JUSTICE 1 COMMITTEE

Wednesday 8 June 2005

Session 2

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JUSTICE 1 COMMITTEE
19th 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:

Carol Duncan (Scottish Executive Justice Department)
Kirsty Finlay (Scottish Executive Legal and Parliamentary Services)
Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 6

Scottish Parliament

Justice 1 Committee

Wednesday 8 June 2005

[THE CONVENER *opened the meeting at 09:53*]

Item in Private

The Convener (Pauline McNeill): Good morning everyone and welcome to the 19th meeting this year of the Justice 1 Committee. If members could do the usual and check that they have switched off their phones, that would be helpful.

Item 1 is to consider whether to take item 3 in private. Do members agree to take that item in private?

Members *indicated agreement*.

Family Law (Scotland) Bill: Stage 1

The Convener: Item 2 is the Family Law (Scotland) Bill. This is our second evidence session with the Deputy Minister for Justice, Hugh Henry. Welcome to the meeting, minister, and thank you for agreeing to come back to answer more of our questions. I also thank Carol Duncan, Kirsty Finlay and Louise Miller for returning to the committee. We have approximately an hour. We do not intend to go over any of the issues that we discussed last time; we will focus on issues that we did not get a chance to explore. I start by raising the issue of post-separation parenting. Will you outline to the committee the Executive's thinking in appointing Alan Finlayson to draw up the parenting agreement?

The Deputy Minister for Justice (Hugh Henry): We recognised that two issues were causing concern or exciting debate. One was to do with parenting and the other was to do with grandparents, which we might come to later. We recognised that certain things needed to be done in the bill to dispel some of the myths about rights in relation to cohabitation. We sought to legislate for more clarity, particularly in relation to fathers who lived with the mother but had no rights.

We also recognised that other issues needed to be considered outwith the legislative framework, because often legislation is not the solution and many cases involving children post separation are dealt with by agreement and by consent. We felt that, if we could help to move the debate on, regularise the information available and provide better support in relation to parenting, that would help all the parties concerned. We wanted to ensure that people not only knew about their rights but could be directed in such a way as to allow them to reach amicable agreements without having to go to court.

We thought that trying to pull all that together to support the legislative process would be of benefit. When we cast about for someone with knowledge, experience and credibility who could usefully do the work for us, it became obvious from Alan Finlayson's CV that he was hugely experienced and committed, as you will have gathered from his evidence last week. We believed that he would be able to bring a perspective that straddled different aspects of the system that deals with children and those responsible for them. We thought that that broader experience, allied to his personal commitment, would help us to produce something that was of benefit to parents throughout Scotland. We hoped that parenting agreements might help people in difficult circumstances to find out more about the system and their rights and to identify ways of resolving issues.

The Convener: How does the Executive envisage getting to the point where parents know about and use parenting agreements?

Hugh Henry: As we said last week, there is an issue about education and information, on which we need to reflect. We certainly intend to engage in an information campaign. We need to ensure that all the relevant agencies have access to information; we want to make it easily accessible. We will consider how we make information available on our website, although I recognise that not everybody would have access to that. The first step, before considering how to get the information out, was to produce something that was relevant, useful and effective. We recognise that there are weaknesses in how we provide information.

The Convener: You will be aware that we have had evidence from a number of organisations—such as Grandparents Apart self-help group and Families Need Fathers—on the quality or lack of access. How can we ensure that contact orders are enforced, especially in relation to access for the non-resident parent? I use the term "non-resident parent" because that is the one that we have, although I am aware that Alan Finlayson suggested that we should not use such terms. How can we deal with the minority of cases in which contact orders are not complied with and access is not given?

10:00

Hugh Henry: It is important that you used the phrase "the minority of cases". We must keep a sense of perspective by remembering that 90 per cent or more of cases are settled without the need to resort to court. One would probably also find that, in the vast majority of cases in which there is a need to rely on the court, the court order is complied with. However, I recognise that frustration is experienced in the minority of cases in which someone who wishes to play a part in their child's life and has the support of the court in doing so finds that access is denied.

I listened to the views that were expressed when we prepared the bill and to some of the evidence that the committee took last week and it is clear that there is frustration with court decisions. That raises the question how we enforce court decisions, which is a different issue. The problem is a delicate one. It is clear that the court considers all the various options, balances the rights of the parties concerned against the overwhelming desire to protect the best interests of the child and comes to an informed view.

If someone fails to comply with a court order, that is an issue for the court to resolve. It is possible to go back to court; sanctions are available to the court for failure to comply with a court order. Those sanctions can be fairly severe, but, in addressing a failure to comply with a court order, the court would have to decide whether some of the ultimate sanctions were appropriate. For example, it would need to consider whether it would be right to fine a parent who was failing to comply with an order or whether that could have adverse consequences for the whole family, including the children. The court could even jail someone for failing to comply with an order, but it would have to assess whether that way of satisfying the rights that it had given to the other parent would be in the best interests of the child. It is extremely difficult for judges to make such judgments; I sympathise with them on that.

I know that absent parents who are determined to play a full role in their child's life but who are frustrated in that goal suffer genuine anxiety and frustration. I do not have an easy solution to that problem. I would be reluctant to constrain the court's right to take what it conceives to be the best decision in the circumstances. The court must weigh up all the factors, but significant penalties are available to it. I do not know what else could be done, short of laying down new legal requirements about how the courts impose and effect sentences.

