

SCHEDULE 2

THE RULES OF THE COURT OF SESSION 1994

*Special provisions in relation to particular proceedings*

CHAPTER 49

FAMILY ACTIONS

PART I GENERAL PROVISIONS

**Interpretation of this Chapter**

**49.1.**—(1) In this Chapter, “family action” means—

- (a) an action of divorce;
- (b) an action of separation;
- (c) an action of declarator of nullity of marriage;
- (d) an action of declarator of marriage;
- (e) an action of declarator of legitimacy;
- (f) an action of declarator of illegitimacy;
- (g) an action of declarator of parentage;
- (h) an action of declarator of non-parentage;
- (i) an action of declarator of legitimation;
- (j) an action of, or application for, any parental rights;
- (k) an action of, or application for or in respect of, aliment;
- (l) an action or application for financial provision after a divorce or annulment in an overseas country within the meaning of Part IV of the Matrimonial and Family Proceedings Act 1984<sup>(1)</sup>;
- (m) an action or application for an order under the Matrimonial Homes (Family Protection) (Scotland) Act 1981<sup>(2)</sup>.

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

- “the Act of 1975” means the Children Act 1975<sup>(3)</sup>;
- “the Act of 1976” means the Divorce (Scotland) Act 1976<sup>(4)</sup>;
- “the Act of 1981” means the Matrimonial Homes (Family Protection) (Scotland) Act 1981;
- “the Act of 1985” means the Family Law (Scotland) Act 1985<sup>(5)</sup>;
- “child” means a person under the age of 16 years;
- “local authority” means a regional or islands council;
- “mental disorder” means mental illness or mental handicap however caused or manifested;
- “order for financial provision” means, except in Part VII of this Chapter (financial provision after overseas divorce or annulment), an order mentioned in section 8(1) of the Act of 1985;

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(1) 1984 c. 42; Part IV was amended by the Family Law (Scotland) Act 1985 (c. 37), Schedule 1, paragraphs 12 and 13.

(2) 1981 c. 59.

(3) 1975 c. 72.

(4) 1976 c. 39.

(5) 1985 c. 37.

*Status: This is the original version (as it was originally made).*

“parental rights” has the meaning assigned in section 8 of the Law Reform (Parent and Child) (Scotland) Act 1986(6).

(3) For the purposes of rule 49.2 (averments in certain family actions about other proceedings) and rule 49.3 (averments where custody sought) and, in relation to proceedings in another jurisdiction, Schedule 3 to the Domicile and Matrimonial Proceedings Act 1973(7) (sisting of consistorial actions in Scotland), proceedings are continuing at any time after they have commenced and before they are finally disposed of.

### **Averments in certain family actions about other proceedings**

**49.2.**—(1) This rule applies to an action of divorce, separation, declarator of marriage or declarator of nullity of marriage.

(2) In an action to which this rule applies, the pursuer shall state in the condescence of the summons—

- (a) whether to his knowledge any proceedings are continuing in Scotland or in any other country in respect of the marriage to which the summons relates or are capable of affecting its validity or subsistence; and
- (b) where such proceedings are continuing—
  - (i) the court, tribunal or authority before which the proceedings have been commenced;
  - (ii) the date of commencement;
  - (iii) the names of the parties;
  - (iv) the date, or expected date of any proof (or its equivalent), in the proceedings; and
  - (v) such other facts as may be relevant to the question of whether or not the action in the Court of Session should be sisted under Schedule 3 to the Domicile and Matrimonial Proceedings Act 1973.

(3) Where—

- (a) such proceedings are continuing;
- (b) the action in the Court of Session is defended; and
- (c) either—
  - (i) the summons does not contain the statement referred to in paragraph (2)(b), or
  - (ii) the particulars mentioned in sub-paragraph (2)(b) as set out in the summons are incomplete or incorrect,
 any defences or minute, as the case may be, lodged by any person to the action shall include that statement and, where appropriate, the further or correct particulars mentioned in paragraph (2)(b).

### **Averments where custody sought**

**49.3.**—(1) A party to a family action, who makes an application in that action for a custody order (within the meaning assigned in section 1(1)(b) of the Family Law Act 1986(8)) in respect of a child, shall include in his pleadings—

- (a) where that action is an action of divorce, separation or declarator of nullity of marriage, averments giving particulars of any other proceedings known to him, whether in Scotland

(6) 1986 c. 9.

(7) 1973 c. 45; Schedule 3 was amended by the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 (c. 12), Schedule 1, paragraphs 19 and 20.

(8) 1986 c. 55; section 1(1)(b) was amended by the Age of Legal Capacity (Scotland) Act 1991 (c. 50), Schedule 1, paragraph 44.

or elsewhere and whether concluded or not, which relate to the child in respect of whom the custody order is sought;

- (b) in any other family action—
  - (i) the averments mentioned in sub-paragraph (a); and
  - (ii) averments giving particulars of any proceedings known to him which are continuing, whether in Scotland or elsewhere, and which relate to the marriage of the parents of that child.

(2) Where such other proceedings are continuing or have taken place and the averments of the applicant for such a custody order—

- (a) do not contain particulars of the other proceedings, or
- (b) contain particulars which are incomplete or incorrect,

any defences or minute, as the case may be, lodged by any person to the family action shall include such particulars or such further or correct particulars as are known to him.

(3) In paragraph (1)(b)(ii), “child” includes a child of the family within the meaning assigned in section 42(4) of the Family Law Act 1986(9).

#### **Averments where identity or address of person not known**

**49.4.** In a family action, where the identity or address of any person referred to in rule 49.8 as a person in respect of whom a warrant for intimation requires to be applied for is not known and cannot reasonably be ascertained, the party required to apply for the warrant shall include in his pleadings an averment of that fact and averments setting out what steps have been taken to ascertain the identity or address, as the case may be, of that person.

#### **Averments about maintenance orders**

**49.5.** In a family action in which an order for aliment or periodical allowance is sought, or is sought to be varied or recalled, by any party, the pleadings of that party shall contain an averment stating whether and, if so, when and by whom a maintenance order (within the meaning of section 106 of the Debtors (Scotland) Act 1987(10)) has been granted in favour of or against that party or any other person in respect of whom the order is sought.

#### **Averments where aliment sought for a child**

**49.6.—**(1) In this rule—

“the Act of 1991” means the Child Support Act 1991(11);

“child” has the meaning assigned in section 55 of the Act of 1991;

“conclusion relating to aliment” means—

- (a) for the purposes of paragraph (2), a conclusion for decree of aliment in relation to a child or for recall or variation of such a decree; and
- (b) for the purposes of paragraph (3), a conclusion for decree of aliment in relation to a child or for recall or variation of such a decree or for the variation or termination of an agreement on aliment in relation to a child;

“maintenance assessment” has the meaning assigned in section 54 of the Act of 1991.

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(9) Section 42(4) was amended by the Children Act 1989 (c. 41), Schedule 13, paragraph 71.

(10) 1987 c. 18; section 106 was amended by the Child Support Act 1991 (c. 48), Schedule 5, paragraph 8(7).

(11) 1991 c. 48.

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- (2) A family action containing a conclusion relating to aliment to which section 8(6), (7), (8) or (10) of the Act of 1991 (top up maintenance orders) applies shall—
- (a) include averments stating, where appropriate—
    - (i) that a maintenance assessment under section 11 of that Act is in force;
    - (ii) the date of the maintenance assessment;
    - (iii) the amount and frequency of periodical payments of child support maintenance fixed by the maintenance assessment; and
    - (iv) the grounds on which the sheriff retains jurisdiction under section 8(6), (7), (8) or (10) of that Act; and
  - (b) unless the court on cause shown otherwise directs, be accompanied by any document issued by the Secretary of State to the party intimating the making of the maintenance assessment referred to in sub-paragraph (a).
- (3) A family action containing a conclusion relating to aliment to which section 8(6), (7), (8) or (10) of the Act of 1991 does not apply, shall include averments stating—
- (a) that the habitual residence of the absent parent, person with care or qualifying child, within the meaning of section 3 of that Act, is furth of the United Kingdom;
  - (b) that the child is not a child within the meaning of section 55 of that Act; or
  - (c) the grounds on which the court retains jurisdiction.
- (4) In an action for declarator of non-parentage or illegitimacy—
- (a) the summons shall include an article of condescendence stating whether the pursuer previously has been alleged to be the parent in an application for a maintenance assessment under section 4, 6 or 7 of the Act of 1991 (applications for maintenance assessment); and
  - (b) where an allegation of paternity has been made against the pursuer, the Secretary of State shall be named as a defender in the action.
- (5) A family action involving parties in respect of whom a decision has been made in any application, review or appeal under the Act of 1991 relating to any child of those parties, shall—
- (a) include averments stating that such a decision has been made and giving details of that decision; and
  - (b) unless the court on cause shown otherwise directs, be accompanied by any document issued by the Secretary of State to the parties intimating that decision.

### **Warrants for arrestment or inhibition on dependence**

**49.7.**—(1) A warrant for inhibition or arrestment on the dependence in a family action or in respect of a claim to which section 19 of the Act of 1985 (action for aliment or claim for order for financial provision) applies shall be applied for by motion.

