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Justice Committee
Scottish Parliament
Edinburgh EH99 1SP

9 February 2016

Dear Convenor and Committee Members,

Family Law (Scotland) Act 2006: post-legislative scrutiny

We attach our joint evidence on the 2006 Act, restricting our comments to provisions pertaining to international private law or having international private law implications.

Yours sincerely,

Professor E B Crawford

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SCOTTISH PARLIAMENT – JUSTICE COMMITTEE

FAMILY LAW (SCOTLAND) ACT 2006

**Evidence of
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Our evidence is restricted to provisions of the 2006 Act pertaining to international private law or having international private law implications.

Section 2 – Void Marriages

Section 38(2) of the 2006 Act directs the question whether a person has consented to enter into a marriage to the law of the domicile of that person immediately before the marriage. While this provision made clear the rule in the general case, the inclusion in section 2 of a particular rule concerning void marriages (inserted as s.20A of the Marriage (Scotland) Act 1977) represented an attempt to address a problem which had troubled the Scots courts in this area.

Insofar as section 2 introduced a mandatory provision of the *lex loci celebrationis*, where the *lex loci* is Scottish, it was, and continues to be, a welcome measure. Given the absence of reported case law on the interpretation and operation of the section, it is difficult to comment further. It is reasonable to infer that the problem demonstrated in *Hakeem v Hussain*, 2003 S.L.T. 515 (on appeal, sub nom. *SH v KH*, 2005 S.L.T. 1025) has been addressed effectively.

Section 15 – Postponement of decree of divorce where religious impediment to remarry exists

Section 15, making provision for Scotland equivalent to the Divorce (Religious Marriages) Act 2002 for England and Wales, was, and continues to be, a welcome measure.

Section 19 – Special destinations: revocation on divorce or annulment

We note that section 19 has been repealed by section 2 (“Effect of divorce, dissolution or annulment on special destination”) of the Succession (Scotland) Act 2016.

Section 21 – Abolition of status of illegitimacy; and Section 41 – Effect of parents' marriage in determining status to depend on law of domicile

Section 21 purported to abolish the status of illegitimacy. Section 21(2)(a) enacts a substitution in the Law Reform (Parent and Child) (Scotland) Act 1986 (s.1: legal equality of children) in the following words:

“No person whose status is governed by Scots law shall be illegitimate; and accordingly the fact that a person’s parents are not or have not been married to each other shall be left out of account in—

- (a) determining the person’s legal status; or
- (b) establishing the legal relationship between the person and any other person.”

This begs the question of *when* a person’s status is governed by Scots law. There is a mutually dependent relationship between domicile and status, domicile being ascribed at birth according to status, but (until the advent of the 2006 Act in Scotland, and still in England) the status of the individual being required to be identified before domicile can be ascribed. Identification of domicile of origin depended upon legitimacy, but, as domicile of origin determined status, legitimacy depended upon domicile. There was, therefore, a problem of circularity of reasoning.

Since, in terms of section 22 of the 2006 Act, the domicile of a child at birth must be ascribed by a Scots court according to the rules contained therein, and not according to status as having been born inside marriage or not, one must conclude that if, in terms of s.22, a child’s domicile is Scots, his status cannot be one of illegitimacy.

But if, by s.22, his domicile is found to be other than Scots, his status must be determined by that other personal law, which yet may contain a distinction between legitimate and illegitimate. The 2006 Act, in section 41, acknowledges this in providing that any question arising as to the effect on a person’s status of— (a) the person’s parents being, or having been, married to each other; or (b) the person’s parents not being, or not having been, married to each other, shall be determined by the law of the country in which the person is domiciled at the time at which the question arises.

Whether the status of illegitimacy by a foreign legal system (such as the law of a title¹ or the *lex situs* of immoveable property) would be found to be against Scots public policy would depend upon the matter being capable of being raised in a Scots forum, and upon the context in which the matter arose. The very existence of section 41 suggests that a foreign status of illegitimacy, per se, would not offend Scots public policy.

Section 22 – Domicile of persons under 16

Section 22 was enacted to assist in the fulfilment of one of the aims of the 2006 Act, namely, the removal from the law of Scotland of the status of illegitimacy. In Scots law, there could no longer be a link between a child’s domicile and the marital status of his/her parents.

