FAMILY LAW (SCOTLAND) ACT 2006

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EXPLANATORY NOTES

THE ACT

Divorce

Section 11: Divorce: reduction in separation periods

20.   Section 11 amends the Divorce (Scotland) Act 1976 to reduce the periods of non-cohabitation required to establish the irretrievable breakdown of a marriage.

21.   Under Scots law, the sole ground for divorce is the irretrievable breakdown of the marriage. The 1976 Act provides a list of the ways in which it is possible to establish such a breakdown. Two of these are:

•   the non-cohabitation of the parties to the marriage for a period of two years where both parties consent to the divorce

•   the non-cohabitation of the parties to the marriage for a period of five years where one party does not consent to the divorce.

22.   Section 11 reduces the periods of non-cohabitation in the 1976 Act to 1 year where both parties consent and 2 years where one party does not consent to the divorce.

Section 12: Irretrievable breakdown of marriage: desertion no longer to be ground

23.   Section 12 removes desertion as a way to establish the irretrievable breakdown of a marriage. Under subsection 1(2)(c) of the Divorce (Scotland) 1976 Act it is only possible to establish the breakdown of the marriage on the grounds of desertion if there has been two years' non-cohabitation after one party has deserted the other.

Section 13: Non-cohabitation without consent: removal of bar to divorce

24.   Section 1(5) of the Divorce (Scotland) Act 1976 prevents the court from granting a divorce following the non-cohabitation of the parties for five years if it considers that to do so would result in grave financial hardship to the party who does not consent to the divorce. Section 13 of the Act repeals this provision.

Section 14: Collusion no longer to be bar to divorce

25.   The aim of this section is to remove collusion as a bar to divorce, but it remains the case that at common law the court should not grant a decree of divorce if satisfied that the pursuer has put forward a false case or the defender has withheld a good defence. 'Collusion' is where the parties to a marriage agree to permit a false case to be substantiated, or to keep back a good defence. For example, this might involve the spouses falsifying an adulterous relationship in order to achieve a quicker divorce. However, given that there is broad agreement that existing legislative provisions relating to collusion no longer serve a useful purpose, section 14 of the Act provides

that any rule of law which would prevent spouses from divorcing if they colluded will cease to have effect.

26.   Subsection 14(2) repeals section 9 of the Divorce (Scotland) Act 1976. Section 9 of the 1976 Act abolished the oath of calumny. The oath of calumny was an oath by a pursuer to swear that there was no agreement between the parties to put forward a false case or to hold back a good defence. However, as collusion is being removed by section 14(1) there is no longer any need to maintain the abolition at section 9 of the 1976 Act. The oath of calumny is not revived.

Section 15: *Postponement of decree of divorce where religious impediment to re-marry exists*

27.   This section inserts a new section 3A into the Divorce (Scotland) Act 1976 which provides the court with the discretion to postpone decree of divorce where a religious impediment to remarry exists. Regardless of the fact that irretrievable breakdown of a marriage has been established in an action of divorce, the court may postpone granting decree of divorce until it is satisfied that the other party has removed or has contributed to the removal of the impediment which prevents that marriage. If this is the case, the court may order the other party to produce a certificate from a relevant religious body confirming that the other party has acted in the way described above. A power is given to Scottish Ministers to make regulations to prescribe the religious faiths which can rely on this provision.