

Justice Committee

Family Law (Scotland) Act 2006

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Introduction

Much of the Family Law (Scotland) Act 2006 is amending rather than substantive legislation – that is to say it amends existing legislation rather than creating new substantive rules contained in itself. Some of the issues that the Act dealt with, such as marriage and civil partnership, have been substantially overtaken by other developments; many of the Act's provisions have settled down into uncontroversial law, and have created little if any problems in practice (most obviously, this is so in relation to the abolition of the status of illegitimacy (s. 21), and the extension of various statutory provisions to same-sex couples (ss. 30, 33 and the schedules)). I am unaware of problems in relation to jurisdiction and private international law (ss. 37 – 41).

There are a number of minor issues that I believe would be worth the Parliament re-examining, and one major issue. The paragraphs below deal with the minor issues first.

Divorce and Dissolution

The reduction in separation periods for divorce (s. 11 and (for civil partners) sched 1(9)) was politically contentious in 2005-06 but I think has been unproblematic in practice. A very late addition to the Bill was section 15, which permits the postponement of a divorce until a religious “divorce” has been granted: at the time I considered the provision conceptually misconceived, and am not yet persuaded that allowing civil process to be affected by religious doctrine is a good thing – but again I am unaware of it causing any problems in practice (I understand that the provision has never been used). Would anything be lost by its removal?

Marriage by Cohabitation with Habit and Repute

Section 3 of the 2006 did something that was long over-due: it abolished the discredited doctrine of marriage by cohabitation with habit and repute. This was a means by which couples who had never (formally) married could obtain all the benefits of marriage by pretending that they had indeed formally married: it was used to ameliorate the difficult positions that cohabitants would otherwise find themselves in. The abolition was a consequence of the Act's provisions conferring financial claims on cohabitants.

The abolition was not complete, however: section 3(3) and (4) effectively retain the concept where its application would protect the validity of marriages invalidly contracted abroad. Personally, I was never convinced that it was good social policy for Scots law to validate marriages which had been entered into by flawed process: the provisions were added in at a very late stage, having been explicitly requested by an MSP who had married abroad in a ceremony conducted in a language he did not

understand. A gauche dinner party joke (“so I might not actually be married after all!”) seemed to suggest a lacuna when none, in fact, existed. I am not aware of the provision ever having been used and it might be regarded as harmless, other than its cluttering up of the statute book.

My real concern (rejected when I raised it in 2005, and misunderstood when I raised it in 2013 as the Marriage and Civil Partnership (Scotland) Act was being debated) concerns civil partnership. Section 3(3) and (4) of the 2006 Act validates *marriages* invalidly contracted abroad; section 4(6) of the 2014 Act extends the provision to same-sex *marriages* invalidly contracted abroad. But civil partnerships invalidly contracted abroad remain invalid and do not receive the benefit of validation that is given to marriages. This was clearly discriminatory before 2014 when same-sex couples had no option but to enter a civil partnership; it remains discriminatory in that it preferences for no sound reason the marital relationship.

I strongly urge the Scottish Parliament to consider either extending the protection to civil partnerships or, preferably, repealing the provisions so that people who marry abroad are treated in the same way as people who marry in Scotland: get the process wrong and suffer the consequences.

Children, Illegitimacy and Parental Responsibilities

Section 21 abolished the status of illegitimacy, but it did not remove all the differences in treatment between marital and non-marital children. Section 23 also provides that a child’s father will obtain parental responsibilities and parental rights so long as he is registered as the father: this substantially ameliorated the position of the unmarried father who, previously, was absolved of his parental responsibilities until he married the mother of his child. However, in passing this provision, the Scottish Parliament in 2005 took the explicit decision not to make it retrospective. This means that for non-marital children born before 4th May 2006 (the date of the Act’s commencement) there is only one adult to whom they can look for the exercise of parental responsibility; while for children born after then there are two adults with responsibilities for them. The argument in 2006 was that imposing parental responsibilities where none existed before would interfere too much with current family arrangements. The Act is now ten years old and the disadvantaged non-marital children are now all ten years old or more. Without amendment we will have another six years to wait until all pre-Act children are 16, but I suggest that it would be worth the Parliament’s while now to make section 23 retrospective. Family relationships will have settled with the growing child, and more people will expect the law to reflect its post- and not pre-2006 position. I urge consideration to be given to this issue.

