SCOTTISH STATUTORY INSTRUMENTS

2009 No. 29

SHERIFF COURT

Act of Sederunt (Child Care and Maintenance Rules) Amendment 2009

Made - - - -	*30th January 2009*
Coming into force - -	*2nd March 2009*

The Lords of Council and Session, under and by virtue of the powers conferred by section 32 of the Sheriff Courts (Scotland) Act 1971(**a**) as read with sections 19 and 31(3) of the Maintenance Orders (Reciprocal Enforcement) Act 1972(**b**), and of all other powers enabling them in that behalf, having approved draft rules submitted to them by the Sheriff Court Rules Council in accordance with section 34 of the said Act of 1971, do hereby enact and declare:

Citation and commencement, etc.

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Child Care and Maintenance Rules) Amendment 2009 and comes into force on 2nd March 2009.

(2) This Act of Sederunt is to be inserted in the Books of Sederunt.

Amendment of Chapter 5 of the Child Care and Maintenance Rules

2.—(1) Chapter 5 (maintenance orders) of the Act of Sederunt (Child Care and Maintenance Rules) 1997(**c**) is amended in accordance with the following subparagraphs.

(2) In rule 5.1 (interpretation), omit the definitions "court in a specified state" and "specified state"(**d**).

(3) In the cross-heading above rule 5.16A(**e**), omit "in a specified state".

(4) In rule 5.16A (application for transmission of order for enforcement in the USA), in paragraph (1), omit "a court in a specified state in" and "registration and".

(5) After rule 5.17 (service on defender in Hague Convention Country) insert–

(**a**) 1971 c.58. Section 32 was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c.73), Schedule 2, paragraph 12, the Civil Evidence (Scotland) Act 1988 (c.32), section 2(4), the Children (Scotland) Act 1995 (c.36), Schedule 4, paragraph 18(2), the Adults with Incapacity (Scotland) Act 2000 (asp 4), schedule 5, paragraph 13 and the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17), section 43 and was extended by the Child Support Act 1991 (c.48), sections 39(2) and 49, the Vulnerable Witnesses (Scotland) Act 2004 (asp 3), section 14(2) and the Bankruptcy and Diligence (Scotland) Act 2007 (asp 3), section 33.

(**b**) 1972 c.18.

(**c**) S.I. 1997/291, as amended by S.S.I. 2000/388, 2002/560, 2005/190, 2006/75 and 2007/468.

(**d**) The definitions of "court in specified state" and "specified state" were inserted by S.S.I. 2000/388, rule 2(2).

(**e**) Rule 5.16A was inserted by S.S.I. 2000/388, rule 2(3).

"Service of notice of proceedings on payer residing in USA

5.17A. Where service of a document is executed in accordance with section 5(4)(a) of the 1972 Act as applied to the United States of America, the Scottish Ministers shall obtain and lodge with the sheriff clerk a certificate by a person who is conversant with the law of the United States of America and who practises or who has practised law in that country or is a duly accredited representative of the Government of the United States of America, stating that the method of service employed is in accordance with the law of the place where service was executed.".

(6) In rule 5.22 (application under section 4 or 5 of the 1972 Act), for "be brought as an ordinary cause" substitute "proceed as an ordinary cause in accordance with the terms of Chapter 33 (family actions) or 33A (civil partnership actions), as the case may be, of the Ordinary Cause Rules".

(7) After rule 5.22 insert–

"Representations or evidence by payer residing in the USA

5.22A.—(1) Where notices are provided in accordance with section 5(4) of the 1972 Act as applied to the United States of America, the sheriff clerk shall notify the recipients of the notices that if the payer wishes the court in Scotland to take into account any representations made by him or any evidence adduced by him or on his behalf, then such representations or evidence must be lodged with the sheriff clerk not later than 21 days before the date fixed for the hearing.

(2) Where such representations are lodged, or such evidence is lodged, the sheriff clerk shall serve a copy of the representations or evidence–

(a) where the payee is represented by a solicitor, on that solicitor, by–

(i) personal delivery;

(ii) facsimile transmission;

(iii) first class ordinary post; or

(iv) delivery to a document exchange; and

(b) where the payee is not represented by a solicitor, on the payee, by any of the methods of service provided for in Chapter 5 of the Ordinary Cause Rules (citation, service and intimation).

Application by payer residing in the USA for variation or revocation of order

5.22B.—(1) Where an application is made in accordance with section 5(6) of the 1972 Act as applied to the United States of America, the sheriff clerk shall give notice of institution of the proceedings, including notice of the substance of the application, in accordance with subparagraph (2) or (3).

(2) Where the payee is represented by a solicitor, the document referred to in subparagraph (1) shall be served on that solicitor by–

(a) personal delivery;

(b) facsimile transmission;

(c) first class ordinary post; or

(d) delivery to a document exchange.

(3) Where the payee is not represented by a solicitor, the document referred to in subparagraph (1) shall be served on the payee by any of the methods of service provided for in Chapter 5 of the Ordinary Cause Rules (citation, service and intimation).".

(8) In rule 5.23 (evidence), for subparagraph (1) substitute–

"(1) Where any request to take evidence is made by or on behalf of a court in terms of section 14 of the 1972 Act, or section 14 of the 1972 Act as amended by any Order in

Council made under Part III of that Act, or by the Secretary of State in terms of section 38 thereof, such evidence shall be taken before a sheriff of the sheriffdom in which the witness resides and shall be–

(a) recorded by tape recording or other mechanical means approved by the court; or

(b) taken down by a shorthand writer, or where the sheriff so directs, by the sheriff,

and the extended notes of evidence certified by the sheriff shall be the notes of the evidence taken.".

