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Children: Grandparents and others who require leave of the court to apply for access

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Summary

Access for grandparents to their grandchildren should initially be sought through agreement with the parents or carers of the child. However, where this cannot be agreed, the grandparent can seek the leave of the court, and if successful, apply for a child arrangements order to agree access. Child arrangements orders were introduced through the *Children and Families Act 2014* (replacing contact and residence orders) and decide where a child lives as well as the contact they have with any person; they principally consider the welfare of the child in any decision.

The process for grandparents and others differs from the process that parents undertake, as grandparents have the additional step of seeking leave of the court first. This additional step is in place “to act as a filter to sift out those applications that are clearly not in the child’s best interests”. The granting of leave does not raise any presumption that the application for a child arrangements order will succeed.

The Labour Government produced a Green Paper in 2010 setting out an intention to remove the requirement to seek leave of the court. The Family Justice Review was then set up in March 2010 and supported by the Coalition Government when it came into government. The Review reported in November 2011 that “the need for grandparents to apply for leave of the court before making an application for contact should remain. This prevents hopeless or vexatious applications that are not in the interests of the child”. The Government accepted this recommendation and this remained the government position of the Coalition and current Conservative Government.

This policy applies to England and Wales. The arrangements for Scotland are also outlined in this paper.

1. Child Arrangements Orders

This section applies to England and Wales only.

1.1 What is a child arrangements order

Child arrangements orders are court orders regulating the living and contact arrangements in relation to a child following, for example, parental separation. They were introduced through the *Children and Families Act 2014* on 22 April 2014 to replace the previous framework of contact and residence orders.

A child arrangements order can determine where a child lives, when a child spends time with a person named in the order, and when and what other types of contact, such as phone calls, take place with any person.¹

1.2 The requirement to seek the leave of the court before applying

For grandparents, where contact cannot be agreed with the parents or carers of the child, they are able to apply to a court for a child arrangements order that, if made, can give them contact with a grandchild (or indeed residence if that is what they seek); however, unlike a parent, **a grandparent typically first requires the leave of the court before they can apply – they are not automatically entitled to apply for a child arrangements order**, although there may be exceptions (see box below).

¹ GOV.UK, [Looking after children if you divorce or separate](#), webpage [taken on 28 April 2016]

Automatic Entitlement for grandparents

A grandparent may be automatically entitled to apply for a child applications order under section 10(5) of the *Children Act 1989* if they are;

- any person with whom the child has lived for a period of at least three years; section 10(10) of the *Children Act 1989* states this period 'need not be continuous but must not have begun more than five years before, or ended more than three months before, the making of the application';
- any person—
 - who has the consent of each of the persons named in a child arrangements order in force relating to with whom the child is to live or when the child is to live with any person;
 - who has the consent of each person in who favour the order was made in any case where there is an existing order for care in force²;
 - who has the consent of a local authority in any case where the child is in the care of that local authority;
 - who has parental responsibility for the child by virtue of provision made under section 12(2A); or
 - in any other case, has the consent of each of those (if any) who have parental responsibility for the child³;
- a relative of a child, if the child has lived with the relative for a period of at least one year immediately preceding the application.⁴

Any person, including a grandparent, may make a child applications order if they obtain the leave of the court to do so. Importantly, the granting of leave does not raise any presumption that the application will succeed.⁵

1.3 The basis on which a court determines whether to grant leave

When a court considers an application for leave to apply for a child arrangements order, the welfare of the child is not its paramount consideration—this is a matter, assuming that leave is granted, for the substantive hearing to consider.⁶ Instead, the criteria set out in section 10(9) of the *Children Act 1989* apply, which states that the court 'shall...have particular regard to:'

- (a) the nature of the proposed application for the section 8 order;
- (b) the applicant's connection with the child;
- (c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it; and
- (d) where the child is being looked after by a local authority—
 - (i) the authority's plans for the child's future; and
 - (ii) the wishes and feelings of the child's parents.

² *Children Act 1989*, section 10(5)(c)

³ *Ibid*, s 10(5)(c)(iii)

⁴ *Ibid*, s 10(5B)

⁵ Hershman and McFarlane, *Children Law and Practice*, para B600

⁶ *Ibid*, para B606

1.4 If leave is granted

If leave is granted, then a child arrangements order can be applied for. When the court determines whether to make (or vary or discharge) such an order, then “the child’s welfare shall be the court’s paramount consideration”.⁷ For more information, see the Library briefing paper, [Child arrangements orders: residence and contact related matters for parents, grandparents and others after separation](#).

The [Government website](#) includes a webpage entitled [Contact with your grandchild if their parents divorce or separate](#) which includes a link to the C2 application form and a tool for finding the nearest divorce court. The webpage notes that “you may have to pay a £215 court fee”.

⁷ *Children Act 1989*, section 1(1)

2. Recent consideration of whether grandparents should require leave of the court

This section applies to England and Wales only.

2.1 Labour Government Green Paper (January 2010)

In 2010, the Labour Government published *Support for All: the Families and Relationships Green Paper*. This stated that "Grandparents play an important role in many families' lives.....this important role is not always recognised by services and support that is available to parents is not always available to grandparents."⁸ As such the paper included, alongside other measures, an intention "to remove the requirement for grandparents to obtain the leave of the court before making an application for a contact order"⁹ (changed under the Coalition Government to child arrangements orders).

