



# Divorce (Scotland) Act 1976

## 1976 CHAPTER 39

An Act to amend the law of Scotland relating to divorce and separation; to facilitate reconciliation of the parties in consistorial causes; to amend the law as to the power of the court to make orders relating to financial provision arising out of divorce and to settlements and other dealings by a party to the marriage, and as to the power of the court to award aliment to spouses in actions for aliment; to abolish the oath of calumny; and for purposes connected with the matters aforesaid. [22nd July 1976]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

### *Divorce*

#### **1 Irretrievable breakdown of marriage to be sole ground of divorce**

- (1) In an action for divorce the court may grant decree of divorce if, but only if, it is established in accordance with the following provisions of this Act that the marriage has broken down irretrievably.

References in this Act (other than in sections 5(1) and 13 of this Act) to an action for divorce are to be construed as references to such an action brought after the commencement of this Act.

- (2) The irretrievable breakdown of a marriage shall, subject to the following provisions of this Act, be taken to be established in an action for divorce if—
- (a) since the date of the marriage the defender has committed adultery; or
  - (b) since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender; or

- (c) the defender has wilfully and without reasonable cause deserted the pursuer; and during a continuous period of two years immediately succeeding the defender's desertion—
    - (i) there has been no cohabitation between the parties, and
    - (ii) the pursuer has not refused a genuine and reasonable offer by the defender to adhere; or
  - (d) there has been no cohabitation between the parties at any time during a continuous period of two years after the date of the marriage and immediately preceding the bringing of the action and the defender consents to the granting of decree of divorce ; or
  - (e) there has been no cohabitation between the parties at any time during a continuous period of five years after the date of the marriage and immediately preceding the bringing of the action.
- (3) The irretrievable breakdown of a marriage shall not be taken to be established in an action for divorce by reason of subsection (2)(a) of this section if the adultery mentioned in the said subsection (2)(a) has been connived at in such a way as to raise the defence of lenocinium or has been condoned by the pursuer's cohabitation with the defender in the knowledge or belief that the defender has committed the adultery.
- (4) Provision shall be made by act of sederunt—
- (a) for the purpose of ensuring that, where in an action for divorce to which subsection (2)(d) of this section relates the defender consents to the granting of decree, he has been given such information as will enable him to understand—
    - (i) the consequences to him of his consenting as aforesaid; and
    - (ii) the steps which he must take to indicate his consent; and
  - (b) prescribing the manner in which the defender in such an action shall indicate his consent, and any withdrawal of such consent, to the granting of decree ;
- and where the defender has indicated (and not withdrawn) his consent in the prescribed manner, such indication shall be sufficient evidence of such consent.
- (5) Notwithstanding that irretrievable breakdown of a marriage has been established in an action for divorce by reason of subsection (2)(e) of this section, the court shall not be bound to grant decree in that action if in the opinion of the court the grant of decree would result in grave financial hardship to the defender.
- For the purposes of this subsection, hardship shall include the loss of the chance of acquiring any benefit.
- (6) In an action for divorce the standard of proof required to establish the ground of the action shall be on balance of probability.

## 2 Encouragement of reconciliation

- (1) At any time before granting decree in an action for divorce, if it appears to the court that there is a reasonable prospect of a reconciliation between the parties, it shall continue, or further continue, the action for such period as it thinks proper to enable attempts to be made to effect such a reconciliation ; and if during any such continuation the parties cohabit with one another, no account shall be taken of such cohabitation for the purposes of that action.
- (2) Adultery shall not be held to have been condoned within the meaning of section 1(3) of this Act by reason only of the fact that after the commission of the adultery the

pursuer has continued or resumed cohabitation with the defender, provided that the pursuer has not cohabited with the defender at any time after the end of the period of three months from the date on which such cohabitation as is referred to in the said section 1(3) was continued or resumed as aforesaid.

- (3) The irretrievable breakdown of a marriage shall not be taken to be established in an action for divorce by reason of section 1(2)(c) of this Act if, after the expiry of the period mentioned in the said section 1(2)(c), the pursuer has resumed cohabitation with the defender and has cohabited with the defender at any time after the end of the period of three months from the date on which the cohabitation was resumed as aforesaid.
- (4) In considering whether any period mentioned in paragraph (c), (d), or (e) of section 1(2) of this Act has been continuous no account shall be taken of any period or periods not exceeding six months in all during which the parties cohabited with one another; but no such period or periods during which the parties cohabited with one another shall count as part of the period of non-cohabitation required by any of those paragraphs.

