

# **FAMILY LAW (SCOTLAND) ACT 2006**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Family Law (Scotland) Act 2006 and to help inform debate on it. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE ACT**

3. The Act seeks to support the aims set out in the Policy Memorandum by introducing changes to update Scottish family law. Family law provides the legal framework that regulates responsibilities and rights between couples and between children and their parents and others with an interest in their welfare. Scotland, in common with many other countries, has, in recent decades, seen significant changes in family formation and in attitudes towards the family. The Act makes a range of provisions designed to address the legal vulnerabilities experienced by family members in Scotland today and to ensure that family law protects the best interests of children regardless of the type of family to which they belong. The provisions of the Act impact across a number of aspects of family law and include:
  - the rules regulating divorce;
  - parental responsibilities and rights (PRRs) for fathers;
  - protection against domestic abuse;as well as introducing new legal safeguards for cohabiting couples and their children and a number of technical amendments designed to remove anomalies and clarify various matters relating to marriage and to the domicile of children.

### ***Marriage***

#### ***Section 1: Marriage to parent of former spouse: removal of special requirements***

4. The Marriage (Scotland) Act 1977 specifies that people who are related to one another by certain 'forbidden degrees' may not marry. This applies to people who are connected by close family ties. There are two levels of these forbidden degrees: relationship by 'consanguinity' and relationship by 'affinity'. While the former refers to relationship by blood, the latter refers to relationships which arise through marriage. Section 1 removes the provision of the Marriage (Scotland) Act 1977 that makes a marriage void between certain persons related by degrees of affinity. If a marriage is void it is considered never to have taken place.
5. [Section 1](#) removes the barriers to a marriage between:

*These notes relate to the Family Law (Scotland) Act 2006 (asp 2)  
which received Royal Assent on 20 January 2006*

- a man and the mother of his former wife
- a man and the former wife of his son
- a woman and the father of her former husband
- a woman and the former husband of her daughter.

### ***Section 2: Void Marriages***

6. **Section 2** amends the Marriage (Scotland) Act 1977 by inserting a new section 20A which puts into statutory form two grounds that will make a marriage void. Previously these grounds were not set out in legislation but existed at common law. The common law is that aspect of the law comprised of decisions by the courts.
7. A marriage will be void under section 20A if:
  - a party to the marriage was capable of consenting to the marriage but consented only because of duress or error; or
  - a party to the marriage was incapable both of understanding the nature of marriage and of consenting to the marriage.
8. Subsection (4) states that a marriage will not be void simply because a party tacitly withheld consent to the marriage at the time the marriage was solemnised. The effect of this is to prevent couples who willingly enter into “sham” marriages from relying on the lack of matrimonial consent as a basis for annulment.
9. Subsection (5) defines ‘error’ for the purposes of section 20A as a mistake as to the nature of the marriage ceremony or the identity of the persons involved in the ceremony.

### ***Section 3: Abolition of marriage by cohabitation with habit and repute***

10. **Section 3** abolishes marriages by cohabitation with habit and repute with prospective effect (other than where the conditions in subsection (4) are met). Couples will be able to begin to constitute a marriage by cohabitation with habit and repute at any point up until the Act (or the relevant section of it) comes into force – but not after that point. The court, in considering an application for decree of declarator of marriage, will take account of any period of cohabitation before and after the Act coming into force.

### ***Section 4: Extension of jurisdiction of sheriff***

11. Actions for declarators of marriage and declarators of nullity of marriage are family actions currently competent only in the Court of Session and governed in certain respects by special rules of procedure. Section 4 provides that actions for declarator of marriage or nullity of marriage are competent not only in the Court of Session but also in the sheriff courts.