The Convener: I want to explore further what the solutions might be. Would there be any merit in giving more legal weight to the status of parental agreements?

Hugh Henry: That is a different issue; the problem that you have identified relates to situations in which an order has been granted by the court but has not been complied with. Giving different legal weight to a parental agreement would not solve the problem of someone saying that they did not care what the court had decided and intended to ignore an order. Members should recall that the court would have the power to vary the terms of residence, as well as to impose a fine or imprisonment. If someone defied a court order, the court might even decide to transfer residence to the other party. Presumably, the court would consider all the circumstances and try to work out what was best for the child. I do not want to second-guess what a court would do in individual cases.

The Convener: When a court grants an order for supervised contact with one parent, is there a statutory obligation on local authorities to provide the service or is that discretionary?

Hugh Henry: I am not aware of any statutory requirement on local authorities to provide the infrastructure or support that is needed to enforce such orders. Much work of that type is done by voluntary organisations. It is not a statutory responsibility of local authorities to ensure that the orders are enforced.

The Convener: Do you think that there should be such an obligation on authorities? That would connect the court decision with the service that is available.

Hugh Henry: I would hesitate to go down that road, for a number of reasons. The issue is very complex. Placing a statutory obligation on local authorities to provide the service would have significant financial implications for authorities. We must ask ourselves whether the resulting obligation that would be placed on local authority social work services, for example, would be greater than other duties that they are required to undertake. Social work services would have to weigh up whether the requirement should take precedence over other statutory obligations that they have under social work legislation. As you know, such legislation is often open to interpretation. I remember many debates that took place over many years about exactly what section 12 of the Social Work (Scotland) Act 1968 required social work authorities to do. The provision was interpreted differently not only by different social work authorities but even by different managers in different offices within authorities.

I do not know whether imposing a statutory requirement on local authorities to support orders for supervised contact would assist the process. I have seen no evidence to suggest that it would. If there were such a requirement but one party continued to fail to comply with an order, the court would still have to decide whether to fine or imprison that person or whether to vary the residence order.

The Convener: I accept what you say. I asked the question because in a minority of cases parents are totally dissatisfied with a system that seems unable to enforce the rights of children to see them. If we want to improve the situation of non-resident parents in particular, we must at least explore whether increasing the willingness of the courts to grant orders for supervised contact would give parents access that the courts would otherwise refuse. Do you see where I am coming from? If there were an obligation on authorities to enforce orders for supervised contact, the courts might grant such access more frequently in the first instance, instead of refusing it.

Hugh Henry: The biggest problem that you identify is not whether access should be supervised in some cases—that is a different argument. The nub of the problem is whether the court would be prepared to act if access, supervised or otherwise, were being denied. All things being equal, most courts are probably inclined to grant access. Given that it is unusual for access to be refused, the issue is not the granting of access but the enforcement of the court order if one party fails to comply with it, which has more to do with what the court does.

It would be unfair to suggest that a sheriff would not consider all the issues in an individual case. You spoke about the child's right to have access to the parent who is being denied access. I presume that, if that parent returned to the court, the court would consider the child's rights and determine whether those rights would be best served by switching the responsibility for residence to the second parent or by fining or imprisoning the parent who currently has that responsibility. I have spoken to a number of sheriffs and I know that courts take such matters seriously. The decision is extraordinarily difficult to make, because the court must consider the child's best interests.

The Convener: I will leave the matter there. You know where I am coming from. The issue is difficult and delicate, as you say, and there might be no better solution. However, I have difficulty in getting to the bottom of what happens in the current system. You say that in most cases the court grants access, but I do not know whether that is the case. We have no statistics on that, so we must take your word for it. If one of two good parents does not have good-quality access, that is unfair on the child and the parent. We should explore ways of improving the system, which is why I asked about the matter.

Marlyn Glen (North East Scotland) (Lab): I welcome the minister's reminder that the majority of cases are settled out of court. Will you comment on the fact that research demonstrates the importance of there being a single primary care giver, particularly for young children? The general trend remains for the primary care giver to be the mother. A demand for equal parenting time would not support that principle, which is in the child's best interests. I think that society implicitly accepts that there should be a primary care giver and the courts probably accept that, too.

Hugh Henry: As I said, most cases are resolved without recourse to the court. If a case must go to court, the court will consider whether the child's interests are best served by identifying a primary carer or by providing for dual and split responsibilities. If the court decides that there should be a primary carer, who is usually the mother, it will have reached that conclusion after considering all the circumstances of the case. I would not want to suggest that the court should be predisposed towards one parent or the other, because I can think of cases that I have dealt with in which it was not in the child's best interests to be with their mother. We should try not to constrain the courts but to leave it to them to make difficult and sensitive decisions. I accept that the courts would normally perceive the mother to have

primary care responsibilities. The court would also reflect that both parents have equal status, but that is different from saying where the child should reside for the best part of the week.

10:15

Marlyn Glen: I wanted to get at that point. The primary care giver for a young child could be the father, the grandmother or one of a number of people. When we are considering extreme cases, we sometimes miss the fact that for a very young child the important relationship is a single relationship with a primary care giver—I use that term deliberately, because the primary care giver could be one of a number of people.

