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A practical cross-border insight into family law

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Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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Scotland

John West

Rachael Kelsey

SKO Family Law Specialists

1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

At the outset, it is important to underline that, whilst Scotland is a constituent part of the United Kingdom of Great Britain and Northern Ireland, it retains its own distinct and separate legal system.

The Scottish courts may entertain an action for divorce if there is jurisdiction under Council Regulation (EC) No 2201/2003 ("Brussels II *bis*") or the action is an "excluded action" (where no court of another EU Member State has jurisdiction under Brussels II *bis*; the defender is not domiciled in Ireland and not a national of another EU state; and either of the parties is domiciled in Scotland on the date the action is commenced).

1.2 What are the grounds for a divorce? For example, is there a required period of separation, can the parties have an uncontested divorce?

There are two grounds of divorce. The first ground of divorce is that the marriage has broken down irretrievably. To establish irretrievable breakdown, the applicant needs to prove one of the four following circumstances:

- that, since the date of marriage, the other spouse has committed adultery (it is not open to parties to a same-sex marriage to establish irretrievable breakdown by adultery);
- that, since the date of marriage, the other spouse has behaved in such a way that the applicant spouse cannot reasonably be expected to cohabit with that other spouse;
- that the spouses have not cohabited for one year or more and the other spouse consents to decree of divorce being granted; or
- that the spouses have not cohabited for two years or more.

The second ground of divorce is established if an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the date of marriage, been issued to either spouse. This certificate is granted when a person has successfully made an application to have their change of gender legally recognised.

1.3 In the case of an uncontested divorce, do the parties need to attend court?

If divorce is sought by one spouse, and the other spouse does not defend the action, it would not usually be necessary for the parties to be required to attend court. Rather, it is likely that the court would grant divorce if it was satisfied that the ground of divorce had been proved on the basis of evidence given by way of affidavits (i.e. sworn statements).

If, however, the action of divorce was defended, financial orders were being sought, and/or there were issues about the parties' children, then both spouses may be required to attend court.

1.4 What is the procedure and timescale for a divorce?

The procedure for divorce (be it opposite or same-sex marriage) applies equally to the dissolution of civil partnerships (which is a registered civil union for same sex couples only – see question 4.3 below).

Divorce proceedings can be brought in either the Court of Session or the local Sheriff Court. The majority of cases are dealt with in the Sheriff Court but cases where there is an international dimension, which are complex and/or high-value, tend to be dealt with in the Court of Session.

The document that initiates divorce in Scotland is an Initial Writ in the Sheriff Court or Summons in the Court of Session. Scots law regards the date of service to be the date on which the court is seised, not the date of presentation to the court.

The procedural rules for the conduct of the action are different in the two courts. In both courts, however, action must be taken within 21 days of service or the ability to subsequently defend (oppose) the action and/or seek any financial orders may be lost.

If an action is defended, which may be because the divorce itself is opposed or, more commonly, because orders relating to children and/or finances are sought, the defender will lodge defences setting out her/his position, and can seek counter orders. Defended actions are determined by way of an evidential hearing ("Proof"). A Proof is usually conducted over one to two days in the Sheriff Court and four to eight days in the Court of Session.

The timings for defended actions vary depending on the nature of the orders sought and issues involved, but generally take around 8−18 months in the Sheriff Court and between 12−24 months in the Court of Session.

An undefended action in either court, where no orders other than divorce are sought, generally takes around two months.

There is an expedited process called the 'simplified divorce procedure' where there are no children under 16 and no financial orders are sought. It takes around six weeks from application to final extract.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Scots law does not separate divorce from the financial consequences of marriage. Financial provision is contingent upon divorce. Financial claims arising from marriage are brought to an end upon divorce being granted (subject to the potential to claim financial provision where there has been an overseas divorce – see question 2.8 below).

Where there are children under 16 years of age, divorce will only be granted where there is evidence of satisfactory arrangements being in place for the children. Where there are child issues, orders can be sought in the divorce action or in separate, stand-alone proceedings.

