

Family Law (Scotland) Bill

[AS INTRODUCED]

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Explanatory Notes, together with other accompanying documents, are printed separately as SP Bill 36-EN. A Policy Memorandum is printed separately as SP Bill 36-PM.

Family Law (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to amend the law in relation to marriage, divorce and the jurisdiction of the courts in certain consistorial actions; to amend the Matrimonial Homes (Family Protection) (Scotland) Act 1981; to amend the law relating to the domicile of persons who are under 16 years of age; to make further provision as respects responsibilities and rights in relation to children; to make provision conferring rights in relation to property, succession and claims in damages for persons living, or having lived, together as if husband and wife; to amend Part 3 of the Civil Partnership Act 2004; to make provision in relation to certain rules of private international law relating to family law; to make incompetent actions for declarator of freedom and putting to silence; and for connected purposes.

Marriage

1 Marriage to parent of former spouse: removal of special requirements

In the Marriage (Scotland) Act 1977 (c.15)—

(a) in section 2 (marriage of related persons)—

(i) in subsection (1), for “subsections (1A) and (1B)” there shall be substituted “subsection (1A)”; and

(ii) subsection (1B) shall be repealed; and

(b) in Schedule 1 (relationships by affinity referred to in section 2(1B)), paragraph 2A shall be repealed.

2 Void marriages

After section 20 of the Marriage (Scotland) Act 1977 (c.15) there shall be inserted—

“Void marriages

20A Grounds on which marriage void

(1) Where subsection (2) or (3) applies in relation to a marriage solemnised in Scotland, the marriage shall be void.

(2) This subsection applies if at the time of the marriage ceremony a party to the marriage who was capable of consenting to the marriage gave consent but did so by reason only of duress or error.

(3) This subsection applies if at the time of the marriage ceremony a party to the marriage was incapable of—

- (a) understanding the nature of marriage; and
- (b) consenting to the marriage.

(4) If a party to a marriage gave consent to the marriage other than by reason only of duress or error, the marriage shall not be void by reason only of that party's having tacitly withheld consent to the marriage at the time when it was solemnised.

(5) In this section "error" means—

- (a) error as to the nature of the ceremony; or
- (b) a mistaken belief held by a person ("A") that the other party at the ceremony with whom A purported to enter into a marriage was the person whom A had agreed to marry."

3 Extension of jurisdiction of sheriff

In subsection (1) of section 5 of the Sheriff Courts (Scotland) Act 1907 (c.51) (extension of jurisdiction), after "marriage", where it secondly occurs, add "where the action is raised after the death of both parties to the marriage".

Matrimonial homes

4 Occupancy rights: duration

In section 1 of the 1981 Act (right of spouse without title to occupy matrimonial home), after subsection (6) there shall be added—

"(7) Subject to subsection (5), if—

- (a) there has been no cohabitation between an entitled spouse and a non-entitled spouse during a continuous period of two years; and
- (b) during that period the non-entitled spouse has not occupied the matrimonial home,

the non-entitled spouse shall, on the expiry of that period, cease to have occupancy rights in the matrimonial home.

(8) A non-entitled spouse who has ceased to have occupancy rights by virtue of subsection (7) may not apply to the court for an order under section 3(1)."

5 Occupancy rights: dealings with third parties

(1) Section 6 of the 1981 Act (continued exercise of occupancy rights after dealing) shall be amended in accordance with subsections (2) and (3).

(2) After subsection (1), there shall be inserted—

"(1A) The occupancy rights of a non-entitled spouse in relation to a matrimonial home shall not be exercisable in relation to the home where, following a dealing of the entitled spouse relating to the home—

- (a) a person acquires the home, or an interest in it, in good faith and for value from a person other than the person who is or, as the case may be, was the entitled spouse; or
- (b) a person derives title to the home from a person who acquired title as mentioned in paragraph (a)."

(3) In subsection (3)—

(a) in paragraph (e)—

(i) for “sale” there shall be substituted “transfer for value”; and

(ii) for the words from “seller”, where it first occurs, to the end of the paragraph there shall be substituted “transferor—

(i) a written declaration signed by the transferor, or a person acting on behalf of the transferor under a power of attorney or as a guardian (within the meaning of the Adults with Incapacity (Scotland) Act 2000 (asp 4)), that the subjects of the transfer are not, or were not at the time of the dealing, a matrimonial home in relation to which a spouse of the transferor has or had occupancy rights; or

(ii) a renunciation of occupancy rights or consent to the dealing which bears to have been properly made or given by the non-entitled spouse or a person acting on behalf of the non-entitled spouse under a power of attorney or as a guardian (within the meaning of the Adults with Incapacity (Scotland) Act 2000 (asp 4)).”; and

(b) in paragraph (f), for “5” there shall be substituted “2”.

6 Occupancy rights: proposed dealings with third parties

In section 7 of the 1981 Act (court’s power to dispense with spouse’s consent to dealing and proposed dealing)—

(a) in subsection (1), at the beginning there shall be inserted “Subject to subsections (1A) to (1D) below,”;

(b) after that subsection there shall be inserted—

“(1A) Subsection (1B) applies if, in relation to a proposed sale—

(a) negotiations with a third party have not begun; or

(b) negotiations have begun but a price has not been agreed.

(1B) An order under subsection (1) dispensing with consent may be made only if—

(a) the price agreed for the sale is no less than such amount as the court specifies in the order; and

(b) the contract for the sale is concluded before the expiry of such period as may be so specified.

(1C) Subsection (1D) applies if the proposed dealing is the grant of a heritable security.

