

**ADOPTION POLICY REVIEW GROUP**

**CHOICES FOR CHILDREN IN  
FOSTERING AND ADOPTION**

**A DISCUSSION PAPER ON LEGAL ISSUES**

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# CHOICES FOR CHILDREN IN FOSTERING AND ADOPTION

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## INTRODUCTION

In April 2001, the Scottish Executive set up the Adoption Policy Review Group under the chairmanship of Graham Cox, formerly Sheriff Principal of South Strathclyde, Dumfries and Galloway. It was agreed that Phase I would look at practice issues in the adoption field, and the Group's Report was published in June 2002, with the Executive's response. Work is continuing on consideration and implementation of the Recommendations.

The remit for Phase II of the Group's work is to review the law in Scotland about fostering and adoption. This Discussion Paper is designed to set out a range of legal issues that the author thinks should be looked at by the Group, together with some possible solutions. It is hoped that the ideas set out will stimulate discussion and debate on these and all related matters, and even provoke some controversy. The object is to raise issues, put forward some possible ideas for development and seek views on these and other relevant matters. Law in this area of practice should aim for a system of flexible control.

The Paper does not attempt:

- to cover all existing problems,
- to find every possible answer, or
- to give any final view on the range of subjects covered.

It is issued at the start of the Group's work on Phase II and therefore does not in any way suggest what the final recommendations might be.

The Paper is concerned with the law on fostering and adoption, not with private law issues such as general rights for unmarried fathers and other family members. Similarly, family and other private arrangements, which do not involve local authorities in making placements, are beyond the scope of this Paper, although some may be covered by the private fostering provisions (see Chapter 12).

Although the different chapters attempt to cover as many aspects of fostering and adoption law as possible, there is only one brief specific one about children. This is because issues for

children arise throughout the Paper. Similarly, there is no single chapter about adults or young people who have been adopted, because issues for them are also covered throughout.

To assist the discussion process, there is a list of numbered questions at the end of each chapter. These are repeated together at the end of the Paper for convenience. Obviously, respondents do not need to deal with all topics covered, and are not restricted to the questions in their responses.

The author would like to thank Sheriff Principal Cox for his help and support, and the Scottish Executive officials for their administrative assistance. She would also like to thank:

- ◇ Professors Nigel Lowe and Mervyn Murch of Cardiff Law School for permission to quote from their book, *Supporting Adoption*, (1998);
- ◇ BAAF (British Association for Adoption and Fostering) for permission to reproduce their 1996 Proposals for the Sheriff Court Rules Council on timetabling in adoption proceedings, to be found in Appendix III;
- ◇ Sheriff Alastair Stewart and W.Green for permission to use Sheriff Stewart's article on court timetables, to be found in Appendix III;
- ◇ Sheriff Principal I. D. Macphail for permission to reproduce his draft Practice Note for Freeing, Adoption and Parental Responsibilities Order cases, to be found in Appendix III.

And finally, she would like to thank all of those who have given and continue to give her the benefit of their knowledge of and views on the wide variety of issues in this area of law and practice.

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## ABBREVIATIONS, TERMINOLOGY AND REFERENCES

There are frequent references in the Paper to Acts, regulations, etc.. In order to avoid lengthy repetition of their titles, appropriate abbreviations have been used. A list of these is found at the end in Appendix I, pg. 117. All the legislation applies to Scotland only unless otherwise specified in the list.

There are a few other abbreviations used throughout the text:

- s. is used for specific sections;
- reg. is used for specific regulations;
- r. is used for specific rules of court;
- PRO is used for a parental responsibilities order under s.86 of the 1995 Act.

Fostering is the general term for arrangements made for children to live away from home on a non-permanent basis. This Paper is concerned with public fostering, where care arrangements are made by local authorities and children are 'looked after'; and with private fostering, where families make their own arrangements for care with people who are not close relatives, and local authorities then have 'inspectorial' duties.

Adoption is a legal process, which replaces a child's birth parents with new adoptive parents, by the granting of an adoption order. Freeing is an earlier, optional court process which can only be sought by a local authority adoption agency and removes all parental responsibilities and rights from the birth parents, giving them to the agency.

The 1978 Act provides for 2 types of adoption: agency adoptions and relative adoptions. An agency adoption is one where an adoption agency places a child for adoption. The child is usually, although not always, a 'looked after' child. A relative adoption is one where the child is adopted by a relative, which is defined as a grandparent, sibling, uncle or aunt, including those of the half blood. Strictly speaking, no adoption should be arranged unless either the child is placed by an agency or it is a relative adoption. However, courts can and do grant adoption orders when that is not the case, e.g. where foster carers seek to adopt a child placed with them on a fostering basis; or an intercountry adoption. References to adoptions as 'non-agency' ones mean any adoption which is not an agency one.

The terms 'local authority', 'adoption agency', 'voluntary agency' and similar expressions are used in the Paper. The first is given its usual meaning and is the body charged in their area with responsibility for services to children and families, including services under the 1978 and 1995 Acts. An 'adoption agency' is a separate body from a local authority. There are two types of adoption agencies:

- Local authority adoption agencies. Every local authority must have an agency, and through their agency, have a duty to provide an adoption service for their area.
- Registered adoption services. These are voluntary agencies currently approved by the Scottish Executive under the 1978 Act, to provide adoption services.

'Adoption agencies' means all agencies, as distinguished from 'local authority agencies' and 'voluntary agencies'. In due course, both types of adoption agencies will require to be registered with and inspected by the Scottish Commission for the Regulation of Care, in terms of the 2001 Act.

A child is 'looked after' by a local authority under the 1995 Act if s/he:

- (1) is accommodated under s.25, by agreement and without any order;
- (2) is subject to a supervision requirement from the hearing system, under s.70;
- (3) is subject to a short term warrant, order or authorisation from a hearing or the court under Part II of the Act;
- (4) is subject to a PRO under s.86;
- (5) is subject to an order made elsewhere in the U.K. when a Scottish authority has had responsibility transferred to them.

If a child 'looked after' and permanence is being considered, the 'looked after' arrangement is most likely to be under (1), (2) or (4) above.

Where a child is 'looked after', there is a system of internal local authority reviews, under the LA Regs, usually called 'looked after' reviews. When a local authority decides to seek permanence away from home for a child, they start the planning process by making that

decision at a 'looked after' review. Birth parents and older children are invited to reviews in terms of the LA Regs.

There are frequent references to 'parental responsibilities and rights' and to 'parental responsibility'. These phrases mean respectively the responsibilities and rights given in Scotland and referred to in the Children (Scotland) Act 1995 and those given in England and Wales and referred to in the Children Act 1989. They are more or less the same in the different jurisdictions, but the terminology is slightly different.

There are references to various publications in the text, and these are listed in Appendix II, pg. 119 References and Further Reading.



## DISCUSSION TOPICS

### General Issues

#### **Chapter 1. Legal Options for Children providing Permanence and Stability**

This Chapter examines the types of legal orders that are and could be available for children and young people. The crucial issues of when, how and within what timescales local authorities make plans for children and young people are dealt with in Chapter 18.

When a child is 'looked after' by a local authority away from the family home, there are at present 4 main legal options for permanence. The child can:

- return home; or
- be made the subject of a residence order under s.11 of the 1995 Act, naming the individual carers and giving them parental responsibilities and rights; or
- be made the subject of a parental responsibilities order (PRO) under s.86 of the 1995 Act, giving the local authority parental responsibilities and rights; or
- be adopted, with or without a freeing order first.

Most 'looked after' children either are never placed away from home, or if they are, it is for a short period only. However, for the children who are unable to return home, local authorities must consider plans for permanent arrangements. They start the planning process at a 'looked after' review, when there is a recommendation for permanence, with or without a particular option in mind.

It is generally accepted that a continuing supervision requirement for a child under s.70 of the 1995 Act, through the Children's Hearing system, is not normally a good way to secure the care of a child who lives away from home and cannot return there. There may be exceptions to this, particularly with an older child, but the hearing system was not designed to deal with the long-term care of children. Rather, it was designed to make short to medium-term arrangements. Supervision requirements (unlike care orders in England and Wales under the Children Act 1989) do not give shared parental responsibilities and rights to the local authority. So children who are

subject to supervision requirements for a long time may be prejudiced if their parents do not or cannot exercise responsibilities and rights, because no one else is able to do so. Also, the review structure, designed to keep cases from being 'lost' in the context of short and medium term planning, can lead to inconsistency of decision-making in long-term situations. (See Chapter 4, Role of the Hearing System in Permanence, at pg.29 onwards.)

Similarly, if a child is 'looked after' away from home under s.25 of the 1995 Act, this is not usually a satisfactory long-term arrangement. Again, local authorities do not have any parental responsibilities and rights and there can be difficulties about making day-to-day decisions if parents cannot or do not stay involved.

It is crucial that a range of options is provided for achieving good permanent legal arrangements for a child away from home, when going home is not in the child's best interests. The U.N.C.R.C. expects that every child should have someone who has legal responsibility for him or her, that is parental responsibilities and rights. If a child is not able to live at home with his or her parents, it is important that a long-term carer has some form of responsibilities and rights:

- to protect the child;
- to make decisions where appropriate for the child; and
- to secure the carer against inappropriate outside interference.

As indicated, the current legal options for long-term care away from home are the residence order, the PRO or adoption. However, these options do not suit all children, and may not achieve long-term support for children, where that is needed. Particular problems are:

- Residence Orders. A child for whom a residence order has been made is not, as such, 'looked after'. This may be satisfactory for the child and carers if they do not want local authority involvement; or it may not be satisfactory for them if they want support. If a child is 'looked after' under s.25 of the 1995 Act, that ceases when the residence order is granted. If a child is 'looked after' on a supervision requirement under s.70 of the 1995 Act, there is normally a hearing after the residence order is granted, to terminate the

supervision requirement and the child will then cease to be 'looked after'. Local authorities may pay a 'residence' allowance under s.50 of the Children Act 1975, as amended by s.71 of the 2001 Act, up to 18. These are discretionary and some authorities pay them and some do not. Many families want the continued support and involvement of the local authority, either at the time the residence order is made, and/or when difficulties relating to health, disability or attachment arise. There are many anecdotal examples of this occurring for children in their teens, but there is no automatic entitlement to local authority assistance, and no entitlement to 'after care' services under s.29 of the 1995 Act.

- PROs. Where a child is subject to a PRO, the local authority have all parental responsibilities and rights except the right to agree or not to adoption. The birth parents are left only with the rights to consent or not to adoption and to go back to court to seek to vary or discharge the order. The child is 'looked after', and there is a general expectation that there will be contact, but no parental right to it. If s/he remains subject to the order after her or his school leaving date, there is an automatic entitlement to 'after care' services under s.29 of the 1995 Act when the PRO is terminated. However, PROs are seen by many as a draconian option, because they take away almost all responsibilities and rights from the birth parents. Although they can be surprisingly flexible (the child can live at home, s.87(2); contact is possible; and conditions can be attached to them, s.86(5)), they are often seen as only one step short of adoption. And there are concerns about having a corporate body as a long-term parent.
- Adoption with or without freeing. This is seen generally as the option of choice for young children needing a permanent placement, but it is a complete legal break and often a complete social break as well. Considerable secrecy continues to surround many adoptions, or at least that is the perception of birth families and others involved. Some social workers and legal practitioners are unhappy at the complete finality of adoption, and do not see it as appropriate in many cases. Adoption is not always seen as a realistic option for older children. This is in spite of the fact that many children clearly want to be

confirmed in their identity with a new family, although not necessarily by adoption. And there are views that adoption is no longer needed and should be abolished altogether. On the other hand, there are children who need the protection that a complete legal break offers; and children who are given up for adoption at birth by parents.

Nothing in adoption legislation specifically says that all adoption matters must be carried out in total secrecy. However, there is a long-standing tradition of treating adoption in a secret and closed manner in every case. This attitude, assisted by the complete legal break that adoption provides, probably stems from the past circumstances of many adoptions. Birth families and adopters often wished to conceal the circumstances of adoption, for personal rather than protection purposes. For example, a birth mother might want to ensure that no-one knew she had had a baby; or a birth family might want to ensure that an adopted child did not know she was adopted and her 'sister' was really her mother; or a couple might want to ensure that no-one knew their child was adopted from a previous relationship of one of them.

There are provisions for privacy and confidentiality in adoption court cases, and for the actions of adoption agencies. These are:

- s.57 of the 1978 Act requires all adoption and freeing court proceedings to be in private 'unless the court otherwise directs.'
- reg.23(1) 1996 Regs - adoption agencies to treat all information etc gathered under the Regs as confidential.
- r.67.3 RCS and rr.2.12 (freeings) and 2.30 (adoptions) AS 1997 - provisions in the court rules that all processes and papers will be treated as confidential.
- r.67.20(1) RCS and r.2.24(1) AS 1997 - provisions in the court rules to protect the identity of adoption petitioners by using a serial number.
- ss.70(6) and 73(11) 1995 Act - a children's hearing can order that the address of a child is not disclosed to a specified person or class of persons.

These provisions require confidentiality of proceedings and restrict the release of information in much the same way as children's hearing processes. They are designed to protect children and families from inappropriate outside interest, not to keep everything secret from as many people as possible for the sake of it.

Confidentiality is crucial, to protect everyone's interests, but secrecy for its own sake does not assist the adoption process. Birth parents and families can be kept up-to-date with plans for the child, without compromising confidentiality; adopters need to be given as much information as possible about the child they are adopting; and all adopted children should learn about their adoption in an appropriate manner at an appropriate age, whether the adoption is an agency or non-agency one.

It is suggested that the legislation and court rules should positively encourage a more open approach to adoption processes by all professionals and parties whenever possible, without, of course, comprising confidentiality or the need for protection when necessary.

Given all the concerns and difficulties, it is suggested there should be a wider range of choices for children. The following options are put forward and include continuing with some existing ones:

- Residence order. This is an existing option: see pg. 10 above.
- 'Child Care Order'. Introduce an option of a long-term court order giving parental responsibilities and rights to local authorities, but on a shared basis with parents. Local authorities would be responsible for ensuring welfare and be able to override parents when necessary, putting children's welfare as paramount. But parents would keep responsibilities and rights and be able to stay involved. Such an order would be able to be varied and/or revoked by the court. Children would be 'looked after'.
- PRO. This is an existing option: see pg. 11. PROs could be seen as more positive and flexible than they often are. The scheme in the 1995 Act allows birth parents to continue to be involved in their children's lives: they (and others) have a right to seek variation and revocation, s.86(5); contact is clearly allowed if it is in the child's interests, s.88; any conditions can be attached to a PRO, s.86(5); and a child may live with birth parents, s.87(2). It should be retained as an option, albeit with changes, as there may be circumstances when taking most responsibilities and rights away from birth parents is of benefit to

children. For example, where a parent has mental health difficulties and is not able to exercise responsibilities and rights, although still involved with the child, a PRO may be the best option. They may also be appropriate where birth parents have disappeared; where children are orphans; where children are looked after long-term in residential units; and where children feel let down by parents whom they perceive to be irresponsible in carrying out parental responsibilities. It should be remembered that PROs can be used as a short-term option for children, as well as to make long-term arrangements.

- 'Enhanced Residence Order'. Introduce an option similar to the provisions for England and Wales in s.115 of the 2002 Act, creating a new order called a 'special guardianship order'. Section 115 inserts additional sections, ss.14A to 14G, in the 1989 Act. The new order will give parental responsibility to the named carers, who are then entitled to exercise this to the exclusion of everyone else except another 'special guardian'. However, birth parents retain some limited rights, particularly the right to consent or not to adoption; and the right ask the court to vary or discharge the order (see ss.14C and 14D of the 1989 Act as amended). This option will be available for children who have been 'looked after' and also for those who have not, e.g. where relatives have directly taken over care from birth parents. The 2002 Act provisions are expected to come into force in 2004, with a support framework, but that is still to be consulted on. However, the child care and legal professionals involved are all clear that, if it is to work as a real option for children, there must be a solid support framework. Those comments would apply equally to any similar order introduced in Scotland. The support could be comparable to that given to 'looked after' children without necessarily treating them as 'looked after' in any or all respects. The Report of Phase I of the Review favoured consideration of this option.
- Simple Adoption. This type of adoption is used in some countries to provide new legal parents for children, without cutting legal ties with the birth parents. The rules vary from jurisdiction to jurisdiction. It is often used in the context of inter-family adoption. For example, Austria and France have this form of adoption, although they also have full adoption. Simple adoption may be a more appropriate order in family or step-parent adoptions.

- Full Adoption. Continue with the existing complete legal break, but encourage a more open approach where that is consistent with protection of children. Such an approach should involve a greater acceptance that contact, direct or indirect, may well be appropriate for children in many cases. Awareness of such an approach needs to be emphasised to all involved in adoption: planners, lawyers, decision-makers, including judges, and prospective adopters. The legislation and court rules should positively encourage a more open approach to all adoption processes whenever possible, without, of course, comprising confidentiality or the need for protection when necessary.

Whatever range of options is fixed on, it will be crucial that each one:

- is flexible in what it offers to children and young people **and**
- has meaning for children and young people.

Crucial issues that arises in planning for permanence away from home, whatever the best options, are:

- when the local authority should start to consider such plans;
- how they should consider them; and
- what timescales should be applied to them.

These issues are considered under Chapter 18 below, Adoption Agencies and Local Authorities. They apply equally to plans for adoptive and non-adoptive placements.

#### **QUESTIONS:**

- 1. What are views on the range of options?**
- 2. Should there be a less secretive and more open approach in adoption law and rules, while preserving necessary confidentiality?**



## Chapter 2 Contact

This is one of the biggest areas of concern in the law and practice of permanence and adoption. The combination of contact and freeing applications, in particular, causes problems, as outlined in Chapter 3, Freeing Orders. However, whether freeing is used or not, the issue of contact is a major one.

There are various difficulties and questions in any discussion of contact in permanence.

- What does 'contact' mean?
- What exactly is meant by 'direct contact' and 'indirect contact'?
- What is 'open' adoption as opposed to 'closed' adoption?

And most important of all are the questions:

- What is the benefit of contact to the child in permanence cases?
- What is the purpose of having contact in permanence cases?

In this Paper, contact means any form of continuing communication or association between the child and the birth family. Direct contact is where there are face-to-face meetings, whether once a year or once a week. Indirect contact is where the association is by letter, telephone or other similar methods, whether through a third party or not. For example, arrangements are often made by agencies for 'letter box' contact, when the agency acts as a go-between with information.

Reference is often made to 'open' adoption as opposed to 'closed' adoption. These terms have no specific legal meaning. Some people might describe an adoption as 'open', meaning there is contact, but that contact could be 'direct' or 'indirect'.

The current legal rules about contact vary depending on the basis on which the child is cared for away from home.

- If a child is away from home subject to a supervision requirement from the hearing system, decisions about contact are made by the hearing. Parental responsibilities and rights are retained by birth parents except to the extent to

which the requirement interferes with them. A supervision requirement does not give any parental responsibilities to the local authority.

- If a child is subject to a PRO, there is a general expectation that there will be contact, but no parental right to it, s.88 of the 1995 Act. The birth parents (and the child, the authority and anyone 'claiming an interest') can take the case back to the sheriff court if there are disputes about contact. (See above, pg. 11 for information about PROs.)
- If a child has been freed for adoption, the local authority adoption agency has all responsibilities and rights, and the birth parents who have lost them are left with none. As a result, birth parents have no legal right to contact (although there may be an informal arrangement); and they have no method of taking the issue back to court:
  - because there are no rights for them in the 1978 Act; and
  - s.11(3)(a)(iii) and (4)(b) of the 1995 Act prohibits them from any future use of s.11, to seek any order about parental responsibilities.
- If a child has been adopted, the adoptive parents have all responsibilities and rights, and the birth parents who have lost them are left with none, unless there is a contact condition attached to the order, in terms of s.12(6) of the 1978 Act. However, case law says that such an order should only be made in 'exceptional circumstances', following *B v C* 1996 S.L.T. 1370, 1996 S.C.L.R. 874. Otherwise, the position of the birth parents is the same as when a child has been freed, and they have no right to go back to court under the 1978 or 1995 Acts.

In *West Lothian Council v M* 2002 S.L.T. 1155, the court took the view that a condition, about contact or anything else, could not be added to a freeing order under the 1978 Act. There is nothing in the freeing provisions which is similar to the court's powers under s.12(6) of the 1978 Act, to attach 'such terms and conditions as the court thinks fit' to an adoption order. Theoretically, (this was not discussed in the case), a court could itself use s.11 of the 1995 Act to grant contact even if no-one formally asked for an order, s.11(1) and (3)(b). However, the provisions of s.18(7) of the 1978 Act (courts' duties about certain fathers in freeing applications) do not easily

fit in with this suggestion, where the person wanting contact is a father without responsibilities and rights.

The court in *West Lothian Council v M* commented critically on the prohibition in s.11(3)(a)(iii) and (4)(b) of the 1995 Act, mentioned above. This prohibits birth parents who have lost responsibilities through freeing or adoption from using s.11. The comments by the court suggest that the provisions should be repealed, whatever long-term changes are made to adoption and freeing law. Any short-term repeal could include a right to such birth parents to apply to court to seek leave to make an application.

This is the position in England and Wales, and leaves birth parents with a remedy, while giving the courts power to prevent inappropriate or vexatious applications. While Scottish courts do not usually operate by giving leave to apply, there are provisions which impose such a system: s.51(11)(b) of the 1995 Act says that the sheriff principal's leave is required to appeal from him to the Court of Session in children's hearing cases; and in s.16 of the 1978 Act, as it will be amended by the 2002 Act, a court will have to give leave before birth parents can oppose a Scottish adoption application, when the child was placed with parental agreement or a placement order has been granted under the 2002 Act (see Sched 3, para 23(b) of the 2002 Act, inserting subsections (3A) to (3D) into s.16 of the 1978 Act).

