

SCOTLAND

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A. New Developments in the field of Divorce (since September 2002)

As in 2002, divorce is governed in Scotland by the Divorce (Scotland) Act 1976. While the basic framework remains in place, the Act has been amended on a number of occasions: by (1) the Gender Reassignment Act 2004, (2) the Family Law (Scotland) Act 2006 and (3) the Marriage and Civil Partnership (Scotland) Act 2014.

To explain what has changed since 2002, a brief reminder is provided of the framework of the 1976 Act, as it applied in 2002. Section 1(1) of the Act, in its original form, provided that:

‘in an action for divorce the court may grant decree of divorce if, but only if, it is established in accordance with the following provisions of this Act that the marriage has broken down irretrievably.’

Section 1(2) of the 1976 Act set out the five situations in which irretrievable breakdown could be established as follows:

- (a) since the date of the marriage the defender has committed adultery; or
- (b) since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender; or
- (c) the defender has wilfully and without reasonable cause deserted the pursuer; and during a continuous period of two years immediately succeeding the defender's desertion—
 - (i) there has been no cohabitation between the parties, and
 - (ii) the pursuer has not refused a genuine and reasonable offer by the defender to adhere; or
- (d) there has been no cohabitation between the parties at any time during a continuous period of two years after the date of the marriage and immediately preceding the bringing of the action and the defender consents to the granting of decree of divorce; or
- (e) there has been no cohabitation between the parties at any time during a continuous period of five years after the date of the marriage and immediately preceding the bringing of the action.

(1) Gender Recognition Act 2004

The structure of the 1976 Act, set out above, was altered by the Gender Recognition Act 2004. Prior to 2004, it was not legally possible for a person to change his or her gender in the UK except in the limited situation where it had been wrongly recorded at birth. At the time, it was also the case that marriage in Scotland was only permissible between persons of different gender. The Gender Recognition Act 2004 introduced a new process whereby an individual could seek legal recognition of gender reassignment by means of a gender recognition certificate. If the applicant was married, then the grant of a full recognition certificate would have the effect of invalidating their marriage and so, for that reason, the 2004 Act also provided for an interim gender recognition certificate. If the person applying for gender recognition was married at the time, then he or she would be granted an interim gender recognition certificate which would permit legal recognition of their new gender for some purposes but would not affect the legality of their marriage. If he or she subsequently divorced, then the interim certificate would be changed to a full certificate. This approach left it to the individuals themselves to decide whether or not they wished to remain legally married.

These legal changes were reflected in the law on divorce and instead of there being one ground for divorce – irretrievable breakdown – section 1 of the Divorce (Scotland) Act 1976 was amended by the Gender Recognition Act 2004 so that there became two grounds:

s1(1) In an action for divorce the court may grant decree of divorce if, but only if, it is established in accordance with the following provisions of this Act that—

- (a) the marriage has broken down irretrievably; or
- (b) an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the date of the marriage, been issued to either party to the marriage.

With the redefinition, by the Marriage and Civil Partnership (Scotland) Act 2014, of marriage to include both same-sex and different-sex couples, this provision has become of less significance albeit considerably more complex in its terms.¹ A very small number of divorces proceed on the basis of this provision. In the latest detailed statistics, there were none.²

¹ Section 1 of the 1976 Act has been amended by the Civil Partnership Act 2004, ss 4C – 4F.

² There were no divorces granted on this ground in the most recent published statistics for 2015-16.

(2) The Family Law (Scotland) Act 2006

Key changes to divorce were made by the Family Law (Scotland) Act 2006. The basic structure of section 1(1) of the 1976 Act remained unchanged with two separate grounds or pathways to divorce – irretrievable breakdown or the issue of an interim gender recognition certificate. The effect of the 2006 Act was to amend the five methods of establishing irretrievable breakdown by removing desertion and reducing the periods of non-cohabitation from two years to one year, where the defender consents, and from five years to two years, regardless of consent.

Section 1(2) of the 1976 Act now provides as follows:

The irretrievable breakdown of a marriage shall, subject to the following provisions of this Act, be taken to be established in an action for divorce if –

- (a) since the date of the marriage the defender has committed adultery; or
- (b) since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender; or
[...]
- (d) there has been no cohabitation between the parties at any time during a continuous period of one year after the date of the marriage and immediately preceding the bringing of the action and the defender consents to the granting of decree of divorce; or
- (e) there has been no cohabitation between the parties at any time during a continuous period of two years after the date of the marriage and immediately preceding the bringing of the action.

In terms of the original 1976 Act, where desertion was a method of establishing irretrievable breakdown, there was provision for a defence of condonation to apply in respect of the desertion.³ With the abolition of desertion by the 2006 Act, this defence also ceased to have effect.