(1D) An order under subsection (1) dispensing with consent may be made only if—

(a) the heritable security is granted for a loan of no more than such amount as the court specifies in the order; and

(b) the security is executed before the expiry of such period as may be so specified.”; and

(c) after subsection (3) there shall be inserted—

“(3A) If the court refuses an application for an order under subsection (1), it may make an order requiring a non-entitled spouse who is or becomes the occupier of the matrimonial home—

- (a) to make such payments to the owner of the home in respect of that spouse’s occupation of it as may be specified in the order;
- (b) to comply with such other conditions relating to that spouse’s occupation of the matrimonial home as may be so specified.”.

7 Amendment of definition of “matrimonial home”

In section 22 of the 1981 Act (interpretation) (which shall become subsection (1) of that section)—

(a) in the definition of “matrimonial home”—

- (i) after “means” there shall be inserted “subject to subsection (2),”; and
- (ii) for the words “one spouse for that” there shall be substituted “a person for one”; and

(b) at the end there shall be inserted—

“(2) If the tenancy of a matrimonial home is transferred from one spouse to the other by agreement or under any enactment, the home shall, on such transfer, cease to be a matrimonial home.”.

Matrimonial interdicts and powers of arrest

8 Matrimonial interdicts

(1) Section 14 of the 1981 Act (matrimonial interdicts) shall be amended in accordance with subsections (2) and (3).

(2) For paragraph (b) of subsection (2) there shall be substituted—

“(b) subject to subsection (3), prohibits a spouse from entering or remaining in—

- (i) the matrimonial home;
- (ii) any other residence occupied by the applicant spouse;
- (iii) any place of work of the applicant spouse;
- (iv) any school attended by a child in the permanent or temporary care of the applicant spouse.”.

(3) After subsection (2) there shall be added—

“(3) Subsection (4) applies if the non-applicant spouse—

- (a) is entitled to occupy the matrimonial home;
- (b) is permitted by a third party to occupy it; or
- (c) has occupancy rights in it.

(4) Except where subsection (5) applies, the court may not grant a matrimonial interdict prohibiting the non-applicant spouse from entering or remaining in the matrimonial home.

(5) This subsection applies if—

- (a) the interdict is ancillary to an exclusion order; or
- (b) by virtue of section 1(3), the court refuses leave to exercise occupancy rights.

(6) In this section and in sections 15 to 17, “applicant spouse” means the spouse who has applied for the interdict; and “non-applicant spouse” shall be construed accordingly.”

9 Powers of arrest

In subsection (2) of section 15 of the 1981 Act (attachment of powers of arrest to matrimonial interdicts), for the words “upon the termination of the marriage” there shall be substituted “on the expiry of the period of 3 years beginning with the day on which the application under subsection (1) is granted”.

Divorce

10 Divorce: reduction in separation periods

In subsection (2) of section 1 of the 1976 Act (irretrievable breakdown of marriage to be sole ground of divorce)—

- (a) in paragraph (d), for “two years” there shall be substituted “one year”; and
- (b) in paragraph (e), for “five” there shall be substituted “two”.

11 Irretrievable breakdown of marriage: desertion no longer to be ground

Paragraph (c) of section 1(2) of the 1976 Act (irretrievable breakdown of marriage to be sole ground of divorce) shall be repealed.

12 Non-cohabitation without consent: removal of bar to divorce

Subsection (5) of section 1 of the 1976 Act (irretrievable breakdown of marriage to be sole ground of divorce) shall be repealed.

13 Collusion no longer to be bar to divorce

- (1) Any rule of law by which collusion between parties is a bar to their divorce shall cease to have effect.
- (2) Section 9 of the 1976 Act (abolition of the oath of calumny) shall be repealed.

14 Financial provision: valuation of matrimonial property

In section 10 of the Family Law (Scotland) Act 1985 (c.37) (which provides for the sharing of the value of matrimonial property and fixes the date of its valuation), after subsection (2) there shall be inserted—

“(2A) Notwithstanding subsection (2), the court may, in determining what order for financial provision (if any) to make and on the application of either party to the marriage, take into account any difference between the net value of the matrimonial property at—

- (a) the relevant date; and

(b) whichever of the dates mentioned in subsection (2B) the court considers most appropriate.

(2B) Those dates are—

(a) the date on which the court makes the determination;

(b) such other date (being a date as near as may be to the date referred to in paragraph (a)) as the court may determine;

(c) a date agreed by the parties to the marriage.”.

15 **Financial provision: incidental orders**

In subsection (2) of section 14 of the Family Law (Scotland) Act 1985 (c.37) (incidental orders), after paragraph (j) there shall be inserted—

“(ja) in relation to a deed relating to moveable property, an order dispensing with the execution of the deed by the grantor and directing the sheriff clerk to execute the deed;”.

Domicile of persons under 16

16 **Domicile of persons under 16**

(1) A person who is under 16 years of age shall be domiciled in the country with which the person has for the time being the closest connection.

(2) The presumptions in subsection (3) shall apply in determining for the purposes of subsection (1) the country with which a person has the closest connection (the “relevant country”).

