

**THE INTERESTS OF THE
CHILD IN
PUBLICLY FUNDED FAMILY
CASES
IN SCOTLAND**

Key Areas for Consideration

- current system and its effectiveness
- costs of publicly funded cases and control measures
- current reviews underway

CHILDREN (SCOTLAND) ACT 1995

- rights of parents to have a child live with them;
- to control, direct or guide their upbringing;
- to maintain personal relations and direct contact with them if living apart; and
- to act as their legal representative

THE CHILDREN (SCOTLAND) ACT 1995

Parental rights exist only to allow the parent to fulfil their parental responsibilities to the child. Responsibilities are responsibilities only to the extent that compliance is practicable and **in the child's interest**

Section 11 – deals with orders relating to parental responsibilities

Central Principles of the Act

In actions involving section 11 orders, the court:

(a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and

(b) taking account of the child's age and maturity, the court should give the child an opportunity to indicate whether he wishes to express his views; if he does so wish, give him an opportunity to express them; and have regard to such views as he may express.

Child Welfare Hearings

- introduced by the 1995 Act as a mechanism for dealing with issues concerning the welfare of children
- are intended to resolve disputes more quickly and to avoid, where possible, any adversarial approach and civil proofs (trials)
- Should operate using an informal shrieval approach and should involve the parties and any children wishing to attend. They should be held in a closed court

Options for a Sheriff

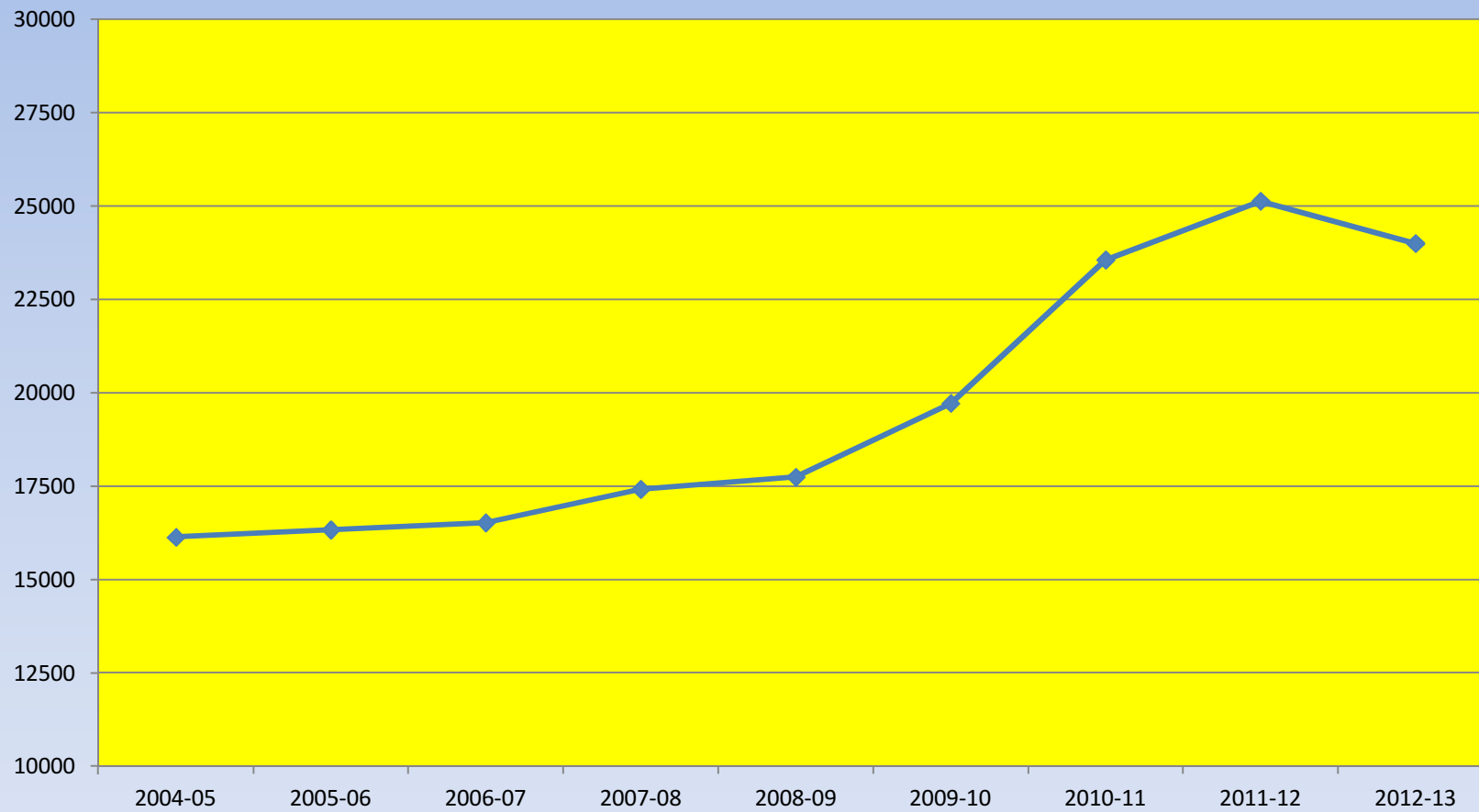
- Make order(s) about residence/contact
- Decide to make no order(s)
- Refer parties to mediation
- Order a report from a court reporter
- Appoint a curator to represent the child
- Speak to the child personally in chambers
- Fix further child welfare hearings or a proof

