EXECUTIVE NOTE

THE ADOPTION AND CHILDREN (SCOTLAND) ACT 2007 (COMMENCEMENT NO. 4, TRANSITIONAL AND SAVINGS PROVISIONS) AMENDMENT ORDER 2012

SSI 2012/99

Introduction and Legislative Context

The above instrument (the 2012 Order) is made in exercise of the powers conferred by sections 116(1) and 117(2) and (3) of the Adoption and Children (Scotland) Act 2007. The instrument is subject to negative resolution procedure.

This instrument makes amendments to the Adoption and Children (Scotland) Act 2007 (Commencement No.4, Transitional and Savings Provisions) Order 2009 ("the Transitional Order").

Policy Objective

The Adoption and Children (Scotland) Act 2007 ("the 2007 Act") came into force on 28 September 2009. That Act created a new order, the Permanence Order, which may be made in respect of children who require local authority supervision. The Permanence Order vests in the local authority the right to determine where the child shall reside but such orders may also allow a court to grant authority for the child to be adopted in the same way as a Freeing Order, made under the Adoption (Scotland) Act 1978 ("the 1978 Act"), but with greater flexibility regarding the allocation of parental responsibilities and rights. Permanence orders therefore replaced Freeing Orders.

The Transitional Order makes transitional and savings provisions. Chapter 4 of Part III of that Order makes provision for Freeing Orders granted under the 1978 Act to continue to have effect until 28th September 2010 (a savings period of 12 months), unless an adoption order is made, at which time they will be deemed to be permanence orders granting authority for the child to be adopted.

The 2012 Order, then, is designed to resolve a potential uncertainty in the way Freeing Orders are treated where an application was made before 28th September 2009 but not completed within the 12 month savings period .

The Transitional Order was silent on what to do with these outstanding Freeing Orders as it had been expected that all proceedings would have been completed within the 12 month period. A decision of the Inner House of the Court of Session on 7 July 2011 made it clear that Sheriffs should read in to the Transitional Order provision requiring that all Freeing Orders granted after 28th September 2010 should be treated as Permanence Orders. This ruling provides the necessary legal clarity to permit outstanding Freeing Orders to be treated as Permanence Orders. The purpose of this 2012 Order is to remove any potential doubts amongst practitioners and potential adopters as to the status of Freeing Orders granted after 28th September 2010.

Legislative Background

The 2007 Act came fully into force on 28 September 2009 at which point most of the 1978 Act, and its associated regulations, along with certain sections of the Children (Scotland) Act 1995, were repealed.

The principal amendment to the Transitional Order is to article 18. Amendments to articles 16 and 21 are made in consequence of the principal amendment.

Applications for freeing orders under the 1978 Act

Article 18 makes savings provisions for applications for freeing orders made before 28th September 2009. It is amended by inserting a new paragraph (2) which makes it clear that an order which is granted following such an application and made outwith the 12 month savings period, will be treated as a permanence order - "(2) Where an application continues by virtue of paragraph (1) and a freeing order is granted by the court on or after 28th September 2010 the child who is subject to that freeing order shall be treated as if they were subject to a permanence order and article 17(2) and (3) applies."

Consultation

The 2012 Order is covered by the consultation undertaken for the 2007 Act.

Equality Impact Assessments

The 2012 Order is covered by the equality impact assessment undertaken for the 2007 Act.

Financial Effects

As the 2012 Order seeks only to ensure the 2007 Act provisions are implemented as originally expected there are not expected additional costs associated with this instrument.

Contact

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