JUSTICE 1 COMMITTEE

Wednesday 1 June 2005

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

CONTENTS

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JUSTICE 1 COMMITTEE
18th 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 GAVE EVIDENCE:

Alan Finlayson
Hugh Henry (Deputy Minister for Justice)
Louise Miller (Scottish Executive Justice Department)
Gary Strachan

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 1 June 2005

[THE CONVENER *opened the meeting at 10:17*]

Family Law (Scotland) Bill: Stage 1

The Convener (Pauline McNeill): I welcome members to the 18th meeting this year of the Justice 1 Committee. We have received apologies form Margaret Mitchell, who will not be joining us today. I welcome our adviser, Professor Norrie, and Sarah Harvie-Clark from the Scottish Parliament information centre, who has also been advising us on the Family Law (Scotland) Bill.

I welcome our first witness today, Gary Strachan—I do not know whether he is lucky or brave. We have asked him to talk to the committee about his experiences. We received many submissions from members of the public, but we obviously cannot call them all, so we have chosen someone who we thought could represent some of the general issues. Gary produced a very good written submission, for which we thank him. I compliment you on your submission: it is very thorough, and we are all very impressed by it.

Gary Strachan: I stand on the shoulders of giants, I am afraid.

The Convener: I hope that you are sitting comfortably—everything will be okay. We have a number of lines of questioning for you this morning to draw out what you say in your paper. Please take your time in responding.

Mr Bruce McFee (West of Scotland) (SNP): There will be no trick questions—we are simply trying to get on the record some of the thoughts that you have put down on paper and to probe and explore them a little bit. What is your experience of post-separation parenting in Scotland and is your experience typical? What are the key issues that currently face parents who are separated?

Gary Strachan: To go back to the start, the problem is basically the lack of information for people about what to do in what is a highly stressful situation. People do not function at their best during separation, but they want to do their best for their children. Sometimes, people can feel that they are out in the cold.

I know now that services are available, but at the time of my separation it was difficult to find out that and to find out what I should do for the best. There was an initial lack of support to help me work out what to do and where to go. That was the start of the problems.

Mr McFee: Did that situation lead to other problems?

Gary Strachan: Because of the lack of information about available services, such as at citizens advice bureaux, I felt that I was being shunted towards a court solution. I do not mean that everybody wanted the matter to go to court; my solicitor and, I presume, my ex-partner's solicitor pointed us towards the mediation service. However, I had the feeling that people were thinking, "We've seen this sort of situation before and we know how it's going to go." There was no attempt to defuse the situation.

Mr McFee: I presume that you went on to the court solution.

Your paper suggests that the law that allows joint decision making after separation is not being applied properly or, at least, that it does not achieve what it sets out to achieve. Will you expand on that a wee bit? Do you have practical examples of the law's failure to achieve what it should have achieved?

Gary Strachan: Parental responsibilities and rights should allow both parents to make decisions on education and health care but, unfortunately, the application of rights is patchy, at best, as are interpretation and understanding of what the rights mean. As one would, I thought that the rights meant that a person could find information about and provide input to, for example, treatment that their child has at hospital. Funnily enough, I am pursuing that issue with Highland NHS Board, which states that I cannot provide input because my home is not my daughter's primary residence. I get no information at all about what medicine she is on or whether she is allergic to something that I should know about. There might be something in my genetic background that I should tell the hospital about and which might influence the course of treatment, but I am allowed no input on such matters. I do not know what the resolution of the issue will be—it is still up in the air—but I am trying to get NHS Highland to tell me why the present situation is in my daughter's best interests.

The phrase "best interests" is bandied about a lot, but it is meaningless. Perhaps people like to use it because they do not want to get involved in what they see as being a confrontational situation in which two parents argue about a particular course of treatment. Of course, anybody who went against medical advice would not be acting in a child's best interests. Basically, I just want information and to be allowed input.

Mr McFee: Are there any other issues?

Gary Strachan: As far as school is concerned, the situation is the exact opposite—I have no

problem at all. I help out at school and I am a member of the parent-teacher association. All doors are open to me there. However, because the situation is patchy, different schools or NHS boards might have different attitudes—I do not know. There is a strange understanding of parental responsibilities and rights.

My feeling is that NHS Highland thinks that to start to apply parental responsibilities and rights would be a hostile act, although I am reading between the lines and I do not want to put words into people's mouths; the issue is still up in the air. Obviously, the situation is worrying, given that medical issues are involved.

Mr McFee: Can you offer any other examples outwith dealing with Government bureaucracies?

Gary Strachan: Do you mean in my experience or in that of other people?

Mr McFee: You can be as broad as you like.

Gary Strachan: There is a general lack of understanding and there is marginalisation of fathers throughout social work services and wherever else people look for help. More progressive attitudes are emerging, but that is patchy and areas of Scotland are different from one another. The attitude is that mother knows best. A book that I have by Pryor and Rodgers talks about the mother mystique and the idea that the mother is always the better parent. I challenge that idea.

Mr McFee: Do judges in Scotland currently demonstrate bias in favour of mothers?

Gary Strachan: In my experience, yes. Perhaps they have preconceived ideas or they do not have the background or training that they should have.

Mr McFee: Did you find in your court experience that there is a lack of experience or training in the judiciary? Do you know of other fathers who have found that?

Gary Strachan: That is my theory, given the number of fathers who are marginalised or given the smaller slice of the pie, as it were. We cannot all be bad parents, but that is the impression that society is left with. If someone only gets contact, they are obviously the lesser parent or the less positive influence.

Mr McFee: Did you get the feeling that one parent won and the other got a consolation prize?

Gary Strachan: Absolutely—there are winners and losers.

Mr McFee: That is interesting. I do not know whether you have had the opportunity to read the bill in its entirety, but do you think that the bill and the non-legislative measures that have been suggested around it will address the problems?

Gary Strachan: I think that they will. I welcome any improvement on the current situation. I am sure that you have read the report by the Australian House of Representatives Standing Committee on Family and Community Affairs. Give me what it suggests—that is what I want. Ninety-nine per cent of my problems are solved right there.

Mr McFee: Which part of that report attracts you? Is it the part on proper mediation?

Gary Strachan: It refers to the creation of a

"visible entry point into the system"

so that people know where to go and are steered away from confrontation—everybody goes there and it is a one-stop shop. They do not have to think, "Should I go to ParentLine? Should I go to couple counselling? Should I go here or there? If I go here, will that be more to my advantage than going there? What is the agenda? That group might be a faith group that has its own agenda." A one-stop shop that encompasses mediation and which works to save marriages is an excellent idea. It would aim to steer people away from the courts, although that route will still exist.

Mr McFee: To sum up, you think that a visible point of entry—a one-stop shop—would help. Various types of information would be available, whether it is faith based or not, and a mediation service would be on offer before people hit the court system.

Gary Strachan: Absolutely.

Mr McFee: Do you think that such a system would have helped in your circumstances?

Gary Strachan: It certainly would. In my case—I am sure that this is also the case for other people—one parent was not being reasonable at the mediation stage, but that information was not passed on to the court stage. There should be continuity and recognition of the fact that one parent is blocking attempts to be reasonable and to find a resolution.

Mr McFee: Do you think that a less adversarial system might lead to that partner being less unreasonable?

Gary Strachan: I think so. I must admit that my back was against the wall—I was an unmarried father, so I had nothing. I was scared and I was grabbing anything that would get me more time with my daughter. I was in an adversarial position from the start and I was given conflicting and wrong advice by some services. There is sometimes a drive to point people in one direction without explaining why. They are pointed down one road when it might be better to go down another road.

Mr McFee: I have one final question; I am sure that my colleagues have more. I am sure that you know other people who have been in the same situation as you. In general, without naming organisations, do you get the impression that some services that you or others went to for mediation pursued a particular agenda that was not necessarily yours, or which was not, with hindsight, in your best interests?

10:30

Gary Strachan: Certainly. I have to admit that because my experience is limited and patchy, it is difficult to take a wide view, but I think that what you have suggested is the case.

I come from Thurso, so I found that remoteness proved to be a difficulty. For a start, I had to deal with many matters in Inverness and I had transport problems. There was also a lack of understanding and it was clear that people had certain preconceptions. For example, I felt that my case was treated not individually, but as one of a type and that people thought, "We've seen this sort of thing before and know what to do about it".

The Convener: We will now move on to the topic of unmarried fathers.

Marlyn Glen (North East Scotland) (Lab): Will you comment on the suggestion in the Families Need Fathers submission that biological fathers should acquire legal rights and responsibilities as parents simply by virtue of their being fathers, as long as there is a relatively straightforward way of removing such rights where appropriate, for example, in cases of domestic abuse?

Gary Strachan: I know that wiser heads than mine have commented on that, but I absolutely agree with that proposal. It is wrong for one parent automatically to get parental rights and responsibilities and for the other not to. Obviously, we should take into consideration issues such as child safety; however, most of us are not committing domestic violence or putting our children in danger. We should not all be tarred with that brush. Parents should not be marginalised; they should be seen as a positive influence on a child's life; toughened up and properly applied parental rights and responsibilities would demonstrate legal intent in that respect. No matter whether the law says you can or cannot do these things, you still want, and have a moral responsibility, to do them.

Marlyn Glen: We will explore those issues later.

The Convener: Are parental rights and responsibilities the key issue? Would they have made any difference to your situation?

Gary Strachan: From my experience, I think that if parental rights and responsibilities had been applied correctly, it would certainly have made a difference. However, I do not think that people know how they should be applied.

The Convener: Having parental rights and responsibilities is one thing; however, the law might well fail if health boards, schools and other agencies do not apply it.

Gary Strachan: Certainly. Before I came down for this meeting, my lawyer told me that the parent who has the contact order, but not the residence order, becomes excluded. I had to push her on that question, because she was not going to answer it. She had found that although you might be able to apply parental rights and responsibilities during hours of contact, you might as well forget about doing so outwith those hours. Unfortunately most hours of contact are outwith doctors' hours, for example, so you would not find appropriate information through a doctor's appointment.

Stewart Stevenson (Banff and Buchan) (SNP): On parenting, your submission refers to the current Australian system. Last week, we met members of the Standing Committee on Family and Human Services, which is our partner committee in the Australian House of Representatives. One committee member said:

"The Family Law Act 1975 … amended in 1995 … was intended to provide outcomes with a far greater emphasis on shared parenting."

You pick up on that point in your submission. However, the same member then said that, before the law was changed to place more emphasis on shared parenting,

"the statistics … show that shared care was awarded more often".—[*Official Report*, *Justice 1 Committee*, 25 May 2005; c 1913.]

For the sake of clarification, were you aware that that was the Australian experience or were you simply commenting on what you thought people said should happen?

Gary Strachan: The latter; I was not aware of that aspect of the Australian experience.

Stewart Stevenson: So, from the evidence that we received last week, it appears that fine intentions do not necessarily deliver on the ground.