Mike Pringle (Edinburgh South) (LD): I think that the convener has given her view based on the evidence that has come before the committee, but that has left me at a slight disadvantage, because I came to the bill late.

Minister, you have talked about the difficulties with a small number of cases that go to court. The court has the ability to fine, imprison or reverse the residence order. Those are the three extreme options, but I understand that we are talking about a very small number of cases. Do you or any of the people who advise you have any idea how often the courts have fined someone? We have heard evidence that people have gone back to court three and four times. Do we have any idea how often a court fines the primary person, whoever that is—as you said, it is mainly the mother—imprisoned them or varied the order? Do we know how often those options have been taken?

Hugh Henry: No, we do not have any such evidence. Even if we did, the principal question would still be what we should do if a court is not enforcing an order. Are we suggesting that we should take the discretion away from the sheriff? Are we suggesting that we legislate about what sheriffs should do when there is a failure to enforce? We then start to get into territory that changes completely the relationship between the legislature and the judiciary. That is a big issue, but we do not have any statistics.

Mike Pringle: I think that you have just answered my second question, which was whether you feel that the bill should indicate what should happen. I agree that fining or imprisoning the mother—if it is the mother—will do no one any good. However, there might be some benefit if the court took the view that it should reverse or change the arrangement after someone has had to go back to the court three or four times, although I think that your answer shows that you do not think that it would be competent for us to include such a measure in the bill.

Hugh Henry: We have a long-standing tradition of politicians not interfering with courts' decisions. If we included such a provision in the bill, it would look as though we were trying to interfere with the sheriff's conscious decision of what to do when someone had flouted an order just because we did not agree with or like that decision. The issue is a big one.

Mike Pringle: It is also a big issue for the parent who has gone back to the court four times and still cannot get to see their son or daughter.

Hugh Henry: Of course it is. However, you can imagine what would happen if we started to give politicians—whether ministers or members of the Parliament—the wherewithal to intervene in individual cases either at the sheriff court or at the High Court. I am sure that politicians of all shades of opinion in this and other Parliaments or in local authorities, as well many members of the public, often feel anxious about decisions that they have read about. The problem is that we do not always know the reasons behind those decisions. Although we might make comment from time to time as individuals, there is still a clear separation of powers. The matter is different from questions about sentences for people who are found guilty and it starts to intrude on the fundamental distinction between judges and legislators. I cannot think of an easy way to proceed that would not significantly change the relationship between the two.

Mrs Mary Mulligan (Linlithgow) (Lab): I hear what you say about not wanting to get into a situation in which ministers or others direct the court and tell it how to act. However, I have some difficulty in reconciling that with the best interests of the child. You said that you do not have evidence about cases in which decisions have been reversed or dealt with in different ways, but given that the court considers the best interests of the child in its initial decision on rights of residence or access, why is it not in the best interests of the child for the court to enforce those decisions? I recognise the difficulties, but I am concerned about the current situation. People understand that nothing happens and we allow the rights of the child to be negated because of that.

Hugh Henry: That is a fair point. Of course, it is predicated on the assumption that the first decision of the court was in the best interests of the child but that its subsequent decision was not. I contend that the first decision would have been taken in the best interests of the child and that when the case returned to court—people have the right to go back to court—the sheriff would again make a decision in the best interests of the child.

Presumably, the sheriff would consider the case and decide that access should be granted to the other parent. When the case comes back, the

sheriff would consider that that parent's failure to secure access warrants action. The sheriff then has four options. They can decide to fine, to imprison, to do both, or to vary the order to give residence to the non-resident parent. Presumably, if the sheriff decided to do none of those things, that would be because they thought that that was in the best interests of the child.

The sheriff faces a predicament. They might have thought that it was in the best interests of the child for both parents to have access, but if they subsequently took action against one parent, would they be doing something that might not be in the best interests of the child? I do not know of particular cases in which that has happened, but I can only assume that the sheriff would conclude that to do nothing, frustrating though that might be, was in the best interests of the child. Further than that, I cannot comment.

Margaret Mitchell (Central Scotland) (Con): Is there an issue about the time delay? In cases in which an order gives, say, equal parenting time but the order is breached by the parent who has residency, the child is often alienated from the other parent by the time the case comes to court. I can understand why, if a gap in the relationship has allowed hostility to build up, a sheriff might consider that the child is hostile to one parent. If we fast-tracked cases in which there is such a breach, would that help to resolve the situation a little earlier?

Hugh Henry: The point that Margaret Mitchell makes is a fair one: often, the longer the gap, the greater the alienation. Absent parents are often concerned that a child is being turned against them by thoughts, words and deeds, which makes their situation more difficult. However, let us leave that aside for the moment.

Even if we fast-tracked such cases and even if the sheriff believed that there was no alienation and a need for a link with the child, if the other parent was frustrating attempts to make that link, we would still not resolve the failure to comply with the court order. It would be attractive to fast-track such cases if we thought that alienation was the issue, but we are hearing that, in many cases, the issue is not alienation, but failure to comply with a court order.

If we accepted Margaret Mitchell's proposition, we would be assuming that the sheriff had refused to enforce the order because he or she perceived that alienation had been built in, rather than because he or she felt that it would not be appropriate in the circumstances to fine or jail the parent or to vary the order. While fast-tracking might be superficially attractive, it would not resolve the fundamental issue. Also, if we decided to fast-track, there would be implications for the legal system, in that other matters would not be dealt with so quickly.

