

Justice Committee

Family Law (Scotland) Act 2006

Written submission from Elaine E Sutherland, Professor of Child and Family Law, Law School, University of Stirling, and Distinguished Professor of Law, Lewis and Clark Law School, Portland, Oregon

The Justice Committee's decision to subject the Family Law (Scotland) Act 2006 to post-legislative scrutiny is welcomed. The invitation to participate in the process encouraged those responding to focus on the main aspects of the Act and to do so relatively briefly. This note highlights key concerns and addresses them in outline only and I would be happy to give oral evidence to the Committee if that would be helpful.

Parental responsibilities and parental rights of non-marital fathers

The Family Law (Scotland) Act 2006, s 23,¹ sought to improve the position of non-marital fathers by providing that, where such a father registers his paternity after the Act came into force on 4 May 2006, he acquires full parental responsibilities and parental rights automatically, just like mothers and married fathers. At a stroke, the law was improved. Most children whose parents are not married to each other will now have two guardians rather than one. For the many families where the unmarried parents are cohabiting or cooperating, the important role of both parents is recognised without the need for further formalities like concluding a parental responsibilities and rights agreement.²

However, two problems remain, each resulting from maternal opposition to the child's father gaining recognition and the parental responsibilities or parental rights that flow from it. It is worth remembering that an obstructive mother may be motivated by reasons that attract some sympathy, including the fear of resumed or continuing domestic violence. However, her opposition may have a less commendable cause, like her own resentment arising out of her relationship (or lack thereof) with the child's father.

The repeated attempts by fathers' rights groups to secure further reform by lodging petitions with the Public Petitions Committee attest to disquiet felt by those groups over the current state of the law. That is not to suggest support for all, or even the majority of, their proposals since many of them are fundamentally flawed.³

¹ Amending the Children (Scotland) Act 1995, s 3.

² 1995 Act, s 4. These agreements were never used extensively.

³ See further, Elaine E Sutherland, "It is a wise child ...", *Journal of the Law Society of Scotland online*, uploaded 16 June 2014, available at: <http://www.journalonline.co.uk/Magazine/59-6/1014070.aspx>

The problems and possible solutions are as follows:

Whether a non-marital father is permitted to register paternity is wholly at the discretion of the child's mother.

How might the matter be addressed? In England and Wales the law was amended to require two parents to be named on a child's birth certificate, subject to exceptions to accommodate maternal ignorance of the father's identity or fear of harm from him.⁴ That is certainly a low-cost solution, but it is submitted that it should not be adopted in Scotland since it would leave decision-making in the hands of civil servants when meaningful regard for the child's welfare requires that disputed cases should be subject to scrutiny by a court.

Faced with maternal opposition, the non-marital father may seek to establish paternity by means of a declarator of parentage and the mother can again impede his progress by withholding consent to DNA testing of the child.

At present in a disputed case, only the child's mother can consent to DNA testing of the child; the court can do nothing to compel her to agree; and the court cannot substitute its own consent for that of a competent mother who refuses.⁵ Granted, it can draw an inference from her refusal to co-operate with testing, but there is no guarantee that this will help the father in establishing paternity.⁶

There is a very simple solution here. The court could be empowered to order DNA testing of a child in the face of maternal opposition, subject to the usual test that the child's welfare is the paramount consideration in the decision-making process. In that way, paternity could be established. The court could then address any dispute over parental responsibilities and parental rights, again, applying the welfare test.

Rights of cohabitants

The Family Law (Scotland) Act 2006, ss 25-30, recognised that non-marital cohabitation is widespread in Scotland and attaches certain legal consequences to such relationships where they 'qualify' under the Act. The goal of the legislation was never to place cohabitants in the same legal position as married couples and civil partners and the remedies available to cohabitants are very much more limited. The 2006 Act creates presumptions that certain money and property acquired during the cohabitation is owned by the cohabitants in equal shares; provides for limited redress on relationship breakdown; and allows the survivor to apply to a court for an award out of the intestate estate in the event of a partner's death. Cohabitants may avoid these legal

⁴ Welfare Reform Act 2009, s 56 and Sched 6.

⁵ Law Reform (Parent and Child) (Scotland) Act 1986, s 6.

⁶ Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 70. See, *Smith v Greenhill* 1993 SCLR 944, where the court refused to draw a contrary inference from the married mother's refusal when her former lover sought to establish paternity. See also, *S v S* 2014 SLT (Sh Ct) 165.

consequences by agreement or, in the case of inheritance, by making a will. There is no obligation of aliment between cohabitants.