You might not be able to answer this question and it might be an unreasonable question, but how can we achieve a better result for the child through ensuring that there is parenting from both parents? We are trying to put the child, rather than the parents, at the centre of things.

Gary Strachan: My findings—you have this evidence—is that greater support from and access to the father benefits the child. There might be problems in high-conflict situations, but the

findings of Baker and Townsend, for example, show that to have shared contact, or 50 per cent contact, can reduce conflict in a high-conflict situation. That is better than one parent scrambling for contact. How can you argue about 50 per cent contact? It means that you are not getting more or less contact than the other partner; you are just getting the same. The child is not getting more or less contact with one parent; it is getting the same contact with both parents.

Stewart Stevenson: I invite you to put on record the benefits that the child derives from having consistent, regular and meaningful contact with both parents compared with the alternative of having only one parent. What real difference can it make?

Gary Strachan: How long is a piece of string? This is about parenting. A person cannot be a good parent unless they have a child; it is that simple. Parents can be nurturing and supportive. Many of you must be parents and know that as well as I do. Those are not difficult things to find out.

Stewart Stevenson: You are saying that the more sources of support, nurture and encouragement to which the child has access, the more the child will benefit. In other words, if two parents support the child, it will be something like twice as good for the child.

Gary Strachan: Certainly. I can see that there might be contrary views from the father and the mother, which might mean that there are confusing signals, but I hope that every parent would have the best interests of their child at heart. There has to be a coming together over differences, even if they are quite fundamental, such as religious differences. Families are so diverse that problems are bound to arise; we cannot legislate for that.

Stewart Stevenson: Is it your take that the legal process presumes that, until it is proved otherwise, the parents will have conflicting views about the child and that that is why many of the legal outcomes are unsatisfactory?

Gary Strachan: I might be getting out of my depth here. I certainly think that—

Stewart Stevenson: You do not have to answer questions that you do not feel comfortable answering.

Gary Strachan: I will try, but please tell me if I make a fool of myself. We have to start by presuming that a parent has a positive influence. Maybe that is going to be true 90 or 100 per cent of the time, but I doubt very much that there will not be sticking problems. That is the nature of families and relationships. That is life, I am afraid; it is not all sweetness and light and we are not the Waltons.

Stewart Stevenson: It is interesting that the Australian evidence is that only 5 per cent of divorces end up in court. That is just an interesting footnote.

Mrs Mary Mulligan (Linlithgow) (Lab): To follow up what Stewart Stevenson asked you about time with the child or children, you talked about having an equal share, I acknowledge that it is when a person is with the child that they are able to give them what they want to give as a parent.

However, I wonder about the practicality of a 50:50 arrangement. As all of us who have children know, children have their own lives. You mentioned that you are from the Highlands and are therefore aware of issues relating to travel and distance and whether people still live in the same area as their previous partner and so on. How can we work through those practical difficulties in a way that ensures that the child's interests are to the fore and that they are able to get on with their lives as they want while also having the support of both parents?

Gary Strachan: Obviously, you start off at the mediation stage and use the parenting plans to thrash out much of the day-to-day stuff, such as who picks the children up from school and so on. Every family has to be treated as an individual case. You cannot legislate for all the arrangements that will be involved, but you can legislate for a parenting plan that will cover those arrangements. Everybody knows that if areas of difficulty can be sorted out, stability can be created, which is good for everyone involved.

Mrs Mulligan: Would you accept that the ideal of each parent having the child for 50 per cent of the time is not easily achieved, but that what is important is that the child spends meaningful time with each parent, and that both parents are involved in important decisions relating to the child's health care and so on?

Gary Strachan: That is true. However, my fear is that, if you do not start out with a position that each parent may have the child 50 per cent of the time, the preconceived ideas about who is the better parent will take over and one parent will end up with less time. How many times do you think it will be the father who ends up with 70 per cent of the time?

Of course, parents have to be flexible and, as children get older, they will have their own agendas that have to be taken into account. Parents cannot say that a child must stay with them instead of going out to the cinema—that would be ridiculous. However, if we start from a position of parity, there exists the potential for each parent to have 50 per cent of the time. How individual families work that out over time is up to them.

The Convener: Other countries have found that to be difficult to achieve. If we could not achieve that in the current system, what else could be done to improve the quality of access? Is your primary concern to do with quality of access rather than divvying up time?

Gary Strachan: Yes, it is. I do not want to back off from my position, because it is close to my heart. A positive parent is important and a negative parent is a waste of time. Of course, we are talking about a two-way street—contact is good for parents and for children. I do not know what the alternative would be to coming to some sort of agreement, whether it be a private agreement or a parenting plan. I do not know what the next step would be.

The Convener: I want to talk about enforcement of contact orders, which you mention specifically in your submission. Could you elaborate on what you meant when you said that contact orders in Scotland are not enforced?

Gary Strachan: That is what I have found to be the case. It is that simple; they are not enforced.

The Convener: Can you tell us more about that?

Gary Strachan: Contact orders are either enforced or they are not; that is it. Last year, my ex-partner breached the contact order three times, but on we go, on our merry way. There might be three more breaches this year—I do not know. There could be one tomorrow. The orders are not enforced.

The Convener: When you say that they are not enforced, do you mean that there is no mechanism for enforcing them?

10:45

Gary Strachan: I do not know whether there is a mechanism; if there is, it is damned rusty. As my lawyer said, we would have to take my ex-partner back to court where she might get admonished, but that would be it. She would likely be told "Don't do that again. Off you go." As my lawyer said, that is the situation.

The Convener: So your impression is that it is possible to return to court on the breach of an order, but the advice that you have received in your case is that it probably would not be worth doing that.

Gary Strachan: Yes. People in my position would be affected financially for a start. They would have to go through the whole court process and the whole confrontational procedure again. I do not know why the matter cannot be handled automatically. There are not two sides to the story. Either there is a breach or there is not a breach; either the contact time is for the person to whom it is granted or it is taken away from them and there is a clear-cut breach of the contact order. I do not know why these things do not happen automatically. Of course, I would rather that they did not happen at all, but there must be some redress.

The Convener: Are the costs prohibitive in respect of making a decision to go back to court?

Gary Strachan: Certainly.

The Convener: The cost is a factor.

Gary Strachan: Yes, frighteningly so.

The Convener: Do you have the impression that, even if you wanted to go back to court, a certain period would have to pass before you could do so? Is that an issue?

Gary Strachan: That is the point. It would be necessary to

"show a wilful course of disobedience for no good reason",

but I do not know over what period that

"wilful course of disobedience for no good reason"

would have to be shown. Perhaps the criterion would be three times a year or at important times such as every Christmas or birthdays. I do not know. Are those dates more important than any others? I do not know what the phrase means.

The Convener: What did you read from?

Gary Strachan: An e-mail from my solicitor. I mentioned it in my written evidence. I liked the phrase

"a wilful course of disobedience for no good reason."

The Convener: Do you feel that in the first instance when a contact order is being granted, regardless of whether it is breached, the courts are responsive? Is a parent allowed quality time by the order?

Gary Strachan: It is an individual thing, so I do not know. The parent turns it into quality time; they use what they have got. They pack a lifetime into two hours—that kind of thing.

Mr McFee: The issue of enforcement has run through all the evidence that we have received so far. It is all very well to have rights of contact, but if those cannot be enforced they are not worth the paper that they are written on. We are faced with a dilemma. I suspect from what you say that you would like a mechanism that is easier to access than a court and that the resolution that you would probably want is that the contact order should be carried out in the way that it is supposed to be. We will not take your situation as an example, however. Let us say that the individual with whom the child is resident says no. What could be done

at that point? The options could perhaps be community service, potential reversal of the residence order, which is sometimes considered in Australia, or the ultimate sanction of imprisonment. What is your view? That is a hard question.

Gary Strachan: It is a difficult issue and I have held strong views on it in the past. I am sure that that is because of the situation that I am in. As I say, people are perhaps not at their logical best in such a situation. They do not want to exacerbate the situation and they certainly do not want to disadvantage their child. That is obviously the paramount consideration, but the other side of the coin is that, by taking account of those considerations, the other person could perhaps get away with breaking contact orders for ever. What can be done to redress that? That is a difficult question and I do not know the answer. The Australian approach is that, if a person breaches the contact order twice, the residence order is reversed. We, too, could take the view that, as a breach of the contact order is not in the child's best interests, the residence order should be reversed in such circumstances. That would be a harsh sanction, but it should be considered.

Mr McFee: I just wanted to get your view on that difficult issue.

The Convener: We now move to the resolution of disputes out of court.

Mrs Mulligan: Mr Strachan has partly answered my question, but I will give him an opportunity to comment further on the issues of when court is the appropriate option and whether there are other ways of dealing with the situation. You said that you went to mediation but that there was an expectation that the matter would end up in court. Should the Executive, through the bill, encourage more people to resolve their differences before going to court and, if so, how could we do that?

Gary Strachan: Absolutely. Anything that breaks down the confrontational process—which, in itself, worsens the problem—would be helpful. I realise now that I took a contrary position—rather than trying to find a solution, I grabbed for things, because, at the time, I was looking for anything. A mediation approach such as the Australian one that I mentioned would funnel people through from the entry point into wider possibilities. The process would begin with the least confrontational method and would end in court. However, at any stage along the way, there could be resolution, which would be great. The sooner resolution is reached, the better, because the situation can become entrenched. It is difficult to come back from the bickering and accusations in court. That process builds brick walls; it does not break them down.

Mrs Mulligan: From your experience and from that of the people to whom you have spoken, is your situation typical?

Gary Strachan: It is typical, but it is at the extreme end of the scale—that is for sure.

Mrs Mulligan: You tried mediation at the early stages, but how readily available is it now as you move through the process? Is there an opportunity to go to mediation on issues such as the enforcement of contact orders, or do you simply return to court?

Gary Strachan: I am in the middle of the process, but I like to think that, with a bit of climbing down on both our parts, we might sort something out, although I do not know whether that is possible.

Mrs Mulligan: Does a service exist to provide that option for you?

Gary Strachan: I hope that it is not the same service that we used at the start, because, to put it simply, the mediators were ill informed and not very good. In my case, unproven accusations that were made against me were taken on board. I remember well that, when I said that I could provide information to show that the accusations were completely untrue, that was regarded as confrontational. The whole process was coloured by that. I admit that the mediator had limited time, but she had her own views from the start. My personal view is that she was ill trained to cope with the situation.

Mrs Mulligan: That is an interesting point, given that a number of people have raised the issue of mediation. We have heard evidence about differences in availability and quality of mediation services throughout Scotland. Your comments were helpful.

Gary Strachan: I am sure that the mediators' intentions were perfectly honourable, but they were simply not up to the job.

Mike Pringle (Edinburgh South) (LD): What is the way forward and what should we be doing? You talked about a one-stop shop to get everybody together. Will you expand a bit on what parents need when they start out on the process? What is the appropriate information to have at the start and from whom should the information and advice come? If the process that you have gone through started tomorrow, what would you want?

