

# MARRIAGE AND CIVIL PARTNERSHIP (SCOTLAND) ACT 2014

---

## EXPLANATORY NOTES

### SCHEDULES

#### *Schedule 1: Jurisdiction in proceedings relating to same sex marriages*

##### Overview

219. The Domicile and Matrimonial Proceedings Act 1973 (“the 1973 Act”) makes provision on the jurisdiction of the Scottish courts to deal with court actions on divorce, separation, declarator of nullity of marriage and declarator of marriage and on actions for declarator of recognition or non-recognition of relevant foreign decrees. The 1973 Act has been amended previously to take account of EC Regulation 2201/2003 (known as Brussels IIa) on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in the matters of parental responsibility. EC Regulation 2201/2003 deals with opposite sex marriage only.
220. [Schedule 1](#) makes provision on the jurisdiction of the Scottish courts in relation to same sex marriages. The schedule amends the 1973 Act to make provision for court actions in relation to same sex couples. The schedule also enables the Scottish Ministers to make provision corresponding to EC Regulation 2201/2003.
221. In addition, overseas couples who enter into a same sex marriage in Scotland but remain or become habitually resident or domiciled in another country may not be able to end their marriage in that country if it does not recognise the existence of the relationship.
222. The schedule therefore amends the 1973 Act to provide a “jurisdiction of last resort” so that those same sex couples who are unable to divorce or obtain other matrimonial order in the country which would normally have jurisdiction are able have their case heard in the Scottish courts. The Scottish courts will be able to assume jurisdiction if the couple were married in Scotland and it is the interests of justice to do so.
223. Provision of a similar nature was made in respect of civil partnerships under Chapter 3 of Part 5 to the Civil Partnership Act 2004. Part 4 of Schedule 4 to the UK Marriage (Same Sex Couples) Act 2013 makes similar provision in respect of the jurisdiction of the courts in England and Wales in relation to matrimonial actions for same sex couples.

##### **Domicile and Matrimonial Proceedings Act 1973**

224. [Paragraph 1\(2\)](#) amends the 1973 Act to set out which provisions in respect of jurisdiction in matrimonial actions do not apply to marriages of same sex couples, which are instead dealt with in [Schedule 1B](#), inserted by [paragraph 1\(4\)](#). [Paragraph 1\(3\)](#) amends section 10 of the 1973 Act, to reflect that references to EC Regulation 2201/2003 are not relevant for same sex married couples, as the Regulation extends to opposite sex marriage only.

225. Paragraph 1(4) inserts a new Schedule 1B into the 1973 Act. Paragraph 1 of the new Schedule 1B sets out that the Schedule has effect with respect to the jurisdiction of the court to entertain proceedings relating to the ending of a same sex marriage (divorce, separation, nullity) and proceedings relating to a marriage's validity, including whether or not the marriage exists. The paragraph also provides definitions.

### **Power to make provision corresponding to EC Regulation 2201/2003**

226. Paragraph 2(1)(a) of Schedule 1B enables the Scottish Ministers to make regulations about the jurisdiction of the courts in relevant proceedings in relation to a same sex marriage. "Relevant proceedings" are defined in paragraph 1(2) of Schedule 1B with reference to the proceedings listed in paragraph 1(1): divorce; separation; declarator of marriage; declarator of nullity of marriage and declarator of recognition, or non-recognition, of a decree of divorce, separation or nullity granted outwith a Member State of the EU. Paragraph 2(1)(b) allows the Scottish Ministers to make regulations to provide for the recognition in Scotland of a judgment by a court of another Member State relating to divorce, separation or annulment.
227. The regulations under paragraph 2(1) would apply where one of the couple: is or has been habitually resident in a Member State), or is an EU national, or is domiciled in a part of the UK or the Republic of Ireland. The regulations may correspond with the terms of EC Regulation 2201/2003 on jurisdiction, recognition and enforcement of judgments in matrimonial matters.
228. The provisions in regulations made under paragraph 2(1)(b) on recognition of judgments can apply retrospectively – i.e. where the date of the divorce is earlier than the date on which the paragraph comes into force.
229. A statutory instrument containing these regulations will be subject to the affirmative procedure.