Margaret Mitchell: The point is that, as soon as such a case had been fast-tracked, the sheriff would start to analyse what had gone wrong and would realise that one parent, for some reason, did not want to comply with the order. At that point, the sheriff could consider mediation, whereas he might not have thought that that was appropriate earlier on. Under my proposal, as soon as a breach occurred, the sheriff would have that other tool in the box.

Hugh Henry: The advice from my officials is that there is no problem with getting such cases to court; the problem is having the court decision recognised and enforced. As I explained, even if we accepted that your proposition could make a contribution, it would not resolve the fundamental problem of one party being able to say, "I'm not bothered." If the sheriff said that the parents should go to mediation but one parent did not turn up, what would the sheriff do then? Would they jail, fine or vary the order? We would be back to the determination of one party not to comply with the order, for whatever reason. In any event, cases that have gone so far are probably not suitable for mediation.

Margaret Mitchell: Do we have statistics on how long a case takes, on average, to go back to court when there has been a breach?

Hugh Henry: The advice from my officials is that, when an order has been breached, the person can lodge the appropriate documents and the process can start within a week. I do not have sufficient detail to say how long it takes for particular cases to go back to court from the time that a breach occurs, although I am not aware that the process per se is inordinately long. I return to the fundamental issue that a determined parent might be prepared not to comply with a court order.

Margaret Mitchell: Statistics on that would be useful.

10:30

The Convener: Yes. I point out to the minister that it is perfectly in order for his officials to speak today, if they want to.

Margaret Mitchell is right that we are struggling with the issue. I am not suggesting that I have no faith in sheriffs, but we are legislators and, because we have no information on the matter, we are being asked to have blind faith in the fact that the courts always make decisions in the child's best interest. We have no statistics on how many cases go to court or cannot go to court because of the costs; we do not know how many requests are

granted and how many are refused; and we do not know the timescales that are involved. That is a difficulty for the committee. We need to understand the system, but there is a lack of information. I know that the Executive does not have some of that information either, but the minister said that it is quite easy to go to court if an order is breached.

Carol Duncan (Scottish Executive Justice Department): I do not want to be overly solicitor-like, but if a court order is breached, a party can lodge a motion with the court. The sheriff clerk checks the motion—it is an A4-sized piece of paper—to ascertain that it is in order, and the motion is then stamped and intimated to the party who is breaching the order. A court date is then fixed. It is years since I was in court, but certainly, in my day, a week at most would elapse before the case was called in court.

However, the person who is not complying with the order might ignore the intimation that they must attend court. That is often an intractable problem and it is the nub of the matter, because if someone is hellbent on not obtempering a court order, they can find many ways of avoiding coming to court. The area is terribly fraught and I do not know whether there is a solution.

The Convener: Much has been said about how delicate the situation can be, but we would accept no other circumstances in which a citizen of this country could ignore an intimation to go to court.

Hugh Henry: However, as I said, it is for the sheriff to decide what to do if a court order is being frustrated. Substantial powers are available to sheriffs, including imprisonment. The sheriff might decide that it is not in the child's best interests to apply that sanction—members have raised that issue—but surely no power is more significant than the power to imprison.

The Convener: Yes, but that leaves us having to defend a system in which someone who refuses to comply with an order or to turn up at court can circumvent the needs and rights of the child, as Mary Mulligan has said, because no one will ever challenge them. It strikes me that given the difficulties of the matter, we should at least be exploring ways of putting the system right, in the interests of children. We could consider the Australian model and other possible solutions that would force people to agree on access, or at least provide a lever whereby they might do so, without having to go to court.

Hugh Henry: I am not sure that the Australian model would resolve the fundamental issue. We could legislate to provide for the automatic imprisonment of someone who breached a court order, but that would not be an acceptable solution. Short of that, much of what we are talking about comes down to the good will of both parties. Whatever model is used, if someone is determined to avoid complying with an order, they will do so, whether the order is for contact or compulsory mediation, or requires the person to turn up at a certain place. If the person refuses to comply with an order that seeks to put such measures in place, it is for the court to decide whether that refusal is sufficiently serious to justify the imposition of serious sanctions.

The Convener: I make it clear that nobody on the committee has suggested that the solution is to imprison parents.

Hugh Henry: I did not say that; I was saying that we—whether the committee or ministers—could decide that imprisonment would be the ultimate sanction for breach of a court order. However, I do not think that anyone in the committee or in any of the professions concerned would want to use such a solution.

Stewart Stevenson (Banff and Buchan) (SNP): In paper J1/S2/05/19/3, we have a table of figures on grandparents' interaction with the legal system from the Grandparents Apart self-help group—GASH—from Bathgate. Have you or your officials looked at those figures and do you have a view on whether they are typical or untypical of such interaction? If you have not yet looked at them, will you do so and revert to the committee?

Hugh Henry: Perhaps you could point me to the table that you are addressing.

Stewart Stevenson: It is the annex to paper J1/S2/05/19/3, on page 9. The paper is part of the public documents that are before the committee.

Hugh Henry: Is it one of our public documents?

The Convener: It is a committee document.

Stewart Stevenson: I am fairly certain that it is a published document. The bottom line is, if we cannot discuss it just now, it would be useful to have an indication of whether you think that the figures that GASH is putting forward are representative of the experience of grandparents who go to court.