Gary Strachan: As I said, I am taken with the Australian approach. Instead of having a range of ideas, we should have a phone number that people can call in a family separation situation so that they can be given the advice that they need. That could be conflict resolution advice or advice to make people aware of what is in the best interests of the child, from the child's point of view. I do not mean the principle of mother knows best, which is 20 years old and dead. This is the 21st century. We want proper advice on how to handle situations in the best interests of the child.

People should be treated fairly. It should not automatically be assumed that a particular parent will have contact until the situation is resolved, which can take years. That is another point: the system should be quicker. People say, "We'll wait another two months and see how the situation gets on," but that is two months gone. In the unmarried father situation, one person holds all the cards and one person has no cards at all—they are trying to get something back. We need quicker resolutions. People start with the CAB, after which they go to a lawyer, who perhaps passes them on to mediation and then the court system. The system is patchy at best. People say, "We'll try this, then we'll go that way." We need clear steps and positive information along the way.

I went from pillar to post looking for information. Sometimes I was given information that was clearly wrong, although I am sure that it was well intentioned. People said, "If we say this, maybe it'll dampen the situation down." Of course, with that approach, I started to mistrust the information that I was getting from everybody. I started to think about what was behind what they said and asked what their agenda was. That resulted in a paranoid situation. In such situations, people are not at their best. The condition is called psychological distress. Separation is bad enough, but one partner loses their children as well. There must be an easier way of providing support than the current approach.

Mike Pringle: Perhaps I am misinterpreting you, but you said a couple of times that the system is very rushed. Do you feel that with the services that you received—which you clearly do not feel were good enough—people took enough time? Were they sufficiently interested? You talked about how in mediation the person was not well qualified. Is the issue to do with resources? Should the Executive provide more resources?

Gary Strachan: My answer will be contentious, because I know that some respondents have said, "Our system works well, but we need more resources. We have the best plan and we want the money to implement it." Unfortunately, that is one for you guys to decide.

Mike Pringle: Okay, we will decide on the resources, but where do you think that they should go?

Gary Strachan: There are lots of good ideas out there, which could be pooled in a one-stop shop. It does not all have to be run by the Executive. There are people out there in various groups with a lot of experience who have proven that certain ideas work. It is up to you guys to pull that together. There is a great scheme in Glasgow, but that does not help me in Thurso.

Mike Pringle: That was a great way to finish.

The Convener: I have a final question. You mentioned Grandparents Apart, from which, as you will know, we took evidence on the rights of the extended family. Do you have any comments on access to children for extended families?

11:00

Gary Strachan: I have comments about everything.

I am sure that most cases involve the paternal grandparents. That brings us back to the need for 50 per cent contact with each parent, because the more contact there is for the father, the more contact there is for the wider family. I know from my experience that that is the case: I pass on time that I am allocated to my parents and the wider family. We spend holidays visiting the grandparents, for example. I admit that having to divvy out my time rankled at first.

The Convener: You seem to be suggesting that there should be automatic rights of access for grandparents or other members of the extended family, but you will know that there is not much support for that proposal. However, improving the quality of access for non-resident parents would put us in a better position to be able to resolve issues to do with grandparents and the extended family. That is the key.

Gary Strachan: Yes, there would be a knock-on effect in the vast majority of cases, although the approach would not solve all the problems that arise when there are internal conflicts in families.

The Convener: Thank you for your evidence, which was extremely clear and helpful—I can tell that from the committee's reaction. I know that it has been difficult for you to talk in general terms, given that you are dealing with your personal case. You have done well to avoid giving us the personal details, which we were careful not to address. Do you want to make any concluding remarks?

Gary Strachan: I am no public speaker and perhaps I did not present the case as well as I should have done. If the committee has follow-up questions, you can contact me. I am better on paper than in real life.

The Convener: I can safely say that the committee thought that your presentation was excellent. We received so many submissions that it was difficult to select a person who might be able to draw out the general issues, but you did that very well, so we made the right choice. Thank you.

I am delighted to welcome Alan Finlayson OBE, our second witness this morning. He is a child law consultant and was asked by the Executive to

draw up the parenting agreement for Scotland that would run alongside the measures in the bill.

Thank you for agreeing to come to the meeting and for your written submission. We have allocated about 45 minutes for this part of the meeting—I am sure that that will not be enough time, but we will try to cram in the key issues as best we can.

Mr McFee: For the record, Mr Finlayson, will you outline the task that you have been undertaking for the Scottish Executive and what it is intended to achieve?

Alan Finlayson: In my submission I set out what I am required to do. I am trying to set out the style of a parenting plan, whereby parents can reach agreements themselves about how they will deal with issues to do with their children. As I indicate, I have been wrestling with the matter—probably unsuccessfully—for a large number of years. I strongly believe that the emphasis must be on trying to get parents to reach a resolution themselves, because, as I have indicated and as some of the committee's earlier discussion indicated, it can be more difficult to resolve problems in the confrontational situation of the court.

The parenting plan will not achieve the optima that one might hope—it will not solve all problems—but I hope that it will give parents the opportunity early in their separation to recognise that each one has responsibilities to the child. I hope that parents will realise that, as has clearly been established, the child's best interests are normally served by the child having real, meaningful and continuous relationships with each parent and by the parents themselves resolving how they will achieve such relationships.

Mr McFee: That will put what you have done firmly on the record. I know that a number of questions will arise from what you have said.

Mrs Mulligan: You will have heard from our previous witness that, when a relationship breaks down, one issue is simply knowing what to do next. How do you envisage parents knowing about the availability of parenting plans? Who will support parents in putting a plan together?

Alan Finlayson: I intend to produce a relatively long paper for those who wish to read it on the issues and the principles that might require to be applied. The paper will include information on how and where parents can get assistance and there will be a section on sources that are currently available to help people with such matters. There are many sources, but if parenting plans are established my wish is that each and every agency will sign up to them and use them to assist and to provide additional help to parents to resolve problems themselves.

Mrs Mulligan: Can you be more specific about the agencies that will be involved? Will only solicitors or people who are involved in mediation support be involved?

Alan Finlayson: People who are involved in mediation support should certainly be involved, but I would probably leave solicitors low down on the list of sources—I am a solicitor. I should also mention the voluntary organisations.

I must declare an interest. I am a board member of Children 1st and am aware of the work that it does in the area. There are other voluntary organisations and helplines for children and I would want them all to have the same documentation. I would certainly want the Family Law Association, solicitors and practitioners to have that documentation, too. In my experience, the vast majority of solicitors want to be able to help parents to reach a resolution rather than to go to court, partly because that does not pay too well nowadays—or so I am told.

Mrs Mulligan: From the work that you have done, have you found that there are sufficient bodies to support parents? Should expansion of existing provision be considered?

Alan Finlayson: I have long experience of working with the Lothian Family Conciliation Service. I recognise that such bodies have always struggled to have the appropriate money available to enable them to do what they want to do. The business is patchy—provision varies across the country—but my experience is that family mediation is a strong resource that the courts can use in certain areas.

Contact that has broken down for one reason or another can be re-established. Perhaps one parent will express real concerns about drugs, alcohol or another matter, the validity of which the court might have difficulty in assessing, or the child might not want to see the father. In such cases, having the resource of family mediation centres and contact centres not as part of a long-term plan, but to build something up, is an enormous assistance. In some courts, such things can take place because family mediation centres are available, whereas that is not possible in parts of the country where centres are not available. The Executive must answer questions about how it resources such facilities.

The critical matter is enabling parents to sit down at an early stage with someone, who might not necessarily be a professional; they could be a mutually trusted friend, a minister, someone from a citizens advice bureau or a mutually trusted relative—lots of people are possible. I would like people to consider the situation early.

If we sort out parenting plans, I would like them to be readily available. I would like doctors'

surgeries and post offices to have them. Social work departments throughout Scotland, whether in the sections for children and families or whatever, also ought to have the plans.

Mrs Mulligan: What will a parenting agreement bring that we cannot achieve at the moment by developing a minute of agreement?

Alan Finlayson: Minutes of agreement can be made, but that is a relatively organised and sometimes expensive exercise. Parenting agreements are intended to get into people's minds the importance of focusing on the children's interests and the parents' responsibilities towards the children. Such an agreement is not as formal as a minute of agreement and might not have the same legal validity as an attested minute of agreement. However, more important, a parenting agreement would encourage parents to think of the issues from early on, right through and consistently. Parents will also be aware that whatever they agree now can be only for today, because situations change. Children become older and circumstances change. People's wishes and needs might be different. Perhaps we need to build in a review, but we certainly need to build in a spirit of flexibility.

In the background to the parenting agreement, I stress the absolute importance of how parents speak to each other. "Respect" might not be a word that I ought to bandy about, but respect for other people's views and the other partner's position is important. One parent criticising or slagging off the other screws up many situations. Parents must recognise together the end towards which they must try to work, whatever their differences are—that may be easier to write on a bit of a paper than to practise in reality. That could be achieved without the necessity for formal minutes of agreement.

Marlyn Glen: My question is about the work that you are doing, which sounds excellent. The list of organisations will be useful. Do plans exist to keep that list updated?

Alan Finlayson: Absolutely. Times change, organisations change and people change. Just as we cannot organise everything for a child today, we cannot organise a parenting agreement in which everything will stay the same. The information will have to be updated.

The Convener: Before we explore what the legal status of parenting agreements should be, I want to be clear about how you are compiling your report. How often do you attend meetings? I know that you hoped to publish in July. Is that still the intention?

Alan Finlayson: I was hoping to do that. As I indicated, it is easier to talk about such things than to do them. The matter is extremely complex, so please do not hold me to the end of July.

11:15

The Convener: I will not, but I must make the point—although it is really for the minister rather than you—that, although your work has no direct connection to the legislative process in relation to the bill, it is in an area that is critical for the committee, which has been considering the issues surrounding, for example, quality time and parenting. Some interesting points have come out of that, particularly from our discussions with the Parliament of Australia, and it is for the committee to decide whether to pursue those any further. It is important for us to do our work in tandem with yours—I think that that would be the general view of the committee. Therefore, although you are right to ask us not to hold you to a particular date, I am sure that you can understand our difficulty with closing stage 1 consideration of the bill without seeing your final piece of work.

Alan Finlayson: I recognise the importance of getting it down on paper. It is a question of whether and at what stage I produce a draft. Initially, I would like to give the draft to members of the stakeholder group that is providing information to the Executive and from which I have gained much information. If it is not finished by the end of July, it will be done not much later than that. The longer part will be the introduction and the reading material for those who want to read it. The draft plan itself will be a relatively tight document. It will not use phrases such as "non-resident parent" but will ask each parent how they are going to resolve issues such as school, health, time, accommodation and how to introduce new partners. It will be relatively short.

