JUSTICE 1 COMMITTEE

Wednesday 25 May 2005

Session 2

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JUSTICE 1 COMMITTEE
17th Meeting 2005, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

*Marlyn Glen (North East Scotland) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Helen Eadie (Dunfermline East) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)

*attended

THE FOLLOWING ALSO ATTENDED:

Professor Kenneth Norrie (Adviser)

THE FOLLOWING GAVE EVIDENCE:

Professor Paul Beaumont (University of Aberdeen)
Michael Clancy (Law Society of Scotland)
Professor Eric Clive (University of Edinburgh)
Morag Driscoll (Law Society of Scotland)
John Fotheringham (Law Society of Scotland)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 1

Scottish Parliament

Justice 1 Committee

Wednesday 25 May 2005

[THE CONVENER *opened the meeting at 10:04*]

Family Law (Scotland) Bill: Stage 1

The Convener (Pauline McNeill): Good morning and welcome to the Justice 1 Committee's 17th meeting of 2005. We have full attendance, except for Mike Pringle, who is fulfilling a constituency engagement, although he should join us later. I welcome Professor Norrie, who is the committee's adviser on the Family Law (Scotland) Bill.

Our first panel comprises Professor Eric Clive, who is from the University of Edinburgh's school of law, and Professor Paul Beaumont, who is from the University of Aberdeen's law school. We welcome you to the committee and thank you for your written submissions. We are delighted to have you with us to discuss the bill. We will proceed straight to questions, for which we have just over an hour, so I hope that we will be able to do quite a lot.

Mr Bruce McFee (West of Scotland) (SNP): Good morning. I will start with section 2, which is on void marriages. Will the provisions in section 2 on the validity of marriage change the common law? Does it make sense to limit those provisions to marriages that are "solemnised in Scotland"?

Professor Eric Clive (University of Edinburgh): The grounds will not change the common law substantially, but the limitation to marriages that are solemnised in Scotland is wrong and should be removed. If a person who is domiciled in Scotland is forced into a marriage abroad, that marriage should be void. The words

"in relation to a marriage solemnised in Scotland"

should be removed.

Professor Paul Beaumont (University of Aberdeen): I agree. In the drafting, we would have to ensure that the provision was limited to Scottish domiciliaries, because we do not want to legislate on foreign marriages for non-Scottish domiciliaries. An amendment would have to make it clear that we were dealing only with Scottish domiciliaries in relation to foreign marriages.

Mr McFee: On your reading of the bill, does the Executive intend in effect to change the common law or merely to restate it? If the intention is restatement, why do it?

Professor Clive: The Executive will have to speak for itself. The Scottish Law Commission's recommendation, which I had something to do with, was designed to put the common law in statutory form. One reason for doing so is ease of access and clarity. Most of our family law—except one or two small bits—is in statutory form. Many years ago, the English law on nullity of marriage was put in statutory form. The bill is partly a tidying exercise, which is why my submission suggests that one or two other matters might be added, to produce a complete statement. The bill will improve the form rather than the substance of the law.

Mr McFee: Is the generality of the rules fully replicated for civil partners? Your submission referred to the matter, Professor Clive, but I ask for your views for the record.

Professor Clive: My general approach is that the rules ought to be replicated, unless there is a very good reason for that not to happen. To be honest, I have not gone through all the civil partnership provisions to check that, so I would not like to venture an answer.

Mr McFee: You think that the principle should be established if it is not already established.

Professor Clive: Yes.

Mr McFee: What is Professor Beaumont's view?

Professor Beaumont: I do not have the expertise on civil partnerships to give an informed answer.

Mr McFee: Okey-dokey—we shall investigate that ourselves. I will deal briefly with marriage by cohabitation with habit and repute. Is pressure being exerted to change that status? What would be the consequences of abolishing it? How easy would it be to abolish? Should we leave it?

Professor Clive: I do not think that there is enormous public pressure to abolish it. However, the bill reforms the law of marriage and the doctrine is one area of the law of marriage that might helpfully be abolished. The doctrine has performed a useful function in the past as a protective device for a lot of people who would not otherwise have been protected, but it is uncertain and gives rise to difficulty.

Because such marriages exist even before they are declared to exist by a court, marriages can be floating around that people do not know about and for which they do not think that they need a divorce. They meet other people and marry them, but the second marriage can be invalid because of the existence of the formless earlier marriage. The doctrine is vague, uncertain, expensive and potentially dangerous, so there is a strong case for getting rid of it. It is appropriate to do that now

because the protective function will be met by the bill's provisions on cohabitants.

There seems to be no reason to protect people who have pretended to be married and have acquired the reputation of being married but not to protect people who have been open and honest about the fact that they are cohabiting without marriage. The doctrine protects the dishonest—those who do not say that they never got married and have just been living together—so I do not think that there is a place for it in the modern law of Scotland. It would be easy to get rid of it and that would not affect acquired rights, as it would be phased out gradually. Those who had already accumulated the necessary length of cohabitation would still be protected.

Professor Beaumont: I agree with what Professor Clive says. It would be wrong to change the law governing the past by giving the new legislation any retrospective effect. The provisions on cohabitation are being introduced only now and we cannot use them as an equivalent protection for people in the past.

It happens so rarely that people nowadays hold themselves out to be married, which is a requirement of the doctrine, that only a small number of people will be affected. If the bill contains provisions to safeguard cohabitees both during their lifetime and at death, it seems unnecessary to maintain marriage by cohabitation with habit and repute. That could cause some of the difficulties that Professor Clive mentioned, although those difficulties would arise extremely rarely because, as I said, people now rarely hold themselves out to be married. Most people are transparent about the fact that they are living together rather than married. There is little to be gained by keeping the doctrine in the law and, potentially, some things to be lost. On balance, I recommend repeal for the future, but not retrospectively.

The Convener: Let us develop that a bit further, as it is a matter on which the committee will have to deliberate. What is the current test? What are the courts looking for? I know that there are very few cases. You say that a couple may hold themselves out to be married. Does that mean that, when they move into a house, they have to say to their neighbours, "By the way, we're married," or is the objective test that the neighbours have just assumed that those people are married and have never asked? What are the courts looking for?

Professor Clive: First, there has to have been cohabitation for a certain length of time. That, in itself, is vague. Secondly, there is the element of reputation. That depends on what friends, neighbours and acquaintances think, which, in turn, depends on what impression the parties give. It is not necessary for the parties to say expressly that they are married; they simply have to give the impression that they are a married couple, not an unmarried cohabiting couple. The question of repute is tricky, because often some people know the truth and others do not, so there is divided repute. The doctrine is very untidy.

The Convener: I know that you think that the doctrine is untidy, but I do not have a view on it at the moment—I am just trying to understand why it exists and possible reasons why it should not exist. You say that the courts would test what other people think. I suppose that the courts consider the whole set of circumstances to find out whether there is a genuine reason for others, as well as the couple themselves, to believe that they are married, even though they have not gone through a ceremony. The couple would not have to go about saying that they were married—that is not the test.

10:15

Professor Clive: That would not be necessary, but they would probably need to call themselves Mr and Mrs So-and-so; they would need to give the impression that they were married.

Stewart Stevenson (Banff and Buchan) (SNP): There appears to be a key difference between cohabitation as defined in the bill and marriage by cohabitation with habit and repute, in that cohabitation as defined in the bill has a clear end point. Section 18(2) says that two people are cohabitants if they are, or were, living together. Under that definition, it appears that if cohabitants stop living together, the relationship has ended, whereas, in law, marriage by cohabitation with habit and repute would not appear to have ended simply because the couple have separated. That is a fine theoretical point but, given the cases that come before the courts, do you think that it matters in the real world? If we abolished marriage by cohabitation with habit and repute, is it likely that that would have an impact on couples who live together in future?

Professor Clive: Yes, because the difference that you have outlined is important. As I have mentioned, the parties to a marriage by cohabitation with habit and repute often do not think that they are married, but once they are married by cohabitation with habit and repute they are married for ever, until they are divorced. That means that they can go about their business without realising that they are married.

In practice, it often happens that no issue arises until one of the parties dies and the surviving party thinks that they should have the rights of a married person. One suspects that that is often an afterthought. Marriage by cohabitation with habit

and repute is significantly different from cohabitation because of its permanence.

Stewart Stevenson: The proposed change in the law could affect the descendants of either party to such a marriage, so quite a range of people could be affected by it, if it is accepted.

Professor Clive: Yes. That leads to consideration of how far people should be affected by the marital status of their parents. At one time, the significance of the marital status of one's parents was an important reason for having marriage by cohabitation with habit and repute. Arguably, that is less important now.

Stewart Stevenson: The point that I am making is that the proposal on cohabitation goes beyond being a tidying-up exercise.

Professor Clive: That is right; it would be a significant reform.

Marlyn Glen (North East Scotland) (Lab): My question is on domestic violence. Has the law of matrimonial and domestic interdicts become too complicated? Would anything be lost by scrapping the laws in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the additions that the bill seeks to make, and relying entirely on the Protection from Abuse (Scotland) Act 2001?

Professor Clive: I think that the law has become too complicated. We now have four separate sets of provisions on the attachment of powers of arrest to interdicts of various kinds. People find it confusing and difficult that those sets of provisions are basically the same, but differ slightly in detail. It is in no one's interests to have overlapping provisions.

The Protection from Abuse (Scotland) Act 2001, which was introduced as a committee bill, wraps up everything very well because it is not linked to status. The question that it is concerned with is whether there is a danger of abuse. A person can get an interdict, whether they are a spouse, a cohabitant or anything else. I think that it would be possible to have only one set of provisions—those in the Protection from Abuse (Scotland) Act 2001—and to scrap the rest. If, on further reflection or as a result of submissions from consultees, it was felt that that act needed to be modified in some way, that could be done, but let us have one act instead of four separate sets of provisions.

Marlyn Glen: Scottish Women's Aid has advocated that the bill should include an amendment to the Children (Scotland) Act 1995 to introduce a rebuttable presumption against contact with children in cases in which domestic abuse has taken place. Is such an amendment desirable in policy terms and would it be workable in practice?

Professor Clive: I read that submission with great interest. I always take what Scottish Women's Aid says very seriously, because its members know what they are talking about and make responsible suggestions.

Although I entirely support the objective of trying to reduce the danger of domestic violence and particularly the abuse of children, how would that objective be framed in legal terms? Indeed, if it could be done, would such a provision be any better than what we have at the moment and would it have any unintended consequences? I see some difficulties in those areas and I am sure that Scottish Women's Aid is also well aware of the problems. After all, one would not want a presumption that was based on alleged domestic violence or on making domestic violence an issue, because that might unintentionally lead to many more allegations and counter-allegations that were not necessarily true.

The presumption that it is not in a child's best interests to be ordered to have contact with a person if there is the danger of physical or mental domestic abuse does not add much to the law. The welfare of the child is already the paramount consideration. Moreover, at the moment, the court is not to make an order unless doing so would be better for the child than not making one. Although I support the objective and do not rule out any attempts to do something—I certainly think that the matter should be explored—the issue is certainly not easy.

Marlyn Glen: You have backed up comments from the members of the Australian Parliament, which has gone down that road.

The Convener: We will move on to the issue of divorce.

Margaret Mitchell (Central Scotland) (Con): Do you favour the retention of a mixed fault and non-fault system?

Professor Clive: Yes. Over the years, many strong voices, including those of the Council of Europe and the Law Commission for England and Wales, have been raised in favour of an entirely no-fault system. However, although the Westminster Parliament went down that road for England and Wales, the approach did not really work. Because so many protections were built in, it turned out to be too complicated and has now been abandoned.

If we do not want people who seek a quick divorce to do so on the ground of behaviour rather than on separation grounds, a much more modest and realistic response would be to shorten the separation period, which is what the bill seeks to do. People might object to that system on theoretical grounds, but it is a more pragmatic response to the real problem than taking what I

would regard as the more doctrinaire approach of introducing an entirely no-fault system.

Margaret Mitchell: If a non-fault system were to be introduced, would you support scrapping the defender and pursuer element in favour of having a joint petition?

Professor Clive: Yes. There is a lot to be said for such an approach.

Margaret Mitchell: What would be its tangible benefits?

Professor Clive: It is difficult to say, because there is consensus in many divorces. Both parties want the divorce and, fortunately, there is no real acrimony. Although it might be difficult to assess any real benefits, anything that appears to reduce the contested element in divorce has to be good.

Margaret Mitchell: Do the bill's provisions generally make divorce less confrontational?

Professor Clive: Yes. I think that that is the intended effect. The problem with the five-year period of separation for a non-consensual divorce is that the party who wants the divorce will be tempted to resort to a behavioural ground—they will be tempted to rake up allegations against the other party in order to get a quick divorce. It is not in anybody's interest for that to happen. The reform is useful.

Margaret Mitchell: Is there anything that you want to add on any of the points, Professor Beaumont?

