

FAMILY LAW (SCOTLAND) ACT 2006

EXPLANATORY NOTES

THE ACT

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.