There has been no reported case on the interpretation and operation of section 22. Even so, a flaw in the provision is that the Act makes no reference to the terms “domicile of origin” and “domicile of choice”, which are pivotal concepts in the law of domicile. Section 22 is an ad hoc statutory incursion into the framework of the domicile rules, and silence about the place of ‘under-16 domicile’ in the general scheme of domicile rules is damaging to their coherence. Legislating under the heading “Domicile of persons under 16”, without

¹ Preserved by Family Law (Scotland) Act 2006 (Commencement, Transitional Provisions and Savings) Order 2006 (SSI 2006/212), art.11.

appreciating the potential repercussions of the provision on the ascertainment of domicile at subsequent points in an individual's life, was ill-advised.

A second criticism is that the Act does not make plain the time at which the section 22 rule is to take effect. Does it apply (in cases litigated from its date of commencement - 4 May 2006 - forward), to regulate the domiciles only of those persons who, at the date of coming into force of the Act, were under 16 and those at that date not yet born? Or does it apply equally to determine the ultimate domicile of an octogenarian *propositus* who dies after commencement of the Act? The point is yet untested and ought to be clarified.

Section 25 – Meaning of “cohabitant” in sections 26 to 29

The Act, in sections 25 – 30, introduced a set of rules which provide for cohabitants certain property rights during and at the termination of cohabitation.

The statutory meaning of “cohabitant”, as enacted, was as follows: either member of a couple consisting of (a) a man and a woman who are (or were) living together as if they were husband and wife; or (b) two persons of the same sex who are (or were) living together as if they were civil partners. By section 4(2) and (3) of the Marriage and Civil Partnership (Scotland) Act 2014, section 25(1)(a) of the 2006 Act must be read now as extending equally to two people of the same sex who are (or were) living together as if they were married to each other.

These notable changes in domestic family law have the potential to generate conflict of laws problems, but in general sections 25–30 are “conflict of laws blind”, except as regards section 29 (see below). It is implicit that application may be made for the rights provided for in the Act whenever Scots law is the *lex causae*. However, since generally the Act contains no jurisdiction or choice of law rules with regard to *de facto* cohabitation, it remains uncertain, e.g. which law governs an individual's legal capacity to attain the status of cohabitant, or indeed when Scots law is to be considered the *lex causae*. An essential antecedent question, not addressed in the Act, is in what circumstances the Scottish courts have jurisdiction to rule on these matters in the first place.

What arguments might a party approaching the Scots court deploy to persuade the court that a law other than Scots law should apply, assuming such other law is furnished with rules containing property rights for cohabitants? Arguably, the starting point might be that Scots law is the governing law where the parties have, or last had, their principal place of cohabitation in Scotland, i.e. a simple territorial basis akin to the “matrimonial domicile”. There is a strong argument for application, by the court of the country in which the parties cohabit, of the law of that country to the property and financial consequences of *de facto* cohabitation. Presumably that law also would determine when, and in what circumstances, such cohabitation is deemed to have ceased.

It is unfortunate, therefore, that, with the exception of section 29, this set of provisions for cohabitants lacks any indication of its applicability in cross-border terms.

Section 29 – Application to court by survivor for provision on intestacy

This provision, unlike section 28, has the merit of specifying a choice of law connecting factor, namely, that for an application to be made for succession rights under the Act the deceased cohabitant must have been domiciled in Scotland at death.

The Sheriff Principal decided in *Kerr v Mangan*,² upon the interpretation of section 29, that while it “innovates” on the manner in which the estate of a deceased cohabitant falls to be distributed, it ought to be read against the background of the Succession (Scotland) Act 1964, and in accordance with existing principles of international private law. Therefore, “references to the ‘net intestate estate’ of the deceased ... ought to be interpreted as meaning the net intestate estate that is to devolve according to Scots law including Scots private international law ...”.³ Hence ‘net intestate estate’ for the purpose of the 2006 Act did not extend to immoveable property situated *outside* Scotland. The argument of counsel for the appellant that section 29 of the 2006 Act did not fall to be applied as part of the Scots law of succession, but rather was an independent and novel scheme, covering all the estate of the deceased wherever situate, failed to convince the court. The court’s decision is consistent with Scots conflict of laws principles in property and succession.

Section 37 – Jurisdiction: actions for declarator of recognition of certain foreign decrees

This continues to be an appropriate provision for use where there is doubt as to the validity in Scotland of a foreign, non-EU consistorial judgment.