Hugh Henry: Are those figures for cases in which access is not enforced?

Stewart Stevenson: GASH has provided quite a complex table—it is nearly an A4 page of numbers. It would be useful to have on record some objective views as well as the important subjective views that we have heard in the discussions that we have been having.

Hugh Henry: We will look at the table and come back to the committee, but I cannot comment on the figures at the moment.

Margaret Mitchell: If a person wilfully breaches an order and we manage to get the parties to court quickly, is not there a case for the sheriff to say that he is of a mind to vary the order unless the person complies? Compulsory mediation is a contradiction in terms, but it might concentrate minds if the party who was breaching the order realised that the balance was suddenly going to change unless they got their mind round co-operating.

Hugh Henry: That option is currently available; the sheriff could decide to vary the residence.

Margaret Mitchell: However, Carol Duncan has just told us how easy it is to ignore the order, and perhaps there are issues that we—

Hugh Henry: No, I will clarify. I am aware that court orders are ignored by someone who is determined to ignore them. In such instances, it would be easy for a sheriff to impose a fine, but they would have to consider the wider circumstances and decide whether it was best to levy a fine that might impact on the child. The sheriff could easily decide to imprison someone for ignoring an order, but that would have significant consequences and I presume that sheriffs do not think that it is in a child's best interest to impose a custodial sentence. The sheriff could also easily decide to vary the order by giving residence to the second party, and the first party would have to be aware that, if they refused to comply with the court order, residence could be switched. I am sure that, in each individual case, sheriffs consider the range of options, and they would have to decide whether, with the first party having refused to comply, it would be best to switch the residence to the second parent. I presume that, having considered that option, sheriffs normally decide not to take it.

Mike Pringle: Judging by the length of time that we have been going on about the issue, I think that it is clear that all committee members regard it as pretty serious. Is there no way in which you can ask the courts to give us some idea of how many cases we are talking about? You say that only 20 per cent of cases go to court. How many of those 20 per cent ever end up in real dispute? It would give us all some comfort if we knew roughly how many cases we are talking about.

Hugh Henry: I do not think that we have those statistics available, but I will find out what information we can provide. I will look at the figures and decide whether we accept the proposition that has been made, and we will see what we come forward with. However, even if we were to accept what the grandparents have said—if we were to find out that there are a huge number of cases of the type that has been described by Mike Pringle—that would not take us any further forward. I am sitting here before you with no obvious solution, whether for one case, for 100 cases or for 1,000 cases. I have not heard—either this morning or at any other time—of an easy and neat solution to the problem. If there was an easy and neat solution, we would be more than willing to consider it, as it frustrates everybody.

The Convener: I do not think that the committee would want to give the impression that we think that you can solve the problem easily. We realise that it is probably the most difficult issue in the bill—in fact, it is not even in the bill; it is to do with issues that are being worked on alongside the bill. Nonetheless, as Mike Pringle says, it is of high importance.

I reiterate that it is difficult for us to make a judgment and that it would be wrong for us not to interrogate the system. As you say, sheriffs have powers available to them, but we do not know whether they use them and why they choose to do so or not. It is not unreasonable for us, as legislators, to ask why a sheriff never reverses a decision. Mary Mulligan's point is valid: it could be just as much in the interests of the child to switch a residence, but sheriffs tend not to do that and we do not know why.

Hugh Henry: I understand your question and I will reflect on it. Nevertheless, I hesitate to say that it would be appropriate for me either to comment on why a sheriff does not reach a decision or to start to interrogate sheriffs about why they do not make decisions. There is a broader issue that we should both consider, concerning how we can get some of that information without breaching the important distinctions that have built up over the years.

The Convener: Thanks very much for that.

We move on to the next topic, which is cohabitants.

Mrs Mulligan: I am sure that this is a much easier topic for the minister to discuss. Will he explain the Executive's decision to limit consideration of children to the genetic children of both cohabitants, where there is cohabitation, whereas in the case of married couples, the children of both people and the children of one of them, if they are treated or accepted as children of the family by the other over a period of time, are considered?

Hugh Henry: Certain options are available to enable a parent who is not the natural parent of a child to access legal responsibilities. To give a degree of automaticity would introduce certain difficulties and complexities. The options that are available generally protect the rights and interests of both the child and the natural parents and provide certain opportunities for the non-natural parent. I am not sure that going beyond that would

make any more significant contribution than is required.

10:45

Mrs Mulligan: I understand the Executive's concern to protect the rights of the child and the natural parent. However, the way in which the bill is structured makes a distinction between children of a married relationship and children of a cohabiting relationship.

Kirsty Finlay (Scottish Executive Legal and Parliamentary Services): I will clarify the matter if I may. We did not want to run the risk that a successive number of relationships could result in successive parent figures having a liability to a child with whom they had perhaps been involved for only a short period of time. The bill makes a distinction between the distinct and separate rights that are to be given to cohabiting couples on the termination of the relationship and the rights and responsibilities that flow from a marriage.

Mrs Mulligan: Okay. I will leave it at that and move on to section 21. Will the minister explain the policy behind the section, which gives cohabitants the right to apply to the court when a relationship ends? Does the drafting of the section achieve the policy intention? I ask the question because, in his evidence to the committee, Professor Clive suggested that the section was not as well drafted as it might have been. He said that the intention was not clearly expressed.