I also hope to have in the introduction and the draft plan a kind of chart. It will have the child in the middle and will include all the people who are important to the child, such as the mother and father, the grandparents, cousins and pals from school. The parenting plan to which the parents will sign up will have a space for the child, if they are old enough, to prepare their own little chart of who is important to them, to let the parents see that and work those matters out.

I take your strictures and will try to produce the parenting plan at the earliest opportunity, so that it can go in tandem with the work that you are doing.

The Convener: Thank you for that.

Stewart Stevenson: On the legal basis of parenting plans, will they operate under the Children (Scotland) Act 1995 and be registered with the Registers of Scotland? Is that what you envisage?

Alan Finlayson: No.

Stewart Stevenson: So there will not be a registration process.

Alan Finlayson: There will not.

Stewart Stevenson: Will a parenting plan confer any legal rights or will it simply be a contract between the parents concerned?

Alan Finlayson: It will be a contract.

Stewart Stevenson: Therefore, the legal process that surrounds it will simply be civil contract law. Is that correct?

Alan Finlayson: Yes, but it is to be hoped that the matter would never reach a court.

Stewart Stevenson: Indeed. My experience of contracts is that one knows the moment one gets them out of the drawer to read them that one is lost. A contract should express what the parties have agreed and understood; it should not be a way of allowing one party to enforce their will over the other. From what you have said, a contract must be entered into with freedom and good will; otherwise, it is not worth having.

Alan Finlayson: Correct.

Stewart Stevenson: If one party feels that the agreement is no longer relevant because of changed circumstances, or that the agreement is not being adhered to by both parties, where is the remedy, whether in the legal system or elsewhere?

Alan Finlayson: The remedy is in achieving from the word go an agreement from both parties that they will work at things and will recognise that there is much to do. If things break down, the parties might have to go to court, but they might agree on an arbiter—an agency or individual to whom they have been before and to whom they would go back in future if there were a problem. However, that would not be legally binding.

As I indicated in my submission to the committee, I am confident that, if a case ended up going to court, the court would recognise that the parties had at one time agreed X, Y and Z. If one party was now seeking to change the agreement but the other party was opposed to that, I would think that most courts would say, "Well look, you agreed on this, so the onus is on you to show me how the situation or the interests of the child have changed." Therefore, there could be some legal value—not force, but value—in the agreement.

Stewart Stevenson: Is it likely that the outline document that would form the basis of a particular parenting agreement would provide for the process by which the document might later be changed—whether by agreement or not?

Alan Finlayson: Absolutely.

Stewart Stevenson: Who might be the first port of call for the parties to the agreement to discuss any prospective change?

Alan Finlayson: You are making me think on my feet. Most of those ideas would have been in my original thinking and some of them might still be there.

Stewart Stevenson: Your answers have been useful. In my experience of civil contract law in business, it helps if matters are agreed at the outset, because people will almost invariably want to modify significant business contracts. In the context that we are discussing, a contract would be valuable in providing the parties to it with the most cost-effective and time-effective means of dealing with issues.

Alan Finlayson: I accept that.

Stewart Stevenson: Could a child be a formal party to a contract? I think that I am correct in saying that a child could not be held liable for having committed to a contract.

Alan Finlayson: With Professor Norrie at the table, I feel as if I am in an examination. I do not want to sit the examination, lest I fail again.

In the background information and in the actual parenting plan that individuals would commit to, the views of a child would be critical—depending on the age of the child and on his or her ability to participate and comprehend. There are two reasons for that: first, it is part of the law of Scotland; and secondly, the agreement will not work otherwise. I certainly see the child being involved.

You asked about changes. When a parenting plan first starts, a child might be only three years old and not in a position to participate. However, by the time there is a disagreement, the child might be 10 years old. It is difficult to know how that could be taken into account. I keep coming back to the fact that, if we can get parents to agree matters and to agree to continue to reflect on the needs of the child, the vast majority of people will be able to resolve their differences if they get the agreement right at trick one.

The Convener: I have a few more questions. I like the idea of the parental agreement—it has a lot of scope. However, we must examine further where it would be placed within the system. As you suggest, in time, if parties have to go to court, the court should be able to point out that they had a parental agreement. Would it not be preferable to have a reference to the parental agreement in statute, to strengthen the court's hand and the meaning of the parental agreement? I am talking about a reference to it, rather than authority for it.

Alan Finlayson: Framing statute is something in which I have little experience, although I visualise the draftsmen having difficulty in deciding how to incorporate such a reference. I can express no real view on that.

The Convener: You said earlier that your thinking so far is to make no reference to the non-resident parent. Will you elaborate on that? As you might know, the committee has received evidence from many sources that indicates concern about the role of the non-resident parent. This morning, Gary Strachan made the interesting point that the issue is not so much about having rights and responsibilities as about how those are applied, especially if the non-resident parent is entitled to be involved in deciding which school the child goes to and so on. Is that the reasoning behind your position?

Alan Finlayson: Yes. That is why I do not want to use the phrase "non-resident parent". The reality is that some parents will be non-residents; however, I do not want that to be regarded as a status in any agreement that is entered into by the parties. Rather, the question should be about how each of the parents is going to deal with the separation, whether or not the child is resident with them. That gives weight to what the previous witness said about difficulties with medicine. Other people have difficulties with schools. I do not want the parenting agreement to refer to anybody being of a lower status even if the child is not residing with them, which the phrase "non-resident" might imply.

The Convener: I have a further question, but Stewart Stevenson has a point to make on that issue.

Stewart Stevenson: It has been drawn to my attention that there are circumstances under which a child as young as 12 can contract in civil law.

Alan Finlayson: I thought that might be right.

Stewart Stevenson: I put that on the record, in case the *Official Report* gave a contrary impression.

Alan Finlayson: The Children (Scotland) Act 1995 speaks about the supposition that a child of 12 will be able to give a view, but it specifically makes it clear that that does not mean that the views of children aged under 12 are not important. Increasingly, courts are considering the views of children of a very young age.

The Convener: You have also mentioned the role of mediation and such services and, like others, you have talked about resourcing them. I put to you the same question as I put to others, but in a slightly different way. Do you support the idea that, rather than expand the services with additional resources, we should review what is out there and why it is there? I say that in the light of the Australian example, which we have examined. There, relationship centres are being set up, which seem to be the logical step for what the Australians are trying to achieve. For a start, they are bringing services together and trying to provide one-stop provision. Would not there be more value in having a review of what is out there, which would allow us to determine the right place and policy for such services?

11:30

Alan Finlayson: As I indicated, the situation in Scotland is not uniform, so it would make sense for people to know what is out there before moving on to consider where they would like to go next. I do not have a clear view of what is available throughout Scotland.

The Convener: We do not either, which is why I suggested that we have a review. Obviously, there is a connection to the work that you are doing. We need to have a comprehensive understanding of what is out there before we move on to the next step of deciding whether additional resources are required.

Alan Finlayson: I agree.

The Convener: I have a final question before we move on to the issue of other jurisdictions. You have considerable experience in this area. In view of the issues that were raised earlier, particularly by Mr Strachan, what is your view of the current system and, in particular, the enforceability of court orders?

Alan Finlayson: The parenting agreement takes on board one of the cardinal principles of the 1995 act, which is that the court will not make an order unless it is in the interest of the child to do so. As I indicated, I sat as a sheriff for 13 years. The reality is that the courts try extremely hard to get parents to reach resolutions at an early stage in the proceedings. Parents are encouraged to do so, particularly through the establishment of child welfare hearings, which are a significant step forward in the law of Scotland in relation to the successful resolution of issues relating to children.

Where these things do not work out and where confrontation becomes the order of the day, the enforcement of orders becomes an extraordinarily complex and vexed area. The committee will know—indeed, the matter was referred to earlier—that the ultimate sanction is that of imprisonment.

Let us say that a court has concluded that it is in the best interests of a child to reside with the mother and to have meaningful contact with the father. If, for some reason, the mother does not comply with the court order, my experience tells me that the court will bend over backwards to try to ensure that she obeys it—if necessary, it will encourage, promote, threaten and cajole. Courts will do better in some situations than in others, but they will try to achieve that end.

Ultimately, the question is whether it is in the best interests of the child to say, "Well, we'll send

your mother to prison." I cannot answer the question, but I am not alone in that.

The Convener: But surely there are lesser sanctions that a sheriff could take against someone who is in breach of an order. Surely a sheriff would not jump straight from considering that someone has breached an order to imprisoning them. Is there not something in-between?

Alan Finlayson: A sheriff could impose a fine, but in many cases the parental financial situation means that a fine is a penalty on the child and not the parent. At the moment, a sheriff could not impose a community service order, because we are talking not about a criminal offence, but about circumstances in which the mother is in contempt of civil proceedings.

The Convener: The fact that ordinary courts would not want to do anything that would violate the interests of the child means that, in reality, there are no sanctions for a breach of an order. A sheriff would not want to imprison or fine the parent. If a sheriff does not want to use such sanctions, the court cannot enforce an order.

Alan Finlayson: The parent stands charged not with failing to ensure that the child has contact with the father, but with the offence of being in contempt of court. In such circumstances, I find myself incapable of reaching any constructive resolution. For me, that strengthens the case for avoiding getting anywhere near such situations; people should manage to reach agreements themselves.

The Convener: If we could make parental agreements important and give them some meaningful status—legal status, for example—that might have the effect of reducing the number of cases that come to court in the first place, by which stage the scope for resolution is limited.

Alan Finlayson: With respect, I do not think that that would advance the situation much.

The Convener: You do not think that making parenting agreements more important would necessarily reduce the number of cases that come to court.

Alan Finlayson: I am sorry; I thought that we were talking about the ultimate sanction again. I agree entirely that the more emphasis there is on reaching agreements, the better things will be. In my experience, sheriffs try to promote that every day and, in the majority of cases, are successful in doing so. I can think of certain jurisdictions where there has not been a proof in relation to a contested case for the past three years because such cases have been resolved one way or another.

The Convener: We move on to other jurisdictions.

Stewart Stevenson: I want to flesh out some of the things that have been said. What jurisdictions have you considered? The example of Australia has been mentioned, but have you examined other jurisdictions? What note are you taking of the experience of other jurisdictions?

Alan Finlayson: To a large extent, my experience of what happens in New Zealand mirrors much of the experience of what goes on in Australia. I am conscious of the situation in England, the parenting plan that is being developed there, the views that are being expressed and the consultative exercise that is being undertaken. I have not considered it to be either necessary or appropriate to do a great deal of wide examination of other jurisdictions. Instead, I have tried to find out the essential principles and to apply them in a Scottish context.

Stewart Stevenson: Do you feel that your work would be informed by knowledge of the experience of other jurisdictions? You have focused on principles, but the evidence that we had from our colleagues in the Parliament of Australia last week was that what looked good on paper appeared, in practice, to have had the opposite effect to what was intended. I am slightly concerned about the extent to which you are considering practice.