(3) Those presumptions are—

(a) that if—

(i) both of the person’s parents are alive;

(ii) the person has a home with a parent (or both parents); and

(iii) both parents are domiciled in the same country,

the relevant country is the country in which the parents are domiciled;

(b) that if—

(i) both of the person’s parents are alive;

(ii) the person has a home with one parent only; and

(iii) the parents are not domiciled in the same country,

the relevant country is the country in which the parent with whom the person has a home is domiciled;

(c) that if—

(i) one of the person’s parents is dead;

(ii) before the death, the person had a home with that parent; and

(iii) the person has not since the death had a home with the other parent,

the relevant country is the country in which the parent with whom the person had a home was domiciled;

(d) that if—
(i) one of the person’s parents is dead;
(ii) before the death, the person had a home with that parent; and
(iii) since the death, the person has had a home with the other parent,
the relevant country is the country in which the surviving parent is domiciled;

(e) that if—
(i) both of the person’s parents are dead;
(ii) before the deaths, the person had a home with a parent (or both parents);
and
(iii) both parents were domiciled in the same country,
the relevant country is the country in which the parents were domiciled;

(f) that if—
(i) both of the person’s parents are dead;
(ii) before the death of one parent, the person had a home with that parent only;
and
(iii) the parents were not domiciled in the same country,
the relevant country is the country in which the parent with whom the person had
a home was domiciled.

(4) The presumptions in subsection (3) are rebuttable.

Unmarried fathers: rights in relation to children

17 Parental responsibilities and parental rights of unmarried fathers

(1) Section 3 of the Children (Scotland) Act 1995 (c.36) (provisions relating both to parental responsibilities and parental rights) shall be amended in accordance with subsections (2) and (3).

(2) In paragraph (b) of subsection (1) (cases in which parents have parental responsibilities and parental rights)—

(a) the words from “married” to the end shall become sub-paragraph (i) of that paragraph; and

(b) at the end there shall be added “or

(ii) where not married to the mother at that time or subsequently, the father is registered as the child’s father under any of the enactments mentioned in subsection (1A).”.

(3) After subsection (1) there shall be inserted—

“(1A) Those enactments are—

(a) section 18(1)(a), (b)(i) and (c) and (2)(b) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (c.49);

(b) sections 10(1)(a) to (e) and 10A(1)(a) to (e) of the Births and Deaths Registration Act 1953 (c.20); and

(c) article 14(3)(a) to (e) of the Births and Deaths Registration (Northern Ireland) Order 1976 (S.I. 1976/1041).

(1B) The Scottish Ministers may by regulations make provision for or in connection with specifying cases in which a father—

(a) who was not married to the mother of a child at the time of the child's conception or subsequently; and

(b) who is not registered as the child's father under any of the enactments mentioned in subsection (1A),

shall have parental responsibilities and parental rights in relation to the child.”.

(4) Paragraph (b)(ii) of subsection (1) of section 3 of the Children (Scotland) Act 1995 (c.36) (which is inserted by subsection (2)(b)) shall not confer parental responsibilities or parental rights on a man who, before the coming into force of subsections (2) and (3), was registered under any of the enactments mentioned in subsection (1A) of that section (which is inserted by subsection (3)).

Cohabitation: new rights

18 Meaning of “cohabitant” in sections 19 to 22

- (1) In sections 19 to 22, “cohabitant” means a person falling within subsection (2) or (3).
- (2) A person falls within this subsection if the person is (or was) living with another person as if they were husband and wife.
- (3) A person falls within this subsection if the person is (or was) living with another person in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex.
- (4) In determining for the purposes of any of sections 19 to 22 whether a person is a cohabitant, the court shall have regard to—
 - (a) the length and nature of the cohabitation;
 - (b) the extent, if any, to which one cohabitant is financially dependent on the other; and
 - (c) whether the cohabitants have a child of whom they are the parents.
- (5) In subsection (4) and section 21, “court” means Court of Session or sheriff.

19 Rights in certain household goods

- (1) Subsection (2) applies where any question arises (whether during or after the cohabitation) as to the respective rights of ownership of cohabitants in any household goods.
- (2) It shall be presumed that each cohabitant has a right to an equal share in household goods acquired (other than by gift or succession from a third party) during the period of cohabitation.
- (3) The presumption in subsection (2) shall be rebuttable.
- (4) In this section, “household goods” means any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation in any residence in which the cohabitants are (or were) cohabiting for their joint domestic purposes; but does not include—

- (a) money;
- (b) securities;
- (c) any motor car, caravan or other road vehicle; or
- (d) any domestic animal.

5 **20 Rights in certain money and property**

- (1) Subsection (2) applies where, in relation to cohabitants, any question arises (whether during or after the cohabitation) as to the right of a cohabitant to—
- (a) money derived from any allowance made by either cohabitant for their joint household expenses or for similar purposes; or
 - 10 (b) any property acquired out of such money.
- (2) Subject to any agreement between the cohabitants to the contrary, the money or property shall be treated as belonging to each cohabitant in equal shares.
- (3) In this section “property” does not include a residence used by the cohabitants as the sole or main residence in which they live (or lived) together.

15 **21 Financial provision where cohabitation ends otherwise than by death**

- (1) Subsection (2) applies where cohabitants cease to cohabit otherwise than by reason of the death of one (or both) of them.
- (2) On the application of a cohabitant (the “applicant”), the court may, after having regard to the matters mentioned in subsection (3)—
- 20 (a) make an order requiring the other cohabitant (the “defender”) to pay a capital sum of an amount specified in the order to the applicant;
- (b) make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of the cohabitants;
- 25 (c) make such interim order as it thinks fit.
- (3) Those matters are—
- (a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and
 - 30 (b) whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of—
 - (i) the defender; or
 - (ii) any child of the cohabitants.
- (4) In making an order under paragraph (a) or (b) of subsection (2), the court may specify that the amount shall be payable—
- 35 (a) on such date as may be specified;
- (b) in instalments.
- (5) Any application under this section shall be made not later than one year after the day on which the cohabitants cease to cohabit.
- (6) In this section—

“child of the cohabitants” means any child under 16 years of age of whom the cohabitants are the parents;

“contributions” includes indirect and non-financial contributions (and, in particular, any such contribution made by looking after any child of the cohabitants or any house in which they cohabited); and

“economic advantage” includes gains in—

- (a) capital;
- (b) income; and
- (c) earning capacity;

and “economic disadvantage” shall be construed accordingly.