(2) A certified copy of the interlocutor granting warrant for diligence applied for under paragraph (1) shall be sufficient authority for execution of the diligence.

(3) A certified copy of the interlocutor containing a warrant for inhibition granted under this rule and an execution of service of it may be registered in the Register of Inhibitions and Adjudications.

(4) A notice of the certified copy of the interlocutor containing a warrant for inhibition granted under this rule may be registered under section 155 of the Titles to Land Consolidation (Scotland) Act 1868<sup>(12)</sup> (inhibitions to take effect from date of registration of notice); and such registration shall have the same effect as registration of a notice under that section.

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(12) 1868 c. 101.

## Warrants for intimation in family actions

- 49.8.**—(1) In the summons in a family action, the pursuer shall insert a warrant for intimation—
- (a) in an action where the address of the defender is not known to the pursuer and cannot reasonably be ascertained, to—
    - (i) every child of the marriage between the parties who has reached the age of 16 years, and
    - (ii) one of the next-of-kin of the defender who has reached that age,unless the address of such a person is not known to the pursuer and cannot reasonably be ascertained, in the following terms:— “Warrant to intimate to (*name and address*) as a child of the marriage [*or to (name and address) the (relationship to defender)*], as one of the next-of-kin of the defender.”;
  - (b) in an action where the pursuer alleges that the defender has committed adultery with another person, to that person, unless—
    - (i) that person is not named in the summons and, if the adultery is relied on for the purposes of section 1(2)(a) of the Act of 1976 (irretrievable breakdown of marriage by reason of adultery), the summons contains an averment that his or her identity is not known to the pursuer and cannot reasonably be ascertained, or
    - (ii) the pursuer alleges that the defender has been guilty of rape upon or incest with, that named person,in the following terms:— “Warrant to intimate to (*name and address*) as a person with whom the defender is alleged to have committed adultery.”;
  - (c) in an action where the defender is a person who is suffering from a mental disorder, to—
    - (i) those persons mentioned in sub-paragraph (a)(i) and (ii), unless the address of such person is not known to the pursuer and cannot reasonably be ascertained, and
    - (ii) the curator *bonis* to the defender, if one has been appointed,in the following terms:— “Warrant to intimate to (*name and address*) as a child of the marriage, (*name and address*) the (*relationship to defender*) as one of the next-of-kin of the defender and (*name and address*), curator *bonis* to the defender.”;
  - (d) in an action relating to a marriage which was entered into under a law which permits polygamy where—
    - (i) one of the decrees specified in section 2(2) of the Matrimonial Proceedings (Polygamous Marriages) Act 1972(13) is sought; and
    - (ii) either party to the marriage in question has any spouse additional to the other party,to any such additional spouse in the following terms:— “Warrant to intimate to (*name and address*) as an additional spouse of the pursuer [*or defender*].”;
  - (e) in an action of divorce, separation or declarator of nullity of marriage where the court may make an order for any parental rights in respect of a child—
    - (i) who is in the care of a local authority, to that local authority in the following terms:— “Warrant to intimate to the chief executive of (*name and address of local authority*) as the local authority having care of (*name and address of child*).”;
    - (ii) who, being a child of one party to the marriage who has been accepted as a child of the family by the other party to the marriage and who is liable to be maintained by a

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(13) 1972 c. 38; section 2(2) was amended by the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 (c. 12), Schedule 1, paragraph 13, by the Law Reform (Husband and Wife) (Scotland) Act 1984 (c. 15), Schedule 1, paragraph 6, by the Family Law (Scotland) Act 1985, Schedule 1, paragraph 8 and by the Statute Law (Repeals) Act 1986 (c. 12), Schedule 1, Part I.

*Status: This is the original version (as it was originally made).*

third party, to that third party in the following terms:– “Warrant to intimate to (*name and address*) as a person liable to maintain (*name and address of child*).”; or

(iii) in respect of whom a third party exercises such rights *de facto*, to that third party in the following terms:– “Warrant to (*name and address*) as a person who in fact exercises parental rights in respect of (*name and address of child*).”;

(f) in an action where the pursuer concludes for the custody of a child, to any parent or guardian of the child who is not a party to the action in the following terms:– “Warrant to intimate to (*name and address*) as a parent [*or guardian*].”;

(g) in an action where the pursuer concludes for the custody of a child and he is–

(i) not a parent of that child, and

(ii) resident in Scotland when the summons is presented for signeting,

to the local authority within which area the pursuer resides in the following terms:– “Warrant to intimate to the chief executive of (*name and address of local authority*) as the local authority within which area the pursuer, not being a parent of (*name and address of child*), resides.”;

(h) in an action which affects a child, to that child, if not a party to the action, in the following terms:– “Warrant to intimate to (*name and address*) as a child who may be affected by the action.”;

(i) in an action where the pursuer makes an application for an order under section 8(1) (aa) of the Act of 1985<sup>(14)</sup> (transfer of property) and–

(i) the consent of a third party to such a transfer is necessary by virtue of an obligation, enactment or rule of law, or

(ii) the property is subject to a security,

to the third party or creditor, as the case may be, in the following terms:– “Warrant to intimate to (*name and address*) as a person the consent of whom is required in respect of the transfer sought [*or as a person who is believed to be a creditor of (name of party)*] in respect of the property sought to be transferred] in the (*number*) conclusion of this summons.”;

(j) in an action where the pursuer makes an application for an order under section 18 of the Act of 1985 (which relates to avoidance transactions), to–

(i) any third party in whose favour the transfer of, or transaction involving, the property is to be or was made, and

(ii) any other person having an interest in the transfer of, or transaction involving, the property,

in the following terms:– “Warrant to intimate to (*name and address*) as the person in whose favour the transfer of [*or transaction involving*] property referred to in the condescence attached to this summons was made [*or is to be made*] [*or is a person having an interest in the transfer of [*or transaction involving*] property referred to in the condescence attached to this summons*].”;

(k) in an action where the pursuer makes an application for an order under the Act of 1981<sup>(15)</sup>–

(i) where he is a non-entitled partner and the entitled partner has a spouse, to that spouse, or

(ii) where the application is under section 2(1)(e), 2(4)(a), 3(1), 3(2), 4, 7, 13 or 18 of that Act, and the entitled spouse or entitled partner is a tenant or occupies the

<sup>(14)</sup> 1985 c. 37; section 1(1)(aa) of the Act of 1985 was inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40), Schedule 8, paragraph 34.

<sup>(15)</sup> 1981 c. 59.

matrimonial home by permission of a third party, to the landlord or the third party, as the case may be,

in the following terms:– “Warrant to intimate to (*name and address*) as a person with an interest in the order sought in the (*number*) conclusion of this summons.”.

(2) Expressions used in paragraph (1)(k) which are also used in the Act of 1981 have the same meaning as in that Act.

(3) A notice of intimation shall be attached to the copy of the summons where intimation is given on a warrant–

- (a) under paragraph (1)(a) (address of defender not known), in Form 49.8–A;
- (b) under paragraph (1)(b) (allegation of adultery), in Form 49.8–B;
- (c) under paragraph (1)(c) (mental disorder of defender), in Form 49.8–C;
- (d) under paragraph (1)(d) (polygamous marriage), in Form 49.8–D;
- (e) under paragraph (1)(e)(i) or (ii) (where order may be made for any parental rights in respect of a child in care of local authority or accepted as a child of the marriage), in Form 49.8–E;
- (f) under paragraph (1)(e)(iii) (where order may be made for any parental rights in respect of a child in respect of whom a third party exercises such rights *de facto*), in Form 49.8–F;
- (g) under paragraph (1)(f) (custody sought by guardian), in Form 49.8–G;
- (h) under paragraph (1)(g) (custody sought by non-parent resident in Scotland), in Form 49.8–H;
- (i) under paragraph (1)(h) (action which affects a child), in Form 49.8–I;
- (j) under paragraph (1)(i) (transfer of property), in Form 49.8–J;
- (k) under paragraph (1)(j) (avoidance transactions), in Form 49.8–K;
- (l) under paragraph (1)(k) (orders sought under the Act of 1981), in Form 49.8–L.

(4) In a family action, where the pursuer–

- (a) concludes for the custody of a child;
- (b) is not a parent of the child; and
- (c) is not resident in Scotland when the summons is presented for signeting,

he shall, on presenting the summons for signeting, apply by motion for an order for intimation in Form 49.8–H to such local authority as the court thinks fit.

(5) Where the address of a person mentioned in paragraph (1)(b), (d), (e), (f), (g), (i), (j), (k) or (l) is not known and cannot reasonably be ascertained, the pursuer shall, immediately after the calling of the summons, apply by motion to dispense with intimation; and the court may grant that motion or make such other order as it thinks fit.

(6) Where the identity or address of a person to whom intimation of a family action is required becomes known during the course of the action, the party who would have been required to insert a warrant for intimation to that person shall apply by motion for a warrant for intimation to that person or to dispense with such intimation.

(7) In relation to paragraph (1)(h) (action which affects a child), the court may, on an application to it by motion to dispense with intimation to a child–

- (a) dispense with intimation to that child on the ground that the child is not capable of forming his own views;
- (b) appoint a curator *ad litem* to the child; or
- (c) order that a specified part of the summons need not be intimated to the child.