Alan Finlayson: I am examining principles from the point of view of how they can be applied in practice. I have always taken on board the fact that one cannot legislate for good practice, to which you referred earlier. I have debated that issue with Professor Norrie on a previous occasion. The debate was purely a debate for debate's sake; it should not be taken as an indication that either of us believed what we were saying.

Stewart Stevenson: I might fairly say that that was a lawyer's answer.

The Convener: That is okay; that is allowed.

Mike Pringle: Alan Finlayson spoke earlier about grandparents. We heard that it is difficult, expensive and non-productive for them to go to court. He talked about his plan, which includes grandparents, but will it be strengthened to include step-parents as well?

Alan Finlayson: In the parenting agreement, I focus on what is in the best interests of the child. That is what the law of Scotland requires. It is easier for me than for warring parents to recognise the critical importance of extended family members to the interests and well-being of the child. Therefore, I propose that both the background information to the plan and the

documentation itself should include a statement of who else is important in the child's life, how the child's relationship with them will be maintained and what contact there will be, such as meetings and telephone communication. That information must be in the parenting agreement. Parents must focus on the interests of the child and must recognise that those interests include the positive influence of extended family members, particularly grandparents.

Mike Pringle: What about step-parents?

Alan Finlayson: Indeed. That is why we cannot have a one-size-fits-all approach and why I want the plan to suit the child. In each individual family situation, the child has different contacts. For many children, step-parents are not an issue, but for others they are of real significance, so I would want to include them. I want parents to recognise their responsibilities and the benefits that can come to the child from that continuing relationship and contact.

Marlyn Glen: We talked about the place of children in contracts, but I turn to the protection of vulnerable parents. Some parents who are separating are vulnerable people—for example, victims of domestic abuse or people who have difficulty in standing up to their partners. We are becoming more aware of the numbers that are involved. The YWCA has an exhibition in the Parliament today that gives statistics on the frequency of that. Is there a danger that some vulnerable parents will be coerced into entering into a parenting agreement?

Alan Finlayson: The family law stakeholder group, which is helping me, is not slow to remind us of the issue that you raise. In particular, Scottish Women's Aid made a considered and interesting presentation on the subject. It is difficult to incorporate that into the parenting agreement, but it is essential that we recognise it.

To an extent, the point mirrors what I said earlier about the availability of contact centres. If one parent alleges that the child is in a dangerous situation but the other parent refutes that, how does the court know who to believe? There is a need for a safety element. We must recognise not only the actual danger but the adverse influence that a dominant person can have in forcing somebody into a parenting agreement. Mr Stevenson would want us to have sanctions for failure in that regard. The area is complex, but we must be mindful of the issues that you raise. In forming a good parenting plan that suits the position of 95 per cent of parents, we must not prejudice children who are in a dangerous situation because of those issues.

11:45

Marlyn Glen: That deals very well with victims of domestic abuse, but what about the other end of the spectrum, where it is just a different power relationship? Because of the way that they are, somebody might not stand up to their partner and might sign the parental agreement. There must be guidance to tell people to check that out.

Alan Finlayson: My ideal is for parents to reach the decision themselves, but there must be recognition of the fact that some people will say, "Och, well. I'd better just sign it anyway, because he's going on and on." For people who are in that situation, we should indicate in the background information where they can find an independent source of counsel—somebody to speak to about matters of that kind. However, even that could be difficult. The partner might say, "What are you going to see her for? There's no need."

Marlyn Glen: Absolutely.

Alan Finlayson: I am not solving the issue; I will just have to try to take it on board.

Marlyn Glen: At least, if the whole thing is pointed out in your parental agreement, it is visible.

The Convener: There are no further questions from members. Is there anything that you want to say in conclusion, Mr Finlayson?

Alan Finlayson: No, thank you. I am pleased to have been able to come here today. I detect from the committee a cautious welcome for the idea of a parental agreement. I recognise that it is one thing to talk about it and that what you want is to see it. You have made that clear to me and I am mindful of that.

The Convener: Yes. That is a helpful comment. You will appreciate the fact that we are all learning about the process, as we are not family law practitioners. Much of this is new to us, and we are trying to interrogate the system so that we understand it and can decide what changes we will support in our stage 1 report. I am grateful for your evidence and the high-quality information that you have given us. We will ask the minister when we will get to see your report. I am sure that I speak for other members of the committee in saying that the work that you are doing is vital to the work on the Family Law (Scotland) Bill. We will want to take a view on how it fits with the bill, so we will want to see your report before we move to stage 2. We will put that to the minister shortly.

On behalf of the committee, I thank you for your written and oral evidence.

Alan Finlayson: Thank you very much.

The Convener: I suggest that we take a short comfort break of five minutes before we hear from the minister.

11:48

Meeting suspended.

12:01

On resuming—

The Convener: Once again, I welcome Hugh Henry, who is the Deputy Minister for Justice, and his legal team. As ever, we have a number of questions, this time on the Family Law (Scotland) Bill. I propose that we continue until 1.25 so that members who have meetings at 1.30 can be there on time. Minister, I have told members that, if absolutely necessary and if we feel that we have run out of time, you will be able to join us for a short while next week. However, we will see how we get on today.

I want to begin by asking about some issues that run alongside the legislation. We wrote to ask you to clarify some of the Executive's work on parenting agreements, and you have since replied; and we have just heard from Alan Finlayson about work on the grandparents charter and on Wallis v Wallis. As our letter emphasised, the committee is concerned to receive all such information before stage 2. When we wrote to you, you confirmed that we would be able to see a report on parenting agreements before stage 2. Will that still be possible?

The Deputy Minister for Justice (Hugh Henry): I certainly hope so. Much will depend on the progress that Alan Finlayson can make on his work. I hope to meet him shortly for an update on his findings and on how things are going. If anything untoward arises that would affect the timetable, I will certainly let you know. However, my aspiration is that a report will be available.

The Convener: You may have heard us put the same point to Alan Finlayson—that we are very keen to see even a draft of his report. Is there a timetable for a report on Wallis v Wallis?

Hugh Henry: There will be a meeting next week and I hope that I will be able to give an update after that.

The Convener: Obviously, we will have some questions on the issue, so I wanted to know about the timetable.

Mr McFee: Good afternoon, minister. I want to ask about section 2, on void marriages and the grounds for void marriages. Last week, we heard evidence from Professors Beaumont and Clive, who said that it would be wrong to restrict section 2 to

"a marriage solemnised in Scotland",

because that would deprive people who were domiciled in Scotland of protection whenever they were removed from the jurisdiction. I am thinking in particular of an individual who is normally domiciled in Scotland but who is taken to another country to be married. Professors Beaumont and Clive said that it was wrong to restrict protection to

"a marriage solemnised in Scotland".

Hugh Henry: As opposed to doing what?

Mr McFee: As opposed to providing that protection to somebody who is normally domiciled in Scotland but who married elsewhere.

Hugh Henry: That is a specific point of view, which we will consider ahead of stage 2. We will reflect on those comments. If something has to be done, we will produce an amendment.

Mr McFee: That would be useful. Both professors agreed that the subject required reconsideration.

I do not know whether you have had the chance to read the evidence from Professor Clive and the Law Society of Scotland, which suggested that the concept of marriage by cohabitation with habit and repute should be abolished, on the grounds that its protective function would become redundant if the proposed new rights for cohabitants were adopted and—perhaps more spuriously—that it is bad policy to reward secrecy. Perhaps that is more important than the first issue that I raised. Do you agree that the matter should be examined, or is it of little consequence?

Hugh Henry: Part of the problem is that the issue has become caught up in some of the myths about whether common-law marriages are created when people live together. That is one reason why we have sought to introduce some clarification through the bill. We were a bit shocked by some of the evidence that we heard about the extent of the myth—the number of people who firmly believed that they had rights because of the relationship that they were in, but who did not have those rights.

Marriage by cohabitation with habit and repute is a specific issue to deal with. The concept is rarely used. We acknowledge that some people have suggested that it should be phased out. Others are of the opinion that, although rarely used, it might still be useful.

We do not think that the issue is the most fundamental. On balance, it is probably best to leave the status for the few people whom it affects. If we took steps to remove it, we would probably need to think about the impact on people who were in a relevant relationship, who might be covered by the notion and who might be affected in future.

Although the point is not the most fundamental for the bill, we will reflect on it. We are probably persuaded to leave the situation as it is, but if

there is compelling evidence that that would damage the bill, we will reflect on it further.

Mr McFee: I am not sure that such evidence exists; I think that removing the concept would mainly be a tidying exercise.

Stewart Stevenson: Before I develop my line of questioning, I will ask about a point that was made by one of the lawyers who gave evidence last week. He said that when cohabitation with habit and repute creates a marriage, it would be necessary for there to be a divorce before either party could enter into any other marriage, notwithstanding the fact that the "habit and repute" had not been tested, registered, solemnised or created at an identifiable time. Does that add to the confusion and to the pressure to clarify the situation?

Hugh Henry: I am sure that that adds to the confusion, but I do not know whether it adds to the pressure for clarification. Far be it from me to offer any significant legal pronouncement about whether clarification is needed—it would be unwise for me to venture into that area. Some people have the opinion that you described. We should just leave the matter and wait and see where we go.

Stewart Stevenson: I am sure that you will take due account of what one lawyer expressing one opinion said to the committee in that regard.

Rather than having the notions of pursuer and defender in divorce cases, it has been put to the committee that introducing joint petitioning would be one way of reducing costs and conflicts and of making the process administratively and practically easier. The committee has also received evidence that joint petitioning might make matters worse. Does the Executive have a view on the matter?

Hugh Henry: The argument is interesting. We were not particularly minded to introduce joint petitioning, but we heard what was said, which gave a different perspective. There could be merit in joint petitioning and we have an open mind on whether that is the best way to proceed. I do not rule out the suggestion, but I am not necessarily ruling it in. We will be interested in where the committee's exploration of the matter leads and the conclusions that might be drawn. Obviously, once the committee has a view on the matter, we will look closely at it before stage 2.

Stewart Stevenson: I suspect that committee members have not yet reached a conclusion, but when the suggestion arose, it appeared likely that it would be most useful as an additional, rather than as a replacement, way forward.

I move on to the more difficult issue of the Wallis v Wallis judgment and the parallel work that is going on, to which you referred earlier. The committee finds it slightly difficult to consider section 14 in ignorance of what might result from wider consideration of the issue. Will you assure us that we will have an opportunity to see your proposals in response to the Wallis v Wallis case before we submit our stage 1 report to the Parliament?

Hugh Henry: As I said earlier, there will be a meeting next week, following which we hope to provide clarification to the committee. I hope that that will help the committee before it reports at stage 1.

Stewart Stevenson: It seems likely that you will want to revisit and amend section 14. If so, the committee might wish to take further evidence, depending on the nature of any proposed amendment. The matter is important. There would be no value in the committee and you falling out over the issue, which is complicated and technical.

Hugh Henry: The Executive might want to revisit section 14, so we will come back to the committee as soon as the matter has been considered further.