### ***Matrimonial homes***

#### ***Section 5: Occupancy rights: duration***

12. **Section 5** concerns the matrimonial home and the rights of the “non-entitled” spouse to occupy the home. An “entitled” spouse is one who has a right to occupy the matrimonial home, whether because he or she is the owner or tenant or because he or she is allowed by a third party to occupy it. A spouse with no such right is a “non-entitled” spouse. The Matrimonial Homes (Family Protection) (Scotland) Act 1981 gives the non-entitled spouse a right to live in the matrimonial home by providing that, if already living there, he or she has the right to continue to occupy it and where not living there he or she has a right to occupy it. Section 5 introduces a time bar to this latter right. Where there has

been no cohabitation between a married couple for two years during which the non-entitled spouse has not occupied the matrimonial home, the non-entitled spouse will cease to have occupancy rights.

### ***Section 6: Occupancy rights: dealings with third parties***

13. The Matrimonial Homes (Family Protection) (Scotland) Act 1981 contains provisions designed to protect the non-entitled spouse from the entitled spouse's "dealing" e.g. selling the house to a third party. However, it may be the case that a third party purchases a house from someone who is not the entitled spouse, unaware that there is a non-entitled spouse who may, subsequent to the sale, seek to exercise his or her occupancy rights.
14. The 1981 Act, therefore, is amended by subsection (2) to provide circumstances where the occupancy rights of a non-entitled spouse shall not be exercisable where a third party has bought the house in good faith from a person who is not the entitled spouse. Section 6 further modifies section 6 of the 1981 Act. The 1981 Act currently stipulates that if five years have passed since the entitled spouse has ceased to be entitled to occupy the matrimonial home and the non-entitled spouse has not occupied the home during that period then the non-entitled spouse loses his or her occupancy rights. Subsection (3) of section 6 reduces that qualifying period from five years to two years.

### ***Section 7: Occupancy rights: proposed dealings with third parties***

15. Section 7 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 details the circumstances in which courts can dispense with the consent of the non-entitled spouse to the dealing of a matrimonial home. Paragraph (b) of section 7 of the Act amends the 1981 Act by further defining these circumstances making them subject to conditions, including: that negotiations on the sale of the home to a third party must not have begun, or at least the price not yet agreed; the agreed sale price is no less than that specified in the court order dispensing with consent; and that the contract for sale be concluded within a specified time period.
16. **Section 7(c)** of the Act provides that if courts refuse an application to dispense with the consent of the non-entitled spouse, they may make an order requiring the non-entitled spouse who becomes the occupier of the matrimonial home to either make specified payment to the owner of the home or otherwise comply with specified conditions.

### ***Section 8: Occupancy rights: effect of court action***

17. This section provides that where an application is made under section 3(1), 4(1) or 5(1) of the Matrimonial Homes (Family Protection) Act 1981, and the application is made to the court within the two year period in which parties cease to cohabit and the non-entitled spouse does not occupy the matrimonial home, then calculation of the two year period is suspended for the duration of the court action. In effect the clock stops ticking once the court action is raised and starts again once the court action is determined.

### ***Section 9: Amendment of definition of "matrimonial home"***

18. This section amends the 1981 Act's definition (at section 22) of the term "matrimonial home". This amendment provides that where the tenancy of a matrimonial home has been transferred from one spouse to the other and becomes the other spouse's separate residence, it should no longer be regarded as the matrimonial home.

## ***Matrimonial interdicts***

### ***Section 10: Matrimonial interdicts***

19. Matrimonial interdicts relate to restraining the conduct of one spouse towards another (or a child of the family) or from being in or near to the matrimonial home. Subsection (2) of this section amends section 14 of the 1981 Act to extend the scope of matrimonial

interdicts to include not only a matrimonial home but also any other home occupied by the applicant, the applicant's place of work and the school attended by any child in the applicant's care. However, subsection (3) provides that a matrimonial interdict cannot be used as an easy alternative to an exclusion order (this is when a court orders someone to leave the matrimonial home). It specifies that a matrimonial interdict should not be available to exclude an entitled spouse, or a spouse with occupancy rights, from the matrimonial home unless the interdict is ancillary to an exclusion order or the court has not granted leave to exercise occupancy rights.