### **Intimation where relevant association**

**49.9.**—(1) In a family action where the pursuer alleges a relevant association as defined in paragraph (4) between the defender and another named person, the pursuer shall, when the summons is presented for signeting, apply by motion for an order for intimation to that person or to dispense with such intimation.

(2) In determining a motion under paragraph (1), the court may—

- (a) make such order for intimation as it thinks fit; or
- (b) dispense with intimation; and
- (c) where it dispenses with intimation, order that the name of that person be deleted from the condescendence of the summons.

(3) Where intimation is ordered under paragraph (2), a notice of intimation in Form 49.9 shall be attached to the copy of the summons to be intimated.

(4) In paragraph (1), “relevant association” means sodomy, incest or any homosexual relationship.

### **Productions in action of divorce or where order for custody may be made**

**49.10.**—(1) There shall be lodged as a production with the principal writ when first lodged in process—

- (a) in an action of divorce, an extract or certified copy of the relevant entry in the register of marriages; and
- (b) in a family action in which the court may make an order in respect of the custody of a child, an extract or certified copy of the relevant entry in the register of births.

(2) In the application of sub-paragraph (a) of paragraph (1) to an action of divorce where the address of the defender is not known, the document to be lodged under that sub-paragraph shall be one obtained and dated within three months before the date on which it is lodged.

### **Execution of service on, or intimation to, local authority**

**49.11.**—(1) Where a local authority referred to in rule 49.8(1)(g) (custody sought by non-parent resident in Scotland) or rule 49.8(4) (custody sought by non-parent not resident in Scotland) is called as a defender in a summons at the time of signeting, service of the summons on that local authority shall be executed within 7 days after the date of signeting.

(2) Where in a family action—

- (a) to which rule 49.8(1)(g) applies, or
- (b) in which a motion under rule 49.8(4) is required,

the local authority referred to in that provision is called as a defender in the summons at the time of signeting, a notice in Form 49.8–H shall be attached to the copy of the summons served on that local authority unless the court otherwise orders.

(3) Where, by virtue of rule 49.8(1)(g), 49.8(4) or 49.15(2), intimation of an application for custody is to be made to a local authority, intimation to that local authority shall be given within 7 days after the date of signeting or order for intimation, as the case may be; and a notice in Form 49.8–H shall be attached to the copy of the summons intimated to that local authority.



### **Notice of actions by advertisement**

**49.12.** Where notice of a family action is given by advertisement under rule 16.5 (service where address of person is not known), the period of notice shall be 21 days from the date of publication of the advertisement unless the court otherwise orders.

### **Service in cases of mental disorder of defender**

**49.13.—**(1) In a family action where the defender suffers or appears to suffer from mental disorder and is resident in a hospital or other similar institution, service of the summons shall be executed in accordance with rule 16.4 (service by post) addressed to the medical officer in charge of that hospital or institution; and there shall be included with the copy of the summons—

- (a) any notice required by rule 49.14(1) (notices in certain actions of divorce or separation);
- (b) a request in Form 49.13–A requesting the medical officer to—
  - (i) deliver and explain the summons, citation and any notice or form of notice of consent required under rule 49.14(1); or
  - (ii) certify that such delivery or explanation would be dangerous to the health or mental condition of the defender; and
  - (iii) complete the certificate in Form 49.13–B; and
- (c) a stamped envelope addressed for return of that certificate to the pursuer or his agent, if he has one.

(2) The medical officer referred to in paragraph (1) shall send the certificate in Form 49.13–B duly completed to the pursuer or his agent, as the case may be.

(3) The certificate mentioned in paragraph (2) shall be attached to the summons when it is lodged for calling.

(4) Where such a certificate bears that the summons has not been delivered to the defender, the court may, at any time while the action is depending—

- (a) order such further medical inquiry, and
- (b) make such order for further service or intimation,

as it thinks fit.

### **Notices in certain actions of divorce or separation**

**49.14.—**(1) In the following actions of divorce or separation, there shall be attached to the copy of the summons served on the defender—

- (a) in an action relying on section 1(2)(d) of the Act of 1976(16) (no cohabitation for two years with consent of defender to decree)—
  - (i) which is an action of divorce, a notice in Form 49.14–A and a form of notice of consent in Form 49.14–B;
  - (ii) which is an action of separation, a notice in Form 49.14–C and a form of notice of consent in Form 49.14–D;
- (b) in an action relying on section 1(2)(e) of the Act of 1976 (no cohabitation for five years)—
  - (i) which is an action of divorce, a notice in Form 49.14–E;
  - (ii) which is an action of separation, a notice in Form 49.14–F.

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(16) 1976 c. 39.

*Status: This is the original version (as it was originally made).*

(2) The certificate of service of a summons in an action mentioned in paragraph (1) shall state which notice or form mentioned in paragraph (1) has been included with the summons.

#### **Orders for intimation by the court**

**49.15.**—(1) In any family action, the court may order intimation to be made to such person as it thinks fit.

(2) Where a party makes an application or averment in a family action which, had it been made in a summons when presented for signeting, would have required a warrant for intimation under rule 49.8 that party shall apply by motion for a warrant for intimation or to dispense with such intimation.

#### **Interested persons entering process**

**49.16.**—(1) A person on whom intimation has been made of a family action or an application in a family action, may apply by minute for leave to be sisted as a party and to lodge defences, answers or a minute, as the case may be—

- (a) where the intimation was made on a warrant in a summons, within 7 days after the summons is lodged for calling; and
- (b) in any other case, within the period of notice.

(2) Where the court grants a motion under paragraph (1), it shall make such order for further procedure as it thinks fit.

#### **Appointment of curators *ad litem* to defenders**

**49.17.**—(1) This rule applies to an action of divorce or separation where it appears to the court that the defender is suffering from a mental disorder.

(2) In an action to which this rule applies, the court shall, after the expiry of the period for lodging defences—

- (a) appoint a curator *ad litem* to the defender; and
- (b) where the facts set out in section 1(2)(d) of the Act of 1976 (no cohabitation for two years with consent of defender to decree) are relied on—
  - (i) make an order for intimation of the ground of the action to the Mental Welfare Commission for Scotland; and
  - (ii) include in such an order a requirement that the Commission sends to the Deputy Principal Clerk a report indicating whether in its opinion the defender is capable of deciding whether or not to give consent to the granting of decree.

(3) Within 7 days after the appointment of a curator *ad litem* under paragraph (2)(a), the pursuer shall send to him a copy of the summons and any defences lodged (including any adjustments and amendments).

(4) On receipt of a report required under paragraph (2)(b)(ii), the Deputy Principal Clerk shall—

- (a) cause the report to be lodged in process; and
- (b) give written intimation that this has been done to—
  - (i) the pursuer;
  - (ii) the agent for the defender, if known; and
  - (iii) the curator *ad litem*

(5) The curator *ad litem* shall lodge in process one of the writs mentioned in paragraph (6)—

- (a) within 14 days after the report required under paragraph (2)(b)(ii) has been lodged in process; or
  - (b) where no such report is required, within 21 days after the date of his appointment under paragraph (2)(a).
- (6) The writs referred to in paragraph (5) are—
- (a) defences to the action;
  - (b) a minute adopting defences already lodged in process; and
  - (c) a minute stating that the curator *ad litem* does not intend to lodge defences.
- (7) Notwithstanding that he has lodged a minute stating that he does not intend to lodge defences, a curator *ad litem* may appear at any stage of the action to protect the interests of the defender.
- (8) If, at any time, it appears to the curator *ad litem* that the defender is not suffering from mental disorder, he may report that fact to the court and seek his own discharge.
- (9) The pursuer shall be responsible, in the first instance, for payment of the fees and outlays of the curator *ad litem* incurred during the period from his appointment until—
- (a) he lodges a minute stating that he does not intend to lodge defences;
  - (b) he decides to instruct the lodging of defences or a minute adopting defences already lodged; or
  - (c) being satisfied after investigation that the defender is not suffering from mental disorder, he is discharged.

### **Applications for sist**

**49.18.** An application for a sist, or there call of a sist, under Schedule 3 to the Domicile and Matrimonial Proceedings Act 1973(17) shall be made by motion.

### **Notices of consent to divorce or separation**

**49.19.**—(1) Where, in an action of divorce or separation in which the facts in section 1(2)(d) of the Act of 1976 (no cohabitation for two years with consent of defender to decree) are relied on, the defender wishes to consent to the grant of decree of divorce or separation, as the case may be, he shall do so by giving notice in writing in Form 49.14–B (divorce) or Form 49.14–D (separation), as the case may be, to the Deputy Principal Clerk.

(2) The evidence of one witness shall be sufficient for the purpose of establishing that the signature on a notice of consent under paragraph (1) is that of the defender.

(3) In an action of divorce or separation where the summons includes, for the purposes of section 1(2)(d) of the Act of 1976, an averment that the defender consents to the grant of decree, the defender may give notice by letter sent to the Deputy Principal Clerk stating that he has not so consented or that he withdraws any consent which he has already given.

(4) On receipt of a letter under paragraph (3), the Deputy Principal Clerk shall—

- (a) cause the letter to be lodged in process; and
- (b) give written intimation of the terms of the letter to the pursuer.