2.2 Family Justice Review (November 2011)

The issue of grandparents' access rights was then examined as part of the independent Family Justice Review, led by David Norgrove. This was established under the Labour Government in March 2010 and subsequently supported by the Coalition Government following the General Election of 2010. The scope of the review, as listed on the Government website, was "to consider radical reform of the current systems for resolving disputes about contact with children and where they should live when couples break up (private law); the process of divorce; and processes when local authorities apply to the courts to take children into care (public law)."¹⁰

The final report was published in November 2011 and in contrast to the Green Paper recommended that "the need for grandparents to apply for leave of the court before making an application for contact should remain. This prevents hopeless or vexatious applications that are not in the interests of the child"¹¹ The report recognised that the requirement to seek the leave of the court divided opinion.¹²

⁸ Department for Children, Schools and Families, *Support for All: the Families and Relationships Green Paper*, Cm 7787, January 2010, pp114-115, <http://webarchive.nationalarchives.gov.uk/20130401151715/http://www.education.gov.uk/publications/eOrderingDownload/CM-7787.pdf>

⁹ *Ibid*

¹⁰ Family Justice Review, *Final Report, November 2011*

¹¹ Family Justice Review, *Final Report, November 2011, p21*, para 110

¹² *Ibid*, p142, [para number]

The Report stated:

4.45. We recognise the importance to children of relationships with their grandparents and recommend that this be emphasised in the process to come to an agreement about their future care. However we continue to feel that the requirement for grandparents to seek leave of the court before making an application is not overly burdensome and should remain.

4.46. As a matter of principle we agree with the many in the call for evidence who argued that just as contact is a right of the child not of the parents so also grandparents do not have a 'right' to contact. We noted in our interim report research showing that grandparents are unlikely to lose contact with a grandchild if they had meaningful contact whilst the parental relationship was still in being and if they resist taking sides after the separation. We do not believe that courts refuse leave unreasonably or that seeking leave is slow or expensive for grandparents. Rather, the requirement to seek leave prevents hopeless or vexatious applications that are not in the interests of the child.¹³

The Government agreed with the recommendation to retain the need to seek leave of the court, "because it acts as an important safeguard for children and their families".¹⁴

We agree with the Panel that grandparents should continue to seek permission before making an application to court for contact. We want to encourage and support grandparents, like parents, to settle their differences outside of the court process.

But grandparents themselves sometimes lose contact with their grandchildren as a result of parental separation. We are clear that the importance of children's relationships with other family members should be emphasised and will ensure this issue is fully reflected in the process for making Parenting Agreements and in bespoke parenting classes for separating parents.¹⁵

¹³ *Ibid*, , p143, [para number]

¹⁴ [Govt dept(s)], *The Government Response to the Family Justice Review* [hyperlink], p67, [para number]

¹⁵ *Ibid*, p22, [para number]

2.3 Recent discussion

There has not been substantive discussion regarding any change to these processes since the Family Justice Review. The current Conservative Government has not expressed an interest in changing the current rules.

A recent Parliamentary Question on the matter was answered by the then Justice Minister, Simon Hughes, under the Coalition Government. Mr Hughes stated:

The Government believes that the existing arrangements for grandparents to spend time with their grandchildren in cases of parental dispute are effective and do not unfairly disadvantage grandparents. Child arrangements orders are able to deal with all the arrangements needed for a child in a single order, and that could include arrangements for spending time with grandparents where the court is considering this as an issue.¹⁶

In response to a query on the number of applications by grandparents for rights of access to their grandchildren since 2010, Caroline Dinenage, Parliamentary Under Secretary of State at the Ministry of Justice, provided the following figures in January 2016 on the number of child arrangements (contact) orders applications made by grandparents in England and Wales:

Year	Applications by grandparents
2011	2403
2012	2574
2013	2755
2014	1624
2015 – 3 quarters only	1335

Ms Dinenage added;

Unlike parents, grandparents and other family members can only make an application for a child arrangements orders with the permission of the court. The requirement to apply for the court's permission is not designed to be an obstacle to grandparents, or other close relatives, but to act as a filter to sift out those applications that are clearly not in the child's best interests. Experience suggests that grandparents (or other interested

¹⁶ [PQ 223947 19 February 2015](#)

relatives) would not usually experience difficulty in obtaining permission where their application is motivated by a genuine concern for the child.¹⁷

However, 'details of the numbers of child arrangements orders issued specifically for grandparents to see their grandchildren could only be obtained by checking each file at disproportionate cost'¹⁸ and so are not available.

¹⁷ [PQ 20477 5 January 2016](#)

¹⁸ *Ibid*

3. Scotland

The above rules apply to England and Wales. In Scotland it is the *Children (Scotland) Act 1995* which covers child access. As in England and Wales, grandparents do not have an automatic right to see their grandchild, as they do not have automatic parental responsibilities and rights (PRR). However, under Section 11 of the Act, they can apply for a court order seeking contact with the child.

This application follows similar guiding principles to a child arrangements order and primarily considers the welfare of the child in any particular case. The Scottish Parliament Information Centre has a briefing paper, [Contact between grandparents and their grandchildren](#), which covers the legislation and policy background in greater detail.

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