

The Changing Concept of ‘Family’ and Challenges for Family Law in Scotland

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1. Introduction	1
2. Horizontal Relationships Between Adults	2
2.1 Divorce	2
2.3 Financial Provision on Divorce.....	3
2.4 Same-sex Couples	4
2.5 Cohabiting Couples	6
3. Vertical Relationships: Parents and Children	10
3.1 Parental Responsibilities and Parental Rights	10
3.2 Adoption of Children	13
3.3 Parenthood Through Artificial Reproduction	14
3.4 Child Protection	15
4. Individual Family Law	16
4.1 Status of Children	16
4.2 Gender Status.....	17
5. Future Challenges	20

1. Introduction

Scots law, no less than the law in any other European country, both reflects the society it serves and, by setting out a hierarchy of family forms that it

preferences, serves to influence the way in which family life is led. Scottish family law, like social attitudes, has been in a state of almost constant flux since the mid-1970s, and it is noteworthy that the major driver of legal change has been legislative rather than judicial.

2. Horizontal Relationships Between Adults

2.1 Divorce

In the 1970s the major political debates around marriage concerned its termination and, in particular, the place of fault within the termination process. No-fault divorce was (partially) introduced into Scots law by the Divorce (Scotland) Act 1976, which restructured the grounds for divorce. Technically, between 1976 and 2004, there was only one ground for divorce – that the marriage had broken down irretrievably – though in reality there were five grounds since irretrievable breakdown could be shown only by establishing one or more of five stated circumstances. Three of these circumstances were fault-based – adultery, desertion and unreasonable behaviour – and could justify immediate divorce. The innovation came with the other two circumstances, which could be shown irrespective of fault: (1) that the parties had not cohabited for a period of two years and agreed to divorce, and (2) that the parties had not cohabited for a period of five years but the defender did not agree to the divorce. An additional ground for divorce, quite separate from irretrievable breakdown, was added into the 1976 Act by the Gender Recognition Act 2004 (a UK statute): that one of the parties had obtained an interim gender recognition certificate. The periods of two and five years were reduced to one and two years respectively by the Family Law (Scotland) Act 2006, which also, consequentially,

abolished desertion as a ground for divorce.¹ Identical amendments were made by the 2006 Act to the grounds for dissolving a civil partnership.²

2.3 Financial Provision on Divorce

More crucial, perhaps, for the notion of no-fault divorce than the grounds upon which it might be obtained was the substantially reduced role that fault now plays in the readjustments to the financial position of the parties that it is open to a court to make when terminating a marriage or civil partnership. Prior to 1985 the courts had a virtually unlimited discretion,³ and though courts were able to make either an order for a periodical allowance or for the payment of a capital sum, they tended to prefer the former, and reflect in the award their assessment of who was to blame for the marital breakdown. All this changed with the Family Law (Scotland) Act 1985, which favours certainty over flexibility, and a clean break between the parties over continued obligation. That Act provides five justifications for granting any financial provision (fair sharing of matrimonial property, balancing of advantages and disadvantages, fair sharing of the costs of bringing up children, affording dependents time to adjust, and relieving serious financial hardship): any claim must be justified by one or more of these principles. The Act also contains structural encouragements to the courts to avoid periodical allowances in favour of clean-break transfers of capital.⁴ Conduct is to be left out of account in determining the appropriate financial provision, unless the conduct has adversely affected the financial resources

¹ Family Law (Scotland) Act 2006, s 11, amending Divorce (Scotland) Act 1976, s 1(2).

² Family Law (Scotland) Act 2006, sched 1 para 9, amending Civil Partnership Act 2004, s 117(3).

³ Divorce (Scotland) Act 1976, s 5.

⁴ For details, see Kenneth Norrie in Jens Scherpe (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing, 2012) at pp. 289 – 310.

available, or it would be manifestly inequitable to leave the conduct out of account.⁵ Though sometimes criticized as being too inflexible,⁶ there has been no serious call to amend the Scots law of financial provision on divorce since 1985. There have of course been a myriad of cases clarifying how the rules are to be applied,⁷ but these have involved matters of statutory interpretation and there has been no scope for judicial development of the policy imperatives underpinning financial readjustment at the end of a marriage or civil partnership.