(5) On receipt of an intimation under paragraph (4)(b), the pursuer may, within 14 days after the date of the intimation, if none of the other facts mentioned in section 1(2) of the Act of 1976 is averred in the summons, apply by motion for the action to be sisted.

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(17) 1973 c. 45; Schedule 3 was amended by the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 (c. 12), Schedule 1, paragraphs 19 and 20.

(6) If no such motion is enrolled, the pursuer shall be deemed to have abandoned the action and the action shall be dismissed.

(7) If a motion under paragraph (5) is granted and the sist is not recalled or renewed within a period of 6 months from the date of the interlocutor granting the sist, the pursuer shall be deemed to have abandoned the action and the action shall be dismissed.

### **Consents to grant of custody**

**49.20.**—(1) Where a party, who requires a consent under section 47(2) of the Act of 1975 **(18)** to the grant of custody, executes service on, or gives intimation to, a person whomay give such consent, he shall—

- (a) include with the copy of the summons or other pleadings, as the case may be—
  - (i) a notice of intimation in Form 49.8-G; and
  - (ii) a form of notice of consent in Form 49.20; and
- (b) in the certificate of service or intimation, as the case may be, state expressly that such notice and form of notice of consent were included.

(2) Where a parent or guardian wishes to consent to the grant of an application for custody, he shall—

- (a) complete and sign the notice of consent in Form 49.20;
- (b) have his signature witnessed; and
- (c) send the notice of consent to the Deputy Principal Clerk who shall cause it to be lodged in process.

(3) Where a person, who has consented under paragraph (2) to the grant of such an application, wishes to withdraw that consent, he shall give notice by letter sent to the Deputy Principal Clerk stating that he withdraws his consent.

(4) On receipt of a letter under paragraph (3), the Deputy Principal Clerk shall—

- (a) cause the letter to be lodged in process; and
- (b) give written intimation of the terms of the letter to the applicant and to every other party.

### **Reports by local authorities under section 49(2) of the Act of 1975**

**49.21.**—(1) On completion of a report made under section 49(2) of the Act of 1975 (report by local authority on child in certain custody applications), the local authority shall—

- (a) send the report, and a copy of it for each party, to the Deputy Principal Clerk; and
- (b) where a curator *ad litem* has been appointed to the child in respect of whom the application for custody has been made, send a copy of the report to him.

(2) On receipt of such a report, the Deputy Principal Clerk shall—

- (a) cause the report to be lodged in process; and
- (b) give written intimation to each party that this has been done and that he may uplift a copy of the report from process.

(3) Where intimation is given to a local authority under rule 49.8(1)(g) or (4) for the purposes of section 49(2) of the Act of 1975, an application for the custody of the child shall not be determined until the report of the local authority has been lodged in process.

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**(18)** 1975 c. 72; section 47(2) was amended by the Law Reform (Parent and Child) (Scotland) Act 1986 (c. 9), Schedule 1, paragraph 14(1) and by the Age of Legal Capacity (Scotland) Act 1991 (c. 50), Schedule 2.

(4) When disposing of an application for custody, the court shall determine which party or parties are to be liable for the expenses of the local authority incurred in the preparation of any report made under section 49(2) of the Act of 1975.

### **Appointment of local authority or reporter to report on a child**

**49.22.**—(1) This rule applies where, at any stage of a family action, the court appoints—

- (a) a local authority under section 11(1) of the Matrimonial Proceedings (Children) Act 1958<sup>(19)</sup> or section 12(2)(a) of the Guardianship Act 1973<sup>(20)</sup> (which both relate to a report on a child with respect to custody), or
- (b) another person (referred to in this rule as a “reporter”), whether under a provision mentioned in sub-paragraph (a) or otherwise,

to investigate and report to the court on the circumstances of a child and on proposed arrangements for the care and upbringing of the child.

(2) On making an appointment referred to in paragraph (1), the court shall direct that the party who sought the appointment or, where the court makes the appointment at its own instance, the pursuer or minuter, as the case may be, shall—

- (a) instruct the local authority or reporter; and
- (b) be responsible, in the first instance, for the fees and outlays of the local authority or reporter appointed.

(3) Where a local authority or reporter is appointed—

- (a) the party who sought the appointment, or
- (b) where the court makes the appointment at its own instance, the pursuer or minuter, as the case may be,

shall, within 7 days after the date of the appointment, intimate the name and address of the local authority or reporter to any local authority to which intimation of the family action has been made.

(4) The local authority or reporter, as the case may be, shall, on completion of a report referred to in paragraph (1), send the report, and a copy of it for each party, to the Deputy Principal Clerk.

(5) On receipt of such a report, the Deputy Principal Clerk shall—

- (a) cause the report to be lodged in process; and
- (b) give written intimation to each party that this has been done and that he may uplift a copy of the report from process.

(6) Where a local authority or reporter has been appointed to investigate and report in respect of a child, an application for the custody of that child shall not be determined until the report of the local authority or the reporter, as the case may be, has been lodged in process.

### **Referral to family mediation and conciliation service**

**49.23.** In any family action in which the custody of, or access to, a child is in dispute, the court may, at any stage of the action where it considers it appropriate to do so and with the consent of the parties, refer that dispute to a specified family mediation and conciliation service.

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<sup>(19)</sup> 1958 c. 40; section 11(1) was amended by the Law Reform (Parent and Child) (Scotland) Act 1986 (c. 9), Schedule 2 and by the Family Law Act 1986 (c. 55), Schedule 1, paragraph 7.

<sup>(20)</sup> 1973 c. 29; section 12(2)(a) was amended by the Children Act 1975 (c. 72), section 48(4).

**Applications for orders to disclose whereabouts of children**

**49.24.**—(1) An application for an order under section 33(1) of the Family Law Act 1986<sup>(21)</sup> (which relates to the disclosure of the whereabouts of a child) shall be made by motion.

(2) Where the court makes an order under section 33(1) of the Family Law Act 1986, it may ordain the person against whom the order has been made to appear before it or to lodge an affidavit.

**Applications in relation to removal of children**

**49.25.**—(1) An application for leave under section 51(1) of the Act of 1975<sup>(22)</sup> (authority to remove a child from the care and possession of the applicant for custody) or for an order under section 35(3) of the Family Law Act 1986 (application for interdict or interim interdict prohibiting removal of child from jurisdiction)—

- (a) by a party, shall be made by motion;
- (b) by a person other than a party, shall be made by minute in the process of that action.

(2) An application under section 35(3) of the Family Law Act 1986 need not be served or intimated.

(3) An application under section 23(2) of the Child Abduction and Custody Act 1985<sup>(23)</sup> (declarator that removal of child from United Kingdom was unlawful) shall be made—

- (a) in an action depending before the court—
  - (i) by a party, in the summons, defences or minute, as the case may be, or by motion; or
  - (ii) by any other person, by minute; or
- (b) after final decree, by minute in the process of the action to which the application relates.

**Intimation to local authority before supervised access**

**49.26.**—(1) Where the court, at its own instance or on the motion of a party, is considering making an award of access or interim access subject to supervision by the social work department of a local authority, it shall ordain the party moving for access or interim access to intimate to the chief executive of that local authority (unless a party to the action and represented at the hearing at which the issue arises)—

- (a) the terms of any relevant motion;
- (b) the intention of the court to order that access be supervised by the social work department of that local authority; and
- (c) that the local authority shall, within such period as the court has determined—
  - (i) notify the Keeper of the Rolls whether it intends to make representations to the court through counsel or other person having a right of audience or in writing; and
  - (ii) where it intends to make representations in writing, to do so within that period.

(2) After receiving notice or written representations, as the case may be, under paragraph (1)(c), the Keeper of the Rolls shall put the action out on the By Order Roll before the Lord Ordinary on such a date as may be convenient, for the court to determine, after considering any representations of a local authority under paragraph (1), whether to order such supervision.

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<sup>(21)</sup> 1986 c. 55.

<sup>(22)</sup> Section 51(1) of the Act of 1975 was amended by the Health and Social Services and Social Security Adjudications Act 1983 (c. 41), Schedule 2, paragraph 25.

<sup>(23)</sup> 1985 c. 60.

### Joint minutes

**49.27.** Where any parties have reached agreement in relation to—

- (a) any parental rights in respect of a child,
- (b) aliment for a child, or
- (c) an order for financial provision,

a joint minute may be entered into expressing that agreement; and the court may grant decree in respect of those parts of the joint minute in relation to which it could otherwise make an order, whether or not such a decree would include a matter for which there was no conclusion or crave.

### PART I UNDEFENDED FAMILY ACTIONS

#### Evidence in certain undefended family actions

**49.28.—**(1) This rule—

- (a) subject to sub-paragraph (b), applies to all family actions in which no defences have been lodged, other than a family action—
  - (i) for any parental rights or aliment;
  - (ii) for financial provision after an overseas divorce or annulment within the meaning of Part IV of the Matrimonial and Family Proceedings Act 1984<sup>(24)</sup>; or
  - (iii) for an order under the Act of 1981<sup>(25)</sup>;
- (b) applies to a family action in which a curator *ad litem* has been appointed under rule 49.17(2)(a) where the curator *ad litem* to the defender has lodged a minute intimating that he does not intend to lodge defences;
- (c) applies to any family action which proceeds at any stage as undefended where the court so directs;
- (d) applies to the merits of a family action which is undefended on the merits where the court so directs, notwithstanding that the action is defended on an ancillary matter.