Stewart Stevenson: In essence, section 14, as it currently stands, provides for the court to take into account any difference between the net value of the matrimonial property at the relevant date and whichever date it considers to be most appropriate, under proposed new section 10(2B) of the Family Law (Scotland) Act 1985, in taking a view on valuing property and, in consequence, how to divide that property.

There will be no particular concerns about the final part of proposed new paragraph (2B)(c), which mentions

"a date agreed by the parties",

because it would not seem reasonable for the court to interfere with an agreement that had been freely and fairly entered into by the parties, except in exceptional circumstances. However, how might the court reach a view on how to reflect the change in the value of assets—which might go up or down—after the relevant date? What considerations should the court take into account in the light of section 14?

12:15

Hugh Henry: I want to be careful about what I say. Far be it from me to try to tell a court how that provision should be interpreted; I would not want it to be suggested that ministers issue guidelines for the courts to consider. All that we can try to do politically is ensure that the context of the legislation is properly understood and that the wording of the bill is as clear and definitive as it can be. It would be a matter for the courts to

interpret the wording. I hesitate to speculate and then to have that speculation used by someone in a court case as an attempt to influence the court decision. Obviously, if anything is needed beyond the bill to assist the courts, we will consider that.

Stewart Stevenson: In essence, the provisions under section 14—in particular, proposed new section 10(2B) of the 1985 act—say that the court can chose any date, which is a change from the present situation. The tests that the court should apply in deciding the appropriate date are not at all clear.

I do not propose any answers, just some scenarios. Clearly, the key scenario is the appreciation in value of the domestic home. Equally, in relation to the division of investments, the issues that pertain to the fluctuating value of investments and to the tax consequences, if those investments had to be sold off to allow the proceeds to be delivered, are considerable. Although the policy in relation to the equity that is to be divided between the two partners is not at all clear, the Executive is seeking, as a matter of policy, that the courts should implement it.

If I may, I will take an extreme position, which I am perfectly happy for the minister to challenge. In the bill as drafted, the Executive seems to be casting itself adrift from the need to take any view whatsoever—you are simply saying that the court can make up its mind on any basis that it considers appropriate. What is the policy change that the Executive wants to deliver?

Hugh Henry: I will first address the generality of the question. We have asked a group of academics and practitioners to give us some further views and thoughts on the matter. If it appears from the work that they are doing that section 14 is not quite right, we will come back to the committee with a proposal to tighten it up.

I return to the specifics. At this stage, whatever we decide in respect of the wording—whether we decide to retain the present wording or to insert other, more appropriate wording—I would hesitate to try to influence what the court might have to do. Each case will have to be decided on its merits, taking into account the circumstances of the case. I do not want to try to suggest to the courts what tax implications they may or may not consider. The courts will have to come to a considered view on what is appropriate in the case that is before them.

The duty on the Executive is to ensure that the wording in the bill is the best possible wording. As I said, if, in the light of the evidence and the information that we are seeking, the wording needs to be changed, we will change it. I do not want to go beyond that.

Stewart Stevenson: Leaving aside the Wallis v Wallis decision, it would be possible to reinstate the provision that the assets are to be divided on the relevant date. Indeed, the explanatory notes say:

> "it does not in any way alter the general presumption towards the relevant date as being the point at which such assets should be divided."

However, I am not sure that that carries across from the explanatory notes to the bill because, according to the bill, the court can decide on whatever date it considers appropriate. That approach would appear to make the court process lengthier, more complex and more open to challenge, and I am not clear that that would be in the interests of public policy or the parties concerned.

You said that the group that you mentioned would consider section 14 and that, if it was not quite right, the provision would be tightened up. What policy criteria has the Executive given that learned group to use in assessing section 14 that will lead to something that we can understand and which makes public policy clear?

Hugh Henry: Our policy objective is to address the perceived problems with the present system and the injustice that is perceived to be suffered by some parties. I hope that what is in the bill will help to address that. If we get back information that section 14 is not sufficient to address the perceived problems and injustices, we will produce an amendment, but before that happens, there is probably not much more that I can add.

The Convener: I want to be clear about section 14. Last week we heard that, in the opinion of Professor Clive and Professor Beaumont, the House of Lords got it wrong. They felt that the House of Lords did not interpret Scots law in the way in which it should have been interpreted. If they are correct, that suggests that, under Scots law, the court can already exercise discretion when it determines the value of matrimonial property. As far as the Executive is concerned, the court either has such discretion or it does not.

Hugh Henry: The professors obviously have an opinion on whether the decision by the House of Lords was correct. We will consider their view carefully before we come to our own conclusion on whether we think that that is right. That conclusion will influence what we do but, at this stage, I will make no comment about whether the professors are right and the House of Lords is wrong.

The Convener: I genuinely was not trying to draw you into making such a comment, although it may have sounded as if I was.

The explanatory notes say that you want to give courts discretion in such matters. That implies that you think that, under the current law, the courts do

not have such discretion: if they had such discretion, you would not need to legislate for it. Notwithstanding the work that you are doing, when you drew up section 14, you must have had something in mind.

Hugh Henry: When we prepared the bill, we responded to the comments and views that were expressed. We thought that it was right to help to clarify the law. That is not necessarily to say that the law was wrong, but in light of the views that were expressed, we felt that clarification was needed. We will reconsider section 14 and decide whether the provision needs further tidying up.

The Convener: Notwithstanding the on-going work, is it the Executive's present position that section 14 is an attempt to clarify the law?

Hugh Henry: It is.

The Convener: Thousands of cases must have been determined under section 10 of the 1985 act in which the value of matrimonial property was determined on the relevant date. Why is it that you now think that the court needs discretion? Is that to do with the housing market?

Hugh Henry: We received representations that there was perceived to be a problem. The bill represented an opportunity for us to update and improve the law relating to families. It was felt that, if there was confusion or a perceived problem, it would be right to address it. We will look again to see whether we have found the right formulation for our proposal.

The Convener: I am not trying to draw you into giving details that you do not yet have, but would it be fair to say that your intention in section 14 is to clarify the law so that sheriffs have discretion in determining the fair division of matrimonial property?

Hugh Henry: We would want a sheriff to try to reach a conclusion that was fair to all parties, that reflected the individual circumstances of the case and that did not unfairly disadvantage anyone. In issues of property, there have been inconsistencies in the past. As you suggest, that has often been a result of the rising property market. Some people going through a separation or a divorce can be adversely affected when trying to take care of their future housing needs. They can be unfairly disadvantaged if a fair decision is not made.

In producing the bill, we were attempting to assist the process, and I think that what we have produced does indeed generally assist. If it does not, we will have another look at it.

Mrs Mulligan: I want to ask about section 17, on unmarried fathers. A couple of weeks ago, the committee heard from Families Need Fathers, who said that biological fathers should acquire parental responsibilities and rights simply by virtue of being biological fathers. Do you have a view on that?

Hugh Henry: I think that we could all conceive of cases in which it would be in no one's interest—except, arguably, that of the biological father—for the biological father to have that right. Would we suggest that someone who became a biological father because of a rape should have such an automatic right? I shudder to think of the possible consequences. There could be other equally horrendous situations of abuse in which applying such a right could cause difficulties.

This is not something that we would encourage but, in today's society, there are casual relationships that can end up in a pregnancy and the birth of a child. We should reflect on whether it would be right to give the biological father the same kind of access that a father in a more established relationship might expect.

I understand what Families Need Fathers are saying and I understand some of the frustrations of people who wish to play a full role in their child's life. However, a simplistic or crude approach to the issue would not necessarily be helpful.

Mrs Mulligan: Would you not support the idea even if there were opt-outs for cases of rape or domestic abuse?

Hugh Henry: Rather than opt-outs, I want the kind of opt-ins that we are considering. I would not want to put any pressure on a woman. That would not be fair.

Mrs Mulligan: Is the Executive confident that section 17 is compatible with the United Nations Convention on the Rights of the Child, in relation to the child having a right to know both its parents, and with the European convention on human rights, which says that the legal system should, in some circumstances, distinguish between married and unmarried fathers? Has the Executive got the balance right in section 17?

12:30

Hugh Henry: Yes. We would not introduce any legislation that was not compatible with our European obligations. Such compatibility is a prerequisite of any legislation. We gave careful consideration to the matter and we believe that we have struck the right balance. We do not believe that we have infringed our wider responsibilities.

Mrs Mulligan: Last week, the Law Society of Scotland told us that, in the drafting of section 17, the Executive had missed an opportunity—even if only a symbolic opportunity—to remove from Scots law the status of illegitimacy. Do you accept that view?

Hugh Henry: No. I am not sure of the significance of what the Law Society of Scotland has said. Before stage 2, we will look again at

whether something needs to be done, but I am not sure that there is a major issue.

Stewart Stevenson: It has been put to me that it should be part of public policy, if not necessarily part of legislation, to ensure that parents who are not married when a child is born are aware of the options that are open to them. I presume that the best time to do that would be at the registering of the birth. To varying degrees, those options will help to create a stable family environment for bringing up the child. That view is articulated principally by those who would wish the encouragement of marriage to be a matter of public policy. However, the idea would offer an opportunity to ensure that new parents also have information on civil partnerships or cohabitation, and to ensure that parents take joint responsibility.

Would it be useful, as a matter of public policy, to ensure that new parents who are not married are provided with information that helps them to look anew at their relationship at a time that, in the document that I have before me, is described as the magical moment? When a child is born, the commitment between parents is probably significantly higher than it might be at other points in the relationship.

Hugh Henry: That is an interesting concept. However, I am not sure that those who vigorously advocate marriage would want the Executive to go out and tell people who were thinking of getting married that they could instead enter into a civil partnership. Those advocates might not regard a marriage and a civil partnership as equal, even though society and the law have clearly moved in that direction. I am not sure that those who vigorously advocate marriage would now want us to say to people, "Stop and think before getting married, because you could enter into other relationships."

The more information that we can give people on their legal rights and status, the better. On the back of this bill, we will seek to improve the flow of information and we will seek to ensure that such information is set out clearly and simply. We acknowledge the role of education and we will consider all the means of education at our disposal, including the increasing use of the internet. We will ensure that our website carries succinct and relevant information. Through a range of national and local bodies, we hope to ensure that relevant information is available to those who seek it.

However, I would hesitate to put major barriers and impediments in the way of people who are seeking to enter into relationships. On the one hand, the state has an obligation to give support and encouragement, for a range of reasons. On the other hand, I am not necessarily persuaded that it would be right for us to tell people that they must stop and consider the range of options and that they must read, examine and understand the options before taking the next step. We should facilitate and enable those who seek the information to obtain it.

As a society, we want people to be more aware of the responsibilities that they enter into. One of my worries—other members of the Executive have expressed this several times—is that people sometimes do not consider properly the decisions that they make, the actions that they take and their effect on others. In societal terms, we want people to be more aware of their rights and responsibilities.