Some professionals in the field argue strongly for contact in adoption if at all possible. Others feel equally strongly that adoption should not be used if there is contact, as the complete legal break of adoption is contra-indicated when there is an actual continuing link. Resolving these difficulties is not really possible simply by introducing or changing statutory and regulatory provisions. However, if greater openness can be achieved in adoption, as discussed above on pgs. 12-13, this could assist the development of practice about contact.

It would appear that the research is still balanced as to whether there are always benefits for children in maintaining contact with their birth families when they are permanently placed away for home. For a discussion of the academic debates about

this, see Quinton *et al* (1999). For a discussion of the complex practice issues, see Lowe *et al* (1999), Chapter 15, pg. 278, and BAAF's *Good Practice Guide: Contact in Permanent Placement* (1999). Among their 'Concluding points' on contact, Lowe *et al* say at pg. 323:

'However, we should make it absolutely clear that we are by no means committed to the view that any form of contact between the child and birth family is always in the child's interest. On the contrary, we take the view that the issue of contact has to be governed by the welfare of the particular child (including taking into account the child's own wishes and feelings) in his or her circumstances which may change from time to time.'

And at pg. 326:

'Finally, the *child's* [authors' italics] needs must always be the priority when planning for contact. Sometimes, the needs of the child get confused with the needs of birth parents, especially when the same social worker is allocated to both. Granting birth parents contact to alleviate their loss, or to persuade them to agree to the adoption, can have negative implications later, and can cause conflict at other levels.'

This echoes the questions:

- whose benefit is the contact for?
- what is the purpose of the contact?

The benefit should always be for the child, not the adults involved. In any proceedings about legal arrangements for a child, the child's welfare is the paramount consideration: s. 6(1)(a) of the 1978 Act and s.11(7)(a) and s.16(1) of the 1995 Act. However, in permanence proceedings for children, particularly where the order sought would remove or significantly diminish birth parents' responsibilities and rights, children's welfare is not necessarily best served by trying to build or maintain a bond by contact with birth parents. This contrasts with the situation in disputes between separating parents.

The purpose of contact is not the same in these two different types of legal proceedings. If there is an existing bond between the child and parents in

permanence proceedings, and it will positively benefit the child to maintain it, then contact should be considered. If the purpose is to let the parent stay in touch, without the child benefiting positively from that contact, then in the context of a new legal care arrangement, contact will not normally be in the child's interests.

However, in the situation of separating families, it may be of positive benefit to a child to maintain even a weak bond, or build one, with the absent parent, because s/he is and will continue to be part of the family. Contact in a separated family was considered by the First Division in *White v White* 2001 S.L.T. 485: see the opinion of Lord President Rodger, particularly in paras. [16] and [17], pg. 490.

If it is wished to promote permanence and adoption, and encourage the use of contact where appropriate, taking the child's welfare as paramount, then there needs to be a debate about the issues to develop future law and practice. Some suggestions include:

- Encouragement of a full debate among all professionals involved in permanence about the nature of adoption and other orders; whether there really is a need for secrecy in all cases; and the use of contact in adoption and other orders, whether direct or indirect.
- Encouragement of an awareness that ongoing contact in permanence should only be considered if it is to benefit the child in his or her new life, and not simply as a means of building or keeping a link which has no meaning for the child.
- Encouragement of prospective adopters' and other carers' awareness that good contact arrangements are to benefit the child, and not to threaten their care and position.
- Provision of a clear legal mechanism for contact orders in freeing (or any equivalent pre-adoption order), adoption and any other orders, ensuring that contact orders can be used in all circumstances, not just 'exceptional' ones.
- Promotion of other options for permanence where there is ongoing regular contact which is beneficial to the child, and another option may be better than adoption.

**QUESTIONS:**

- 3. What are views on the place of contact in permanence?**
- 4. Should the law allow the possibility of contact conditions in all circumstances and all types of orders?**

### Chapter 3. Freeing Orders

Freeing is a court application, which can only be made by a local authority adoption agency. The effect is to remove all parental responsibilities and rights from the birth parents, and give them to the agency.

A child does not have to be freed before he or she is adopted, so freeing is not mandatory. However, the timetables in the regulations often mean that a local authority agency has to apply for a freeing when the birth parents are not in agreement and the child has not been placed with prospective adopters. Sometimes local authority agencies choose to use freeing to deal with parental agreement or disagreement before placing with adopters; or to avoid a disputed adoption case between birth and adoptive parents.

The legal provisions for freeing need to be reviewed, because freeing is largely no longer used for the purpose for which it was introduced, that was to allow birth parents a quick pre-adoptive order to deal with their agreement to the adoption. Also, the current use of freeing does not always work well, and is often detrimental to planning for children.

The 2002 Act abolishes freeing orders in England and Wales and replaces them with placement orders, s.21. These will give parental responsibility to local authorities; and also to prospective adopters once children are placed with them. However, birth parents will retain responsibility until adoption is granted; but they will not be able to contest the application for adoption unless the court gives permission and that will not be allowed unless the parents can show a change of circumstances. It is expected that the placement order changes will come into force in 2004.

Current issues about freeing can be summarised as follows:

- Some local authorities feel they must always seek a freeing before an adoption, even when the child is placed, to avoid any conflict between birth parents and adopters.

- The timetables in the 1996 Regs have had the unplanned consequence in many cases of forcing local authorities to raise freeing applications where they would not otherwise do so.
- Freeing is perceived to be odd by many social work practitioners, lawyers and judges. This is because full parental responsibilities and rights are transferred to the local authority, but, if the child is not placed, the court has no idea with whom the placement will be made or when. The strangeness of the result is something with which many professionals, including judges, are not comfortable. This is particularly true when there is contact.
- The combination of contact and freeing is such that some judges feel unable to grant an order if there is to be ongoing contact. This view is not universal, but it is a reflection of the point above, that a freeing order is a rather strange statutory creature.
- When a freeing is granted, a child can fall into legal limbo. There is an automatic, although not explicit, expectation that the child will be placed as soon as possible, and that an adoption application will follow thereafter. This does not always happen. There are difficulties in finding a match for some children, particularly older children with disabilities and/or children in sibling groups. Sometimes a placement is made, but the adopters do not apply to court for adoption, for whatever reasons. Some placements do not work out well, and no adoption is sought, but the child is not moved. Such legal limbo can and does last for a number of years, and this is clearly against the general spirit of the legislation. 'A 'freed' child is not 'looked after' (unless s/he also remains in the hearing system) and while there must be a high standard of duty towards a child for whom a local authority have responsibilities and rights, there is little statutory provision about this. If a placement is not made within 6 months of the freeing, reg. 21 of the 1996 Regs. says that the child's case must be reviewed; but there is no provision to review after placement up to an adoption. Further, if a child has been placed within six months of the freeing, but not adopted, there is no duty in the 1996 Regs. to review the placement, although good practice indicates there should be reviews. Finally, it can be argued that children who have been freed and not placed or adopted
- could have a claim under Article 8 of the E.C.H.R.: they could argue that their entitlement to respect for private and family life has been breached.

- It is not considered possible to grant a contact order in freeing, and this inability may well be incompatible with the E.C.H.R. This matter was considered in *West Lothian Council v M* 2002 S.L.T. 1155, see pgs.18-19 above.
- Parents who have lost responsibilities and rights through freeing or adoption orders are prohibited from applying to court for orders about their children under the 1995 Act:-s.11(3)(a)(iii) and (4)(a) and (b). This provision was criticised by the court in *West Lothian Council v M* above, and needs changing as a matter of urgency. See pg. 19 above.

Given all these difficulties, change needs to be considered. There would appear to be 3 options:

- (1) Retain freeing, with radical changes.
- (2) Abolish freeing and introduce a new type of order, whether similar to a placement order or something different. Such an order could remove parental responsibilities and rights totally; or restrict them, either as a placement order does in the 2002 Act, or in some other way.
- (3) Abolish freeing without substituting any court order dealing with parental responsibilities and rights prior to adoption, so that no pre-adoption order is possible.

A placement order is a pre-adoptive one, but is earlier in the process than freeing, as it will have to be completed before a child can be placed. So if there are delays in the legal process, the child will have to wait for placement, even where prospective adopters have been identified. When an order is granted, birth parents retain responsibility until adoption is granted. However, they only have a right to challenge the adoption application if there has been a change of circumstances and the court gives them leave to do so. This does not seem to give much more to birth families, and whether it would make a difference to many children is open to debate.

Complete abolition of freeing, option (3), with no other way of resolving disputes about responsibilities and rights except by a direct adoption case between birth parents and adopters, may not be practicable. While some prospective adopters are happy to be involved directly in disputed cases, some are not. Some family adopters

do not want to apply directly against the birth parents. There might be a reduction in recruitment of prospective adopters if there was no pre-adoption order available. Options (1) or (2), which retain some type of pre-adoption order as a means of removing responsibilities and rights, may offer a better choice provided there are sufficient changes to the existing system. A name change could also help.

The following points should also be considered in the debate about whether or not there is some form of pre-adoption order:

- The timetables in the 1996 Regs need to be reviewed. Admirable though it is to ensure that cases do not take too long between an adoption panel recommendation and a court application, forcing unnecessary freeing applications to be raised is not helpful to anyone, particularly children.
- Tied in with timetables for the period from adoption panel to court, consideration should be given to some form of regulatory timetable prior to adoption panels. See Chapter 18, Adoption Agencies.
- It is essential that the problem of court delays is addressed. See Chapter 6, Court Processes in Permanence.
- A contact order should be able to be made with any pre-adoption order, with the matter considered again in the adoption application.
- If no contact order is made with a pre-adoption order (or adoption order), there should be a limited right for birth parents who have lost parental responsibilities and rights, enabling them to go back to court in the future, in the adoption process or later. This is what already happens in England and Wales, where birth parents have a right to apply to the court for leave to seek contact. See Chapter 2, Contact.
- The grounds for dispensing with agreement need to be reviewed. These are considered in Chapter 6, Court Processes in Adoption.
- There is a need for clarity about the duties owed by local authority agencies to children who have been freed, even if freeing is abolished. Such duties

should include timetables for reviewing and placing; and assistance to adopters with their adoption applications. While placements and adoption petitions must not be pushed through regardless, it would be of assistance to have specific duties set out. Where these are not adhered to, children's cases could automatically return to court. Consideration could be given to a system of appointment, by the court or the local authority, of an independent person for all freed children, to provide support and advocacy for them, whatever their ages.

- Revocation of freeing raises difficulties. Birth parents can apply for a revocation, if a child has not been adopted or placed for adoption within a year of the order being granted. Local authorities can seek revocation at any time if the child has not been adopted and has not been placed for adoption. However, difficulties arise about a situation where a child may have been placed, but no adoption has gone ahead. Should a birth parent be able to seek revocation? Should the local authority/agency be able to do so? The legislation needs to be clarified, even if freeing is abolished, to assist in all orders granted before such abolition.
- Further, the options open to the court on revocation need to be changed. At present, if the court grants a revocation, it can only grant an order under s.11 of the 1995 Act to an individual person or persons. However, there are occasions when revocation of freeing is sought and the best option for the child is a PRO under s.86 of the 1995 Act. This could be where a young person is cared for in a residential unit, and it is not appropriate for the child to live with individual carers. The court on revocation should be able to grant a s.11 order or a PRO or, if other options for permanence are introduced, one of those. This sort of tidying up is necessary even if freeing is abolished, because the revocation provisions will apply to existing freeing orders. The sheriff court rules on revocation of freeing also need tidying up.
- Finally, as discussed under Chapter 2, Contact, pg. 19, the appeal court, in *West Lothian Council v M* 2002 S.L.T. 1155, criticised the prohibition in

s.11(3)(a)(iii) and (4)(b) of the 1995 Act, on birth parents who have lost responsibilities as a result of a freeing or adoption. This prohibition needs to be reconsidered, probably in advance of any future adoption legislation.

**QUESTIONS:**

- 5. Should freeing be abolished?**
- 6. If it is abolished, should there be any replacement pre-adoption order?**

## Chapter 4. Role of the Hearing System in Permanence

Many 'looked after' children for whom permanence plans are made are subject to supervision requirements from the Children's Hearing system, under s.70 of the 1995 Act. When children are on s.70 requirements, it is the hearing that makes all legal decisions about them, including where they stay, who their specific carers will be and arrangements for any contact, s.3(4) of the 1995 Act. This means that these children continue to be involved with the hearing system until requirements are terminated, usually at the same time or after any permanence orders are granted.

When permanence plans are initiated by local authorities for children who are subject to supervision, two main types of children's hearings will take place:

- review hearings;
- advice hearings.

The hearing system includes a wide-ranging review structure. The main types are:

- where the child or a 'relevant person' (someone with the right to attend the child's hearings, including anyone with parental responsibilities) asks for a review, provided the last decision on the requirement was more than 3 months before, s.73(6) and(8)(a)(ii) of the 1995 Act;
- where the local authority asks, which they can at any time, s.73(4)(a) and (b) and (8)(a)(i);
- where permanence plans are being made for the child, s.73(4)(c) and (8)(a)(i);
- where hearing members asked for a review as part of the previous decision, s.70(7) and s.73(8)(a)(iii);
- where it is more than 9 months since the last decision (often called the 'annual review'), s.73(8)(a)(v).

When a review is requested, the reporter has no discretion and must fix a hearing. Every review decision can then be appealed from the hearing to the sheriff, by the child and/or the relevant person, s.51(1) of the 1995 Act.

Therefore, all requirements must be reviewed at least once a year but there may be reviews more frequently than that. These rights of review and appeal are used appropriately by some 'relevant persons', but are sometimes abused. On occasions, this leads to hearings every three months and appeals from them. Different hearings usually have different panel members, who may make different decisions from previous hearings, even when specific plans have been agreed earlier. As a result, there can be great uncertainty about whether a plan will continue. This increases anxiety and uncertainty for children, families and those making plans for them.

If a child is subject to supervision, and an application is made for adoption, freeing or a PRO, the court dealing with the case should have a report from the children's hearing (usually called 'advice') before it grants any order, s.73(14) of the 1995 Act. It is one of the reports the court has to consider. There must be a hearing to give this advice and there are timetables for this in the 1996 Regs. when birth parents do not agree with the plan. The hearing does not have to agree with the plans, but should comment on them one way or the other.

When there is an advice hearing, there must always be a review at the same time, s.73(8)(a)(i) of the 1995 Act. There is no appeal against the 'advice' given, as it is not a decision but a report to another forum. However, the review part of the hearing can be appealed.

Prior to the introduction of the 1995 Act in 1997, it was difficult for permanence, particularly adoption, to be discussed at children's hearings, because this was felt to be interfering with long term decisions. The 1995 Act attempted to open up discussions about these issues at hearings by introducing 'advice' hearings and providing for regulations to be made about timetables for the process - now set out in the 1996 Regs. One of the purposes of the timetables is to allow a local authority to proceed with a court application for a child, even when the hearing opposes the plan. However, as discussed under Chapter 3, Freeing Orders, an unintentional consequence of the timetables has been to force local authorities into freeing applications where plans are not agreed by parents and the children are not placed.

Any child in this position may be involved in a mixture of review and advice hearings, with or without appeals. This type of situation tends to be very confusing for everyone: child, family and professionals. In the most complicated cases, there is confusion about the status of decisions where, for example, there is an outstanding appeal and a new review hearing is fixed before the appeal is heard. Also, as indicated, there is usually little continuity of panel members, so different views can be taken and different decisions made about the same things, over quite a short period.

Taking all these points together, the role of the Children's Hearing system is one of the current concerns in permanence law and practice, where hearings are making decisions about children for whom the local authority have made planning decisions that they need permanence away from home. Some hearing members are unhappy about dealing with such cases, and feel that they are not familiar with all practice issues. The main purpose of the hearing system is to offer care and protection to children in the short and middle term, with reviews, rather than to provide a forum to make long-term decisions for children's care away from home.

A further unforeseen complication is that some hearing members feel uncertain about permanence, and, when asked to provide advice, appoint a safeguarder under s.41 of the 1995 Act, to prepare a report. Such an option is not provided for in the timetables in the 1996 Regs, so there is a gap in the process, while the safeguarder is preparing the report.

It can also be argued that introducing a further person (the safeguarder) into the process is unnecessary, given the number of different professionals involved, the other reports provided to court and that the child's interests are represented in court by the curator. (See Chapter 19 below for information about curators.) The court will always have two reports in every case, disputed or not, from the agency/local authority and the curator. And birth parents who are disputing the plan are able to contest the application in court with legal representation, and give evidence about their facts and views. Introducing a safeguarder is perceived as bringing yet another person into the process, often with no apparent benefit to the child, given the appointment of a curator in the court proceedings. It is argued that if hearing

members are not happy with the plan put to them, they are able to say so, without appointing a safeguarder.

The number of children involved in these situations is small, but the effect of many different types of proceedings in different settings usually causes delays in cases and can be confusing for decision-makers, professionals and the birth family. In some cases:

- the hearing makes a decision about placement and/or contact;
- the family appeal to the sheriff;
- while the appeal is pending, there is another hearing;
- and meantime a permanence application has been raised in court.

None of the problems raised are in the interests of children, their birth parents or prospective carers. Serious consideration needs to be given to how these problems should be tackled. Options for change and development include:

- Increased specialist training on permanence and contact issues for all panel members.
- Developing a core of 'specialist' panel members so that one of them would form part of any hearing dealing with a child for whom a local authority had made a decision to seek permanence. There could be peripatetic specialists.
- Rules providing for definite continuity of panel members for any hearing dealing with a child for whom a local authority has made a decision to seek permanence.
- A radical suggestion is that when a local authority decide at a 'looked after' review that a child who is subject to supervision should have a plan for permanence away from home, the child's case is immediately transferred to the local sheriff court. The child would remain subject to a supervision requirement at all times, and be 'looked after'. If an adoption or freeing order did not go ahead or was abandoned or refused, the child's case would immediately go back to the hearing system. However, in the interim, between the local authority's decision and a final decision by the court on the

permanence case, short-term decisions would be made by the sheriff, who would be provided with the same information that the hearing members would have received. Appeals could be heard by the sheriff principal. At an appropriate stage, a hearing would provide advice on the case for the court's long-term decision.

This suggestion involves no interference with the integrity of the Children's Hearing system, merely the removal of some decisions, in the short-term, to another setting. With such a system in place, it would also be possible to retain the panel's role of providing advice to the court in the permanence case.

On the other hand, cases would lose the external overview of the panel. Hearing members are specifically trained to make welfare decisions whereas sheriffs are not trained in this area. The position in England and Wales is different. There courts deal with interim and full care orders for protection, and also hear permanence cases. Many judges are specialists with expertise in child care law.

- Consideration of an alteration to the provisions about safeguarders, so that the appointment of a safeguarder would not be allowed when a hearing is providing advice on permanence. In practice, hearings do not appoint a safeguarder when providing advice to the court in criminal matters, so such an alteration is not a great change to the system.

#### **QUESTIONS:**

- 7. What are views on the suggested ideas and what are other options?**
- 8. What, if any, should be the role of safeguarders in advice hearings in permanence cases?**



## Chapter 5. Medical Issues

There are a number of concerns about the current nature and understanding of the law in relation to medical matters, including consent, and particularly in adoption. While the Review is not charged with a wholesale enquiry into this complex area, it would be inappropriate for this Paper to ignore it.

Particular concerns are:

### **(a) *Medical information about children and consent thereto.***

A medical assessment is required, in terms of regs.8(a) and (b), 9(1)(a) and (b) and Schedule 2 of the 1996 Regs, for a child's adoption/freeing medical report. Difficulties occur when the child is too young to consent to the assessment and the birth parent does not do so. Where the long-term plans for a child are disputed, a birth parent may jeopardise planning for a child by refusing to consent; or, if absent, by being unavailable to do so. There are ways round the situation where the parent is absent (s.5 of the 1995 Act) but these are not totally satisfactory. If duties are laid on local authorities and adoption agencies to obtain medical information and reports on a child for whom they are making plans, there needs to be some consideration of how this can be done, with or without the birth parent's consent. In England and Wales, where a child is subject to a care order, this problem does not arise, as the local authority, sharing parental responsibility, can consent.

### **(b) *Medical information about birth parents and consent thereto***

There needs to be consideration of the issue of obtaining information about a birth parent's health from his or her medical practitioner, where there is no consent from the birth parent. In practice, there are difficulties for local authorities and adoption agencies in obtaining information in three types of situation. These are where:

- there is no consent because the birth parent has never been asked;
- there is no consent because the birth parent has disappeared or is otherwise absent and therefore cannot be asked;
- there is no consent because there is a positive refusal to agree.

There are serious issues here about medical confidentiality, particularly in the third situation. However, it is increasingly clear, particularly with current developments in genetics, that the more available information there is about a child's and birth family's health during planning and placement, the easier it will be to deal with ongoing health issues for the child, through into adulthood. In the past, a certain amount of information was usually available, even without the consent of the birth parent, but birth parents' doctors are, quite rightly, increasingly concerned about requests for information when there is no explicit consent from their patients. The fact that the authorities/agencies and their medical advisers see a need for such information, putting a child's welfare as paramount, does not mean that the parents' doctors can release information without their patients' consent.

There needs to be some discussion about what processes might be available in the three different situations mentioned, balancing the interests of children and birth parents. In particular, consideration needs to be given to a system to ensure that birth parents are actually asked about consent. Another possibility is having a system which allows blood tests on children in certain cases.

***(c) Medical reports on prospective adopters***

When prospective adopters are being assessed, agencies are charged with obtaining comprehensive medical reports on them, in terms of regs.9(1)(a) and (b) and Schedule 2, Part IV, of the 1996 Regs. Obviously, such reports and information can only be obtained with the consent of the prospective adopters. If they refuse to consent, the necessary investigation cannot be completed on them, and agencies would be justified in not approving them. However, even when prospective adopters do consent, questions sometimes arise as to how much information is put into reports, and made available to agencies through a medical advisor. General practitioners are sometimes reluctant to include written information which they think might be unhelpful to their patients' application, but often disclose such information verbally if contacted directly by medical advisors. This is not particularly helpful to any of the parties. Consideration needs to be given to clearer guidance for general practitioners and consultants dealing with prospective adopters, possibly requiring doctors to

disclose all information. Consent forms signed by prospective adopters should reflect this clearly.