22 Application to court by survivor for provision on intestacy

(1) This section applies where—

- (a) a cohabitant (the “deceased”) dies intestate; and
- (b) immediately before the death the deceased was—
 - (i) domiciled in Scotland; and
 - (ii) cohabiting with another cohabitant (the “survivor”).

(2) Subject to subsection (4), on the application of the survivor, the court may—

- (a) after having regard to the matters mentioned in subsection (3), make an order—
 - (i) for payment to the survivor out of the deceased’s net intestate estate of a capital sum of such amount as may be specified in the order;
 - (ii) for transfer to the survivor of such property (whether heritable or moveable) from that estate as may be so specified;
- (b) make such interim order as it thinks fit.

(3) Those matters are—

- (a) the size and nature of the deceased’s net intestate estate;
- (b) any benefit received, or to be received, by the survivor—
 - (i) on, or in consequence of, the deceased’s death; and
 - (ii) from somewhere other than the deceased’s net intestate estate; and
- (c) the nature and extent of any other rights against, or claims on, the deceased’s net intestate estate.

(4) An order or interim order under subsection (2) shall not have the effect of awarding to the survivor an amount which would exceed the amount to which the survivor would have been entitled in respect of legal rights and prior rights had the survivor been the spouse of the deceased.

(5) An application under this section may be made to—

- (a) the Court of Session;
- (b) a sheriff in the sheriffdom in which the deceased was habitually resident at the date of death;

(c) if at the date of death it is uncertain in which sheriffdom the deceased was habitually resident, the sheriff at Edinburgh.

(6) Subject to subsection (7), any application under this section shall be made before the expiry of the period of 6 months beginning with the day on which the deceased died.

5 (7) The court may, on cause shown, permit an application to be made after the expiry of the period mentioned in subsection (6).

(8) In making an order under paragraph (a)(i) of subsection (2), the court may specify that the capital sum shall be payable—

(a) on such date as may be specified;

10 (b) in instalments.

(9) In making an order under paragraph (a)(ii) of subsection (2), the court may specify that the transfer shall be effective on such date as may be specified.

(10) If the court makes an order in accordance with subsection (8), it may, on an application by any party having an interest, vary the date or method of payment of the capital sum.

15 (11) In this section—

“intestate” shall be construed in accordance with section 36(1) of the Succession (Scotland) Act 1964 (c.41);

“legal rights” has the meaning given by section 36(1) of the Succession (Scotland) Act 1964 (c.41);

20 “net intestate estate” means so much of the intestate estate as remains after provision for the satisfaction of—

(a) inheritance tax;

(b) other liabilities of the estate having priority over legal rights and the prior rights of a surviving spouse; and

25 (c) any legal rights and the prior rights of a surviving spouse; and

“prior rights” has the meaning given by section 36(1) of the Succession (Scotland) Act 1964 (c.41).

23 Administration of Justice Act 1982: extension of definition of “relative”

30 In section 13 of the Administration of Justice Act 1982 (c.53) (supplementary provisions and definitions in relation to Part 2), in the definition of relative, after paragraph (b) insert—

35 “(ba) any person (“A”), not being the civil partner of the injured person, who was, at the time of the act or omission giving rise to liability in the responsible person, living with the injured person in a relationship which had the characteristics of the relationship between husband and wife except that A and the injured person are of the same sex;”.

Cohabitation: domestic interdicts

24 Domestic interdicts

(1) The 1981 Act shall be amended in accordance with subsections (2) and (3).

- (2) In subsection (3) of section 18 (cohabiting couples: occupancy rights and application of certain provisions of Act), for the words from “sections”, where it first occurs, to “17” there shall be substituted “section 13”.
- (3) After section 18 there shall be inserted—

“Domestic interdicts and powers of arrest

18A Meaning of “domestic interdict”

- (1) In sections 18B, 18C and 18E, “domestic interdict” means—
- (a) an interdict granted on the application of a person (“A”) who is (or was) living with another person (“B”) as if they were husband and wife against B for any of the purposes mentioned in subsection (2); or
- (b) an interdict granted on the application of a person (“C”) who is (or was) living with another person (“D”) in a relationship which has the characteristics of the relationship between husband and wife except that C and D are of the same sex against D for any of the purposes mentioned in subsection (2).
- (2) Those purposes are—
- (a) restraining or prohibiting such conduct of the defender towards—
- (i) the pursuer; or
- (ii) any child in the permanent or temporary care of the pursuer, as the court may specify;
- (b) prohibiting the defender from entering or remaining in—
- (i) a family home occupied by the pursuer and the defender;
- (ii) any other residence occupied by the pursuer;
- (iii) any place of work of the pursuer;
- (iv) any school attended by a child in the permanent or temporary care of the pursuer.
- (3) In this section and in sections 18B to 18E—
- “family home” means, subject to subsection (4), any house, caravan, houseboat or other structure which has been provided or has been made available by the pursuer or the defender (or both of them) as (or has become) a family residence for them and includes any garden or other ground or building usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure; but does not include a residence provided or made available by any person for the pursuer or, as the case may be, the defender to reside in (whether or not with any child who is treated as a child of the family by the pursuer and the defender) separately from the defender or, as the case may be, the pursuer; and
- “interdict” includes interim interdict;
- (4) If the tenancy of a family home is transferred from a pursuer to a defender (or, as the case may be, from a defender to a pursuer) by agreement or under any enactment, the home shall, on such transfer, cease to be a family home.

