

# Current Challenges in Scottish Family Law

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## Introduction

In 1988 the UK Parliament, with conscious malignity and etymological illiteracy, prohibited local authorities from promoting “homosexuality as a pretended family relationship”<sup>1</sup> (subsequently providing the model for more recent legislation to the same effect in Mr Putin’s Russia). One of the first things the Scottish Parliament did after its (re)establishment was to repeal the so-called “section 28”.<sup>2</sup> To their shame, Scottish Conservative MSPs voted unanimously to retain the prohibition, while not a single other MSP did so.<sup>3</sup> Fourteen years later the Scottish Parliament passed the Marriage and Civil Partnership (Scotland) Act 2014, a far starker rejection of the distaste for same-sex families embodied in section 28. Within the overall majority of 105 to 18, Scottish Conservative MSPs voted 8 against and 6 in favour of the 2014 Act, revealing a party still predominantly resistant to an expanded conception of the family, though less overwhelmingly so than in 2000.<sup>4</sup> The change in voting patterns between 2000 and 2014 reflects but is not wholly explained by the general weakening of social conservatism in Scottish society. There has in addition been a shift in the understanding of what family law is actually for.

Family law traditionally was the state’s means of encouraging particular forms of family relationship (most obviously, through the legal preferences and protections afforded by the institution of marriage) and of discouraging other forms (by refusing legal recognition to unmarried couples, by disadvantaging the “illegitimate” child, and by dismissing same-sex relationships as “pretended”). Today, however, legislatures across the (western) world have lost their appetite for using family law in this directory fashion, and instead have adopted a more regulatory approach which

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<sup>1</sup> Local Government Act 1988, s.28.

<sup>2</sup> Ethical Standards in Public Life etc (Scotland) Act 2000, s.34.

<sup>3</sup> Though two SNP MSPs (Dr and Mr Ewing) abstained.

<sup>4</sup> In England in the second reading debate on the Marriage (Same-Sex Couples) Bill 2013 Conservative MPs voted 136 against and 127 voted in favour.

seeks to give space to individuals to construct their family lives in a way that they choose as most suitable for them: a model, in other words, of social liberalism in the tradition of John Stuart Mills. But this new approach creates new challenges, which can be seen in both the main aspects of family law: regulation of adult domestic relationships, and of the parent-child relationship.

### **Adult Relationships**

By the Family Law (Scotland) Act 2006, the Scottish Parliament achieved for Scotland what no other part of the United Kingdom has yet been able to achieve: substantial formal recognition of cohabiting couples, carrying practical (financial) consequences for the individuals concerned. Previously, the mutuality of rights and obligations inherent in marriage were limited to marital couples, and unmarried couples were left to utilise, as best they could, such legal mechanisms as contract, will, and unjustified enrichment to protect the interests that family law protected through marriage. But the increasing number of cohabitants clearly showed that the assumption underpinning this, that couples could be encouraged to marry by withholding marital benefits from those who did not, was flawed, and the major effect of the non-recognition of cohabitation was to make more vulnerable the economically weaker of the two (typically women) – as well as, paradoxically, giving an incentive to the economically dominant (typically men) to avoid marriage with its range of financial consequences.

But the 2006 Act does not make the financial claims of the cohabitant equivalent to those of the spouse (as similar legislation in, for example, Australia and New Zealand does). Instead, there are provisions to ensure that what a court awards on death or separation will be less than what might be sought at the end of a marriage/civil partnership. The Act is designed to respond to the reality that domestic relationships can create financial imbalances irrespective of how they are legally structured, but at the same time to retain an institutional preference for marriage/civil partnership. The main flaw in this approach is that the 2006 legislation gives no clear picture of what it is trying to achieve for cohabitants. Courts are given little guidance on how to value the claims, and in the absence of any clear indication of the very purpose of the claims courts have struggled to exercise the discretion the

Act gives them with any consistency. It took the Supreme Court to tell us that, looking at the background papers that accompanied the Family Law (Scotland) Bill in 2005, together with the debates at Holyrood on that Bill, the underlying principle (at least in a claim on separation) is one of “fairness”. This is useful, so far as it goes, but fairness, like beauty, lies in the eye of the beholder and the end result is that determination of the aim of the law has passed from the legislature to the judiciary. This might, perhaps, be an inevitable consequence of family law’s change in overall purpose from directory to regulatory, but it does mean that parties have nothing to lose by raising speculative actions. Such encouragement is never good legal policy.