## ***Divorce***

### ***Section 11: Divorce: reduction in separation periods***

20. **Section 11** amends the Divorce (Scotland) Act 1976 to reduce the periods of non-cohabitation required to establish the irretrievable breakdown of a marriage.
21. Under Scots law, the sole ground for divorce is the irretrievable breakdown of the marriage. The 1976 Act provides a list of the ways in which it is possible to establish such a breakdown. Two of these are:
  - the non-cohabitation of the parties to the marriage for a period of two years where both parties consent to the divorce
  - the non-cohabitation of the parties to the marriage for a period of five years where one party does not consent to the divorce.
22. **Section 11** reduces the periods of non-cohabitation in the 1976 Act to 1 year where both parties consent and 2 years where one party does not consent to the divorce.

### ***Section 12: Irretrievable breakdown of marriage: desertion no longer to be ground***

23. **Section 12** removes desertion as a way to establish the irretrievable breakdown of a marriage. Under subsection 1(2)(c) of the Divorce (Scotland) 1976 Act it is only possible to establish the breakdown of the marriage on the grounds of desertion if there has been two years' non-cohabitation after one party has deserted the other.

### ***Section 13: Non-cohabitation without consent: removal of bar to divorce***

24. Section 1(5) of the Divorce (Scotland) Act 1976 prevents the court from granting a divorce following the non-cohabitation of the parties for five years if it considers that to do so would result in grave financial hardship to the party who does not consent to the divorce. Section 13 of the Act repeals this provision.

### ***Section 14: Collusion no longer to be bar to divorce***

25. The aim of this section is to remove collusion as a bar to divorce, but it remains the case that at common law the court should not grant a decree of divorce if satisfied that the pursuer has put forward a false case or the defender has withheld a good defence. 'Collusion' is where the parties to a marriage agree to permit a false case to be substantiated, or to keep back a good defence. For example, this might involve the spouses falsifying an adulterous relationship in order to achieve a quicker divorce. However, given that there is broad agreement that existing legislative provisions relating to collusion no longer serve a useful purpose, section 14 of the Act provides that any rule of law which would prevent spouses from divorcing if they colluded will cease to have effect.
26. Subsection 14(2) repeals section 9 of the Divorce (Scotland) Act 1976. Section 9 of the 1976 Act abolished the oath of calumny. The oath of calumny was an oath by a pursuer to swear that there was no agreement between the parties to put forward a false case or to hold back a good defence. However, as collusion is being removed by section 14(1)

there is no longer any need to maintain the abolition at section 9 of the 1976 Act. The oath of calumny is not revived.

***Section 15: Postponement of decree of divorce where religious impediment to re-marry exists***

27. This section inserts a new section 3A into the Divorce (Scotland) Act 1976 which provides the court with the discretion to postpone decree of divorce where a religious impediment to remarry exists. Regardless of the fact that irretrievable breakdown of a marriage has been established in an action of divorce, the court may postpone granting decree of divorce until it is satisfied that the other party has removed or has contributed to the removal of the impediment which prevents that marriage. If this is the case, the court may order the other party to produce a certificate from a relevant religious body confirming that the other party has acted in the way described above. A power is given to Scottish Ministers to make regulations to prescribe the religious faiths which can rely on this provision.

***Financial provision***

***Section 16: Financial provision: valuation of matrimonial property***

28. This section seeks to address the potential for an unfair division of matrimonial property between divorcing spouses. It introduces a measure of discretion for courts when considering the value of matrimonial property on divorce. This includes, for example, the value of the matrimonial home or the occupational pension of one of the parties.
29. Scots law favours a clean break in divorce settlements. This is based on the fair sharing of the net value of all matrimonial property. This provision has the effect of modifying section 10 of the Family Law (Scotland) Act 1985 as it applies to property transferred by an order under Section 8(1)(aa) of that Act. Such property will be valued at a date agreed between the parties, failing which the date of the order. However, while this provision is aimed at enhancing protection and fairness in the division of matrimonial assets by offering some flexibility, it does not in any way alter the general presumption towards the “relevant date” as being the point at which such assets should be divided. The relevant date is whichever is the earlier of the date on which the parties cease to cohabit and the date of the service of the summons in the action of divorce.