The 1976 Act, as originally enacted, gave the court discretion to refuse divorce, sought on the basis of five years' non-cohabitation without the consent of the defender, in the following terms:

s1(5) Notwithstanding that irretrievable breakdown of a marriage has been established in an action for divorce by reason of subsection (2)(e) of this section, the court shall not be bound to grant decree in that action if in the opinion of

³ Divorce (Scotland) Act 1976, s2(3).

the court the grant of decree would result in grave financial hardship to the defender.

For the purposes of this subsection, hardship shall include the loss of the chance of acquiring any benefit.

This was repealed by the Family Law (Scotland) Act 2006.⁴ Grave financial hardship is no longer a bar to the granting of a divorce although it may be taken into account in any award of financial provision on divorce.

At common law, collusion between the parties was a bar to divorce and this continued to be the situation when the 1976 Act was introduced. With the high rate of undefended divorces which has become common, this was not an issue which troubled the courts. A significant change to the law was made by section 14(1) of the Family Law (Scotland) Act 2006 which provided that:

‘Any rule of law by which collusion between parties is a bar to their divorce shall cease to have effect.’

While one party, as the pursuer, must still technically take the lead in applying for divorce, there is nothing to prevent them from acting together and any collusion between them will not act as a bar to the court granting decree.

(3) Marriage and Civil Partnership (Scotland) Act 2014

Marriage was legally redefined by the Marriage and Civil Partnership (Scotland) Act 2014 to include both same-sex and different-sex couples. The law on divorce applies to both but there is one particular point to note in respect of adultery. Adultery, as explained above, is one of the four ways in which to establish irretrievable breakdown, thus giving ground for divorce in terms of section 1 of the Divorce (Scotland) Act 1976.

Adultery was last defined in Scots law in 1958, by Lord Wheatley in *MacLennan v MacLennan*⁵ a case in which the court defined the act in terms of physical penetration and declined to treat an instance of artificial insemination as adultery. When civil partnership was introduced in 2004, as a same-sex equivalent to marriage, one of the very few legal differences between the two relationships was the omission of adultery from the methods for establishing irretrievable breakdown for the purposes of dissolution. The explanation at the time was that adultery was a legal concept defined in heterosexual terms and therefore it did not apply. Infidelity in any relationship could always be used as evidence of unreasonable behaviour, leading to either divorce

⁴ s11.

⁵ 1958 SC 105.

or dissolution. When in 2014, same-sex marriage became available in Scotland, it might have been thought this would lead either to the repeal of adultery as a ground for divorce or to the redefinition of adultery to make it relevant to both same-sex and different-sex marriage. In fact, neither of those options was taken but instead section 1 of the Divorce (Scotland) Act 1976 was amended as follows:

1(3A) For the avoidance of doubt, in relation to marriage between persons of the same sex, adultery has the same meaning as it has in relation to marriage between persons of different sexes.

In other words, adultery may be used to establish irretrievable breakdown of either a same-sex or a different-sex marriage but only in accordance with the definition of adultery as heterosexual sexual intercourse. As Kenneth Norrie comments: 'The hetero-specificity of adultery is not altered in any way but it will apply ... to all marriages irrespective of gender-mix'.⁶ Adultery is by far the least used of the grounds (only 32 divorces proceeded on the basis of adultery in 2015-16)⁷ and it stands out as discriminatory in an otherwise gender-neutral legal framework.

B. New Developments in the field of Maintenance between former spouses (since September 2002)

The starting point is to note, as was stressed in the original national report, that there is no provision in Scots law for maintenance post-divorce. Spouses (and since 2004, civil partners) owe an obligation to maintain each other during the existence of the relationship – the obligation of 'aliment'. The obligation of aliment, however, ceases on divorce (marriage) or dissolution (civil partnership) and maintenance, between adults, does not feature as a concept within Scots family law.

In 2002, marriage was the only formal legal relationship recognised by Scots law and it could only be formed by a different sex couple. In 2004, a new relationship of civil partnership was introduced, for same sex couples, which was almost exactly the same in legal terms as marriage.⁸ In 2014, marriage was redefined in Scotland to include both same sex and different sex couples.⁹ The obligation of aliment is set out in section 1 of the Family Law (Scotland) Act 1985 and the only significant amendment of it since 2002 has been to incorporate the relationship of civil partnership.

⁶ K. Norrie, "Now the dust has settled: the Marriage and Civil Partnership (Scotland) Act 2014" (2014) *Juridical Review* 135.

⁷ <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsCJS/CIDow16>.

⁸ Civil Partnership Act 2004.

⁹ Marriage and Civil Partnership (Scotland) Act 2014.

Section 1(1) now provides that an obligation of aliment shall be owed by, and only by:

- (a) a husband to his wife;
- (b) a wife to her husband;
- (bb) a partner in a civil partnership to the other partner

Paragraph (bb) was inserted by the Civil Partnership Act 2004, Sched 28(2), para 11. It should be noted that, although the language of paragraphs (a) and (b) has not been changed to reflect same-sex marriage, the obligation applies equally and is subject to the general provision in section 4 of the Marriage and Civil Partnership (Scotland) Act 2014, which provides that references in any enactment, however expressed, to marriage or to persons who are or were married are to be interpreted as including both different-sex and same-sex marriage.