Professor Beaumont: Unlike Professor Clive, I am not a family law expert. I am here as a private international law expert. In principle, like any other informed member of the public, I am rather more attracted to the English model. Although that model, indeed, failed, I wonder whether it did so because of a lack of public expenditure commitment rather than a lack of commitment to the principle.

If we are to go for a no-fault system and we want to make it a good one—which I think is what the Law Commission for England and Wales and the then Lord Chancellor, Lord Mackay, were trying to do—we will have to have some kind of public investment in conciliation systems in order to avoid a situation in which everything is done without thought. The process needs to be carefully thought through.

It is a bit odd to have a mixed system in which desertion is abolished as a ground but adultery, for example, or what used to be called cruelty is retained as a ground. The idea of retaining the notion of fault may be to protect people in society who want to be able to say, "It wasn't my fault that I got divorced." It is important for some people in society, for religious or other reasons, to be able to say, "I wasn't the guilty party." They want the clean conscience that enables them to go on and marry someone else. That is true of people in the reformed Protestant tradition, for example.

Although I can see the utility of keeping fault grounds, desertion should be kept as a ground for that kind of person. The theory behind the reform may be to try to preserve fault for people who feel that it is valuable if divorce is possible only when they are pushed into it. If so, surely we should keep the full panoply of fault grounds. It would be a little bit odd for us not to do so.

If we are going to move away from the current system entirely, I see no reason to keep some fault grounds and not others. It would be better to have a complete no-fault system, as everybody would know that the law of the state was not about determining whether someone was guilty or not. The divorced person could go out with a clean conscience and say, "Of course, the state divorced me on a no-fault basis; it wasn't because I did something heinous or really bad."

From the logical point of view, I would prefer to have either a no-fault system or, if we are to have a fault system, the full range of fault grounds, including desertion. As I said, I do not come to the committee as an expert on family law. The view that I have given is one of a citizen and not a professor.

Margaret Mitchell: Is there anything that you want to add to what Professor Beaumont has said, Professor Clive?

Professor Clive: Yes. I see the remaining fault grounds as indicators that the marriage has broken down. They are not designed to give one spouse a feeling of being right and innocent. If one party has behaved intolerably towards the other in such a way that that other party cannot be expected to put up with the first party's behaviour or if one party has committed adultery, that is an indication that the marriage has broken down. On that basis, it is not entirely unreasonable to retain such fault grounds.

Margaret Mitchell: That is helpful. I will move on to a more technical issue. Section 13 specifies:

"Collusion no longer to be bar to divorce".

Will you explain the reasoning behind the provision?

Professor Clive: The provision was recommended by the Scottish Law Commission because collusion has become something of an empty concept. A party presenting a false case will still not get a divorce, because the grounds will not be there. They will also not get a divorce if it is known that they are keeping back a just defence. Changes to the law on collusion will not give people carte blanche to lie with impunity.

The idea behind the law on collusion was never very clear. Originally, in the 19th century, the idea was that people were to be discouraged at all costs from getting together to agree on a divorce or to make it go through more easily. However, that idea has gradually become meaningless. It is now contrary to the philosophy of divorce, which is that parties should be encouraged to agree and to get the divorce through. Abolishing the bar will not make a great deal of difference, but it will be another indication that we are now looking for less confrontational divorces. We do not want the parties to be at arm's length and negotiating through solicitors.

10:30

Professor Beaumont: The preservation of fault grounds still worries me. People get divorced on the ground of adultery or unreasonable treatment because they know that that is the quickest way to get divorced. In effect, the parties agree to say that there was adultery or unreasonable treatment. That—dare I say it—is a form of collusion and it seems to me that it is the kind of thing that we want to move away from. We do not want to encourage people to engage in falsehood in order to get divorced. We do not want a person to say, "Yes, I committed adultery with X," when in fact they did not commit adultery with X but are simply saying so in order to get divorced in a month or two rather than in a year or two.

The mix-and-match approach of having fault and no-fault divorces causes problems. It can still encourage the quickest possible remedy, which is a fault-based remedy. There could therefore be collusion and I do not think that such an approach is desirable.

Margaret Mitchell: Is that problem not avoided now because people can separate after one year if there is agreement?

Professor Beaumont: Of course, one year is a great deal shorter than two years, but there will still be some people who are impatient and who will go for a fault-based solution that could take only one or two months. That is my understanding, although I am not an expert and perhaps I am worrying unnecessarily.

Margaret Mitchell: Do you think that a necessary protection is being taken away, Professor Clive?

Professor Clive: No, I do not think that there will be any significant effects. There will always be the danger that Paul Beaumont refers to, but it will be significantly reduced if we reduce the separation periods.

Margaret Mitchell: I want to turn now to English law on divorce. Has the new English law on Jewish divorce caused any difficulties?

Professor Clive: I am sorry, but I am not well prepared for answering a question on that.

Margaret Mitchell: To put it more generally, should Scots law be amended to reconcile civil and religious divorce?

Professor Clive: I will answer that on a theoretical basis without regard to any particular religion, and my answer is no. The civil law of Scotland ought to be neutral; it ought to be available to people of all religious views and none to use for its civil effects. I would be slightly averse to adjusting the civil law in order to cater for any particular religion. I have no particular religion in mind; I am talking quite generally.

Professor Beaumont: I agree with that. I do not want you to misunderstand what I said earlier. My view is that the civil law should be designed to be best for society as a whole. People of religious persuasion—including me—live according to their values but do not expect that those values should necessarily be reflected in the civil law. I was merely making the point that it might make more sense for the civil law simply to operate on a no-fault basis. That was all that I was saying.

Margaret Mitchell: Thank you. Your answers have been very helpful.

The Convener: I want to press the witnesses a bit further on the grounds for divorce. As Professor Beaumont pointed out, some people might apply for divorce on fault grounds because it will still be speedier to do that than to apply for divorce on the ground of one year's separation. It is fair to say that there has been some misunderstanding of the provisions, in that many people think that the bill is about allowing for divorce within one year or two years, whereas those are actually the proposed periods of separation that will be required. At the moment, if a person sues for divorce on the ground of adultery and the other person does not defend the action, can the sheriff grant a divorce on the ground of two years' separation with consent if the couple have lived apart for two years by the time that the case reaches court?

Professor Clive: I do not think so. The Law Society of Scotland might be able to give a definitive answer, but the basic idea in our system is that the parties dictate the grounds of divorce. The court cannot divorce people on a ground that the parties themselves have not used.

The Convener: Right, I just wanted to be clear about that. If a person sues on the grounds of fault such as unreasonable behaviour or adultery, the sheriff can grant a divorce only on those grounds. That leads to my next question. In cases in which

someone sues for divorce on the ground of adultery and the action is defended, do judges ever refuse to grant a divorce?

Professor Clive: Very occasionally, but such cases are now rare.

The Convener: Is the divorce refused because the case has been either not proved or disproved?

Professor Clive: It is refused if the ground is not established because the sheriff or court feels that the pursuer has not made a case. Usually, adultery is a fairly clear-cut issue. However, behaviour is a much looser issue, and the court has much more room to say that the behaviour that has been proved is not such that the persons could not be expected to cohabit. In such cases, the court can say that the behaviour that has been proved does not come up to the required standard and does not establish a ground for divorce. That happens, but it does not happen very often.

The Convener: Finally, a question that has been raised in the committee is the court's ability to deal with a system of shorter time limits. Although the whole process should be shorter if the time limits are shortened to one year's separation with consent and two years' separation without consent, it might look a bit odd if the courts cannot hold a hearing for such cases within one year or two years. Do you have any concerns about the courts system?

Professor Clive: I do not have great concerns, because the courts have simplified procedures for divorce that allow everything to proceed in a fairly straightforward way on the basis of affidavit evidence and so on. The real cause of delays is arguments about financial provision and, sometimes, about children. Those so-called ancillary matters are what give rise to the real difficulties and delays, but I do not think that the bill can do an awful lot about those matters.

The Convener: We will move on to valuation of matrimonial property on divorce and the important case of Wallis v Wallis, which I know you have views on.

Stewart Stevenson: Will Professor Clive explain why—to paraphrase his written submission to the committee—the judgment in the Wallis v Wallis case has resulted in the potentially useful technique of a property transfer order often being prevented from being used?

Professor Clive: I will try to explain. In the Wallis v Wallis case, the sheriff wanted to order the wife to transfer her half-share in the matrimonial home to the husband and the husband to make a countervailing payment. In essence, he wanted the husband to buy out the wife's share in the property. In many such cases, that is a perfectly sensible and reasonable thing to do. Unfortunately, when the case went to the higher courts, the court judgment was that the price that the husband had to pay was not the current value of what he was getting but the value at the date on which the parties separated. That was not what was required under the Family Law (Scotland) Act 1985, so the courts went wrong in that case.

The problem with property transfer orders is that one spouse gets a bargain—they get their half-share at much less than its current value. Therefore, the courts are reluctant to use them, because they produce such a manifestly unfair result. The courts and solicitors are getting round that technical problem by asking for other forms of order under which a property can be sold and the proceeds divided. If that is done, people will not have the problem.

It is unfortunate that such a potentially useful technique cannot be used without resort to unfairness. Although something should be done about it, the section in the bill does not set about things in the right way.

Stewart Stevenson: So, the issue is not that the provision creates a legal unfairness but that a financial effect results from the use of certain circumstances. A significant change in the value of whatever asset might be under discussion will have occurred between the relevant date and the date of the court hearing. You are talking about a practical and not a legal issue.

Professor Clive: Yes, it is the fact that, under this kind of order, one spouse is ordered to transfer property under value.

Stewart Stevenson: You say that the drafting in the bill, which in essence provides for the court to choose a date from a range of dates, does not address the issue. How would you draft the bill to restore order?

Professor Clive: It would be wise to distinguish between three quite different problems, the first of which is the one that we have just mentioned, where the court orders one spouse to transfer property to the other partner for a countervailing price. That problem must be dealt with on its own. The bill needs to say, clearly and simply, that the countervailing price should reflect the current value.

Stewart Stevenson: Do you mean current at the point of transfer, at the point of going to court or what?

Professor Clive: At the point of transfer or as near to that as is practicable. Basically, the price should be close to current value.

The second problem, which is a different question altogether, is how the matrimonial property should be valued to decide the overall

division between the parties. A decision must be taken on whether to use the relevant date—normally the date when the parties separated. Basically, the committee should decide whether to take the date on which the parties separated, the current value or a mix that would give the court discretion to depart from the value on the relevant date.

The idea of valuing matrimonial property at the date on which the parties separated, which has been a feature of our system since 1985, is that it gives certainty. There is a fixed date on which the valuation is made and negotiations can be undertaken on that basis. That certainty is a positive advantage in the system; people do not necessarily want there to be too much discretion. However, some people would argue that there should be some flexibility in the system. Obviously, things can change between the relevant date and the date of the divorce. On balance, the advantages of having a fixed relevant date are important, and there are other ways of dealing with injustice, such as awarding interest on one spouse's share.

The third problem is pensions, which is also a separate issue. Although there are particular problems with pensions, they are largely to do with the regulations and not with primary legislation. Again, there is some value in having the clear starting point of the transfer value, which is used at the moment and which saves a lot of actuarial expense. I know of certain cases in which such an approach is not appropriate and might need some fine tuning, but I am happy to leave that to pensions experts. In any case, pensions are a separate question and should be dealt with on their own.

The problem with section 14 is that it attempts to solve three problems at once, but does not solve any of them very well.

10:45

Stewart Stevenson: I want to play back to you my understanding of what you have said and see whether I have got it. In essence, you are saying that we should return to having the date of separation as the basic date but that, in cases in which value has to be transferred, there should be a process to allow for adjustments in the light of what might have happened to the value of assets that have been in the custody of one of the partners in the intervening period. We are leaving aside the operation of the market, which is a huge factor in housing, and you are saying that because the partner who will receive the transferred value based on that date will not have had control of the assets in order to either increase or decrease their value, the courts should have the discretion to deal with the matter post the relevant date. I have other questions, but I will come to them shortly.

Professor Clive: I am not sure that that is the essence of what I am saying. The Wallis problem should be solved on its own by using current value, and the relevant date problem should be solved by leaving the law as it is.

Stewart Stevenson: Just for the sake of clarity, do you mean the current value of the assets on the relevant date?

Professor Clive: I am sorry, but no.

Stewart Stevenson: This is very important.

Professor Clive: Yes, it is, and I am not making myself very clear. I apologise for that.

For the specific problem that arises when a court orders a spouse to transfer his or her share of property for a countervailing price—which I refer to as the Wallis problem—I think that the property transferred should be valued at or as near as is practicable to the date of the transfer.

As for the general problem of valuing matrimonial property for the purpose of deciding what is fair sharing under the Family Law (Scotland) Act 1985, I think that we should stick to the relevant date and not introduce a new discretion to depart from it. Doing so would only introduce too much flexibility into the system. Of course, there is another respectable view on that difficult matter.