2.4 Same-sex Couples

The 1990s saw a profound social change in attitudes towards same-sex relationships, and that decade also saw a radical shift in judicial perceptions.⁸ The House of Lords recognized in a series of English cases that there was no reason in principle why same-sex couples should be unable to access common law remedies from which they were not explicitly excluded.⁹ More importantly, in *Fitzpatrick v. Sterling Housing Association*¹⁰ the House of Lords interpreted a statutory provision that gave benefit to members of a deceased tenant's 'family' to include a same-sex couple.¹¹ This case, though its practical effects were limited to a single statutory

⁵ Family Law (Scotland) Act 1985, s 11(7).

⁶ See for example the judgment of Lord Hope of Craighead in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24. For disagreement with Lord Hope's views, see Eric Clive, 'Financial Provision on Divorce' (2006) 10 Edin. L.R. 413 and Kenneth Norrie 'Clean Break Under Attack' 2006 JLSS (July) 26.

⁷ This is inevitable since the process, like divorce itself, is a judicial process which requires a court decision unless the parties can agree amongst themselves.

⁸ See further Kenneth Norrie, 'From Decriminalisation to Marriage: Changing Political, Judicial and Religious Attitudes in the United Kingdom to Gay and Lesbian Families' in Hanne Petersen (ed), *Contemporary Gender Relations and Changes in Legal Cultures* (Djøf, Copenhagen, 2013), 181 - 210.

⁹ *Tinsley v Milligan* [1994] 1 AC 340; *Wayling v Jones* [1995] 2 FLR 1029.

¹⁰ [1999] 4 All ER 705.

¹¹ It took the European Court of Human Rights a further ten years before it recognized that a same-sex couple could have a right to respect for their family life under article 8 of the European Convention on Human Rights (*Schalk & Kopf v Austria* (2011) 53 EHRR 20) though it had dealt with the very issue in *Fitzpatrick* earlier under the 'private life' part of article 8: *Karner v Austria* (2008) 38 EHRR 24.

provision, had a profound effect on judicial and legislative thinking, for it signalled unambiguously that same-sex couples, as 'family', were to be accorded the respect that the law shows to opposite-sex unmarried couples.¹² Of more practical significance (once that point of principle had been accepted) was the case of *Ghaidan v. Godin-Mendoza*¹³ where the phrase most commonly used to identify unmarried conjugal couples, that is to say couples 'living together as if husband and wife' was interpreted to include same-sex couples – a step that the House of Lords had felt unable to take only five years previously in *Fitzpatrick* but which was now mandated by the Human Rights Act 1998.

The most significant development for same-sex couples came, of course, in 2004 when the UK Parliament (with authority to legislate for Scotland in this devolved matter conceded by the Scottish Parliament) passed the Civil Partnership Act 2004. Part II of this Act applies to Scotland and it creates a civil partnership regime that gives to same-sex couples virtually all the rights and responsibilities accessible by opposite-sex couples in Scotland through the institution of marriage. Civil partnership, as originally designed, did not quite replicate marriage, in its method of entry or its rules for exit. Civil partnership may currently be created only by civil process at the hands of a district registrar and not also, as marriage may be, by a religious celebrant. This, however, changed with the coming into effect, at the end of 2014, of the Marriage and Civil Partnership (Scotland) Act 2014.¹⁴ The primary purpose of this Act is to open marriage to same-sex couples but it also amends civil partnership and will allow civil partnership registration (and same-sex marriages) to

¹² See Kenneth Norrie, 'We Are Family (Sometimes): Legal Recognition of Same-Sex Relationships After *Fitzpatrick*.' (2000) 4 Edin. L.R. 256.

¹³ [2004] 2 AC 557.

¹⁴ For details of the full effects of this Act, see Kenneth Norrie, 'Now the Dust has Settled: The Marriage and Civil Partnership (Scotland) Act 2014' (2014) J.R. 135.

be effected at religious and 'belief' ceremonies,¹⁵ and in any place a civil marriage might be conducted.¹⁶ The two existing differences between marriage and civil partnership relating to dissolution will, however, remain even after marriage is opened to same-sex couples though only one will affect such couples. First, a civil partnership is not voidable, as a marriage is, on the ground of one of the party's incurable impotency at the time it was entered into¹⁷ and the Marriage and Civil Partnership (Scotland) Act 2014 explicitly restricts this rule to opposite-sex marriages.¹⁸ Secondly, adultery, which remains one of the grounds for terminating a marriage, is not a ground for dissolving a civil partnership and adultery, as presently defined in explicitly heterosexual terms, is to remain a ground for divorce whether the marriage is same-sex or opposite-sex.¹⁹