On divorce (marriage), or dissolution (civil partnership), either party may apply to the court for one or more orders for financial provision on divorce (or dissolution). This is an integrated system, which incorporates both property division and the possibility of a periodical allowance. There is however no separate provision for maintenance and there appears to be only limited use of periodical allowance. The system was introduced by the Family Law (Scotland) Act 1985 and there have been no significant changes since 2002. Nor has there been any significant debate or proposal for reform. This is a well-established aspect of Scots family law, which currently shows little sign of change.

C. New Developments in the field of Parental Responsibilities (since December 2004)

There was no Scottish report as part of the Parental Responsibilities project.

D. New Developments in the field of Property relations between spouses (since August 2008)

Property relations between spouses, both during marriage and on divorce, are governed by the Family Law (Scotland) Act 1985. This statutory framework has not changed since 2008. While the definition of marriage was amended in 2014, by the Marriage and Civil Partnership (Scotland) Act of that year, to include same-sex marriage, this had no impact on the law relating to property with the provisions applying equally. There have as yet been no published or reported judgments of the Scottish courts which expressly deal with property relations between same-sex spouses.

The 1985 Act continues to give rise to relatively few reported judgments. Couples are free to reach their own agreements, with no need for judicial approval, and even where cases do come to court, they are rarely reported and only occasionally subject to appeal. There is therefore little evidence of any change in practice since 2008. The statutory framework for regulation of property on divorce was the focus of recent substantial research, the first major research review of the legislation during its existence.¹⁰ The research, which focused on analysis of 200 reported cases, and in-depth interviews with lawyers and judges, concluded that the 1985 Act was regarded as being '*a very good piece of legislation*' [Advocate 22]: '*a gem*' [Solicitor 05]. It was valued for being clear and well drafted. It was described as complex and sophisticated but very carefully constructed, with the provisions being well signposted and well-integrated in the statutory framework. There was widespread respect for the legislation and almost no desire for change. In fact there was a positive message from practitioners that they did not want substantial change. It should be noted, that this research focused on the views of legal professionals – solicitors, advocates and judges – and did not look at the experience of parties or wider social implications. Nonetheless, it confirmed the broadly unquestioned and settled nature of this area of family law in Scotland and it is therefore unsurprising that there have been no significant changes or updates to report since 2008.

E. New Developments in the field of De Facto Partnerships (since February 2015)

De Facto partnerships are regulated in Scotland through the law relating to cohabitants. The key provisions are set out in the Family Law (Scotland) Act 2006, which have not changed since 2015. There have been no significant new judicial decisions since 2015, with the volume of reported judgments remaining low.

There is however considerable dissatisfaction in practice with the law relating to cohabitants and, in the few cases which do proceed to final judgment, it is clear that there is a lack of certainty. The Scottish Law Commission is, therefore, currently reviewing the operation of the provisions of the 2006 Act as they apply to cohabitants. The review, which is part of the SLC's Tenth Programme of Law Reform,¹¹ commenced in 2019, a Discussion Paper was published in 2020¹² and, following a period of consultation, a Report of proposed reform is expected later in 2021. In the introduction to the Discussion Paper, the Scottish Law Commission acknowledged the work of CEFL as follows:

¹⁰ Mair, Mordaunt and Wasoff, *Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce*, 2018: accessible at <https://mk0nuffieldfounpg9ee.kinstacdn.com/wp-content/uploads/2019/11/Research20report1.pdf>.

¹¹ [Scot Law Com No 250 \(2018\)](#).

¹² [Aspects of Family Law Discussion Paper on Cohabitation](#).

The Commission on European Family Law (“CEFL”) has recently published principles relating to de facto unions. While the principles are aspirational only, and are not binding on the jurisdictions involved, we have been mindful of the work done by the CEFL in reaching consensus as to these principles, and of how these might help to inform this phase of our project.¹³

It is still too early to anticipate what reforms may follow from the Scottish Law Commission’s project. The first key question to be asked is as follows:

Should the regime for financial provision for cohabitants on cessation of cohabitation otherwise than by death remain separate from that for spouses and civil partners on divorce and dissolution?¹⁴

The answer to this question will of course determine the nature of the proposed reforms. While there is as yet no answer to the question, It is worth noting that the Discussion Paper goes on to set out an extensive range of further questions which seem to assume that the answer to the first question will be ‘no’. In other words, it seems likely that the regime for cohabitants – or de facto partnerships – will remain separate from marriage and that the focus will be on improvement and modification of the specific provisions for cohabitants. While there is much which as yet remains undecided, there are some preliminary matters of scope which have been settled. These include that the project will not consider rights on death and it will exclude consideration of multiple partner, purely platonic or caregiver relationships: in other words, whatever the resulting reforms, they will continue to focus on two-partner, conjugal relationships.

¹³ Ibid, at para 1.41.

¹⁴ Ibid, at para 2.66.