

JUSTICE 1 COMMITTEE

Wednesday 21 June 2006

Session 2

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JUSTICE 1 COMMITTEE

25th Meeting 2006, 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)

Bill Aitken (Glasgow) (Con)

Karen Gillon (Clydesdale) (Lab)

Mr Jim Wallace (Orkney) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Anne Cairns (Scottish Executive Legal and Parliamentary Services)

Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERKS

Euan Donald

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 1

Scottish Parliament

Justice 1 Committee

Wednesday 21 June 2006

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

Subordinate Legislation

Family Law (Scotland) Act 2006 (Consequential Modifications) Order 2006 (draft)

The Convener (Pauline McNeill): Good morning. Welcome to the 25th meeting in 2006 of the Justice 1 Committee. It probably seems to the minister as if he has appeared before us 25 times.

The Deputy Minister for Justice (Hugh Henry): Every time has been a pleasure.

The Convener: I welcome the minister, Anne Cairns from the Scottish Executive Legal and Parliamentary Services, and Christina Phillips from the Justice Department.

I invite the minister to make some short opening remarks.

Hugh Henry: Thank you, convener. You will note that the order was laid in draft, withdrawn, amended and subsequently relaid. I apologise for any inconvenience that that may have caused.

Article 3 of the order as originally drafted would have repealed section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, which concerns the protection of trustees and executors of estates. Repealing that section would have removed that protection, which was not our policy intention: our aim was to remove references to illegitimacy. I believe that the order as redrafted does that. I thank committee members for their tolerance in this matter.

The order makes consequential modifications to primary legislation, to take account of the provisions of the Family Law (Scotland) Act 2006, which came into force on 4 May. The order affects five aspects of that act: illegitimacy, pension protection, occupancy rights, marriage and domestic abuse. I will set out briefly the purpose of each article in the order and its impact on those aspects.

Section 21 of the 2006 act abolished the status of illegitimacy. Articles 2, 3 and 7 of the order make consequential amendments to the Succession (Scotland) Act 1964, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 and the Foster Children (Scotland) Act 1984.

Section 17 of the 2006 act amended matrimonial legislation to take account of the introduction of the pension protection fund. Article 8 of the order makes changes to the Family Law (Scotland) Act 1985.

Articles 5 and 9 make changes to the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Civil Partnership Act 2004 in respect of the interests of heritable creditors.

Section 1 of the 2006 act concerns the removal of the barrier to marrying the parent of a former spouse. Article 4 makes consequential changes to the Marriage (Scotland) Act 1977.

Section 32 of and schedule 3 to the 2006 act simplify the law on the attachment of powers of arrest to interdicts. Articles 6 and 10 make further consequential changes to the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Civil Partnership Act 2004.

Stewart Stevenson (Banff and Buchan) (SNP): I seek clarification of one issue. I find it slightly difficult to pin down in my mind exactly what the order means by parents. That may sound odd, but I am aware that it will include adoptive parents, for example. I want to be clear in my mind—or even to be clear that you are clear in your mind—about the definition of parents that is used in the order. When people become adoptive parents, will the order remove the status of the natural parents? In other words, how many parents can someone have?

The second point is probably more important. To what extent does parents encompass the creation of the status of parents in other jurisdictions? Are there any limitations on that? If there is a form of becoming a parent in Papua New Guinea, for the sake of argument, that is entirely unfamiliar to us, will that be covered if people have attained residency here and are caught by the order?

Hugh Henry: I wish that I could say thank you for that question. Stewart Stevenson asked first about adoptive parents. Those who take on legal responsibility for a child take precedence and are defined as parents under legislation. The member also asked about other jurisdictions. The definition in the order will apply to any parent who moves abroad and becomes subject to any jurisdiction there. Any parent who comes from another jurisdiction to Scotland will need to fall within the definitions of parenting that are contained in our legislation. We would not give another jurisdiction the right to determine what constitutes parenting for us. Normally there is compatibility, but if there is any doubt our jurisdiction will take precedence.

10:00

Stewart Stevenson: Is that the case regardless of residency? We have discussed the matter in the context of other legislation that we have considered. For example, if someone owns property in Scotland but is not resident here, the property is dealt with in general terms under Scots law, but other issues are dealt with under the law of the place in which the person is resident. However, if they are resident here for a period of—let us say, for obvious reasons—15 years, but they are not a British citizen and their relationship with their children was determined before they arrived, the Succession (Scotland) Act 1964 could apply to them. I am sorry; I am not trying to make it complicated, even though it might seem that I am. I am simply trying to ensure that I fully understand the situation rather than trying to—

Hugh Henry: Bear with me while I consult my experts.

Mr Bruce McFee (West of Scotland) (SNP): If you are not confused, you have not been paying attention.

Hugh Henry: I refer Mr Stevenson to my earlier comment. A parent is a parent for the purposes of Scots law. Scots law would determine the way in which that individual would be dealt with and the rights that they would have. I am not sure that I can give any greater clarification.

Stewart Stevenson: That is fine, minister; I am going to support the order anyway.

Margaret Mitchell (Central Scotland) (Con): Is the provision relating to the protection of trustees and executors in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 or the Succession (Scotland) Act 1964?

Hugh Henry: It is in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.

Margaret Mitchell: How is the Succession (Scotland) Act 1964 affected by the modifications?

Hugh Henry: Article 3 of the order makes changes to the Succession (Scotland) Act 1964. It is the reference to legitimacy that is affected.

Margaret Mitchell: Is that the only thing that is affected?