2.5 Cohabiting Couples

Shortly after the passing of the Civil Partnership Act 2004, the Scottish Parliament turned its attention to cohabiting couples, that is to say couples who live together in a conjugal relationship but who have neither married nor entered a civil partnership. Finally enacting the 1990 recommendations of the Scottish Law

¹⁵ A 'belief' ceremony is one conducted by philosophical organisations whose beliefs are non-religious. The proposal is designed to deal with and remove the (rather pleasing) paradox that the Humanist Society Scotland, in order to be allowed to conduct marriage ceremonies, was recognized by the Registrar General of Scotland as a 'religious' body.

¹⁶ While English law tends to concentrate on the *place* of marriage, Scots law has traditionally controlled *who* may conduct the ceremony. The emphasis on place of civil partnership registration that currently appears in Part II of the 2004 Act is an alien infection traced to that emphasis in Part I of a Westminster-designed statute. The Marriage and Civil Partnership (Scotland) Act 2014 scraps the process for authorising places, but retains for all civil marriages and civil partnerships a prohibition on the place being a religious place.

¹⁷ This is the only ground in Scots law upon which a marriage is voidable (as opposed to void).

¹⁸ Marriage and Civil Partnership (Scotland) Act 2014, s.5(1).

¹⁹ So a same-sex couple can have their marriage but not their civil partnership terminated if one of the parties indulges in heterosexual intercourse: Marriage and Civil Partnership (Scotland) Act 2014, s.5(2) (inserting a new s.1(3A) into the Divorce (Scotland) Act 1976).

Commission,²⁰ the Family Law (Scotland) Act 2006 substantially extends the existing legal consequences of cohabitation. Section 25 defines 'cohabitant' as someone who lives with another as if they were husband and wife or as if they were civil partners. There is no requirement for the cohabitation to have subsisted for any particular period of time, though the discretionary element allows the judge to take length into account in determining the award to make. The two major provisions relating to cohabitants are sections 28 and 29, dealing with financial claims at the termination of the relationship by, respectively, separation or death. The crucial feature of both these sections is that the financial claims that an ex-cohabitant may make against the other or the other's estate are deliberately designed to be less valuable, and from a judicial perspective much more discretionary, than those available to ex-spouses and ex-civil partners.

Section 28 allows the court, on the application made within a year of the termination of the cohabitation, to make (1) 'an order requiring the other cohabitant to pay a capital sum of an amount specified in the order to the applicant', taking account of (a) whether (and if so to what extent) the defender has derived economic advantage from contributions made by the applicant and (b) whether (and if so to what extent) the applicant has suffered economic disadvantage in the interests of the defender and (2) 'an order requiring the defender to pay such amount as may be specified in the order in respect of the economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents'.²¹ The statute deliberately avoids identifying the reason why the court should make any award at

²⁰ Scottish Law Commission, *Report on Family Law* (Scot Law Com No 135, 1990).

²¹ Though the disadvantages relevant to the first claim may include those constituted by the costs of bringing up any child irrespective of that child's parentage, a direct claim for sharing the costs of bringing up a child may be made only in respect of a child whose parents are the cohabitants themselves.

all, which is very different from the highly structured list of 'justifications' that underpin a claim for financial provision on divorce: the Scottish Parliament took the view that the circumstances of cohabiting couples are likely to be so diverse and individual that it would be inappropriate to restrict the discretion of the courts. The Court of Session, in the first appeal case, took a very restrictive view and held that the purpose of section 28 was to ameliorate only 'clear and quantifiable' disadvantages suffered by one party acting with the intention of benefiting the other; the Supreme Court, however, took a much more expansive view.²² According to Lady Hale the starting point should be to compare the position of the parties at the start of the cohabitation with their position at the end, and to make such order as would fairly reflect the difference. Lord Hope rejected the Court of Session's conclusion that any disadvantage suffered by one cohabitant was recoverable only if intended to confer a benefit on the other: rather, any disadvantage suffered in the furtherance of the relationship is potentially recoverable. He also drew attention to the background papers relating to the Act, including the Scottish Law Commission's 1990 *Report on Family Law* and various ministerial statements made as the Bill was going through the Scottish Parliament, before concluding that, though the word does not appear in section 28, 'fairness' is at the heart of the provision. It follows that judges must attempt to achieve a fair result by making such order as evens out the financial imbalances caused by the cohabitation.