***(d) Disclosure of medical information about prospective adopters***

There can be issues about the disclosure of medical information obtained on prospective adopters in disputed cases, where a child is already placed for adoption. Agents for birth parents can and do call for production of the medical and other reports made available to adoption panels and minutes from adoption panels. If these papers include confidential medical information about prospective adopters, which information might or might not assist disputing birth parents, should this automatically be disclosed to the other parties in the application? Consideration needs to be given to a clear and simple system for ensuring that there is no inappropriate disclosure of confidential medical information, without prejudicing the rights of any of the parties in a disputed case.

***(e) 'Registered medical practitioner' to include a registered nurse***

Regulation 13(1) of the LA Regs requires an examination and a report and by 'a registered medical practitioner' for a 'looked after' child who is placed away from home. Similarly, regs.8(b) and 9(1)(b) of the 1996 Regs require a report by a 'fully registered medical practitioner', about a child for whom the plan is adoption, with or without freeing. There is an increasing trend to involve registered nurses in assessments and examinations of all patients, including children. Nurse practitioners do carry out these tasks, but it would be useful to have definitions of the phrases in the regulations for the avoidance of doubt, to make it clear that they are included as well as doctors.

*(f) Access by adoptees to medical information and records of birth families*

There are problems for adult adoptees and adopters of younger adoptees, who need access to medical information about the adoptees' birth family. In most families, this sort of information is informally available and easily accessed, but this is usually not possible after an adoption. Consideration needs to be given to whether a system can be developed to allow access to this information after adoption, without unnecessarily compromising confidentiality.

**QUESTIONS:**

- 9. What are views on the issues raised, (a) to (f)?**

## Chapter 6. Court Processes in Permanence, Including Grounds and Court Delays

### (a) *Principles applied in permanence proceedings*

The principles referred to here also apply to local authority and adoption agency decisions, and should be part of all planning and decision making for children.

#### (i) *Welfare of the child as paramount consideration*

It is established law in the 1978 Act, as amended by the 1995 Act, and the 1995 Act itself, that the welfare of children is the paramount consideration or concern in legal proceedings and decisions about them:

- s.11(7)(a) of the 1995 Act for court decisions in private law;
- s.16(1) of the 1995 Act for children's hearing decisions and court decisions about hearing cases, emergency orders, PROs and other cases under Part II of the Act;
- s.17(1) of the 1995 Act for local authority decisions about 'looked after' children, including planning decisions;
- s.6(1)(a) of the 1978 Act for 'any decision' by courts and adoption agencies about the adoption of children (and also s.24(3) which reiterates the duty for courts).

In the 1978 Act, the test is stronger than in the 1995 Act, as courts and agencies are instructed to 'regard the need to safeguard and promote the welfare of the child concerned throughout his life as the paramount consideration'. This test was introduced by the 1995 Act amendments, with effect from 1 April 1997. Previously, the test had been that 'first consideration' be given 'to the need to safeguard and promote the welfare of the child throughout his childhood' (s.6 of the 1978 Act before amendment by the 1995 Act).

A question arises as to whether this test is the appropriate one in adoption court decisions. The U.N.C.R.C., in Article 3.1, says: 'In all actions concerning children' by courts and other bodies, 'the best interest of the child shall be a primary consideration.' Article 8 of the E.C.H.R. says: 'Everyone has the right to respect for his private and family life'. This right can be interfered with, provided the interference is by lawful process and for a purpose such as the protection of health or

the rights and freedoms of others. The interference should be in proportion to the remedy sought. It is crucial to maintain a fair balance between the general public interest and protecting the human rights of individuals. Adoption or freeing is an extreme interference with birth parents' right to respect for their family life, as they lose all responsibilities and rights if such an order is granted. It is sometimes argued that putting the child's welfare as paramount does not allow proper weight to birth parents' Convention rights.

On the other hand, children also have rights under Article 8, and family life does not have to be with birth families if children's health and protection are not secure there. The 2002 Act introduces the test of welfare as paramount throughout life for children in adoption cases in England and Wales, s.1(2). The Act was certified as compatible with the E.C.H.R. when introduced as a Bill.

Further, there are protections for birth parents in adoption and freeing applications which are not agreed. The court cannot grant an order unless either agreement is given or is dispensed with; and if consent is to be dispensed with, the court must first be satisfied that there is sufficient evidence to do so. That test is an evidential one, whether there are enough facts to establish a ground on the balance of probabilities. The welfare of the child is not part of this evidential test, but only comes into play after the court has decided that the evidential test is satisfied. This process is covered in the heading below.

**(ii) *Children's views.***

The 1978 and 1995 Acts set out that young people and children should be given the chance to say if they have a view about decisions being made; and should be given the chance to express their views. Any views expressed should be considered. Account should be taken of a child's age and maturity, and a child of twelve or over is presumed to have a view, which is not to say that a child under twelve does not or cannot have a view. They reflect well-established practice in child care.

These provisions are in:

- s.11(7)(b) and (10) for court decisions in private law;
- s.16(2) of the 1995 Act for children's hearing decisions and court decisions about hearing cases, emergency orders, PROs and other cases under Part II of the Act;
- s.17(3)(a) and (4)(a) of the 1995 Act for local authority decisions about 'looked after' children, including planning decisions;
- s.6(1)(b)(i) and (2) of the 1978 Act for 'any decision' by courts and adoption agencies about the adoption of children.

***(iii) Consideration of race, religion, culture and language***

The principle was introduced by the 1995 Act, including an amendment to the 1978 Act. The decision maker is obliged when making a decision to 'have regard so far as practicable' to the child's religious persuasion, racial origin and cultural and linguistic background. The principle is found in:

- s.17(4)(c) of the 1995 Act for local authority decisions about 'looked after' children, including planning decisions;
- s.6(1)(b)(ii) of the 1978 Act for 'any decision' by courts and adoption agencies about the adoption of children.

There are no statutory provisions for court decisions in private law cases or for children's hearing decisions and court decisions about hearing cases, emergency orders, PROs and other cases under Part II of the Act. However, there is judicial authority for using the principle and considering these matters in private law cases under s.11 of the 1995 Act: *Osborne v Matthan* 1997 S.L.T. 811. Consideration needs to be given to whether the existing provisions and case law are sufficient to ensure that these crucial matters are properly looked at in all decisions made for and about children. Issues that arise are whether the phrase 'have regard so far as practicable' should be altered and the duty strengthened; and whether statutory duties should be imposed on all courts and hearings making decisions about children. The 1976 Act, as amended and strengthened by the 2000 Act, provides that public authorities must have due regard to the need to promote race equality and these duties may be of assistance in promoting best practice in this area of work.

**(iv) Minimum necessary intervention**

This principle was introduced by the 1995 Act, including amendments to the 1978 Act. It is sometimes referred to as the 'no order' principle, but that is a misnomer, suggesting that orders should only be made as a last resort. In fact, the principle provides that a court or hearing can only make an order if it is better for the child that this is done, rather than not done. The principle is found in;

- s.11(7)(a) for court decisions in private law;
- s.16(3) of the 1995 Act for children's hearing decisions and court decisions about hearing cases, emergency orders, PROs and other cases under Part II of the Act;
- s.6A of the 1978 Act for 'any arrangements for the adoption of a child' by adoption agencies.
- s.24(3) of the 1978 Act for 'any decision' by courts about the adoption of children.

Courts and hearings use this principle to help ensure that orders are not made where they are not necessary, while allowing appropriate orders to be made when they are needed for children.

**(b) Grounds for dispensing with the agreement of birth parents.**

No adoption or freeing order can be granted without either agreement from the birth parents or formal court dispensation with that agreement. Many orders are granted with agreement, but where there is no consent, the court has to be asked to dispense with it. The existing grounds for dispensation are set out in s.16(2) of the 1978 Act, and are that the parent:

- is not known, cannot be found or is incapable of agreeing;
- is withholding agreement unreasonably;
- has persistently failed, without reasonable cause, to carry out one or other of the parental responsibilities:
  - to safeguard the child's welfare or
  - to maintain contact;
- has seriously ill-treated the child, who is not likely to return to live with the parent.

Where the court is asked to dispense with agreement, the decision-making process is set out in the leading case, *Lothian Regional Council v A* 1992 S.L.T. 818. The court looks first at whether or not there is enough evidence to establish one or more of the grounds for dispensing with agreement. That is a purely evidential decision, with the standard of proof being the balance of probabilities. Then, if the court finds that there is sufficient evidence, it must decide whether to dispense with the consent; and, if so, whether to grant the order. Both these decisions are made putting the child's welfare throughout life as the paramount consideration, in terms of s.6 of the 1978 Act.

The grounds in the English and Welsh legislation have traditionally been much the same as those in Scots law, but the court's decision-making process is different. The court looks first at whether welfare suggests that dispensation would be a good idea; and then whether there is enough evidence to dispense with the consent. The 2002 Act has taken this further, and in s.52 provides only two grounds for dispensing with consent:

- that the parent or guardian cannot be found or is incapable of giving consent;
- that the child's welfare requires the consent to be dispensed with.

A debate could be useful, about whether the existing Scottish grounds, and the courts' method of decision-making, continue best to serve the interests of children and birth parents. The new grounds in the 2002 Act do not fit with the Scottish courts' model of making decisions in these cases. However, there is scope for adding to the existing Scottish grounds. A possible additional ground is that a parent is physically or mentally unable to care for the child and that the inability is likely to continue for some time. This is one of the grounds used in New Zealand Law, in terms of s.8(1)(b) of the Adoption Act 1955. Such a ground could be used when a parent is legally capable, but otherwise allegedly unable to care adequately for the child, for whatever reason.

**(c) *Conditions in adoption.***

Section 12(6) of the 1978 Act allows the court in an adoption to make any condition which it feels is appropriate. However, this is not used much, and in the case of *B v C* 1996 S.L.T. 1370, 1996 S.C.L.R. 874, the court indicated that conditions should only be made in 'exceptional circumstances'.

There is no equivalent power in the 1978 Act to attach conditions to a freeing order. The court in *West Lothian Council v M* 2002 S.L.T. 1155 took the view that it is not possible to grant a contact condition in a freeing, although it did not consider the possibility of using s.11 of the 1995 Act. Section 11(2) says that 'The court may make such order under subsection (1) above as it thinks fit'.

It could be helpful if the law generally permitted appropriate conditions, including contact, in all permanence orders, including any pre-adoptive ones. See Chapter 2, Contact, for a more detailed discussion of contact.

**(d) *Enforcement of conditions in adoption.***

In the above case, *B v C*, the court provided a mechanism for enforcing conditions in adoption orders. It would be helpful if this was set out in legislation and court rules. Such a mechanism could also be used if conditions are allowed in other types of permanence orders.

**(e) *Expediting cases and avoiding delays in court.***

It is accepted that adoption and freeing cases frequently take an excessive amount of time in court, particularly (although not always) when they are disputed. The Department of Health's White Paper in 2000, *Adoption: a new approach*, said 'If cases are not managed well by the court there is delay and distress for children.' (pg. 52). This was followed by *Adoption Proceedings - A New Approach* (Court Service, 2001), Guidance designed 'to reduce delay and inefficiency in adoption court proceedings and to improve the service for everyone in adoption cases.' And in June 2003, the Department for Constitutional Affairs published the *Protocol for Judicial*

*Case Management in Public Law Children Act Cases* to eliminate 'unnecessary delay' in public law cases under the 1989 Act.

In Scotland, great and increasing concern is expressed by all interested professionals about delays and the effect on children and birth families. Delay leads to uncertainty for children and sometimes the loss of a prospective placement. It does not usually benefit birth families, who may be buoyed up by the lack of a decision and believe that children will be returned to them, and then be even more distressed when this does not happen. There is a history of judicial pronouncements about the need to avoid delay, such as Lord Guest in *A v B and C* 1971 S.C. (H.L.) 129 at 144, and Lord President Hope in *Lothian Regional Council v A* 1992 S.L.T. 858 at 861-2.

Section 25A of the Adoption (Scotland) Act 1978, added by the 1995 Act, says that, in any disputed adoption or freeing, the court must draw up a timetable and give directions for keeping to the timetable 'with a view to determining the question without delay'. However, neither judicial dicta nor the introduction of this section has made much difference to practice in many courts. No consistent, uniform system of case management has been developed to expedite cases and minimise delays.

Implementation of the Human Rights Act 1998 raises the possibility of challenges under Article 6 of the Convention by any party, including the child, who alleges that the case is not being heard 'within a reasonable time'. And, of course, it goes without saying that delays are contrary to the interests of children, and all the other parties involved.

The following is a list of some suggestions for improvement. Many of these points overlap, and are not new: see, for example, McNeill, 3<sup>rd</sup> edition, pg. 38-40.

1. Recognition of the importance of avoiding delay by all groups and professionals involved in permanence court cases. In the 2000 White Paper mentioned above, it was said: 'The Government wants to build on best practice already available to minimise delays.' (pg. 53). The proposals included guidance for

the courts on case management and consistency of practice, and this has now been published as indicated above.

2. Use of specialist sheriffs with an expertise and interest in family and adoption cases.

3. Training for judges on the whole range of child care, permanence and adoption practice.

4. Use of the administrative authority of the Sheriffs Principal, to oversee prompt handling of adoption cases. They have a statutory duty to secure the speedy and efficient disposal of court business. Binding procedures and guidance from them could include case management directions and times within which judgements should be issued. For example, Sheriff Principal I. D. Macphail, Sheriff Principal of Lothian and Borders, has drafted a Practice Note for freeing, adoption and PRO cases, as Guidance for Sheriffs and Practitioners. This is reproduced in Appendix III.

5. Consideration of methods of judicial case management.

6. Specific timetables in the court rules, giving times within which each stage should occur. There would have to be a general excusing power for when a stage could not be adhered to (e.g. illness). Two existing proposed schemes are to be found in:

- BAAF's Response to the Consultation Paper issued by the Sheriff Court Rules Council on sheriff court procedures for adoption (1996);
- Sheriff Alastair Stewart's article on timetables in Green's Family Law Bulletin, July 1999, Issue 40, pg. 2.

Copies of these schemes are in Appendix III.

7. Greater awareness of all the legal aid options, including emergency and fast track applications, and specialist assessment of applications by the Scottish Legal Aid Board.

8. A recognition from and use by the courts dealing with these cases of the fact that the proceedings in adoption and freeing are *sui generis* (literally, of their own kind) (see Lord President Cooper in *J and J v C's Tutor* 1948 S.C. 636 at pg. 642). Courts may therefore dictate the procedure for the running of cases and proof hearings to a greater extent than is possible in Ordinary cases. As indicated in *T, Petitioner* 1997 S.L.T. 724 at 730L, the strict rules of evidence do not apply.

9. Consideration of the use of written court pleadings to focus issues, including what can be agreed. It would be better if these were informal, without the need to adhere to the strict rules of civil pleadings. They could assist parties and the court in deciding the real areas of dispute. In this way, it should be possible to avoid leading unnecessary evidence and wasting witnesses' time.

10. Early 'welfare' hearings (as in other sheriff court family law cases) to:

- facilitate timetabling;
- allow the sheriff to check on parties' preparations;
- encourage agreement between the parties on non-contentious matters.

11. Use of affidavits to provide the courts with undisputed evidence, including from witnesses who may also have contentious evidence led in court.

12. Use of mediation services to assist resolution of disputes. Mediation services are increasing used to achieve settlement in a wide range of disputes, from commercial cases to matrimonial matters to applications regarding children with special educational needs. Such services could provide an alternative option for dispute resolution.

13. Reducing the unnecessary use of expert witnesses by the

- promotion of joint instruction of experts by both/all parties in proceedings;
- early sharing of reports by parties;
- pre-proof agreement on non-contentious matters.

14. Use of Joint Minutes for agreed facts, to reduce unnecessary evidence.

15. Mandatory use of the procedure set out in *F v F* 1991 S.L.T., so that any application for parental responsibilities is dealt with by the same court as is hearing the permanence application. (See Chapter 13, Birth Families, pg. 78 for further reference to *F v F*; and pg. 79 for reference to *McCreight v City of Edinburgh Council and Another* 2003 FamL.R. 2, where there were two applications, for freeing and contact.).

16. Continuous proof hearings on consecutive days, once a case has started; and no non-essential adjournments. This was suggested by Lord President Hope in *Lothian Regional Council v A* above.

#### **QUESTIONS:**

- 10. Should the welfare test in adoption cases stay the same?**
- 11. Do the provisions about children's views need changing, and if so, how?**
- 12. Do the provisions about consideration of race, religion, culture and language need changing, and if so, how?**
- 13. Do the provisions about minimum necessary intervention need changing, and if so, how?**
- 14. Should the grounds for dispensing with agreement be changed?**
- 15. Should there be a ground based on a birth parent's inability to care?**
- 16. Should conditions be allowed in all adoption and pre-adoption orders?**
- 17. If so, should the test for contact conditions be 'exceptional circumstances' or something else?**
- 18. Should there be a statutory mechanism for enforcement of conditions?**
- 19. What are views on the suggestions about reducing delay and what are other options?**

## Chapter 7. Revocation

Adoption orders are considered final, subject to normal time-limited rights of appeal. Apart from some narrow exceptions, (for example, where an order was made in favour of one birth parent and that parent later marries the other birth parent (s.46(1) of the 1978 Act)), there is no statutory provision for revocation. In *D v Grampian Regional Council* 1995 S.C. (H.L.) 1, Lord Jauncey of Tullichettle at pg. 5H said that: 'an adoption order once made is revocable only in circumstances which will have no practical effect upon the child's day to day life'.

The leading Scottish case is *J & J v C's Tutor* 1948 S.C. 636, when the court refused to revoke or reduce the adoption. The adopters maintained that they had adopted under essential error on the basis of innocent misrepresentations, and had found after the adoption that the child was brain damaged at birth and suffered from mental disability. The court stated that adoption was not a contract between the adopters and birth parent, but a matter of the child's status. It could not be set aside because the adopters were misled into applying. *J & J v C's Tutor* was considered in a leading English case of *Re B (An Adoption Order: Jurisdiction to Set Aside)* [1995] 3 All E.R. 333. The Court of Appeal refused to set aside the 1959 adoption of B, whose birth parents were an English Roman Catholic mother and an Arab Muslim father, and who had been adopted by a Jewish couple. The court held it had no inherent power to set aside an adoption order where the procedures had been properly carried out.

On the other hand, courts have set aside adoptions where there have been mistakes or procedural irregularities. In *Re M (Minors) (Adoption)* [1991] F.L.R. 458, after allowing a late appeal by the birth father, the Court of Appeal set aside an adoption. The birth father had consented to a step-parent adoption for his two children, not knowing that the mother was terminally ill; and when she died three months after the order, the step-father was not able to care for the children, who returned to their birth father. In *F v M* 1999 S.L.T. 571 (also reported as *M v S* 1999 S.C.L.R. (Notes) 738 and *ES Petitioner* 1999 FamL.R. 26) the Inner House quashed an adoption order ten months after it was granted, having allowed a late appeal by the birth mother. This was a non-agency adoption application by the child's paternal aunt, and the sheriff had dispensed with the mother's agreement on various grounds, including that she could

not be found. The mother only learnt about the adoption later and maintained that insufficient efforts had been made to contact her. The appeal court was satisfied that, looking at all the information, there was an issue about whether all reasonable steps had been taken to find her.

In some jurisdictions, adoptions can be revoked or discharged. In all Australian States and Territories, an order can be discharged if the adoption or consent to it was obtained by duress, fraud or other impropriety, or there is some other exceptional reason. In New Zealand, under s.20 of the Adoption Act 1955, discharge is possible if the order was the 'result of a mistake as to a material fact or...a material misrepresentation to the court or to any other person concerned'. The New Zealand Law Commission has recommended that the ground for discharge should be extended to allow an adoptee to apply, where s/he is an adult and 'the adoptive relationship has undergone a significant and irretrievable breakdown.': *Adoption and its Alternatives*, Report 65, September 2000, para. 461.

Consideration needs to be given as to whether the current position is sufficient to deal with all the situations which can arise, particularly where fraud or misrepresentation is alleged, or relationships have totally broken down. Allowing late appeals may deal with some situations, but may not be possible in other ones. If revocation is introduced, consideration would also have to be given to whether it would be available to young adoptees under 16.

If a limited right of revocation is introduced, any decisions should be based on the test for all other adoption decisions, namely that the child's/adoptee's welfare throughout life is the paramount consideration.

#### **QUESTIONS:**

- 20. Should there be a limited right to seek revocation of adoption?**
- 21. If so, what should the grounds be?**

## **Chapter 8. Public Fostering**

Public fostering is where local authorities make arrangements to 'look after' children by placing them with individual named carers. The children are 'looked after' in terms of s.17 of the 1995 Act, and all placements are regulated by the LA Regs and the F Regs. All publicly fostered children are 'looked after', although, obviously, not all 'looked after' children are fostered.

### **(a) *Section 25 of the 1995 Act***

Questions can arise as to whether or not a child is 'looked after' under s.25 of the 1995 Act, particularly when they are cared for by family or friends. Many children who are 'looked after' without a formal order under s.25 of the 1995 Act are placed with foster carers. In terms of fostering (and other placements) there are uncertainties, when it is not clear if a child is actually 'looked after' or not. For example, a child may be living with relatives or friends and questions arise as to who made the arrangements or organised the placement: was it the local authority or a voluntary organisation or the family? Depending on who actually arranged the placement and how the arrangements were made, the child may or may not be 'looked after'. Questions also arise when a hospital or residential placement is arranged by health services and/or education departments with local authority social work: is the child 'looked after' or not? Does it depend on which budgets are paying? While such situations do not all involve fostering, they highlight the difficulties with s.25.

Discussion about this issue and some clarification of what constitutes being 'looked after' under s.25 would facilitate matters, for foster care and other types of care.