1.6 Are foreign divorces recognised in your jurisdiction?

Yes. By virtue of Brussels II *bis*, a judgment given in another EU Member State (excluding Denmark) will be recognised in Scotland without any special procedures being required. A 'judgment' includes divorce, legal separation or marriage annulment. There are limited grounds of non-recognition in Article 22 of Brussels II *bis*.

The recognition of judgments given in Denmark and all other countries outside the European Union is governed by the Family Law Act 1986, with different rules for recognition and non-recognition being applied to judgments obtained by means of proceedings and those obtained otherwise than by means of proceedings.

1.7 Does your jurisdiction allow separation or nullity proceedings?

It is possible to raise an action for separation but this is very rare, with most couples opting to seek divorce instead. Judicial separation provides the couple with sanction to separate and live apart without drawing an end to the marriage. All other responsibilities and rights arising from marriage continue.

It is also possible to ask the court to grant declarator of nullity of marriage for a limited number of reasons (for example, lack of consent). Again, these types of actions are very rare in practice.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Conflicts between Scotland and another EU Member State will be determined in accordance with the *lis pendens* provisions of Article 19 of Brussels II *bis*.

However, the *lis pendens* provisions are not operational in the event of two competing intra-UK divorce actions (i.e. one involving Scotland and another part of the UK). Instead, the Domicile & Matrimonial Proceedings Act 1973 provides a system of "mandatory sists" (or "obligatory stays"), in that the courts within the UK which should have jurisdiction for the divorce are those of the country in which the couple last lived together before separation.

For conflicts involving Scotland and a jurisdiction outwith the EU, the Scottish courts have discretion to sist (i.e. stay) an action if it appears that there are other proceedings ongoing in respect of the marriage which are capable of affecting its validity. The discretion to sist the action will be determined by the balance of fairness and convenience.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

The financial orders which can be made are found in section 8 of the Family Law (Scotland) Act 1985 and include: payment of a capital sum; transfer of property; making of a periodical allowance (that is, regular support post-divorce); pension sharing order; and various other incidental orders such as sale of property.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default regime?

There is no default marital property regime in Scots law.

2.3 How does the court decide what orders to make? What factors are taken into account?

A codified set of provisions which deal with financial provision on divorce are found in the Family Law (Scotland) Act 1985. The court is empowered to make such financial orders as are justified by the principles within the legislation and are reasonable, having regard to the resources of the parties. The objective of the legislation is to share the value of the marital acquest (i.e. "matrimonial property"), rather than what the parties need.

Matrimonial property is property belonging to either of the couple at the date of separation having been acquired (otherwise than by way of gift or succession from a third party) by them (a) during the marriage prior to separation, and (b) before the marriage for use by them as a family home or as furniture or plenishings for such home.

There are five principles which the court will consider to determine financial provision on divorce in Scotland. The net effect of these principles is that the vast majority of cases in Scotland are resolved on either an equal sharing of the net value of the matrimonial property, or a modest departure therefrom.

The thrust of the legislation is to secure a "clean break" between the parties and, in most cases, this is done by deciding how best to divide the net value of "matrimonial property" between them by way of capital sum or transfer of property.

2.4 Is the position different between capital and maintenance orders?

No, when making any orders for financial provision, be it capital or maintenance, those must be justified by one or more of the principles of the 1985 Act. The orders must be reasonable with regard to the parties' resources (present and foreseeable).

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

No, parties can enter into a binding contract to capture any agreement regarding financial matters between them (see section 3 below) and can oust the court's jurisdiction.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Up until divorce is granted, each spouse is under an obligation to financially support the other spouse. This financial support is

known as aliment and is determined with reference to the parties' respective needs and resources, earning capacities, and generally all of the circumstances of the case.

It is rare for there to be any support paid between former spouses post-divorce (i.e. "periodical allowance"). The court can award support post-divorce in only limited circumstances; for example, if there will be a need for an economically dependent spouse to adjust to the loss of support from their former spouse after divorce.