Scottish Government Review - 2010

Findings on Child Welfare Hearings

- Hearings usually meant the level of contact was increased and maintained
- Sheriffs believed that the hearings worked well as a mechanism to address the issues and the parties directly
- More than half of those who brought actions reported experiencing moderate or severe stress
- Most pursuers felt prepared for a hearing but 70% were nervous about it and 50% did not speak at all during the hearing

Family expenditure £000 millions



Sheriff Court Family Costs 2011-12

- Civil family expenditure £17.9 million
(excluding VAT on solicitor and counsel fees)
- £8.3 million (46%) was paid in the top 10% most expensive paid accounts
- Highest single category of expenditure was contact - £7.2 million

Supreme Court Judgment

“The cost of the proceedings before the Sheriff, in particular, was wholly disproportionate to the complexity of the issues which had to be resolved. It is a cost which could only arise in proceedings of this kind where the parties were publicly funded: it is inconceivable that any reasonable person would expend resources on this scale on a dispute over contact if the money was coming out of his or her own pocket.”

Lord Reed NJDB-V-JEG UKSC 2012

Supreme Court Judgment

“The proceedings for variation of the contact order began in December 2004 when S was four years of age and ended in January 2010 when he was nine. The glacial pace of the proceedings was itself inimical to the best interest of the child”

Lord Reed NJDB-V-JEG UKSC 2012

“Fog of war”

“A significant amount of the evidence in this case consisted of disputed versions of historical events. This evidence was of limited assistance....the overall affect was to create a “fog of war” which has made reaching a decision in this case more difficult than it need have been if the evidence had been properly focussed on the issues.”

Falkirk Sheriff Court

Warring Parents

“It is not acceptable that warring parents be allowed to dictate the speed at which the action progresses whilst all the while the delay and uncertainty are impacting adversely on the welfare of their child in respect of whom they have very heavy responsibilities”

Banff Sheriff Court December 2012

Wishes of the Child

“I just want this all to stop, stop court and stop counsellors and people coming to ask me questions”

Psychologist's Report
Banff Sheriff Court 2013

Conduct and High Costs

- Lack of private client reality
- Criticisms of behaviour in judgments
- Behaviour leading to significant costs through reports and psychologist involvement
- Multiple parties legally aided
- Employment of counsel
- Lengthy proofs

Bar Reporter Costs in Family Cases

- 2010-11 - £4,088,546
- 2011-12 - £4,116,038
- 2012-13 - £4,442,854

Stage Reports

- Time based reports after 6 months and then every 12 months while the case continues
- If no report is lodged the grant is suspended and potentially terminated
- Unprompted reports must be submitted if there are material developments
- If unprompted reports not made where needed we may refuse to pay the solicitor

Sheriff Court Appeal Judgment

“It is high time that some means of effectively limiting the expenditure of public funds on such litigation can be found”

Paisley Sheriff Court – August 2012

Cost Limits

- Attached to grants of civil legal aid for applications made on or after 21 March 2013
- Each type of case has its own limit to cover all costs including fees and outlays
- Limit can be exceeded on cause shown
- Intended to introduce better, more cost effective case management

Scottish Government Working Group on Reporters

Scottish Civil Courts Review - 2009

Recommendations about court reporters
covering

- recruitment and qualifications;
- training and remuneration;
- clarity of remit for appointees; and
- a system for monitoring the quality of the work done.

Lord Brailsford's Review

- Set up following Supreme Court ruling in NJDB
- Comprises lawyers, judges and the Board
- Its purpose is to review current family law procedures, in particular looking at
 - simplified rules and procedures
 - abbreviated pleadings
 - partly litigant friendly systems

Communication

“I try to make them think they’re going to be parents all their lives, so they have to communicate”.

Comment by a sheriff 2010