The policy objectives behind the Marriage and Civil Partnership (Scotland) Act 2014 were far clearer but its passing signifies, even more than the 2006 Act, the Scottish Parliament’s acceptance that family law’s role is no longer to encourage certain forms of family over others but rather to reflect and regulate family life as it is in fact led. It is as well to remind ourselves how recently the law in Scotland acted to diminish and destroy same-sex families for religious/ideological reasons. As noticed above, “section 28”, with its dismissive message of contempt, remained in force until 2000, as did differential ages of lawful sexual activity; the Scottish courts were, as late as 1995, removing children from their mothers who entered lesbian relationships; anti-discrimination legislation did not cover discrimination on the ground of sexual orientation until 2003, before which it was lawful to refuse to employ or promote, or to pay less, gay and lesbian people; it remained lawful to refuse to provide goods and services to gay and lesbian people until 2007; joint adoption by same-sex couples was not permitted until 2009; and it took Strasbourg until 2011 to accept that same-sex couples had a right to respect for their family life under article 8 of the European Convention on Human Rights.

The Marriage and Civil Partnership (Scotland) Act 2014 is the culmination of these statutory developments if, paradoxically, one of the least significant in terms of strict legal effect (given the substantive effects of the original Civil Partnership Act 2004). Underpinning the Parliamentary debates on the Bill were very different conceptions not only of the meaning of marriage, but also and more profoundly of the very role of the law in regulating family life. Was marriage an institution of such venerable age, or of such divine creation, that it was simply not in the realm of the law to change its essential nature? Is the role of the law to create an environment in which all families

have the greatest opportunity to thrive, irrespective of how they are structured, or to give effect to the state's decisions as to which forms are most likely to lead to the greatest good of society itself? And if the latter, what forms of evidence might law- and policy-makers legitimately use to determine which type of family structure is socially most beneficial?

In the event, the practicalities of accommodating same-sex couples within marriage were remarkably straight-forward, for most of the work in removing the rules that had traditionally ensured the legal dominance of the male spouse and legal subservience of the female spouse had been done long ago. The real focus of dispute as the Bill was being debated was how to provide space in the public domain for those who cannot or will not reconcile their own consciences to the law as it now stands.

The Marriage and Civil Partnership (Scotland) Act 2014 offers some accommodation to religious opponents of same-sex marriage and civil partnership, to the extent of ensuring that neither religious bodies nor individual members thereof are required to be involved in the legal creation of such relationships. But the Act certainly does not exempt religious believers from having to accept, and act upon the fact, that couples are married: religious believers remain subject to the general law. So it is no infringement of the right to freedom of thought, conscience and religion for the state to refuse to employ (or to continue to employ) as a district registrar an individual who does not want to be involved in registering same-sex marriages or civil partnerships. Bed and breakfast owners who refuse to allow same-sex couples a double room are still guilty of unlawful discrimination. A local authority may still refuse to register as foster carers religious believers who put their own faith above the authority's non-discrimination policies. Though there were calls for a much broader "conscience clause", the Scottish Parliament was very wise to resist these calls, for they amounted to no more than a claim for general exemption for religious people from the legal obligation not to discriminate.

Allowing an exemption from taking part in the (legal) creation of the relationship may well have been a necessary compromise in order to neutralise opposition. However, the challenge for the future is not to ensure that this compromise works, but rather to ensure that it becomes less and less necessary. Law- and policy-makers need to encourage all sections of the community to recognise the essential benignity of

same-sex relationships – and indeed of unmarried relationships. Thought it is not for any Parliament to tell citizens what they can and cannot believe, legislatures can (and should) adopt policies that allow all families, irrespective of their structure, to thrive; they can (and should) create a social environment in which the harmful effects of some religious beliefs are minimised. Ensuring that teachers are aware of the insidious effects of homophobic bullying can do a lot. Not permitting teachers or other leaders to endorse any second class status for those of any minority, whether sexual, racial or religious, can do more. Challenging bigotry and assumptions of heterosexual superiority wherever they are found – in the classroom, the football terraces or even the pulpit – can help to build a society in which families are valued and nurtured for the functions they perform as opposed to the norms that they adhere to. That is a legitimate role for the Scottish Parliament, and a clear challenge for them.

### **The Parent-Child Relationship**

For most of our history the centre of gravity within the family, and the focus of family law, was the marital relationship between a husband and a wife: everything flowed from that relationship, not only the responsibilities and rights between the married couple themselves but also the legal connection they had with their children. The status of the child was traced to the marriage of the child's parents and the so-called "illegitimate" child suffered serious social and legal detriments. Marriage, indeed, served as a mechanism both for establishing the legal relationship between children and their fathers and for conferring on the father a role in the child's upbringing. Marriage was the mechanism by which men were tied not only to their wives but also to their children.

