

CHAPTER 70

APPLICATIONS UNDER THE CHILD ABDUCTION AND CUSTODY ACT 1985

PART I

GENERAL PROVISIONS

Interpretation of this Chapter

70.1. In this Chapter-

"the Act of 1985" means the Child Abduction and Custody Act 1985**(a)**;

"the European Convention" means the convention defined in section 12(1) of the Act of 1985 and as set out in Schedule 2 to the Act of 1985;

"the Hague Convention" means the convention defined in section 1(1) of the Act of 1985 and as set out in Schedule 1 to the Act of 1985;

"relevant authority" means-

(a) in the United Kingdom, a sheriff court, the Sheriff Appeal Court, a children's hearing within the meaning of the Children's Hearings (Scotland) Act 2011**(b)**, the High Court, a county court or magistrates' court in England and Wales, the High Court, a county court or magistrates' court in Northern Ireland, or the Secretary of State, as the case may be; or

(b) in a relevant territory, the appropriate authority or court within that territory;

"relevant territory" means a territory outside the United Kingdom to which the Act of 1985 extends by virtue of an Order in Council made under section 28(1) of that Act or in relation to which provision is made by an Order in Council under section 28(2) of that Act.

Translations of documents

70.2. Where any document lodged in process in a cause to which this Chapter applies is in a language other than English, there shall be lodged with that document a translation into English certified as correct by the translator; and the certificate shall include his full name, address and qualifications.

Applications for certified copy or extract

70.3.-(1) An application for a certified copy or extract of a decree or any other interlocutor relating to a child, in respect of whom the applicant wishes to apply under the Hague Convention or the European Convention in another Contracting State, shall be made by letter to the Deputy Principal Clerk.

(2) A certified copy or extract issued on an application under paragraph (1) shall be supplied free of charge.

Disclosure of information

70.4. Where the court pronounces an interlocutor under section 24A of the Act of 1985**(c)** (order to a person to disclose information to the court as to a child's whereabouts), it may order that person to appear before it or to lodge an affidavit.

(a) 1985 c.60.

(b) 2011 asp 1.

(c) 1985 c.60; section 24A was inserted by the Family Law Act 1986 (c.55), section 67(4).

PART II

INTERNATIONAL CHILD ABDUCTION(THE HAGUE CONVENTION)

Form of applications under this Part

70.5.-(1) Subject to rule 70.16 (warrant for intimation on a child), an application for the return of a child under the Hague Convention shall be made by petition and-

- (a) shall include averments in relation to-
 - (i) the identity of the petitioner and the person alleged to have removed or retained the child;
 - (ii) the identity of the child and his date of birth;
 - (iii) the whereabouts or suspected whereabouts of the child;
 - (iv) the date on which the child is alleged to have been wrongfully removed or retained;
 - (v) the grounds on which the petition is based; and
 - (vi) any civil cause in dependence before any other court or authority in respect of the child, or any proceedings mentioned in section 9 of the Act of 1985^(a) relating to the merits of the rights of custody of the child in or before a relevant authority;
- (b) there shall be produced with the petition and lodged as a production a certified or authorised copy of any relevant decision or agreement; and
- (c) there shall be lodged with the petition the evidence by affidavits of any witnesses and any documentary evidence, whether originals or copies initially, in support of the petition.

(2) An application for organising or protecting rights of access granted by any court of a contracting party to the Hague Convention, or for securing respect for the conditions to which the exercise of such rights of access is subject shall be made by petition and-

- (a) shall include averments in relation to-
 - (i) the identity of the petitioner;
 - (ii) the identity of the child and his date of birth;
 - (iii) the parents or guardians of the child;
 - (iv) the whereabouts of the child;
 - (v) the factual and legal grounds on which access is sought; and
 - (vi) any civil cause in dependence before any other court or authority in respect of the child, or any proceedings mentioned in section 9 of the Act of 1985 relating to the merits of the rights of custody of the child in or before a relevant authority;
- (b) there shall be produced with the petition and lodged as a production a certified copy of any relevant decision or agreement; and
- (c) there shall be lodged with the petition the evidence by affidavits of any witnesses and any documentary evidence, whether originals or copies initially, in support of the petition.