We must balance helping people and providing information with not interfering unnecessarily in decisions that are properly left to the individual.

Stewart Stevenson: For clarity, I explain that I was not expressing a personal view. You are of course correct. It has been put to me—and, I am sure, to others—that a substantial group of organisations and people wish marriage to be promoted more actively. They argue their case well, which has merits.

I was not taking a view on marriage, civil partnership or any relationship. My main point was whether the registration of a birth was a key time for providing information. The point was not about directing, controlling or forcing two people who are at that magical moment to consider whether to deepen and increase the formality of their relationship in the new infant's interests.

You said everything that I wanted to hear you say, except that that time was the moment at which to provide the information that should be supplied. I and others would be encouraged if you said that you would at least think about that.

Hugh Henry: Advocates of marriage have a clear view of how families and society should be structured. That view is noble and respected. The Executive values the contribution that marriage makes to families and to society. We will do nothing to undermine the contribution of marriage, which we recognise. However, we as legislators must acknowledge that many people are in relationships that are not defined by the traditional marriage. It is right to respect their views and correct to examine their rights and to allow them to lead their lives to the full. They should be able to make their contribution not only to society, but to their families, whatever way their families are defined.

Stewart Stevenson asked whether the broad range of information should be made available at what he described as a magical moment. I hesitate to think about what we would do at that magical moment by saying to people, "Excuse me—just before you sign that form, here's a book

that you'll need to take away and read. We don't want to destroy the magic or burden you with worries, but did you realise that all these other options are available?" Far be it from me to be a killjoy and destroy that moment.

If we can do something to help people at whatever stage they need information, we will consider doing that. I hope that a range of information would be made available to people in the places where they go to register births, marriages and partnerships. However, it would be a crude response that would say, "You are here for what is, for you, a very important reason. By the way, the state wants you to take away this book and we hope that you will read it at your leisure." I am not sure that that would be the right approach.

Stewart Stevenson: If I may, I will close down the question; the minister does not need to comment further. If someone has to register a death, as many of us have done, they are given a leaflet that sets out a range of options on how to deal with the death. It seems slightly perverse that, at other important points in a person's life, they are not given a similar opportunity to be well informed. I leave that thought with you, minister.

Hugh Henry: I want to put on record the difference between the two situations. Someone who has suffered a bereavement needs advice on how to cope with that bereavement and on where to go for financial or legal support. It would be quite another thing to tell someone who had turned up to register the birth of a child, "Here are a range of options for you on how to run your life." I am not ruling it out, but I hesitate to say that that is the most appropriate time at which to provide that information.

The Convener: That is fine; we should leave the subject at that. Stewart Stevenson made the suggestion as a tactic to get the minister to think about the issue—he has certainly done that.

Mrs Mulligan: I do not plan to leave the issue. The minister said that he thought it important that people should have appropriate information and support on the way forward. An issue that has been raised with us is that unmarried fathers do not know what to do and what their circumstances are. If the minister is saying that the magical moment is not the time at which to provide that information, when would he do so?

Has the minister considered the option of family relationship centres, which was mentioned by the Australian MPs to whom we spoke last week? The centres give a one-door approach to the provision of a lot of information, guidance and support. Is the Executive considering that option?

Hugh Henry: I am not saying that the magical moment is not the right moment; all I am saying is that I hesitate to destroy the magical moment by insisting on using it in that way. A range of relevant information could be made available and people could choose to take some or all of it if they so wished. That would be entirely appropriate. We will look to invest in public information and education; I think that we have allocated a budget of something like £200,000 to do that. The more that people are aware of their rights, as well as of their responsibilities, the better it will be for all concerned.

The Australian model is particular to Australian society; it has many positive features, some of which we are familiar with in any case. I hope that some of the work that we are doing—for example, encouraging closer co-operation between the four national bodies and providing funding to help those bodies to work together—will make a contribution and lead to more improvements. If we compare the size of Scotland with that of Australia, one could argue that for us to do that on a Scotland-wide basis would be equivalent to a state, or the level below a state, doing similar work in Australia. In some parts of Scotland, counselling and mediation services are starting to co-operate and work together more closely. It is in everyone's best interests for us to help and encourage people at the local and national level to work together.

We have no plans to go down the Australian route of setting up family relationship centres. We will support national bodies to do work at the national level, but we believe that the determination of local service provision is best done locally by those who are responsible for local service delivery. That has been, and will continue to be, our approach.

As members know, there is an anomaly in Scotland in our funding around 10 local family mediation groups. That funding will not be withdrawn, but we are trying to pass it down to local decision makers who are best able to decide how the money will be used in the future. There must be a partnership approach that involves support at the national level, development of work at the local level and trying to evolve the Scottish model, which is clearly developing and which I acknowledge can be improved. However, we have no plans to set up the type of service that exists in Australia.

12:45

Mrs Mulligan: Does what you envisage include something prior to the establishment of relationships? You mentioned people taking decisions that affect others without thinking through the consequences. Do you intend to take the issue back a step so that advice or support is offered at an earlier stage, before people even begin to get into conflicts?

Hugh Henry: I return to a point that I made in response to Stewart Stevenson. The issue is the balance between what Government or the state should do and what is best done at local or personal level. Government has a responsibility to ensure that the legislation is clear and effective, to articulate what the legislation means and to educate people so that they understand the legislation and can use it. We do not want only a precious few who happen to be educated on the law to be left with the ability to use it—I believe strongly that that is not right.

Centrally, we will support the national bodies to develop their work on training and development and guidance work in relation to mediation, couple counselling, marriage, families and stepfamilies. We will continue to invest in that work.

At the local level, when individuals seek information, we hope that the information that we provide and the work that is being done by the national bodies can be taken up by local groups, which should be supported by local agencies and local authorities, and made available to people in the area. I am not sure that I want to be entirely prescriptive and to expect that in every community, in every part of Scotland, people will have to go through steps in order to enter into a specific form of relationship. On the other hand, I hope that good-quality advice and information will be available through local authorities and voluntary organisations so that people who seek to take such steps can do so and can have the best information. Saying that people will have to sit down and go through guidance before they enter into a relationship is a step beyond where we are.

The Convener: I do not think that that has been suggested. Stewart Stevenson started the discussion, and all that he asked you to consider was whether there is a point that people will reach at which they can be presented with options.

Hugh Henry: I developed a slightly different point in answer to—

The Convener: Hold the bus, minister. You have moved on to a different issue, which we wanted to explore in depth with you. Mary Mulligan mentioned mediation, so it might be appropriate to move on to that issue. Do you want to continue your line of questioning, Mary?

Mrs Mulligan: I was not going to, but I am happy to do so if you want me to.

The Convener: Mike Pringle wants to say something, but I would like to discuss the issue of mediation, to which we have been brought. The committee has listened carefully to what some of the organisations that provide such services have said, both orally and in their submissions. The general view that I have taken so far is that it is important to understand what services are provided and what they do. In the context of the bill, would it not be useful to assess the services that we provide and how effective they are? Surely the question whether to provide additional funding arises only if you are satisfied that good work is being done. If things could be done more effectively, would you not want to consider how they could be done more effectively and resource that instead?

Hugh Henry: That takes us back to my point about governmental responsibility and local responsibility. We are doing what you suggest in relation to the national bodies, to four of which we provide annual funding. In addition, we have provided £0.25 million to help those bodies to carry out a change process so that they can work more closely together and consider how they operate and the support that they provide to local organisations. I am not sure that it would be our responsibility to identify what goes on in every community in Scotland, because the patterns vary throughout the country. In some areas, there are active mediation groups, some of which we support for historical reasons, some of which local authorities support, but many of which rely on voluntary funding. In other areas, there are no such services and people must rely on local authority social work services, for example.

The Convener: I am not suggesting that we look all over Scotland to find out which areas do not have a service. I am suggesting that the Executive, as a matter of policy, could consider such matters as whether mediation should be entirely separate from reconciliation and couple counselling and that, before getting involved in arguments about where a mediation service should be provided, it could think about what kind of service would be beneficial. I do not know what standards are required. Some places have contact centres. To some extent, there is a link with the post-parenting issue, which we have not yet discussed.

I am playing devil's advocate. I take your point about national bodies not getting involved in the minutiae of local services, but rather than continue in the direction of providing funds, the Executive could take a policy decision that it would be beneficial to families and family relationships to bring some of those services closer together. I know that there is a good reason why you do not want to follow what the Australians have done, which has cost them 398 million Australian dollars; I do not know how much that is in real money. I am thinking out loud, but perhaps we should take a policy view of what kind of service would be appropriate and take things from there. We have not done that; we are starting from the position that we have such services in place. At every opportunity, organisations are saying to the committee, "If we are to have the Family Law

(Scotland) Bill, please can we have more money?" One can understand why that is the case. I am just trying to take us in another direction, which is to examine whether the existing services are the right thing to fund in the first place.

Hugh Henry: That is a perfectly valid point to make. The Executive has a responsibility to consider how the money that we allocate is used and if we do not think that that money is being used effectively, we should consider other options for using it. However, such an approach has implications because, for every person whom we can persuade that the money is not being used properly and would be better used elsewhere, there will be someone such as an MSP or a councillor who will argue that the withdrawal of the funding is a disgrace because the organisation in question has a fine track record and that, rather than touch the organisation's funding, we should think again. There have been examples of that in the past. You win some, you lose some. All that we can be sure of is that we will not please everyone.

I agree that we should consider carefully the money that we are investing in promoting such work, which is one of the reasons why we have helped the four national bodies to consider a change process. We have asked them to consider areas for co-operation; to try to avoid duplication; and to consider where best use could be made of shared resources. Generally, that process is working well, although we might have to make decisions at the end about whether the money could be used differently. I am encouraged by the fact that most people in the national organisations are starting to think clearly about what can and should be made available. However, I hesitate to prescribe to voluntary organisations and tell them that they should be involved in mediation rather than counselling, or in reconciliation rather than mediation.

Many organisations develop because, over the years, people with a common interest come together and work hard to raise funds and develop expertise. In general, such organisations add to the value of our society. I do not want the Executive to prescribe which organisations should exist and which should not. However, I agree that the Executive must decide which bodies to fund, a decision that is best based on value added. We are discussing many of the issues and, in general, the four national organisations are responding well. I hope that something productive will come from that.

Mike Pringle: We heard earlier from Gary Strachan, who is a father who lives in Thurso. From what I gathered from his evidence, when he started out on the process of separation, little advice was available, he did not know where to turn and the advice that he got was not good. We want the bill to help everyone equally throughout Scotland. Given that it is clear that Gary Strachan was not helped, how will we reach out to such people? I do not know where the four national organisations that you mentioned are based, but I guess that most of them are pretty close to the central belt. How will we help people who have separated and who live in Wick, Thurso or Stornoway? How will we tell them what their opportunities are and to whom they should go?