Stewart Stevenson: Now that I understand your point, I will turn the matter round. If the transfer date that the court sets is beyond the relevant date—as it would be—what account should the court take of the change in value between the relevant date and the transfer date? The value of the asset could go up—or, indeed, down—as a result of the positive or negative impact of the partner who was the "custodian" of the asset pro tem or because of market forces. How should the court take account of such issues, which might arise from separating the relevant date and the transfer date?

Professor Clive: We are talking about only money or money's worth. The court wants to reach an overall solution in which a husband—it is more likely to be the husband—transfers, let us say, £50,000-worth to the wife. If the husband has £50,000 or property that is worth £50,000, he can transfer it. Sometimes it might be appropriate for him to transfer property and for the wife to make a countervailing payment—in other words, to buy him out. The only fair way of giving effect to the overall objective of transferring £50,000-worth of stuff is to value it more or less at the transfer date. If someone wants to give me money or the money's worth, the money's worth would be valued now, not at some previous date.

Stewart Stevenson: But you mentioned that the court might take interest that had been denied to a party. Would you want to take account not only of interest, but of capital appreciation or depreciation?

Professor Clive: That is the second question. When the court splits up the value of the matrimonial property and arrives at the overall sum to be transferred, it should stick to the relevant date. However, that applies only to the fair sharing of matrimonial property. There are other principles that the court can apply in getting an overall settlement. For example, the economic advantages or disadvantages that one spouse has suffered can be taken account of. Even when it makes a division of the matrimonial property, the court can take account of special circumstances; it does not need to divide the property's value half and half. The issue is highly complicated. There are various stages at which the court can intervene and make an adjustment.

My basic point is that, for the purpose of valuing matrimonial property under the fair-sharing provision, there is much to be said for sticking to the relevant date. Other devices can be used to make adjustments later on; they are not part of the relevant date provision. I am sorry that I am not making myself at all clear, but it is a tricky subject.

Stewart Stevenson: I suspect that we will need to read the *Official Report*. I would like to ask about a related pensions matter, but I think that the convener wants to come in.

The Convener: We appreciate that a working party is already doing work on what is a complex subject.

Professor Clive: You would be better reading the *Official Report*.

The Convener: Thank goodness for the *Official Report*.

I want to ask about valuation. We have considered the principle before, in various acts of Parliament, including the Land Reform (Scotland) Act 2003. The argument is about who values the land and what the benchmark for valuation is. Are there problems with that? I have read in the press recently that, depending on whom one goes to, there can be vast differences in the valuation. Is that a genuine problem that needs to be solved?

Professor Clive: It is a constant problem, but I do not think that there is any easy legislative solution to it. It is expensive to get valuations and one often gets competing valuations, but as long as property has to be valued, I see no way out. We can try to avoid multiple valuations, which is why the relevant date has value as a basic starting point. It is a date in the past that can be used to value a property.

The Convener: I just want to clarify. When a property is valued at the relevant date, how is that usually done?

Professor Clive: That depends on the kind of property. If the property is complicated—for example, if it is a share in a business—professional valuers would have to be involved. With pensions, there is a default rule, whereby the transfer value is taken. In many cases, that works well and avoids the need for expensive actuarial valuations but, in a few cases, it will not be felt to be appropriate.

The Convener: Of course, matrimonial property covers everything—it includes anything that is worth arguing over within a matrimonial home. If we allow the relevant date and current value to be adjusted, a whole range of property issues would be affected.

Professor Clive: That is right.

The Convener: In case you are wondering where Stewart Stevenson has gone, he has had to go to the Public Petitions Committee to speak to a petition, but he will be back. We will move on to consider the domicile of children.

Mrs Mary Mulligan (Linlithgow) (Lab): As the witnesses know, section 16 is about the domicile of children, so my questions relate to that. Professor Clive, in your written submission, you comment on the section's structure. If you want to add any further comments to that, I give you the opportunity to do so now.

Professor Clive: Thank you very much. Paul Beaumont will probably also have views on section 16, as it is firmly within his area of expertise. I strongly approve of the objective of eliminating the distinction between children born in marriage and those born out of marriage—that is highly important and highly commendable—but I preferred the provisions in the Scottish Law Commission's draft bill to those in section 16. The section has become a bit complicated and I am not sure that it deals well with situations in which a parent of the child has died. I am not sure that it is justified to presume that, if the child lived with the deceased parent many years ago, they have the same domicile as that parent. Therefore, I would be tempted to cut out paragraphs (c) to (f) and have two rules that are based on the child living with one parent or both.

The basic idea of section 16 is sound, but the drafting is a little bit complicated and goes too far in some respects. It is almost a question of technique; it could easily be sorted out. I would rather that we have section 16 than the current provisions, but it could be improved.

Professor Beaumont: The intention of section 16 is good. It tries to avoid making distinctions

between legitimate and illegitimate children, which we obviously want to avoid, but the proposal in the Scottish Law Commission's report—I think it is on page 130—is much simpler. I think that the Scottish Executive was trying, perhaps laudably, to create more certainty by having additional presumptions, because the basic test is rather uncertain, as a closest connection test always is. We get few cases in the area of law that section 16 covers and, if we have an uncertain test and few cases, that produces uncertainty for a great deal of time. Uncertain tests are fine when there is a lot of litigation in the area of the law to which they apply, because the judges refine what we mean by the concept but, in this instance, we can predict that there will not be many cases.

The Scottish Executive was right to try to create further clarity by introducing a series of presumptions, but it is reasonable to object to some of them. The two types of case with which the Scottish Law Commission deals in its report are the core cases. Its report says:

"where the child's parents are domiciled in the same country and the child has his or her home with either or both of them, it is to be presumed … that the child is most closely connected with that country".

I think that we would all agree on that, which is the simplest case. On the second type of case, the report says:

"where the child's parents are not domiciled in the same country and the child has his or her home with one of them, but not with the other, it is to be presumed … that the child is most closely connected with the country in which the parent with whom the child has his or her home is domiciled".

Again, that is a straightforward case. If the two parents live in different places but only one of them has parental responsibility—at least, the child lives with only one parent and not with the other—the child's domicile is the country of the parent with whom they live.

I suggest that we have a third category of case to deal with the situation in which the child does not live with either parent but is cared for by someone else and so the parental responsibility is with someone else—it could be a grandparent, an uncle or an aunt or somebody else. That might happen if the parents are dead and the provision that they have made in their will says, "If we die, we want my brother and wife to look after the children," or whoever it might be. Where children live with people other than their parents, and those people have the parental responsibility, there should be a presumption that they are domiciled in the place where the people who have parental responsibility are domiciled, if they are living with them. That would deal with quite a lot of the cases that would not be covered by the Law Commission's proposal. It is something to be considered. I am not saying that it is necessarily the right outcome, but I encourage the committee to examine it.

I favour the presumption route, which is what the Law Commission recommended. We should not create rules. Presumptions create enough certainty, because lawyers and others will operate in accordance with them, unless there is a very strong reason for wanting to contest them and have litigation over the matter.

11:00

Mrs Mulligan: Professor Clive mentioned rules. Can he say more about why he thinks they are needed?

Professor Clive: You need to have rules about where a child is domiciled, because domicile sometimes affects legal issues. At the moment, we have rules that discriminate between children who are born in marriage and those who are born out of marriage, which is entirely unsatisfactory. There is a need for the bill's provisions, which are on the right lines. Professor Beaumont's suggestion is constructive. I did not have the chance to think about it before this morning, but at first sight it looks like a much better way of dealing with the situation if one or both parents are dead than the way in which the bill currently deals with that.

Mrs Mulligan: Do you want to add anything, Professor Beaumont?

Professor Beaumont: Domicile is a connecting factor that is still relevant for some legal actions, for example succession. If a child had property and died while they were under 16 one would need to know where they were domiciled. Therefore, domicile is not an irrelevant issue, although it does not arise often, because in many cases, for example in child abduction and some other areas, the connecting factor is the habitual residence of the child, rather than the domicile of the child.

Domicile is not otiose. It is still necessary to make provision for the domicile of a child under 16. Even the Scottish Executive proposal is a considerable improvement on the existing law. I am just offering some constructive suggestions on how it might be even better.

Mrs Mulligan: I was going to ask if you thought that the issue was complex but, given that you suggest it should be less so, we will take your answer as read.

The Convener: I have one question on that issue before we leave it. Section 16 contains a series of presumptions. Normally, a presumption can be overturned. I suppose that my question is about the drafting. In your view, should the section contain a set of rules rather than presumptions?

Professor Clive: I do not feel strongly about that. It can be done either way. The presumption would be rebuttable by proving that the child had a stronger connection with another country. That is theoretically okay—it works—but I am not sure that one would want the presumption to be rebutted. If a child is living in family with parents who are both domiciled in the same country, and living in France, would we want someone to be able to say, "Well, the whole family is living in France so the child actually has a closer connection with France." Would we not want the family to have the same domicile? It is for that reason that I suggest in my written submission that there might be a case for having rules, rather than presumptions. However, it works quite well either way, and I do not feel strongly about it.

The Convener: Does section 18 provide a workable definition of "cohabitant" or do you foresee problems with the definition?

Professor Clive: I think that it works quite well. The obvious question to ask is whether a minimum period of cohabitation should be required, but that might bring problems of its own, in that the minimum period would be arbitrary and it would mean that cases would fall narrowly on one side of the line or the other.

The issue depends on what rights cohabitants are given. If cohabitants are given valuable rights automatically as a matter of law, it is dangerous to have an open definition such as that which is in the bill. If those rights are qualified by the court's discretion to take into account the length of the cohabitation, and if the rights automatically increase in content as time goes on—for example, as time goes on, the parties will acquire more furniture—so that the length of the cohabitation period is catered for automatically, as will happen under the bill, a fairly loose definition without any minimum period should be all right. However, if cohabitants were to be given rights of a less discretionary kind, a minimum period would probably need to be specified.

I think that the definition is okay as it stands.

The Convener: I ask the same question about the rules on financial provision in section 21. Are the rules workable or is more detail required?

Professor Clive: The drafting of section 21 could be improved quite considerably, but I think that its provisions are workable. They provide the court with quite a wide discretion, whereas the Scottish Law Commission's proposal, which I would prefer, was more tied down and objective. However, the provision is better than what we have at the moment. In essence, it is a good provision, but I would like to see its drafting improved.

The Convener: My instinct on first reading section 21 was that it provides quite a bit of discretion. As we continue to consider the bill I may change my view, but I probably agree that it would help to give the court guidance on our intentions.

Professor Beaumont: As Professor Clive's written submission points out—this is a point of private international law—for some reason the bill does not contain a jurisdiction provision as was proposed in the Scottish Law Commission report. We should not purport to legislate for everything in the world. Given that we legislate for things that fall appropriately within the jurisdiction of the Scottish courts, we should clarify what that jurisdiction is in relation to cohabitees, as we do in relation to married persons or others. I do not understand that omission.

The Convener: In that section, should cohabitation be treated, for the purposes of jurisdiction, in the same way as marriage?

Professor Beaumont: That should certainly be the starting point. We should start with clause 36(4) of the draft bill in the Scottish Law Commission's report.

The Convener: That is helpful. We will have a further look at that.

When we heard from the children's organisations last week, they expressed the view that the children of a cohabiting couple should not be disadvantaged financially compared with the children of a married couple. We have considered that statement further. In absolute terms, is it possible to achieve that parity? Can we achieve that objective without interfering substantially with the rights, under the law of succession, of a cohabitant who is not the parent of the children in a relationship? The children's organisations may well just have been saying that, in general, children should not be disadvantaged—they should not live in worse conditions or their circumstances should not deteriorate. However, we need to test in absolute terms the implications of the measure.

Professor Clive: I am sorry, I have not seen that evidence, although I approve of the objective—children should not be discriminated against or prejudiced in any way because of the way in which their parents choose to order their personal relations and whether or not they get married. I approve of that principle, but I am not sure that the bill will do anything against it. I am not sure what more the bill could do to foster that principle. Therefore, I wonder what sort of amendment might be proposed to have that effect.

The Convener: You are correct that the bill does not refer to the matter. Cases in which cohabiting couples have children are probably

straightforward, but, with cohabiting couples in which the children are of only one of the parties in the relationship, to put those children in exactly the same position, we would have to interfere in some way with the rights of the non-parent in the relationship. The bill will give the courts discretion to decide whether people satisfy the criteria in the bill and therefore whether they should get something from the estate if a cohabitant dies. However, we must also think about the children. I wonder whether the court's decision in such a case would have implications, if it is taken to its logical conclusion. If it is not, under the law of succession, members of the family of the non-parent in the relationship—such as brothers and sisters or the mother and father—would inherit the estate.