***Section 17: Financial provision on divorce and dissolution of civil partnership: Pension Protection Fund***

30. The purpose of this section is to amend matrimonial legislation to take account of the introduction of the Pension Protection Fund (PPF). The fund, which is designed to protect members of eligible private sector defined pension schemes where the employer has become insolvent, was introduced in the Pensions Act 2004. Once the PPF provisions of the Pensions Act come into force, where an eligible private sector pension scheme is unable to meet the minimum level of members benefits, the scheme’s assets and liabilities will be transferred into the PPF which will be administered by a Pension Protection Board. The Board will have responsibility for making compensation (not pension) payments to existing pensioners and to pay such compensation to other members when they reach retirement. This section ensures that Scotland’s policy relating to pension sharing on divorce and the PPF will be consistent with that in the rest of the UK.
31. A consequential amendment has been made in paragraph 5 of schedule 2 to the Act to section 12 A(2) of the Family Law (Scotland) Act 1985.

***Section 18: Financial provision: incidental orders***

32. **Section 18** provides sheriffs with the power to direct a sheriff clerk to execute deeds relating to moveable property. Currently the sheriff can do so in relation to heritable

property where the grantor of deeds cannot be found, refuses or is unable, or fails to execute the deed. However, in an increasing number of matrimonial cases, courts are being asked to make orders for the transfer of movable property, e.g. insurance policies. This section removes the existing anomaly in the law.

### ***Special destinations: revocation on divorce or annulment***

#### ***Section 19: Special destinations: revocation on divorce or annulment***

33. This section ensures that survivorship destinations (which are clauses in title deeds dealing with the ownership of property on death) become ineffective when married co-owners divorce or when their marriage is annulled. Provision is also made to protect a third party who buys the property from the surviving ex-spouse unaware of the divorce or annulment and protects the Keeper of the Land Register for Scotland from a claim being made by the deceased ex-spouse's executors since the Keeper cannot rectify the Land Register against the third party.

### ***Aliment***

#### ***Section 20: Variations of agreements on aliment: powers of court***

34. This section inserts three new subsections after subsection (2) of section 7 of the Family Law (Scotland) Act 1985 whereby the court can award a retrospective and/or interim variation of registered minutes of agreement entered into between separating parties which regulate the parties' financial affairs. Aliment is the duty between a husband and wife to maintain each other, and the duty a parent has to maintain a child. This is usually manifested in financial provision between spouses after divorce and financial provision made to a child by a person who is legally obliged to support that child.

### ***Abolition of status of illegitimacy***

#### ***Section 21: Abolition of status of illegitimacy***

35. This section removes, as far as it is possible and competent, the status of illegitimacy from Scots Law. It amends section 1 of the Law Reform (Parent and Child) (Scotland) Act 1986 which deals with legal equality of children. That section removed the practical effect in law of illegitimacy for most purposes but did not abolish the status itself. Section 21 abolishes that status. The abolition does not apply to the reserved area of hereditary titles and arms, or to the construction of deeds executed and enactments (including Acts of the Scottish Parliament) made before the coming into force of section 21. Schedule 3 makes provision for the consequential repeal of references to legitimacy or illegitimacy in various enactments.

### ***Domicile of persons under 16***

#### ***Section 22: Domicile of persons under 16***

36. **Section 22** takes steps to further eradicate the remnants of the condition of illegitimacy in Scots law. Currently, the domicile of a child is dependent on the child's father, if the parents are married and the mother if the parents are unmarried. Section 22 does away with this distinction. It provides that a child's domicile before they have reached the age of 16 will be that of the country with which the child is for the time being most closely connected. There will therefore no longer be a link between a child's domicile and that of his or her parents' marital status in relation to both the domicile of origin and dependant domicile.