18B Domestic interdicts: further provision

- (1) Subsection (2) applies if the defender—
- (a) is entitled to occupy the family home;
 - (b) is permitted by a third party to occupy it; or
 - (c) has occupancy rights in it.
- (2) Except where subsection (3) applies, the court may not grant a domestic interdict prohibiting the defender from entering or remaining in the family home.
- (3) This subsection applies if—
- (a) the interdict is ancillary to an exclusion order; or
 - (b) the defender has no occupancy rights in the family home (or the grant of any such rights is recalled by the court).

18C Attachment of power of arrest to domestic interdict

- (1) This section applies where an application is made for a domestic interdict.
- (2) Subject to subsection (3), the court shall, on the application of the pursuer, attach a power of arrest—
- (a) to any domestic interdict which is ancillary to an exclusion order (including an interim order made, by virtue of section 18(3), under section 4(6));
 - (b) to any other domestic interdict where the defender has had the opportunity of being heard by or represented before the court, unless it appears to the court that in all the circumstances of the case such a power is unnecessary.
- (3) The court may attach a power of arrest to an interdict by virtue of subsection (2) only if satisfied that attaching the power would not result in the defender being subject, in relation to the interdict, to a power of arrest under both this Act and the Protection from Abuse (Scotland) Act 2001 (asp 14).
- (4) A power of arrest attached to an interdict by virtue of subsection (2) shall not have effect until such interdict together with the attached power of arrest is served on the defender; and such a power of arrest shall, unless previously recalled, cease to have effect on the expiry of the period of 3 years beginning with the day on which the application under subsection (2) is granted.
- (5) If, by virtue of subsection (2), a power of arrest is attached to an interdict, a constable may arrest without warrant the defender if he has reasonable cause for suspecting the defender of being in breach of the interdict.
- (6) If, by virtue of subsection (2), a power of arrest is attached to an interdict, the pursuer shall, as soon as possible after service of the interdict together with the attached power of arrest on the defender, ensure that there is delivered to the chief constable of the police area in which the family home is situated a copy of the application for the interdict and of the interlocutor granting the interdict together with a certificate of service of the interdict and, where the application to attach the power of arrest to the interdict was made after the interdict was granted, a copy of that application and of the interlocutor granting it and a certificate of service of the interdict together with the attached power of arrest.

- (7) Where any domestic interdict to which, by virtue of subsection (2), there is attached a power of arrest is varied or recalled, the person who applied for the variation or recall shall ensure that there is delivered to the chief constable of the police area in which the family home is situated a copy of the application for variation or recall and of the interlocutor granting the variation or recall.

18D Police powers after arrest

- (1) Where a defender has been arrested under section 18C(5), the officer in charge of a police station may—
- (a) if satisfied that there is no likelihood of violence to the pursuer or any child in the temporary or permanent care of the pursuer, liberate the defender unconditionally; or
 - (b) refuse to liberate the defender.
- (2) For such refusal and the detention of the defender until appearance in court by virtue of section 18E(2) or any provision of the Criminal Procedure (Scotland) Act 1995 (c.46) the officer shall not be subjected to any claim.
- (3) Where a defender arrested under section 18C(5) is liberated under subsection (1)(a), the facts and circumstances which gave rise to the arrest shall be reported forthwith to the procurator fiscal who, if he decides to take no criminal proceedings in respect of those facts and circumstances, shall at the earliest opportunity take all reasonable steps to intimate his decision to the persons mentioned in paragraphs (a) and (b) of section 18E(5).

18E Procedure after arrest

- (1) This section shall apply only where—
- (a) a defender arrested under section 18C(5) has not been liberated under section 18D(1)(a); and
 - (b) the procurator fiscal decides that no criminal proceedings are to be taken in respect of the facts and circumstances which gave rise to the arrest.
- (2) The defender shall wherever practicable be brought before the sheriff sitting as a court of summary criminal jurisdiction for the district in which he or she was arrested not later than in the course of the first day after the arrest, such day not being a Saturday, Sunday or a court holiday prescribed for that court under section 8 of the Criminal Procedure (Scotland) Act 1995 (c.46) (“the 1995 Act”).
- (3) Nothing in subsection (2) shall prevent the defender from being brought before the sheriff on a Saturday, a Sunday or such a court holiday where the sheriff is, in pursuance of section 8 of the 1995 Act, sitting on such day for the disposal of criminal business.
- (4) Subsections (1) to (3) of section 15 of the 1995 Act (intimation to a named person) shall apply to a defender who has been arrested under section 18C(5) as they apply to a person who has been arrested in respect of any offence.
- (5) The procurator fiscal shall at the earliest opportunity, and in any event prior to the defender being brought before the sheriff under subsection (2), take all reasonable steps to intimate—
- (a) to the pursuer; and

(b) to the solicitor who acted for the pursuer when the domestic interdict was granted or to any other solicitor who the procurator fiscal has reason to believe acts for the time being for the pursuer,

that no criminal proceedings of the kind mentioned in subsection (1) are to be taken.

(6) On the defender's being brought before the sheriff under subsection (2), the following procedure shall apply—

(a) the procurator fiscal shall present to the sheriff a petition containing—

(i) a statement of the particulars of the defender;

(ii) a statement of the facts and circumstances which gave rise to the arrest; and

(iii) a request that the defender be detained for a further period not exceeding 2 days;

(b) if it appears to the sheriff that—

(i) the statement mentioned in paragraph (a)(ii) discloses a *prima facie* breach of interdict by the defender;

(ii) proceedings for breach of interdict will be taken; and

(iii) there is a substantial risk of violence by the defender against the pursuer or any child in the permanent or temporary care of the pursuer,

he may order the defender to be detained for a further period not exceeding 2 days;

(c) in any case to which paragraph (b) does not apply, the defender shall, unless in custody in respect of any other matter, be released from custody.