Professor Clive: I assume that the issue arises mainly in connection with section 22, which is on succession. I suppose that any time that one person gets more from a deceased person's estate, somebody else gets less. To that extent, the children of a person might be prejudiced by the fact that a cohabitant got an award. Given the current life expectancy, most of the children whom we are talking about will be adults and in many cases quite elderly, so cases in which young children will be penalised by an application under section 22 will be infrequent. The court could take into account the needs of young children. Therefore, the objection to the measure is not serious. However, I admit that I have not thought about the issue in those terms before now.

The Convener: We are starting to think through the issue. We thought that we should consider the measure and ensure that we understand all the implications of working towards the objective.

11:15

Professor Beaumont: The issue is the law of succession, to which I hope the Scottish Law Commission might apply its mind—the matter is in its programme for the next few years. There are issues in succession law about minor children; at present, we do not treat them differently from adult children. We treat all children in the same way, and we guarantee a small amount of money through legal rights.

A strong case can be made for reform of the law—although not through the present bill—so that it protects more adequately minor children who are in the unfortunate situation in which a parent dies. The current law does not guarantee sufficient protection for those children. Thankfully, most people look after their children, either through their wills or by ensuring that the family will sort it out. Nonetheless, we should guarantee proper provision for minor children. We need to look at the law of succession. However, that is in a different context.

In all situations, we should try to avoid what one might call double counting. I do not suggest that we should design the law so that children who are in complicated relationships—in other words, their natural parents have split up and they now live with one of their parents who cohabits with another person—have legal rights from both sets, because they would then get better provision than someone who lives in a normal situation.

The question is: what do we mean by equality? The real issue is about ensuring that in no matter what context children are brought up, we do what we can through the law of succession to ensure that those who have parental responsibility for the child actually provide for the child after the parent's death. We do not do that at the moment. We provide for those children only through legal rights that relate to a natural parent and that has nothing to do with parental responsibility. The law of succession and family law are no longer tied together, because succession has not been reformed for a very long time. It needs to be looked at.

The Convener: We move to questions about jurisdiction and private international law, which is Professor Beaumont's area of expertise.

Margaret Mitchell: Your submission was comprehensive, so the purpose of my questions is to get on the record what you said about sections 27 to 29. Are civil partnerships covered in those sections? Do they need to be, considering that we have the Civil Partnership Act 2004?

Professor Beaumont: Professor Norrie is in a better position to advise you on that. I know that he is working extremely hard on the subject. I have not had a chance to compare the provisions of the Civil Partnership Act 2004 with the proposed amendments to the Family Law (Scotland) Bill. However, Professor Norrie has done that, so I am sure that members will be adequately advised on the topic.

Margaret Mitchell: Would it be right to say that the equivalent rules are in the 2004 act?

Professor Kenneth Norrie (Adviser): There are not equivalent rules; there are similar rules.

Margaret Mitchell: Should there be equivalent rules, Professor Beaumont?

Professor Beaumont: The difference between similar and equivalent is a difficult one to play with. I would be happy to hear what Professor Norrie proposes to change in the provisions and then to comment on those changes—that is the best way to deal with it.

Account must be taken of the new position under the Civil Partnerships Act 2004, which was not in the minds of members of the Scottish Law Commission in 1992 when they made their proposals. The matter needs careful consideration. The rules will not necessarily be identical, because there are some differences in the way in which one treats same-sex partnerships and heterosexual partnerships. For example, one of the bars to marriage is when the partners are of the same sex. We would have to make a slightly different rule that a bar to a civil partnership would be that the partners could not be of the opposite sex. The rule would not be the same; it would be similar or equivalent.

Margaret Mitchell: Does Professor Norrie want to pursue that further?

Professor Norrie: That was a good example of why the equivalent rule is the appropriate one. Other provisions, such as section 29 of the bill, are not replicated in the Civil Partnerships Act 2004 because section 29 is subsequent to the 2004 act. There is no equivalent provision for civil partners of what appears in section 29 of the Family Law (Scotland) Bill.

It would be useful to hear whether Professor Beaumont believes that there are any technical reasons why we should have this new rule for marriage but not for civil partnerships. I know that he has problems with section 29 in any case.

Professor Beaumont: The issue with section 29 is whether we need to codify the law at all. We might need to do that more for civil partnerships than for marriage, because there is no law for civil partnerships unless it is created by statute whereas there are already common-law provisions for matrimonial property. If we are going to reform the law on matrimonial property, should we do that to preserve the status quo or should we move to a system that has the same rule whether the property is movable or immovable?

I wonder whether now is the right time; the provision was probably right in 1992 when the Scottish Law Commission proposed it, but 13 years have gone by. Already there are working papers in the European Union on matrimonial property, and the introduction of legislation to harmonise the international rules on matrimonial property is on the Commission's long-term agenda. That will not happen for a few years, but it is in the pipeline, therefore one suspects that any reforms that are made here will be rather short lived.

Margaret Mitchell: Do you accept that we would fall in with European law?

Professor Beaumont: You are right to point that out, because the United Kingdom has the option of not opting into legislative proposals in title 4 of the EC treaty. The UK has a flexible position; it can opt in or out. At the moment, it is generally UK Government policy to opt in to legislation in this area. The opt-out is used for border controls and immigration and asylum issues, for example, but it could be used in relation to matrimonial property. The situation with European legislation is not necessarily a reason for Scotland to do nothing; I simply point out that the matter will be considered in the fairly near future. I suspect that there will be a move towards a unitary rule for movable and immovable property, but that has not been determined; it is just what the academics in the area propose at the moment.

With regard to Professor Norrie's question, once there is a same-sex relationship with a clear legal civil partnership, the idea is to treat such people in the same way as we treat people who are in a marriage relationship. Therefore, there should be an appropriate choice of law rule on the property of the civil partners. The rule should be similar to, if not the same as, the one for marriage. I do not know of any technical reason why it would be different.

Margaret Mitchell: You have quite a lot to say in your submission about section 28, primarily that the bill does not follow the Scottish Law Commission's recommendation for public policy exception on the validity of marriage. You go on to question whether the law should be codified at all or whether it would be better dealt with under common law because it is flexible. Can you expand on your reasoning?

Professor Beaumont: I do not oppose codifying the law if it is done in a way that improves the existing common law. However, abolishing the public policy exception will not be an improvement on the common law. I do not know whether the Executive really intends to do that, but that would be the consequence of the bill as I read it.

Margaret Mitchell: Will you explain that a little more?

Professor Beaumont: Paragraph 14.12 of the Scottish Law Commission's 1992 report is on public policy. It says:

"Under the present law there are certain cases where the normal choice of law rules will not be applied because to do so would be contrary to Scottish public policy. For example, an incapacity by the law of the domicile would probably not be recognised if it were based on religion or skin colour. Conversely, a law of the domicile conferring capacity might not be recognised if, for example, it allowed a girl of five years of age to marry. In the 1985 discussion paper we suggested that a public policy exception should continue to apply. No-one disagreed with this."

The Law Commission published a consultation paper and all consultees agreed that a public policy exception was needed. The Law

Commission's report recommended a public policy exception, but the Scottish Executive has produced a bill with no public policy exception. The onus is on the Executive to say why we do not need a public policy exception. The arguments in the Law Commission's report show why such an exception is needed.

Margaret Mitchell: I take your point. I agree that the Parliament sometimes rushes to legislate when it does not need to do so and when the common law not only covers a matter, but is more flexible and better. I take that point on board in relation to section 28.

Professor Beaumont: Another point—it is very technical—is that once we legislate, we pin down something that was unclear. As the Law Commission recommended—the Executive is at least in line with it—subsections (1) and (2) of section 28 include the principle of renvoi. I am not at all convinced that we want to include that principle. In many other parts of private international law, we have abolished that principle, because it complicates the law greatly.

Margaret Mitchell: Will you explain that?

Professor Beaumont: I will try to explain—it is not easy, but I will do my best. A choice of law rule determines which legal system will decide how to resolve a case. Such rules point to a particular legal system—in this case, the system in the place where a person was domiciled immediately before marriage. Without the principle of renvoi, we go to the internal law of that place. If a person was domiciled in France immediately before marriage, French law would apply and everybody would know where they were.

Because the bill does not say that determination will be by the internal law of a place, which would exclude renvoi, the bill includes renvoi, so to try to find out what the law is, somebody would have to read French law to find out whether French private international law would apply a different legal system to determine the case. They might be bounced from French law to Spanish law or any other system in the world. Renvoi is a delight for academic private international lawyers such as me, but it is not particularly good for people in the real world, because it adds complexity and costs to finding out what the law is and to litigation, if it is needed.

One advantage of not legislating is that such a question remains open. If the Parliament wants to legislate, it must decide whether to include renvoi. That decision will be reflected in the statute. Parliamentary time to consider such an obscure question is unlikely to be available again for a long time, so we will be stuck with whatever the rule is for ever or for a very long time.

Unlike Professor Clive, who is instinctively keen on codification, I am instinctively rather unkeen on it and tend to think that it sometimes forces us in a particular direction when it is better to leave things alone. Arguments go both ways.

Margaret Mitchell: That was a helpful explanation of a technical point.

The Convener: We will just ask the Executive to comment on the *Official Report*. That will save a bit of time.

Some of Marlyn Glen's points have been covered. Does she have further questions?

11:30

Marlyn Glen: I intended to ask about same-sex couples, but the issue has been covered. The basic point is that provisions for civil partners should be consistent with those for spouses.

The Convener: The final question concerns grandparents and step-parents.

Mr McFee: The bulk of the evidence that we have received so far suggests that children can benefit greatly from the interest of the extended family. However, the bill gives no automatic parental responsibilities and rights to step-parents or grandparents. What is your view on that? Do you believe that step-parents and grandparents have a problem, simply on grounds of cost, in accessing children or obtaining orders that would give them some form of access?

Professor Clive: I speak as a grandparent and citizen, rather than as a professor. The role of grandparents can be extremely important, and the grandparent-grandchild relationship is marvellous. However, I do not think that making it a matter of legal rights is the best way forward. It could be worse, because the issue would become litigious. Undoubtedly, there are difficult cases. One can sympathise with the devastation that certain grandparents must feel, but I believe that there must be better ways of handling the issue than to introduce a right that would conflict with other rights.

The question of step-parents is more difficult, in a way. I found step-parent agreements to be the most difficult issue in the consultation exercise. On the one hand, there is something strange about allowing parents, as adults, to dish out rights and responsibilities to other persons. At the very least, one would need to have the informed and uninfluenced consent of the child or of someone representing them. On the other hand, there is no doubt that large numbers of step-parents are playing a parental role and that people do not want to go to court, because that is expensive and stressful. If step-parent agreements could solve the problem, they would be a good step. This is a

difficult issue and it would be worth our exploring it further.

Mr McFee: Can you quantify the scale of the problem that affects grandparents? We have found it hard to tie any numbers or percentages to it. Do you have an indication of how deep seated the problem is?

Professor Clive: I do not have any such figures.

Mr McFee: Perhaps the next panel will.

Professor Beaumont: The issue of agreements and party autonomy is important and needs careful consideration in most areas of family law. In principle, it is good to allow people to reach agreement with one another. The problem in family law is that the child is not capable of entering into an agreement, although they are the person whose welfare must be paramount in such cases. Usually it is good to let adults agree among themselves, but in this instance that is not possible because of the involvement of children. There must be some mechanism for ensuring that any agreement is in the best interests of the child. That is always the difficulty in this area; a way has to be found to allow a third party at least to check whether the agreements that have been reached by the adults—the step-parents, grandparents or whoever—are in the best interests of the child.

I would like to mention something that I did not say earlier about aliment and section 30. There is a strong likelihood of an imminent proposal on this subject from the European Commission. The committee should watch what is happening in Europe. Unlike the new arrangements for matrimonial property, which will not apply for several years, we could well be faced with a proposal from the European Commission in the autumn on the issue of the applicable law on maintenance or aliment. The UK will have to decide whether to opt into the proposal by either using a separate piece of legislation or incorporating the provisions into a bigger package of legislation on maintenance. The committee will have to take account of that. If the proposals were to go ahead as a piece of Community legislation, that would clearly take priority over the Family Law (Scotland) Bill.

The Convener: That is a very different perspective on the application of European law. You are right to make that point, and I reassure you that the committee takes the work of the European Union very seriously. We have met representatives of the Commission to discuss the topic. We have made it clear that we wish to see any official Commission documents on the matter at the earliest opportunity. As you know, that is difficult because much of the work is done virtually in secret, and we do not get to see it until a formal procedure is in place. We have made it clear that we do not think that that is good enough.

We would like to make an impact on the proposals, as we are responsible for family law in Scotland. Until now, we have supported the UK Government's position, which is that the application of the law should be based on the principle of mutual recognition rather than harmonisation. I know that that is controversial, but there you have it.