Hugh Henry: I will bring in officials on the second point about the drafting. In essence, we are trying to ensure that, at the end of a cohabiting relationship, vulnerable adults and children are protected by being able to apply to the court for financial provision where there is an identified economic disadvantage. We also want to equip the courts with the power to take account of the needs of any child in the relationship as well as any economic disadvantage that is experienced by the adult.

Kirsty Finlay: On the drafting point, obviously, we have taken note of Professor Clive's evidence to the committee and will look at the bill again. If something requires to be done to clarify the drafting, we are more than happy to look at that.

Mrs Mulligan: I understand the point that the minister made about wanting to protect those who are vulnerable in a cohabiting relationship, particularly if children are involved. Is it more than likely that all cohabiting couples will be included? Does the provision imply in any way that the Executive views cohabiting as it views marriage? If so, should the same rights and protections that are afforded to married couples be afforded to cohabiting couples?

Hugh Henry: We are clear that one of the things that we are attempting to do is to dispel some of the myths that exist in Scotland about cohabitation. We recognise that marriage has a different and separate significance, but we also want to protect the children of any relationship where there has been cohabitation. I recognise some of the difficulties, but it is important to address some of the significant weaknesses and vulnerabilities that exist at present. It was evident from the research that we did that there is a view that common-law marriage and living together endow all sorts of rights, which is not correct.

Mrs Mulligan: It is clear that the Executive will have a job to do to educate people, even after the bill has been passed. The committee has also found that people's perceptions of cohabiting were not correct.

How will the Executive's policy intention be achieved through section 22 when a cohabiting partner dies intestate?

Hugh Henry: When a relationship ends in the death of one party, that change would protect vulnerable adults by providing for applications to be made to the court by the surviving cohabiting partner for a discretionary share in a deceased partner's estate where that person has died intestate. We accept that we might need to make some technical changes at stage 2 and we are still considering that. However, what I have described is generally what we are trying to do with that section.

Mrs Mulligan: Is it the Executive's intention that any discretionary payment to a cohabiting partner should come from the share that, at present, would go to the deceased's child?

Hugh Henry: No, I do not think so.

Kirsty Finlay: It is quite difficult to explain, so we sent the committee some worked examples that set out clearly where the provision will come from. I do not have the examples to hand, but we are satisfied that the provision will not undermine the position of a child of an individual who dies while they are in a cohabiting relationship.

Mrs Mulligan: At the moment, everything goes to the child. Surely, therefore, if in the future the cohabiting parent is to have a share, some of that will have to come from the child's share.

Kirsty Finlay: It would be only that part of the estate that was left over after the rights of any child of the individual had been satisfied.

The Convener: Is there any doubt about that?

Kirsty Finlay: We are satisfied that that is the case.

Mrs Mulligan: Am I right in thinking that, at the moment, the child would get everything?

Hugh Henry: I understand the point that you are making. You are saying that the child gets 100 per cent, therefore any change that gave something to the cohabiting partner would eat into that 100 per cent.

Kirsty Finlay: That is not the case. The provision is discretionary, so the cohabitant would only get something from what, if anything, was left over from the estate once the child's rights had been satisfied. It is important to remember that that would happen only in those cases in which no will had been drafted. If the cohabitants wrote a will, that would take precedence. My understanding is that there will be an information campaign on the importance of drafting a will so that an individual can be sure that their wishes will be met.

Mrs Mulligan: I am happy to go back and look at the information that you gave us previously. I must have misunderstood.

The Convener: Is the Executive making a distinction between the rights of the child to succeed and the cohabitant? If there is no will, the child usually gets whatever is left, so they would get 100 per cent.

Kirsty Finlay: Yes.

The Convener: Under the bill, therefore, if the cohabitant is to get something discretionary out of the estate, that must affect the child's inheritance.

Kirsty Finlay: But—

The Convener: The child will not have the same entitlement that they had previously, because the cohabitant's share has to come from somewhere.

Hugh Henry: Yes.

Kirsty Finlay: It might be better if we were to write to the committee to give it the facts and figures. The matter is not straightforward. The committee will be aware that the rules of intestate succession in Scots law are pretty complicated. If it would satisfy the committee, we could certainly write to it on the matter.

The Convener: That would be helpful, because we have struggled with the point.

Hugh Henry: On the points that have been made by the convener and Mary Mulligan, it is right to say that we are attempting to give some protection to vulnerable adults when the relationship ends. We will consider whether that has other consequences and get back to the committee.

Stewart Stevenson: I want to explore the subject of concurrent relationships and to establish the Executive's policy objectives in providing, at section 18, a definition of "cohabitant". First, it would be useful to confirm that the definition of cohabitation—in other words, the creation of a legal definition for a relationship—in no way supplants existing marriages that the partners to the cohabitation may have and that, therefore, the cohabitation is an additional legal relationship that is brought into play through section 18.

Hugh Henry: In section 18, we are not creating a new status for cohabitants or cohabitation. We are attempting to provide certain legal safeguards for people who cohabit and who are affected by the break-up of a relationship. Section 18 will not impact on, or affect, the status of marriage.

Stewart Stevenson: So we are quite clear that if either or both partners are married, they remain married. The bill simply defines the legal status of cohabitation. I am not yet talking about the consequences of that legal status, which is a different issue.

