two siblings who live together.
120. For the purposes of this section, subsection (4) defines a ‘parent’ to be a parent who has any parental responsibilities or parental rights in relation to the child.

Section 30 - Adoption by one person

121. This section sets out the circumstances in which one person (as opposed to a couple) may adopt a child.
122. By virtue of subsection (1), that person must be aged 21 or over, and either domiciled in the British Islands (subsection (6)(a)) or have been habitually resident in the British Islands for at least one year before the date of the application for an adoption order (subsection (6)(b)).

123. In addition to these two conditions, such persons must fall within one of the following categories.
124. By virtue of subsection (2), the applicant must be a single person (i.e., a person who is unmarried, not a civil partner and not part of a couple living together in an enduring family relationship).
125. By virtue of subsection (3) a person may apply for an adoption order where they are a member of a “relevant” couple, if the other member of the couple is a parent of the child to be adopted and is aged 18 or over. That parent must also have parental responsibilities and parental rights in relation to the child to be adopted and meet same domicile or residence requirements as the applicant. This category therefore relates to step-parents, civil partners and cohabitants and allows them to make an application to adopt the child of their spouse, civil partner or person with whom they are living in an enduring family relationship.
126. By virtue of subsection (4) an adoption order may be granted on the application of one person if his or her spouse or civil partner, not being a parent of the child, cannot be found, is separated from the applicant on a basis that is likely to be permanent, or is incapable of making an application for adoption because of illness.
127. By virtue of subsection (5), one person may adopt where they are living in an enduring family relationship with someone who is incapable of applying to adopt because of illness. Again, the application may be made only if the applicant’s cohabitant is not the parent of the child to be adopted.
128. By virtue of subsection (7), where the application to adopt is made by a person who is the natural parent of the child to be adopted, an adoption order can only be made if the other parent is dead or cannot be found, or there is no other parent by virtue of section 28 of the Human Fertilisation and Embryology Act 1990 (meaning of “father”) (disregarding subsections (5A) to (5I) of that section), or there is another reason justifying the exclusion of the other parent.
129. For the purposes of this section, ‘parent’ has the same meaning as that given at section 29(4), namely a parent who has any parental responsibilities or parental rights in relation to the child.

Section 31 - Parental etc. consent

130. Before an adoption order can be made, the court must be satisfied that one of five conditions relating to consent is met.
131. The first condition is that each parent or guardian of the child has either consented to the making of the adoption order (subsection (2)(a)) or his or her consent should be dispensed with (subsection (2)(b)).
132. Subsection (3) sets out the grounds on which a parent or guardian’s consent can be dispensed with. These are that the parent or guardian is dead; that they cannot be found or are incapable of giving consent; that, either subsection (4) or (5) applies or, where neither of those subsections applies, the welfare of the child requires the consent to be dispensed with. Subsection (4) applies where the parent or guardian has parental responsibilities or parental rights in respect of the child (other than those mentioned in sections 1(1)(c) and 2(1)(c) of the Children (Scotland) Act 1995 (relating to contact only)), and, in the opinion of the court, is unable satisfactorily to discharge those responsibilities or exercise those rights and is likely to continue to be unable to do so. Subsection (5) applies where the parent or guardian does not have parental responsibilities or parental rights as the result of the making of a permanence order (not including one granting authority to adopt) and is unlikely to have parental responsibilities or parental rights vested in them.

133. The second condition is contained in subsection (7) and is that the child in respect of whom the adoption order is applied for is subject to a permanence order which grants authority for the child to be adopted. This means that the child's parents will already have consented to the making of an adoption order or their consent has been dispensed with at the time the permanence order was made.
134. The third condition, set out in subsection (8), applies where consent to adoption has been given by the child's parent or guardian under section 20 (advance consent to adoption) of the Adoption and Children Act 2002, that consent has not been withdrawn and the parent or guardian does not oppose the making of the adoption order.
135. The fourth condition, set out in subsection (9), applies where the child to be adopted has been placed with the prospective adopters by an adoption agency within the meaning of section 2(1) of the 2002 Act (basic definitions), either by virtue of section 19 (placing of children with parental consent) or section 21 (placement orders) of the 2002 Act. The child must have been at least 6 weeks old at the time the consent was given or, as the case may be, the order was made. In addition, no parent or guardian must oppose the making of the adoption order under consideration.
136. The fifth condition, set out in subsection (10), applies where a freeing order in respect of the child to be adopted is in force, having been made under legislation in Northern Ireland.
137. Subsection (11) provides that parental consent given by the mother to the making of an adoption order under subsection (2)(a) only has effect if the child is at least 6 weeks old when the consent is given.
138. By virtue of subsection (12) a parent or guardian can oppose an adoption under subsection (8) or (9) only with leave of the court. Under subsection (13), a court may grant such leave only if it is satisfied that there has been a change of circumstances since consent was originally given or the order under section 21 of the 2002 Act (placement orders) was made.
139. By virtue of subsection (14) it is not possible for a parent or guardian to withdraw consent given under section 19 (placing children with parental consent) or 20 (advance consent to adoption) of the 2002 Act, or under an order under section 21 of that Act, if that consent was given after an application for an adoption order has been made.
140. Subsection (15) defines 'parent', for the purposes of subsections (2) and (3), as meaning a parent who has any parental responsibilities or parental rights in relation to the child or a parent who, by virtue of a permanence order which does not include authority for the child to be adopted, has no such responsibilities or rights.