(3) An application under section 8 of the Act of 1985 (application for declarator that removal or retention of child was wrongful) shall be made by petition and-

- (a) shall include averments in relation to-
 - (i) the identity of the petitioner and of the person who is alleged to have removed or retained the child;
 - (ii) the identity of the child and his date of birth;
 - (iii) the whereabouts or suspected whereabouts of the child;
 - (iv) the date on which the child is alleged to have been wrongfully removed or retained;
 - (v) the proceedings which gave custody to the petitioner; and
 - (vi) the proceedings under the Hague Convention in relation to which the petition is necessary;
- (b) there shall be produced with the petition any relevant document; and

^(a) Section 9 of the Act of 1985 was amended by the Family Law Act 1986 (c.55), Schedule 1, paragraph 28 and by the Children Act 1989 (c.41), Schedule 13, paragraph 47 and Schedule 15.

- (c) there shall be lodged with the petition the evidence by affidavits of any witnesses and any documentary evidence, whether originals or copies initially, in support of the petition.

Period of notice, service of causes and hearings under this Part

70.6.-(1) Subject to rule 14.6(2), the period of notice for lodging answers to a petition to which rule 70.5 applies shall be four days.

(2) Subject to rule 70.16 (intimation of notice on child), such a petition, and a copy of any affidavit and documentary evidence lodged with it, shall be served on-

- (a) the person alleged to have brought the child into the United Kingdom;
- (b) the person with whom the child is presumed to be;
- (c) any parent or guardian of the child if he or she is within the United Kingdom, or a relevant territory and not otherwise a party;
- (d) the chief executive of the local authority, and the reporter to the Children's Panel in the local authority area in which the child resides; and
- (e) any other person who may have an interest in the child.

(3) The first order under rule 14.5 (first order in petitions) in a petition to which rule 70.5 applies shall specify a date within seven days after the expiry of the period of notice for a first hearing to determine the further progress of the petition.

(4) A respondent shall lodge in process, and send a copy to the petitioner of, the evidence by affidavits of any witnesses and any documentary evidence, whether originals or copies initially, in support of his answers to the petition at least 3 days before the first hearing fixed under paragraph (3).

(5) Subject to rule 70.17 (views of the child), at the first hearing fixed under paragraph (3), the court-

- (a) shall determine to what extent, if any, further evidence by affidavit is required, by whom and in regard to what matters, and by what date any such affidavit should be lodged;
- (b) may, on special cause shown, direct that a particular matter should be the subject of oral evidence in lieu of further, or in addition to, affidavit evidence; and
- (c) may, if no further evidence is required, determine the petition at the first hearing or, if further evidence is required, shall give directions as to the period within which a second hearing shall be held to determine the petition.

Notice of other proceedings

70.7.-(1) Where a petition is presented under paragraph (1) of rule 70.5 and there are proceedings mentioned in section 9 of the Act of 1985 relating to the merits of the rights of custody of the child depending in or before a relevant authority, the court shall give written intimation of the petition and, in due course of the outcome of the petition, to that relevant authority.

(2) Where the court receives a notice equivalent to that under paragraph (1) from a relevant authority, all proceedings in any cause mentioned in section 9 of the Act of 1985 relating to the merits of the rights of custody of the child shall be sisted by the court until the dismissal of the proceedings in that other court under the Hague Convention; and the Deputy Principal Clerk shall give written intimation to each party of the sist and of any such dismissal.

Transfer of causes

70.8.-(1) At any stage of a cause mentioned in paragraph (1) of rule 70.5, the court may, at its own instance or on the motion of any party, pronounce an interlocutor transmitting the cause to the High Court in England and Wales or Northern Ireland, or the appropriate court of a relevant territory, as the case may be.

(2) Where a cause is transferred under paragraph (1), the Deputy Principal Clerk shall-

- (a) transmit the process to the appropriate officer of the High Court in England and Wales or Northern Ireland, or the appropriate court of a relevant territory, as the case may be;
- (b) give written intimation of such transfer to each party; and
- (c) certify on the interlocutor sheet that such written intimation has been given.

(3) Where a cause is transferred under paragraph (1), the question of expenses shall not be determined by the court, but shall be at the discretion of the court to which the cause is transferred.

(4) Where such a cause is transferred to the court from the High Court in England and Wales or Northern Ireland, or the appropriate court of a relevant territory-

- (a) the Deputy Principal Clerk shall, on receipt of the order transferring the cause and any documents in the cause, give written intimation to each party of the transfer;
- (b) the cause shall be deemed to have been commenced by petition; and
- (c) the Deputy Principal Clerk shall, within two sitting days of the receipt of it, cause it to be put out on the By Order Roll before the Lord Ordinary.