The provisions on property during the relationship have not resulted in litigation, but couples rarely take disputes over property to court while they are together, something evidenced by the lack of litigation under the older, equivalent legislation applying to spouses and civil partners. The provisions on inheritance appear to have operated well in the small number of cases that have arisen. There are problems, however, with section 28, the provision dealing with two financial remedies available on relationship breakdown and they are discussed below.

While the problems outlined below could be addressed somewhat by amending the legislation, the real difficulty is that the provision dealing with breakdown of cohabitation takes only two pieces of the coherent and comprehensive package of remedies available to parting spouses and civil partners. As a result, what is being offered to cohabitants is incomplete. A more radical solution would be to re-examine the whole approach of the legal system to cohabitation with a view to putting cohabitants in the same legal position as spouses and civil partners.⁷ Such an approach has been adopted or explored in other jurisdictions.

Balancing the books: advantages and disadvantages: s 28(2)(a)

A former cohabitant may apply to the court for the award of a capital sum, payable by the other, designed to reflect advantages gained, and disadvantages sustained, as a result of the relationship. This provision has its origins in a recommendation from the Scottish Law Commission that was based on language similar to that found in legislation applying to spouses.⁸ However, what emerged in the 2006 Act was couched in very different terms. That led to several years of uncertainty while the lower courts gave conflicting interpretations of the provision, before the Supreme Court provided some clarification in 2012.⁹ The lesson to be learned from that experience is that the Scottish Parliament should not depart from the phraseology recommended by the Commission without having a very good reason.

The problems here are:

- The action must be raised within one year of the cohabitation ending. Arguably, that forces cohabitants to 'rush to court' when, given more time, they might be able to arrive at an agreed solution.
- Practitioners report that the provision remains somewhat ambiguous and this causes difficulty in advising clients.

⁷ Elaine E Sutherland, 'From "Bidie-In" to "Cohabitant" in Scotland: The Perils of Legislative Compromise', (2013) 27(2) *International Journal of Law, Policy and the Family* 1.

⁸ Scottish Law Commission, *Report on Family Law*, Draft Family Law (Scotland) Bill, cl 36 (Scot. Law Com. No 135, 1992).

⁹ *Gow v Grant* 2013 SC (UKSC) 1.

Sharing the economic burden of childcare: s 28(2)(b)

Alternatively, or in addition to the above, a former cohabitant may seek an award 'in respect of' the future burden of caring for the couple's child. This provision did not originate from the Scottish Law Commission because, at the time it reported, another remedy addressed this issue. By the time the legislation was in prospect, that remedy had been removed. This provision is similar to one that applies to spouses and civil partners under the Family Law (Scotland) Act 1985, s 9(1)(c), but there are significant differences, leading to the following problems:

Which children?

The 1985 Act refers to caring for a 'child of the marriage' and defines the term as including a child 'accepted' by the parties as a child of the family, and there is a similarly broad definition in the context of civil partnership.¹⁰ The 2006 Act offers no similarly broad definition and applies only to 'a child of whom the cohabitants are the parents', leaving provision for the care of an 'accepted' child outside its ambit.¹¹ That means that, were a former cohabitant to continue to look after the ex-partner's child by a previous relationship, the caring cohabitant would have no avenue for recovery for his or her own losses.

Lack of useful criteria for an award

The 1985 Act refers to the burden being 'shared fairly' between the parties¹² and provides the court with a list of 'relevant factors' to guide it in its determinations.¹³ There is no reference to 'fairness' in the 2006 Act and no list of guiding factors. Instead, when the court is determining eligibility for an award, it is directed to the economic advantages gained and disadvantages sustained by the parties during the relationship. As one sheriff observed, 'the factors to which the court is to have regard are expressed, rather curiously, solely in the past tense.'¹⁴

Periodic payments rather than a capital sum?

The 1985 Act anticipates payment in respect of future child care costs being in the form of an award of a capital sum, transfer of property or a periodic allowance.¹⁵ While the 2006 Act does not limit an award under section 28(2)(b) to a capital sum expressly, that appears to be how the courts and practitioners are reading the provision. In this, they may be garnering some support from the reference in the 2006 Act to the court

¹⁰ Family Law (Scotland) Act 1985, ss 9(1)(c) and 27(1).

¹¹ Such children remain relevant in calculating advantages and disadvantages for the purpose of a section 28(2)(a) award: 2006 Act, s 28(3).

¹² 1985 Act, s 9(1)(c).

¹³ 1985 Act, s 11(3). The factors are: any decree or arrangement for aliment for the child; any expenditure or loss of earning capacity caused by the need to care for the child; the need to provide suitable accommodation for the child; the age and health of the child; the educational, financial and other circumstances of the child; the availability and cost of suitable child-care facilities or services; the needs and resources of the persons; and all the other circumstances of the case.

