

## **Response to consultation on 10<sup>th</sup> Programme of Law Reform**

### **Response from SKO Family Law Specialists 31 July 2017**

SKO actively welcomes the Scottish Law Commission's potential interest in family law as an area for a possible project in the context of the 10<sup>th</sup> programme of law reform. We, as a firm, are firmly of the view that there are areas of family law in which the law has not kept pace with social change. There are also areas of family law which are inconsistent with one another. Further, there are areas of family law which are fragmented and would benefit from consolidation. For all of these reasons we consider that a review of family law would have genuine real world impact on the vast numbers of Scots who come into contact with this area of law.

We hope that the Commission (and other law makers) might be receptive to our suggestion that family law be the subject of a comprehensive review. We, along with many others, have nothing but praise for the work of the Commission which resulted, in particular, in the terms of the Family Law (Scotland) Act 1985. It is our experience that smaller, more fragmented law reform measures since then have not resulted in the same quality of legislative provision. Some elements of our family law provision are lauded by our colleagues in other jurisdictions. We see this as an opportunity for all aspects of family law to reach that same quality.

In support of our submission that family law be considered for a holistic review we take this opportunity to highlight some specific issues which would particularly benefit from the Commission's attention.

#### **Marriage**

It is our view that the law of marriage should be considered in the context of adult relationships more widely. Marriage should not be reformed or reviewed in isolation but in the context of consideration of civil partnership reform and the law of cohabitation. It may be that one piece of legislation setting out the different classifications of adult relationships and the protections associated with them would serve the population well.

It may be that the law of formation of marriage should be reviewed. At present it is potentially discriminatory insofar as automatic qualification of some celebrants are concerned.

#### **Cohabitation**

If adult relationships are to be considered as a whole then the definition of cohabitation is one matter which requires particularly careful attention. There is a considerable amount of judicial discretion in recognising cohabiting relationships with a limited degree of consistency in the exercise of that discretion.

The time limits for applications in terms of Sections 28 and 29 of the Family Law (Scotland) Act 2006 are so short as to cause substantial injustice, particularly in so far as claims on death of a cohabitant are concerned. The short time limit often results in increased conflict because Court actions have to be raised simply to prevent actions being time barred.

It would be helpful to have legislative clarification as to whether unjustified enrichment remains available as a remedy for those couples in intimate relationships who do not fall within the ambit of the 2006 Act.

There is, at present, some lack of clarity about the interaction between the law in relation to financial provision on divorce and the financial claims that might be made for cohabitants. It is perfectly likely that a very long cohabitation might be followed by a very short marriage. In circumstances where similar wording is used within the 2006 Act and within the 1985 Act there is a lack of clarity about how financial arrangements between such a couple would be determined.

### **Contracts**

As present Scotland is believed to have a clear position on the enforceability of marital contracts, whether entered into before the date of marriage or after the date of marriage (including those contracts which postdate separation).

There is huge scope here for the resources of the Commission to be brought to bear in a way which would give us a world leading approach to contracts in the sphere of intimate adult relationships. Of particular interest would be clear legislative provision in relation to applicable law and reform to achieve a consistent approach in relation to contracts between cohabiting couples, between married couples and between separating couples (for instance, Section 16 of the 1985 Act presently only applies to agreements entered into between the parties to a marriage, not cohabiting parties).

### **Divorce**

Although relatively recently revisited, the pace of social change in relation to attitudes about separation is rapid. The continued (discriminatory) availability of adultery as a ground for divorce may not be an appropriate use of judicial resource. It may very well be that social attitudes have now moved to a point where divorce on demand should be considered (with a waiting period for those couples where one party does not wish to be divorced). The difficulties presently before the Court in England<sup>1</sup> illustrate the difficulties with which the Court and practitioners are faced when a party must compile and focus on their spouse's behaviour in order to obtain remedies which are primarily financial in nature.

Although we appreciate that procedural matters are for other bodies, there are good grounds for reviewing the statutory requirement that divorce can only be granted when the Court has been satisfied that the arrangements in place for the care of the child (ren) of the marriage are satisfactory. That results in divorce being a very laborious and expensive process for married people who are parents to children under the age of 16. We believe that this legislative provision was intended to have a child protection purpose. However, it is our experience in practice that the provision of detailed Affidavits in line with the practice notes from the Sheriffs Principal rarely, if ever, has the effect of protecting a child. We submit that that requirement should be the subject of review in the context of review of adult relationships.

On the whole we do not consider that the provisions of the Family Law (Scotland) Act 1985 relating to financial provision on divorce should be altered. The amendments which have been made to that Act should be reconsidered, particularly in relation to the "appropriate valuation date" now included as an alternative to the "relevant date". However, the statutory framework within which the procedural rules operate does require to be updated. It is curious that we have no statutory requirement for full disclosure of assets and liabilities on divorce. It results in expensive and cumbersome Court procedure (usually by means of a motion for commission and diligence). It is hoped that the bodies responsible for Court procedure will be introducing reform to achieve a system for application for divorce and

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<sup>1</sup> Owens v Owens [2017] EWCA Civ182

financial orders which is much more readily understood by the public. The present system of traditional pleadings is badly understood and difficult to operate for those outwith the legal system. Those reforms will be aided if the statutory framework is modernised.

On the whole, financial provision for children is now dealt with in the Child Support legislation on a UK wide basis. However, there is one peculiarly Scottish element in terms of Section 9 (1) (c) of the 1985 Act which allows the Court to make appropriate financial provision where one of the parties to the marriage will have the economic burden of caring for the children of the marriage under the age of 16. That age should potentially be reviewed, particularly in the context of Child Support legislation which is based on a public policy decision that children should be supported by their parents up until the end of their secondary schooling.