Section 29 of the Family Law (Scotland) Act 2006 has so far generated less case law though it is even more discretionary than section 28. The purpose of section 29 is to allow a surviving cohabitant to claim an award from the net intestate

²² *Gow v Grant* 2012 UKSC 29.

(but not testate)²³ estate of their now-deceased cohabitant. It is explicitly provided that the amount a cohabitant might be awarded by a court can never be greater than the amount that a surviving spouse would receive,²⁴ and in addition a number of factors are set out that the court must take into account, including the size and nature of the estate, any benefit received by the survivor on or in consequence of the deceased's death, and the nature of any other claims on the estate. In *Savage v. Purches*,²⁵ the first decision on section 29, the sheriff took account both of the short period of time the parties had cohabited and the fact that the applicant had received a pension benefit on the death of his ex-partner, concluding that both factors militated against making any award to the applicant which would defeat or reduce the claims on intestacy of the deceased's half-sister. In *Windram, Applicant*,²⁶ on the other hand, the parties had cohabited for over 20 years and had two children together (who would succeed to their father's estate under the normal rules of succession). Though the surviving cohabitant received a small amount from the deceased's pension fund the court ordered that an amount sufficient to allow her to purchase outright the family home from the estate should be awarded: otherwise her children would succeed to the property leaving her without resources notwithstanding that she would be responsible for their upkeep for some years to come. The sheriff in this case emphasized 'fairness' as the guiding principle, as it was in section 28. However, in *Kerr v Mangan*²⁷ the Inner House of the Court of Session held that 'fairness' could not be the guiding principle in section 29 since the issue was a balance between the survivor and the heirs in intestacy – it was not a

²³ Surviving spouses and civil partners have claims in Scots law that can defeat testamentary provisions.

²⁴ Family Law (Scotland) Act 2006, s 29(4).

²⁵ 2009 SLT (Sh Ct) 36.

²⁶ 2009 Fam LR 157.

²⁷ [2014] CSIH 69.

balance of fairness between the two cohabitants. The Court strongly criticised the current wording of section 29 on the ground that it gave wide discretion to the judge but no indication at all as to how the judge was to exercise that discretion. They called on the Scottish Parliament to implement the Scottish Law Commission's *Report on Succession*²⁸ which had recommended section 29's repeal and replacement with a clearer (and very different) rule for cohabitants. The Scottish Government is, as this chapter is being written, consulting on the matter.

3. Vertical Relationships: Parents and Children

3.1 Parental Responsibilities and Parental Rights

Radical change in Scottish child law came with the passing of the Children (Scotland) Act 1995. In common with other statutes across the world around that time, the 1995 Act attempted to effect a fundamental shift in attitudes towards the nature of the parent-child relationship, from one of parental rights to one of parental responsibilities.²⁹ Importantly, these responsibilities are designed to last beyond the end of the relationship between the parents. Prior to 1995, though parents who were married to each other had joint rights to determine how the child was to be brought up, on parental separation the courts saw their role (always based on the best interests of the child³⁰) as 'awarding' custody of the child to one parent, permitting if appropriate access to the child by the other parent. There always was something inherently illogical in a court granting 'custody' to a parent in these circumstances,

²⁸ Scot. Law Com. No 215 (2009).

²⁹ The 1995 Act retains (and delimits) 'parental rights' but these are explicitly stated to exist 'in order to enable [the parent] to fulfil his parental responsibilities': s 2(1).

³⁰ Law Reform (Parent and Child) (Scotland) Act 1986, s 3(2), prior to which, Guardianship of Infants Act 1925, s 1.

because that parent already had what the court decree seemed to be conferring.³¹ In truth, the real (and intended) effect of a custody order was not to *grant* custody to the primary carer but to *remove* the custodial rights of the other parent.