Hugh Henry: Sorry, could you repeat that?

Stewart Stevenson: Section 18 creates a legal status of cohabitation, which may or may not—depending on other parts of the bill and other matters—create rights and responsibilities. Section 18 states what cohabitation is, in law. Therefore, the relationship between people is legally defined and can be added to other relationships that they may have.

Hugh Henry: I do not want to get into a semantic debate. I think that Stewart Stevenson's latter point is correct—section 18 provides a certain definition of the term. However, on his first point, the section does not create a new legal relationship.

Stewart Stevenson: It was a small "l" not a capital "L", if that helps. In other words, the section is in the bill so it defines cohabitation.

Hugh Henry: Yes.

Stewart Stevenson: I want to explore the policy intention. Would it be possible for more than one cohabitation to be captured by the definition? I give the example of a person who spends half the week in the Highlands of Scotland and the other half in Edinburgh and who has a cohabitation relationship in each place. It is not the policy intention to exclude the possibility of there being two such cohabitations. The minister will note that I said the Highlands—of course, I do not come from the Highlands.

Hugh Henry: Nevertheless, outside the committee room I would be interested to know who you are talking about. However, we will leave that point aside.

I leave aside for the moment the status of marriage. In any relationship such as that which was described by Stewart Stevenson, it would be for the courts to determine exactly what the relationship was and which, if any, of those partners would be the person described. Goodness, if—

11:00

Stewart Stevenson: May I help by clarifying my question? Is it your intention that the courts will be permitted to say that, in law, there are two cohabiting relationships and that, on the death of the person who intercepts those two relationships, intestacy rights are created for both the people with whom the person in question has been cohabiting? I am trying to establish the Executive's policy intention; I am not commenting on it.

Hugh Henry: That does not describe our policy intention. Section 18(1) says:

"In sections 19 to 22, 'cohabitant' means a person falling within subsection (2) or (3)."

Subsection (2) says:

"A person falls within this subsection if the person is (or was) living with another person as if they were husband and wife."

To an extent, that rules out the generality of anyone in the situation that was described by Stewart Stevenson. Using Stewart Stevenson's example, a court might find that someone was living with someone as husband and wife in the Highlands for three and a half days a week and living with someone else as husband and wife for the other three and a half days a week in Edinburgh. It would be a matter for the courts to assess whether there was equality in law between those two relationships, or whether one relationship was seen by everyone in all circumstances as being one of husband and wife, whereas the other one was not.

Stewart Stevenson: But it is not your policy intention to exclude the courts from coming to such a conclusion.

Hugh Henry: It would be a matter for the courts to decide whether that was an appropriate determination.

Stewart Stevenson: That covers relationships in parallel. There is also the matter of relationships in series, with one following another.

Hugh Henry: Cases in which one relationship followed another would be different. The first situation is more difficult, certainly for me to argue; the court might not be so confused. In the case of relationships in series, one relationship would end and another would start. The previous relationship would no longer be cohabitation if another relationship then started. I do not think that the succession or series would lead to a number of people being regarded as cohabitants. Presumably, one relationship would have ended once another had started.

Stewart Stevenson: If I may, I advise you to think about this carefully. Are you saying that, if a cohabiting relationship has ended, but the deserted partner—if I may use that phrase—nonetheless has assets that have been built up jointly, and if a new cohabitation starts but the person concerned dies within a period during which the joint assets have not been divvied up or agreed, that person, under those circumstances, has no recourse to going to the court, saying that there was a cohabiting relationship, and that they are therefore entitled to assets? I suspect that that is not your intention, but perhaps you could tell us.

Hugh Henry: I draw Stewart Stevenson's attention to section 22—"Application to court by survivor for provision on intestacy"—which reads:

"This section applies where … a cohabitant (the 'deceased') dies intestate; and … immediately before the death the deceased was … domiciled in Scotland; and … cohabiting with another cohabitant (the 'survivor')."

That subsection refers to immediacy in relation to the cohabitation.

Stewart Stevenson: So it is your intention that, when someone dies a week after the ending of a cohabitation that has involved joint assets, the person who is party to the breakdown of the cohabitation and who has survived be denied any rights under the bill.

Hugh Henry: That would be a matter for the courts. Section 22(5) states:

"An application under this section may be made to … the Court of Session"

or to "a sheriff". It would be for the courts to decide whether a death the week before fell within the definition of immediacy in section 22.

Stewart Stevenson: For tax purposes, it would be possible not to incur capital gains tax until two years had passed, on the basis, I understand, that it may take two years to sell a house. I am not trying to get you to second-guess the courts' decisions. However, in that context, is it your policy intention that, after a cohabitation has ceased, for as long as there are jointly built-up assets as a result of that cohabitation, the two people have rights, notwithstanding the fact that new relationships might have been established?

Hugh Henry: Leaving aside the question of time limits, we are attempting to define the rights and interests of someone who is cohabiting. We are not considering the rights of someone who might have lived with another person at some point during the past 30 years. That is a different issue, which is why section 22 applies where

"a cohabitant dies intestate; and … immediately before the death .. was … cohabiting with another cohabitant".

As I recall, the time limit for raising the action is six months.

Stewart Stevenson: Right. In policy terms, does "immediately" refer to that six months?