(7) In computing the period of 2 days mentioned in paragraphs (a) and (b) of subsection (6), no account shall be taken of a Saturday, Sunday or a court holiday prescribed for that court under section 8 of the 1995 Act.”.

Amendments of Civil Partnership Act 2004

25 Amendments of Civil Partnership Act 2004

Schedule 1, which contains amendments of the Civil Partnership Act 2004 (c.33), shall have effect.

Application of 1981 Act to cohabiting couples of same sex

26 Application of 1981 Act to cohabiting couples of same sex

(1) Section 18 of the 1981 Act (occupancy rights of cohabiting couples) shall be amended in accordance with subsections (2) and (3).

(2) In subsection (1)—

- (a) after “wife” there shall be inserted “or two persons (not being civil partners of each other) are living together in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex”;
- 5 (b) after “wife (”, there shall be inserted “in either case”; and
- (c) for “man and the woman” there shall be substituted “entitled partner and the non-entitled partner”.
- (3) In subsection (2)—
- (a) for “a man and a woman” there shall be substituted “two persons”; and
- 10 (b) in paragraph (b), for the words from “are” to the end of that paragraph there shall be substituted “is any child—
- (i) of whom they are the parents; or
- (ii) who they have treated as a child of theirs.”.

Jurisdiction

- 15 **27 Jurisdiction: actions for declarator of recognition of certain foreign decrees**
- (1) The Domicile and Matrimonial Proceedings Act 1973 (c.45) shall be amended in accordance with subsections (2) and (3).
- (2) In section 7 (jurisdiction of Court of Session in certain consistorial causes)—
- (a) in subsection (1)—
- 20 (i) for “(2) to (8)” there shall be substituted “(2A) to (10)”; and
- (ii) at the end there shall be inserted—
- “(aa) an action for declarator of recognition of a relevant foreign decree.”;
- (b) in subsection (3A), after “marriage”, where it first occurs, there shall be inserted “or for declarator of recognition of a relevant foreign decree”; and
- 25 (c) after subsection (8) there shall be added—
- “(9) In this section, “relevant foreign decree” means a decree of divorce, nullity or separation granted outwith a member state of the European Union.
- (10) References in subsection (3A) to a marriage shall, in the case of an action for declarator of recognition of a relevant foreign decree, be construed as
- 30 references to the marriage to which the relevant foreign decree relates.”.
- (3) In section 8 (jurisdiction of sheriff court in certain consistorial causes)—
- (a) in subsection (1)—
- (i) for “(4)” there shall be substituted “(6)”; and
- (ii) the words from “an” to the end shall become paragraph (a) of that
- 35 subsection; and
- (iii) at the end there shall be added “and
- (b) an action for declarator of recognition of a relevant foreign decree.”;
- (b) in subsection (2), after “divorce” there shall be inserted “or for declarator of recognition of a relevant foreign decree”; and

(c) after subsection (4) there shall be added—

“(5) In this section, “relevant foreign decree” has the meaning given by section 7(9).

(6) References in subsection (2) to a marriage shall, in the case of an action for declarator of recognition of a relevant foreign decree, be construed as references to the marriage to which the relevant foreign decree relates.”.

Private international law

28 Validity of marriages

(1) Subject to the Foreign Marriage Act 1892 (c.23), the question whether a marriage is formally valid shall be determined by the law of the place where the marriage was celebrated.

(2) The question whether a person who enters into a marriage—

(a) had capacity; or

(b) consented,

to enter into it shall, subject to subsection (3) and to section 50 of the Family Law Act 1986 (c.55) (non-recognition of divorce or annulment in another jurisdiction no bar to remarriage), be determined by the law of the place where, immediately before the marriage, that person was domiciled.

(3) If a marriage entered into in Scotland is void under a rule of Scots internal law, then, notwithstanding subsection (2), that rule shall prevail over any law under which the marriage would be valid.

(4) If the law of the place in which a person is domiciled requires a person under a certain age to obtain parental consent before entering into a marriage, that requirement shall not be taken to affect the capacity of a person to enter into a marriage in Scotland unless failure to obtain such consent would render invalid any marriage that the person purported to enter into in any form anywhere in the world.

29 Matrimonial property

(1) Any question in relation to the rights of spouses to each other’s immoveable property arising by virtue of the marriage shall be determined by the law of the place in which the property is situated.

(2) Subject to subsections (4) and (5), if spouses are domiciled in the same country, any question in relation to the rights of the spouses to each other’s moveable property arising by virtue of the marriage shall be determined by the law of that country.

(3) Subject to subsections (4) and (5), if spouses are domiciled in different countries then, for the purposes of any question in relation to the rights of the spouses to each other’s moveable property arising by virtue of the marriage, the spouses shall be taken to have the same rights to such property as they had immediately before the marriage.

(4) Any question in relation to—

(a) the use or occupation of a matrimonial home which is moveable; or

(b) the use of the contents of a matrimonial home (whether the home is moveable or immoveable),

shall be determined by the law of the country in which the home is situated.

- (5) A change of domicile by a spouse (or both spouses) shall not affect a right in moveable property which, immediately before the change, has vested in either spouse.
- (6) This section shall not apply—
- 5 (a) in relation to the law on aliment, financial provision on divorce, transfer of property on divorce or succession;
- (b) to the extent that spouses agree otherwise.
- (7) In this section, “matrimonial home” has the same meaning as in section 22 of the 1981 Act.