The Children (Scotland) Act 1995, though retaining the child's welfare as the paramount consideration in any dispute brought before the court,³² abolished the concept of custody as an order that excluded the non-resident parent. In its place a parent (or indeed anyone else with an interest³³) is able to seek a 'residence order', which is an order regulating the arrangements as to with whom the child under the age of sixteen years is to live.³⁴ But a residence order does no more than it says and the right of the non-resident parent to be involved in the child's upbringing is unaffected unless explicitly removed.³⁵ The practical result of the change, and it is significant, is that while prior to 1995 a non-resident parent had to persuade the court how it would further the child's welfare for him to remain a decision-maker in the child's life jointly with the residence parent, since 1995 it is for the residence parent to persuade the court how it would further the child's welfare to exclude the non-resident parent from that role.³⁶

International standards are reflected in the 1995 Act. So the court is constrained not to make any order unless it considers that it would be better for the child that the order be made than that none should be made at all.³⁷ This is

³¹ Section 8 of the Law Reform (Parent and Child) (Scotland) Act 1986 defined 'parental rights' to include 'custody or access'.

³² Children (Scotland) Act 1995, s 11(7)(a).

³³ 'Interest' in this context is interpreted very liberally for the Scottish courts have never imposed artificial limitations on who can seek a court order in respect of a child, preferring to allow the court to move immediately to the substance of the dispute, which is what is best for the child.

³⁴ Children (Scotland) Act 1995, s 11(2)(c).

³⁵ Which might happen under the 1995 Act, s 11(2)(a).

³⁶ There is, however, no formal burden of proof: *White v White* 2001 SC 689.

³⁷ Children (Scotland) Act 1995, s 11(7)(a).

described as the minimum intervention principle, or the no-order presumption. It reflects, if imperfectly, the requirement imposed by ECHR jurisprudence that any state intervention in family and private life be proportionate to the legitimate aim to be achieved. Similarly, article 12 of the United Nations Convention on the Rights of the Child is given effect to by the statutory requirement that the child be given an opportunity to express views, and that the court shall have regard to any views expressed by the child.³⁸ It is important to note that this is a self-standing provision and is not (as in English law) simply an aspect of the child's welfare.

The welfare of the child remains, of course, the paramount consideration in all court actions, but the protean nature of that concept means that the courts are required to flesh out the factors that they consider will either enhance or threaten the child's welfare. These factors are subject to constant reappraisal, as may be illustrated by the way the issue of sexual orientation has been treated. As late as 1990 the Scottish court was so concerned about maternal lesbianism that it considered it better to remove an eight-year-old boy from the mother with whom he had always lived and deliver him into the custody of a father who had not previously been directly involved in his upbringing and who had two convictions for child neglect.³⁹ By 1997, however, in an adoption application uncontested by anyone except the judge at first instance⁴⁰ on the basis of concerns that the applicant was a gay man, the Inner House overruled the rejection of the application on the ground that it was illegitimate for a judge to decide cases on the basis of his own preconceptions relating to homosexuality.⁴¹ The case was a watershed in judicial

³⁸ Children (Scotland) Act 1995, s 11(7)(b).

³⁹ *Early v Early* 1990 SLT 221.

⁴⁰ Since 2012 the Lord President of the Court of Session.

⁴¹ *T, Petitioner* 1997 SLT 724.

attitudes towards homosexuality and courts no longer assume that the minority sexual orientation affects parenting negatively.

3.2 Adoption of Children

Adoption law in Scotland underwent its most radical change in 1975 when the Children Act 1975⁴² restructured the earlier conception of adoption into a radical transference not only of parental responsibilities and parental rights from the birth parents to the adoptive parents but also of parenthood itself. This new configuration of adoption was followed in the Adoption (Scotland) Act 1978 and again, more recently, in the Adoption and Children (Scotland) Act 2007, which contains the current law. The most publicly discussed (but hardly the most significant) change made by the 2007 Act was to extend eligibility to adopt. Joint adoption applications could under the earlier legislation be made only by married couples; now a joint application may be made by a 'relevant couple', which is defined⁴³ to mean married couples, civil partners, and persons who are living together as if husband and wife, or as civil partners, in an enduring family relationship.⁴⁴ This is an important acceptance that a child's welfare is threatened neither by being brought up by a couple who have eschewed marriage, nor by being brought up by homosexuals.

⁴² A UK statute, applicable in England and Wales also.

⁴³ Adoption and Children (Scotland) Act 2007, s 29(3).

⁴⁴ This is a double test of living together *and* being members of an enduring family relationship. The English decision (on different statutory wording) in *Re T (Adoption)* [2011] 1 FLR 1487 that a couple who did not live together but who were nevertheless in an enduring family relationship could adopt a child jointly, would not be open to the Scottish courts.