### ***Unmarried fathers: rights in relation to children***

#### ***Section 23: Parental responsibilities and parental rights of unmarried fathers***

37. Subsections (2) and (3) of section 23 of the Act amend the Children (Scotland) Act 1995. The amendment in subsection (2)(b) gives parental responsibilities and parental rights to unmarried fathers who, in the future, register the birth of their child jointly with the mother. The registration must be under one of the provisions referred to in subsection (3). At present, a father will only automatically acquire such responsibilities and rights if he was married to the child's mother at the time of conception or subsequently.
38. Subsection (3) refers to the relevant provisions for registration in Scotland, England, Wales and Northern Ireland.
39. Subsection (4) makes it clear that a man whose child's birth was registered under any of the provisions for registration referred to in subsection (3) before section 23 comes into force will not gain parental responsibilities and parental rights as a result of the amendment made to the Children (Scotland) Act by subsection (2)(b).

### ***Protection of children from abuse***

#### ***Section 24: Orders under section 11 of the Children (Scotland) Act 1995: protection from abuse***

40. This section provides that when the court is considering the welfare of the child in relation to parental responsibilities and rights in relation to an order under section 11 of the Children (Scotland) Act 1995, the court shall take into account the matters set out in this section. They include the need to protect the child from any abuse or the risk of any abuse which affects, or might affect, the child. The definition of abuse includes domestic abuse.

### ***Cohabitation***

#### ***Section 25: Meaning of "cohabitant" in sections 26 to 29***

41. This section defines the term "cohabitant" as it is used in this legislation and, at subsection (2), describes the factors which courts will take into account when determining whether a person is a cohabitant for the purposes of sections 26 to 29. This section applies equally to same sex couples.

#### ***Section 26: Rights in certain household goods***

42. The provisions relating to cohabitants are designed to give legal protection to unmarried cohabitants on the breakdown of the relationship or when a partner dies. Subsection (2) specifies that it shall be presumed that each party has the right to an equal share of any household goods which were acquired during the period of the cohabitation. This excludes items which were received as gifts or acquired by succession from a third party. Subsection (4) further defines what is meant by "household goods".

#### ***Section 27: Rights in certain money and property***

43. This section specifies that money deriving from any allowances made by either cohabitant for their joint household expenses – or any property purchased from such money – will be treated as belonging to each cohabitant in equal shares. Subsection (3) makes it clear that "property" does not here include the cohabitants' family home.

***Section 28: Financial provision where cohabitation ends otherwise than by death***

44. On the break up of a committed cohabiting relationship, one party may find themselves in a position of financial vulnerability and section 28 seeks to make provision for such situations. It provides that one party can apply to the court for a limited financial settlement from their former cohabitant. Subsection (2) states that courts may require the defender to pay a capital sum, payable as described at subsection (7). Courts may also require the defender to make payment in respect of the cost of caring for any child of whom the cohabitants are parents under the age of 16, also payable as described at subsection (7).
45. In considering such applications for financial support, courts will consider, under subsection (3), whether the defender has derived any economic advantage from contributions made by the applicant and conversely whether the applicant has suffered any economic disadvantage. Subsections (4) to (6) provide for a balancing exercise to be carried out by the court when assessing the economic advantage and disadvantage derived and suffered by either or both parties. Subsection (8) specifies that any application to the court under this section would have to be made within a year after the day on which the cohabitation ended. This section also sets out which courts have jurisdiction to deal with such applications. Subsection (10) provides for the definition of the relevant child, namely a child of whom the cohabitants are the parents or a child who is or was accepted by the cohabitants as a child of the family.

***Section 29: Application to court by survivor for provision on intestacy***

46. This section makes provision to allow applications to be made to the court by the surviving partner on the death of a cohabitant when that person has died intestate. The surviving partner may make such an application for a share in the deceased partner's estate although this is qualified by subsection (4) which specifies that any such award cannot exceed the amount which the survivor would have been entitled to under statutory rules of intestacy had the survivor been the spouse or civil partner of the deceased.
47. Subsection (2) provides that, if appropriate, courts may award either a capital sum or a transfer of property from the estate. A capital sum may be paid either on a specified date or in instalments, as is specified at subsection (7). Subsection (3) describes the matters which courts may take into account when considering making an order under section 29. Such matters include the size of the deceased cohabitant's estate and the nature and extent of any other claims on the estate.
48. Subsection (6) specifies that an application to the court under section 29 must be made within 6 months of the date on which the deceased died. Subsection (10) provides definitions of certain expressions used in the section. This section applies equally to same sex partners.