(2) Unless the court otherwise directs, evidence shall be given by affidavit.

(3) Unless the court otherwise directs, evidence relating to the welfare of a child shall be given by affidavit, at least one affidavit being sworn by a person other than a parent or party to the action.

(4) Evidence in the form of a written statement bearing to be the professional opinion of a duly qualified medical practitioner, which has been signed by him and lodged in process, shall be admissible in place of parole evidence by him.

(5) Rule 36.8 (conditions for receiving certain written statements in evidence) shall not apply in an undefended family action to which this rule applies.

#### Procedure for decree in actions under rule 49.28

**49.29.—**(1) In an action to which rule 49.28 (evidence in certain undefended family actions) applies, if counsel or other person having a right of audience, on consideration of the available affidavits and support in documents, is satisfied that a motion for decree may properly be made, he may, at any time after the expiry of the period for lodging defences, move the court by minute in Form 49.29–A to grant decree in terms of the conclusions of the summons or in such restricted terms as may be appropriate.

(2) On lodging such a minute in process, the pursuer shall—

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<sup>(24)</sup> 1984 c. 42; Part IV was amended by the Act of 1985 (c. 37), Schedule 1, paragraphs 12 and 13.

<sup>(25)</sup> 1981 c. 59.

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- (a) lodge in process the documents specified in the schedule to the minute; and
  - (b) send to the Deputy Principal Clerk, Form 49.29–B duly completed.
- (3) The court may, at any time after the minute and other documents referred to in paragraph (2) have been lodged, without requiring the appearance of counsel or other person having a right of audience–
- (a) grant decree in terms of the motion for decree contained in the minute; or
  - (b) put the action out on the By Order Roll before the Lord Ordinary for such further procedure, if any, including proof by parole evidence, as the court thinks fit.
- (4) Notice shall be given in the rolls of all decrees granted under paragraph (3)(a).

### **No suspension in undefended divorce actions**

**49.30.** A defender may not bring any proceedings for the suspension of any decree of divorce pronounced in an undefended action.

### **PART III UNDEFENDED FAMILY ACTIONS**

### **Defences in family actions**

- 49.31.**—(1) This rule applies where the defender in a family action seeks–
- (a) to oppose any conclusion in the summons;
  - (b) to make a claim for–
    - (i) aliment;
    - (ii) an order for financial provision within the meaning of section 8(3) of the Act of 1985; or
    - (iii) an order relating to parental rights; or
  - (c) an order–
    - (i) under section 16(1)(b) or (3) of the Act of 1985<sup>(26)</sup> (setting aside or varying agreement as to financial provision);
    - (ii) under section 18 of the Act of 1985 (which relates to avoidance transactions); or
    - (iii) under the Act of 1981; or
  - (d) to challenge the jurisdiction of the court.
- (2) In an action to which this rule applies, the defender shall–
- (a) lodge defences to the action in process; and
  - (b) make any claim or seek any order, as the case may be, referred to in paragraph (1) in those defences by setting out in those defences–
    - (i) conclusions;
    - (ii) averments in the answers to the condensation in support of those conclusions; and
    - (iii) appropriate pleas-in-law.

### **Abandonment by pursuer**

**49.32.** Notwithstanding abandonment by a pursuer, the court may allow a defender to pursue an order or claim sought in his defences; and the proceedings in relation to that order or claim shall continue in dependence as if a separate cause.

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(26) 1985 c. 37.



### **Adjustment and further procedure**

**49.33.**—(1) Chapter 22 (making up and closing records) shall not apply to a family action.

(2) The court shall, 14 days after the date on which defences were lodged, or a minute by a person on whom intimation has been made under rule 49.8, 49.9, or 49.15 was lodged, pronounce an interlocutor allowing the parties a proof of their respective averments.

(3) Notwithstanding the pronouncement of an interlocutor under paragraph (2), the parties may adjust their respective pleadings until 28 days before the diet of proof; and any such adjustments shall be written on the summons, defences or minute, as the case may be.

(4) Not earlier than 28 days after the allowance of proof, the court may, on cause shown, withdraw the allowance of proof and appoint the action to the Procedure Roll.

(5) The pursuer shall, within 7 days after the end of the adjustment period under paragraph (3) or the appointment of the action to the Procedure Roll, as the case may be—

- (a) subject to rule 49.68 (procedure for minutes in causes under the Act of 1981), make up a copy of the adjusted pleadings in the form of a record;
- (b) send not less than three copies of the record to every other party; and
- (c) not later than 48 hours before the diet of proof or hearing on the Procedure Roll, as the case may be, lodge two copies of the record in process.

### **Late appearance by defenders**

**49.34.**—(1) In a family action, the court may, at any time while the action is depending, make an order with such conditions, if any, as it thinks fit, allowing a defender—

- (a) to lodge defences to the action; and
- (b) to appear and be heard at a diet of proof although he has not lodged defences, but he shall not, in that event, be allowed to lead evidence without the pursuer's consent.

(2) Where the court makes an order under paragraph (1)(a), the pursuer may recall a witness already examined or lead other evidence whether or not he closed his proof before that order was made.

## **PART IV APPLICATIONS AND ORDERS RELATING TO CHILDREN IN CERTAIN ACTIONS**

### **Application and interpretation of this Part**

**49.35.**—(1) This Part applies to an action of divorce, separation or declarator of nullity of marriage.

(2) In this Part, “the Act of 1958” means the Matrimonial Proceedings (Children) Act 1958(27).

### **Applications in actions to which this Part applies**

**49.36.**—(1) An application for an order mentioned in paragraph (2) shall be made—

- (a) by a conclusion in the summons or defences, as the case may be, in an action to which this Part applies; or
- (b) where the application is made by a person other than the pursuer or defender, by minute in that action.

(2) The orders referred to in paragraph (1) are—

- (a) an order for any parental rights; and
- (b) an order for aliment for a child.

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(27) 1958 c. 40.

**Intimation before committal to care or supervision**

**49.37.**—(1) Where the court is considering making an order under section 10(1) of the Act of 1958<sup>(28)</sup> (committal of care of child to an individual other than one of the parties to the marriage or to a local authority) or Under section 12(1) of that Act<sup>(29)</sup> (placing child under supervision of a local authority), it shall ordain one of the parties to intimate to that person or to the chief executive of the appropriate local authority, as the case may be, where not already a party to the action and represented at the hearing at which the issue arises—

- (a) a copy of the pleadings (including any adjustments and amendments);
- (b) the terms of any relevant motion;
- (c) a notice of intimation in Form 49.37 requiring any representations which that person or that local authority wishes to make to the court to be made by minute in the process of the action within such period as the court has determined.

(2) Before lodging a minute under paragraph (1)(c), the minuter shall intimate to every other party a copy of the minute and the date on which it will be lodged.

**Care or supervision orders**

**49.38.** Where the court makes, varies or recalls an order under section 10(1) (committal of care of child to an individual other than one of the parties of the marriage or to a local authority), or section 12(1) (placing child under supervision of a local authority), of the Act of 1958, it shall send a copy of the interlocutor making the order and a notice in Form 49.38 to the chief executive of the local authority or other person concerned.

**Intimation of certain applications to local authorities or other persons**

**49.39.** Where a child is subject to an order under section 10(1) (committal of care of child to an individual other than one of the parties to the marriage or to a local authority), or section 12(1) (placing child under supervision of a local authority), of the Act of 1958, any motion enrolled or minute lodged which relates to that child shall be intimated to the chief executive of the local authority or other person concerned.

**Applications in depending actions by motion**

**49.40.**—(1) An application by a party in an action depending before the court to which this Part applies—

- (a) for, or for variation of, an order—
  - (i) for interim aliment for a child under the age of 18 years, or
  - (ii) for interim custody of, or interim access to, a child, or
- (b) for variation or recall of an order under section 10(1) (committal of care of child to another individual other than one of the parties to the marriage or to a local authority), or section 12(1) (placing child under supervision of a local authority), of the Act of 1958,

shall be made by motion.

(2) Written intimation of a motion under paragraph (1) shall be given to every other party not less than 7 days before the date on which the motion is enrolled.

<sup>(28)</sup> Section 10(1) of the Act of 1958 was amended by the Law Reform (Parent and Child) (Scotland) Act 1986 (c. 9), Schedule 2; and the Family Law Act 1986 (c. 55), Schedule 1, paragraph 6.

<sup>(29)</sup> Section 12(1) of the Act of 1958 was amended by the Social Work (Scotland) Act 1968 (c. 49), Schedule 9.

### **Applications after decree relating to parental rights or care**

**49.41.**—(1) Subject to rule 49.42 (applications after decree relating to access or supervision), an application after final decree—

- (a) for, or for the variation or recall of, an order relating to parental rights other than access, or
- (b) for an order under section 10(1) of the Act of 1958 (committal of care of child to an individual other than one of the parties to the marriage or to a local authority),

shall be made by minute in the process of the action to which the application relates.

