

ADOPTION AND CHILDREN (SCOTLAND) ACT 2007

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Chapter 3

Status of Adopted Children

Section 39 - Meaning of “adoption” in Chapter 3

154. Subsection (1) defines the term “adoption” for the purposes of Chapter 3 of the Act.
155. Subsection (2) provides that references to adoption in this Chapter do not include an adoption which took place before the Chapter came into force.
156. Subsection (3) provides that any reference in an enactment to an adopted person within the meaning of Chapter 3 also includes an adopted child within the meaning of Part IV of the Adoption (Scotland) Act 1978. Part IV deals with the status of adopted children under that Act and is the only part of the 1978 Act which is not repealed. This is to ensure that the status of children adopted under the provisions of the 1978 Act is unaffected by this Act.

Section 40 - Status conferred by adoption

157. This section provides for the status conferred by adoption. An adopted person is to be treated in law as if he or she were the child of the adopters or adopter (subsection (1)). Where the adoption is undertaken by a relevant couple under section 29, or a step-parent, civil partner or cohabitant under section 30(3) of the Act, the adopted person is to be treated as the child of the couple concerned (subsection (2)).
158. In the case of an adoption under section 30(3), the adopted person is to be treated in law as if he or she were not the child of any person other than the adopter and the parent (i.e. the other member of the relevant couple (subsection (3))). In all other cases, an adopted person is to be treated as the child of no-one other than the adopters (subsection (4)).
159. By virtue of subsection (5) references to a person’s natural parents or any other natural relationship elsewhere in this Act are not affected by subsections (3) and (4).
160. Where an application is made under this section in the case of a person adopted under a Convention adoption (as defined in section 119(1) of the Act), subsections (6) and (7) provide that the Court of Session has discretion to direct that subsection (4) should not apply or that it is only to apply to the extent specified in the direction. The conditions which must be met before such a direction may be given are set out in subsection (6), namely that under the law of the country in which the adoption took place the adoption was not a full adoption (as defined by subsection (8)), that the consents required for adoption have not been given or the UK is not a receiving State and that it would be more favourable to the person for a direction to be given by the court under this provision.

Section 41 - Miscellaneous enactments

161. Although section 40 means that a person is regarded in law as the child of the adopters and not the child of anyone else, section 41(1) provides that this does not affect the rules on marriage to or registration of a civil partnership with a relative. So, while a child's natural parents are, on the making of an adoption order, treated in law as if no longer that child's parents, the ban, for example, on a child marrying his or her natural mother or natural father or forming a civil partnership with either natural parent continues to apply. Similarly, despite the terms of section 40, a child's natural parent remains treated as the child's mother or father and therefore falls within the forbidden degrees for the purpose of the law on incest.
162. Subsection (2) provides that, on the making of an adoption order, the adopter and adopted person are considered for all time coming to be within the forbidden degrees relating to marriage, eligibility to register as civil partners, and incest.
163. Subsection (3) provides that section 40 does not apply for the purposes of the British Nationality Act 1981, the Immigration Act 1971, any instrument having effect under any either of those Acts or any other law which determines British citizenship, British overseas territories citizenship or British Overseas Citizenship.

Section 42 - Pensions

164. The effect of this section is to provide that section 40 of the Act does not affect an adopted person's entitlement to a pension which is payable to, or for the benefit of, the person, at the time of the adoption and which is in payment at that time.

Section 43 - Insurance

165. Under section 43, where a child is adopted and his or her natural parents had an insurance policy for the payment on the death of the child of money for funeral expenses, the rights and liabilities under the policy are transferred to the adoptive parents. The adoptive parents are to be treated as the persons who took out the policy.

Section 44 - Succession and inter vivos deeds

166. The effect of this section is to preserve the law relating to succession and to disposal of property by a person under a deed which takes effect while the person is still alive (as that law affects adopted persons). That law remains unaffected by section 40.