Hugh Henry: I certainly do not expect the four national organisations to provide local services in every community in Scotland, but I expect them to develop standards, training material and information and support services for local organisations. Mike Pringle raises a slightly different issue that will always arise in relation to a range of services, not just those that relate to the bill. The issue arises for many communities, whether they are in Stranraer, Wigtown, Oban or Lerwick, or on Barra or Skye. The way in which to resolve the issue is not for us to say what will pertain in such communities. Most of the responsibility for that is with the local decision makers—the local authorities—and there is a danger that we might start to drift into handing down a model or template to local decision makers to tell them how they should develop and run services.

Local support for families who are under pressure and in crisis is the responsibility of local social work departments, although I accept that, when matters get to the point at which people need to take court action, there is an impact on the courts. We must consider the relation between what happens in court and the support that is available outside it. However, I am not sure that we could come up with a model that would satisfy Gary Strachan or anyone else who lives in remote parts of Scotland, whether in relation to family law, welfare rights, money advice or advice on housing-related matters. That is why we work closely with organisations such as Citizens Advice Scotland and voluntary organisations to consider a range of services.

I know from other parts of my portfolio that interesting work is being developed that uses, for example, computer technology, the web, interactive services and telephone lines. Such approaches can make a contribution. I do not have solutions about how services should be developed for people who live beyond the more densely populated areas and there needs to be a vigorous debate with the people who are responsible for developing local services.

13:00

Mr McFee: What is the intention behind section 16, on the domicile of children under 16?

Hugh Henry: We are trying to eliminate the distinction that currently exists between children whose parents are married and children whose parents are unmarried, in relation to the child's domicile.

Mr McFee: Currently, is the domicile of a child who is born within wedlock broadly determined by the mother's domicile, whereas the domicile of a child who is born outwith wedlock is broadly determined by the father's domicile?

Hugh Henry: No. It is the other way round.

Mr McFee: It is the other way round. At its meeting last week, the committee heard evidence from Professor Beaumont and Professor Clive that the drafting of section 16 is needlessly complex and might sometimes lead to the wrong result, if it were concluded that the child's domicile was where it lived, rather than the domicile of its parents. Do you want to comment on that?

Hugh Henry: We will carefully consider the implications of what Professor Beaumont and Professor Clive said. We will come back with further proposals if we decide that they are needed.

Mr McFee: I do not know whether you have come across the following example: a child's parents both have New Zealand nationality and are domiciled there, but the family has lived in France since the child's birth and the child has never been to New Zealand. Section 16(1) states:

"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."

The presumptions in section 16(3) could lead to the child being domiciled in New Zealand.

Hugh Henry: We will consider the points that were raised in relation to that example, to ascertain whether there is sufficient evidence that the provisions should be amended.

Mr McFee: That would be useful. There might be further such examples, because the provisions are prescriptive. Of course, under section 16(4),

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

I do not know whether that would just cause more trouble.

Will you comment on Professor Beaumont's suggestion that if a child is looked after by someone who is not their parent, the child's domicile should be that of the carer, as opposed to that of the parents?

Hugh Henry: We can consider the suggestion. We live in a world in which not only do relationships break up but people move regularly between different countries, so we might need to think about the implications of the provisions.

Mr McFee: Section 28 provides for the validity of marriages in relation to private international law. I understand that the Scottish Executive has accepted the Scottish Law Commission's recommendation to codify in section 28 the existing rules on recognition of marriages abroad, but that it has not accepted that body's recommendation to include in the codification the existing common-law public policy exception. Is there a reason for that?

Hugh Henry: I will ask the official who deals with that to answer.

Louise Miller (Scottish Executive Justice Department): In a nutshell, I think that Professor Beaumont is probably right about this. I think that the drafting of section 28 and the underlying policy have become slightly dislocated. We shall talk to the draftsperson some more about that, but that is certainly something that we will need to reflect on before stage 2.

Mr McFee: That would be most satisfactory, because that threw up a whole range of issues that could have been minefields.

Last but not least, Professor Beaumont commented that Parliament should be cautious about legislating on matters that are likely to be subject to European Union review in the near future. Such matters might include the classification of matrimonial property, which is covered in section 29, and jurisdiction to enforce alimentary awards, which is covered in section 30.

Hugh Henry: I suppose that it is the classic dilemma. We could delay and then find that the changes that we anticipate do not in fact come about. It could take some time for those changes to work their way through at European level. We have a legislative opportunity now and I think that it is right that we take that opportunity. If there are any changes to be made in future, we believe that they can be made validly and relatively simply by introducing a statutory instrument to codify any necessary changes. If something has to be done, we can do it, but at the moment it would be impossible, and wrong, to anticipate what might happen at European level. We could be left in a difficult situation if the changes that we anticipate do not come about.

Mr McFee: Current political events might lend some credibility to that view.

Do you foresee any implications for Scots law and the Scottish courts system from the European Commission's proposals to harmonise the applicable law rules at EU level in relation to divorce? What response does the Executive intend to make to the current green paper?

Hugh Henry: If anything happens at EU level in future, we will obviously need to reflect on it. As far

as the current situation is concerned, we have still to make any decision. I am not sure what stage things are at with the divorce proposals, but I know that the green paper on matrimonial property is coming next year. Louise Miller may be able to bring us more up to date.

Louise Miller: We are currently consulting some external stakeholders about the Commission's green paper known as Rome III, on applicable law in divorce. The official deadline for responses to the Commission on the green paper is 30 September. Given the commitments that people have over the summer holidays, I do not think that feedback will be going from the UK to the Commission until quite close to that time.

Mr McFee: So it is out to consultation at the moment.

Louise Miller: Yes.

Mr McFee: Has the Executive formed any provisional opinions on that?

Hugh Henry: We will wait to see what comes back from the consultation.

The Convener: Before we leave this topic, and as we have Louise Miller with us, I ask whether the bill has any other implications for private international law of which we should be aware.

Louise Miller: I do not think that there is anything that has not already been raised. Professor Beaumont raised the issue of the provisions on international maintenance cases and matrimonial property in international cases, and what would happen if an instrument came out of Brussels that conflicted with those, but the minister has already dealt with that.

The Convener: We have had preliminary discussions with the Commission on the applicable law, although we have not seen any of the paperwork. The committee will discuss whether to respond to that issue. I also understand that there is a green paper on succession. Is the closing date for submissions 30 September?

Louise Miller: Yes, the closing dates are the same.

The Convener: Is the Executive concerned about having to input to three separate important issues in a short timescale, given that we have a summer recess? Is there a case for asking for an extension?

Louise Miller: That has been done in the past. Informally, the official deadlines for responding to the Commission often turn out not to be the actual deadline. There is usually a significant gap between the official deadline and the Commission analysing the responses, perhaps having an experts meeting or stakeholders hearing, and then producing a proposal for legislation, which is likely to take several months at least. Generally, some responses from Governments and other organisations come in late, and the Commission is prepared to consider them. Having said that, I think that in the United Kingdom we will be doing everything to ensure that we get responses to the Commission on time.

The Convener: To save some time today, could the committee be given a note on the representations that the Executive has made on those topics, or any information that will tell us where you are with your response?

Hugh Henry: We will get to you whatever relevant information is available. I will check when we get back.

The Convener: Are there any more questions on that topic?

Stewart Stevenson: My apologies, but I did not come in soon enough to ask a brief question about the domicile of persons under 16—although I note that people are now considered to be children up to the age of 18. Given that people are now required to have their own separate passports, why is the domicile of children determined in relation to their parents at all?

Hugh Henry: I do not want to pre-empt any discussion that we may have tomorrow about ages but, to put it simply, children are still children, and we have to define them. Notwithstanding the fact that for a number of reasons we require children to have passports, legally and in terms of development, protection and everything else, we have to have some point of reference. If the point of reference is not to be their parents, there could be complications. I do not know what the implications would be if we had no reference to the parents and followed Stewart Stevenson's logic to its ultimate conclusion.

Stewart Stevenson: I am simply saying that entitlement to a passport of a particular country would seem to be the most obvious way of resolving the legal domicile of someone in relation to the bill. However, you may wish to think about that further rather than comment now.

The Convener: I propose to take a final question from Mike Pringle. You will see that we are not getting through all our questions—sorry about that—and we also have to deal with a couple of Scottish statutory instruments today. We will finish with Mike's question, and discuss having a short session with the minister next week.

Mike Pringle: I want to explore the issue of step-parents. Is it the case that the Executive does not intend to introduce step-parent agreements? If it does not intend to do that, why not? Stepfamily Scotland has suggested that the interests of the child can be safeguarded by having conditions on

the registration of such agreements, about which there has been evidence. Will you flesh out the Executive's thinking on the issue?

13:15

Hugh Henry: This is a complicated issue. Stepfamilies can be diverse. In some cases, a lone mother might marry a new partner who might be in the child's life until adulthood. More complex cases might involve multiple adults in a child's life. At the moment, step-parents have the option of going to court to acquire parental responsibilities and rights or they can adopt the child, which would be more clear cut. The system seems to work well and we are not convinced that legislative changes are either necessary or in the best interests of the child. However, as part of the information campaign that I mentioned earlier, it is right that we give greater publicity to the powers available in existing legislation for delegating parental rights to step-parents. The issue is complicated, but I do not want to introduce further complications or cause further difficulties by taking a fairly crude approach.

The Convener: That ends our questions for now. I thank the minister and his officials for attending and agreeing to come back for another session next week. The main outstanding issues are to do with cohabitants, domestic violence, non-legislative measures and same-sex couples and we will raise them with you next week.

Subordinate Legislation

Confirmation to Small Estates (Scotland) Order 2005 (SSI 2005/251)

13:18

The Convener: I know that members will hardly believe this, but we are only on item 2, although that is the final item. I invite members to consider the note prepared by the clerk, which provides background information on the Confirmation to Small Estates (Scotland) Order 2005, which is a negative instrument. Are members happy to note the order?

Members *indicated agreement*.

Prior Rights of Surviving Spouse (Scotland) Order 2005 (SSI 2005/252)

The Convener: I invite members to consider the note prepared by the clerk providing background information on the Prior Rights of Surviving Spouse (Scotland) Order 2005, which is also a negative instrument. It is timely that the order has come before us now, given that we are considering such issues in the Family Law (Scotland) Bill and there has not been such an order since 2000. Members will note that there is a substantial increase in the prior rights upper limit recommended by the Law Society of Scotland. Are members happy to note the order?

Members *indicated agreement*.

Mike Pringle: The order did not concern the Subordinate Legislation Committee.

The Convener: There is nothing to report from the Subordinate Legislation Committee. Members will be aware from the evidence that we heard last week that the Scottish Law Commission is reviewing the law on succession, which seems appropriate.

I remind members that at our next meeting we will hear again from the Deputy Minister for Justice as agreed. We will then consider the oral and written evidence that we have received so that we can begin drawing up our stage 1 report on the Family Law (Scotland) Bill.

Meeting closed at 13:20.

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