¹⁴ *Lindsay v Murphy* 2010 Fam LR 156, at [66].

¹⁵ 1985 Act, ss 8 and 13(2)(a).

specifying when payment is to be made¹⁶ and making the award payable by instalments.¹⁷ The problem is that, by and large, capital awards are not subject to future variation, while awards of a periodical allowance can be varied on showing a change of circumstances. Similarly, child maintenance assessments and awards of aliment in respect of a child can be varied at a future date, should circumstances change. No such variation is provided for in the 2006 Act and there is a danger that this makes judges cautious in the sums they award.

Divorce

The Family Law (Scotland) Act 2006, ss 11-15, amended earlier legislation¹⁸ to make divorce and civil partnership dissolution more accessible and rationalising the grounds for each. The vast majority of divorces and dissolutions in Scotland are now granted on the no-fault, non-cohabitation grounds.¹⁹ That calls into question whether there is any need to retain the fault grounds of adultery and behaviour.

There has long been a case for abolishing adultery as a ground for divorce and it is certainly arguable that adultery is a symptom of a troubled relationship rather than the cause of the breakdown. However, with the advent of same sex marriage – or, rather, the approach of the legislation to it – the case for abolition has acquired another dimension. A same sex spouse can only use adultery as the foundation for a divorce if the infidelity occurs with a person of the opposite sex and not, as seems more likely, if his or her spouse has strayed with a person of the same sex. The justification for this approach can be found in the way adultery is defined in a rather old case,²⁰ but there is no escaping the implication that sexual infidelity is viewed differently and, arguably, less seriously, in respect of same sex couples. It would render the law less offensive and more coherent to remove adultery as a ground of divorce and address all infidelity under the behaviour ground.

That would require, of course, retaining the behaviour ground as a basis for divorce and there are other justifications for its retention. There is sometimes good reason to want to raise the divorce action immediately rather than waiting for the one or two years of non-cohabitation to elapse. A party may want to found jurisdiction in Scotland to keep the case within the ambit of the Scottish courts. Then there are the cases of domestic abuse where there may be some urgency. A further point is worth noting in respect of domestic abuse. By retaining the fault ground of behaviour for these cases, the legal system is signalling clear condemnation of domestic abuse, albeit there are other criminal and civil remedies that send that message.

¹⁶ 2006 Act, s 28(7)(a).

¹⁷ 2006 Act, s 28(7)(b).

¹⁸ Divorce (Scotland) Act 1976, s 1.

¹⁹ *Civil Justice Statistics in Scotland 2013-2014*: <http://www.gov.scot/Publications/2015/07/9805>

²⁰ *MacLennan v MacLennan* 1958 SC 105, p 109, *per* Lord Wheatley ('sexual intercourse or carnal connexion between a consenting spouse and a member of the opposite sex who is not the other spouse is the basic criterion of adultery').

Other matters

Illegitimacy

The headnote to the Family Law (Scotland) Act 2006, s 21,²¹ claims that it abolishes the status of illegitimacy and, for the majority of the Scottish population, that is its effect. However, one of the exceptions to the provision relates to succession to titles and honours. For the aristocracy, the status of illegitimacy remains. While this will affect only a tiny minority of individuals, there is no reason to retain this exception.

The welfare test

The Family Law (Scotland) Act 2006, s 24, amended the welfare test (also known as the 'best interests' test) used by the courts in making decisions about parental responsibilities and parental rights – usually decisions about residence and contact.²² The amendment was prompted by a desire to protect children from exposure to domestic abuse and to facilitate contact between children and parents with whom they are not living. These are both desirable goals. However, the result is that Scots law now has a partially-defined welfare test that flags up domestic abuse and the feasibility of contact as factors to which the court should pay particular attention. Yet there are numerous other factors that are relevant to a welfare determination. In many other jurisdictions, the legislation addressing the welfare test provides the court with an extensive checklist of factors to assist in assessing the welfare of the child. It would make sense for Scots law to follow suit, something made all the more pressing because the United Nations Committee on the Rights of the Child has urged States Parties to provide such guidance.²³

Elaine E Sutherland
University of Stirling
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²¹ Amending the Law Reform (Parent and Child) (Scotland) Act 1986, s 9.

²² Children (Scotland) Act 1995, s 11.

²³ United Nations Committee on the Rights of the Child, *General Comment No. 14 on the rights of the child to have his or her best interests taken as a primary consideration* (2013), CRC/C/GC/14, para 50 ('The Committee considers it useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best interests assessment by any decision-maker having to determine a child's best interests.').