

**SCOTTISH CIVIL JUSTICE COUNCIL: FAMILY LAW COMMITTEE
POLICY PAPER BY THE SCOTTISH GOVERNMENT
PROPOSED EXTENSION OF SIMPLIFIED DIVORCE TO CASES WHERE THERE
ARE CHILDREN UNDER 16 AND NO DISPUTE ABOUT THEIR WELFARE**

Introduction

1. This paper proposes the extension of simplified divorce to cases where there are children under 16 and no dispute about their welfare.
2. This paper follows an approach by the Scottish Legal Aid Board (SLAB) to the Scottish Government to discuss the possibility of extending the simplified divorce procedure. It also follows an earlier short paper prepared by the Government which was considered by Lord Brailsford's Joint Working Group on Family Actions. This earlier paper is attached at Appendix A.
3. The Government expects that extending simplified divorce to cases where there are children under 16 and no dispute about their welfare would require:
 - Changes to court rules.
 - Changes to court forms.
 - An Order made by the Scottish Ministers under section 8 of the Civil Evidence (Scotland) Act 1988.
4. In putting forward these proposals both the Scottish Government and SLAB have been conscious of the need to safeguard the welfare of children as well as the need to reduce unnecessary costs.
5. This paper refers throughout to divorce. There is also a simplified procedure for dissolution of civil partnership. The Government would suggest that the same considerations apply to it as to the simplified divorce procedure. Therefore, the proposals in this paper would apply to the dissolution of civil partnerships as well as to divorce.

Current divorce procedure

6. The Scottish Courts grant around 9,500 divorces every year¹. Approaching 6,000 of these are through the simplified procedure.
7. A couple must satisfy certain requirements before they can use the simplified procedure. These include that the couple has no children under 16 and that neither is claiming money from the other.
8. More information about the simplified procedure is available on the Scottish Court Service website².

¹ <http://www.scotland.gov.uk/Publications/2012/12/9263/5> See tables 11 and 12.

² <http://www.scotcourts.gov.uk/taking-action/divorce-and-dissolution-of-civil-partnership/simplified-do-it-yourself-procedure>

9. Where a couple do not qualify for the simplified procedure, they must use the ordinary procedure. It is more time consuming and more expensive than the simplified procedure. SLAB estimates that extending the simplified procedure could produce savings for the Board of around £700,000 a year, not including further savings in respect of Advice and Assistance. SLAB also noted that there could be savings in court time. There will also be savings for couples seeking divorce who have agreed all matters including welfare arrangements and who do not qualify for legal aid.

Proposed extension to cases involving a child under 16

Section 12 of the Children (Scotland) Act 1995

10. The Government agrees with SLAB that the simplified divorce procedure should be extended to cases where a couple have a child under 16 but have reached agreement about future arrangements for that child.
11. Clearly, there is a need to ensure the welfare of the child. In divorce and dissolution actions, the court has a duty under section 12 of the Children (Scotland) Act 1995 to consider the arrangements for the upbringing of children of the family.
12. We suggest that in order for the court to fulfil its duty under section 12, a couple must tell the court 1) that they have reached agreement and 2) what it is that they have agreed.

Court forms

13. The proposed extension would require either a new form for cases involving children under 16, or an amendment to the existing forms³. It will be important to ensure that this new or revised form is drafted so that the court is clear about what has been arranged and so that the court can ask questions, if appropriate. The form could, for example, ask specific questions on the children's circumstances. If a minute of agreement has been drawn up in relation to the child's welfare, that could be attached to the form.
14. We wish to ensure that the information available to the court is at least as comprehensive as information available in undefended family actions under ordinary cause (Ordinary Cause Rule 33.28(3), on certain undefended family actions, provides that "Unless the sheriff otherwise directs, evidence relating to the welfare of a child shall be given by affidavit, at least one affidavit being emitted by a person other than a parent or party to the action.").
15. Lord Brailsford's working group considered that the application form for cases involving children under 16 should be signed by the applicant in the presence of a notary public and the other parent should sign the application. This would indicate his or her consent in relation to the proposed arrangements for

³ The existing application forms in relation to simplified divorce are at <http://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/simplified-divorce-and-simplified-dissolution-of-civil-partnership-forms>

bringing up the child. However, this consent by the other parent would not have to be signed in the presence of a notary public.