I reassure you that we have those issues in mind. You can understand the difficulties of dealing with legislation here while also scrutinising properly what is going on at EU level. However, we are doing our best to keep up. I am sure that committee members will welcome any input that you wish to make on any of the issues concerned. I know that this is an area of your expertise, and members would be pleased to hear more from you.

I thank both the witnesses. The committee feels privileged to have you both here, as you are such eminent professors in the field. Hearing from you has been very valuable. We know that you have been working hard on family law matters for some time, through the work of the Scottish Law Commission. We are grateful for your evidence, and I assure you that we will read the *Official Report* when it appears so that we are all clear about the evidence that we have heard.

The committee met at 8 o'clock this morning for a videoconference with a committee of the Parliament of Australia, and we will meet again after this meeting closes. We will break for a few minutes before we hear from the Law Society of Scotland witnesses.

11:38

Meeting suspended.

11:47

On resuming—

The Convener: I welcome Michael Clancy, Morag Driscoll and John Fotheringham, who represent the Law Society of Scotland's family law sub-committee. I thank them for attending and for their helpful submission. We will go straight to questions.

Marlyn Glen: The Law Society's written submission says quite a lot about domestic violence and occupancy of a family home. Are the bill's amendments to the law on matrimonial interdicts and its provisions on domestic interdicts sensible? I refer in particular to the time limits.

John Fotheringham (Law Society of Scotland): The time limits are entirely appropriate, given that a two-year model is used throughout the bill. However, as a practitioner, I must say that the confusing array of remedies can cause difficulty. Therefore, the Law Society proposes that there should be a single remedy for victims of domestic violence, which would be simpler for those who seek the remedy, those who seek to administer the remedies, the courts and, most significant, the police. At the sharp end of a case of domestic violence, the victim does not need a bit of paper—an interlocutor from the court. They need a couple of burly constables. The more quickly and simply that can be achieved, the better.

There is currently an array of remedies. The focus of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 is on the matrimonial home and exclusion orders and we have protection from harassment orders, the focus of which escapes me. The Protection from Abuse (Scotland) Act 2001 is concerned more with what is being done and what can be done to protect the victim. We should adopt that model, rather than amend the 1981 act.

Marlyn Glen: My next question is on occupancy rights. Are the amendments that the bill makes in relation to occupancy rights sensible and workable in practice, or do they reduce protection for vulnerable women in particular, by reducing the period of occupancy rights from five to two years and removing occupancy rights when the family home has been sold in good faith by a third party to a purchaser?

John Fotheringham: As we say in our submission, the proposal to reduce the period to two years is entirely appropriate. It makes good sense if the bill is to reduce the other periods to two years. Failing to make that change could place a shadowy blight on a property that a third party would not find out about until much later. If the property was never occupied by the woman and it was never her home, is it fair that she should have occupancy rights there? The answer to that question is probably no.

Marlyn Glen: Scottish Women's Aid has advocated that the bill should include an amendment to the Children (Scotland) Act 1995 to introduce a rebuttable presumption against contact with children where domestic abuse has taken place. Do you think that such an amendment is desirable in policy terms? Would it be workable in practice?

Morag Driscoll (Law Society of Scotland): The Law Society does not comment on policy—that is not our role. However, the thrust of the Children (Scotland) Act 1995 is that all action should be in the best interests of the child. Presumptions could interfere with those interests. At the moment, if the parent with care believes that the child should not have contact with the absent and violent parent, it is possible for them to refuse contact. The court will consider whether it is in the best interests of the child for them to have contact with that parent. If we introduce a rebuttable presumption, we will insert another factor into highly charged emotional situations. That is not necessary, given the provisions of the 1995 act.

John Fotheringham: Part of the problem is the use of the term "parental rights", which is rather unfortunate. The term is not restricted to parents—it can be used in relation to grandparents, step-parents, neighbours and anyone else who shows an interest.

A much bigger objection is to the use of the word "rights". Back in 1985, a judge said that

"parental rights exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child".

Parental rights under the 1995 act are better regarded as parental powers that exist for the benefit of the child. They are not free-standing rights in the way that property rights and rights against insurance companies are. If parental rights are given or are presumed to have been given to someone, or if someone is presumed to have been deprived of them, the focus is not on the interests of the child, as it should be. I disagree that there should be a rebuttable presumption. Of course, the courts will and should take into account the effect on the child of any history or allegation of domestic abuse. However, there should not be a presumption.

The Convener: I want to ask about a related point. In evidence to the committee, Families Need Fathers talked about the rights of the child, which is a slightly different issue from the interests of the child. The organisation wants responsibility for the child to be apportioned in a more balanced way, as it believes that in some cases fathers or mothers have not had a level of contact with their child that is appropriate and in the interests of the child. Would a change in the law that put the emphasis on the rights of the child to see both parents be helpful?

Morag Driscoll: The Children (Scotland) Act 1995 already makes such provision. The absent parent has a responsibility to maintain contact with the child. The 1995 act gives a corollary right to the child to have contact. There is also a corollary responsibility on the parent with care to make contact possible. In the court system, in mediation and in family law practice generally, the rights of the child are the paramount consideration.

The Convener: That is the point. Instead of things being done just for the welfare and in the

interests of the child, Families Need Fathers made the slightly different suggestion that the child should have a right to see both parents.

Morag Driscoll: That should be the case if it is in the best interests of that child.

John Fotheringham: If I may put the matter this way, I think that the right of the child is to have his or her best interests looked after. The child has a further right to express a view if he or she wishes to do so in the appropriate circumstances, but the right of the child is to have his or her best interests looked after.

The Convener: I want to be clear about that. Families Need Fathers suggested that the law needs to be changed to give the child a right to see both parents, but you say that such a right already exists under the 1995 act. I am not sure that such a right exists in that form.

John Fotheringham: The right already exists. If that is in the best interests of the child, the court will order it.

The child can have a voice in the process and be a player rather than a football. If either parent wishes to have a court order, whether positive or negative, in relation to a child, the child must receive intimation of that fact if he or she is old enough. If the child can express a view, he or she will be invited to do so if he or she wishes. As a matter of practice, most children do not want to express a view, but some do and those who do have a right to do so. A child of 14 or 15 who wishes to see a parent will probably have that wish granted. In the very rare cases where that wish might be a matter of dispute, the child's view will be given great respect by any sheriff.

The Convener: In your experience, is there a particular age at which a child is generally consulted or is that totally a matter of discretion?

John Fotheringham: The 1995 act requires us to ask whether the child has sufficient maturity and understanding. That is presumed to happen when the child is 12, but the presumption is rebuttable. If the case involves a particularly quick-witted 11-year-old, the court will certainly demand intimation to that child. If that child wishes to express a view, the court will listen. Once the child has expressed a view, the court may take the view that the child does not have sufficient maturity and understanding, but the child's view is at least allowed into the process. In a recent case, it was suggested that, no matter how young the child might be, the child ought always to be asked whether they had a view that they wanted to express.

Morag Driscoll: It is not uncommon for children under the age of 12 to express a view and even to consult a solicitor who will express that view for them. Not infrequently, if a sheriff is faced with different stories from two warring parties with the child in the middle, the sheriff will request a report from a third-party solicitor who has not been involved in the case. That solicitor, who will have met none of the parties beforehand, can go and interview anybody, including the child's teacher, nursery teacher or health visitor and the child or children themselves. That is another way of getting the child's views across without making the child choose between parents. A number of avenues are available to allow children to be heard in the middle of such situations.

The Convener: The question for the committee to consider is why, if the current law is right and effective, so many groups seem to be unhappy with it. However, we will come to that issue later. We will move on to consider the issue of divorce.

Margaret Mitchell: From your perspective as practitioners, will the new separation periods for divorce that are provided for in the bill make the whole process easier for the parties to cope with?

Morag Driscoll: Are you asking whether they will make things easier from the point of view of separation or from the point of view of divorce?

Margaret Mitchell: I am asking about the separation periods, which will be reduced to one year and two years respectively. Is it likely that the reduced periods will make things easier for the parties in every sense?

Morag Driscoll: Yes.

John Fotheringham: I agree. At the moment, parties who want to divorce must wait for two years from the date of the cessation of their cohabitation provided that the divorce is consensual in terms of section 1(2)(d) of the Divorce (Scotland) Act 1976. If the parties are required to wait for only one year, they might be more likely to wait for that period and proceed with a divorce on a consensual basis rather than raise a fault-based divorce, as that would now be unnecessary. The committee heard evidence earlier about whether we should have fault-based grounds at all. For the reasons that the committee heard, I want those grounds to be retained, but they should not be used when they are unnecessary. The answer to the question is that, yes, the changes will make the process easier.

Margaret Mitchell: It is helpful to have the perspective that people may not rush to use the very quick option, given that the year option will be available to sort things out.

12:00

Morag Driscoll: The Scottish way is negotiation over children and property. People do not often hit the lawyer's office the day after a big argument.

There is a space of time, which allows for a legal aid application. By the time that a minute of agreement is agreed, other issues are settled and people proceed to divorce, the one-year period has often been reached, which allows for a nice, amicable, consent-based divorce. Also, in cases in which one party will not consent, the fact that the other party will not have to wait a full five years will make the process a great deal easier for many people. Five years is a long period to wait.

Margaret Mitchell: Given that the hope is that we will have more consent-based settlements, are you in favour of a system of joint petitions rather than the pursuer and defender system?

Morag Driscoll: In a way, we already have joint petitions. Consent-based divorce is great in cases in which there is nothing to be argued about. However, if people are fighting over who gets the house, consent is withheld, which creates a problem.

John Fotheringham: If everything is agreed, we do not need a joint petition. Another problem is economic: the Scottish Legal Aid Board would probably not be willing to provide funding for half a joint petition.

Margaret Mitchell: To be clear, in my understanding there must be a pursuer and a defender under Scots law.

Morag Driscoll: That is correct.

Margaret Mitchell: Should we do away with that and instead have joint petitions?

Morag Driscoll: That would be a symbolic gesture. If there is an argument, there will not be enough agreement to present anything jointly to a court.

Margaret Mitchell: I agree, but if there is agreement, is it not unnecessary and does it not needlessly cause acrimony if one person has to be the defender and one person has to be the pursuer?

Morag Driscoll: In my experience as a practitioner, by that stage, there is often no acrimony and the titles "pursuer" and "defender" do not suddenly create acrimony where there has been none. Also in my experience, it can be easier to get a consent-based divorce if the other party does not have to contribute in any way and does not have to fuss about it or go to a lawyer. A joint petitions system might create situations in which one person refused to pay half the costs or did not want to go to a lawyer because the other person was receiving legal aid, whereas they would have to pay. That could cause acrimony where there was none.

With the previous panel, the committee discussed whether a sheriff could grant a divorce on the ground that the people had been separated, rather than on the ground of the adultery of the defender. However, sheriffs are rather stuck with what we lawyers present to them. It is possible to amend that information—that has happened—but another piece of paper has to go to the court, so it is an extra expense. Furthermore, if a person who is on legal aid wants to do that, they must get the Scottish Legal Aid Board's permission. However, in adultery-based divorces, it is not uncommon for the defender and the person whom we grandly call the paramour happily to provide the necessary affidavit evidence. Such divorces often go through without acrimony and everybody is happy. The suggested change would be symbolic, but it might add an extra layer of complexity and a thread of acrimony that does not exist at present.

Margaret Mitchell: That is interesting, because it is contrary to the views that we have heard from people who are not practitioners. I suppose that I assumed that joint petitions would be much easier, would involve less work by a solicitor and might even be presented without the involvement of a solicitor. Was that assumption correct?

John Fotheringham: I do not think that we would ever want something like that to go through if children were involved. One does not want any decree to go through that could radically affect children's rights without the court having at least some input. At the moment, we have a simplified divorce under the two or five-year procedure if there are no financial conclusions or disagreement and if no children under 16 are involved. That is fair enough. However, if parties could, through a joint petition, agree with complete freedom what was to happen and children were involved, that would be a retrograde step. We want—and I understand that this is the Executive's policy—to look after the interests of children above all else. Therefore, we do not believe that the joint petition would be a good idea.

Margaret Mitchell: That was very helpful and adds a perspective that we have not had so far.

Morag Driscoll: In a way, we already have a joint petition procedure. Couples frequently do not agree and one party will raise a divorce, usually either on the ground of adultery or of behaviour. The matter then goes on hold—it gets sisted at court—and that is sometimes how one brings the other person to the negotiating table. Things get agreed and the parties submit a joint minute or petition to the court, saying, "This is what we've agreed. Will you ratify it and grant the divorce?" That is how the divorce goes through. That procedure helps parties who started off in opposition to reach an agreement and to submit to the court the joint document, which says, "We've

made the agreement. Can you rubber-stamp it for us, please?"

Margaret Mitchell: To be quite clear, is a joint petition exactly the same as a joint application process?