### **Protective orders and domestic abuse cases**

This area of the law is in desperate need of consolidation. These cases involve particularly vulnerable people for whom the law is impenetrably complicated. There are multiple different protective remedies available, all contained in different statutes and with different threshold tests. This is significantly unsatisfactory, particularly in such a sensitive and socially important area of law.

It is suggested that any review of this area of the law should also look at the interaction with the criminal law and child protection law in so far as they interact (or don't interact) with family law legislation. Some families find themselves subject to three different legal regimes simultaneously and some measure of consistency would go some way to easing the current difficulties in the way the system responds to these families.

### **Appropriate dispute resolution**

The Civil Evidence (Family Mediation) (Scotland) Act 1995 is the primary basis of legislation in this area. It would benefit from review bearing in mind the evolution and development of mediation in family cases since its inception. In particular, it would be helpful if the law could clarify whether family mediation in Hague Convention Child Abduction cases is or is not subject to statutory protection.

In addition to that other forms of appropriate dispute resolution have emerged, many of them specific to the sphere of family law. Family law clients are offered a menu of options including litigation, family mediation (for which there is a statutory framework), collaborative law, family arbitration and solicitor led joint meetings. Clarification of the framework within which these operate would be helpful. At present the framework is largely contractual. That may be a satisfactory arrangement but it would be preferable if that were an active policy decision within a framework that recognises the modern practice of family law.

### **Child residence and contact**

The principles underlying part 1 of the Children (Scotland) Act 1995, continue to serve children well, particularly the emphasis in the best interests of the child and the principle of minimum intervention. However, we are very clear that the terminology used in the Act is not helpful. The words "residence" and "contact" create a sense of two different tiers of parent. Neutral language would be equally consistent with judicial discretion to put in place whatever arrangement serves the best interest of each particular child. It would be easier if Court orders simply indicated when the child stays with each parent or set out times when a parent has care of a child.

There is very significant inconsistency in relation to the approaches taken by different Sheriffs to obtaining the views of a child. Whether the Sheriff takes the views directly, takes the views on written form using a form F9, appoints a curator ad litem, appoints a Court reporter or appoints a child psychologist tends to depend on local practice rather than any policy decision. That is unsatisfactory for the families involved.

Curators ad litem remain appointed at common law with limited, if any, case law by reference to which their roles and responsibilities are defined. That is not consistent with a modern, streamlined approach to family justice.

### **Grandparents' rights**

We mention this because we are aware that there is some political momentum for reviewing this topic with a view to giving grandparents rights. We consider that it would be an error to review this area in isolation. At present, the whole Scottish judicial system takes a very child centred approach to all decisions in relation to children. Any person with an interest can apply to the Court and that would include grandparents. We think it likely to lead to injustice and inconsistency if rights are awarded to certain adults by virtue of their genetic connection to a child's parents. We suggest this underlines the needs for a holistic review of family law.

### **Parental rights and responsibilities**

We question, again, the terminology used here. The idea of rights accruing to parents creates a considerable amount of conflict and removes the emphasis from the child at the centre of dispute. If these were regarded as legal responsibilities that might assist considerably. We propose that there be a wholesale review of which adults have responsibilities to a child. That review should take into account both terminology and substance. That would allow for proper consideration of the issue of grandparents rights in a child focussed way.

### **Assisted reproduction**

It is appreciated that this is a reserved matter and therefore there are limits as to the extent to which the Commission will be able to review this issue, particularly in light of the fact that we understand that surrogacy is presently being considered by the English and Welsh Law Commission, a project into which we hope the Scottish Law Commission has an opportunity to contribute (we would note that there does seem to us to be insufficient research on social attitudes in this area and it may be that up to date research would assist in law reform recommendations).

However, the concept of who is a legal parent does require to be considered carefully in a Scottish context to ensure that there is consistency across all areas of law. If (as we suggest) the law is to start from the perspective of the child then it seems necessary that the various ways in which a person can acquire a formal legal relationship with that child should be consistent and preferably codified in one place.

We would also suggest that the process for registration of a birth might be updated to reflect current family structures, perhaps with potential for a birth certificate to record legal parents and genetic parents, where these differ.

### **The definition of "child"**

This is inconsistent across different areas of the law and we suggest that some measure of consistency would be helpful.

### **Adoption and permanence orders**

At present the rules on permanence are unclear and difficult to explain to clients. They have also been the subject of adverse comment from the UK Supreme Court, particularly with regard to Section 84 of the Adoption and Children (Scotland) Act 2007<sup>2</sup>. Those provisions should be reviewed again. It is particularly important that parents who are to be deprived of their parental rights and responsibilities should have the ability to understand the law. This area of the law is of critical importance to social workers and health professionals. It should be clear and readily understood by those without legal education. That is not presently the case.

We suggest that it is unhelpful that there are currently different tests for granting a permanence order, granting a permanence order with authority to adopt and for adoption.

### **Domicile**

The law of domicile remains relevant for family lawyers in a number of different contexts and will become more important at the point when Brexit takes effect. As such it is important that it be updated to reflect modern family structures. For instance, children born to same sex parents may have some difficulty in identifying their domicile of origin.

### **Conclusion**

We hope that the areas highlighted above demonstrate the need for a comprehensive review of family law with a view to codification and modernisation. We suggest that family law is of crucial importance to individual members of the population and to society at large and that it is eminently suitable for inclusion in the Commission's 10<sup>th</sup> programme of law reform.

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<sup>2</sup> *Re EV (A Child)* [2017] UKSC 15