Section 38 – Validity of marriages

Formal validity of marriage: section 38(1) is a statutory crystallisation of the pre-existing common law, and to that extent is unexceptionable. However, one reported case in the period since 2006, namely, *A v K*,⁴ has shown that occasionally there may be difficulty in applying the ‘*lex loci celebrationis*’ rule. The case concerned the formal validity of a marriage purportedly concluded by telephone between parties, one of whom was in Scotland and the other in Pakistan. Lord Stewart in the Outer House of the Court of Session, refusing a declarator of nullity, took the view that the marriage took place wholly in Pakistan.⁵

In such an unusual ‘dual locality’ case, we suggest that the choice of law rule should be one of cumulative application, in the same way as occurs with regard to the essential validity of marriage *per* section 38(2) of the 2006 Act. Such an approach, which we have recommended elsewhere,⁶ was commended in England in *SB v The Secretary of State for Work and Pensions (BB)*.⁷

² 2013 S.L.T. (Sh.Ct.) 102. Affirmed by the Court of Session at 2015 S.C. 17.

³ *Ibid*, para.23 *per* Sheriff Principal RA Dunlop QC.

⁴ 2011 S.L.T. 873.

⁵ [58].

⁶ E.B.Crawford and J.M.Carruthers, 'Dual locality events: marriage by telephone' 2011 SLT (News) 227-234; and E.B.Crawford and J.M.Carruthers, *International Private Law – A Scots Perspective*, 4th edition (2015), W.Green, para 11-21.

⁷ [2014] UKUT 0495 (AAC), at [40]. See also the decision of the Court of Appeal in *KC v City of Westminster Social and Community Services Department* [2008] EWCA Civ 198, where a marriage ceremony was conducted by telephone call between one party (a British national of Bangladeshi

Essential validity of a marriage: section 38(2)(a), in stating that the question whether a person who enters into a marriage had capacity to enter into it shall be determined by the law of the place where, immediately before the marriage, that person was domiciled, affirms in statutory form the common law approach. In so doing, it appears to exclude the possibility in Scotland of advancing an alternative argument on choice of law (the ‘intended matrimonial home theory’ or ‘common law exception’) which might produce an *in favorem matrimonii* result where application of the dual domicile theory would yield a negative, i.e. a finding of lack of capacity on the part of either or both parties. No cases have been reported on the operation of section 38(2), and so it may be conjectured that the fixed nature of the rule is not causing difficulty in practice.

Third party consent to marriage: section 38(5). There are no reported cases concerning section 38(5). Issues of parental consent to underage marriage now are practically unknown, but the statutory rule – though convoluted in its terms – probably should remain.

Section 39 – Matrimonial property

Scots applicable law rules of matrimonial property were placed on a legislative footing by section 39. The need for this was not pressing (and insofar as we know, there have been no reported cases concerning section 39). The drafting of the section is unclear in various places.

The first point to be made is that the provision admits only at the end (section 39(6)(b)) that the rules in section 39 are subject to the spouses’ contrary agreement. It is, therefore, apparent that these rules do not trump private marriage contract provisions. It is assumed that the provisions contained in section 39 are subject also to rights which have vested under a statutory scheme (though it has to be conceded that the Act nowhere makes such a specific assertion). It would be clearer if the rule admitted in the opening clause that the provisions contained in section 39 are subject to contrary private agreement or vested statutory provisions.

By section 39(2), the rights of spouses to each other’s moveable property arising by virtue of the marriage shall be determined by the law of the common domicile. The relevant time at which domicile is to be ascertained is not specified: is the reference to the domicile of the spouses at the date of acquisition of the property in question, or to the immediate post-nuptial domicile? For sake of clarity, a *tempus inspiciendum* (i.e. the time at which domicile is relevant) ought to be specified.

Section 39(3), in our view, is unclear. By section 39(3), where the parties are domiciled in different countries (when?), the spouses shall be taken to have the same rights in each other’s moveable property arising by virtue of the marriage as they had immediately before the marriage (by which law?). This obscure provision is subject also to the provision on vested rights contained in section 39(5). It may mean that the parties are to be taken to have adopted

descent, and an English domiciliary) and the second party, a woman of presumed Bangladeshi domicile. For the purposes of the case, the marriage was accepted to have taken place in Bangladesh, by the law of which it was formally valid.

for the future the matrimonial property rules existing in their respective ante-nuptial domiciles; but what if these systems are mutually inconsistent?

If section 39 is to remain, its drafting should be made more precise in order to remove ambiguity.

Section 40 – Aliment

The UK decision not to participate in the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations reflects the UK Government's view that in maintenance cases the expense of proving the content of foreign law would be disproportionate to the value of the great majority of maintenance claims. The UK agreed to participate in the Maintenance Regulation only on the basis that applicable law rules were removed from the EU instrument; and further that EC accession to the 2007 Protocol would be done on the basis that the UK was not obliged to participate therein. Accordingly, where a Scots court has jurisdiction in respect of a maintenance claim, it will apply Scots domestic law to the substance of the question. This means that the substance of section 40 requires no alteration.

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9 February 2016