3.3 Parenthood Through Artificial Reproduction

The Human Fertilisation and Embryology Act 2008 is a UK statute applying equally in England and Wales and in Scotland. Parenthood was, under its predecessor statute – the Human Fertilisation and Embryology Act 1990 – conferred upon the husband of a woman who underwent infertility treatment (unless it was shown that he did not consent to that treatment) and upon the unmarried male partner of a woman who underwent such treatment (so long as the treatment was provided in licensed premises to the woman and her male partner together). The 2008 Act amended the latter rule, for children born after the coming into force of that Act, so that parenthood is conferred on the (male) partner so long as he consented to being treated as the child's father; and it applied both rules (with appropriate modifications) to female partners of the mother. So the civil partner of the mother will be deemed to be the (other) parent of the child unless it is shown that she did not consent to the treatment being provided to her partner; and the unregistered female partner will be deemed to be the (other) parent of the child so long as she has consented to being treated as the parent of the child.⁴⁵ The provision in the 1990 Act that, in determining whether to provide treatment, a service provider had to take account of the need of a child for a father⁴⁶ was amended by the 2008 Act and now reads that the service provider must take account of the need of that child for supportive parenting.

⁴⁵ Human Fertilisation and Embryology Act 2008, ss 35 and 36, 42 and 43. Being a matter (currently) reserved to Westminster, it will require UK legislation to make appropriate amendments to this Act when marriage in Scotland is opened to same-sex couples. The list of reserved matters is of course currently under review following the Scottish Independence Referendum in September 2014.

⁴⁶ Human Fertilisation and Embryology Act 1990, s 13(5).

3.4 Child Protection

The Scottish Parliament has more recently turned its attention to issues of child protection and the state's duties towards children that it looks after. The children's hearing – Scotland's unique tribunal for dealing with children who have offended and children who are at risk from their family or social circumstances⁴⁷ – was renewed and restructured by the Children's Hearings (Scotland) Act 2011. Perhaps one of the most remarkable features of the 2011 Act is that, other than putting the system on a national (as opposed to local) basis and making some adjustments to ensure compatibility with the European Convention on Human Rights,⁴⁸ the underlying philosophy of the system remains as it was in previous legislation,⁴⁹ having been designed by the Kilbrandon Committee, whose report was published in 1964.⁵⁰ Political and social changes since 1964 have had little effect on principles underpinning how the children's hearing system operates today. The Kilbrandon Report was commissioned in 1961 by a Conservative Government, enacted by a Labour Government in 1968, re-enacted in 1995 by a Conservative Government and restructured in 2011 by a Scottish Nationalist Government with seemingly no regard to changes in the ideology of either juvenile justice or child protection.

2007 saw the introduction of 'permanence orders' as another weapon in local authorities' child protection armoury.⁵¹ These are designed to act as a sort of sub-adoption order when it is clear that, in order to ensure the child's safe and

⁴⁷ See generally, Kenneth Norrie *Children's Hearings in Scotland* (3rd edn. 2013).

⁴⁸ For example, legal aid is for the first time made available for children and their parents attending children's hearings; and those who have family life with the child are given standing to argue before the hearing that their existing family life should not be interfered with by any order the hearing might wish to make.

⁴⁹ Prior to the 2011 Act the rules were contained in Part II of the Children (Scotland) Act 1995; prior to 1995 the rules were contained in the Social Work (Scotland) Act 1968.

⁵⁰ *Report on Children and Young Persons, Scotland* Cmnd. 2306 (1964), 'The Kilbrandon Report'.

⁵¹ Adoption and Children (Scotland) Act 2007, ss 80 – 104.

satisfactory upbringing, the child must be kept away from his or her birth parents permanently, but for whatever reason an adoption is either unlikely or inappropriate (at the current time). A permanence order will transfer the right to regulate the child's residence to the local authority, and may in addition allocate the other parental responsibilities and parental rights between the local authority, the permanent carer of the child, and the birth-parents, depending upon what is appropriate in the particular circumstances of the individual case. The order may contain authority for the child to be adopted, which will obviate the need for parental consent if, subsequently, an adoption order is sought over the child. There has as yet been little academic analysis of the operation of permanence orders, but the reported cases suggest that they are bedding down smoothly and proving, for some children, a valuable route to a secure upbringing. The major issue for the future, currently generating case law in relation to children's hearings, is to ensure the right to participate in care proceedings is fully recognised and protected.