### **(b) *Respite care provision***

If respite care is provided by a local authority for more than twenty-four hours at a time, children are 'looked after' under s.25 of the Act. This means that the local authority duties in the LA Regs apply to them, with the modifications set out in reg.17 of those regulations, about 'short-term placements'. Carers must be approved under the F.Regs, although the assessment and tasks are not the same as those in long-term

fostering. However, service provision varies from authority to authority, and there is a need for clarity about provision of this service, probably in Guidance.

***(c) Emergency and immediate placements under the Fostering Regulations***

Emergency placements are made under reg.13 of the F Regs, with carers who have been fully approved under reg.7. Immediate placements are made under reg.14 of the F Regs, for up to six weeks, with family or friends of the child, being carers who are not approved under reg.7 but about whom basic checks have been made, as listed in regs. 13 and 14.

Following on from a reg.14 placement, there is a need for a form of interim approval under reg.7, to cover the gap that occurs in some cases at the end of the six week period. At that time, if the child is not yet (and may never be) subject to a supervision requirement, s/he should return home or be placed elsewhere or be placed on a supervision requirement. This last option is unlikely to be achieved within six weeks unless the child is already in the hearing system. A removal from the immediate placement is often not in a child's interests, whereas staying there may be the best plan. A mechanism is needed to allow 'interim approval' after initial checks, to allow time for a full assessment of the carer if that is the best plan for the child. A full foster carer assessment takes considerably longer than six weeks.

Another change which could help would be to extend the period of placement under reg.14 to, say, three months. However, a form of 'interim approval' would still be needed, to allow for proper completion of a full assessment. If the child is to be placed on a supervision requirement, then full assessment under reg. 7 may not be necessary; but there can be no certainty of a supervision requirement being in place even at the end of three months, if matters are disputed by the birth parents.

Generally, regs.13 and 14 could be re-ordered and clarified, to remove the need for cross references between them.

**(d) *Placement recommendations to Children's Hearings***

Regulation 15 of the F Regs and r.20(6) of the Hearing Rules 1996 allow children to be placed on a supervision requirement with carers who are not parents, either:

- if the carers are fully approved under reg.7 of the F Regs, reg.15(1)(b); or
- if the local authority have carried out various procedures and think the placements are the best choices for the children, reg.15(1)(b).

The latter provision is used to facilitate placements with family and friends where they have not been approved under reg.7, do not wish to apply for such approval or the authority do not seek to approve them for whatever reason. The provisions work reasonably well, but the terms of reg.15 could be clarified, and there should be a clear tie in with r.20(6) of the Hearing Rules. There is also a question about whether supervision requirements should be able to be made and continued without it ever being necessary to complete formal approval processes for these carers.

**(e) *Arrangements with voluntary organisations.***

These are provided for in regs.16 and 17 of the 1996 Regs. These need to be clarified:

- reg.16 suggests that a voluntary organisation can carry out all of the fostering tasks for an authority, except actually having the 'looked after' responsibility for the child: that must remain with the authority. However, there is uncertainty about the status of voluntary organisations' fostering panels, and how authorities satisfy themselves about these. There is a variety of practice. It would be helpful if it could be made clear whether voluntary agencies can have their own panels, without authorities having to approve the panels or individual carers. The definition of 'foster carer' in reg.2(1) suggests that no carer can be approved by a voluntary agency's panel.

- Guidance: Vol.2, pages 67 to 68, needs to be clarified to avoid the existing confusion which (particularly para 109, pg. 68) talks about 'private arrangements' with other fostering agencies and suggests, wrongly, 'private fostering'.

**(f) *Fostering placements under reg.12(4).***

This is a contentious provision in the F Regs. Not only does it prohibit fostering by a same sex couple who live together, but it also effectively prohibits fostering in households where there are two adults of the same sex who are not in a same sex relationship: e.g. a foster mother and a former foster child who is female, who has chosen to stay on in the house as part of the wider 'family'. There are E.C.H.R. issues about this provision, and not just about same sex couples.

The position is different in England and Wales, where there is no such restriction and a same sex couple can be jointly assessed and approved for fostering and adoption. And in Scotland, a same sex couple may be assessed jointly for adoption, even though only one of them can adopt. The BAAF *Practice Note 44: Assessing Lesbian and Gay Foster Carers and Adopters* looks at practice issues in this area.

There are other questions about this regulation:

- if a foster carer marries or starts to live with a new partner during or after approval, who exactly needs to be assessed, when, and to what level?
- what does 'household' mean and who does it cover?

**(g) *Checks on households which 'looked after' children are visiting***

There is nothing in the F Regs about this although it is a frequently asked question in practice. A child who is 'looked after' away from home may wish to stay at friend's house overnight. Many authorities will only allow this if the family to be visited are made the subject of police and other checks. This is a higher level of 'checking out' than is usually be carried out by birth parents when their child who is not 'looked after' goes to stay at a friend's house overnight. Many 'looked after' children feel discriminated against by such rules and policies. On the other hand, local authorities

have responsibilities to their ‘looked after’ children, and feel that this level of checking is necessary. Some authorities delegate the power of permission to stay overnight to foster carers, but there is a variety of practice throughout Scotland.

Consideration needs to be given as to whether there should be specific regulations about such arrangements.

**QUESTION:**

- 22. Would clarification of s.25 placements be helpful?**
- 23. What are views on the suggestions about emergency and immediate placements?**
- 24. Should the placement provisions for supervision requirements, in reg.15, be changed?**
- 25. Should the arrangements with voluntary organisations be clarified, and if so, how?**
- 26. Should reg.12(4) be amended?**
- 27. Should there be regulations for ‘looked after’ children on overnight visits, and if so, what should they say?**



## Chapter 9. Support in Non-adoptive Permanent Placements

This chapter is concerned with children who are 'looked after' and for whom permanent arrangements are planned away from home in non-adoptive placements. Family and other private arrangements, which have not involved local authorities in making placements, are beyond the scope of this Paper, although some may be covered by the private fostering provisions (see Chapter 12 below); and many such arrangements do raise serious questions about general support needs for families.

Where local authorities are making arrangements for children to be cared for on a permanent basis, short of adoption, by someone other than birth parents, part of the planning should be to consider what support is needed for the children and their carers. The type of and arrangements for support depend on what permanent legal provisions are made for the children.

- If children remain on supervision requirements or cared for under s.25 of the 1995 Act, they obviously continue to be 'looked after' by the local authority. Children are cared for on a permanent basis under these provisions, even although neither are designed for permanent care - see Chapter 1, Legal Options for Children.
- If children are subject to PROs, they are 'looked after' by the local authority.
- If children are cared for under a residence order, s.11 of the 1995 Act, they are not 'looked after' by the local authority.

### *(a) Support where children are 'looked after'.*

Where children are 'looked after' on a permanent basis, the 'looked after' duties apply as set out in s.17 of the 1995 Act and the LA Regs. Support systems should be provided accordingly, depending on individual needs, whether children are cared for in institutions, by approved foster carers or family or friends.

Where children are 'looked after' with approved foster carers, the carers are eligible for Fostering Allowances, under reg.9 of the F Regs. Although these are not mandatory, every local authority pays them. However, there are great variations in practice about how allowances are calculated and paid. There is a view that fostering

allowances should be fixed on a national level, so that the amounts paid are the same throughout the country.

There are also issues where children are 'looked after' and cared for by family members or friends. If children are on supervision, the carers do not need to be approved foster carers under reg.7 of the F Regs, because of reg.15(1)(b) of the same regulations: see Chapter 8, Public Fostering. This allows supervision requirements to name carers on whom a lesser amount of checks have been carried out. The children are 'looked after' but carers are not paid Fostering Allowances as such. Payments can be made to such carers, but are often at different and lower rates than to approved carers. Some family carers where children are on supervision are approved as carers under reg.7, but may not be paid the same allowances as unrelated carers.

If children are 'looked after' long-term under s.25 of the 1995 Act or on PROs, and are with foster carers, these carers must be approved under reg.7 of the F Regs and are eligible for Fostering Allowances. There is anecdotal information to suggest that not all family carers are approved; and that if they are, they do not necessarily receive the same allowances as unrelated carers. There could be a successful legal challenge by a family carer who could show a lesser level of allowance and support than that paid to an unrelated carer. In the case of *R. (on the application of L. (A child) v Manchester City Council* [2002] 1 F.L.R. 43, Munby, J. held that the Council's policy of discriminating against relative foster carers in relation to allowance payments was neither necessary nor proportionate and breached the child's rights under Article 8 of E.C.H.R., the right to respect for family life.

***(b) Support for children subject to s.11 residence orders.***

These children cease to be 'looked after' when a s.11 order is granted, if they were previously cared for under s.25; or shortly thereafter at a hearing, if they were previously on a supervision requirement. The carers are usually family or friends or former foster carers. These children have no further entitlement to 'looked after' services, and carers are not eligible for Fostering Allowances. This may be welcomed by carers and children, as there is no more 'interference' from the local authority, but many carers express a need for some continuing support, particularly

when children become adolescents. There are many anecdotal examples of children who were formerly 'looked after' and who, in their teens, face difficulties and problems which can be traced back to the experiences that resulted in them becoming 'looked after' in the first place. Although these children were formerly 'looked after', they have no entitlement to the 'After-care' services in s.29 of the 1995 Act, because they will have ceased to be 'looked after' long before reaching the threshold criterion of their school leaving age, s.29(1).

Carers of children on s.11 orders (and other carers who are neither parents nor foster carers) can receive payments from local authorities, in terms of s.50 of the Children Act 1975, as amended by s.71 of the 2001 Act. This allows local authorities to pay what are often referred to as 'Residence Allowances' for children up to the age of 18. However, these are discretionary payments and a number of authorities do not make them.

If there is a new option for permanence as outlined in Chapter 1, pg. 14, the 'Enhanced Residence Order', this would be expected to have a support framework. The availability of such an option might replace s.11 orders for many 'looked after' children, and reduce the support problems for children in the future.

**QUESTIONS:**

- 28. Should there be changes to the support system for children 'looked after' on a permanent fostering basis?**
- 29. Should there be changes to the support available to children who were 'looked after' and are then cared for on a s.11 order?**



## Chapter 10. Support in Adoption Placements

For issues about tracing and access to adoption records, see Chapter 11.

Adoption support raises many practice issues, but it is important to get the legal framework right. The Report on Phase I of the Review dealt with post-adoption support in Chapter 3. Many of the recommendations are practised-based, but a mixture of possible legislation, Guidance and Standards flow from them. And overall, in order to ensure an effective and efficient support system, a robust legal structure is necessary.

Following up on the Phase I, Chapter 3 Recommendations, there is a need to consider how legal changes could help:

- (a) actively to promote comprehensive support services and ensure they are explicitly available to all parties;
- (b) to ensure that all local authorities include adoption and adoption support services clearly in their Children's Services Plans, as required by s.19(2)(b) of the 1995 Act;
- (c) to promote the benefits of partnerships between local authorities and voluntary agencies in this area of practice;
- (d) to promote Guidance and/or Standards for post-adoption services for children, birth families and adoptive parents;
- (e) to establish an Adoption Support Network for Scotland.

The 1978 Act and the 1995 Act already have provisions that cover many of these points, but their expansion and consolidation might increase their effectiveness. It can be difficult in practice to marry up the various duties because they are in two different pieces of legislation.

There are a number of matters needing consideration.

- It is crucial for effective delivery of services that the duties in primary legislation on local authorities to provide adoption support are as clear and as wide-ranging as the recommendations proposed. The current provisions for post-adoption support are contained in s.1 of the 1978 Act. Serious

consideration needs to be given to expanding these, either within s.1, or in a stand-alone provision. For example, s.1(1)(a) and (2)(bb) mentions assisting only 'children who have been or may be adopted' with no direct reference to adopted adults. And while counselling and assistance is to be provided to such children and to adopters, only counselling is available for other persons, including birth parents, s.1(2)(c).

- Clarity is needed about which authority should be responsible for support for children and adults who have been adopted. At present, the duty lies on the local authority where the person is living, irrespective of where the adoption took place, or the child's original residence, s.1(1) and (2) of the 1978 Act. Services for adopted adults probably need to be organised on the basis of where adoptees live. However, there is a question about whether or not local authority agencies who have placed children outwith their area should remain responsible for adoption support and funding, until the child is 18. They do remain liable for children 'looked after' by them, wherever they are living. The 2002 Act provides that the authority agency where the child, or other person looking for support, lives should be responsible, s.3(1). It imposes a duty to assess the need for adoption support, s.4(1). The Department of Health are currently consulting in detail about how the system should work, including what should happen when a child is placed in another area.
- 'Adoption Contracts' between adoption agencies and prospective adopters are a good practice tool. These can help provide clarity of expectation on all sides, particularly when there are two agencies involved, i.e. the placing one and the one where the adopters live. Should contracts be mandatory in all agency adoptions?
- Section 22 of the 1995 Act concerns local authority services for children 'in need' and forms the cornerstone of local authority child-care services in the community. There is a question about whether the definition of 'in need' (s.93(4)(a) of the 1995 Act) should specifically include some or all adopted children. This could be viewed as negative and labelling. However, it could highlight that such children and families have specific needs to be met and bring them clearly within the ambit of the local authority services which are most widely provided.

- The adoption allowances system would benefit from re-consideration. Every local authority agency must have an adoption allowances scheme, and voluntary agencies may have one, s.51A(1) of the 1978 Act. The AAll Regs set out the rules about when and how allowances can be paid and provisions for review, variation and termination. At present, practice varies from agency to agency; and amounts paid also vary between agencies. There are problems about arranging allowances after adoption, either when unforeseen difficulties arise; or when foreseen difficulties arise, but were not considered by the adoption agency at the time of matching and placing. One possibility would be to introduce a national scheme for all agencies, so that children and adopters could expect the same system and payments throughout the country. Another possibility would be National Standards or Criteria to ensure that every family receives the same consideration for allowances. This ties in with the recommendation in the Phase I Report, that there should be an Adoption Support Network for Scotland, Chapter 3, Recommendation 8.

#### **QUESTIONS:**

- 30. Should the adoption support provisions in the 1978 Act be expanded?**
- 31. Should the local authority agency where the person seeking adoption support lives be liable for support, whatever the age of the adoptee?**
- 32. Should there be a duty on local authority agencies to assess for the need for adoption support?**
- 33. Should adoption support contracts be mandatory in all agency adoptions?**
- 34. Should s.22 of the 1995 Act (children 'in need') be extended to include some or all adopted children?**
- 35. Should there be one adoption allowances scheme applying throughout Scotland?**



## Chapter 11. Tracing and Access to Adoption Records

This is a specialised type of adoption support, and entitlement to these services and which authority/agency is responsible for providing them are subject to the general issues discussed in Chapter 10.

There are three groups of people with an interest in tracing others and/or accessing records of adoptions. They are:

- (1) adults and children who have been adopted - adoptees;
- (2) birth parents and other birth relatives of adoptees;
- (3) other relatives of adoptees, such as their spouses, children or adoptive parents, particularly when the adopted person has died or otherwise cannot or perhaps will not exercise rights to information.

These groups have different interests and perspectives, and their rights to access information are different. However, there are some general provisions which are helpful to them all, albeit in different degrees, in obtaining advice on tracing, even where there is no right to information on a specific adoption.

- The 1978 Act obliges local authorities to have an adoption service, to meet the needs of 'children who have been or may be adopted'; 'parents and guardians of such children'; 'and persons who have adopted or may adopt a child', s.1(1)(a)-(c).
- Part of that service includes 'counselling and assistance....to children who have been adopted and to persons who have adopted a child', s.1(2)(bb); and counselling only 'for other persons if they have problems relating to adoption.', s.1(2)(c).
- Every adoption agency has discretion under reg.24(2)(a) of the 1996 Regs to give access to its records and information as it sees fit 'for the purposes of carrying out its functions as an adoption agency'.

These provisions can allow varying degrees of help and support, including advice on tracing, to all of the groups mentioned above, although the emphasis is on adoptees, adopters and, to a lesser extent, birth parents. Some agencies provide more support about these issues than others do. Some provide comprehensive mediation services

for anyone seeking support. Some services are called intermediary ones, and this is reflected in the DoH's 2000 publication for birth family support in this matter: *Intermediary Services for Birth Relatives: Practice Guidelines*.

As well as these rights, individuals can approach the adoption contact registers. If the adoption order was made in Scotland, they can put their names on the Adoption Contact Register run by Birthlink, which is a non-statutory register. If the adoption was granted in England and Wales, there is a statutory register, and also an older, non-statutory Contact Register, run by Norcap. All these Contact Registers (whether statutory or not) allow adoptees and birth relatives to indicate that they want to establish contact. When there is a 'match', some sort of contact can be established, though it may be through agency professionals.

There are also two other provisions which theoretically are open to everyone in the process, although they are rarely if ever used.

- The Registrar General is obliged to ensure that traceable connections can be made between entries in the Adopted Children Register and entries in the registers of birth which have been marked 'Adopted', s.45(4) of the 1978 Act. Such information is automatically open only to adoptees who are 16 or over, or agencies etc. providing counselling to them, except with a court order, s.45(5). So someone else could apply for information, but there is no reported case of any such order being granted in Scotland.
- Court rules allow an adoption process to be opened up by court order on the application of 'any person', RCS. 1994 r.67.32(2)(e); or the application of 'a person....to the sheriff setting forth the reasons for which access to the process is required', AS 1997 r.2.33(2)(c). The sheriff court provision was used in the recent case of *McCreight v City of Edinburgh Council and Another* 2003 FamL.R. 2, when the adopters' names were ordered to be disclosed to M to enable her to pursue her application for contact to her grandchildren. That decision was appealed.

So far as rights to information are concerned, there are different rights for different groups.

(1) Adult adoptees have positive rights to information about themselves and their adoptions. The situation is different as between Scotland, and England and Wales, and what matters is where the order was granted, not where the adoptee lives. When adoption was granted in Scotland, adoptees who are 16 or over can:

- obtain a copy of their original birth certificate - s.45(5) of the 1978 Act;
- have full sight of their court papers in any sheriff court freeing or adoption - r.2.14(2)(a) and r.2.33(2)(a) of AS 1997; and any Court of Session adoption - RCS.67.32(2)(a);
- ask to see all their agency records - reg.25 of the 1996 Regs.

The first two rights are unqualified, but the last one is subject to the agency's discretion. All this information can be obtained without counselling, although adoptees should be advised that this is available, and may seek it if they wish.

Where adoptees are under 16, they have no automatic rights. But, it can be argued that adoption agencies should give information in appropriate circumstances, given the terms of s.1(1)(a) and (2)(bb) of the 1978 Act and reg.24(2)(a) of the 1996 Regs, mentioned above. If it is important for an adopted child to have information, these provisions should allow its release as part of the agency's functions under s.1 of the 1978 Act and its powers in reg.24(2)(a), while recognising the need to involve the adoptive parents.

When the adoption was granted in England or Wales, the relevant age is 18 and there is no automatic right to see court papers, only a right to ask to see them. Some judges are keen to allow access, others are not. Otherwise, the adoptee can obtain her or his original birth certificate and ask to see the adoption agency records.

(2) Birth parents and other birth relatives have no right to information about adoptees. However, there are some provisions which can assist them:

- Birth parents (but not other birth relatives) have a right to an adoption service in terms of s.1(1)(b) and (2)(c) above.
- The discretion to adoption agencies, in reg. 24(2)(a) of 1996 Regs above, allows agencies to provide information from their records. This ties in with the duties under s.1 above but could be of assistance to all birth relatives, not just birth parents;
- Agencies are not prohibited from giving out general information to or working with any birth relatives. Many agencies do work positively with birth relatives.
- If birth relatives want to try to trace an adoptee, they can put their names on one or more of the adoption contact registers mentioned above. All these contact registers, whether statutory or not, allow birth relatives as well as adoptees to indicate that they want to establish contact. When there is a 'Match', some sort of contact can be established, though it may be through agency professionals.
- For birth families generally, the DoH's practice guidelines promote good practice and greater uniformity in service provision for birth relatives: *Intermediary Services for Birth Relatives: Practice Guidelines, 2000*. These are comprehensive guidelines and while they were issued for England and Wales, they are very useful and indicative of good practice in this difficult area.

(3) Other relatives of adoptees are in a similar position to birth relatives and do not have any specific rights to information about adoptees and their adoptions. This group includes the spouses, children or adopted parents of adoptees, and the issue arises particularly where the adoptee has died or otherwise cannot or will not exercise her or his rights to information. Again, the provisions in s.1(2)(c) and reg.24(2)(a) could assist, and agencies and authorities are not prohibited from working with this group or providing general information.

Overall issues which could usefully be considered are:

- how to rationalise the various rights and duties;
- whether to give limited rights to information to birth family members, including birth parents;
- if so, whether to give an absolute right of veto to the adoptee in all cases;
- whether to give limited rights to information to others mentioned in (3) above.

Alongside the mesh of rights and duties, service provision in this area, for adoptees, birth relatives who want to trace and others is patchy throughout the U.K. Some local authorities contract with the voluntary sector to provide practical advice and counselling, others do not.

Overall, there is limited professional and public knowledge of these issues, the rights of different individuals, and how to help and support enquirers, whoever they are. However, this is an area in which the Adoption Support Network for Scotland recommended in the Report for Phase I, Chapter 3, Recommendation 8, could provide assistance.

#### **QUESTIONS:**

- 36. Should After-Adoption mediation and tracing services have a greater profile, with greater publicity for agencies and the public, including use of the DH Guidance?**
- 37. Should there be a licensing of information and intermediate service provision, allowing organisations other than local authorities and adoption agencies to work in this area?**
- 38. Should there be positive rights to information for birth relatives, while protecting the rights of adoptees?**
- 39. Should there be positive rights to information for other parties, while protecting the rights of adoptees?**
- 40. How could adoptees' rights best be protected?**



## **Chapter 12. Private Fostering**

Private fostering is dealt with in the 1984 Act and the 1985 Regulations. It is completely separate from the 'public' fostering service carried out by and on behalf of local authorities. Public fostering is covered in Chapter 8 above.