Hugh Henry: The relevant section of the 1964 act reads in full:

“Where, in relation to any purpose specified in section 23(1) of this Act, any right is conferred or any obligation is imposed, whether by operation of law or under any deed coming into operation after the commencement of the Children Act 1975, by reference to the relative seniority of the members of a class of persons, then, without prejudice to any entitlement under Part I of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 of an illegitimate child who is adopted by one of his parents,

(a) any member of that class who is an adopted person shall rank as if he had been born on the date of his adoption, and

(b) if two or more members of the class are adopted persons whose dates of adoption are the same, they shall rank as between themselves in accordance with their respective times of birth.”

Margaret Mitchell: I just wonder whether there is anything else. We looked at prior rights and how they might be affected by cohabitants having a claim. I wonder whether that had a knock-on effect on the Succession (Scotland) Act 1964. However, you say that it is a purely technical matter relating to legitimacy.

The Convener: The committee has welcomed the move with regard to the extremely few circumstances in which there will be a succession to a title or a coat of arms, as an anomaly would otherwise exist.

I am not clear about the pension fund issue. What does it mean?

Hugh Henry: In a sense, we are making further consequential changes because of the changes that have been made by section 17 of the Family Law (Scotland) Act 2006 as a result of the creation of the pension protection fund. We are trying to ensure that everything that has been done elsewhere can be provided for as a result of the 2006 act.

The Convener: Yes, but the order states:

“Subsection (7ZB) applies where a right under an occupational pension scheme to payment of a lump sum in respect of death would, but for the provisions of Chapter 3 of Part 2 of the Pensions Act 2004 (c.35), arise during an assessment period”.

I do not know what that means. Will someone tell me using commonsense language what will be done?

Hugh Henry: We are trying to ensure that the Family Law (Scotland) Act 2006 reflects what is being done elsewhere. I do not know whether officials can clarify the bit about the Pensions Act 2004.

Anne Cairns (Scottish Executive Legal and Parliamentary Services): Basically, the provision relates to earmarking orders under section 12A of the Family Law (Scotland) Act 1985. There is a technical point in the Pensions Act 2004 that if an order has been made in respect of payment of a lump sum on death during an assessment period, which is defined in that act, the order cannot come into effect. The order will simply amend the Family Law (Scotland) Act 2006 to reflect that.

The Convener: To be honest, I am not sure whether I am any the wiser. We are not familiar with the Pensions Act 2004. I realise what you are trying to do in principle—you are trying to ensure

that the Family Law (Scotland) Act 2006 is in line with other legislation—but I confess that I am not clear about everything. However, I will trust you.

Stewart Stevenson: Would it be fair to say that another approach—which is not within our power to take—would have been to remove the window of restriction in the Pensions Act 2004? The important thing is that the two approaches would be the same. You are not trying to change the policy; indeed, you do not have the power to do so.

Hugh Henry: We are not trying to change the essentials of pension law, but there is an issue relating to family law, which is a devolved matter. We are trying to ensure that the part of the Pensions Act 2004 that relates to family law is properly attended to, which is within our competence. We do not aim to rewrite or change the fundamentals of pensions legislation.

Stewart Stevenson: But the approach that I have described would be an alternative approach, if it were available to us.

Hugh Henry: You might argue that.

The Convener: I suppose that you cannot say whether the order will be the last consequential order to do with family law.

Hugh Henry: No.

The Convener: An expanded explanatory note would have been helpful. The only information that we have on what the order will do is very basic.

Hugh Henry: We could consider providing such a note, but we do not want to burden the committee with details about substantive issues in respect of which we do not intend to make changes. We are not attempting to change any of the fundamentals of the other legislation; we are merely seeking to ensure that the Family Law (Scotland) Act 2006 reflects other substantial pieces of legislation and implements what it should implement. Some questions that have been asked are more to do with what is in the original legislation. It is clear that we would be required to give the committee a more detailed explanation if anything more significant were involved and we were seeking to make substantial changes to other legislation, but some of the other legislation is not within our competence anyway. We are merely trying to ensure that the Family Law (Scotland) Act 2006 is consistent with other legislation and that nothing that can be done under that act is impeded because it does not properly reflect what has happened.

The Convener: We appreciate that. I accept that you are not attempting fundamentally to overturn anything that we have done in the Family Law (Scotland) Act 2006. However, the order states:

“but for the provisions of Chapter 3 of Part 2 of the Pensions Act 2004”.

Unless I read chapter 3 of part 2 of the Pensions Act 2004, I have no idea to what that refers. It would be helpful to have a reference to what the chapter does so that we know what we are doing when we pass orders.

Hugh Henry: I will reflect on whether anything helpful could be added to the explanatory notes. When we produce information for the committee prior to a committee appearance the clerks could perhaps say to officials if they feel that we could provide further explanation.

The Convener: Consequential orders often deal with a group of miscellaneous things that do not seem controversial, but we want to ensure that we know what we are dealing with.

Hugh Henry: If we can provide further information we will be happy to do so, but I do not want to burden my officials and the committee clerks with unnecessary information. If matters are identified that require further explanation we are more than happy to consider what we can do.

The Convener: Thank you. Fundamentally, the order does not alter the basic provisions on how pensions are dealt with in family law. It does not alter the way in which pensions are divided or assessed.

Hugh Henry: No.

The Convener: So the situation is exactly the same as before. I am happy now.

As there are no more questions, I invite the minister to move motion S2M-4475.

Motion moved,

That the Justice 1 Committee recommends that the draft Family Law (Scotland) Act 2006 (Consequential Modifications) Order 2006 be approved.—[*Hugh Henry.*]

Motion agreed to.

The Convener: I thank the minister and his officials.

The committee agreed at its meeting last week that we would go into private session for the purposes of completing our report on the Criminal Proceedings etc (Reform) (Scotland) Bill.

10:12

Meeting continued in private until 13:10.

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