(2) where a minute has been lodged under paragraph (1), any party—

- (a) may apply by motion for any interim order which may be made pending the determination of the application; and
- (b) shall intimate any such motion to every other party not less than 7 days before the date on which the motion is enrolled.

### **Applications after decree relating to access or supervision**

**49.42.**—(1) An application after final decree for, or for the variation or recall of—

- (a) an order for access to a child, or
- (b) an order under section 12(1) of the Act of 1958 (placing child under supervision of a local authority),

shall be made by motion in the process of the action to which the application relates.

(2) A motion under paragraph (1) shall—

- (a) include a brief statement of the reasons for the order sought, and
- (b) be intimated by registered post or the first class recorded delivery service to—
  - (i) any person concerned or a solicitor known to be acting on behalf of that person, and
  - (ii) where appropriate, the local authority concerned, not less than 14 days before the date on which the motion is enrolled.

(3) On enrolling a motion under paragraph (1), the applicant shall lodge in process—

- (a) a copy of the letter of intimation; and
- (b) the Post Office receipt or certificate of posting of that letter.

(4) At the hearing of a motion under paragraph (1), the court may order that the application be made by minute; and, in such a case, shall make an order for the lodging of answers to the minute in process within such period as it thinks fit.

(5) Where the court makes an order under paragraph (4), any party may apply by motion for an interim order pending the determination of the application.

### **Applications after decree relating to aliment**

**49.43.**—(1) An application after final decree for, or for the variation or recall of, an order for aliment for a child shall be made by motion in the process of the action to which the application relates.

(2) A motion under paragraph (1) shall—

- (a) include a brief statement of the reasons for the order sought; and
- (b) be intimated by registered post or the first class recorded delivery service to any person concerned or a solicitor known to be acting on behalf of that person, not less than 14 days before the date on which the motion is enrolled.

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- (3) On enrolling a motion under paragraph (1), the applicant shall lodge in process—
  - (a) a copy of the letter of intimation;
  - (b) the Post Office receipt or certificate of posting of that letter; and
  - (c) written evidence of the earnings or other income of the applicant or, if not employed, written evidence of that fact.
- (4) At the hearing of a motion under paragraph (1), the court may order that the application be made by minute; and, in such a case, shall make an order for the lodging of answers to the minute in process within such period as the court thinks fit.
- (5) Where the court makes an order under paragraph (4), any party—
  - (a) may apply by motion for an interim order pending the determination of the application; and
  - (b) shall give written intimation of any such motion to every other party not less than 7 days before the date on which the motion is enrolled.

#### **Applications after decree by persons over 18 years for alimant**

- 49.44.**—(1) A person—
  - (a) to whom an obligation of alimant is owed under section 1 of the Act of 1985<sup>(30)</sup>,
  - (b) in whose favour an order for alimant while under the age of 18 years was made in an action to which this Part applies, and
  - (c) who seeks, after attaining that age, an order for alimant against a person in that action against whom the order for alimant in his favour was made,

shall apply by minute in the process of that action.

(2) An application for interim alimant pending the determination of an application under paragraph (1) shall be made by motion.

(3) Where a decree has been pronounced in an application under paragraph (1) or (2), any application for variation or recall of any such decree shall be made by motion; and rule 49.43 (applications after decree relating to alimant) shall apply to a motion under this paragraph as it applies to a motion under that rule.

PART VORDERS RELATING TO FINANCIAL PROVISION ETC.

#### **Application and interpretation of this Part**

- 49.45.**—(1) This Part applies to an action of divorce or declarator of nullity of marriage.  
(2) In this Part, “incidental order” has the meaning assigned in section 14(2) of the Act of 1985.

#### **Applications in actions to which this Part applies**

- 49.46.**—(1) An application for an order mentioned in paragraph (2) shall be made—
  - (a) by a conclusion in the summons or defences, as the case may be, in an action to which this Part applies; or
  - (b) where the application is made by a person other than the pursuer or defender, by minute in that action.
- (2) The orders referred to in paragraph (1) are—
  - (a) an order for financial provision within the meaning of section 8(3) of the Act of 1985;

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(30) 1985 c. 37.

- (b) an order under section 16(1)(b) or (3) of the Act of 1985 (setting aside or varying agreement as to financial provision);
- (c) an order under section 18 of the Act of 1985 (which relates to avoidance transactions); and
- (d) an order under section 13 of the Act of 1981<sup>(31)</sup> (transfer or vesting of tenancy of a matrimonial home).

#### **Applications in depending actions relating to incidental orders**

**49.47.**—(1) In an action depending before the court to which this Part applies—

- (a) the pursuer or defender, notwithstanding rule 49.31(2) (application by defender for order for financial provision) and rule 49.46(1)(a) (application for order for financial provision in summons or defences), may apply by motion for an incidental order; and
- (b) the court shall not be bound to determine such a motion if it considers that the application should properly be by a conclusion in the summons or defences, as the case may be.

(2) In an action depending before the court to which this Part applies, an application under section 14(4) of the Act of 1985 for the variation or recall of an incidental order shall be made by motion.

#### **Applications relating to interim aliment**

**49.48.**—(1) An application for, or for the variation or recall of, an order for interim aliment for the pursuer or defender shall be made by motion.

(2) Written intimation of a motion under paragraph (1) shall be given not less than 7 days before the date on which the motion is enrolled.

#### **Applications relating to orders for financial provision**

**49.49.**—(1) An application—

- (a) after final decree under any of the following provisions of the Act of 1985—
  - (i) section 8(1) for periodical allowance,
  - (ii) section 12(1)(b) (payment of capital sum or transfer of property),
  - (iii) section 12(4) (variation of date or method of payment of capital sum or date of transfer of property), or
  - (iv) section 13(4) (variation, recall, backdating or conversion of periodical allowance), or
- (b) after the grant or refusal of an application under—
  - (i) section 8(1) or 14(3) for an incidental order, or
  - (ii) section 14(4) (variation or recall of incidental order),

shall be made by motion in the process of the action to which the application relates.

(2) Rule 49.43 (applications after decree relating to aliment) shall apply to a motion under this rule as it applies to a motion under that rule.

#### **Applications after decree relating to agreements or avoidance transactions**

**49.50.** An application for an order—

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(31) 1981 c. 59; section 13 was amended by the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 (c. 12), Schedule 1, paragraph 23, by the Tenants' Rights, Etc. (Scotland) Amendment Act 1984 (c. 18), section 8(2), by the Family Law (Scotland) Act 1985, Schedule 1, paragraph 11 and by the Housing (Scotland) Act 1987 (c. 26), Schedule 23, paragraph 26.

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- (a) under section 16(1)(a) or (3) of the Act of 1985 (setting aside or varying agreement as to financial provision), or
- (b) under section 18 of the Act of 1985 (which relates to avoidance transactions),

made after final decree shall be made by minute in the process of the action to which the application relates.

#### PART VIAPPLICATIONS RELATING TO AVOIDANCE TRANSACTIONS

##### **Form of applications relating to avoidance transactions**

**49.51.**—(1) An application for an order under section 18 of the Act of 1985 (which relates to avoidance transactions) by a party to a family action shall be made by including in the summons, defences or minute, as the case may be, appropriate conclusions, averments and pleas-in-law.

(2) An application for an order under section 18 of the Act of 1985 after final decree in a family action, shall be made by minute in the process of the action to which the application relates.

#### PART VIIFINANCIAL PROVISION AFTER OVERSEAS DIVORCE OR ANNULMENT

##### **Interpretation of this Part**

**49.52.** In this Part—

“the Act of 1984” means the Matrimonial and Family Proceedings Act 1984<sup>(32)</sup>;

“order for financial provision” has the meaning assigned in section 30(1) of the Act of 1984;

“overseas country” has the meaning assigned in section 30(1) of the Act of 1984.

##### **Applications for financial provision after overseas divorce or annulment**

**49.53.**—(1) An application under section 28 of the Act of 1984<sup>(33)</sup> for an order for financial provision after a divorce or annulment in an overseas country shall be made by summons.

(2) An application for an order in an action to which paragraph (1) applies—

(a) made before or after final decree under—

(i) section 13 of the Act of 1981<sup>(34)</sup> (transfer of tenancy of matrimonial home),

(ii) section 29(4) of the Act of 1984 for interim periodical allowance, or

(iii) section 14(4) of the Act of 1985 (variation or recall of an incidental order), or

(b) made after final decree under—

(i) section 12(4) of the Act of 1985 (variation of date or method of payment of capital sum or date of transfer of property),

(ii) section 13(4) of the Act of 1985 (variation, recall, backdating or conversion of periodical allowance), or

(iii) section 14(4) of the Act of 1985 (variation or recall of incidental order),

shall be made by motion.

(3) Rule 49.43 (applications after decree relating to aliment) shall apply to a motion under this rule as it applies to a motion under that rule.

#### PART VIIIACTIONS OF ALIMENT

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<sup>(32)</sup> 1984 c. 42.

<sup>(33)</sup> Section 28 was extended by section 29A (inserted by the Act of 1985, Schedule 1, paragraph 12) to an annulment.