4. Individual Family Law

4.1 Status of Children

The remaining effects of illegitimacy on the child were removed by the Law Reform (Parent and Child) (Scotland) Act 1986, section 1(1) of which (then headed 'Legal Equality of Children') provided, as originally passed, that 'the fact that a person's parents are not or have not been married to one another shall be left out of account in establishing the legal relationship between the person and any other person; and accordingly any such relationship shall have effect as if the parents were or had been married to one another'. This was never quite true, for the parental

responsibilities and parental rights enjoyed by the child's father remained dependent upon whether the father was or had been married to the mother.⁵² It was not until 2006 that the 1986 Act was amended by the insertion of a new section 1(1) (with a new heading 'Abolition of Status of Illegitimacy'), which now provides: 'No person whose status is governed by Scots law shall be illegitimate; and accordingly the fact that a person's parents are not or have not been married to each other shall be left out of account in—(a) determining the person's legal status; or (b) establishing the legal relationship between the person and any other person'.⁵³ The practical effect is that the unmarried father of any child whose birth is registered on or after 4th May 2006 (when the 2006 Act came into force) has the same parental responsibilities and parental rights as the married father.⁵⁴

4.2 Gender Status

In common with most other legal systems, Scots law has always assumed a binary model of gender, even though it has for many centuries been recognized that some individuals do not fit readily into that model. The issue of marital capacity of 'hermaphrodites' provided a rich source of contention for the canon lawyers and, later, Scotland's Institutional authors,⁵⁵ but the binary model itself has never been challenged and every person is allocated (and registered with) one or other of the genders 'male' or 'female' at birth. Even the Gender Recognition Act 2004 is based

⁵² This position was endorsed by the European Court of Human Rights in *McMichael v. United Kingdom* (1995) 20 EHRR 205.

⁵³ Law Reform (Parent and Child) (Scotland) Act 1986, s. 1 as amended by Family Law (Scotland) Act 2006, s 21.

⁵⁴ Family Law (Scotland) Act 2006, s 23.

⁵⁵ Stair, *Institutions of the Law of Scotland* (1681) 1, 4, 6; Forbes, *Institutes of the Law of Scotland* (1722) 1, 1, 20 (following Grotius, *Jurisprudence of Holland*, 1, 3, 6).

on this binary model.⁵⁶ It has always been possible to correct the Register of Births, but only if error in the original registration of gender can be shown. So in *X, Petitioner*⁵⁷ a correction was refused to a man in his 50s who had undergone, apparently naturally, physical changes that rendered his body more female than male on the basis that the statutory provisions upon which he founded were designed to correct erroneous entries and not to record subsequent changes. Error was, however, found in *Forbes Sempill, Petitioner*⁵⁸ where the petitioner had, on birth, been registered as female and had been brought up as a girl but, in adulthood, had started to live as a man. He obtained a correction of his birth certificate in 1952, on the basis that his external genitalia were ambiguous and that an error had been made at the time of his birth. On the death, childless, of his elder brother the question of succession to a baronetcy that transmitted only through the male line arose and Lord Hunter in the Court of Session held that in such cases of ‘intersex’ or hermaphrodite individuals the law would allocate the person to the sex with the more predominant characteristics. Importantly, one of the characteristics he held relevant in determining that predominance was the psychological perception, or self-identity, of the individual – which is to be compared with the slightly later English transgender case of *Corbett v. Corbett*⁵⁹ where that aspect was dismissed as irrelevant.

By the turn of the 21st century, the United Kingdom had fallen far behind most other European jurisdictions in allowing individuals who were born of one gender to

⁵⁶ So is the Equality Act 2010, which includes as a protected characteristic ‘gender reassignment’, defined in s 7 to mean those who are proposing to, are changing or have changed sex but does not cover ‘intersex’ individuals. A lonely statutory acknowledgement of the existence of intersex individuals is found in the Offences (Aggravation by Prejudice) (Scotland) Act 2009, which includes within the Act’s terms ‘intersexuality’ and ‘any other gender identity that is not standard male or female gender identity’: s 2(8).

⁵⁷ 1957 SLT (Sh Ct) 61.

⁵⁸ Unreported: 12 December 1967, Court of Session (Outer House); discussed by AIL Campbell in ‘Successful Sex in Succession’ 1998 JR 257 and 325.

