

FAMILY LAW (SCOTLAND) ACT 2006

EXPLANATORY NOTES

THE ACT

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:
 - 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.