<sup>(34)</sup> 1981 c. 51; section 13(2) was amended by the Act of 1985, Schedule 1, paragraph 11.

### **Interpretation of this Part**

**49.54.** In this Part, “action of aliment” means a claim for aliment under section 2(1) of the Act of 1985.

### **Undefended actions of aliment**

**49.55.**—(1) Where a motion for decree in absence is enrolled in an action of aliment, the pursuer shall, on enrolling the motion, lodge all documentary evidence of the means of the parties available to him in support of the amount of aliment sought.

(2) Where the court requires any appearance for the pursuer, the cause shall be put out for hearing on the Motion Roll.

### **Applications relating to aliment**

**49.56.**—(1) An application for, or for the variation of, an order for interim aliment in an action of aliment depending before the court shall be made by motion.

(2) Written intimation of a motion under paragraph (1) shall be given not less than 7 days before the date on which the motion is enrolled.

(3) An application after final decree for the variation or recall of an order for aliment in an action of aliment shall be made by motion; and rule 49.43 (applications after decree relating to aliment) shall apply to a motion under this paragraph as it applies to a motion under that rule.

(4) A person—

- (a) to whom an obligation of aliment is owed under section 1 of the Act of 1985<sup>(35)</sup>,
- (b) in whose favour an order for aliment while made under the age of 18 years was made in an action of aliment, or
- (c) who seeks, after attaining that age, an order for aliment against the person in that action against whom the order for aliment in his favour was made,

shall apply by minute in the process of that action.

(5) An application for interim aliment pending the determination of an application under paragraph (4) shall be made by motion.

(6) Where a decree has been pronounced in an application under paragraph (3) or (4), any application for variation or recall of any such decree shall be made by motion; and rule 49.43 (applications after decree relating to aliment) shall apply to a motion under this paragraph as it applies to a motion under that rule.

### **Applications relating to agreements on aliment**

**49.57.** An application under section 7(2) of the Act of 1985 (variation or termination of agreement on aliment) shall be made by summons or in defences in a family action, as the case may be.

## **PART IX CAUSES RELATING TO PARENTAL RIGHTS**

### **Application and interpretation of this Part**

**49.58.**—(1) This Part applies to an application for any parental rights in a family action other than in an action of divorce, separation or declarator of nullity of marriage.

(2) In this Part, “the Act of 1973” means the Guardianship Act 1973<sup>(36)</sup>.

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<sup>(35)</sup> 1985 c. 37.

<sup>(36)</sup> 1973 c. 29.

**Form of applications relating to parental rights**

**49.59.** Subject to any other provision in this Chapter, an application for an order for any parental rights in respect of a child shall be made—

- (a) by an action for parental rights,
- (b) by a conclusion in the summons or defences, as the case may be, in any other family action to which this Part applies; or
- (c) where the application is made by a person other than a party to an action mentioned in paragraph (a) or (b), by minute in that action.

**Defenders in actions for parental rights**

**49.60.** In an action for parental rights, the pursuer shall call as a defender—

- (a) the parents or other parent of the child in respect of whom the order is sought;
- (b) any guardian of the child;
- (c) any person who has accepted the child into his family;
- (d) any person having the *de facto* custody of the child;
- (e) any local authority in whose care or under whose supervision the child is; and
- (f) in any case where there is no person falling within paragraphs (a) to (e), the Lord Advocate.

**Applications relating to interim orders in depending actions**

**49.61.**—(1) An application, in an action depending before the court to which this Part applies, for, or for the variation or recall of, an order for interim custody or interim access shall be made by motion.

(2) Written intimation of a motion under paragraph (1) shall be given not less than 7 days before the date on which the motion is enrolled.

**Care and supervision by local authorities**

**49.62.**—(1) Where the court is considering making an order under section 11(1) of the Act of 1973<sup>(37)</sup> (committal of care of child to a local authority or order that a child be under supervision of a local authority), it shall ordain one of the parties to intimate to the chief executive of the appropriate local authority (unless such a local authority is a party to the cause and represented at the hearing at which the issue arises)—

- (a) a copy of the pleadings (including any adjustments and amendments);
- (b) the terms of any relevant motion;
- (c) a notice of intimation in Form 49.62–A requiring any representations which the local authority wishes to make to the court to be made by minute in the process of the cause within such period as the court has determined.

(2) Before lodging a minute under paragraph (1)(c), the minuter shall intimate to every other party a copy of the minute and the date on which it will be lodged.

(3) Where the court makes, varies or recalls an order placing a child under the supervision of a local authority under section 11(1) of the Act of 1973, it shall send a copy of the interlocutor making the order and a notice in Form 49.62–B to the chief executive of that local authority.

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(37) Section 11(1) was amended by the Act of 1975 (c. 72), section 48(3).



(4) Where a child is subject to an order made under section 11(1) of the Act of 1973, any motion enrolled or minute lodged which relates to that child shall be intimated to the chief executive of the local authority concerned.

### **Applications after decree**

**49.63.**—(1) An application after final decree—

- (a) for the variation or recall of an order for any parental rights other than access, or
- (b) for, or for the variation or recall of, an order under section 11(1) of the Act of 1973 committing the care of a child to a local authority,

shall be made by minute in the process of the action to which it relates.

(2) Where a minute has been lodged under paragraph (1), any party—

- (a) may apply by motion for an interim order pending the determination of the application; and
- (b) shall intimate such a motion to every other party not less than 7 days before the date on which the motion is enrolled.

(3) An application after final decree for, or for the variation or recall of—

- (a) an order for access, or
- (b) an order under section 11(1) of the Act of 1973 for the supervision of a child by a local authority,

shall be made by motion; and rule 49.43 (applications after decree relating to aliment) shall apply to a motion under this paragraph as it applies to a motion under that rule.

PART XCAUSES UNDER THE MATRIMONIAL HOMES (FAMILY PROTECTION) (SCOTLAND) ACT 1981

### **Interpretation of this Part**

**49.64.** Unless the context otherwise requires, words and expressions used in this Part which are also used in the Act of 1981<sup>(38)</sup> have the same meaning as in that Act.

### **Form of applications under the Act of 1981**

**49.65.** Subject to any other provision in this Chapter, an application for an order under the Act of 1981 shall be made—

- (a) by an action for such an order;
- (b) by a conclusion in the summons or in defences, as the case may be, in any other family action; or
- (c) where the application is made by a person other than a party to an action mentioned in paragraph (a) or (b), by minute in that action.

### **Defenders in causes under the Act of 1981**

**49.66.** The applicant for an order under the Act of 1981 shall call as a defender—

- (a) where he is seeking an order as a spouse, the other spouse;
- (b) where he is a third party making an application under section 7(1)<sup>(39)</sup> (dispensing with consent of non-entitled spouse to a dealing), or section 8(1) (payment from non-entitled spouse in respect of loan), of the Act of 1981, both spouses; and

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<sup>(38)</sup> 1981 c. 59.

<sup>(39)</sup> Section 7(1) was amended by the Age of Legal Capacity (Scotland) Act 1991 (c. 50), Schedule 1, paragraph 37.

- (c) where the application is made under section 18 of the Act of 1981<sup>(40)</sup> (occupancy rights of cohabiting couples), or is one to which that section applies, the other partner.

### **Applications by motion under the Act of 1981**

**49.67.**—(1) An application under any of the following provisions of the Act of 1981 shall be made by motion:—

- (a) section 3(4) (interim order for regulation of rights of occupancy etc.);
- (b) section 4(6) (interim order suspending occupancy rights);
- (c) section 5 (variation and recall of orders regulating occupancy rights and of exclusion order);
- (d) section 15(1) (order attaching power of arrest), if made after application for matrimonial interdict;
- (e) section 15(2)<sup>(41)</sup> and (5) (variation and recall of matrimonial interdict and power of arrest); and
- (f) the proviso to section 18(1)<sup>(42)</sup> (extension of period of occupancy rights).

(2) Written intimation of a motion under paragraph (1) shall be given not less than 7 days before the date on which the motion is enrolled—

- (a) to the other spouse or partner, as the case may be;
- (b) where the motion is under paragraph (1)(a), (b), (c) or (f) and the entitled spouse or partner is a tenant or occupies the matrimonial home by the permission of a third party, to the landlord or third party, as the case may be; and
- (c) to any other person to whom intimation of the application was or is to be made by virtue of rule 49.8(1)(k) (warrant for intimation to certain persons in actions for orders under the Act of 1981) or 49.15 (orders for intimation by the court).

### **Procedure for minutes**

**49.68.** Where an application is made by minute under rule 49.65(c) (form of application under the Act of 1981 by a person other than a party) and answers to that minute are lodged, the minute and answers shall not be included with the other pleadings in the action in any record, but shall be made up separately in the form of a record; and rule 49.33(5)(b) and (c) (lodging etc. of records) shall apply to that record as it applies to a record under that rule.

### **Sist of actions to enforce occupancy rights**

**49.69.** Unless the court otherwise directs, the sist of an action by virtue of section 7(4) of the Act of 1981 (where action raised by non-entitled spouse to enforce occupancy rights) shall apply only to such part of the action as relates to the enforcement of occupancy rights by a non-entitled spouse.