Private fostering is where a parent makes an arrangement with someone who is not a close relative, to care for her/his child. That is a 'private' arrangement. Basically, if the child is to stay with the other person for more than 28 days at a time, then there are duties on the parent and the carer under the 1984 Act, to notify the local authority of the arrangement. The authority then has a duty to check that the arrangements and carers are satisfactory. This can be described as having a monitoring or 'inspectorial' duty, because the task is different from the full assessment that is made of public foster carers, although some of the checks are similar. The child is not the responsibility of the authority and is not 'looked after', but the authority retain a monitoring role until the child returns to live with the parent. The way in which the duty is carried out in practice varies from authority to authority.

There is almost certainly a great deal of private fostering which is not known to authorities, where arrangements are either deliberately not notified or where families and carers have no knowledge of their duty to inform authorities. There is very little public awareness of this legislation and local authority workers themselves are often unsure of its scope. The Guidance, Vol. 2, offers no assistance, because it deals only with local authority duties under the 1995 Act. There is a reference to 'private fostering agencies' on page 68 of Vol. 2, para 109, but this is about public fostering duties.

The 1995 Act did not change the scheme of private fostering under the 1984 Act. However, the 2001 Act includes private fostering in its description of 'fostering services' in s.2(14). In due course, local authority private fostering services, that is, how they carry out the duties imposed on them by the 1984 Act, will need to be registered with and inspected by the Care Commission. National Care Standards for Private Fostering will be required, s.5 of the 2001 Act. At the time of writing, there are no Standards, and no specific date for has been approved for the commencement

of registration and inspection of these services. It should be noted that the equivalent legislation for England and Wales, the Care Standards Act 2000, does not include local authorities' private fostering services in its list of services to be registered and inspected.

The Utting Report (Department of Health, 1997) described privately fostered children as some of the most vulnerable children living away from home. The Report recommended that local authorities should keep a register of approved private foster carers, similar to the ones for child-minders, but this was not accepted at the time. Such a scheme would go further than that imposed by the 2001 Act, as it would suggest more assessment of carers than is currently carried out under the 1984 Act.

The Report of the Victoria Climbié Inquiry also deals with private fostering. Recommendation 11. is that: 'The Government should review the law regarding the registration of private foster carers.' and that that should be done within two years of the Report, that is by January 2005. Again, the disparity between the registration of childminders and the system for checking private foster carers is raised.

On the other hand, where families make private arrangements, they and the carers may resent being involved in a more formal process of checks, assessment and registration. Payment is made for some private fostering arrangements, but not all. There are issues about how assessment processes for private carers would operate, given that they are not seeking to be approved as public foster carers.

Overall, this whole area of law and practice would benefit from reconsideration. The legislation is almost 20 years old and does not reflect current trends in society or welfare concerns about the children for whom such arrangements are made. While families and carers may not want more official involvement, it remains an anomaly that child-minders and day carers have to be registered and inspected (by the Care Commission since April 2002), but private fostering carers do not, given that the former only care for children during the day, while the latter have children living with them.

**QUESTIONS:**

- 41. Should individual private foster carers be registered with local authorities, or the Care Commission, or not at all?**
- 42. If there is registration, what method of assessment should be used?**
- 43. If there is no registration, should there be clearer rules about the level of checks required?**
- 44. Should there be a requirement on local authorities or the Care Commission to publish information about private fostering?**



## **Stakeholder Issues**

### **Chapter 13. Birth Families in Adoption, including Unmarried Fathers**

Many of the other Chapters cover issues for birth families, and this one relates to those not dealt with elsewhere. For example, for contact issues, see Chapter 2. Contact; for court matters, see Chapter 6. Court Processes in Adoption; for post-adoption support for birth families, see Chapter 10. Support in Adoption Placements, and Chapter 11. Tracing and Access to Adoption Records; and for birth parents' rights to attend adoption panels, see Chapter 15. Panels: Fostering, Adoption and Permanence.

#### ***(a) Fathers without responsibilities and their position in adoption and freeing.***

There is an overlap between this and the following two headings, and they need to be considered together. This heading looks at some issues for birth fathers, but the position of fathers without responsibilities in relinquishing adoptions is dealt with below, under heading *(c)*.

In England and Wales, s. 111 of the 2002 Act, expected to be implemented in 2004, will give full responsibility to unmarried fathers who appear on children's birth certificates, by amending s.4 of the 1989 Act. There was little controversy about this provision in the debates in Westminster. The Scottish Office consulted on this, among other matters, in March 1999, *Improving Scottish Family Law* and the Scottish Executive issued a consultative white paper in September 2000, *Parents and Children*, which also looked at the issue. There have been no further proposals to date.

This Paper is written on the basis that the law in Scotland may change in the future, and that the law in England and Wales will change in 2004. Whatever happens, however, there will always be issues for unmarried father in permanence cases, as any change will not be retrospective; and there will always be fathers without parental responsibilities and rights whose situations will vary from case to case.

The current law in Scotland is that an unmarried father does not have responsibilities and rights unless:

- he has completed an agreement with the mother under s. 4 of the 1995 Act;
- he has a court order under s. 11 of the 1995 Act;
- he has been named guardian of the child in the will of someone who has responsibilities and rights (e.g. the mother) and that person has died.

In all legal and practice matters, when an unmarried father has such responsibilities and rights (which could simply be a contact order under s.11), he has to be treated in the same way as the mother throughout the adoption process. His agreement to adoption or freeing has either to be given or dispensed with before an order can be made.

In adoption practice matters, an unmarried father without responsibilities and rights should be and usually is treated in the same way as those with responsibilities, when he has involvement in the child's life, particularly if it is a 'significant' one.

In adoption legal matters, an unmarried father who has not got responsibilities and rights cannot be treated exactly the same as a father who has, because he does not have the right to agree or not, and the court does not need his consent. However, he should not be completely disregarded, as there are various rules applying to him:

- The 1996 Regs allow an agency to give an unmarried father without responsibilities and rights the same notification and information about its decision that it has to give to parents with responsibilities and rights, if it knows his identity, and it thinks it should do so and that is compatible with the child's welfare - reg.14(2) of the 1996 Regs.
- In a freeing application, the court rules say that the hearing diet must be intimated 'to any person whose whereabouts are known [to the local authority] and who claims to be the father of the child' but does not have responsibilities and rights - RCS 1994, r.67.13(3)(aa); AS 1997, r.2.11(2)(b).

- In a freeing application, the court must be satisfied that any unmarried father without responsibilities has no intention of either applying for an order under s.11 of the 1995 Act or entering into an agreement under s.4 of the 1995 Act; or if he does have such intentions, that he is likely to be refused an order, or be unable to enter into an agreement - s.18(7) of the 1978 Act.
- In A v G (unreported, Second Division, 12 April 1994) the appeal court held that the unmarried father without responsibilities and rights had no right to consent or not to the adoption; but that he remained 'someone who is entitled to be heard, and....to make representations or lead evidence relevant to the welfare of the child'.

These provisions are confusing:

- The provisions in the 1996 Regs, while suggesting what is good social work practice, are not uniformly followed, and discretion is allowed either way.
- The right to be notified of the freeing hearing is not extended into adoption cases, although a sheriff in adoption has the right to intimate the hearing date to anyone whom he or she feels it appropriate to notify (AS 1997, r.2.28(4)(d)). But such discretion is not provided in the sheriff court rules for freeing hearings.
- However, in RCS 1994, the Court of Session has discretion to intimate the hearing in adoption and freeing to anyone it feels should be advised, as well as obliging intimation to an unmarried father in all freeing applications.
- Section 18(7) says that the court must consider a father without responsibilities, but its terms do not provide any procedures for the court if it decides that he has intentions and/or might succeed.
- The decision in A v G above is not widely known, and therefore often overlooked.

In addition, there is the First Division case of *F v F* 1991 S.L.T. 357, also reported as *AB and CD Petitioners* 1992 S.C.L.R. 274. This held that there should be a hearing of evidence in a custody application by grandparents in the same court as was dealing with the post-freeing adoption application for the children. Although this case was about grandparents without rights, and not a father, and it dealt with pre-1995 Act legislation, it should equally apply to a father who has raised an application, at whatever stage. Bringing evidential hearings together in such circumstances has clear advantages. Delay is reduced, the possibility of conflicting judgements is avoided and fathers can be heard. Like *A v G* above, this case is often overlooked.

In the reg.7(3) of the Adoption Agencies Regulations 1983, for England and Wales, agencies are obliged, where the father does not have responsibility, it knows his identity and it considers it reasonably practicable and in the interests of the child, to give him the same sort of service and information that it must give someone with responsibility. This is involvement at the planning stage, far earlier than any regulatory duty in the 1996 (Scottish) Regs.

Clarification of rights for fathers without parental responsibilities would benefit everyone involved, including the fathers themselves. The introduction of the E.C.H.R. reinforces the need to have a clearer structure, particularly for fathers who have no responsibilities but have involvement in children's lives.

***(b) Other birth relatives and their rights to be involved in the adoption process***

Some of the issues for fathers without parental responsibilities and rights also occur in relation to other birth relatives, including grandparents, older siblings, uncles and aunts etc. If any relatives or other persons have responsibilities and rights, they are treated accordingly in the adoption process, and their position is clear. However, most birth relatives do not have such responsibilities and rights, but may have involvement in the child's life and/or an interest in and knowledge of the plans for a child.

In good practice terms, when plans are being made for a child to live away from home on a permanent basis, consideration should be given to involving relatives. There

needs to be assessment of the abilities of the family member or members who care or could care for the child. This should be done, in good practice, if there is knowledge of the family members, and if he/she/they are realistically possible carers.

However, difficulties occur when:

- the local authority/agency have little or no knowledge about relatives, and are not able easily to do an assessment;
- relatives are unaware of the plans for the child;
- relatives change their mind about being willing to care for the child;
- relatives appear very late in the planning process with an offer;
- relatives have been considered and assessed as not suitable but still wish either to care for the child or at least to maintain contact.

Informal arrangements can be made for birth family members who have, for example, some form of contact, even when they are not going to care for the child, but this is not always possible. Also, such arrangements may not be the best thing for individual children, but are still sought by the birth relatives who want to have involvement nonetheless.

Consideration needs to be given as to whether the permanence and adoption processes should be made sufficiently open to allow birth relatives more involvement and/or a formal right to have some participation in:

- planning for the child being with them or another carer;
- the court processes for freeing and adoption.

The case of *McCreight v City of Edinburgh Council and Another* 2003 FamL.R. 2 shows what can happen when a birth family member has difficulty accessing legal processes. A grandmother sought contact but her application under s.11 of the 1995 Act was sisted (temporarily suspended) on the basis that the matter could be considered in the forthcoming freeing proof. This did not go ahead because the birth mother died. The children were adopted and the grandmother sought to obtain the names and addresses of the adopters so that she could carry on with her application. The court allowed the names to be disclosed, care of the agencies, and the case was appealed.

Consideration of children's rights to respect for their family life, and the similar rights of birth relatives, under Article 8 of E.C.H.R., mean that these issues must be looked at. It would be helpful to have clarification on these questions, to help both birth families and local authorities/agencies who are trying to make the best plans for children.

***(c) Contacting family members in 'relinquishing' adoptions***

Where mothers, or indeed both parents, wish to relinquish their children (usually babies) for adoption, and do not wish the father and/or the extended families to know or be contacted, difficult legal and practice issues arise. There are questions about what steps local authorities/agencies must or may take to include and contact the wider families. There are no statutory provisions in the 1978 or 1995 Acts addressing this directly. In the 1995 Act, there is an expectation that work with and for children will be done in the context of their families, but this has never been examined judicially in Scotland. It cannot, therefore, be said that the courts expect agencies to trace and check out all family members even against the wishes of the birth parents.

That is in contrast to the provision in England and Wales in s.23(6) of the 1989 Act, which instructs local authorities to make arrangements for 'looked after' children to live with people with parental responsibility or 'a relative, or friend or other person connected' with the children. In addition, courts in England and Wales can be asked by authorities/agencies to give advice about who they should contact. The courts also have to take into account the duties of adoption agencies under reg.7(3) of the Adoption Agencies Regulations 1983, to notify fathers without responsibility about plans for adoption: see heading ***(a)*** above.

Case law indicates that steps must be taken to involve, say, an unmarried father, in the care of a relinquishing child, or at least assess him for such care, particularly where he knows about the child and has had some involvement with the birth mother and other older siblings. However, the case law is not totally consistent or clear, and each case depends on its own circumstances. The cases make it clear that this was an area of

debate before implementation of the E.C.H.R., and that the Convention is simply adding another consideration.

There is a need to consider what duties should be placed on adoption agencies when relinquishing mothers, or couples, say that they do not wish their wider family contacted. Are there circumstances where this should be overruled? The parents have a right to respect for their private and family life under E.C.H.R., and also general rights to confidentiality, having consulted the agency/ local authority. Is it of benefit to the young child to go against clear parental wishes in this area, particularly if the parents provide background information for the child to use when older, in tracing the wider family? In a recent decision, the European Court of Human Rights held, by a majority of ten to seven, that a French law which allows a birth mother to abandon legally her children at birth and request that the birth be kept secret, did not violate the child's Article 8 rights to respect for family life: *Odievre v France*, 13 February 2003.

The issue raises consideration of fairness and E.C.H.R. rights, for all parties including fathers without responsibilities, and also overlaps with matters raised under the two previous headings. Again, some clarification of what is expected of local authorities/agencies would be helpful for them in carrying out their duties, and also to provide a clear picture of the rights and position of the child, and the rest of the birth family.

**QUESTIONS:**

- 45. Should unmarried fathers without responsibilities and rights be given more legal involvement in adoption and freeing cases? If so, what rights should they be given?**
- 46. Should there be a legal duty on local authorities/agencies to assess family members for long-term care, even if the end result is formally to exclude them?**
- 47. If so, should there be rules about which relatives are included, and time-limits within which they come forward?**
- 48. Should relatives be given a statutory right to enter the freeing or adoption court process to have their say on welfare?**
- 49. What duties should be placed on local authorities/adoption agencies when mothers/parents wish to relinquish children?**

## **Chapter 14. Children Waiting for Permanence and Adoption**

### ***(a) Section 44 of the 1995 Act***

This section makes it an offence to 'publish any matter in respect of a case about which the Principal Reporter has from any source received information or any matter in respect of proceedings at a children's hearing' or any related court case if it 'is intended to, or is likely to, identify' a child involved in such proceedings, or an address or school for the child. This is intended to prevent publicity about children's cases within the hearing system. However, it has given rise to long-running discussions as to whether it also prohibits the publication of photographs of children who are subject to supervision and for whom permanent/adoptive carers are being sought. In England and Wales, photographs of children are regularly published, without identifying information, where permanent/adoptive carers are sought. It is felt that Scottish children are disadvantaged because the debate leads many authorities not to use photographs in publications such as *Be My Parent*, or in other types of circulation of information about children. Such a perceived disadvantage may increase with the introduction of the National Register.

An amendment of s.44 seems required to clarify the matter. It would also be helpful to have a provision allowing such use of photographs with or without parental permission.

### ***(b) Restrictions on removal of children***

These are dealt with in ss.27-31 of the 1978 Act, which provide rules for a variety of situations:

- where child placed for adoption with agreement of birth parents, s.27;
- where child has lived for five years with someone who has applied to adopt or given notice of intention to adopt, s.28;
- return of child removed in contravention of ss.27 and 28, s.29;
- return of child placed for adoption, s.30;
- return of child not placed for adoption where carer has given notice of intention to adopt, s.31.

These provisions are extremely confusing, and quite possibly do not cover all the variations of circumstances which can arise before an adoption application is raised or granted. The supporting court rules also need clarification and tidying up: RCS 1994 rr.67.18 and 67.28; and AS 1997 r 2.36.

**QUESTION:**

**50. What are views on these issues?**

## Chapter 15. Panels: Fostering, Adoption and Permanence

### (a) *Terminology and Functions*

There are a variety of names given to panels, the main terms being:

- Fostering Panel;
- Adoption Panel;
- Permanence Panel.

The first two are specific statutory names, and the last one is not. There are two important facts to remember about panels: they make recommendations, not decisions; and the statutory duties for adoption panels include considering plans for children, while those for fostering panels do not.

Fostering Panels are part of the local authority system for approving public foster carers. Every local authority must have a panel in terms of the F Regs, reg.4(1). The panel's functions are set out in reg.6, and in particular, it has a duty to recommend to the authority whether a person is 'suitable to be a foster carer' and if so for a particular child, any child or certain categories of children, reg.6(1). In approving a carer, the local authority must consider a report from the panel with its recommendation on the carer's suitability, reg.7(1)(d).

Adoption panels have been part of the internal processes of adoption agencies for many years. Every adoption agency, local authority and voluntary, must have one, unless the agency is a voluntary one which does not approve plans for children or adopters, reg.7(1) and (2). Agencies have to follow the regulations or they would be failing properly to carry out their duties. The 1996 Regs set out the duties of panels:

- to recommend to the agency whether adoption is in the best interests of a child, with or without freeing, reg.11(1)(a) - 'child plans' recommendation;
- to recommend to the agency whether a prospective adopter is suitable to be an adoptive parent, reg.11(1)(b) - 'approval of adopters' recommendation;
- to recommend to the agency whether a particular adopter would be suitable to adopt a particular child, reg.11(1)(c) - 'matching' recommendation.

Some local authorities combine the two panel functions in one body, and some do not. Various combinations of names are used, such as Fostering and Adoption Panel or Adoption and Fostering Panel. The term 'Permanence Panel' has no statutory meaning and is sometimes used for a combined panel, and sometimes for a panel that deals with adoption recommendations as well as non-statutory ones about other permanence plans for children. The Adoption Policy Review Group recommended in its Phase I Report 'that local authorities should have one panel to consider all decisions about permanence away from home, including adoption.', Chapter 1, Recommendation 7.. Consideration needs to be given to creating such 'Permanence Panels' and imposing duties on them to make recommendations on all permanence plans for children, and appropriate matching, not just in adoption cases.

Another suggestion for change would be to create new 'Carer Panels', to make recommendations about all prospective carers, for fostering and adoption. Obviously, assessment and approval of adopters is a different task from that of short-term foster carers and respite carers, but the work for long term foster carers has similarities. Tasks could then be divided between Permanence Panels - planning for children - and Carer Panels - approval of carers.

There may be a view that adoption/permanence panels are not necessary for child or matching matters and that agencies could carry out the overview of assessment of such plans through a system of 'looked after' and other internal reviews, followed by decisions by the agency decision maker. However, this could be difficult for voluntary agencies

***(b) Fostering Panels***

The regulations about Fostering Panels, regs.4-7 of the F Regs, are less detailed than those for Adoption Panels. Consideration needs to be given to extending the provisions in the regulations, by:

- providing for appointment of legal advisers to panels, and a duty on them to attend and/or advise;
- giving a right to applicants to receive their assessment reports, excluding confidential third-party information;

- giving a right to applicants to attend panels (they usually do in practice, but there is no right to be invited as there is for prospective adopters);
- inserting a duty on the local authority to involve panels in reviewing foster care approval. At present, the local authority do not need to consult the panel;
- increasing the details generally in the review provisions for foster care approval, in reg.10.

These issues would be relevant for general 'Carer Panels'.

***(c) Adoption Panels: children***

Questions have arisen about whether children could attend the panel discussing their plans? Children should not be required to attend panels, but older ones often wish to do so, and such attendance is in keeping with the principles in the 1978 and the 1995 Acts, about the views of children, as well as children's E.C.H.R. rights. Specific regulatory provision would avoid children's wishes to attend being ignored because adults did not think it appropriate.

***(d) Adoption panels: birth parents***

As indicated above under heading ***(a)***, pg. 85, adoption panels make statutory recommendations about three matters: 'child plans', 'approval of adopters' and 'matching'. In the past, birth parents with parental responsibilities and rights have not normally been invited to panels considering their children's plans or matching them with prospective adopters. However, the issue that increasingly arises is whether there should be a duty on agencies to invite birth parents. The *National Care Standards: Adoption Agencies* (Scottish Executive, 2002) suggest that birth parents should know about the panels for their children and have access to the reports, excluding confidential third party information: see Standards 14.3 and 16.2. Although not the universal practice, some agencies in Scotland (and in England and Wales) already invite birth parents to panels making recommendations about children.

The objections to inviting birth parents can be logistical and/or that there is no history of doing so. However, for many birth parents and their advisers, the proceedings of

adoption panels seem shrouded in mystery and tied in with the tradition of secrecy in adoption. Given that birth parents are invited to and have rights to attend child protection case conferences, local authority 'looked after' reviews, and all children's hearings and court proceedings, it seems inconsistent to exclude them from adoption panels. The impression given to many outsiders, albeit erroneously, is that there is something particularly secret being dealt with at panels, whereas it is simply a required administrative stage in the planning process for children.

Looking at the process from an E.C.H.R. perspective, exclusion of birth parents does not tie in with the general principles of openness. While adoption panels do not make decisions (only recommendations); and neither the recommendations nor the agency decision-makers' subsequent decisions make any 'determination of...civil rights and obligations' (Article 6, E.C.H.R.), because only the courts can do that, it seems only fair to allow birth parents to attend. This view is strengthened by reference to Article 8 of the E.C.H.R., which provides that everyone is entitled 'to respect for his private and family life'. Including birth parents in panel meetings would accord them this respect.

There have been two recent sheriff court cases looking at this issue:

- Dundee City Council v M, Sheriff K Pritchard, 29 November 2002, 2003 FamL.R. 28. A freeing application was dismissed because the birth parents were not at the adoption panel. This case has been appealed.
- Dundee City Council v W, Sheriff I Dunbar, 20 January 2003, 2003 FamL.R. 35. The sheriff refused an application to dismiss a freeing application before the proof hearing, although the birth parents had not been at the adoption panel. He held that the matter should be looked at in the round after all evidence was led, and that to dismiss the case would simply cause delay which was in no-one's interests, particularly the child's, whose welfare was paramount.