***Section 30: Administration of Justice Act 1982: extension of definition of "relative"***

49. Under the Administration of Justice Act 1982, it is competent for a "relative" of an injured person to raise a court action for a claim of liability against the responsible person. This section amends the definition of "relative" under the Act to include a same-sex cohabiting partner.

***Cohabitation: domestic interdicts***

***Section 31: Domestic interdicts***

50. This section introduces into the 1981 Act the concept of "domestic interdicts" which will apply to unmarried cohabitants, either opposite-sex or same-sex. Domestic interdicts will have much the same effect in relation to cohabitants as matrimonial interdicts have for married couples with similar scope as is defined in section 10, above.

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Subsection (3) introduces into the 1981 Act two new sections relating to domestic interdicts. Subsection (18A) describes what a domestic interdict is, who it will apply to and what the scope of such an interdict is. Subsection (18B) provides further detail as to the application of domestic interdicts.

### ***Amendment of Protection from Abuse (Scotland) Act 2001: powers of arrest***

#### ***Section 32: Amendment of Protection from Abuse (Scotland) Act 2001: powers of arrest***

51. This section provides that where an application is made to the court for an interdict for the purposes of protection from abuse, the court must attach a power of arrest to the interdict if that interdict is ancillary to an exclusion order, including an interim exclusion order made under section 4 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 or section 104 of the Civil Partnership Act 2004. The effect of this is that Protection from Abuse (Scotland) Act 2001 will contain exclusively the power of the court to attach powers of arrest to interdicts granted under the Matrimonial Homes (Family Protection) (Scotland) Act 1981, including domestic interdicts, and the Civil Partnership Act 2004.

### ***Amendments of Civil Partnership Act 2004***

#### ***Section 33: Amendments of Civil Partnership Act 2004***

52. This gives effect to schedule 1 which amends the Civil Partnership Act 2004.

### ***Application of 1981 Act to cohabiting couples of same sex***

#### ***Section 34: Application of 1981 Act to cohabiting couples of same sex***

53. Section 34 introduces amendments to the Matrimonial Homes (Family Protection) (Scotland) Act 1981 extending the provisions on occupancy rights of cohabiting couples (dealt with in section 18) to same sex couples.

### ***Amendments of Damages (Scotland) Act 1976***

#### ***Section 35: Amendments of Damages (Scotland) Act 1976***

54. This section provides for amendment of the Damages (Scotland) Act 1976 whereby the definition of “immediate family” set out in Schedule 1 to that Act is extended to include any person who accepted the deceased as a child of the person’s family, any person who was the brother or sister of the deceased and any person who was the grandparent or grandchild of the deceased. In addition, persons who are related by affinity, for example son-in-law and mother-in-law, will no longer be entitled to sue for grief and suffering (known as non-patrimonial loss).

### ***Amendments of Adults with Incapacity (Scotland) Act 2000***

#### ***Section 36: Amendments of Adults with Incapacity (Scotland) Act 2000***

55. This section amends the Adults with Incapacity (Scotland) Act 2000 to include civil partners, as well as married people, in the provisions relating to the termination of power of attorney – thus ensuring that civil partners are treated in the same way as spouses in this legislation.

## ***Jurisdiction***

### ***Section 37: Jurisdiction: actions for declarator of recognition of certain foreign decrees***

56. This section provides rules as to the jurisdiction of the Court of Session and the Sheriff Court in actions where a pursuer is seeking recognition or non-recognition in Scotland of a decree of divorce, nullity or separation granted in a country outwith the European Union.