If an award for periodical allowance were to be granted, however, it would be only in the most extreme circumstances that the order was granted for an indefinite period.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes, see question 2.3 above.

2.8 Do the courts treat foreign nationals differently on divorce, if so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Scots law, on the whole, rigidly adheres to the application of *lex fori*. The UK is not a signatory to Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. Accordingly, the Scottish courts will, on the whole, apply Scots law in relation to actions for divorce.

The UK is not a signatory to the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. Accordingly, the Scottish courts will apply Scots law in relation to actions for maintenance.

2.9 How is the matrimonial home treated on divorce?

Where spouses own heritable property together in common, the possession and use of the property will be determined according to the rules of Scots property law: the default position being that each owner has a right to occupy the property and, in most cases, insist on the sale of the property.

If the spouses divorce, but continue to own the property in common, their rights and responsibilities *qua* owners are unaffected by the divorce.

Where, however, during the marriage only one spouse owns the matrimonial home, the other spouse has limited occupancy rights which will come to an end after a period of non-occupation or divorce.

It is likely that the matrimonial home will form part of the Matrimonial Property and its value be divided and potentially subject to a property transfer order – see question 2.3 above.

2.10 Is the concept of "trusts" recognised in your jurisdiction?

Yes, although it must be underlined that, whilst English trust law has influenced the development of Scots trust law, "trusts" in England & Wales and Scotland are different conceptually.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

It is possible for parties to raise an action in Scotland for financial provision following an overseas divorce (Matrimonial and Family Proceedings Act 1984). However, the circumstances in which an application may be made are narrow and there are strict jurisdictional and other conditions which must be satisfied before the Scottish courts would entertain such an application. For example, the applicant must be domiciled or habitually resident on the date the application is made, but also the application must be made within five years after the date when the overseas divorce was effective.

If an application can be made to the Scottish courts, then the question of financial provision will be determined according to the Family Law (Scotland) Act 1985 (see question 2.3 above). It should be noted, however, that in addition to the provisions of the 1985 Act, the court will have regard to the parties' resources, present and foreseeable at the date of disposal of the application, and any orders by a foreign court for the making of financial provision.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce? E.g. court, mediation, arbitration?

The following dispute resolution models are used to resolve issues, and reference to the court is seen as the last resort. The norm in Scotland is for parties to capture the terms of any agreement contractually and for there then to be no court order, other than for divorce.

- Negotiation: most commonly parties instruct separate lawyers to negotiate the financial arrangements arising from marriage between them either in correspondence or at round-table meetings.
- Arbitration: parties can appoint an arbitrator to make decisions about any issues referred. The parties will be bound by the arbitrator's decision. Arbitration is less formal and more flexible than a court action. One key advantage of arbitration is that there is greater scope for ensuring confidentiality of the details of the proceedings, including the decision reached.
- Mediation: with the help of an impartial third party (usually a specialist family lawyer), parties can use mediation to explore various and creative options for trying to agree a financial settlement. Information as to what was said, agreed or occurred during family mediation is generally not admissible as evidence in any court proceedings to follow.
- Collaboration: parties and their lawyers enter into a contract to agree to attend structured four-way meetings to resolve the dispute. If the issues cannot be resolved without going to court, then the lawyers must withdraw from acting and they are barred from representing their client in court.

3 Marital Agreements

3.1 Are marital agreements (pre and post marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Marital agreements, be they pre- or post-nuptial, are enforceable in Scotland. Unlike English law, couples are free to oust the

jurisdiction of the court by entering into marital agreements, and such agreements have rarely been regarded as contrary to public policy.

That said, either spouse may ask the court to set aside or vary the agreement or any term of it if agreement was not fair and reasonable at the time it was entered into. However, in only very limited circumstances would the court seek to interfere with an agreement reached between parties.

Foreign marital agreements should be capable of being enforced in Scotland so long as the jurisdictional, formal validity and other contractual requirements are met, and the terms of the agreement are not contrary to public policy. However, should the Scottish courts be properly seised of divorce, it should be open to the either party to ask the court to consider setting aside or varying the agreement.