### **3 Action for divorce following on decree of separation**

- (1) The court may grant decree in an action for divorce notwithstanding that decree of separation has previously been granted to the pursuer on the same, or substantially the same, facts as those averred in support of the action for divorce ; and in any such action (other than an action for divorce by reason of section 1(2)(a) of this Act) the court may treat an extract decree of separation lodged in process as sufficient proof of the facts upon which such decree was granted.
- (2) Nothing in this section shall entitle the court to grant decree of divorce without receiving evidence from the pursuer.

#### *Actions for separation*

### **4 Actions for separation**

- (1) Sections 1, 2 and 11 of this Act shall apply to an action for separation or separation and aliment brought after the commencement of this Act and decree in such action as those sections apply to an action for divorce and decree therein subject to—
  - (a) the modification that any reference to irretrievable breakdown of a marriage shall be construed as a reference to grounds justifying decree of separation of the parties to a marriage ; and
  - (b) all other necessary modifications.
- (2) In an action for separation or separation and aliment brought after the commencement of this Act, decree of separation shall not be pronounced except in accordance with the provisions of this section.

*Financial provision for spouses and children***5 Orders for financial provision**

- (1) In an action for divorce (whether brought before or after the commencement of this Act), either party to the marriage may, at any time prior to decree being granted, apply to the court for any one or more of the following orders—
- (a) an order for the payment to him or for his benefit by the other party to the marriage of a periodical allowance;
  - (b) an order for the payment to him or for his benefit by the other party to the marriage of a capital sum;
  - (c) an order varying the terms of any settlement made in contemplation of or during the marriage so far as taking effect on or after the termination of the marriage:

Provided that any reference in this subsection to payment by the other party to the marriage shall include a reference to payment out of any estate belonging to that party or held for his benefit.

- (2) Where an application under the foregoing subsection has been made in an action, the court, on granting decree in that action, shall make with respect to the application such order, if any, as it thinks fit, having regard to the respective means of the parties to the marriage and to all the circumstances of the case, including any settlement or other arrangements made for financial provision for any child of the marriage.
- (3) Where an application for an order for the payment of a periodical allowance under subsection (1)(a) of this section has been withdrawn or refused, or where no such application has been made, either party to the marriage may apply to the court for such an order after the date of the granting of decree of divorce if since that date there has been a change in the circumstances of either of the parties to the marriage; and the court shall make with respect to that application such order, if any, as it thinks fit, having regard to the factors mentioned in subsection (2) of this section.
- (4) Any order made under this section relating to the payment of a periodical allowance may, on an application by or on behalf of either party to the marriage (or his executor) on a change of circumstances, be varied or recalled by a subsequent order.
- (5) Any order made under this section relating to payment of a periodical allowance—
- (a) shall, on the death of the person by whom the periodical allowance is payable, continue to operate against that person's estate, but without prejudice to the making of an order under the last foregoing subsection ;
  - (b) shall cease to have effect on the remarriage or death of the person to whom or for whose benefit the periodical allowance is payable, except in relation to any arrears due under it on the date of such remarriage or death.
- (6) Provision shall be made by act of sederunt to impose upon the pursuer in an action for divorce to which section 1(2)(d) or 1(2)(e) of this Act relates a duty to inform the defender of his right to apply for—
- (a) financial provision under this Act,
  - (b) an order providing for the custody, maintenance and education of any child of the marriage under section 9 of the Conjugal Rights (Scotland) Amendment Act 1861,

in such form and manner as the act of sederunt may require, and, for the purposes of this subsection, where the pursuer alleges that the address of the defender is unknown to him, he shall satisfy the court that all reasonable steps have been taken to ascertain it.

- (7) Any reference in this section to a settlement shall be construed as including a settlement by way of a policy of assurance to which section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880 relates.

## **6 Orders relating to settlements and other dealings**

- (1) Where a claim has been made, being—
- (a) an application under subsection (1)(a) or (1)(b) or (3) or (4) of section 5 of this Act which has been made by either party to the marriage, or
  - (b) an action for separation and aliment, adherence and aliment or interim aliment which has been brought by either party to the marriage, or
  - (c) an application for variation of an award of aliment (other than an interim award) in such an action which has been made by the party of the marriage who has brought that action,

that party may, at any time before the expiration of a period of one year from the disposal of the said claim, apply to the court for an order—

- (i) reducing or varying any settlement or disposition of property belonging to the other party to the marriage made by him in favour of any third party at any time after the date occurring three years before the making of the said claim ; or
  - (ii) interdicting the other party to the marriage from making any such settlement or disposition, or transferring out of the jurisdiction of the court, or otherwise dealing with, any property belonging to him.
- (2) On an application for an order under the foregoing subsection the court may make such an order if it is shown to its satisfaction that the settlement or disposition was made or is about to be made, or that the property is about to be transferred or otherwise dealt with, wholly or partly for the purpose of defeating in whole or in part any claim referred to in the foregoing subsection which has been made or might be made:

Provided that an order under this subsection shall not prejudice the rights (if any) in that property of any third party who has in good faith acquired it or any of it for value, or who derives title to the property or any of it from any person who has done so.

