

Draft Regulations laid before the Scottish Parliament under paragraph 2(5) of Schedule 1B to the Domicile and Matrimonial Proceedings Act 1973 for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2014 No.

JUDGMENTS

The Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) (Scotland) Regulations 2014

Made - - - - 2014

Coming into force - - 16th December 2014

The Scottish Ministers make the following Regulations in exercise of the powers conferred by paragraph 2 of Schedule 1B to the Domicile and Matrimonial Proceedings Act 1973⁽¹⁾, and all other powers enabling them to do so.

In accordance with paragraph 2(5) of Schedule 1B to that Act, a draft of these Regulations has been laid before and approved by resolution of the Scottish Parliament.

Citation, commencement, extent and interpretation

1.—(1) These Regulations may be cited as the Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) (Scotland) Regulations 2014 and come into force on 16th December 2014.

(2) These Regulations extend to Scotland only.

(3) In these Regulations “member State” means a member State of the European Union.

PART 1

JURISDICTION

Jurisdiction

2.—(1) In this Part—

(1) 1973 c.45. Schedule 1B was inserted by paragraph 1(4) of schedule 1 to the Marriage and Civil Partnership (Scotland) Act 2014 (asp 5).

“relevant foreign decree” means a decree of divorce of, nullity of the marriage of, or judicial separation of a married same sex couple granted outwith a member State.

(2) The courts in Scotland have jurisdiction in proceedings for the declarator of recognition, or non-recognition, of a relevant foreign decree and in proceedings for the divorce of, declarator of nullity of the marriage of, or judicial separation of a married same sex couple where—

- (a) both spouses are habitually resident in Scotland;
- (b) both spouses were last habitually resident in Scotland and one of the spouses continues to reside there;
- (c) the defender is habitually resident in Scotland;
- (d) the pursuer is habitually resident in Scotland and has resided there for at least one year immediately preceding the date on which the action is begun;
- (e) the pursuer is domiciled and habitually resident in Scotland and has resided there for at least six months immediately preceding the date on which the action is begun; or
- (f) both spouses are domiciled in Scotland.

PART 2

RECOGNITION AND REFUSAL OF RECOGNITION OF A JUDGMENT OF A COURT OF A MEMBER STATE

Interpretation and application

3.—(1) In this Part “judgment” means a judgment of a court of a member State other than the United Kingdom which orders the divorce of, annulment of the marriage of, or the judicial separation of a married same sex couple.

(2) In paragraph (1) a “court of a member State” means any authority, whether judicial or administrative, in a member State with jurisdiction in those matters falling within the scope of these Regulations.

(3) This Part applies to all judgments even if the date of the judgment is earlier than the date on which paragraph 2 of Schedule 1B to the Domicile and Matrimonial Proceedings Act 1973 and these Regulations come into force.

Recognition of a judgment

4.—(1) Subject to regulation 5, where a judgment is (or has been) given in respect of a marriage of a same sex couple, that judgment is to be recognised.

(2) Any interested party may apply to either the Court of Session or the sheriff court for a declarator of recognition or non-recognition of a judgment.

(3) Where the recognition of a judgment is raised as an incidental issue in proceedings before a court, that court may determine the issue.

Refusal of recognition of judgment

5.—(1) Recognition of the validity of a judgment may be refused if the judgment was obtained at a time when it was irreconcilable with a decision determining the question of the subsistence or validity of the marriage—

- (a) previously given by a court of civil jurisdiction in Scotland; or

(b) previously given by a court elsewhere and recognised or entitled to be recognised in Scotland.

(2) Recognition of the validity of a judgment may be refused if the judgment was obtained at a time when the law of Scotland did not recognise marriages of same sex couples.

(3) Paragraph (2) does not prevent the recognition of a judgment if, at the time the judgment was obtained, the marriage would have been treated as a subsisting civil partnership according to the law of Scotland.

(4) Recognition of the validity of a judgment may be refused if—

(a) in the case of a judgment obtained by means of proceedings, it was obtained—

(i) without such steps having been taken for giving notice of the proceedings to a spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or

(ii) without a spouse having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, that spouse should reasonably have been given; or

(b) in the case of a judgment obtained otherwise than by means of proceedings, there is no official document certifying the judgment is effective under the law of the country in which it was obtained; or

(c) in either case, recognition of the judgment would be manifestly contrary to public policy.

(5) In this regulation “official”, in relation to a document certifying that a judgment is effective under the law of any country, means issued by a person or a body appointed or recognised for the purpose under that law.

Jurisdiction and review

6.—(1) The court may not review the jurisdiction of the court which issued the judgment.

(2) A judgment may not be reviewed as to its substance.

Differences in applicable law

7. The recognition of a judgment may not be refused because the law of Scotland would not allow divorce, declarator of nullity or judicial separation on the same facts.

Sist of proceedings

8. Where recognition is sought of a judgment given in a member State and an appeal against that judgment has been lodged in that member State, the court may sist the proceedings.

St Andrew’s House,
Edinburgh
Date

Name
A member of the Scottish Government

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make corresponding provision, as far as is possible in domestic law, to the jurisdiction and recognition provisions of Council Regulation (EC) 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (OJ L 338, 23.12.03, p.1) for certain proceedings.

Regulation 2 provides that the Scottish courts have jurisdiction in proceedings for the declarator of recognition, or non-recognition, of a relevant foreign decree and in proceedings for the divorce of, or declarator of nullity of a marriage of, or the judicial separation of a married same sex couple if the couple meet one of the criteria set out in subparagraphs (a) to (f) of regulation (2)(2).

Regulations 3 and 4 provide that if a court of an EU member State (other than the United Kingdom) gives judgment in respect of the divorce of, annulment of a marriage of, or the judicial separation of a married same sex couple, that judgment must be recognised in Scotland unless any of the matters in regulation 5 apply.

Regulation 5 sets out the criteria for non-recognition of a judgment.

Regulation 6 prevents the court from reviewing the jurisdiction of the court of the member State that made the original judgment and also from reviewing the substance of that judgment.

Regulation 7 ensures that a judgment is recognised notwithstanding that there might well have been a different outcome on the facts if the law of Scotland had been applied to the judgment.

Regulation 8 allows the court to sist proceedings for recognition of a judgment given in a member State when there is an appeal outstanding against that judgment in that member State.