10 **30 Aliment**

Subject to the Maintenance Orders (Reciprocal Enforcement) Act 1972 (c.18), a court in Scotland shall apply Scots internal law in any action for aliment which comes before it.

Declarator of freedom and putting to silence: action no longer competent

15 **31 Action for declarator of freedom and putting to silence to cease to be competent**

It shall not be competent to raise an action for declarator of freedom and putting to silence.

General

20 **32 Interpretation**

In this Act—

20 “the 1976 Act” means the Divorce (Scotland) Act 1976 (c.39); and

 “the 1981 Act” means the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c.59).

25 **33 Minor and consequential amendments and repeals**

- (1) Schedule 2 (which contains minor amendments and amendments consequential on the provisions of this Act) shall have effect.
- (2) The enactments mentioned in the first column in schedule 3 (which include enactments that are spent) are repealed to the extent set out in the second column.

30 **34 Short title and commencement**

- (1) This Act may be cited as the Family Law (Scotland) Act 2005.
- 30 (2) The provisions of this Act (except this section) shall come into force on such day as the Scottish Ministers may by order made by statutory instrument appoint.
- (3) An order under subsection (2) may—
- 35 (a) appoint different days for different purposes; and
- (b) include such transitional or saving provision as the Scottish Ministers consider necessary or expedient in connection with the coming into force of the provisions brought into force.

- (4) A statutory instrument containing an order under subsection (2) which includes provision as mentioned in subsection (3)(b) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

SCHEDULE 1
(introduced by section 25)

AMENDMENTS OF THE CIVIL PARTNERSHIP ACT 2004

1 The Civil Partnership Act 2004 (c.33) shall be amended in accordance with this
5 schedule.

2 In section 101 (right of civil partner without title to occupy family home), after
subsection (6) there shall be inserted—

“(6A) Subject to subsection (5), if—

10 (a) there has been no cohabitation between an entitled partner and a non-
entitled partner during a continuous period of two years, and

(b) during that period the non-entitled partner has not occupied the family
home,

the non-entitled partner shall, on the expiry of that period, cease to have
occupancy rights in the family home.

15 (6B) A non-entitled partner who has ceased to have occupancy rights by virtue of
subsection (6A) may not apply to the court for an order under section 103(1).”.

3 In subsection (1) of section 103 (regulation by court of rights of occupancy of family
home), at the beginning there shall be inserted “Subject to section 101(6A),”.

4 In section 106 (continued exercise of occupancy rights after dealing)—

20 (a) after subsection (1), there shall be inserted—

“(1A) The occupancy rights of a non-entitled partner in relation to a family home
shall not be exercisable in relation to the home where, following a dealing of
the entitled partner relating to the home—

25 (a) a person acquires the home, or an interest in it, in good faith and for
value from a person other than the person who is or, as the case may be,
was the entitled partner, or

(b) a person derives title to the home from a person who acquired title as
mentioned in paragraph (a).”; and

(b) in subsection (3)—

30 (i) in paragraph (e), for “sale” there shall be substituted “transfer for value”;

(ii) in paragraph (e), for the words from “seller”, where it first occurs, to the
end of the paragraph there shall be substituted “transferor—

35 (i) a written declaration signed by the transferor, or a person acting on
behalf of the transferor under a power of attorney or as a guardian
(within the meaning of the Adults with Incapacity (Scotland) Act
2000 (asp 4)), that the subjects of the transfer are not, or were not
at the time of the dealing, a family home in relation to which a
civil partner of the transferor has or had occupancy rights, or

(ii) a renunciation of occupancy rights or consent to the dealing which bears to have been properly made or given by the non-entitled partner or a person acting on behalf of the non-entitled partner under a power of attorney or as a guardian (within the meaning of the Adults with Incapacity (Scotland) Act 2000 (asp 4)).”; and

(iii) in paragraph (f), for “5” there shall be substituted “2”.

5 In section 107 (dispensation with civil partner’s consent to dealing)—

(a) in subsection (1), at the beginning there shall be inserted “Subject to subsections (1A) and (1C),”;

(b) after that subsection there shall be inserted—

“(1A) Subsection (1B) applies if, in relation to a proposed sale—

- (a) negotiations with a third party have not begun, or
- (b) negotiations have begun but a price has not been agreed.

(1B) An order under subsection (1) dispensing with consent may be made only if—

- (a) the price agreed for the sale is no less than such amount as the court specifies in the order, and
- (b) the contract for the sale is concluded before the expiry of such period as may be so specified.

(1C) Subsection (1D) applies if the proposed dealing is the grant of a heritable security.

(1D) An order under subsection (1) dispensing with consent may be made only if—

- (a) the heritable security is granted for a loan of no more than such amount as the court specifies in the order, and
- (b) the security is executed before the expiry of such period as may be so specified.”; and

(c) after subsection (3) there shall be inserted—

“(3A) If the court refuses an application for an order under subsection (1), it may make an order requiring a non-entitled partner who is or becomes the occupier of the family home—

- (a) to make such payments to the owner of the home in respect of that partner’s occupation of it as may be specified in the order,
- (b) to comply with such other conditions relating to that partner’s occupation of the family home as may be so specified.”.

6 In section 113 (civil partnerships: competency of interdict)—

(a) in subsection (2), for paragraph (b) there shall be substituted—

“(b) subject to subsection (3), prohibits a civil partner from entering or remaining in—

- (i) the family home,
- (ii) any other residence occupied by the applicant civil partner,
- (iii) any place of work of the applicant civil partner,

(iv) any school attended by a child of the family or a child in the care of the applicant civil partner”; and

(b) after that subsection, there shall be added—

“(3) Subsection (4) applies if the non-applicant civil partner—

(a) is entitled to occupy the family home,

(b) is permitted by a third party to occupy it, or

(c) has occupancy rights in it.

