

Justice Committee

Family Law (Scotland) Act 2006

Written submission from the Law Society of Scotland

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's legal profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective legal profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the Justice Committee's call for evidence on the Family Law (Scotland) Act 2006 ("the Act"). This response has been prepared on behalf of the Law Society of Scotland by members of our Family Law Sub-committee.

General comments

In this evidence, we have sought to focus on the main issues which the Justice Committee may wish to consider in the course of its short inquiry. We would be happy to attend an oral evidence session to provide further detail in due course.

Divorce

The Act amended the grounds for divorce and dissolution with the intention of reducing acrimony, conflict, and recrimination – especially where children were involved. This was approached by reducing the time requirements for non-cohabitation.

The review of the Act may provide an appropriate opportunity to consider further rationalisation of divorce and dissolution, including the fact that adultery as a ground for divorce or dissolution can only apply to instances of infidelity with the opposite sex.

Unmarried fathers: rights in relation to children

S 23 of the Act made a significant improvement to the law by providing for non-marital fathers to gain full parental rights and responsibilities automatically when registering paternity.

This gives unmarried fathers the opportunity to be on the same footing as married fathers, removing the need for further action, such as a parental responsibilities and rights agreement, to be taken in order to give the unmarried father formal responsibilities and rights.

However, the effectiveness of this provision is limited in cases where the mother opposes registration of the father. In such cases, the unmarried father may seek a declarator of parentage, but neither the father nor the court can compel the mother to allow DNA testing of the child.

The Justice Committee may wish to consider options to facilitate unmarried fathers to register in situations of maternal opposition. In doing so, it is important to ensure that safeguards are available in situations where the mother may oppose on grounds of fear of harm.

Protection of children from abuse

S 24 of the Act added specific criteria in relation to abuse to the welfare test to be considered by a court when making an order in relation to parental responsibilities, parental rights, guardianship, or administration of a child's property under s 11 of the Children (Scotland) Act 1995.

However, there remains scope to consider whether other specific factors that a court should be directed to consider in the course of a welfare determination, and many other jurisdictions apply a more comprehensive list of factors. In addition, the United Nations Committee on the Rights of the Child specifically encourages States to draft lists of elements that could be included in a best interests assessment.

It may also be relevant at this point for the Justice Committee to consider whether it is appropriate that contact orders under s 11 of the Children (Scotland) Act are seen to be parental rights, therefore preventing siblings from applying for an order to maintain contact.

Cohabitation

The Act provides for certain financial and property rights for unmarried cohabiting couples (as defined by s 25 of the Act) during the period of cohabitation, following the end of cohabitation due to relationship breakdown, or following death of one of the couple.

Cohabitation continues to be widespread within Scotland, accounting for 9% of households in the 2011 census (up from 7% in 2001), 40% of which have one or more dependent children. It is important to ensure that the status and rights of those in this type of relationship are effectively provided for.

Section 25 – meaning of 'cohabitant'

The definition provided by the Act was, according to the Policy Memorandum, intended to capture "longstanding and enduring relationships". A qualifying time period was deliberately avoided in favour of indicative factors to be considered by

the courts with the intention that there would be a developing understanding over time of what circumstances will be likely to succeed in courts.

Although it may be beneficial to allow for discretion in assessing the nature of a relationship, there are also obvious difficulties posed by such an approach. In addition, there has been relatively little case law on this point, meaning that there are still significant gaps in our understanding of how a court would assess the wide range of circumstances that can exist around a relationship.

The Justice Committee may wish to consider whether a firmer definition of the meaning of cohabitant would be beneficial, and how to balance this against the need for flexibility to accommodate the wide range of relationships and circumstances that exist in reality.

Time limits

The Act creates time limits within which claims must be made by a cohabitant. S 28(8) of the Act requires an application for financial provision following the end of cohabitation to be made not later than one year after cohabitation ceases. S 29(6) requires an application for provision on intestacy to be made within six months of the death of the deceased partner. Both of these time limits are extended by s 29A in situations of mediation of a cross-border dispute. These time limits have been strictly adhered to by the courts.

The Justice Committee may wish to consider whether it would be appropriate to lengthen the time limits for making an application under these provisions to allow for greater flexibility in dealing with applicants undergoing difficult times during which situations, relationships, and arrangements between parties may change, and to allow time for parties to a dispute to make attempts to come to an agreement without the need for raising a court action.

Section 28 – Financial provision where cohabitation ends otherwise than by death

The Act permits a former cohabitant to apply to the court for an order for payment of a capital sum, with a view to accounting for situations of economic advantage or disadvantage over the course of the cohabitation. There has been some concern that the terms of provision lack clarity.

S 28 also allows a former cohabitant to apply to the court for an order for payment of an amount in respect of the economic burden of caring for a child of whom the cohabitants are the parents.

This provision only applies where the cohabitants are the parents of the child, and does not cover the situation of a child accepted as a child of the family (for example, where one former cohabitant continues to care for the other's child of a previous relationship). Although a child accepted as a child of the family is considered relevant when considering the balance of economic advantage or disadvantage between the cohabitants, an order for a payment actually relating to the care of such a child going forward is not within the scope of the Act.

In addition, the criteria for an award relating to care for a child simply have regard to the economic advantages and disadvantages sustained, and only during the period

of cohabitation. It is arguable that this is insufficient (particularly compared to the provisions in the Family Law (Scotland) Act 1985 regarding divorce or dissolution).

Finally on this section, in practice, the courts appear to be limiting the provision in relation to child care to payment of a capital sum. It may be beneficial to consider whether it should be expressly possible to provide for payment of a periodic allowance which would allow for variation on change of circumstances. This would be in line with payments following divorce or dissolution, and payments of child maintenance or aliment.

The issues raised by these provisions should be considered by the Justice Committee. A related issue arises in comparison with protections offered on divorce or dissolution in the Family Law (Scotland) Act 1985. S 16 of this Act allows for the court to set aside or vary an agreement that was made between the parties to a marriage or civil partnership as to financial provision to be made on divorce or dissolution. This applies where the agreement expressly allows for the court to set aside or vary a term relating to a periodical allowance, but also in situations where the agreement was not fair and reasonable at the time it was entered into. Now may be an appropriate time to consider whether such protections should be offered in relation to agreements made between cohabiting couples.

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