## ***Private international law***

### ***Section 38: Validity of marriages***

57. The rules as to which law governs the validity of marriage in cases involving a foreign element (such as where one of the spouses is domiciled in one country but married in another) depend partly on statute and partly on common law. Section 38 offers more clarity in this regard by providing for which rules will apply, in certain circumstances. Subsection (1) provides that, subject to the Foreign Marriage Act 1892, the formal validity of a marriage will be governed by the laws of the place where the marriage took place. Subsection (2) provides that the question of whether a party had capacity, or had consented, to marry will be determined by the law of that person's domicile, but is subject to the exceptions in subsections (3) and (4). Subsection (3) makes provision that where a marriage takes place in Scotland, notwithstanding any rule of law of either party's domicile, Scots law in relation void marriages shall prevail. Subsection (4) provides a public policy exception to subsection (2). Subsection (5) makes provision in relation to the capacity of a person to marry in Scotland where the law of that person's domicile requires parental consent to be obtained.

### ***Section 39: Matrimonial property***

58. This section provides for the rules which will apply in determining rights to matrimonial property in marriages involving a foreign element.

### ***Section 40: Aliment***

59. This section provides for the rules which will apply in defining aliment in marriages involving a foreign element.

### ***Section 41: Effect of parents' marriage in determining status to depend on law of domicile***

60. This section provides that questions arising as to the effect that the marital status of a person's parents has on that person's status will be determined by the law of country in which that person is domiciled. Consequential amendments are made in schedules 2 and 3. This section follows on from the provisions removing the last remnants of matters relating to illegitimacy.

## ***Declarator of freedom and putting to silence: action no longer competent***

### ***Section 42: Action for declarator of freedom and putting to silence to cease to be competent***

61. An action for a declarator of nullity of marriage is not available if there is not even a semblance of marriage or pretended marriage that can be declared null. In the past, the remedy for this situation has been an action for declarator of freedom and putting to silence in which the pursuer asks the court for a declarator that he or she is free of any marriage with the defender and for a decree ordaining the defender to desist from asserting that he or she is the spouse of the pursuer and putting the defender to silence thereafter. Whilst there may have been a need for this type of action in days when

irregular marriages were common and there was often doubt as to whether a couple had privately exchanged consent to marry, the action is now virtually unknown and has become obsolete. Section 42 therefore removes the remedy by providing that it shall no longer be competent to raise an action for declarator of freedom and putting to silence.

### **General**

#### **Section 44: Ancillary provision**

62. This section provides the Scottish Ministers with power to make consequential, transitional or saving provisions needed to give full effect to the Act.

#### **Section 45: Minor and consequential amendments and appeals**

63. [Section 45\(1\)](#) gives effect to schedule 2 which provides for consequential amendments. [Section 45\(2\)](#) gives effect to schedule 3 which provides for consequential repeals.

#### **Section 46: Short title and commencement**

64. [Section 46](#) contains power to make commencement orders (which are not subject to any parliamentary procedure) to bring the Act into effect. Statutory instruments containing orders made under section 44 will be subject to negative resolution procedure unless they modify primary legislation, in which case they will be subject to affirmative procedure in the Parliament.

#### **Schedule 1: Amendments of the Civil Partnership Act 2004**

65. [Schedule 1](#) makes amendments to the Civil Partnership Act 2004. Paragraphs 3 to 6 relate to the occupancy rights of civil partners with regard to the family home. Paragraph 8 extends the scope of interdicts to include the family home, place of work and school attended by a child in the care of the applicant civil partner. Paragraph 9 reduces the qualifying non-cohabitation periods for dissolution of a civil partnership from two years to one year where the parties consent and from five years to two where one of the parties does not consent. Paragraph 12 amends the definition of “family home” in section 135 of the Civil Partnership Act 2004 to include the condition that where one civil partner transfers tenancy to the other civil partner (either by agreement or under any enactment) then from that point the house ceases to be the “family home”.

### **PARLIAMENTARY HISTORY**

66. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that stage took place, the references to the Official report of those proceedings, the dates on which Committee Reports and other papers relating to the Act were published, and references to those Reports and other papers.