Morag Driscoll: A joint minute comes about when one party raises an action individually and it goes to court. Normally, the action gets sisted to allow for a negotiation period. Negotiation is managed successfully, parties come to an agreement and they put the main points of their agreement into a joint document that is called a minute, which is then submitted to the court.

Margaret Mitchell: Is that different from a joint application process?

Morag Driscoll: A joint application process implies that the parties start off in full amity. If the parties are not in amity, there will be no joint petition, because the parties will not be asking the court for the same thing.

Margaret Mitchell: Is your argument the same for a joint access application?

Morag Driscoll: What do you mean by "joint access application"?

Margaret Mitchell: Starting the whole ball rolling.

Morag Driscoll: Again, by the nature of the process, both parties would be required to agree that the matter should go to court. They would also have to agree what should go to court. Sometimes, the only way of getting things started is for one party to say, "No, I don't agree with any of this," in which case there will not be a joint petition. The joint petition process would add an extra level of complexity and its use would not necessarily avoid acrimony.

Margaret Mitchell: Section 14 of the bill allows for a fluctuation in value of any financial provision to be taken into account. What are your views on that? Should the provision be limited to, for example, the family home, to jointly owned property or, as in the case of Wallis v Wallis, property transfer orders?

John Fotheringham: The committee heard a clear exposition of that from Professor Clive, which I will not try to top. The problem with the Wallis case was that the transfer value was taken as the valuation at the separation date—the relevant date. In that case, there was a gap in value of £24,000 between the relevant date and the date of the divorce decree—the date of the transfer.

Practitioners tend to agree that that procedure causes injustice. In negotiation, we tend to try to work on current values. A tiny minority of such cases get to court for the decision; the vast majority are agreed through negotiation. We tend to agree on the basis of current-date value, because that is seen as more just. In any case, the parties are able to agree what they think is just.

The difficulty with the bill is that it seems to throw out the baby of certainty with the bath water of injustice. We need to have some kind of certainty so that we can advise our clients and the clients can know roughly what will happen in court. If we give complete discretion to the sheriff, that is not law—it is telling the court to decide what is fair. If we want to do that, we can, but it would be very unfortunate, because no one would know where they stood. That is why in our submission we suggest that we attack the problem not at section 10 of the 1985 act, but at section 8, which deals with the transfer of property, and leave the rest unchanged.

Earlier, the example of the valuation of pensions was given. There is no just reason why the spouse who wants a share of the other party's pension should have any share of the increase in the value of the pension that took place after the parties had ceased to cohabit. He or she has no right to the asset and has not contributed, even indirectly, to its value. For that reason, the pension should be valued at the relevant date.

The transfer of property, especially when it is in joint names, is an altogether different matter, because one or other party has had title to the property in common law but has not had use of it since the relevant date and up to the transfer date. There is no reason why we should take the relevant date value, rather than the transfer date value. In order to take away the injustice of Wallis v Wallis—which, as Professor Clive said, was simply wrong—we do not need as radical a change as the bill proposes.

Margaret Mitchell: You have addressed the transfer issue. What about the issue of jointly owned property and the family home? Does your view that we should move away from using the relevant date relate only to transfer?

John Fotheringham: I am talking chiefly about the transfer of the family home, which is a separate matter. The issue has been very relevant in recent years, because the value of housing has shot up much faster than that of all other kinds of property. However, if we take the relevant date for other forms of property and the current value—the value at divorce—for the family home, we will remove the ill effects of Wallis v Wallis and be left with the certainty that was one of the good aspects of the 1985 act.

Margaret Mitchell: Does anyone else want to comment on the issue?

Michael Clancy (Law Society of Scotland): John Fotheringham has said it all.

Margaret Mitchell: In other words, the provision should be limited. You are not in favour of giving carte blanche in respect of all valuations.

John Fotheringham: That is correct.

Stewart Stevenson: I am sorry, but I want to pursue the issue of Wallis v Wallis. You have helpfully provided a paper on that topic. Perhaps less helpfully, however, you go into some of the tax implications of the decision. I want to help my understanding of the issue by asking a simple factual question. You say that the transfer of assets happens at the point of divorce. In tax terms, does it happen before the divorce—while people are still married—which means that all the benefits of inter-spouse transfers accrue to it, or after the point of divorce?

John Fotheringham: The real issue is capital gains tax. The Inland Revenue has always taken the value of the property as it became the property of both parties or either party; it goes right back to the acquisition date, rather than the date of the transfer.

Stewart Stevenson: I understand that. I am asking where in the tax cycle the capital gains tax liability crystallises into a payment that needs to be made to the Inland Revenue. If tomorrow I transferred a large shareholding with an accrued capital gains tax liability to my spouse, there would be no need for tax to be paid. That would happen when she disposed of the asset. From reading your paper, I am not entirely clear whether the same would be true if the asset were transferred at the point of divorce. In other words, would the liability transfer to the person receiving the asset but become payable on disposal of it, or would it came into play at the point of divorce and transfer?

12:15

John Fotheringham: The transfer is a chargeable event for capital gains tax purposes.

Stewart Stevenson: So the liability happens then.

John Fotheringham: That is right.

Stewart Stevenson: The money has to be paid out to the Inland Revenue at that point.

John Fotheringham: That is the chargeable event.

Stewart Stevenson: If the divorce were not to be active until the transfers had taken place, would that defer the chargeable event until the person receiving the asset disposed of it? That is a speculative question, because we are talking about the view that the Inland Revenue would take.

Michael Clancy: I do not think that matters could be arranged in such a way that the divorce would be suspended until the property had been transferred. The concept of a suspended divorce strikes me as unusual.

John Fotheringham: Of course, the situation does not arise very often, because a transfer is usually of the matrimonial home and there is an exemption for the matrimonial home anyway. However, I take your point.

Stewart Stevenson: It would arise with assets such as shareholdings. The example that you give in your submission includes shareholdings, albeit that the value of the shares in that case would be unlikely to trigger capital gains tax unless they had done extremely well. I am not clear about the tax position. Are you suggesting that the bill will make it more difficult for the courts to take account of tax liabilities that move from one partner to another or are you saying that the bill adequately covers that situation?

Michael Clancy: We are saying that the bill needs to be changed.

Stewart Stevenson: So it will not allow the courts sufficient flexibility to regard the transfer of liabilities between parties as one of the value items that must be taken into consideration. Is that why you say that it needs to be changed?

Michael Clancy: Yes.

Stewart Stevenson: That has probably worn my brain out, convener.

Michael Clancy: You are not the only one.

The Convener: That is a relief. On Wallis v Wallis, are you saying that the law is wrong or that the decision was wrong?

John Fotheringham: The decision was wrong. Hark at me—I am a little solicitor from Inverkeithing and I am saying that the House of Lords got it wrong. However, I am supported by some fairly heavy guns.

The Convener: The case interests me. My reading of it is that, if the House of Lords has applied the law, the law might not be right. Why do you say that the interpretation is wrong?

John Fotheringham: It was an unnecessary interpretation and the court could certainly have taken the view that the transfer value should be the value on the date of the decree of divorce rather than that on the relevant date. There were complex arguments at the time—I do not know whether the committee has a copy of the case with all the arguments in it. It was a narrow decision, but the House of Lords got it wrong. The implications of that emerged only later, but everybody sees them now. However, because the case went to the House of Lords, we will not get

rid of it except by legislation, which is why we are delighted that we have the opportunity to do so through the bill.

Stewart Stevenson: I have a wee point on costs to defender and pursuer. How do the costs end up, for the pursuer in particular, when there is a minute of agreement? I hope that I am using the right terminology.

Morag Driscoll: Basically, in matrimonial matters, the usual court rule that expenses follow success does not apply and it is normal that each party pays their own costs. The exception would be if the behaviour of one of the parties had caused the costs to mount. For example, if someone simply refuses to submit the necessary documents, as a result of which extra actions are required, they can be found liable for the other party's share of that extra cost. However, normally, a person pays what their side has cost—it is not paid for them because they have won.

Stewart Stevenson: Are the costs that the pursuer will incur deducted from the pursuer's assets, before they are divvied up?

Morag Driscoll: No. They are irrelevant.

Stewart Stevenson: So they come out of whatever share the pursuer ends up with.

Morag Driscoll: Yes. The same is true for the defender, given that the defender could end up with the assets. If a person receives legal aid, the Scottish Legal Aid Board does not touch the first £4,500 of whatever they achieve, but they are expected to pay their legal expenses if they achieve more than that.

John Fotheringham: Of course, those expenses will be much less if a person is on legal aid, because they are calculated at legal aid rates, which are about one third of ordinary, unenhanced rates.

Morag Driscoll: It assists the parties if they negotiate and come to an agreement, because the court action costs much less. The majority of divorces that go through are two-year consent-based divorces, which means that nothing contentious has been discussed. In such cases, the court is simply asked for the divorce, otherwise it would not be consent based. The most economic way in which parties can get a divorce is to have a formal agreement, which is called a minute of agreement, that is separate from any court action, after which one of the parties raises a divorce and the other party provides the consent or—if the divorce is adultery based and for some reason the parties want it to go through quickly—the necessary affidavits about adultery and the welfare of any children.

The Convener: I have a question to assist our thinking on the debate that Margaret Mitchell initiated about whether the system should be adversarial or whether we should recommend a system of joint petitions. Given what you have said, are there implications for the pursuer in that they are expected to outlay expenses first, albeit that the costs are evened up at the end of the process?

Morag Driscoll: A person has costs for seeing their solicitor about divorce. The decision to go to court to get a divorce because issues cannot be agreed is never taken lightly on either side, because that is much more expensive. A person has to pay court dues to lodge a document with the court. If the defender chooses to defend any part of the action, they will have equivalent costs. To lodge their defences, it costs the same as it costs the pursuer to lodge the initial writ. Therefore, the costs end up roughly the same, unless the case is completely undefended, in which case the defender has no costs. They will have signed a consent form or provided affidavits, which are often paid for by the pursuer, because the defender agrees to provide them as long as they do not have to pay. If the divorce is undefended, the costs fall on the pursuer, but they are quite low.

The Convener: That is the information that I am interested in, so that we know whether there is any financial disadvantage.

Morag Driscoll: It is in the hundreds not the thousands of pounds.

The Convener: You say that the costs are low. Define low.

Morag Driscoll: For an undefended two-year consent-based divorce, the court dues add up to just under £81, and there are fees for lodging the affidavits and the minute for decree.

John Fotheringham: Those are another £30 each.

Morag Driscoll: So the court fees are about £150 or £160. Solicitors' fees for an undefended divorce are in the region of £350 to £400. We are not talking about a vast amount of money. Of course, if the person is legally aided or if they are in receipt of benefits, they do not have to pay the court costs; they submit a form with the court documents and the court waives the fees.

Mrs Mulligan: You have given fairly substantive written evidence on section 16, which relates to domicile of children. However, to get your views on the record, it would be useful if you would outline your concerns and explain why you suggest that certain paragraphs should be deleted.

Michael Clancy: I will deal with that; it gives me an opportunity to talk. Some of you know me—I recognise Mike Pringle and congratulate him on

his appointment as deputy justice spokesperson. How is that for smarminess?

Section 16 is intended to dispose of the distinction between the domicile of legitimate and illegitimate children. We support that proposal, its objective and the rule in section 16(1) that

"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."

However, we have reservations about the provisions of section 16(3), which sets out the presumptions that are to apply in determining for the purposes of the section the country with which a person has the closest connection.

Earlier this morning, you debated whether the presumptions are presumptions or rules and whether a rule can be expressed as a presumption and vice versa. Those questions were bounced around the society's sub-committee on family law for a couple of meetings. We arrived at the conclusion that the evidential route of presumption was not appropriate and made the structure of section 16 a bit too complex for its provisions to be usefully and easily applied. We came up with a recommendation for a replacement, which takes account of our conclusion and proposes the deletion of parts of section 16(3). We also wanted to confine paragraph (d) of subsection (3) to cases in which the child is currently at home with a surviving parent. The effect of that paragraph as drafted is that the child is presumed to have the domicile of a parent with whom the child might have lived for only a brief time some years ago.

We came to the conclusion that section 16 should be amended. A draft amendment is in our submission, and you can confidently expect that we will send it to you in advance of stage 2.

Mrs Mulligan: It was useful to have the example laid out in front of us, because it clarified the concerns that you had. I will not pursue the matter any further.

Mr McFee: Section 17 concerns unmarried fathers. I am aware from your very brief comments on it in your submission that you agree with the section, but my question is whether granting parental responsibilities and rights to unmarried fathers will be likely to cause significant practical problems for single parents or their legal advisers.

Morag Driscoll: In many ways, it will make life a great deal easier for the client—the unmarried father—who comes in because he wants to see his children, as it will remove the need to go to court for declarative paternity and various other complexities.

Mr McFee: Would making the new rules retrospective create problems?