⁵⁹ [1971] P 83.

be treated for legal purposes as belonging to the other gender, and that position was for many years accepted by the European Court of Human Rights to involve no contravention of the European Convention⁶⁰ before that Court's patience with the United Kingdom finally snapped in *Goodwin v United Kingdom*.⁶¹ That led directly to the passing of the Gender Recognition Act 2004, which introduced a mechanism for the legal acceptance of gender reassignment. Even before then, however, the House of Lords had held that the law could, in some circumstances at least, include within a statutory reference to 'man' and 'woman' individuals who, having been born one gender, now lived their lives as the other.⁶² The Gender Recognition Act 2004 contains some exceptions to the otherwise general recognition of a change of gender,⁶³ and a serious inconvenience if the person who seeks a gender recognition certificate is married or in a civil partnership,⁶⁴ which is only partially resolved by the opening of marriage to same-sex couples.⁶⁵

⁶⁰ *Rees v United Kingdom* (1986) 9 EHRR 56; *X, Y and Z v United Kingdom* (1997) 24 EHRR 143; *Sheffield & Horsham v United Kingdom* (1998) 27 EHRR 163.

⁶¹ (2002) 35 EHRR 18.

⁶² *A v Chief Constable of West Yorkshire Police* [2004] UKHL 21, followed in relation to pensionable age (when UK pension rules treated men differently from women) in *Grant v UK* (2007) 44 EHRR 1 and *Timbrell v Secretary of State for Work and Pensions* [2010] EWCA (Civ) 701.

⁶³ Excluded from the Act's effects are succession to titles of honour and gender-specific offences: ss 15 and 20. The Equality Act 2010, s 195 also excludes some sports.

⁶⁴ Currently such an individual may be issued with an interim gender recognition certificate that has no effect except to allow a speedy divorce or dissolution, leaving the couple free to marry or civilly partner in the gender-appropriate institution.

⁶⁵ The Marriage and Civil Partnership (Scotland) Act retains civil partnership as a gender-specific relationship. A married couple may now remain married but the transgender partner still needs to obtain an interim gender recognition certificate (which gives a ground of divorce) followed by a full gender recognition certificate – granted by the gender recognition panel if the spouse consents or by the sheriff if the spouse does not consent. Thus in Scotland the spouse has no veto on the obtaining of the full certificate..

5. Future Challenges

The earlier push for gender equality in Scottish family law has led more recently to a movement towards sexuality neutrality, which is substantially (though not wholly) achieved with the coming into force of the Marriage and Civil Partnership (Scotland) Act 2014. That Act, like earlier developments, is based fundamentally on the proposition that sexual orientation is morally neutral. The main challenge for the law, reflected in the Parliamentary debates and some of the provisions in the 2014 Act, is to give effect to that proposition while at the same time creating the space for those who deny it to maintain their own freedom of speech and of religion without changing their practices.

Other challenges remain for the law, such as in particular ensuring the effectiveness of remedies (both protective and punitive) for domestic violence and the enforceability of contact orders. Work still needs to be done to ensure that child law is consistent with international norms and requirements as contained in the UN Convention on the Rights of the Child and the European Convention on Human Rights. The Scottish Government is strongly (and rightly) resisting calls for the UN Convention to be 'incorporated' into Scots law in the same way that the ECHR is incorporated, preferring instead an approach of ensuring that all child law and policy is effectively and regularly audited for consistency with the UN Convention.⁶⁶ The UN Committee on the Rights of the Child has in the past criticized the UK for Scotland's failure to ban parents from visiting corporal punishment on their children, but the Scottish Government has no plans to make any changes to the law as now contained in section 51 of the Criminal Justice (Scotland) Act 2003. The Children

⁶⁶ See Part 1 of the Children and Young People (Scotland) Act 2014.

and Young People (Scotland) Act 2014 articulates much more strongly than at present the rights that children have across the public sector, with positive duties on public bodies to work together to design, plan and deliver their policies and services for the improvement of children's and young people's wellbeing. Services for young people leaving state care are extended to age 26, the concept of 'corporate parenting' is given statutory force and content, and new provisions are introduced to support the parenting role of kinship carers. The key challenge ahead facing Scottish family law is to ensure that these sound aspirations actually make a difference, for the better, in the lives of Scotland's children.

Recommendations for further reading

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