Reference should also be made to Scott v U.K. 2000 FamL.R. 102, where the European Court dismissed an application by a mother whose child had been freed, on the basis that her Article 8 rights had not been breached despite there being some meetings which she was not invited to attend. And there is also the English decision,

Re L [2002] 2 F.L.R 730, where Munby, J. held that a care order should be made and the amended plan for adoption approved despite breaches of the mother's rights.

Consideration needs to be given to this area of law and practice, with a view to providing clear rules. Included in the debate should be the issues:

- whether any rights of attendance given to birth parents should include going to matching panels, as well as child recommendation ones;
- whether any rights of attendance given to birth parents should include fathers without parental responsibilities and rights, if they are 'significant adults' in the children's lives.

**(e) *Adoption panels: Adopters***

At present, prospective adopters in Scotland must be given a copy of their assessment report as sent to the adoption panel (excluding third party confidential information) and must be invited to attend the adoption panel: regs.10(5)(b) and 11(3). These provisions were introduced by the 1996 Regs in 1997, and reflected existing good practice.

These provisions seem to work well, although reg.11(3) is ambiguous. It says that panels can only make approval recommendations 'where they had the opportunity to meet with the prospective adopters'. The intention of the provision was to ensure that all prospective adopters were invited to meet the adoption panel considering their case, but that such attendance was not mandatory or part of the assessment process. This is supported by the Guidance, Vol. 3, page 22, para. 115 and is good current practice, but there is dubiety given the wording. Unfortunately, this has led some to believe that an adoption panel can only consider the case of prospective adopters if they have actually met with them. It would be helpful to have clearer regulations about this.

**(f) *Fostering and Adoption panels: general***

Without imposing excessive rigidity, there is scope for providing more detail in regulations and/or guidance about fostering and adoption/permanence panels.

- The meaning of 'panel'. At present, the word is used interchangeably in the 1996 Regs and the F Regs, to refer to the whole group of people whom an authority/agency can use to meet and to make recommendations; and to refer to individual meetings making recommendations. This ambiguity could be removed by a change of terminology, such as calling the first 'panel' and the second 'panel meeting'.
- More detail is required about qualifications of panel members. At present, it is up to authorities/agencies to be satisfied that the numbers, qualifications and experience of members are such that it can carry out its duties: reg.5 of the F.Reggs and reg.7(3) of the 1996 Regs.
- More detail is required about having a man and a woman at each panel meeting. At present, there are no requirements at all about gender balance in the F.Reggs, either for the panel as a whole or for individual meetings. In the 1996 Regs, reg.7(4) imposes a gender balance requirement only for the panel as a whole. It is good practice to have a gender balance at each panel meeting, and it would be helpful to debate whether the regulations should specify this or not.
- Clarity is required about the style, form and status of panel minutes. There is a wide variety of style, and greater clarity and uniformity could be helpful, particularly in disputed permanence cases, where minutes are often lodged as court productions.

#### **QUESTIONS:**

- 51. Should 'Carer' Panels deal with approval of all carers, foster and adoptive ones?**
- 52. Should agencies continue to have adoption/permanence panels as part of the planning process for children?**
- 53. Should children have a right to attend a panel looking at plans for them?**
- 54. Should birth parents have a right to attend panels looking at plans for their children and matching them with adopters?**
- 55. What are views on the proposals to amend the details of provisions for panels?**



## Chapter 16. Foster Carers and Processes for Them

### *(a) Who can be approved as a foster carer?*

There is nothing about who can or cannot be approved as a foster carer in the 1995 Act or Part II of the F Regs, which is headed 'Approval of Foster Carers'. However, there is a contentious provision in reg.12(4) of the F Regs. This is considered in Chapter 8, Public Fostering, pg. 54.

### *(b) Checks on previous offences*

There needs to be consideration about whether there should be tighter provision, in regulations, about checks on previous convictions and related matters. There is a question as to whether there should be a list of convictions which would automatically make an applicant ineligible for approval. This issue applies equally to prospective adopters and is set out in Chapter 17, Adopters and Processes for Them, heading *(b)*. If restrictions are provided in the domestic adoption assessment process, they should be reflected in the rules for assessing foster carers.

A related issue is whether regulations should specifically state that enhanced records checks must be carried out on carers. At present, previous convictions are simply listed as a matter of information to be sought by an authority in Sched 1 of the F Regs.

### *(c) Appeals by prospective foster carers*

At present, there is no statutory provision for an appeal process for prospective foster carers whose applications are refused, either on initial application or on review. Foster carer approval must be reviewed annually, reg. 10(1) of the F Regs.

As with adopters, there needs to be consideration given to setting up a statutory procedure for appeals, possibly a national one. Section 12 of the 2002 Act introduces provisions for an independent body to deal with such appeals by adoption applicants in England and Wales. As with the previous issue, this matter applies equally to

prospective adopters and is set out in Chapter 17, Adopters and Processes for Them, heading (c).

**QUESTIONS:**

- 56. Should there be a list of prescribed offences, which would automatically bar applicants from approval or re-approval?**
- 57. Should there be a statutory appeals system for applicants who are refused approval or re-approval? Should it be a national one?**

## Chapter 17. Adopters and Processes for Them

### *(a) Who can adopt?*

At present, only married couples or single individuals can adopt in Scotland. In practice, unmarried couples do apply and are assessed, although only one of them goes ahead and adopts, while the other one can seek a residence order under s.11 of the 1995 Act. Consideration needs to be given to as to whether the law in Scotland should be changed or not. In England and Wales, unmarried couples, including same-sex ones, will be able to adopt together when the 2002 Act is implemented as expected in 2004.

Many of the arguments on both sides of the debate were rehearsed in the House of Lords' Debates on 16 Oct and 5 November 2002: see Hansard, H L Deb (2001-02) Vol. 639, cc 864-912 and H L Deb (2001-02) Vol. 640, cc 567-624. The issues are also discussed in the BAAF *Practice Note 44: Assessing Lesbian and Gay Foster Carers and Adopters*.

If it is proposed to allow unmarried couples to adopt, there needs to be consideration of what statutory definition should be used. The 2002 Act defines 'a couple' as:

- (a) a married couple, or
- (b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship - s.144(4).

Another way of defining a couple could be to refer to the length of time they have lived in partnership.

### *(b) Assessment of adopters*

There is currently relatively little in the 1996 Regs about how adoption agencies carry out assessments of adopters. The Phase I Report makes a number of recommendations about the recruitment of adopters, but most of these do not require new legislation, although many of them could be assisted by clear guidance.

Recommendation 4 of the Phase I Report states that 'there should be clear, standard, basic information about adoption for answering enquiries. Agencies should manage enquiries effectively and quickly.' Depending on how the Phase 1 Recommendations are taken forward by the Scottish Executive, it would be helpful to translate Recommendation 4 into regulations and/or guidance so that agencies know exactly what is required of them. The draft Guidance on Intercountry Adoptions, issued by the Scottish Executive in June 2002, did cover this type of detail for intercountry cases.

At present, reg.10(1) of the 1996 Regs obliges an agency to 'prepare and make available ... a statement of general criteria' which it should apply when considering whether to accept someone for assessment. Obviously, such criteria vary from agency to agency. Further, such information is only about whether someone could be accepted for assessment or not. It is not about providing general information to possible prospective adopters on how the whole system works. It could be helpful, therefore, if regulations and/or guidance included:

- the need to have available clear, standard, basic information about adoption for people interested in being assessed;
- greater clarity about criteria for individual agencies, and how they use them;
- a duty on agencies to deal with general enquiries, and then applications for assessment, within certain timescales, which could either be in regulations or provided for in National Standards. The existing *National Care Standards: Adoption Agencies* (Scottish Executive, 2002) have six months as the period from initial interview to completed assessment (Standard 23.1) but this may need to be reviewed.

There needs to be consideration about whether there should be tighter provision, in regulations, about checks on previous convictions and related matters. There is a question as to whether there should be a list of convictions which would automatically make an applicant ineligible for approval. In England and Wales, if prospective carers have been convicted of prescribed offences against children, they are usually automatically unable to be approved. This may be harsh, given the huge variety in seriousness of such offences, but consideration has to be given to whether convictions

for certain specified offences should automatically rule out prospective adopters. The Intercountry Adoption (Hague Convention) (Scotland) Regulations 2003, (S.S.I. 2003/19), which came into force on 1 June 2003, do provide a prescribed list for prospective convention adopters only, and there is a question about whether the domestic regulations should be the same. If such restrictions are provided in the domestic adoption assessment process, they should be reflected in the rules for assessing foster carers, as the issues apply equally to them: see above, Chapter 16, Foster Carers and Processes for Them, heading *(b)*.

*(c) Appeals by prospective adopters*

At present, there is no statutory provision for an appeal process for prospective adopters whose application is refused. There is also confusion about the difference between complaints procedures (which are available), reviews of decisions, and appeals. Complaints should be about procedural and other matters arising during the course of an assessment, whether or not the prospective adopter is approved. Review in practice is really about an appeal against a decision which the prospective adopter does not like, namely a refusal to approve.

A statutory procedure for appeals against refusal of approval could be established, possibly on a national basis. Section 12 of the 2002 Act introduces provisions for an independent body to deal with such appeals by applicants in England and Wales. It would be helpful to prospective adopters and to agencies if there was a Scotland-wide system set out; and this could also ensure that, without doubt, the assessment process was E.C.H.R. compatible. In terms of Article 6 of the E.C.H.R., everyone has a right to a fair trial in any determination of their civil rights and obligations. While no-one has a right to be an adopter, if someone has been assessed and turned down, s/he should have some formal appeal process, given that the only other legal option is judicial review, an expensive and time-consuming option.

At present, adoption agencies operate their own review/appeal procedures, but Scotland-wide provisions would greatly assist agencies in knowing what they have to do and assist prospective adopters in knowing what processes they can use. This is

also an equally important issue for foster carers: see above, Chapter 16 Foster Carers and Processes for Them, heading (c).

**(d) Information provided to prospective adopters about children**

At present, prospective adopters must be provided with written information about the child with whom they are matched, in terms of reg.19(1) of the 1996 Regs. Also, medical information must be passed to the prospective adopters' health board and G.P., reg.19(2)(c) and (d). While these provisions and the supporting Guidance, Vol. 3, pgs. 26 and 27, paras. 134-137 and 140 and 141 are quite wide-ranging, adopters have complained that they have not been given full information about a child, particularly about the possibility of future health and other needs. There have been examples of agencies failing to give all the information that they had, so that prospective adopters were not prepared for foreseeable deterioration in the child's health. Some prospective adopters argue that, in some circumstances, they would not have accepted placement of the children in question.

This is a subject needing consideration, including whether existing guidance and regulations should be strengthened, and whether a duty should be inserted in primary legislation. Any duties to pass on information can only, of course, cover what an agency actually knows, so that no breaches of duty or liability would occur if, for example, a child developed a medical condition later about which the agency knew nothing.

In a recent English case, *A and B v Essex County Council* [2002] EWHC 2707 (QB), the Buckley, J. held that Essex was liable to adopters for failing to pass on information about one of the children they had adopted. This case is under appeal. In the United States, the tort (wrong or delict) of 'wrongful adoption' has been recognised for more than fifteen years: see Freundlich's article in *SCOLAG Journal* August 2003, reproduced from *ChildRight*.

Another issue is whether information should be passed to prospective adopters before a match is made, so that they can decide whether to take a child or not. This is an area fraught with practice and legal difficulties, but if it is felt necessary to allow

prospective adopters information about one or more children prior to matching, this should be laid out in regulations, as there is no such existing provision.

**QUESTIONS:**

- 58. Should there be a change in the law about who can adopt? .**
- 59. Should regulations or guidance include more details about information to be made available by agencies to those thinking of applying for assessment as adopters?**
- 60. Should there be a list of prescribed offences, which would automatically bar applicants from approval?**
- 61. Should there be a statutory appeals procedure for applicants who are refused approval as adopters? Should it be a national one?**
- 62. Should there be clearer, stronger duties on agencies to pass on information when a child is placed?**
- 63. Should there be a duty to provide information before a match is made? If so, how much information should be given?**



## Chapter 18. Adoption Agencies and Local Authorities

### (a) *Principles applied by agencies and authorities in permanence cases*

These are discussed under Court Processes in Chapter 6 above.

### (b) *The place of local authority adoption agencies*

The Scottish adoption service is provided by Scottish adoption agencies which are either local authority ones (and every authority must have an agency) or voluntary ones, called registered adoption services, s.1 of the 1978 Act. Prior to the 2002 Act, there was discussion in England and Wales as to whether adoption services should be removed from local authorities. This was strongly advocated by Patricia Morgan in *Adoption and the Care of Children* (1998). For a rehearsal of the issues, see Lowe *et al* (1999), pgs.437-441. In 2000, the *Prime Minister's Review of Adoption* took the view that adoption should stay with local authorities, 'but that significant improvements in LA performance should be sought.' - see Chapter 6, pgs. 62-64. This was followed by the White Paper *Adoption: A new approach* (Department of Health, 2000), which set out the changes proposed 'to improve council performance on adoption', pg. 43.

Although Scottish authorities vary in size, and it can be more difficult to provide comprehensive adoption services in smaller units, the problems about centralising adoption services include whether separating adoption decisions for individual children from an authority's other child care duties increases effective work for children or not. If adoption services are removed from authorities, it may be more difficult to look at a broad range of options for children. This issue was recognised in the *Prime Minister's Review of Adoption*, pg.62.

In addition, the Report of Phase I was not in favour of a national service, although it recommended centralisation of some services, including:

- a national recruitment strategy, Chapter 2, Recommendation 2;
- standardisation of pre-assessment criteria and materials, Chapter 2, Recommendation 7;

- establishment of an Adoption Support Network for Scotland, Chapter 3, Recommendation 8.

The Scottish Executive *Response and Consultation Paper* included the question: 'should we consider a national service?' para. 4.1, pg.4. Most respondents were not in favour of a national service.

**(c) *Stages of and planning to avoid delay.***

This issue is crucial for plans for all types of permanence for children and is a matter of great importance to agencies and authorities.

As discussed in Chapter 6 above, about court processes, delay is in no-one's interests, and is particularly not in children's interests. In planning for a child 'looked after' away from home, there are three stages when delays can occur, before the lodging of a court application. These are identified on pgs. 17 and 18 of the APRG Report, Phase I. The stages are:

- between the child becoming 'looked after' away from home and a 'looked after' review decision to seek permanence.
- between such a review and the adoption/permanence panel.
- between the panel recommendation and the lodging of a court application for freeing or adoption.

The *National Adoption Standards for England*, Department of Health, 2001, state in Standard A.2.a) that 'the child's need for a permanent home will be addressed at the four month review and a plan for permanence made'. In other words, at the 'looked after' review at the end of four months of the child being away from home, permanence must be considered and planned for. Vera Fahlberg, in *A Child's Journey Through Placement*, (1994) suggests that such plans should be looked at as soon as the child becomes 'looked after' away from home, as one option among a number of them. Such proposals are to avoid unnecessary planning delays, whether the best permanence option is adoption or not.

A number of the recommendations in Chapter 1 of the Phase I Report, pg.20, are concerned with improved planning for 'looked after' children, including the avoidance of delay. Recommendations 2 to 9 could be assisted by greater specification within regulations and/or guidance. In particular, there could be:

- statutory timetables (if a child cannot return home) to limit the period between a child becoming 'looked after' away from home and a 'looked after' review decision to seek permanence;
- statutory timetables to limit the period between such a review decision and a permanence/adoption panel;
- a statutory requirement that a child's care plan must consider permanence options, including returning home, as soon as the child becomes 'looked after' away from home;
- a statutory requirement that parallel or twin-track planning must be considered for all children who have been 'looked after' away from home for a certain period (e.g. 3 months).

**(d) *Existing timetables for Local Authority Adoption Agencies***

These are in regs.12-18 of the 1996 Regs and apply after adoption panel recommendations about plans for children. As part of the discussion around options for permanence and freeing (Chapters 1 and 3), changes may be required to the timetables, depending on other policy decisions.

**(d) *The Role of the Adoption Agency Decision-Maker***

The agency decision-maker has a crucial role in the adoption agency planning system, following a recommendation by the adoption panel. However, there are few regulations about how a decision-maker should carry out the task and there is a wide variety of practice. In most cases, decision-makers make decisions that are the same as panel recommendations. But they can and do disagree with recommendations and make other decisions. Agencies are obliged to record in writing reasons for decisions which are contrary to panel recommendations, reg.12(2) of the 1996 Regs, but there is no other check or review.

Given that there have been legal challenges in cases where birth parents have not been at adoption panels making recommendations about their children, the question arises as to whether there should be a right of, say, written representation to agency decision-makers. If there was to be such a right, it would have to be decided:

- who should have the right; and
- whether it should be available in every case or only when decision-makers wanted to make decisions contrary to the panel recommendations.

Other issues in this area include:

- should the decision maker attend all panels as an observer only so that s/he is aware of all issues and concerns?
- how much detail should there be in minutes of adoption panels, a verbatim record or a summary of discussions?
- should every agency be obliged to appoint at least two decision makers?
- should there be an automatic internal review/appeal process where the decision maker does not agree with the panel's recommendations?

Overall, there needs to be consideration about whether duties for decision-makers should be set out in regulations and/or guidance. If there are precise rules or provisions for decision makers, it may be that the fourteen days in reg.12(1) will not be long enough properly to carry out the task.

#### **QUESTIONS:**

- 64. Acknowledging that the Executive's Phase I Response asked if there should be a national adoption service, and most respondents said 'No', are there further views on this matter?**
- 65. Would new regulations and/or guidance help tighten up planning procedures and reduce unnecessary delays?**
- 66. Should the timetables for adoption agencies in the 1996 Regs be reviewed?**
- 67. Should there be regulations and/or guidance about the role of agency decision-makers?**



## Chapter 19. Curators and Reporting Officers

In any discussion about curators, reporting officers and similar appointments, there is often a confusion of terminology about who does what and in which type of case? There are four types of appointments in cases involving children and their care:

- (1) **Common law Curators *ad litem*.** These are appointed by courts under their common law powers. These powers give the courts a general right to ensure that children involved in any type of court case are entitled to have their interests protected by independent representation. This is done by appointing independent solicitors or advocates as curators. They are required to report to the court and generally act in the children's interests, the welfare of the children being the paramount concern. They can apply for and obtain legal aid to carry out their work on behalf of the child.
- (2) **Curators *ad litem* for adoption, freeing and PROs.** These are curators appointed by courts in these particular cases. Such appointments are a mandatory statutory requirement in most but not all permanence cases, under the court rules (see below). Most of these curators are appointed from lists or panels kept by every local authority of people in their area who can do this work. Each local authority must have a panel of curators and reporting officers (see (3) below). In some permanence cases, however, the sheriff appoints a curator from the common law list, rather than the local authority panel. The duties in the adoption court rules are the same, but the remuneration structure is different.
- (3) **Reporting Officers for adoption, freeing and PROs.** These are people appointed by courts in permanence cases for specific purposes, usually about consents to cases (see below for a note of their duties). Again, these appointments are usually a mandatory statutory requirement.
- (4) **Safeguarders in children's hearing cases.** These are appointed under s. 41 of the 1995 Act. Their appointment is statutory but at the discretion of individual hearings or sheriffs, where they think appointment is necessary. The tasks are similar to those of curators, with the child's welfare as paramount consideration. Each local authority must have a panel of safeguarders from whom appointments are made and they are responsible for the fees. In some sheriff courts, common law curators are appointed in hearing cases instead of safeguarders.

None of these appointments are to be confused with solicitors or advocates representing children in court or hearings. Such solicitors and advocates represent their clients as they would adult clients: that is, they carry out their clients' instructions which may conflict with the children's best interests, viewed objectively. A young person under 16 is entitled to instruct a solicitor in any civil matter if s/he 'has a general understanding of what it means to do so' - s.2(4A) of the Age of Legal Capacity (Scotland) Act 1991. There is no lower age limit and someone who is 12 or older is presumed to have the necessary understanding.

### **When are appointments made?**

As indicated, appointment of adoption curators and reporting officers are mandatory in most but not all cases.

- The court must appoint an adoption curator (though not always a reporting officer):
  - in every sheriff court freeing and adoption application, including post-freeing adoptions - the majority of cases are dealt with in the sheriff court.
  - in every Court of Session freeing or adoption application 'where it appears desirable in order to safeguard the interests of the child', and this includes post-freeing adoptions.
  - in every application for a PRO.
- The court may appoint an adoption curator:
  - in any application for revocation of a freeing order.
  - in any application for variation or revocation of a PRO.

### **What are the duties?**

Adoption curators' and reporting officers' duties are laid out in the court rules and these rules apply whether appointments are from the local authorities' lists or are common law ones. The rules are in:

- RCS 1994, Chapter 67 for the Court of Session;
- AS 1997, Chapter 2 for the sheriff court.

Adoption curators must investigate and report to the court with the children's welfare as their paramount concern. If children's formal agreement to adoption or freeing is sought in the sheriff court, it is the curator who discusses this with children, and witnesses any consent, not reporting officers. They are also expected to give the court the views of the child, although this is not the only medium for doing so and this must be distinguished from the overall duty to put forward the child's best interests. Views of children and their welfare do not always coincide.

Reporting officers are concerned with confirming facts in applications, finding out if birth parents consent or not, and witnessing any agreements. The tasks are much more procedural than those of curators, and not focused on the children. The court often appoints the same person as curator and reporting officer, but not always.

### **Local authority panels.**

As indicated, each local authority must have a panel of curators and reporting officers from whom appointments are usually made, although courts can use their common law powers and appoint someone who is not on a list to carry out the statutory duties. Authorities are responsible for appointments to their panel of curators and reporting officers. These are carried out in consultation with the appropriate sheriff and Sheriff Principal. No qualifications are laid down. Some, but not all, sheriffs prefer only qualified solicitors to act as adoption curators. Payment of fees for 'panel' appointments is the responsibility of local authorities. The relevant regulations are the Curators *ad Litem* and Reporting Officers (Panels)(Scotland) Regulations 2001 (S.S.I. 2001/477). These are virtually the same as the previous regulations issued in 1984 and 1985 and do not specifically set out fees.