John Fotheringham: That should absolutely not be done, because it would create huge problems. If that were to happen, one would be saying that a mother who had allowed joint registration on the basis that the father would not have rights had taken a decision about the status of the child and the father's parental responsibilities and rights that she did not mean to take. To make the new provisions retrospective would be appalling, to be frank. If the mother is willing jointly to register the birth so that the father has equal parental responsibilities and rights, she should do so knowingly. If you were to make those parental responsibilities and rights retrospective, she would have done so unknowingly and 16 years' worth of births would have been changed by the stroke of the parliamentary pen.

12:30

Morag Driscoll: You would also be giving the small number of very difficult absent parents a brand new weapon. They would suddenly have acquired rights over a child that they might not have seen since it was born 10 or 12 years before.

Mr McFee: What about the situation in which the father is unmarried but the parents registered the birth of the child jointly? Is there a case of unfairness there?

John Fotheringham: No. The change in section 17 is more symbolic than it looks, because it does not give the father an automatic right to see the child at all. It gives him the option to go to the court to ask for contact with the child, which he already has. If he is still living with the mother of the child, he does not need any rights; he is there, pouring the Coco Pops, helping with the homework, taking the child to East End park and fulfilling the functions of a father.

Mr McFee: You were doing well up to that point.

John Fotheringham: This season, perhaps.

Such a father does not need the rights, and if he does not need the rights he should not have them. One of the overarching principles of the Children (Scotland) Act 1995 is that no court orders are given unless it is necessary that they should be given. If everything is working out happily, the father does not need those rights and should not be given them—certainly not retrospectively.

Morag Driscoll: Remember that it is open to a couple who are living together and happily bringing up their children together to sign a parental rights agreement. That is the avenue. Not making the rights retrospective does not mean that there will be a whole raft of fathers who cannot get the rights in any other way than by going to court.

Mr McFee: Thank you. I just wanted to explore that point with you.

Morag Driscoll: I would like to mention one other small point—although it is quite a big point for the people involved. The advantage of giving parental rights to unmarried fathers is that, in the very small number of cases where a mother dies, the father will have the automatic right to continue to look after his children and will not have to compete with other family members. I have been involved in cases in which a father has come back from the funeral home to find that the weans have been taken by another family member, and he has had to go to court to get them back.

Mr McFee: Does that apply to children between the ages of zero and 16, even if they have been registered?

Morag Driscoll: Yes. It is retrospective legislation.

Mr McFee: I understand the argument about retrospective legislation.

Morag Driscoll: We all come out in spots about retrospective legislation. We are lawyers.

Mr McFee: It is amazing to see so many lawyers agreeing with one another.

The Convener: I turn to section 18 on the meaning of "cohabitant". Is the section workable in practice?

John Fotheringham: It is workable subject to the slight amendments that we have made.

Morag Driscoll: We have merely suggested amendments; it is the committee that will make them. [*Laughter.*]

John Fotheringham: That is a fair point.

The idea behind the section is certainly thoroughly workable, and possibly not before time, but I think that the slight amendments that we have proposed would make it work better.

The Convener: That is helpful. Further to that, do you foresee any difficulties that either clients or solicitors might face in giving surviving cohabitants a claim for succession? I know that, strictly speaking, the Family Law (Scotland) Bill does not deal with succession, but there are one or two areas where one might end up entering into that area of the law.

Michael Clancy: Section 22 makes most inroads into that topic, and a number of issues arise from that. It is important to realise that it applies to intestacy, where someone does not leave a will. It is also important to note that the provision in section 22(2) is discretionary. Section 22(2) provides that

"Subject to subsection (4), on the application of the survivor, the court may … after having regard to the matters mentioned in subsection (3), make an order"

for payment of a capital sum or for the transfer of property. There are issues around that provision, which does not cover everything.

We noted that a difficulty might arise if more than one person were to make a competing claim on the estate. That is the principal difficulty that the provisions on intestacy present.

The deadline of six months for making an application, in section 22(6), also causes us a wee bit of trouble. Section 22(7) allows the court to extend the deadline. Such an extension might be necessary, but the approach could lead to the situation that we describe in our submission, in which

"the executor who winds up an estate and pays out without knowledge of a claim by a cohabitant after say 9 months could be faced with an order to pay the cohabitant without any funds with which to make the payment."

The provision in section 22(11)(c) on the net intestate estate brings together the legal rights and prior rights of the surviving spouse. It would be better to treat legal rights and prior rights as separate components.

As Paul Beaumont said most eloquently, the law of succession needs a fundamental overhaul. The last major provision was the Succession (Scotland) Act 1964 and I think that the committee recently dealt with the Prior Rights of Surviving Spouse (Scotland) Order 2005 (SSI 2005/252), which increased the amounts to which the surviving spouse has a prior right. The 1964 act deals with intestate matters, but the structure for succession was designed with the feudal system in mind and now that we have abolished feudal tenure we should consider the matter closely.

The Convener: You are not the first person this morning to advise the committee of the need to consider the law of succession.

Michael Clancy: The matter could be an item for a future agenda.

The Convener: The Prior Rights of Surviving Spouse (Scotland) Order 2005 is on its way to the Justice 1 Committee, but we have not yet seen it.

Michael Clancy: It is a thoroughly commendable order.

The Convener: We shall see; I will not presume anything.

For the record, is the bill's approach to financial claims on the separation of cohabitants workable?

Morag Driscoll: I echo John Fotheringham's comment. If the provisions are amended as we propose, they will be workable. The proposed approach will certainly be better than a system in which we have to tell a gentleman or woman who shared their house with a cohabitant for 20 years

that they are entitled to nothing when the relationship is over.

The Convener: That is a good note on which to end our discussion on cohabitants; I think that there is consensus on that point.

Marlyn Glen: There are provisions throughout the bill on same-sex couples. Does the bill achieve its aim of treating cohabitants of the same sex in the same way as it treats cohabitants of the opposite sex?

John Fotheringham: Broadly. We address some drafting matters in our submission, but if our proposed amendments or versions of them were to be accepted, the bill would largely achieve that aim.

Marlyn Glen: You think that there is a need for the amendments that you propose in your submission.

John Fotheringham: Yes.

Marlyn Glen: Does the bill go far enough in treating civil partners in the same way as it treats married couples?

Morag Driscoll: That question is really about policy more than legal workability. We tend to be fairly careful to stay away from approving or disapproving policy.

Marlyn Glen: I was not really asking you about policy; I was asking about the way in which the bill is drafted. I notice that you have suggested amendments to various parts of the bill to make it more consistent.

John Fotheringham: An unfortunate aspect of the bill is that it suggests that we treat same-sex partners as if they are living together as husband and wife. That is a little flawed conceptually, because they would not be living together as husband and wife but as civil partners. If we did not have the Civil Partnership Act 2004, that would be a perfectly good definition, but we do. By chance, that act is likely to come into force even before the eventual family law act. Therefore, we should refer to same-sex couples who are living together as if they were civil partners, rather than husband and wife.

Marlyn Glen: From a practitioner's perspective, does the bill need to address issues that same-sex couples face more than do opposite-sex couples?

John Fotheringham: We have not had any civil partnership cases yet, so that issue has not arisen. I cannot think of particular problems that they would have that have not been suffered and possibly solved by heterosexual couples.

The Convener: Bruce McFee has a question on grandparents and step-parents.

Mr McFee: You probably heard the question that I asked the previous panel; this one will be largely the same. I do not think that we need to go into the reasons for not granting automatic rights and responsibilities to grandparents, unless you particularly want to; however, in your opinion, is there a substantial problem with grandparents not being able to gain access to or contact with grandchildren? I would be delighted if you could quantify that, because otherwise you will be about the 95th panel that has not been able to do so. Is part of the problem straightforward and financial, in that the cost of pursuing contact with grandchildren through the courts is prohibitive, or are there other obstacles?

John Fotheringham: I will have a stab at quantifying the problem by saying that the number involved is nearly nil. I know that there is a group of grandparents who will disagree with that, but I have been practising family law for 30 years and I have rarely found a grandparent who has been put off seeking parental responsibilities and rights, including the responsibility and right of contact where that is appropriate. Usually, the grandparent does not have to seek a court order; grandparents are part of the backbone of family life and, given that in more and more families the mother and father are both employed, grandparents are more and more involved—indeed, in most families they are absolutely essential. The question of rights arises only in cases of dispute, and if there is a dispute, it ought to be under the eye of the court. Therefore, the question of granting automatic rights is more symbolic than real. A grandparent would not have an automatic right to see a specific child if the case were in dispute; the grandparent would have to go to court.

Morag Driscoll: Yet again the overarching principle is what is in the best interests of the child. Where we have warring adults, granting automatic rights is like putting petrol on a fire—it does not help. People having contact with a child is not about whether or not they should have contact with Billy or Susie, say, but about the sort of contact that they should have and when and where it should take place. Many issues are involved. In the first flush of a family break-up, it is often not helpful for there to be competing adults all wanting to see the children. Very often the problems can be solved by the parents negotiating what will happen about the children, and grandparents can be included in that.

The vast majority of grandparents see their grandchildren and the vast majority of grandparents are a positive part of their grandchildren's lives. However, we must not forget that in a tiny percentage of difficult cases having contact with their grandparent might not be in the best interest of the grandchild for various reasons or because it would add a difficulty to the child's

life. If an automatic right is established, the child, as well as the parent, is put on to the back foot. The child might have to say, "No, that is not in my best interest," and have to prove it. That is a heavy burden.

12:45

Mr McFee: I want to tease out something that John Fotheringham said, which was that, even if someone has an automatic right, if they have been denied contact, they would have to go to court to prove that right or to—

Morag Driscoll: Enforce?

Mr McFee: Enforcement is another issue. I presume that where there is conflict, enforcement will be extremely difficult. What John Fotheringham said is that even if grandparents were given the automatic right of contact with their grandchildren tomorrow, that would not make a jot of difference.

John Fotheringham: In practical terms, it would not make very much difference.

Mr McFee: In fact, it could enflame the situation.

John Fotheringham: Certainly.

Morag Driscoll: Grandparents, aunties, uncles, brothers and sisters can go to court and ask for contact.

John Fotheringham: And neighbours.

Morag Driscoll: They can do so under section 11 of the 1995 act; they do not need a right to do it. Anyone who has an interest in a child's life—who is part of the child's emotional life—who might need such a right can already apply to the court for contact with the child.

Mr McFee: Okay. I want to crystallise things, as what you are saying is helpful. So, someone does not need the right to go to court to establish contact, and even if they have the right to have contact, they might have to go to court to enforce it. Do people decide not to go to court because the cost is prohibitive or because some other obstacle is in their way—perhaps ignorance?

Morag Driscoll: I do not like the word "prohibitive" because that implies that the process is overly expensive.

Mr McFee: I suppose that that depends on someone's income.

Morag Driscoll: There can be two problems with finance. First, for people who do not qualify for advice and assistance or legal aid, cost can be an extra burden. There are also people who qualify financially for legal aid but who have to justify to the Scottish Legal Aid Board that it should take their case forward. That is not always guaranteed. Just because a person qualifies financially does not mean that they will get legal aid to raise the action. The question is complicated. Most lawyers are willing to negotiate payments over time, but finance can be an extra burden.

Mr McFee: Perhaps you would quantify that for me. If I was a grandparent—which, clearly, I could not be—and wished to pursue that right, what would the costs be? Can you give me a ballpark figure? I know that that might be like asking, "How long is a piece of string?"

Morag Driscoll: It depends how long the case takes in court, how many times someone has to appear and so on.

Mr McFee: What does it start at?

John Fotheringham: An undefended action would not cost very much—perhaps £200 to £400. However, the case would not go ahead if the action was undefended—if there was agreement, there would be no action at all. A case will only ever happen where there is dispute. Of course, the cost will also depend on the length and, to some extent, the bitterness of the dispute.

The present court rules are designed to minimise court time and expense. Even so, the costs can go into the thousands of pounds. Very often in cases of dispute, one or other party—or possibly both or all three parties—might want to hire their own psychologist to give evidence, which is horrifically expensive. The case should not go to proof, as that is just too expensive.

Morag Driscoll: The hope is that all parties can be got into some form of mediation. That can often take the sting out of a heated situation and help the parties to come to an agreement that they can live with. Sometimes, mediation can make clear to the grandparents the nature of the difficulty, which can also take the sting out of the situation. Just going to court can be a burden and it can put an equivalent financial burden on the parent of the child who is defending the action, reasonably or unreasonably.

Michael Clancy: The issue of statistics was raised. We took a look to see if there were statistics on the subject. "Civil Judicial Statistics Scotland 2002" contains the most recently published statistics that we could find. They indicate that in 2002, in sheriff courts, there were 481 cases involving residence or contact issues. Although 1,138 cases were initiated, the number reduced as they went through the various processes. The statistics do not deconstruct that any further. To be honest, your question should be addressed to the Scottish Courts Service, which might have a sufficient statistical breakdown that it does not publish.