Hugh Henry: Yes. Section 22(6) states:

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

Stewart Stevenson: If there were still assets that had been jointly built up or contributed to, an action could be raised in the six-month period after the death, even though the cohabitation had ceased some period, which I am not specifying, before the death.

Hugh Henry: Yes. If the action was raised within six months of the death, it would be for the court to decide whether such cohabitation existed immediately before the death.

Stewart Stevenson: It is the word "immediately" that causes me concern and which might run counter to what I suspect you are trying to achieve in policy terms. I suspect that we have covered the point as far as we can for today.

The Convener: I have a question on the limitations on the court in interpreting section 22. Is it open to the court to use its discretion to treat cohabitants who are making an application on the ground of economic disadvantage in the same way as married couples are treated under section 9(1)(a) of the Family Law (Scotland) Act 1985? There is nothing to prevent the courts from interpreting the bill in that way if they wanted to, given the way in which matrimonial property is divided up currently.

Hugh Henry: I honestly could not tell you off the top of my head. We will consider that and get back to you.

Kirsty Finlay: It would depend entirely on the facts and circumstances of the case and on what other claims there might be on the deceased cohabitant's estate.

The Convener: You are giving the court wide discretion. The only upper limit is that the cohabitant should get no more than they would have got if they had been married to the deceased cohabitant. It strikes me that, if the courts wanted to and if they thought it was justified, they could apply that limit in every case.

Kirsty Finlay: Yes, if it was justified but—

The Convener: The Executive would not want that to happen.

Kirsty Finlay: I think that we are struggling a bit to understand where you are coming from.

Hugh Henry: I think that the policy intention would be to allow that.

The Convener: If someone says, "I am economically disadvantaged and I have lived with this person for 20 years. Give me something out of their estate", the court will decide, on the basis of the facts and circumstances, how much that person will get. Somewhere along the line, however, the court will have to devise some rules. There is nothing in the bill to prevent the court from taking the view that the provisions that it applies to married couples would apply to cohabitants.

Hugh Henry: If the court has that discretion, case law may well build up on the issue. Nevertheless, we will consider the matter to see whether there might be any unforeseen consequences.

The Convener: Okay.

Marlyn Glen: Does the minister accept the view of Professor Clive and of the Law Society that the bill's amendments to the law relating to domestic violence interdicts make the law too complicated and that the provisions of the Protection from Abuse (Scotland) Act 2001 are sufficient?

Hugh Henry: I am not sure that what we are doing would unnecessarily complicate matters.

Marlyn Glen: We are concerned about the law being too complex for practitioners such as the police and other agencies.

Hugh Henry: If there was a way for us to simplify matters without prejudicing vulnerable people, we would be prepared to consider that. If the Law Society or others had a suggestion about how that could be done easily, it would be worth considering. At this stage, we are not persuaded that that could easily be done, but if there is a way of doing it we will consider it.

Marlyn Glen: So, you will have a look at that.

Hugh Henry: We will, if a detailed suggestion is made available to us.

Marlyn Glen: I would also like you to comment on the view of Scottish Women's Aid and various children's charities that the bill should be amended to introduce a presumption against contact when there is an issue of domestic violence.

Hugh Henry: We are aware of the issue that has been raised by Scottish Women's Aid, and there have been meetings between some of my ministerial colleagues and Scottish Women's Aid. I acknowledge the fact that the issue is serious and that those concerns are legitimate. There will be further discussion with Scottish Women's Aid about how that can best be addressed.

However, the issue should be considered in the wider context of post-separation parenting. It

probably takes us back to our earlier discussion about the welfare of the child being paramount. We acknowledge the legitimate concern of many women who have been in a violent or abusive relationship, and we will try to reconcile that with the decision that we make about whether the child is equally threatened by any contact. That is a difficult issue and there is some dilemma. We need to reconsider that and, over the summer, we will consult on it and discuss the matter further. I am not sure what the conclusion of those discussions will be, but the issue is worthy of further consideration.

11:15

Marlyn Glen: Are you thinking about reconsidering the proposed changes to occupancy rights? Scottish Women's Aid believes that the provision in the bill that relates to occupancy rights will expose more vulnerable women to the risk of homelessness than the existing legislation does, by cutting down the time within which occupancy rights have to be exercised.

Hugh Henry: That is a new argument, with which we are unfamiliar. I am not sure whether what is suggested would happen. However, if evidence shows that, or if a detailed argument has been made, we will be obliged to consider it. My initial reaction is that we are not persuaded that that is a logical conclusion of what is proposed, but if a solid and valid argument to that effect exists, we will reflect on that.

Marlyn Glen: That is helpful.

The Convener: You will be pleased to know that we have asked all our questions. I have copied to you letters that I wrote to the Minister for Education and Young People and the Minister for Health and Community Care.

Hugh Henry: I have received the letters.

The Convener: They concern evidence that Gary Strachan gave to the committee. He told us that he was having difficulty with health boards and not having access to information about his child, which we thought might be an issue to pursue.

Hugh Henry: Thank you—I have got that.

The Convener: I thank the minister and his officials for last week's and this week's sessions. I am sure that we will exchange more information in the next few weeks.

The committee agreed to take in private the next agenda item, under which we will begin to draw up our report on the Family Law (Scotland) Bill.

11:17

Meeting continued in private until 12:55.

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