Cohabitation

The major contribution to law reform made by the 2006 Act was undoubtedly sections 25 to 31, dealing with cohabitants, and I will not be the only one to point out that it is these provisions that deserve most examination of their effectiveness.

There is little of interest in sections 26, 27 and 30, and the Scottish Government are presently (I understand) working on the Scottish Law Commission’s proposals for

amending the law of succession, including the succession claim of cohabitants in section 29. So the remaining provisions that require a fresh look are those in section 25 (which provides the definition of cohabitant) and section 28 (which allows claims for financial readjustment on separation).

The definition of “cohabitant” in section 25 has proved less problematical for the courts than had, perhaps, been assumed in 2006, but its wording could still be improved upon. For example, in determining whether a person is a cohabitant the court has to take account of “the nature of the relationship” – which is the very point at issue and so is circular. I am not sure that it adds anything of import to the court’s consideration. The reference to “living together as if they were civil partners” looks increasingly anomalous on the face of the statute, but section 4(3) and (4) of the Marriage and Civil Partnership (Scotland) Act 2014 requires that this phrase be read to mean “as if married”. The substance of the law is clear but, requiring to be read in light of the 2014 Act, is obscure. If there is to be any amendment, then section 25(1)(b) needs to be repealed and the whole subsection replaced with a reference to a couple, irrespective of gender mix, who live together as if they were a married couple.

Section 28 has generated the most case law. Very deliberately, the Parliament in 2005 worded this provision to ensure that courts have maximum discretion. Section 28(2)(a), for example, allows the court to make “an order” but it contains no indication as to *why* the court should make an order, what goal the order is to seek, nor how the order is to be valued. The thinking in 2005 was that cohabiting couples are so very diverse that the strict delimitations to financial adjustments when married couples divorce are not suitable. I was unconvinced by that argument then, and I am even more unconvinced today. Married couples lead diverse and individual lives to no lesser extent than cohabiting couples, and if guidance for the court is suitable for married couples and civil partners, it should also be suitable for cohabiting couples. It took the Supreme Court in *Gow v Grant* (2012) to tell us that section 28 required the court to seek “fairness” (though that word never appears in section 28). Fairness, like beauty, lies in the eye of the beholder and I should prefer the legislation to set down much clearer principles to guide the court as to what the order made in section 28 should seek to achieve, and how it should be valued. The model of section 9(2)(b) of the Family Law (Scotland) Act 1985, applicable to married couples and civil partners, is worth looking at again.

The thinking behind both sections 28 and 29 is to ensure that some claim can be made by a cohabitant but that it is less valuable – or at the very least no more valuable – than the claim available to a spouse or civil partner. The Scottish Law Commission suggests in relation to succession claims that it should be valued the same, but then the cohabitant should receive only a percentage (which could be up to 100) depending on the nature of the cohabitation. This seems to be a complex mechanism to achieve what other jurisdictions achieve by imposing time-limits. Australia and New Zealand for example allow the cohabitant to make a claim on death equivalent to that of the surviving spouse, but only after the cohabitation has lasted for (usually) three years or more. There will inevitably be hard cases in which a cohabitant dies very shortly before the three years have passed, and the commencement of cohabitation is not so easily established as the commencement of marriage/civil partnership. But it is at the least arguable that these problems would

arise less often than those created by the current law and so it is I think worth the Parliament's time reopening all these debates that were had ten years ago.

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5 February 2016