### **Issues for curators and reporting officers.**

Adoption curators and reporting officers perform similar roles to Guardians *ad litem* (GALs) in adoption etc. proceedings in England and Wales. However, while GALs are not appointed in every case, curators and reporting officers are appointed in almost all cases involving adoption, freeing and PROs. Therefore they have a crucial role in freeing, adoption and PRO cases. Even where there is no dispute, s/he still

represents an independent voice looking at the case, independent from adoptive families, adoption agencies, local authorities, birth families, and any other relatives or parties with an interest.

Unfortunately, however, there are serious concerns about the 'curatorial' system throughout Scotland and its haphazard nature. Problems are reported by social worker practitioners involved in permanence cases, authorities' legal advisers, sheriffs and curators themselves, whether lawyers or not. The issues include:

- No specification of qualifications for and methodology of appointment.
- No prescribed term of appointment.
- No system for training, support and monitoring of curators and reporting officers. Anecdotally, many report feeling isolated and uncertain of legal and practice developments. Curators need to know their legal duties, how the whole adoption process works and the complex welfare and care issues in this complex field.
- No system of complaints for curators or about work carried out by curators and their reports.
- Shortage of experienced curators, because of the lack of an overall structure. This causes difficulties for courts in making individual appointments.
- Delays in submitting reports, because of pressure of work, lack of experience or other reasons. Curators' reports in the sheriff court should be lodged within 4 weeks of appointment, AS 1997, r.2.8(1) and (2) for freeing, r.2.26(1) and (2) for adoption and r.2.40(1) and (2) for PROs.
- The funding structure. Payments to curators from a local authority panel are the responsibility of that authority, in terms of the 2001 Regulations mentioned above. But there is uncertainty as to which authority pays when the court is in the area of one authority and the child has been placed by another authority. Further, the current fixed fee agreed with COSLA, approximately £98 plus expenses, is not considered sufficient to cover the time and work required in complex cases.

Some local authorities will pay higher fees, but others will not. There is no uniform pattern throughout Scotland. COSLA has issued new Guidance for safeguarder payments, with effect from 1 April 2003, but has indicated that no such guidance will be issued for adoption curators. And the 2001 Regulations do not cover payments to curators in PROs. And if a curator is appointed in an adoption case on a common law basis, s/he is not bound by the panel fee structure.

Some suggestions for change are:

- Reviewing whether or not appointment of curators and reporting officers should be mandatory in all cases, including revocations and variations.
- Centralisation of the system, as has now happened in England and Wales for GALS, under CAFCASS. Such a system could be administered centrally, but easily maintain good local contacts and lists.
- New regulatory provisions setting out minimum qualifications for curators and reporting officers, clearer methods of appointment, training and support to be provided for them, and monitoring and complaints procedures. Qualifications should include skills in communicating with children and an understanding of child development and related issues.
- A more flexible fee structure, taking account of the variable work. Some reports do not take much work, and the fees for them should therefore be less than the fees required in very complex cases. The amount of work varies from case to case.
- Granting legal aid to all curators and reporting officers, whatever the basis for their appointments. The courts which appoint them could do this and the work would be paid for on the ordinary civil legal aid rate. This rate of payment is not a particularly high one, but it would reflect the work actually carried out. Common law curators are paid through the legal aid system and there appear to be few reasons why adoption curators could not be similarly remunerated, even taking into account that not all of them are legally qualified.

Many experienced and interested childcare professionals no longer carry out this work. The system would benefit from review and possibly better regulation. The concern should be to improve all aspects of the system.

**QUESTIONS:**

- 68. Should a curator always be appointed in every permanence case?**
- 69. Should the system be centralised nationally?**
- 70. Should curators be paid for out of the legal aid fund?**

## **Chapter 20. Step-Parent Adoption**

### ***(a) Processes for step-parent adoption***

Many professionals are unhappy about step-parent adoption. Such adoptions can be used as a means of excluding completely the other absent birth parent from a child's life, whatever the child's age and relationship with her/him. Given that contact is increasing in agency adoptions, where the child is not being returned to the birth family, such a cutting-out of contact and other ties in step-parent adoptions may be completely inappropriate. The absolute prohibition on the use of s.11 of the 1995 Act by a parent whose responsibilities have been removed by adoption applies equally to all adoptions, including step-parent ones. This provision was criticised by the court in *West Lothian Council v M & Ors* 2002 S.L.T. 1155, see above pg. 19.

On the other hand, it is important for children that adults closely involved in their care can obtain the responsibilities and rights needed in day to day life. It is helpful to all, children, adults and outside agencies like schools, to be clear about who can do what. Ensuring that a step-parent has a legal relationship with a child can be crucial, especially if the other absent birth parent has died or has no role in the child's life. Step-parent adoption is an option, but families should consider other ones as well.

Consideration of step-parent adoption would be useful, including whether there should be specified processes and procedures for them, as a distinct type of adoption. In looking at step-parent adoption, it may be helpful to review all the options that are and should be available for step-families, including unmarried ones.

### ***(b) Who can adopt in step-parent adoption?***

At present, only married couples can adopt together, and a step-parent can only adopt the children of his or her partner if the couple are married. If an unmarried step-parent adopted a step-child, the effect would be to wipe out the rights of all birth parents, including the adopter's partner. Whether unmarried couples can adopt together is considered under in Chapter 17, 'Adopters and Processes for Them' pg. 95. In discussion about the issue, consideration needs to be given as to whether any future provisions allowing unmarried couples to adopt should also permit an unmarried step-

parent to adopt. It could be argued that it would be inequitable to allow an unmarried couple to adopt jointly in an agency adoption, but not to permit an unmarried step-parent to adopt his or her step-child. The 2002 Act permits both types of adoption. On the other hand, step-parent adopters are not subject to the assessment process that all agency adopters undergo. One possibility is that any unmarried adoption, whether step-parent or not, is only possible if the couple have lived together for a specified period of time.

**(c) *Raising awareness of residence orders.***

Residence orders under s.11 of the 1995 Act give parental responsibilities and rights to the applicant without normally removing all of them from an absent birth parent. It is a method which allows a step-parent to gain responsibilities and rights without the complete legal break of adoption. Applications under s. 11 can be made whether the step-parent is married to the birth parent or not.

**(d) *Step-parent agreements/court orders***

The Scottish Office consulted on this issue in its Consultation Paper *Improving Scottish Family Law* in March 1999, and the Scottish Executive issued a consultative White Paper in September 2000, *Parents and Children*, which also dealt with it. So far, there have been no further developments in Scotland, but the 2002 Act introduces agreements and court orders allowing step-parents to acquire parental responsibility, in s.112 which inserts the provision as s.4A of the 1989 Act. This will apply in England and Wales and is expected to come into force in 2004. The new s.4A provides that the step-parent:

- must be married to a birth parent who has parental responsibility; and
- can acquire responsibility by agreement with the spouse and the other birth parent if s/he has parental responsibility; or
- can acquire responsibility by a court order.

Such agreements and orders can only be brought to an end by a court order, on the application of the child or any person with responsibility. There is no restriction on the use of agreements or orders only to where both birth parents have responsibility.

This is a complex matter, as can be seen from the White Paper *Parents and Children* and the responses to it. These and an analysis of them are available on the Family Law pages of the Scottish Executive website. A number of issues arise:

- should any scheme be restricted to married step-parents?
- should any scheme be available only by agreement, or should the courts be able to make a step-parent order on the model in the 2002 Act, as distinct from their existing powers under s.11 of the 1995 Act?
- should agreements/orders only be available when the birth parent who is the step-parent's spouse/partner shares responsibilities with the other birth parent?
- should agreements/orders be available when the 'other birth parent' is dead, whether s/he had responsibilities or not?
- should agreements/orders be available when the 'other birth parent' does not have responsibilities?
- if so, should her/his consent be sought in all cases, or only if s/he has 'significant involvement' in the child's life and has not previously lost responsibilities?
- what mechanisms should be used to obtain the views of the child? Should formal consent be required by any child of twelve or over, as is the case in adoption?

This subject could be seen as a family law and private law matter. However, the issue is raised here as it relates to adoption law, and is one on which respondents to this Paper may wish to express a view, particularly in the light of the provisions in the 2002 Act.

**QUESTIONS:**

- 71. Should there be specific processes for step-parent adoptions?**
- 72. Should an unmarried step-parent be able to adopt?**
- 73. If so, should there be limits on which step-parents can adopt, such as the length of relationship?**
- 74. What are views on step-parent agreements/orders and particularly the provisions in s.112 of the 2002 Act?**

## **APPENDIX I:**

### **MAIN LEGISLATIVE AND REGULATORY PROVISIONS:**

#### **A LIST OF ABBREVIATIONS.**

(These provisions apply to Scotland only, unless otherwise stated.)

- European Convention on Human Rights 1950 E.C.H.R.  
(This is now incorporated into UK law by the Human Rights Act 1998, which is UK legislation)
- UN Convention on the Rights of the Child 1989 U.N.C.R.C.  
(This has not been incorporated into UK law and remains persuasive only)

#### **Acts of Parliament**

- Race Relations Act 1976 1976 Act
- Adoption (Scotland) Act 1978 1978 Act
- Foster Children (Scotland) Act 1984 1984 Act
- Children Act 1989 1989 Act  
(This is largely applicable to England and Wales only.)
- Children (Scotland) Act 1995 1995 Act
- Adoption (Intercountry Aspects) Act 1999 1999 Act  
(This is UK legislation)
- Race Relations (Amendment) Act 2000 2000 Act  
(This is UK legislation)
- Regulation of Care (Scotland) Act 2001 2001 Act
- Adoption and Children Act 2002 2002 Act  
(This will largely apply to England and Wales only)

#### **Regulations and Rules**

- Foster Children (Private Fostering) (Scotland) Regulations 1985 1985 Regs
- Adoption Agencies (Scotland) Regulations 1996 1996 Regs
- Adoption Allowance (Scotland) Regulations 1996 AAll Regs
- Arrangements to Look After Children (Scotland) Regulations 1996 LA Regs
- Fostering of Children (Scotland) Regulations 1996 F Regs
- Children's Hearings (Scotland) Rules 1996 Hearing Rules

### **Court Rules**

- Act of Sederunt (Rules of the Court of Session) 1994 (as amended) RCS 1994
- Act of Sederunt (Child Care and Maintenance Rules) 1997 AS 1997

### **Guidance**

- Scotland's Children: The Children (Scotland) Act 1995, Regulations and Guidance
  - Volume 2: Children Looked After by Local Authorities Guidance, Vol. 2
  - Volume 3: Adoption and Parental Responsibilities Orders Guidance, Vol. 3

### **Standards**

- National Care Standards: Foster Care and Family Placement Services Fostering Standards
- National Care Standards: Adoption Agencies Adoption Standards

## APPENDIX II: REFERENCES AND FURTHER READING

- Adoption Policy Review Group (2002), *Adoption Policy Review Group-Report Phase 1*, Edinburgh: Scottish Executive. This is available on the web at: <http://www.scotland.gov.uk/library5/education/apr1-00.asp>
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Morgan, Patricia (1998), *Adoption and the Care of Children*, London: Institute of Economic Affairs, Health and Welfare Unit.

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Performance and Innovation Unit (PIU) (2000), *Prime Minister's Review of Adoption*, London: Cabinet Office. Available on the web at: <http://www.doh.gov.uk/adoption/>

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Ross, M. (2002), *Adoption in the 21<sup>st</sup> Century: Still Image against a Moving Picture?* in Scoular, J. (ed.) (2002), *Family Dynamics: Contemporary Issues in Family Law*, Butterworths: Edinburgh. (Chapter 5, pg. 105.)

Scottish Executive (2000), *Parents and Children*, Edinburgh: Scottish Executive. Available on the web at: <http://www.scotland.gov.uk/justice/familylaw/>

Scottish Executive (2002), *National Care Standards: Adoption Agencies*, Edinburgh: Scottish Executive. Available on the Care Commission's website: <http://www.carecommission.com>

Scottish Executive (2002), *National Care Standards: Foster Care and Family Placement Services*, Edinburgh: Scottish Executive. Available on the Care Commission's website: <http://www.carecommission.com>

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*Note:* Department of Health publications should be found on the web at: <http://www.doh.gov.uk> although the DH is no longer responsible for adoption in England and Wales.

## **APPENDIX III:**

### **COURT TIMETABLES FOR ADOPTION AND FREEING:**

#### **TWO POSSIBLE SCHEMES AND DRAFT PRACTICE NOTE**

**(see Chapter 6.)**

**1. Proposals submitted by BAAF in 1996 in response to the Sheriff Court Rules Council's Consultation Paper on sheriff court procedures in adoption. This paper is reproduced with the permission of BAAF, the copyright holders. It should be remembered that it was written as part of the consultation process on implementation of the 1995 Act, and therefore pre-dates the AS 1997.**

#### **Proposals for Timetabling**

We propose the following Timescales for Adoption and Freeing Petitions, in order to provide a real measure of certainty for all those involved, children, adopting and birth families and their advisors. Predictability, knowing how long the overall process should take, is very important, especially for the children.

Timetabling starts as soon as the Petition is lodged. The Petitioner is immediately given a date for the preliminary (or options style) Hearing, which date must be within 2 months of the date of lodging. The Petitioner intimates the Hearing to the birth parent and anyone else who appears to have an interest.

At the same time, just after lodging, the Curator is appointed and his or her report must be lodged within 28 days of appointment, notice also being given of the Hearing date.

At the Hearing, the Sheriff may dispose of the Petition if, *e.g.*, it is clearly uncontested. Otherwise, in disputed cases, a date for the Proof will be set, and that date must be within 3 months of the Hearing. The Rules should also provide that once the Proof has started, it will continue on a daily basis until completed, *i.e.* all issues have been dealt with.

Once the Proof has concluded, the Sheriff must prepare and issue his judgement within 28 days. In order to allow for situations where a judgement is not available in time, it may be appropriate to provide that at the end of a Proof the Sheriff shall fix a date within 28 days when parties appear for formal notification of the decision, so that the Sheriff will formally have to continue matters (for not more than another 28 days) and explain if there is a delay.

It is appropriate under the general heading of timescales to raise another issue which could help speed up cases. There is uncertainty in some courts about procedures prior to a Proof for agreeing issues or focusing on disputed ones. There should be disputed rules encouraging the agreement of all non disputed matters by way of Joint Minute, and allowing the Sheriff to order a Note of Issues to be provided by those opposing the Petition, in order to focus on exactly what is disputed. We do not seek a complicated set of written pleadings but simply a means to draw out the real issues before the Proof starts.

A Note of Issues, if asked for, should be produced not later than 28 or 21 days prior to the Proof date.

Throughout this process, the Sheriff should have a general dispensing power to extend this timetable, but this should only be used sparingly and should itself be within set timetables. That is, the Sheriff may, at the preliminary Hearing, be persuaded to continue the matter to another Hearing and not fix a proof, but such a continued Hearing should be set down within another 28 days.

If such timescales are kept to, it should be possible in almost all cases to provide a reasonable idea of the time required to the children and families involved. The problem of waiting for a award of legal aid should be helped if parties are given a set Proof date, as emergency provisions can then be used if necessary. Sheriff Clerks should also know more exactly what demands will be made by these processes on the courts' other business.

## **SUMMARY OF PROPOSALS**

- I. Petition Lodged:**
1. Petitioner given date of Hearing and authority to intimate.
  2. Curator appointed; to report within 28 days.

### **Maximum of 2 months allowed from lodging until:**

- II. Hearing:**
1. Petition disposed of where appropriate.
  2. Proof date fixed where appropriate, advisability of Joint Minutes urged and Notes of Issues ordered if necessary.
  3. On cause shown, continue Hearing for not more than 28 days.

### **Maximum of 3 months allowed from Hearing until; and any Notes of Issues to be lodged at least 28 days before:**

**III. Proof** Proceeds on a day-to-day basis until concluded.

**Maximum of 28 allowed from conclusion of the Proof until:**

**IV. Judgement issued.**

**2. Article on timetables by Sheriff Alastair Stewart, Q.C., published in Greens's Family Law Bulletin, July 1999, Issue 40, pg.2, and reproduced with the permission of the author and W.Green, the copyright holders**

**Proposed Timetable for Adoptions and Freeing Orders**

*Sheriff Alastair Stewart, Q.C.*

Section 25A of the Adoption (Scotland) Act 1978 provides that in any proceedings, whether involving a freeing order or an adoption, where a question arises of dispensing with the agreement of a parent, “the court shall, *with a view to determining the question without delay* [emphasis added] – (a) draw up a timetable specifying periods within which certain steps must be taken in relation to those proceedings”.

Two facts emerge clearly from the existing legislation. First, the objective of timetabling is to reduce delay in reaching a decision as to whether or not agreement should be dispensed with. Secondly, the act of preparing a timetable itself is something that must not be delayed – it must be done “forthwith”, see rule 2.4 of the Child Care and Maintenance Rules 1997.

**1. The Starting Point**

I suggest that the starting point must be the reception by the courts of the reports of the reporting officer and curator ad litem. It is usually not until these reports are received that a reasonable clear picture emerges as to the attitude of the parent whose agreement is sought to be dispensed with.

**2. The Preliminary Hearing**

Rules 2.11(1) (in the case of an application for freeing) and 2.28(1) (in the case of a petition for adoption where the child has not already been freed for adoption) provide that the sheriff must fix a diet of hearing on receipt of the reports of the reporting officer and the curator ad litem. I therefore suggest that the hearing should be the first item in the timetable. It must, of

course, be emphasised that the “hearing” referred to in these rules will in most disputed cases be only a preliminary hearing at which future procedure will be discussed.

The sheriff will be better able to decide on a suitable timescale for fixing the hearing after he has read the reports. I therefore favour the timetable providing that within 24 hours of the sheriff clerk’s receiving the reports of the reporting officer and curator ad litem he must place the petition, these reports and all other papers in the process before the sheriff in order that the sheriff may fix a date for a hearing.

No more than four weeks should elapse between the date of the interlocutor fixing the hearing and the hearing actually taking place. This should give ample time for intimation to all parties (as required by rules 2.11(2) and 2.28(3) and (4)).

### **3. The Procedural Hearing**

The sheriff could hear what the opposing parent and the petitioner have to say at the hearing just referred to, but, in practice, if there is opposition to the application, there will require to be a proof. It is here that any attempt at rigid timetabling is likely to break down.

An application for either a freeing order or adoption falls fairly and squarely within the definition of a summary application. Thus, so far as the matter is not determined by the 1997 Rules, the sheriff may lay down whatever procedure he thinks appropriate. Thus he *could* order parties to lodge pleadings and make up a record, but only in the most exceptional case should he do so.

What he should, however, do is devise some way in which the parties may identify the issues in dispute and those matters about which there is agreement, thus limiting the scope of any proof. I suggest that this should be done before the date of a proof is fixed. Fixing an adoption proof into a busy court schedule is always difficult. It will be much easier if there is some idea of how long the proof is likely to last. What I am suggesting is a procedural hearing – a sort of options hearing.

I suggest that a maximum of eight weeks should be allowed between the initial hearing of the case and the procedural hearing. During this time the opposing parent (and, if appropriate, the petitioner) should be able to obtain legal aid and his or her solicitor should be able to examine all the relevant documents in the case. I suggest that the sheriff should normally order parties to lodge affidavits or at least precognitions of all potential witnesses in order that the scope of the evidence may be determined.

At the procedural hearing the parties' representatives together with the sheriff would consider all the documents in the case including any affidavits or precognitions ordered. The sheriff should be able to order a joint minute to be produced. He should be able to note the disputed issues. The parties should be able to determine how long the proof is likely to last with a reasonable degree of accuracy. At the end of the procedural hearing the sheriff would fix the date for the proof, which would be no more than six weeks after that date.

I am aware that what I have suggested would throw a great burden on a busy court programme. The fixing of a proof within six weeks is unheard of in most of the bigger courts. However, there is no reason why it should not be done. Summary criminal trials have to be fixed within 40 days if the accused is remanded in custody. In practice, certainly in the courts in which I have sat, such trials are usually fixed within 30 days. A hearing which is to determine the future of a child is surely as important as a summary criminal trial.

### **1. The Proof**

Many adoption proofs drag on over several weeks or even months with a few days' evidence being heard followed by a long gap before the sheriff is available to hear further evidence. This is quite wrong. If a sheriff can hear a criminal jury trial from day to day, as he is bound to do, similar arrangements should be made for adoption or freeing hearings.

In almost every case the hearing on evidence should follow on immediately after the completion of the proof. In the exceptional case it may have to be postponed until after shorthand notes of the evidence have been extended. In that case, the hearing should be no more than four weeks after the end of the proof.

### **2. The Decision**

Unless there are exceptional circumstances, a sheriff should be able to produce his decision in a freeing or adoption case within 28 days. There is provision in the summary cause rules for a sheriff to produce a written judgement within 28 days, so there is a precedent for my suggestion.

A sheriff should be allowed to apply to his sheriff principal for an extension of the 28-day period if there is a good reason for his not being able to comply with the time limit.

The total time under this timetable between the lodging of the petition and the sheriff producing his judgement should be about 26 weeks plus the number of days occupied by the proof and the hearing on evidence. To some it may seem like a long time but it must be

remembered that the court is dealing with a child's whole future, and it is essential, so far as humanly possible, to get it right. In such cases there is very seldom a second opportunity.

**3. Draft Practice Note for the Sheriffdom of Lothian and Borders for Freeing, Adoption and PRO cases providing Guidance for Sheriffs and Practitioners, reproduced with the permission of Sheriff Principal I. D. Macphail.**

## **SHERIFFDOM OF LOTHIAN AND BORDERS**

### **PRACTICE NOTE NO 1, 2003**

#### **FREEING FOR ADOPTION, ADOPTION ORDERS AND PARENTAL RESPONSIBILITIES ORDERS**

#### **GUIDANCE FOR SHERIFFS AND PRACTITIONERS**

##### **A. PRELIMINARY**

##### **1. Introduction**

###### *Purpose*

1.1 The purpose of this Practice Note is to secure the efficient management of contested proceedings in applications for orders declaring children free for adoption, applications for adoption orders and applications for parental responsibilities orders. It is intended to provide Sheriffs and practitioners with practical guidance about the operation of the Adoption (Scotland) Act 1978 ('the 1978 Act'), the Children (Scotland) Act 1995 ('the 1995 Act') and the Act of Sederunt (Child Care and Maintenance Rules) 1997 ('the Rules') relative to such proceedings. It will be revised in the light of experience and any new primary or secondary legislation.