<b>Proceedings and Reports</b>	<b>Reference</b>
<b>Introduction</b>	
7 February 2005	<a href="#">Bill as Introduced (SP Bill 36)</a>
<b>Preliminary Discussion</b>	
<b>Finance Committee</b>	
8 <sup>th</sup> Meeting, 8 March 2005	<a href="#">Col 2446</a>
<b>Subordinate Legislation Committee</b>	

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8 <sup>th</sup> Meeting, 8 March 2005	Cols 860-861
<b>Justice 1 Committee</b>	
7 <sup>th</sup> Meeting, 9 March 2005	Item in private
<b>Stage 1</b>	
<b>Subordinate Legislation Committee</b>	
9 <sup>th</sup> Meeting, 15 March 2005	Col899
<b>Justice 1 Committee</b>	
8 <sup>th</sup> Meeting, 16 March 2005	Cols 1613-1646
11 <sup>th</sup> Meeting, 20 April 2005	Item in private
13 <sup>th</sup> Meeting, 4 May 2005	Item in private
14 <sup>th</sup> Meeting, 11 May 2005	Cols 1787-1840
15 <sup>th</sup> Meeting, 18 May 2005	Cols 1841-1900
17 <sup>th</sup> Meeting, 25 May 2005	Cols 1921-1976
18 <sup>th</sup> Meeting, 1 June 2005	Cols 1977-2023
19 <sup>th</sup> Meeting, 8 June 2005	Cols 2026-2048
20 <sup>th</sup> Meeting, 15 June 2005	Item in private
21 <sup>st</sup> Meeting, 22 June 2005	Col 2054
22 <sup>nd</sup> Meeting, 27 June 2005	Item in private
23 <sup>rd</sup> Meeting, 29 June 2005	Item in private
24 <sup>th</sup> Meeting, 30 June 2005	Item in private
8th Report, 2005 (SP Paper 401)	Volume 1 & Volume 2
26 <sup>th</sup> Meeting, 14 September 2005	Cols 2071-2104
27 <sup>th</sup> Meeting, 21 September 2005	Cols 2105-2130
<b>Finance Committee</b>	
13 <sup>th</sup> Meeting, 10 May 2005	Cols 2584-2589
15 <sup>th</sup> Meeting, 24 May 2005	Item in private
<b>Consideration by the Parliament</b>	
Stage 1 Debate, 15 September 2005	Cols 19113-19161
<b>Pre-Stage 2</b>	
<b>Justice 1 Committee</b>	
27 <sup>th</sup> Meeting, 21 September 2005	Cols 2105-2130
29 <sup>th</sup> Meeting, 28 September 2005	Cols 2133-2166
<b>Stage 2</b>	
<b>Justice 1 Committee</b>	
30 <sup>th</sup> Meeting, 5 October 2005	Cols 2168-2180
34 <sup>th</sup> Meeting, 2 November 2005	Cols 2184-2235
36 <sup>th</sup> Meeting, 9 November 2005	Cols 2239-2293

*These notes relate to the Family Law (Scotland) Act 2006 (asp 2)  
which received Royal Assent on 20 January 2006*

37 <sup>th</sup> Meeting, 16 November 2005	<a href="#">Cols 2295-2336</a>
38 <sup>th</sup> Meeting, 23 November 2005	<a href="#">Cols 2343-2400</a>
39 <sup>th</sup> Meeting, 30 November 2005	<a href="#">Cols 2401-2412</a>
<b>After Stage 2</b>	
<b>Subordinate Legislation Committee</b>	
35 <sup>th</sup> Meeting, 13 December 2005	<a href="#">Cols 1447-1452</a>
46 <sup>th</sup> Report, 2005 (SP 474)	<a href="#">Report on the Bill as amended at Stage 2</a>
<b>Stage 3</b>	
<b>Consideration by the Parliament</b>	
Stage 3 Debate, 15 December 2005	<a href="#">Cols 21771-21823 Morning Debate</a> <a href="#">Cols 21880-21958 Afternoon Debate</a> <a href="#">Cols 21962-21964 Decision Time</a>
Bill Passed 15 December 2005	<a href="#">Family Law (Scotland) Bill as passed</a>
<b>Royal Assent</b>	20 January 2006