(4) Except where subsection (5) applies, the court may not grant a relevant interdict prohibiting the non-applicant civil partner from entering or remaining in the family home.

(5) This subsection applies if—

(a) the interdict is ancillary to an exclusion order, or

(b) by virtue of section 101(4), the court refuses leave to exercise occupancy rights.

(6) In this section and in sections 114 to 116, “applicant civil partner” means the civil partner who has applied for the interdict; and “non-applicant civil partner” is to be construed accordingly.”.

In subsection (3) of section 114 (attachment of powers of arrest to relevant interdicts), for the words from “upon” to the end there shall be substituted “on the expiry of the period of 3 years beginning with the day on which the application under subsection (1) is granted”.

In subsection (3) of section 117 (dissolution of civil partnerships)—

(a) in paragraph (c), for “two years” there shall be substituted “one year”; and

(b) in paragraph (d), for “5” there shall be substituted “two”.

Section 135 (interpretation of Part 3) shall become subsection (1) of that section and—

(a) in the definition of “family home”—

(i) after “means” there shall be inserted “subject to subsection (2)”; and

(ii) for the words “one civil partner for that” there shall be substituted “a person for one”; and

(b) at the end there shall be inserted—

“(2) If the tenancy of a family home is transferred from one civil partner to the other by agreement or under any enactment, the home shall, on such transfer, cease to be a family home.”.

SCHEDULE 2

(introduced by section 33(1))

MINOR AND CONSEQUENTIAL AMENDMENTS

The Domicile and Matrimonial Proceedings Act 1973 (c.45)

1 In section 7 of the Domicile and Matrimonial Proceedings Act 1973 (jurisdiction of Court of Session)—

- (a) in paragraph (a) of subsection (1)—
- (i) after “marriage”, where it first occurs, there shall be inserted “or”; and
 - (ii) the words “declarator of freedom and putting to silence” shall be repealed;
- (b) subsection (2) shall be repealed; and
- 5 (c) in subsection (5)—
- (i) after “marriage”, where it secondly occurs, there shall be inserted “or”; and
 - (ii) “or declarator of freedom and putting to silence” shall be repealed.

The Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c.59)

- 10 2 (1) The Matrimonial Homes (Family Protection) (Scotland) Act 1981 shall be amended as follows.
- (2) In subsection (1) of section 3 (regulation by court of rights of occupancy of matrimonial home), at the beginning there shall be inserted “Subject to section 1(7) of this Act,”.
- (3) In the proviso to section 17(2), for “10” there shall be substituted “8”

The Law Reform (Parent and Child) (Scotland) Act 1986 (c.9)

- 15 3 In section 9 of the Law Reform (Parent and Child) (Scotland) Act 1986 (savings and supplementary provisions)—
- (a) in paragraph (b) of subsection (1), at the beginning there shall be inserted “subject to subsection (1A) below,”; and
- (b) after that subsection, there shall be inserted—
- 20 “(1A) Subsections (1) and, with the omission of the words “Subject to subsection (4) below,”, (2) of section 1 of this Act shall apply in relation to adopted children.”.

The Civil Partnership Act 2004 (c.33)

- 25 4 In section 115(2) of the Civil Partnership Act 2004 (police powers after arrest) for “Criminal Procedure (Scotland) Act 1975 (c.21)” there shall be substituted “Criminal Procedure (Scotland) Act 1995 (c.46)”.

SCHEDULE 3
(introduced by section 33)

REPEALS

<i>Enactment</i>	<i>Extent of repeal</i>	
5	The Conjugal Rights (Scotland) Amendment Act 1861 (c.86)	The whole Act.
	The Law Reform (Husband and Wife) Act 1962 (c.48)	The whole Act.
10	The Domicile and Matrimonial Proceedings Act 1973 (c.45)	Section 4.
	The Divorce (Scotland) Act 1976 (c.39)	In section 2, subsection (3) and, in subsection (4), the word “(c)”.
	The Adoption (Scotland) Act 1978 (c.28)	In section 39, in subsections (1) and (2), the word “legitimate”, wherever it occurs.
15	The Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c.59)	Section 15(6). Section 21. In section 22, in the definition of “matrimonial home”, the words “attached to, and”.
20	The Law Reform (Parent and Child) (Scotland) Act 1986 (c.9)	In section 9(1), paragraph (a).
	The Age of Legal Capacity (Scotland) Act 1991 (c.50)	Section 7.
25	The Civil Partnership Act 2004 (c.33)	Section 86(4) to (7). Section 114(7). In section 117, subsections (3)(b), (6) and (7). In Schedule 10, paragraph 3.

Family Law (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to amend the law in relation to marriage, divorce and the jurisdiction of the courts in certain consistorial actions; to amend the Matrimonial Homes (Family Protection) (Scotland) Act 1981; to amend the law relating to the domicile of persons who are under 16 years of age; to make further provision as respects responsibilities and rights in relation to children; to make provision conferring rights in relation to property, succession and claims in damages for persons living, or having lived, together as if husband and wife; to amend Part 3 of the Civil Partnership Act 2004; to make provision in relation to certain rules of private international law relating to family law; to make incompetent actions for declarator of freedom and putting to silence; and for connected purposes.

Introduced by: Cathy Jamieson
On: 7 February 2005
Supported by: Peter Peacock, Malcolm Chisholm
Bill type: Executive Bill

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