### *Commencement*

1.2 This Practice Note applies to all such applications lodged after 1 November 2003.

### *Minimum of delay*

1.3 It is the duty of the court to secure that applications for freeing orders are dealt with 'as expeditiously as possible with the minimum of delay' (*Lothian Regional Council v A* 1992 SLT 858 at 861). Such applications require the co-operation of all concerned and firm case management by the Sheriff (*Strathclyde Regional Council v MF* 1996 SCLR 142 at 143). The same considerations apply to applications for adoption and for parental responsibilities orders. This Practice Note indicates how Sheriffs and practitioners may best fulfil those responsibilities.

### *Identity of Sheriff*

1.4 In the interest of continuity and consistency in management, every stage of each case must, whenever possible, call before the same Sheriff on dates and at times assigned by him or her. This paragraph does not apply to the Borders courts.

### *Representatives*

1.5 At every calling of each case any representative of any party must be familiar with the case and must have sufficient authority to deal with any issues that are likely to arise.

### *Subject sheet*

1.6 The Sheriff and the parties may find it helpful to use a subject sheet in order to check the matters that should be ascertained at different stages of the case. A specimen of such a sheet, which may be adapted according to circumstances, is printed as an Appendix to this Practice Note.

## **B. APPLICATION FOR AN ORDER DECLARING A CHILD FREE FOR ADOPTION**

### **2. Timetable**

2.1 Section 25A of the 1978 Act provides that in proceedings in which the question arises as to whether the court is satisfied that the agreement of a parent or guardian should be dispensed with, the court must do the following 'with a view to determining the question without delay'. First, it must draw up a timetable specifying periods within which certain steps must be taken. Secondly, it must give such directions as it considers appropriate for the purpose of ensuring, so far as reasonably practicable, that the timetable is adhered to.

2.2 Rule 2.4 of the Rules requires the court to draw up the timetable 'forthwith' in three situations: (1) where the petition craves the agreement of a parent or guardian to be dispensed with; or (2) where it appears from a report by an adoption agency, local authority or reporting officer that a question as to dispensing with such agreement arises; or (3) such agreement previously given is withdrawn.

2.3 In virtually every freeing case situation (1) will apply, since the application will have been lodged by the local authority in a case where a parent is withholding agreement. In such a case, in order to comply with rule 2.4 the timetable should be drawn up at the same time as the interlocutor appointing the curator *ad litem* and the reporting officer. That interlocutor must be pronounced after the petition is lodged (rule 2.7(1)). It will usually be too early, however, to draw up a detailed timetable at this stage because the areas of dispute, the availability of legal aid, documents and witnesses, and other matters with a bearing on the progress of the case will not yet be known. The timetable at this stage should therefore only specify the date of the first hearing (see paragraph 3.1 below). It is recommended that normally that date should be some six weeks after the date of interlocutor appointing the curator *ad litem* and the reporting officer. The reasons for selecting a period of six weeks is that the curator *ad litem* and the reporting officer must generally report within four weeks of the date of the interlocutor appointing them (rule 2.8(1), (2)), and thus the parties should have at least two weeks to consider their reports before the first hearing.

2.4 The Sheriff may select periods other than four weeks and six weeks since he or she has a discretion to select a period other than four weeks for the lodging of the reports. If selecting any other period it is necessary to keep in view the court's duty to determine 'without delay' the question whether consent should be dispensed with.

2.5 Although it may not be possible to draw up a detailed timetable at the outset of the proceedings, the drawing up of a further firm and realistic timetable or timetables and the need for adherence to them will be of central importance to the efficient management of the later stages of the case, as will appear from later paragraphs.

### **3. First hearing**

3.1 Rule 2.11(1) requires the Sheriff to fix 'a diet of hearing' on receipt of the reports of the reporting officer and the curator *ad litem*. This is the hearing referred to above as 'the first hearing'. If it has not been fixed as part of the initial timetable, it should be fixed now for a date some two weeks ahead, as suggested in paragraph 2.3.

3.1.1 The object of the first hearing is to make preliminary inquiries with a view to ascertaining the likely scope of the dispute and to encouraging early preparation for the proof.

#### *Before the first hearing*

3.2 Before the first hearing the Sheriff should be prepared to engage in active management of the case.

3.2.1 He or she should have read the report lodged by the local authority which accompanies the petition, and checked that it contains the information required by rule 2.5(2)(b).

3.2.2 The Sheriff should also have read the reports of the curator *ad litem* and the reporting officer and checked that they similarly comply with rule 2.8(1) and (2).

3.2.3 The Sheriff should also have read any other documents lodged by the petitioners.

3.2.4 The Sheriff should have checked that intimation of the hearing has been made as required by rule 2.11(2).

*At the first hearing*

3.3 At the first hearing the attention of the Sheriff and all parties should be devoted to securing that the issues at the proof will be as sharply focused as is possible at that stage.

3.3.1 The Sheriff should ask the respondent or his or her solicitor to indicate in general terms the grounds of his or her opposition to the petition.

3.3.2 The Sheriff should ask the respondent or his or her solicitor whether the respondent has applied, or proposes to apply, for legal aid. If so, the respondent should be able to give the Sheriff at least as much information as is or will be in the legal aid memorandum.

3.3.3 The Sheriff should ask the respondent or his or her solicitor whether it is intended to instruct counsel or any expert witness and, if so, whether legal aid for that purpose has been or is to be applied for.

3.3.4 The Sheriff should ask the respondent or his or her solicitor whether they will be seeking to recover other documents and, if so, which documents. The Sheriff should ask the petitioners' solicitor if the petitioners will make these available to the respondent informally without the need for a commission and diligence, and if so, should fix a date by which those documents should be lodged with the court.

3.3.5 It is now for the Sheriff to determine further procedure. In many cases it will be advantageous to appoint a second hearing and thereafter a pre-proof hearing, as recommended in the following paragraphs. In other cases, however, the Sheriff may in the exercise of his or her discretion dispense with either or both of those hearings. For example, in a very simple case the Sheriff may instead continue the first hearing for a short period in order that any outstanding matters may be addressed and then, if satisfied that the issues in dispute have been clearly identified and the preparations for proof will be simple and straightforward, obtain the parties' estimates of the duration of the proof and assign a diet of proof (as in paragraphs 4.3.4-4.3.6 below).

3.3.6 If the Sheriff decides that a second hearing is appropriate, he or she should advise the parties that he or she is now going to fix a second hearing; and that before the second hearing they must have lodged the joint minute and minute of disputed issues referred to below, and must be prepared to give the Sheriff the information referred to below.

3.3.7 The date fixed for the second hearing should normally be no more than six weeks after the date of the first hearing.

#### **4. Second hearing**

4.1 The object of the second hearing is to make further preparations for the proof, to identify clearly the issues in dispute and to avoid having a lengthy and poorly focused proof. 'The principal duty of representatives in adoption proceedings is to identify the issues in dispute, and to lead evidence in relation to those issues.' (Macphail, *Sheriff Court Practice* (2<sup>nd</sup> edn) paragraph 28.111). The following guidance is intended to assist the parties' representatives to carry out that duty.

##### *Before the second hearing*

#### THE JOINT MINUTE

4.2.1 Before the hearing the parties should enter into a joint minute. It is the responsibility of the petitioners' solicitor to draft the joint minute and send it to the respondent's solicitor for revision. The petitioners' solicitor may use as a basis of the joint minute the material facts in the local authority's report which are considered not to be controversial. The parties' solicitors are expected to co-operate in the framing of the joint minute. It should be signed and lodged at least two working days before the hearing.

#### THE STATEMENT OF DISPUTED ISSUES

4.2.2 Before the hearing the respondent's solicitor should prepare a statement of disputed issues. It should specify the matters in the local authority's report which the respondent disputes, and should refer to the numbered paragraphs of the report in which these matters are

stated. It should also specify any other issues which are not mentioned in the report but which the respondent intends to raise at the proof. Like the joint minute, it should be signed and lodged at least two working days before the hearing.

#### CONSIDERATION OF LEGAL ISSUES, EVIDENCE AND PROOF DATES

4.2.3 Before the hearing the parties' solicitors should consider the matters mentioned in paragraphs 4.3.1-4.3.5 below in order that they may provide the Sheriff with sufficient information to enable him or her to conduct the hearing as provided for in these paragraphs.

*At the second hearing*

#### CONSIDERATION OF JOINT MINUTE AND STATEMENT

4.3.1 At the hearing the Sheriff should consider with the parties the contents of the joint minute and the statement of disputed issues. If necessary, the Sheriff should ask whether further facts can be agreed by joint minute. He or she may also seek clarification of any matter in the statement of disputed issues.

#### LEGAL ISSUES

4.3.2 The Sheriff should ask the parties if there are any questions of admissibility of evidence or any other legal issues, including any questions under the European Convention on Human Rights, that are likely to arise at the proof. If so, the Sheriff should consider whether they could with advantage be determined at this hearing rather than at the proof and, if so, should determine them at this hearing.

#### EVIDENCE

4.3.3 It should be noted that evidence may be presented in the form of affidavits or other written documents (Civil Evidence (Scotland) Act 1988, section 2; *McVinnie v McVinnie* 1995 SLT (Sh Ct) 81; *Glaser v Glaser* 1997 SLT 456). The Sheriff is bound to consider reports placed before him or her even if the authors are not called to speak to them, and the strict rules of evidence do not apply (*T, Petitioner* 1997 SLT 724 AT 730L). Such

considerations may render the attendance of certain witnesses unnecessary, although for other reasons it may be preferable to call the author of a document. The Sheriff should therefore invite the parties to apply their minds to the question whether any evidence might be appropriately presented in the form of an affidavit or other document, and encourage them to decide that question at this hearing.

4.3.3.1 Where the author of a report is to be called as a witness, the Sheriff should order that the report is to be held to be equivalent to the witness's examination-in-chief, unless for special reasons he or she otherwise directs.

4.3.3.2 The Sheriff should ask the parties what further productions, if any, they intend to lodge. Any difficulties over the obtaining or lodging of documents should be raised and if possible resolved.

#### ESTIMATE OF DURATION OF PROOF

4.3.4 'It is essential . . . that the Sheriff should be given at the outset a carefully considered forecast of the time which the proof is expected to take.' (*Lothian Regional Council v A* at 861L). It is therefore very important that the parties should pay close attention to this matter. The Sheriff should ask each party to specify in detail how long he expects to take in the presentation of his own evidence and in the cross-examination of the other side's witnesses. On the basis of that information the Sheriff should assess how many days should be set aside for the proof (including closing submissions). At the proof, parties may expect to be held to the estimates given at this hearing, unless in exceptional circumstances.

#### ASSIGNING THE DIET OF PROOF

4.3.5 Having assessed how many days are needed for the proof, the Sheriff should assign the diet. He or she should do so at the hearing, if necessary after consulting the Sheriff Clerk. The parties should have come to the hearing with a list of dates when their witnesses, including any expert witnesses, and counsel, if any, will be available. It is not generally a valid ground for postponing a proof that a party wishes to instruct particular counsel. The Sheriff should not, unless in highly exceptional circumstances, pronounce an interlocutor

allowing a proof on dates to be afterwards fixed. If the dates cannot be fixed at the hearing, it will usually be preferable to continue the hearing for a few days and fix the dates at the continued hearing. The dates assigned should be consecutive working days.

4.3.6 The reason for those arrangements is that the Sheriff 'should be released from other duties so that he can give priority to the case without interruption and until it has been completed by the issuing of his interlocutor. Special arrangements of that kind are necessary if the sheriff is to maintain the continuity of thought throughout the proceedings which is so necessary to a proper disposal of the case.' (*Lothian Regional Council v A* at 862A-B).

#### ASSIGNING THE PRE-PROOF HEARING

4.3.7 The Sheriff should also assign a pre-proof hearing on a date some two weeks before the proof.

4.3.8 In addition to assigning the pre-proof hearing the Sheriff should assign a date two weeks prior to the pre-proof hearing by which the parties must have lodged their productions and exchanged list of the witnesses who are to give oral evidence.

#### **5.Pre-proof hearing**

5.1 The purpose of the pre-proof hearing is to ascertain whether the parties are still in dispute and, if so, whether they are fully prepared for proof. The timetable must, however, be respected and a proof will be discharged only in highly exceptional circumstances.

#### **6.The proof**

6.1 If the guidance above is followed, the proof should not be unduly long. In any event, 'there is a heavy responsibility on the parties' representatives to exercise all reasonable economy and restraint in their presentation of the evidence and in their submissions to the court.' (*Lothian Regional Council v A* at 862B).

6.2 Parties may expect to be held to their estimates of time taken for examination and cross-examination which they gave at the second hearing.

6.3 The Sheriff may intervene to discourage prolixity, repetition, the leading of evidence of unnecessary witnesses and the leading of evidence on matters which are unlikely to assist the court to reach a decision.

6.4 Before the hearing on evidence, the Sheriff may require the parties to submit draft findings in fact, or skeleton arguments, or both.

### **C. ADOPTION ORDERS**

7.1 Part A of this Practice Note applies to contested applications for adoption orders.

7.2 Part B of this Practice Note applies to contested applications for adoption orders, *mutatis mutandis*.

7.3 In paragraph 2.3, for the reference to rule 2.7(1) there shall be substituted a reference to rule 2.25(1), and for the reference to rule 2.8(1), (2) a reference to rule 2.26(1), (2).

7.4 In paragraph 3.1, for the first two sentences there shall be substituted:

'Rule 2.28(1) requires the Sheriff to fix 'a diet of hearing' on receipt of the reports of the reporting officer and curator *ad litem* in respect of a child who is not free for adoption. Rule 2.28(2) provides that the Sheriff may fix 'a diet of hearing' on receipt of the report of the curator *ad litem* in respect of a child who is free for adoption. The hearing referred to above as 'the first hearing' is any diet of hearing fixed in terms of either of these rules.'

7.5 For paragraph 3.2.1 there shall be substituted:

'3.2.1 He or she should have read all the reports lodged with the petition and will have checked that a report by the local authority or adoption agency contains the information required by rule 2.21(3).'

7.6 In paragraph 3.2.2, for the reference to rule 2.8(1) and (2) there shall be substituted a reference to rule 2.26(1) and (2).

7.7 In paragraph 3.2.4, for the reference to rule 2.11(2) there shall be substituted a reference to rule 2.28(3).

#### **D. PARENTAL RESPONSIBILITIES ORDERS**

8.1 Part A of this Practice Note applies to contested applications for parental responsibilities orders.

8.2 Part B of this Practice Note applies to contested applications for parental responsibilities orders, *mutatis mutandis*.

8.3 In paragraph 2.3, for the reference to rule 2.7(1) there shall be substituted a reference to rule 2.39(1), and for the reference to rule 2.8(1), (2) a reference to rule 2.40(1), (2).

8.4 In paragraph 3.1, for the reference to rule 2.11(1) there shall be substituted a reference to rule 2.42(1).

8.5 For paragraph 3.2.1 there shall be substituted:

'3.2.1 He or she should have read any report received in terms of section 73(14) of the 1995 Act.'

8.6 In paragraph 3.2.2, for the reference to rule 2.8(1) and (2) there shall be substituted a reference to rule 2.40(1) and (2).

8.7 In paragraph 3.2.4, for the reference to rule 2.11(2) there shall be substituted a reference to rule 2.42(2).

**APPENDIX**

**SPECIMEN SUBJECT SHEET**

(Paragraph 1.4)

*[To be added]*

Sheriff Principal of Lothian and Borders

00 September 2003



## **Summary of Questions**

### **Legal Options for Children Providing Permanence and Stability**

1. What are views on the range of options?
2. Should there be a less secretive and more open approach in adoption law and rules, while preserving necessary confidentiality?

### **Contact**

3. What are views on the place of contact in permanence?
4. Should the law allow the possibility of contact conditions in all circumstances and all types of orders?

### **Freeing Orders**

5. Should freeing be abolished?
6. If it is abolished, should there be any replacement pre-adoption order?

### **Role of the Hearing System in Permanence**

7. What are views on the suggested ideas and what are other options?
8. What, if any, should be the role of safeguarders in advice hearings in permanence cases?

### **Medical Issues**

9. What are views on the issues raised, (a) to (f)?

## **Court Processes in Adoption, including Grounds and Delays in Court**

10. Should the welfare test in adoption cases stay the same?
11. Do the provisions about children's views need changing, and if so, how?
12. Do the provisions about consideration of race, religion, culture and language need changing, and if so, how?
13. Do the provisions about minimum necessary intervention need changing, and if so, how?
14. Should the grounds for dispensing with agreement be changed?
15. Should there be a ground based on a birth parent's inability to care?
16. Should conditions be allowed in all adoption and pre-adoption orders?
17. If so, should the test for contact conditions be 'exceptional circumstances' or something else?
18. Should there be a statutory mechanism for enforcement of conditions?
19. What are views on the suggestions about reducing delay and what are other options?

## **Revocation**

20. Should there be a limited right to seek revocation of adoption?
21. If so, what should the grounds be?

## **Public Fostering**

22. Would clarification of s.25 placements be helpful?
23. What are views on the suggestions about emergency and immediate placements?
24. Should the placement provisions for supervision requirements, in reg.15, be changed?
25. Should the arrangements with voluntary organisations be clarified, and if so, how?
26. Should reg.12(4) be amended?
27. Should there be regulations for 'looked after' children on overnight visits, and if so, what should they say?

### **Support in Non-adoptive Permanent Placements**

28. Should there be changes to the support system for children 'looked after' on a permanent fostering basis?
29. Should there be changes to the support available to children who were 'looked after' and are then cared for on a s.11 order?

### **Support in Adoption Placements**

30. Should the adoption support provisions in the 1978 Act be expanded?
31. Should the local authority agency where the person seeking adoption support lives be liable for support, whatever the age of the adoptee?
32. Should there be a duty on local authority agencies to assess for the need for adoption support?
33. Should adoption support contracts be mandatory in all agency adoptions?
34. Should s.22 of the 1995 Act (children 'in need') be extended to include some or all adopted children?
35. Should there be one adoption allowances scheme applying throughout Scotland?

### **Tracing and Access to Adoption Records**

36. Should After-Adoption mediation and tracing services have a greater profile, with greater publicity for agencies and the public, including use of the DH Guidance?
37. Should there be a licensing of information and intermediate service provision, allowing organisations other than local authorities and adoption agencies to work in this area?
38. Should there be positive rights to information for birth relatives, while protecting the rights of adoptees?
39. Should there be positive rights to information for other parties, while protecting the rights of adoptees?
40. How could adoptees' rights best be protected?

## **Private Fostering**

41. Should individual private foster carers be registered with local authorities or the Care Commission or not at all?
42. If there is registration, what method of assessment should be used?
43. If there is no registration, should there be clearer rules about the level of checks required?
44. Should there be a requirement on local authorities or the Care Commission to publish information about private fostering?

## **Birth Families in Adoption including Unmarried Fathers**

45. Should unmarried fathers without responsibilities and rights be given more legal involvement in adoption and freeing cases? If so, what rights should they be given?
46. Should there be a legal duty on local authorities/agencies to assess family members for long term care, even if the end result is formally to exclude them?
47. If so, should there be rules about which relatives are included, and time-limits within which they come forward?
48. Should relatives be given a statutory right to enter the freeing or adoption court process to have their say on welfare?
49. What duties should be placed on local authorities/adoption agencies when mothers/parents wish to relinquish children?

## **Children Waiting for Permanence and Adoption**

50. What are views on these issues?

## **Panels: Fostering, Adoption and Permanence**

51. Should 'Carer' Panels deal with approval of all carers, foster and adoptive ones?
52. Should agencies continue to have adoption/permanence panels as part of the planning process for children?
53. Should children have a right to attend a panel looking at plans for them?

54. Should birth parents have a right to attend panels looking at plans for their children and matching them with adopters?
55. What are views on the proposals to amend the details of provisions for panels?

### **Foster Carers and Processes for Them**

56. Should there be a list of prescribed offences, which would automatically bar applicants from approval or re-approval?
57. Should there be a statutory appeals system for applicants who are refused approval or re-approval? Should it be a national one?

### **Adopters and Processes for Them**

58. Should there be a change in the law about who can adopt?
59. Should regulations or guidance include more details about information to be made available by agencies to those thinking of applying for assessment as adopters?
60. Should there be a list of prescribed offences, which would automatically bar applicants from approval?
61. Should there be a statutory appeals procedure for applicants who are refused approval as adopters? Should it be a national one?
62. Should there be clearer, stronger duties on agencies to pass on information when a child is placed?
63. Should there be a duty to provide information before a match is made? If so, how much information should be given?

### **Adoption Agencies**

64. Acknowledging that the Executive's Phase I Response asked if there should be a national adoption service, and most respondents said 'No', are there further views on this matter?
65. Would new regulations and/or guidance help tighten up planing procedures and reduce unnecessary delays?
66. Should the timetables for adoption agencies in the 1996 Regs be reviewed?
67. Should there be regulations and/or guidance about the role of agency decision-makers?

## **Curators and Reporting Officers**

- 68. Should an adoption curator always be appointed in every permanence case?
- 69. Should the system be centralised nationally?
- 70. Should adoption curators be paid for out of the legal aid fund?

## **Step-Parent Adoption**

- 71. Should there be specific processes for step-parent adoptions?
- 72. Should an unmarried step-parent be able to adopt?
- 73. If so, should there be limits on which step-parents can adopt, such as the length of relationship?
- 74. What are views on step-parent agreements/orders and particularly the provisions in s.112 of the 2002 Act?