(9) After rule 5.23 insert–

"Taking of evidence at request of a court in the USA

5.23A. Where evidence is taken by a sheriff under section 14(1) of the 1972 Act as applied to the United States of America, rules 29.7 (citation of witnesses), 29.9 (second diligence against a witness) and 29.10 (failure of witness to attend) of the Ordinary Cause Rules shall apply in respect of the matters set out in those rules.

Requests for the taking of evidence by a court in the USA

5.23B. An application made to a sheriff for the purposes of section 14(5) of the 1972 Act as applied to the United States of America shall follow as nearly as may be the procedure set out in rule 28.14 of the Ordinary Cause Rules (letters of request), subject to any modifications necessitated by that provision of the 1972 Act as so applied.

Communication with courts in the USA

5.23C. In so far as applicable to outgoing orders under the 1972 Act to the United States of America, for the purposes of the provisions in Part I of the 1972 Act, the sheriff may communicate with a court or courts in the United States of America in such circumstances and in such manner as he thinks fit.

Disapplication of provisions where payer resides or has assets in the USA

5.23D. In any case in which the payer under a maintenance order made by a court in Scotland is residing or has assets in the United States of America, none of the provisions in this Part shall apply except this rule and rules 5.16A, 5.17A, 5.21, 5.22, 5.22A, 5.22B, 5.23, 5.23A, 5.23B and 5.23C.".

(10) After rule 5.37 (application to set aside registration of, or to set aside decision not to register, an order made in a Hague Convention Country) insert–

"Taking of evidence at the request of a court in the USA

5.37A. Where evidence is taken under section 38(2) of the 1972 Act in consequence of a request made by a court in the United States of America under section 38(1) of that Act, rules 29.7 (citation of witnesses), 29.9 (second diligence against a witness) and 29.10 (failure of witness to attend) of the Ordinary Cause Rules shall apply in respect of the matters set out in those rules.

Communication with courts in the USA

5.37B. In so far as applicable to incoming orders under the 1972 Act from the United States of America, for the purposes of the provisions in Part I of the 1972 Act, the sheriff may communicate with a court or courts in the United States of America in such circumstances and in such manner as he thinks fit.

Disapplication of provisions in respect of orders made by courts in the USA

5.37C. In any case in which a maintenance order is made by a court in the United States of America which falls to be dealt with under sections 6 to 11 of the 1972 Act as those provisions are applied to the United States of America, none of the provisions in this Part shall apply except this rule and rules 5.30, 5.32, 5.37A and 5.37B.".

A.C.HAMILTON
Lord President
I.P.D.

Edinburgh
30th January 2009

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt makes amendments to Parts III and V of Chapter 5 of the Child Care and Maintenance Rules 1997 in consequence of four Orders in Council:

(a) the Reciprocal Enforcement of Maintenance Orders (United States of America) (Scotland) Order 2007 (S.S.I. 2007/354),

(b) the Recovery of Maintenance (United States of America) (Scotland) Order 2007 (S.S.I. 2007/355),

(c) the Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 (S.I. 2007/2005), and

(d) the Recovery of Maintenance (United States of America) Order 2007 (S.I. 2007/2006).

All four of these Orders in Council, which came into force on 1st October 2007, modified provisions in the Maintenance Orders (Reciprocal Enforcement) Act 1972.

Paragraphs 2(1) to (4) amend references in rules 5.1 and 5.16A of the 1997 Rules to reflect the fact that there is now a single federal authority in the United States of America in relation to the reciprocal enforcement of maintenance orders, rather than the previous system whereby individual states had their own central authority to deal with such matters.

Paragraph 2(5) inserts a new rule 5.17A into the 1997 Rules, requiring confirmation of the lawful service of notice of certain types of proceedings raised in Scotland on payers who reside in the USA.

Paragraph 2(6) amends rule 5.22 of the 1997 Rules so as to provide that an application brought under section 5 of the 1972 Act as applied to the USA shall proceed as an ordinary cause in accordance with either Chapter 33 or 33A of the Sheriff Court Ordinary Cause Rules.

Paragraph 2(7) inserts a new rule 5.22A into the 1997 Rules to make provision regarding the applicable procedure for the sheriff court in taking into account any representations or evidence from a payer residing in the USA, after notices are issued under section 5(4) of the 1972 Act, as applied to the USA.

Paragraph 2(7) also inserts a new rule 5.22B setting out the requirements to give notice of the institution of proceedings where an application for variation or revocation of an order is made under section 5(6) of the 1972 Act, as applied to the USA.

Paragraph 2(8) amends rule 5.23 of the 1997 Rules so as to provide for evidence taken under specified provisions of the 1972 Act to be recorded by tape recording or other mechanical means.

Paragraph 2(9) inserts new rules 5.23A, 5.23B, 5.23C and 5.23D into Part III of Chapter 5 of the 1997 Rules. These rules relate to the procedure for the taking of evidence by a sheriff at the request of a court in the USA, the procedure for making an application to request that a court in the USA takes or provides evidence, communication with courts in the USA and the disapplication of certain rules in Part III of Chapter 5 of the 1997 Rules in cases where a payer under a maintenance order made by a court in Scotland is residing or has assets in the USA.

Paragraph 2(10) inserts new rules 5.37A, 5.37B and 5.37C into Part V of Chapter 5 of the 1997 Rules. These rules relate to the procedure for the taking of evidence by a sheriff at the request of a court in the USA, communication with courts in the USA and the disapplication of certain rules in Part V of Chapter 5 of the 1997 Rules in cases where a payer under a maintenance order made by a court in the USA is residing or has assets in Scotland.

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