Mr McFee: I understand that you cannot say how many of the 481 cases involved grandparents, step-parents or aunties.

Michael Clancy: Exactly. However, the fact that there were 6,418 divorce actions in the same period shows you that residence and contact issues do not come to litigation anything like as frequently as some of the other family matters.

Morag Driscoll: That is true of residence and contact issues in isolation. However, often, they are dealt with as part of a divorce action.

Mr McFee: Do you find that children are often used as pawns in a divorce action?

Morag Driscoll: I would not say that that happens often. Scottish parents must be given a great deal of credit. I have often been astonished by the generosity of spirit of mothers who have been through terrible violence and who say to me, "Aye, he beats me but he doesn't touch the kids," and who will agree to the father's contact requests. I have seen some mean mindedness but that can often be solved by working with the client. You can ask them whether they love their dad—or their mum, if the client is a man—and when they reply that of course they do, you can ask, "Well, don't your children love their dad?" Most people are reasonable. Some are unreasonable for a short time and some are permanently unreasonable.

The Convener: I want to test this; I am not expressing a view. Everyone defends the current system and says that there is nothing better that we can do. I entirely agree with your conclusion that giving rights to grandparents is the wrong way to approach the situation—I have no doubt about that—but, as a legislator, I have to ask myself why I am hearing from Families Need Fathers, which seems to be putting a reasonable case, and from grandparents across the country that the system is not working for them.

I realise that we are hearing about a minority of cases, but it seems that paternal grandparents are denied access more often than are maternal grandparents. That seems to be something that we cannot ignore. You talk about situations in which both adults are not acting in the interests of the child but, often, it is one adult who is not acting in the interests of the child by not complying with the other person's request for reasonable access. At the moment, the system exonerates the person who is behaving badly, which means that the other person does not get proper access and the child does not get to see them.

I should add that we have had an hour's videoconference session this morning with the Australian Parliament. The Australians have done some interesting work in relation to getting parents to sign up to parenting agreements in advance of a divorce. They have a three-stage process that enables people to get round a table and talk about the interests of the child in the context of the extended family. Such useful initiatives cannot be excluded from the discussion.

Morag Driscoll: We have an equivalent process through minutes of agreement, which are agreed before the divorce takes place. As a routine part of that process, the parents agree where the children will live, how often they will see the other parent, whether they will see grandparents, where they will spend their holidays and so on.

The Convener: But when one parent will not do that we have nothing; we have no sanctions. All that we have is the welfare interests of the child.

Morag Driscoll: Various jurisdictions have different sanctions. The French can put someone in jail and fine them a huge amount of money. My question is always: what does the child do when mum is in jail?

The Convener: I know that that is a good example to put us off the idea of having sanctions, and none of us sitting round the table is suggesting that that should happen, but we have no sanctions and all I am asking you to consider is that we could go to that extreme. That is possible in the Australian system, but it never happens and the Australians explained to us that they just want to have the sanction as a reminder to parents that they must get round the table and talk.

It appears that we have nothing. To be honest, I am not convinced by your evidence that the process is not cost prohibitive, as that is the evidence that we get from ordinary people. Perhaps they do not know how to fund such cases, but there is an obstacle, and even if we do not agree with their conclusions, we would be wrong to ignore the fact that some people have a problem with the system.

Morag Driscoll: There is a general question about access to justice in relation to family law. More and more family law practitioners are tearing their hair out because they can no longer afford to do the work. We are not here to discuss that today, but practices—I am among them—are pulling out of family legal aid because they cannot afford to do such work any more.

John Fotheringham: The convener essentially asked three questions. I will go back to the first one, which I think was: why is it that more paternal grandparents complain than maternal grandparents? Is that what you asked?

The Convener: Yes.

John Fotheringham: That is largely because, even nowadays, the children usually end up with the mother and she is often on better terms with her own parents than with her former parents-in-

law. That is where the problem arises. It is not that the maternal grandparents are less concerned with the welfare of the children, but that they do not need rights and do not go to court because, as often as not, they already fulfil a function.

If there is matrimonial dispute—I do not need to tell members that disputes can be incredibly bitter—the bitterness that is aimed at the former spouse, usually the father, can often affect and infect the mother's relationship with all members of his family, as they owe a greater loyalty to their son and take his side. The whole structure of adversarial conflict is set up.

The second question is: why do we see more and more people who think that the system is not working? One of the great changes of the Children (Scotland) Act 1995 means that people no longer get orders unless they need them. Before the 1995 act, in the classic case of a husband and wife who divorced, everything was agreed and the children stayed with the wife, so she got decree of custody, as we then called it—there was an order for custody. Nowadays a person does not get an order for the residence of children unless they need it, and if everything is agreed, they do not need it. Questions of contact and residence arise only where there is a dispute—where there is an argument between the parties—because no unnecessary decrees are granted. The contact and residence cases that we see are generally more bitter and unpleasant because the pleasant ones, if you like—the agreed ones—do not happen any more.

Why are people unhappy? People are unhappy because they do not like the result. If there is conflict in a case because, let us say, a father wants to have contact with the child but the mother thinks that that is contrary to the interests of the child, one of them will end up being unhappy with the result whatever happens. If the court says that there should be no contact or very restricted contact, the father will be unhappy with the result. If the mother is forced to give contact that she thinks is contrary to the interests of the child, she will be unhappy with the result.

Courts are there to deal with situations in which people disagree about something. Someone must make the decision and it should be made by the sheriff. The sheriff often says that the parties should go to mediation and sends the case to mediation, but if the parties are not at all willing to sit round the table and talk, mediation will not usually do much good. Mediation is particularly useful when people agree that contact should take place but cannot agree how it should take place or how much of it should take place. When people disagree altogether about contact, there is usually a reason, which the father who seeks contact might not accept or believe. The court must make up its mind about that. It is obvious that the person who loses will be unhappy with the result. I suggest that the system is not at fault in such a situation. If the process is adversarial, someone will be unhappy with the result.

13:00

Morag Driscoll: It is unquestionable that, in a small percentage of cases, we as lawyers have done everything that we could and have explored every avenue—they might well have been to court if they could afford it—but we end up holding our sobbing client's hand because he cannot see his kids, as the mother will not agree.

By the time that a case has dragged on, the children are so sick of it that they say that they do not want to see their father, because that is easier. I had a client whose child said to him, "If I tell mummy I want to see you, I'll be in trouble, so I'll tell her that I don't want to." Those are the impossible cases. I am not sure whether any law will ever fix that injustice for the child, the parent and the grandparents. Short of taking children away from their mothers and giving them to their fathers, the situation will not be fixed.

All the acrimony, emotion and bitterness are swirling around the small vulnerable figure of a child. In the search for justice, the child can end up crushed, because they live with all that adult emotion. I am not sure whether, sometimes, it is not better just to leave the situation. A child will always return to the other parent when they are old enough to make their own decisions. We cannot fix everything with a law.

The Convener: We understand that. However, it would be wrong of us as legislators not to play devil's advocate and not to test what we hear. I hoped that you would understand where we are coming from. We listen to ordinary people who have issues. I am sure that you are right that some situations may be impossible to fix, but it is our job to test whether the rules that courts apply are right. That is what we are examining.

Mike Pringle (Edinburgh South) (LD): Most of the questions that I intended to ask have been answered. We have not discussed the rights of stepfathers and stepmothers—it is mostly stepfathers who are involved. Does the bill address equally step-parents' rights to access to children?

Morag Driscoll: Under section 11 of the Children (Scotland) Act 1995, someone who has lived with a child and has been a part of their life can apply to the court. I have a bit of a problem with giving a step-parent a right over a child, because a child could end up with a series of adults who have competing rights over them, which would be a recipe for much pain. John

Fotheringham has a favourite part of the 1995 act that is seldom used and is useful.

John Fotheringham: When no dispute exists, one difficulty for step-parents and grandparents who play a practical part in looking after children is that when they take them to a dentist, doctor or school, the receptionist will not let them in, because they have no parental rights.

A way round that is in section 3(5) of the 1995 act, under which a mother—the person who can act is usually the mother—can enter into a deed of arrangement, which is a simple little document of some 15 lines. She and the grantee of the document sign it. That does not transfer parental responsibilities and rights, but it allows the grantee to exercise rights and to discharge responsibilities in the child's interests. That takes grandparents past the medical receptionist and the school secretary and allows them to play a full part, in the child's interests. Such arrangements are rarely used—I am not sure why, because they have been in the 1995 act for 10 years.

I would rather have such deeds than a step-parental agreement that is analogous to section 4 of the 1995 act, which is the most appalling idea. One reason for that is that the essence of the 1995 act is embodied in the three overarching principles: first, the child's welfare is paramount; secondly, there are no unnecessary orders—no orders are granted unless they must be; and thirdly, in appropriate conditions, the child's view is taken.

If, as has been suggested, there was a step-parental agreement, a mother could sign an agreement with her new partner and give the step-father a right. However, no test would be applied by anybody to establish that that was in the interest of the child, that it was better for that order to be made than none, or even that the child had been informed, far less consulted. Such agreements are the worst way to give rights because they fly in the face of the principles of the 1995 act, which have served us so well for the past 10 years.

Morag Driscoll: They could have another effect. Does the absent biological parent have a right to say no? The agreement could be used to exclude them even further from their child's life. Would there be three people standing around the hospital bed saying yea or nay to hospital treatment? That would give rise to too much complexity.

Michael Clancy: We are arranging a meeting with the family law stakeholders group, which is considering parenting arrangements, step-parents' rights and grandparents' rights. Beyond peradventure, there is no doubt at all that both grandparents and step-parents can play an inestimable role in a child's life. Just as Eric Clive is a grandparent, I am a grandson and I know that a grandparent can play that role. We support that role when it is played properly, but we need to meld the freedom to grow in a family setting with the law, which is sometimes a blunt instrument. It is a difficult combination.

Mr McFee: The reason why folk do not use section 3(5) of the 1995 act might be that they do not know about it. Will you clarify how it can be used? Can a father sign to allow the step-mother access to dental records and hospital records without the consent of the birth mother?

John Fotheringham: Yes.

Mr McFee: Can he sign to allow the grandparents that access?

John Fotheringham: Yes.

Mr McFee: Can an individual give that right to someone else, such as an aunt, an uncle or a next-door neighbour?

John Fotheringham: Yes. Sometimes it is the next-door neighbour who has had the most contact with the child.

Mr McFee: I can see the reason for that provision.

The Convener: As there are no further questions, that brings us to the end of the session—

Morag Driscoll: May I make a point on a matter that was raised earlier but which we have not discussed? There is one practical reason for continuing to have fault-based divorce. Where there is violence, and sometimes when one partner is, sadly, mentally ill, it can be in the interest of the other partner's safety to proceed to a faster divorce. It is also cost effective, in that one can get an interdict—an exclusion order or a power of arrest—as part of the divorce action instead of having to raise two separate actions. I have had several cases in which it was in the interests of safety to get the divorce fast and the only way in which to do that was to base it on the behaviour of the other party.

John Fotheringham: There is another issue that we wanted to raise. To some extent, we have been dealing today with matters of symbolism. There are some symbolic changes in the bill, but there is one symbolic change that it does not make—to remove from Scots law the status of illegitimacy. It is about time that we did that, and we will probably not get another chance to do it for a good few years. The step would be a largely symbolic one, because illegitimacy has almost no effect in law. The only people who would be upset about such a change are the heralds, but they can argue their own case.

There is no reason why any child in this country should be branded illegitimate any more. We now have a perfect opportunity to change that. Our committee and I would like that symbolic change to be made. This is a glorious opportunity to change Scots law for the better.

The Convener: Those are helpful points. What do we need to do, albeit symbolically, that has not already been done?

Michael Clancy: We propose an amendment, which you will find on page 18 of our submission.

Mike Pringle: I have a brief question to ask to highlight the issue. I agree fundamentally that it is nonsense to have children branded as being illegitimate. Do you have any idea what percentage of children who are born into a happy family relationship in Scotland are illegitimate?

Morag Driscoll: We had statistics somewhere, but I cannot remember the figure.

Michael Clancy: We received evidence that 40 per cent of children are born to parents who are not married.

Mike Pringle: Do you agree that that figure is right?

Michael Clancy: The figure is find-outable.

Mike Pringle: I realise that.

The Convener: I thank the witnesses for their valuable evidence. We appreciate the effort that the Law Society has put into its written submission and the work that it does with the committee, for which we are grateful. We will read the *Official Report* when it appears next week and take in everything that has been said. You probably know that we were supposed to hear from representatives of the Family Law Association, but it could not spare anyone today. Nonetheless, we have had a good session so thank you very much.

I remind members that the next meeting will be on Wednesday 1 June, when we will take further evidence. We will hear from Alan Finlayson OBE, who is working on the parenting agreement, and the Deputy Minister for Justice.

Meeting closed at 13:13.

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