16. The Government's understanding is that the working group considered the risk of challenge to a non-notarised statement was minimal given service of the documents would still have to be made to the non-applicant spouse (see Sheriff Court Ordinary Cause Rule 33.76⁴ and Court of Session Rule 49.75⁵).
17. Changes may be required to the citation forms⁶ (such as Forms F34 and F35) to make it clear to the non-applicant spouse that the court has been advised that agreement has been reached by the parties on the welfare arrangements for any children under 16.
18. In addition, any children under 16 would need to be notified of any divorce application under simplified procedures which impacts on them. Therefore, a revised version of Form F9 may be required.

Court rules

19. Changes would need to be made to the court rules to give effect to the proposal. For example, in the Sheriff Court Ordinary Cause Rules, Rule 33.73(1)(d) on simplified divorce applications refers to there being "no children of the marriage under the age of 16 years".
20. In addition, as indicated above, provision may be required to ensure that children under 16 are notified of any divorce application under simplified procedures which applies to them. Provision may also be required to disapply this requirement in certain circumstances (eg if the child is too young to offer any view at all on the proceedings). One option might be for the pursuer to give reasons in the application as to why the child should not be intimated (Rule 33.7(7) provides a potential precedent).
21. Any changes to the court forms might also need to be reflected in the rules.

Cases where the court is not satisfied

22. There will be cases where the court is not satisfied with the information provided.
23. In some cases, the court may decide that the application under simplified procedures should just be refused. At the moment, Sheriff Court Ordinary Cause Rule 33.78 makes provision on opposition to a simplified divorce

⁴ Chapter 33 of the Sheriff Court Ordinary Cause Rules (for actions lodged on or after 24 June 2013) is at: [http://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33---family-actions-\(6\).doc?sfvrsn=6](http://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33---family-actions-(6).doc?sfvrsn=6)

⁵ Chapter 49 of the Court of Session Rules is at <http://www.scotcourts.gov.uk/docs/default-source/cos---rules/chap49.pdf?sfvrsn=2>

⁶ Relevant forms can be found at <http://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/ordinary-cause-forms/page/2/>.

application. Rule 33.78(2) provides that where a person on whom service or intimation of a simplified divorce application has been made objects to the application, the sheriff “shall dismiss the application unless he is satisfied that the reasons given for the opposition are frivolous”.

24. In cases where there are children under 16, dismissing the application could still be appropriate in some cases – for example, where there are technical errors in the application.
25. However, there may be other cases where the court considers that it needs to take further steps in order to comply with its duty under section 12 of the 1995 Act, as mentioned in paragraphs 10 to 12 above, in relation to the upbringing of children. Where the court has concerns, a number of steps might be taken, such as:
 - The court might ask for further written or oral evidence from the parents.
 - The court might ask for further written or oral evidence from the local authority.
 - The court might order that a child welfare hearing take place. [Section 12 of the 1995 Act makes specific reference to the circumstances of the case requiring, or likely to require, the court to exercise any power under section 11 of the 1995 Act].
 - The court might refer the matter to the Principal Reporter under section 62 of the Children’s Hearings (Scotland) Act 2011. [Section 12 of the 1995 Act makes specific reference to the circumstances of the case requiring, or likely to require, the court to exercise any power under section 62 of the 2011 Act].
26. When steps of this nature are taken, the action would cease to be treated as being under the simplified procedure and would be remitted to ordinary cause. This would, for example, ensure that legal aid could be available to the parties, subject to the usual eligibility criteria. (Under Schedule 2 to the Legal Aid (Scotland) Act 1986, civil legal aid is not available in simplified divorce applications under the Rules of Procedure of the Court of Session or the sheriff court).

Third party evidence

27. Section 8 of the Civil Evidence (Scotland) Act 1988 requires the court to establish the grounds of action in a divorce case by evidence including evidence from a person other than a party to the marriage. This requirement can be disapplied by an order made by Ministers. The Government would propose to make an order to disapply the requirement in cases involving children under 16 where there is no dispute about the child’s welfare.
28. Simplified divorce is currently available, subject to certain conditions, when the action is brought on the basis of
 - One year non-cohabitation and both spouses consent to the divorce.
 - Two years non-cohabitation.
 - The issue of an interim Gender Recognition Certificate.