Section 32 - Consent of child aged 12 or over

141. By virtue of this section, an adoption order cannot be made in respect of a child who is aged 12 or over unless the child consents, except where the court is satisfied that the child is incapable of consenting. Only where the court is of the opinion that the child aged 12 or over is incapable of giving his or her consent can this be dispensed with. The views of children should be considered in accordance with section 14.

Section 33 - Restrictions on making orders

142. By virtue of subsection (1), a court may not hear an application for an adoption order in relation to a child where any application falling within subsection (3) has already been made by the same applicants and refused by any court.
143. The applications listed at subsection (3) are an adoption order within the meaning of the Act; an adoption order as defined section 46(1) of the Adoption and Children Act 2002 (adoption orders); an adoption order made, or having effect as if made, under Article 12

of the Adoption (Northern Ireland) Order 1987 (adoption orders); an order for adoption made in the Isle of Man; or an order for adoption made in any of the Channel Islands.

144. Subsection (1) does not apply where, in refusing the previous application, the court directed that this section should not apply (subsection (2)(a)). In addition, a court may hear an application where it appears that it is proper to do so because of a change in circumstances or for any other reason (subsection (2)(b)).

Section 34 - Contravention of section 72 no bar to making order

145. By virtue of this section, even where the applicants have made or accepted payments prohibited by section 72 of the Act in relation to the child to be adopted, a court can still make an adoption order in their favour.

Section 35 - Effect of order on existing rights etc.

146. By virtue of subsection (1), where an adoption order is made on the application of a member of a relevant couple under section 30(3) (a step-parent or equivalent adoption), the making of the order does not extinguish the parental responsibilities and parental rights that are vested in the other member of the couple. Neither does it extinguish any duty owed to the child by that other member in respect of paying or providing aliment in respect of any period after the making of the order, nor any duty to make payment arising out of parental responsibilities and parental rights in respect of this period.
147. Otherwise, by virtue of subsection (2), the making of an adoption order extinguishes any parental responsibilities and parental rights that vested in any person immediately before the making of the order and extinguishes any duties owed immediately before the making of the order to pay or provide aliment or make any payment arising out of parental responsibilities or parental rights relating to the child in relation to any period occurring after the making of the order.
148. However, under subsection (3), the making of an adoption order does not extinguish a duty deriving from a deed or agreement which constitutes a trust or which expressly provides that it is not extinguished by the making of an adoption order.
149. By virtue of subsection (5), the making of an adoption order also has no effect on parental responsibilities and parental rights in relation to the period prior to the making of the order.

Section 36 - Revocation of supervision requirement

150. Under this section, where the child is subject to a supervision requirement (see section 119 for the definition of this term) and the court is satisfied that compulsory measures of supervision (as defined in that section) would (by virtue of the making of the adoption order) no longer be necessary, the court must make an order providing that the supervision requirement ceases to have effect on the making of the adoption order.

Section 37 - Information to be kept about adoptions

151. By virtue of this section, the Scottish Ministers have the power to make regulations with regard to the information which an adoption agency must keep in relation to adoptions, and the form and manner in which such information must be kept.

Section 38 - Disclosure of information kept under relevant enactment

152. By virtue of this section, the Scottish Ministers have the power to make regulations in relation to disclosure by adoption agencies to adopted persons and others of information about adoptions held by adoption agencies by virtue of section 37 or any other enactment which imposes a requirement to keep records relating to adoption.

*These notes relate to the Adoption and Children (Scotland) Act
2007 (asp 4) which received Royal Assent on 15 January 2007*

153. Subsection (2) provides that such regulations may include provision giving adoption agencies discretion as to whether or not to disclose information in certain circumstances; specifying conditions which are to apply to the disclosure of information; specifying circumstances in which information should not be disclosed to certain categories of adopted persons; and providing for the review of decisions of adoption agencies in connection with the disclosure of information and the conditions applicable to such disclosure.