Today, however, the centre of gravity in family life has shifted to the parent-child relationship, and the predominant concern of the law needs to be to regulate that relationship in a way that gives all children the best chance to thrive. Of all the theories of child development, the one thing that we can be most sure of is that children tend to thrive in an environment of stability and security. Families today are clearly much more complex and fluid than in the past, with reconstituted families, step-parenthood, single-parenthood, kinship care of children, and same-sex

parenthood all becoming more common. Given this, the major challenge for the future is to ensure that children are able to be brought up in stability and security while recognising, and accommodating, the reality that family life today takes a variety of different forms. Again, therefore, regulating the *function* of families in creating the right environment for children is a much more important role for the law than directing the *form* any individual family ought to take.

That environment depends, of course, on how parents see their role. Too often, parents perceive the parent-child relationship in terms of “rights”, reflecting the fact that the governing legislation, the Children (Scotland) Act 1995, continues to use the language of parental rights. Yet juridically speaking there are no “rights” here: in disputes between parents, or between parents and others, the court does not make its decision by weighing conflicting “rights” but by identifying the child’s welfare. This continued emphasis on rights has almost certainly contributed to the failure of the two main policy objectives of the 1995 Act: to reconceptualise the parent-child relationship as one of parental responsibility, and to encourage joint parenting after parental separation. The social perception of the parent-child relationship, and of how disputes on parental separation should be resolved, remains much as it was before 1995. Men, in particular, have resisted seeing parenthood as one of responsibility and while they have fully embraced the concept of shared parenting after separation they have all too often done so within the context of attempts to vindicate their own rights to continued involvement in their children’s lives. Women, in particular, have been resistant to the notion of joint decision-making after parental separation and all too often assume that sole residence gives them the right to be sole decision-maker.

The legislature in England, recognising the importance of language, has recently tackled this problem and moved away from a legal process that “grants” residence to one parent and contact to the other in favour of “child arrangement orders”.<sup>5</sup> Additional effort is made to encourage shared parenting and the English legislation creates a presumption (strongly opposed, in some quarters) that continued involvement in a child’s life by the non-resident parent will further the child’s welfare. Scotland would do well to watch closely how these changes to English law work in

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<sup>5</sup> Children and Families Act 2014.

practice, but the lesson from the 1995 Act is that legal change alone does not change parental expectation, or parental demand: what is needed is public education to effect a change in mindset of what being a parent is actually about – shared responsibility, not individual right.

One part of this is for the law to be far more robust in dealing with the recalcitrant parent who simply refuses to allow their ex-partner any role in their child's upbringing. How to enforce contact orders is an old debate that continues to be bedevilled by gender-politics. Mostly the argument is between resident mothers and non-resident fathers and organisations such as Fathers 4 Justice, though they tendentiously structure their arguments in terms of children's rights (to have and to know a father), exacerbate very unhelpfully a gender split emphasised by their very name. Yet the law does seem virtually powerless to enforce orders that it makes over children if the resident parent (the main carer, usually the mother) refuses to obey it. It happens (at least in Scotland) only in the most extreme and egregious of circumstances that a mother is imprisoned for contempt of court by defying contact orders. Courts need to be more willing to use this remedy, and need to be open to the development of other responses that would make it far less palatable for resident parents to defy court orders. Some countries revoke driving licenses, or reduce state benefits before the extreme of imprisonment. In return, non-resident parents must be encouraged to accept that the child's need for stability and security will sometimes require that they step back and recognise that continued disputes about what is in the child's welfare are, in themselves, likely to act against that very interest. Being a parent requires the parent to sacrifice their own interests.

Another part of this is for parents – and “small government” politicians – to accept that the state has a supervisory role to play. At the extreme, the state has the power (and duty) to impose compulsory measures of child protection when the upbringing process has been seriously compromised: few would challenge the state's role in such circumstances. The Children and Young People (Scotland) Act 2014, however, goes much further and seeks to provide support for families at an earlier stage, when it is still possible to effect sufficient change within the family to render later compulsion unnecessary. The “named person” provisions, which attracted much ideological opposition, are a central feature in the sharing of information amongst agencies to ensure that the problems in particular children's lives are not overlooked

(as has happened, with tragic consequences, too often in the past). It is misleading and unhelpful to castigate these provisions as the “nanny state” imposing “state guardians”. Guardians are decision-makers, while named persons are information facilitators with no power to overrule parental decisions. We must never forget the unpalatable fact that most children who are injured by adults are injured within their own families: any measure designed to allow early identification of potential problems within families must, therefore, be a good thing, though these measures will work only if the resources are there to provide the necessary support.

The provision of such resources – which will of course be directed to some of the least popular sections of the community (families living with low educational achievement, unemployment, addiction, violence and criminality) – lies ultimately in the hands of politicians. Since every child is valuable, no matter who their parents are, the major challenge for Scottish family law is for politicians to see past the unpopularity and increase the supports available to vulnerable families as a whole. By these means, all children can be nurtured by the society of which they are members, and society as a whole will benefit.