### **Divorce or separation**

230. Paragraph 3(1) of Schedule 1B provides that the Court of Session is able to deal with divorce or separation cases relating to same sex marriage either (a) where the Scottish courts have jurisdiction because of regulations made under paragraph 2 of the Schedule or (b) when no court has jurisdiction under the regulations and either of the married same sex couple is domiciled in Scotland when the case starts.
231. Under paragraph 3(2), the sheriff court has jurisdiction in these cases when either (a) or (b) above is met and:
- either party to the marriage was resident in the sheriffdom for a period of 40 days before the court action is raised; or
  - either party had been resident in the sheriffdom for at least 40 days ending not more than 40 days before the court action is raised and has no known residence in Scotland when the action is raised.
232. In addition, Edinburgh sheriff court has jurisdiction if the couple married in Scotland, no court has jurisdiction under regulations made under paragraph 2 of Schedule 1B and it appears to the court to be in the interests of justice for it to deal with the case. This is referred to in paragraph 222 above as "jurisdiction of last resort".

### **Declarator of marriage**

233. Paragraph 4(1) of Schedule 1B provides that the Court of Session is able to deal with declarator of marriage cases relating to same sex marriage either where either of the parties is (a) domiciled in Scotland when the action is raised or (b) habitually resident in Scotland for a year before the action is raised or (c) dead and at death was domiciled in

Scotland or had been habitually resident in Scotland for a year immediately preceding the death.

234. Under paragraph 4(2), the sheriff court has jurisdiction in these cases when either (a) or (b) or (c) above is met and either party to the marriage:
- was resident in the sheriffdom for a period of 40 days before the court action is raised; or
  - had been resident in the sheriffdom for at least 40 days ending not more than 40 days before the court action is raised and has no known residence in Scotland when the action is raised.

### **Nullity of marriage**

235. Paragraph 5(1) of Schedule 1B provides that the Court of Session is able to deal with declarators of nullity of a same marriage where (a) the Scottish courts have jurisdiction under regulations made under paragraph 2 of Schedule 1B or (b) no court has jurisdiction under the regulations and either party to the marriage is (i) domiciled in Scotland when the action is raised or (ii) dead and at death had been domiciled in Scotland or had been habitually resident in Scotland for a year immediately preceding the death.
236. Under paragraph 5(2), the sheriff court has jurisdiction in these cases when either (a) or (b) above is met and either party to the marriage:
- was resident in the sheriffdom for a period of 40 days before the court action is raised; or
  - had been resident in the sheriffdom for at least 40 days ending not more than 40 days before the court action is raised and has no known residence in Scotland when the action is raised.
237. In addition, Edinburgh sheriff court has jurisdiction if the couple married in Scotland, no court has jurisdiction under regulations made under paragraph 2 of Schedule 1B and it appears to the court in the interests of justice for it to deal with the case. This is referred to in paragraph 222 above as “jurisdiction of last resort”.

### **Recognition, or non-recognition, of foreign decrees**

238. Paragraph 6(1) of Schedule 1B provides that the Court of Session is able to deal with proceedings to recognise or not recognise a court decree from outwith the EU relating to divorce, separation or nullity of a same sex marriage if (a) the Scottish courts have jurisdiction under regulations made under paragraph 2 of Schedule 1B or (b) no court has jurisdiction under the regulations and either party to the marriage is (i) domiciled in Scotland when the action is raised or (ii) dead and at death was domiciled in Scotland or had been habitually resident in Scotland for a year immediately preceding the death.
239. Under paragraph 6(2), the sheriff court has jurisdiction in these cases when either (a) or (b) above is met and either party to the marriage:
- was resident in the sheriffdom for a period of 40 days before the court action is raised; or
  - had been resident in the sheriffdom for at least 40 days ending not more than 40 days before the court action is raised and has no known residence in Scotland when the action is raised.

### **Supplementary provision**

240. Paragraph 7(1) of Schedule 1B makes it clear that the provisions in this Schedule on divorce or separation do not affect the Court of Session's jurisdiction to hear separation proceedings as a matter of necessity and urgency.
241. Paragraph 7(2) makes it clear that the provisions in Schedule 1B on divorce, separation and nullity do not affect the sheriff court's jurisdiction to hear such cases remitted to it under any enactment or rule of court, where hearing such cases does not contravene regulations made under paragraph 2.
242. Paragraph 7(3) makes it clear that when hearing a case under paragraphs 3 to 6 of Schedule 1B, the court can also hear other proceedings in respect of the same marriage, even if it would not normally have jurisdiction.

### **Presumption of Death (Scotland) Act 1977**

243. [Paragraph 2](#) of schedule 1 makes amendments to section 1 of the Presumption of Death (Scotland) Act 1977, which allows actions to be raised so that someone who is missing can be presumed to be dead. The amendment allows Edinburgh sheriff court to hear such actions in relation to a person in a same sex marriage where the marriage took place in Scotland and it appears to the court to be in the interests of justice to assume jurisdiction. This is referred to in paragraph 222 above as "jurisdiction of last resort".