PART III

RECOGNITION AND ENFORCEMENT OF CUSTODY DECISIONS (THE EUROPEAN CONVENTION)

Form of applications under this Part

70.9.-(1) An application under any of the following provisions shall be made by petition:-

- (a) section 15 of the Act of 1985 (application to declare a decree for custody not to be recognised);
- (b) section 16 of the Act of 1985 (application for registration of custody decision); and
- (c) section 18 of the Act of 1985 (application for enforcement of custody decision).

(2) An application under section 17(4) of the Act of 1985 (application for variation or revocation of registered decision), shall be made by note in the process of the petition for registration.

(3) An application under section 23(2) of the Act of 1985 (application in custody proceedings for declarator that removal of a child was unlawful), shall be made-

- (a) by minute in the process of a cause depending before the court commenced by summons;
or
- (b) by note in the process of a cause depending before the court commenced by petition.

(4) In an application mentioned in this rule-

- (a) the petition, minute or note, as the case may be, shall include averments in relation to-
 - (i) the identity of the petitioner, minuter or noter, as the case may be, and his interest in the cause;
 - (ii) the identity of the child and his date of birth;
 - (iii) the parents or guardians of the child;
 - (iv) the order which is required to be registered, enforced, declared unlawful, declared not recognised, varied or revoked, as the case may be;
 - (v) the whereabouts or suspected whereabouts of the child; and
 - (vi) any civil cause in dependence before any other court or authority in respect of the child, or any proceedings specified in section 20(2) of the Act of 1985^(a) in dependence in or before a relevant authority;
- (b) there shall be produced with the petition, minute or note, as the case may be-
 - (i) a certified or authorised copy of any decision to be registered or enforced;

^(a) Section 20(2) was amended by the Children Act 1989 (c.41), Schedule 13, paragraph 57 and Schedule 15.

- (ii) where a decision to be registered was given in the absence of the person against whom the decision was made or in the absence of his legal representative, a document which establishes (subject to Article 9(1)(a) of the European Convention) that that person was duly served with the document which instituted the original proceedings;
- (iii) a certificate or affidavit to the effect that any decision to be registered is enforceable in accordance with the law of the State in which the decision was made; and
- (iv) any other relevant document; and
- (c) there shall be lodged with the petition, minute or note, as the case may be, the evidence by affidavits of any witnesses and any documentary evidence, whether originals or copies initially, in support of the petition, minute or note.

Period of notice, service of causes and hearings under this Part

70.10.- (1) Subject to rule 14.6(2), the period of notice for lodging answers in a petition to which rule 70.9 applies shall be four days.

(2) Such a petition, and a copy of any affidavit and documentary evidence lodged with it, shall be served on-

- (a) the person alleged to have brought the child into, or removed the child from, the United Kingdom, or a relevant territory, as the case may be;
- (b) the person with whom the child is presumed to be in the United Kingdom or a relevant territory;
- (c) the mother and father of the child if he or she is within the United Kingdom, or a relevant territory, and not otherwise a party;
- (d) the chief executive of the local authority, and the Reporter to the Children's Panel, in the local authority area in which the child resides; and
- (e) any other person who may have an interest in the child.

(3) The first order under rule 14.5 (first order in petitions) in a petition to which rule 70.9 applies shall specify a date within seven days after the expiry of the period of notice for a first hearing to determine the further progress of the petition.

(4) A respondent shall lodge in process, and send a copy to the petitioner of, the evidence by affidavits of any witnesses and any documentary evidence, whether originals or copies initially, in support of his answers to the petition to which rule 70.9 applies at least 3 days before the first hearing fixed under paragraph (3).

(5) At the first hearing fixed under paragraph (3), the court-

- (a) shall determine to what extent, if any, further evidence by affidavit is required, by whom and in regard to what matters, and by what date any such affidavit should be lodged;
- (b) may, on special cause shown, direct that a particular matter should be the subject of oral evidence in lieu of further, or in addition to, affidavit evidence; and
- (c) may, if no further evidence is required, determine the petition at the first hearing or, if further evidence is required, shall give directions as to the period within which a second hearing shall be held to determine the petition.