## **7 Power of court to award aliment**

- (1) Without prejudice to its other powers to award aliment, it shall be competent for the court, in an action for interim aliment brought after the commencement of this Act, to grant decree therein if it is satisfied that—
- (a) the pursuer and the defender are not cohabiting with one another, and
  - (b) the pursuer is unwilling to cohabit with the defender whether or not the pursuer has reasonable cause for not so cohabiting by virtue of the circumstances set out in paragraph (a), (b) or (c) of section 1(2) of this Act:

Provided that, where the pursuer does not have reasonable cause for not cohabiting as aforesaid, the court shall not grant decree if it is satisfied that the defender is willing to cohabit with the pursuer.

- (2) In determining the amount of aliment, if any, to be awarded in a decree of separation and aliment, adherence and aliment or interim aliment, the court shall have regard to the factors mentioned in section 5(2) of this Act.

This subsection shall apply to actions brought before the commencement of this Act as well as to actions brought after such commencement.

## **8 Amendment of Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963**

Section 3 of the Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963 is amended as follows—

- (a) For subsection (1) there shall be substituted the following subsection—

“(1) An action of interim aliment by one party to a marriage against the other may competently be brought before the sheriff as a summary cause if the aliment claimed in the action does not exceed—

- (i) the sum of £25 per week in respect of the pursuer; and
- (ii) the sum of £7.50 in respect of each child (if any) of the marriage;

and any provision in any enactment limiting the jurisdiction of the sheriff in a summary cause by reference to any amount, or limiting the period for which a decree granted by him shall have effect, shall not apply in relation to such an action of interim aliment as is described in this subsection.”

- (b) In subsection (2) for the words " in the small debt court " there shall be substituted the words " as a summary cause ".
- (c) After subsection (2) there shall be added the following subsections—

“(2A) The Lord Advocate may by order vary the amounts prescribed in paragraphs (i) and (ii) of subsection (1) above.

(2B) The power to make an order under the last foregoing subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament, and shall include power to vary or revoke any order made thereunder.”

- (d) Subsection (3) is hereby repealed,  
and this section shall come into force on 1st September 1976.

### *Supplemental*

## **9 Abolition of oath of calumny**

In a consistorial action (whether brought before or after the commencement of this Act) the oath of calumny shall not be administered to the pursuer, and accordingly that oath is hereby abolished, but nothing in this section shall affect any rule of law relating to collusion.

## **10 Right of husband to cite paramour as a co-defender and to sue for damages abolished**

- (1) After the commencement of this Act the following rights of a husband shall be abolished, that is to say—
  - (a) the right to cite a paramour of his wife as a co-defender in an action for divorce, and
  - (b) the right to claim or to obtain damages (including solatium) from a paramour by way of reparation.
- (2) Nothing in the provisions of the foregoing subsection shall preclude the court from awarding the expenses of the action for or against the paramour or alleged paramour in accordance with the practice of the court.
- (3) Section 7 of the Conjugal Rights (Scotland) Amendment Act 1861 (citation of a co-defender in an action for divorce and decree for expenses against him) shall cease to have effect.

## **11 Curator *ad litem* to be appointed in certain cases**

Provision shall be made by act of sederunt for the purpose of securing that, where in an action for divorce the defender is suffering from mental illness, the court shall appoint a curator *ad litem* to the defender.