29. The proposed order would not disapply the requirement for third party evidence when the action is brought on the basis of an interim Gender Recognition Certificate. In these cases, the interim Gender Recognition Certificate, or a certified copy, has to be supplied.
30. Before making such an order, the Government would intend to carry out a full consultation, putting the consultation on its website and allowing 12 weeks for comment in the usual way. The Government would be particularly keen to hear views from legal practitioners and bodies representing the interests of children.
31. In accordance with usual practice when making secondary legislation, the Government would also consider the need to prepare Impact Assessments.
32. The Government has already concluded that an Equality Impact Assessment (EQIA) is required and will be included in the consultation. A draft EQIA is attached. Any comments on the draft EQIA from the Committee are welcome.
33. The Government is considering the introduction of Children's Impact Assessment (CIA) and this may be an area where the CIA could be trialled.
34. The Government has considered if it needs to complete a Business and Regulatory Impact Assessment (BRIA). The impact on business does appear to be minimal. However, the Government intends to interview 3 family law firms and, at the very least, complete a basic partial BRIA.
35. The Government does not consider that there is any need for it to carry out a Privacy Impact Assessment or a Strategic Environmental Assessment.
36. There is already an order in place which refers to the existing terms of the simplified divorce procedure - The Evidence in Divorce Actions (Scotland) Order 1989 (SI 1989/582).
37. The Evidence in Civil Partnership and Divorce Actions (Scotland) Order 2012 (SSI 2012/111) makes provision in relation to simplified dissolution of civil partnership.
38. Before the 2012 Order was in force, the Scottish courts granted a number of dissolutions of civil partnership under the simplified procedure. Section 25 of the Marriage and Civil Partnership (Scotland) Bill, currently before the Scottish Parliament, provides that the 2012 Order is to be treated as having had effect since 5 December 2005 (when civil partnerships were introduced).
39. Should the Council agree the proposed extension of simplified divorce procedures, there would need to be careful coordination between work by the Government and work by the Scottish Court Service whilst continuing to ensure clear boundaries between the respective areas of responsibility.

Conclusion

40. The Government invites the Council to agree the general principle of extending simplified divorce to cover cases where there are children under 16 and no dispute about their welfare.
41. As indicated above, the Government would intend to consult on dis-applying the need for third party evidence in such cases. Following this consultation, a further policy paper on simplified divorce would be sent to the Council.

SCOTTISH GOVERNMENT

**Justice: Civil Law and Legal System Division: Family and Property Law
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APPENDIX A

EXTENSION OF SIMPLIFIED DIVORCE

1. This paper by the Scottish Government, which follows discussions with the Scottish Legal Aid Board, suggests a possible extension of the use of simplified procedures in divorce and dissolution cases. In particular, it suggests the simplified procedures could be extended to cases where there is a child under 16 but no dispute about his or her welfare.
2. There are over 10,000 divorces a year in Scotland. Around 6,000 of these are through the simplified procedure.
3. The simplified divorce and dissolution procedure can generally be used when there are no children under 16 and no money claims by one spouse or partner against another. In line with streamlining court processes generally, the Government considers it is worth investigating whether simplified procedures could be extended to cases where there is a child under 16 but no dispute between the parents about the child's welfare.
4. Where there are children under 16 but no dispute about their welfare, a new court form could be completed (or the existing forms could be amended). In this new form, the couple would have to outline what was proposed in respect of the child. This would enable the court to exercise its functions under section 12 of the Children (Scotland) Act 1995 and, if it had concerns, postpone granting the decree of divorce. (Section 12 of the 1995 Act makes provision on the court postponing a decree of divorce in certain circumstances in the light of information before the court on the upbringing of the child).
5. Clearly, adjustments would be needed to Court Rules to extend the potential use of simplified procedures. The Government could put a policy paper to the Rules Councils to seek a change.
6. In addition, the Scottish Ministers would need to make an affirmative resolution order under section 8 of the Civil Evidence (Scotland) Act 1988. Section 8 of the 1988 Act generally requires that the court obtains evidence from a third party when a divorce action is raised. Ministers have the power to make an order to disapply this requirement. An order was made in 1989 to reflect the current simplified divorce procedures. A further order was made last year in respect of the dissolution of civil partnerships through the simplified procedure.
7. In relation to the current proposals, Ministers would need to make another order to disapply or modify the requirement to obtain third party evidence in cases where there are children under 16 but no dispute about their welfare.
8. The Government would welcome views on extending the use of simplified procedure in divorce and dissolution actions to cases where there is a child under 16 but no dispute about his or her welfare.

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