Registration

70.11. Where the court pronounces an interlocutor ordering registration under section 16 of the Act of 1985, the Deputy Principal Clerk shall record that interlocutor in a register of decisions pronounced under that Act.

Other proceedings

70.12.-(1) Where a petition is presented under section 16 (application for registration and enforcement of custody decision), or section 18 (application for enforcement of a custody decision), of the Act of

1985 and there are proceedings mentioned in section 20(2) of that Act depending or such proceedings are commenced after the petition has been presented-

- (a) the petitioner shall inform the court by including averments or lodging an affidavit, as the case may be, to that effect containing a concise statement of the nature of those proceedings; and
- (b) the court shall give written intimation of the petition and, in due course of the outcome of the petition, to the relevant authority.

(2) Where the court receives a notice equivalent to that under paragraph (1)(b) from the High Court in England and Wales or Northern Ireland, or the appropriate court of a relevant territory, the Deputy Principal Clerk shall give written intimation to each party to any cause which is one mentioned in section 20(2) of the Act of 1985.

Transfers

70.13.-(1) At any stage of a cause mentioned in rule 70.9, the court may, at its own instance or on the motion of any party, pronounce an interlocutor transferring the cause to the High Court in England and Wales or Northern Ireland, or the appropriate court of a relevant territory, as the case may be.

(2) Where a cause is transferred under paragraph (1), the Deputy Principal Clerk shall forthwith-

- (a) transmit the process to the appropriate officer of the High Court in England and Wales or Northern Ireland, or the appropriate court of a relevant territory, as the case may be;
- (b) give written intimation of such transfer to each party; and
- (c) certify on the interlocutor sheet that such written intimation has been given.

(3) Where a cause is transferred under paragraph (1), the question of expenses shall not be determined by the court, but shall be at the discretion of the court to which the case is transferred.

(4) Where such a cause is transferred to the court from the High Court in England and Wales or Northern Ireland, or the appropriate court of a relevant territory-

- (a) the Deputy Principal Clerk shall, on receipt of the order transferring the cause and any papers in the cause, give written intimation to the parties of the transfer;
- (b) the cause shall be deemed to have been commenced by petition; and
- (c) the Deputy Principal Clerk shall, within two days of the receipt of it, cause it to be put out on the By Order Roll before the Lord Ordinary.

Variation and revocation of registered decision

70.14.-(1) Where a decision registered under section 16 of the Act of 1985 is varied or revoked by an authority in the Contracting State in which the decision was made, the court shall-

- (a) on cancelling the registration of a decision which it has been notified has been revoked, give written intimation of that cancellation to-
 - (i) the person appearing to the court to have actual custody of the child;
 - (ii) the petitioner in the petition for registration; and
 - (iii) any other party to that petition; and
- (b) on being notified of the variation of a decision, give written intimation to-
 - (i) the person having custody in fact of the child; and
 - (ii) any party to the petition for registration of the decision, of the variation.

(2) Any person to whom intimation of a variation has been given under paragraph (1)(b) may apply by note for the purpose of making representations before the registration is varied.

(3) An application under section 17(4) of the Act of 1985 (application to cancel or vary registration) shall be made by note.

PART IV

APPLICATIONS UNDER THE HAGUE CONVENTION WHERE THE COUNCIL REGULATION APPLIES

Application and interpretation of this Part

70.15.-(1) This Part applies to petitions under rule 70.5(1) (applications for the return of a child) under the Hague Convention where the Council Regulation (E.C.) No. 2201/2003 of 27th November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility applies(a).

(2) In this Part-

“the Council Regulation” means Council Regulation (E.C.) No. 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility;

“central authority” means a central authority designated under Article 53 of the Council Regulation;

“the Hague Convention” means the Convention defined in section 1(1) of the Child Abduction and Custody Act 1985(b) and as set out in Schedule 1 to that Act;

“Member State” has the same meaning as in Article 2(3) of the Council Regulation;

“wrongful removal or retention” has the same meaning as in Article 2(11) of the Council Regulation.

Warrants and forms for intimation to a child and for seeking a child’s views

70.16.-(1) Subject to paragraph (2), in a petition under rule 70.5(1) (form of applications under this Part)(c) where the Council Regulation applies, the petitioner must-

- (a) include in the prayer of the petition a crave for a warrant for intimation and the seeking of the child’s views in Form 49.8A;
- (b) include in the statement of facts in the petition averments setting out the reasons why it is appropriate to send Form 49.8A to the child;
- (c) when presenting the petition for first orders, submit a draft Form 49.8A, showing the details that the petitioner proposes to include when the form is sent to the child.