### **Certificates of execution of delivery of documents to chief constable**

**49.70.**—(1) Where an applicant is required to comply with section 15(4) or (5), as the case may be, of the Act of 1981<sup>(43)</sup> (delivery of documents to chief constable where power of arrest attached

<sup>(40)</sup> Section 18 was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73), section 13(9).

<sup>(41)</sup> Section 15(2) was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40), section 64(a).

<sup>(42)</sup> The proviso to section 18(1) of the Act of 1981 was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73), section 13(9).

<sup>(43)</sup> Section 15(4) was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40), section 64(b).

to matrimonial interdict is granted, varied or recalled), he shall, after such compliance, lodge in process a certificate of delivery in Form 49.70.

(2) Where a matrimonial interdict to which a power of arrest under section 15(1) of the Act of 1981 has been attached ceases to have effect by reason of a decree of divorce or declarator of nullity of marriage being pronounced by the court, the pursuer in the action of divorce or declarator of nullity of marriage, as the case may be, shall send—

- (a) to the chief constable of the police area in which the matrimonial home is situated, and
- (b) if the applicant spouse (within the meaning of section 15(6) of the Act of 1981) resides in another police area, to the chief constable of that other police area,

a copy of the interlocutor granting decree; and lodge in process a certificate of delivery in Form 49.70.

### **Evidence in causes under the Act of 1981**

**49.71.**—(1) For the purposes of proof in any application for an order under the Act of 1981, evidence by affidavit shall be admissible in place of parole evidence.

(2) Rule 36.8 (conditions for receiving certain written statements in evidence) shall not apply in a cause to which paragraph (1) of this rule applies.

### **PART XISIMPLIFIED DIVORCE APPLICATIONS**

#### **Application and interpretation of, and directions under, this Part**

**49.72.**—(1) This Part applies to an application for divorce by a party to a marriage made in the manner prescribed in rule 49.73 (form of applications for simplified divorce) if, but only if—

- (a) that party relies on the facts set out in section 1(2)(d) (no cohabitation for two years with consent of defender to decree), or section 1(2)(e) (no cohabitation for five years), of the Act of 1976~~(44)~~;
- (b) in an application under section 1(2)(d) of the Act of 1976, the other party consents to decree of divorce being granted;
- (c) no other proceedings are pending in any court which could have the effect of bringing the marriage to an end;
- (d) there are no children of the marriage under the age of 16 years;
- (e) neither party to the marriage applies for an order for financial provision on divorce; and
- (e) neither party to the marriage suffers from mental disorder.

(2) If an application ceases to be one to which this Part applies at any time before final decree, it shall be deemed to be abandoned and shall be dismissed.

(3) In this Part, “simplified divorce application” means an application mentioned in paragraph (1).

(4) The Principal Clerk shall give directions in relation to the administrative procedures to be followed on the lodging of a simplified divorce application for—

- (a) the registration and service of such an application,
- (b) having it brought before the court for consideration,
- (c) in the event of decree of divorce being granted, for notification to the parties, and
- (d) connected purposes;

and such directions shall have effect subject to the provisions of this Part.

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(44) 1976 c. 39.

### **Form of applications for simplified divorce**

**49.73.**—(1) A simplified divorce application in which the facts set out in section 1(2)(d) of the Act of 1976 (no cohabitation for two years with consent of defender to decree) are relied on shall be made in Form 49.73–A and shall only be of effect if—

- (a) it is signed by the applicant; and
- (b) the form of consent in Part 2 of Form 49.73–A is signed by the party to the marriage giving consent.

(2) A simplified divorce application in which the facts set out in section 1(2)(e) of the Act of 1976 (no cohabitation for five years) are relied on shall be made in Form 49.73–B and shall only be of effect if it is signed by the applicant.

### **Lodging and registration of simplified divorce applications**

**49.74.**—(1) The applicant shall send a simplified divorce application to the Deputy Principal Clerk with—

- (a) an extract or certified copy of the marriage certificate; and
- (b) the appropriate fee.

(2) Subject to the following rules of this Part, a simplified divorce application shall, on being registered in accordance with any directions made under rule 49.72(4), be treated as a summons in an action of divorce which has commenced.

### **Warrants for service or intimation of simplified divorce applications**

**49.75.**—(1) On registration of a simplified divorce application where the address of the other party to the marriage is known, a clerk of session shall grant warrant for service of the application.

(2) On registration of an application in which the facts set out in section 1(2)(e) of the Act of 1976 (no cohabitation for five years) are relied on where the address of the other party to the marriage is not known to the applicant and cannot reasonably be ascertained—

- (a) the Deputy Principal Clerk shall grant warrant for intimation of the application to—
  - (i) every child of the marriage, and
  - (ii) one of the next of kin of the other party who has reached the age of 16 years, unless the address of such person is not known and cannot reasonably be ascertained; and
- (b) the application shall thereafter be placed before the Lord Ordinary for such order under rule 16.5 (service where address of person is not known) as he thinks fit.

(3) A warrant granted under paragraph (1) or (2)(a) shall be sufficient authority for such service and intimation.

### **Execution of service or intimation of simplified divorce applications**

**49.76.**—(1) Subject to the following paragraphs, service of intimation of a simplified divorce application on a warrant granted under rule 49.75 on any person whose address is known to the applicant shall be made—

- (a) by the Deputy Principal Clerk by post in accordance with rule 16.4 (service by post); or
- (b) by a messenger-at-arms.

(2) In the application of Part I of Chapter 16 (service and intimation) to service or intimation under this rule, the following provisions of that Part of that Chapter shall not apply:—

- rule 16.1(3) (which relates to a party lodging a certificate of service in process),

rule 16.3(1)(b) (form of citation and certificate of service by messenger-at-arms),  
rule 16.4(2)(b) (service by post by agent),  
rule 16.4(4) (form of citation in service by post).

(3) In the case of service of a simplified divorce application on the other party to the marriage under paragraph (1), the person executing service shall complete a citation in Form 49.76–A (no cohabitation for two years with consent to divorce) or Form 49.76–B (no cohabitation for five years), as the case may be.

(4) In the case of intimation of a simplified divorce application on a person under paragraph (1), the person giving intimation shall complete a notice of intimation in Form 49.76–C.

(5) A certificate of service or intimation in Form 49.76–D (certificate by Deputy Principal Clerk) or Form 49.76–E (certificate by messenger-at-arms), as the case may be, shall be—

- (a) completed by the person executing service or giving intimation;
- (b) in the case of a certificate completed by a messenger-at-arms, sent to the Deputy Principal Clerk; and
- (c) attached to the application by the Deputy Principal Clerk.

#### **Opposition to simplified divorce applications**

**49.77.**—(1) Any person on whom service or intimation of a simplified divorce application has been made may give notice by letter sent to the Deputy Principal Clerk within the period of notice that he challenges the jurisdiction of the court or opposes the grant of decree of divorce and giving the reasons for his opposition to the application.

(2) Where opposition to a simplified divorce application is made under paragraph (1), the court shall dismiss the application unless it is satisfied that the reasons given for the opposition are frivolous.

(3) The Deputy Principal Clerk shall give written intimation of the decision under paragraph (2) to the applicant and the respondent.

(4) The sending of a letter under paragraph (1) shall not imply acceptance of the jurisdiction of the court.

#### **Evidence in simplified divorce applications**

**49.78.**—(1) Parole evidence shall not be given in a simplified divorce application.

(2) Rule 36.8 (conditions for receiving certain written statements in evidence) shall not apply in a simplified divorce application.

#### **No reclaiming in simplified divorce applications**

**49.79.** A decree pronounced in a simplified divorce application may not be reclaimed against.

#### **Applications after decree in simplified divorce applications**

**49.80.**—(1) Any application to the court after decree of divorce has been granted in a simplified divorce application which could have been made if it had been an action of divorce shall be made by minute.

(2) On lodging a minute under paragraph (1), the minuter shall lodge a process.

### **Interpretation of this Part**

**49.81.** In this Part—

“the Act of 1991” means the Child Support Act 1991(45);

“child” has the meaning assigned in section 55 of the Act of 1991;

“maintenance assessment” has the meaning assigned in section 54 of the Act of 1991.

### **Restriction of expenses**

**49.82.** Where the Secretary of State is called as a defender in an action for declarator of non-parentage or illegitimacy, and the Secretary of State does not defend the action, no expenses shall be awarded against the Secretary of State.

### **Effect of maintenance assessments**

**49.83.** The Deputy Principal Clerk shall, on receiving notification that a maintenance assessment has been made, cancelled or has ceased to have effect so as to affect an order of a kind prescribed for the purposes of section 10 of the Act of 1991, endorse on the interlocutor sheet relating to that order a certificate in Form 49.83–A or 49.83–B, as the case may be.

### **Effect of maintenance assessments on extracts relating to aliment**

**49.84.—**(1) Where an order relating to aliment is affected by a maintenance assessment, any extract of that order issued by the Extractor shall be endorsed with a certificate in Form 49.84–A.

(2) Where an order relating to aliment has ceased to have effect on the making of a maintenance assessment, and that maintenance assessment is later cancelled or ceases to have effect, any extract of that order issued by the Extractor shall be endorsed also with a certificate in Form 49.84–B.

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(45) 1991 c. 48.