## **12 Amendments, repeals and transitional provisions**

- (1) The enactments described in Schedule 1 to this Act shall have effect subject to the amendments specified therein in relation to them respectively.
- (2) The enactments specified in columns 1 and 2 of Schedule 2 to this Act are hereby repealed to the extent specified in relation to them respectively in column 3 of that Schedule.
- (3) Subject to the following provisions of this section and without prejudice to the operation of section 38 of the Interpretation Act 1889 (effect of repeals), nothing in this section shall affect any proceedings brought, anything done, or the operation of any order made, under any enactment repealed by this section; nor shall anything in this Act be taken to revive any rule of law superseded by any enactment repealed by this section.
- (4) Anything which, prior to the commencement of this Act, could have been done under section 2 of the Divorce (Scotland) Act 1938 or section 26 or 27 of the Succession (Scotland) Act 1964 may, after the commencement of this Act, be done under the corresponding provision of section 5 or 6 of this Act.
- (5) An order under section 2 of the Divorce (Scotland) Act 1938 for the payment of an annual or periodical allowance to or for the behoof of a child of the marriage may, after the commencement of this Act, be varied or recalled by a subsequent order under subsection (2) of that section as if that section had not been repealed by this Act.
- (6) Subsection (5) of section 5 of this Act shall apply in relation to an order for the payment of an annual or periodical allowance under section 2 of the Divorce (Scotland) Act 1938 or of a periodical allowance under section 26 of the Succession (Scotland) Act 1964 as it applies in relation to an order for the payment of a periodical allowance under the said section 5.

### **13 Interpretation**

- (1) In this Act, unless the context otherwise requires—
  - " action for divorce " has the meaning assigned to it by section 1(1) of this Act;
  - " the court " means—
    - (a) in relation to an action for divorce or an order under section 5 or 6 of this Act, the Court of Session ;
    - (b) in relation to any other action, the Court of Session or the sheriff, as the case may require.
- (2) For the purposes of this Act, the parties to a marriage shall be held to cohabit with one another only when they are in fact living together as man and wife ; and " cohabitation " shall be construed accordingly.
- (3) References in this Act to any enactment are references to that enactment as amended, and include references thereto as applied, by any other enactment, including, except where the context otherwise requires, this Act.

### **14 Citation, commencement and extent**

- (1) This Act may be cited as the Divorce (Scotland) Act 1976.
- (2) This Act except section 8 shall come into operation on 1st January 1977.
- (3) So much of section 12 of, and Schedule 1 to, this Act as affects the operation of section 16 of the Maintenance Orders Act 1950 shall extend to England and Wales and to Northern Ireland as well as Scotland, but save as aforesaid this Act shall extend to Scotland only.



## SCHEDULES

### SCHEDULE 1

Section 12(1).

#### ENACTMENTS AMENDED

- 1 In section 16(2)(b)(i) of the Maintenance Orders Act 1950, for the words " under section 26 of the Succession (Scotland) Act 1964" there shall be substituted the words " an order for the payment of a periodical allowance under section 26 of the Succession (Scotland) Act 1964 or section 5 of the Divorce (Scotland) Act 1976. "
- 2 In section 33(2) of the Succession (Scotland) Act 1964 there shall be added at the end the words " or section 5 of the Divorce (Scotland) Act 1976 ".
- 3 In section 8(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, at the end of paragraph (c), there shall be added the words " or under section 5 of the Divorce (Scotland) Act 1976 ".
- 4 In section 11(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, for the words from " administering " to the end of the subsection there shall be substituted the words " receiving evidence from the pursuer ".
- 5 In Schedule 2 to the Domicile and Matrimonial Proceedings Act 1973, after paragraph 12 there shall be inserted the following paragraph—  
“12A Section 5 (orders for financial provision) and section 6 (orders relating to settlements and other dealings) of the Divorce (Scotland) Act 1976.”

### SCHEDULE 2

Section 12(2).

#### ENACTMENTS REPEALED

Chapter	Short Title	Extent of Repeal
6 Geo. 4. c. 120.	The Court of Session Act 1825.	In section 28 the words " or adultery ".
11 Geo. 4 & 1 Will. 4. c. 69.	The Court of Session Act 1830.	In section 36 the words from the beginning to " to the pursuer; and ".
24 & 25 Vict. c. 86.	Conjugal Rights (Scotland) Amendment Act 1861.	Section 7.
3 Edw. 7. c. 25.	The Licensing (Scotland) Act 1903.	Section 73.
1 & 2 Geo. 6. c. 50.	The Divorce (Scotland) Act 1938.	The whole Act, except sections 5, 6(1) and 8.

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*Status: This is the original version (as it was originally enacted).*

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Chapter	Short Title	Extent of Repeal
6 & 7 Eliz. 2. c. 54.	The Divorce (Insanity and Desertion) Act 1958.	The whole Act.
8 & 9 Eliz. 2. c. 61.	The Mental Health (Scotland) Act 1960.	In Schedule 4 the paragraph relating to the Divorce (Scotland) Act 1938.
1964 c. 41.	The Succession (Scotland) Act 1964.	Section 25. Section 26. Section 27.
1964 c. 91.	The Divorce (Scotland) Act 1964.	The whole Act.
1966 c. 19.	The Law Reform (Miscellaneous Provisions) (Scotland) Act 1966.	Section 8(5).