(2) Where the petitioner considers that it would be inappropriate to send Form 49.8A to the child (for example, where the child is under 5 years of age), the petitioner must-

- (a) include in the prayer of the petition a crave to dispense with intimation and the seeking of the child’s views in Form 49.8A;
- (b) include in the statement of facts in the petition averments setting out the reasons why it is inappropriate to send Form 49.8A to the child.

(3) The court must be satisfied that the draft Form 49.8A submitted under paragraph (1)(c) has been drafted appropriately(d).

(4) The court may dispense with intimation and the seeking of views in Form 49.8A or make any other order that it considers appropriate.

(5) An order granting warrant for intimation and the seeking of the child’s views in Form 49.8A under this rule must be signed by the Lord Ordinary.

(a) O.J. No. L338, 23.12.2003,p.1.

(b) 1985 c.60.

(c) Rule 70.5(1) was last amended by S.S.I. 2005/135.

(d) The Scottish Civil Justice Council has published guidance on the preparation of Form 49.8A in child-friendly language. This document can be viewed online at the “Publications” page of its website (www.scottishciviljusticecouncil.gov.uk). Alternatively, a copy can be requested by emailing scjc@scotcourts.gov.uk.

(6) Where the court orders intimation and the seeking of the child's views in Form 49.8A, the petitioner must-

- (a) send Form 49.8A to the child as soon as possible;
- (b) on the same day, lodge-
 - (i) a copy of the Form 49.8A that was sent to the child;
 - (ii) a certificate of intimation in Form 49.8B;
- (c) not send the child a copy of the petition.

Views of child

70.17.-(1) In an application under rule 70.5(1)(application for the return of a child) where the Council Regulation applies and the child has-

- (a) returned Form 49.8A, or
- (b) otherwise indicated to the court a wish to express views on a matter affecting him,

the court shall not grant any order unless an opportunity has been given for the views of that child to be obtained or heard.

(2) Where a child has indicated his wish to express his views, the court shall order such steps to be taken as it considers appropriate to ascertain the views of that child.

(3) The court shall not grant an order in a petition under rule 70.5(1) (return of a child) affecting a child who has indicated his wish to express his views, unless due weight has been given by the court to the views expressed by that child, having regard to his age and maturity.

Continuations

70.18. In an application under rule 70.5(1) (application for the return of the child), where the Council Regulation applies, the court may allow a continuation of the hearing for a period not exceeding 7 days or to the first suitable court date thereafter but any further continuations shall only be allowed on special cause shown.

Recording of hearings under Article 12 of the Hague Convention

70.19.-(1) Any hearing on an application for the return of a child under rule 70.5(1) and Article 12 of the Hague Convention, where the Council Regulation applies, shall be recorded by-

- (a) a shorthand writer to whom the oath *de fidei administratione officii* has been administered on his appointment as a shorthand writer in the Court of Session; or
- (b) tape recording or other mechanical means approved by the Lord President.

(2) The record of the hearing shall include-

- (a) any objection taken to a question or to the line of evidence;
- (b) any submission made in relation to such an objection; and
- (c) the ruling of the court in relation to the objection and submission.

(3) A transcript of the record of the hearing shall be made only where an order is made under Article 13 of the Hague Convention refusing to order the return of a child in an application where the Council Regulation applies.

(4) The transcript of the record of the hearing shall be certified as a faithful record of the hearing by-

- (a) the shorthand writer or shorthand writers, if more than one, who recorded the hearing; or
- (b) where the hearing was recorded by tape recording or other mechanical means, the person who transcribed the record.

(5) The court may make such alterations to the transcript of the record of the hearing as appear to it to be necessary after hearing parties; and, where such alterations are made, the Lord Ordinary shall authenticate the alterations.

Order under Article 13 of the Hague Convention

70.20. Where an order is made under Article 13 of the Hague Convention refusing to order the return of a child in an application under rule 70.5(1) where the Council Regulation applies, the Deputy Principal Clerk shall transmit a copy of the order and a transcript of the proceedings to the central authority of the Member State where the child was habitually resident immediately before the wrongful removal or retention.