3.2 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime?

Yes, couples may reach agreement in terms of all financial and other matters arising from marriage, which arrangements are then documented contractually in a "Minute of Agreement" or "Separation Agreement".

The Family Law (Scotland) Act 1985 has been commended for encouraging private ordering as a result of the clear statutory framework for financial provision. Having said that, the 1985 Act has also been criticised as it does not provide the Scottish judiciary with inherent jurisdiction to do justice as between the parties which, when compared to English law, can produce very different outcomes.

The terms of the Minute of Agreement are capable of being enforced as though they were made by order of the court (see question 3.3 below), and so in most Scottish cases no orders are made on divorce, apart from divorce itself.

3.3 What are the procedural requirements for a marital agreement to be enforceable on divorce?

The Minute of Agreement can be registered in the public court register (i.e. "the Books of Council & Session") which allows either party to enforce the terms of the agreement, if required. Registration gives the agreement, in effect, the same status as a court order.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitees, which do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

The Family Law (Scotland) Act 2006 introduced a statutory scheme enabling cohabitants to claim financial provision at the end of the relationship. The rights enjoyed by cohabitants are inevitably less than those enjoyed by spouses, but do provide some measure of protection that is not currently available in, for example, England and Wales.

The grounds for making a financial claim are as follows:

- whether (and, if so, to what extent) the defender (i.e. the respondent) has derived economic advantage from contributions made by the applicant; and
- whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of the defender or any relevant child (one under 16 years – either the child of the parties or one accepted by the cohabitants, "as a child of the family").

The principle underlying the statutory scheme is one of fairness, and that the court's role is to correct imbalances arising out of a non-commercial relationship. A claim must be brought within one year of the date of cessation of the cohabitation.

The 2006 Act also allows cohabitants to make a claim on their deceased partner's intestate estate. The surviving cohabitant must make a claim within six months of death and the court has discretion as to what is fair in the circumstances. The award cannot exceed that which would be awarded if the surviving cohabitant had been a spouse or civil partner. There are no equivalent provisions where the deceased cohabitant left a valid will.

4.2 What financial orders can a cohabitee obtain?

Upon separation, the court may grant the following orders in favour of the applicant cohabitant, so long as they can be justified by the grounds noted above: a capital sum; a payment in respect of any economic burden of childcare (after the end of the cohabitation for a child of whom the cohabitants are the parents); or such interim order as the court thinks fit.

Upon death, the court, on the application of the surviving cohabitant, may grant: capital sum from the net intestate estate; transfer of heritable or movable property from the estate; or such interim order as the court thinks fit.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

As well as marriage and cohabitation, Scots law also provides for civil partnerships. The registration of civil partnerships is very similar to the registration of marriages, and civil partners are afforded more or less the same rights and responsibilities as spouses.

Financial provision on the dissolution of a civil partnership will be determined in accordance with the principles noted at question 2.3 above.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Marriage and cohabitation are available to both same-sex and opposite-sex couples equally. Only those in same-sex relationships are permitted to enter a civil partnership.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

A child has the right to be supported ("alimented") by both of their parents, whether or not their parents live together or are separated, as per the Family Law (Scotland) Act 1985.

A child is defined as a person under the age of 18; or over 18 and under the age of 25 who is reasonably and appropriately undergoing instruction at an educational establishment, or training for employment or for a trade, profession or vocation.

Whilst the claim can be made by the child, if the child is under the age of 18 years, then it is likely to be made on behalf of the child by one parent against the other.

Since the introduction of the Child Support Act 1991, the majority of child maintenance cases are dealt with through the UK government's child support regime, which is administered by the Child Maintenance Service (CMS).

CMS will accept applications to determine the level of maintenance to be paid by the paying parent (i.e. the parent who does not have day-to-day care of the child) to the receiving-parent (i.e. the parent with day-to-day care of the child) for a child who is: (i) under 16; (ii) under 20, if they are in full-time non-advanced education (i.e. not higher than A-level, Highers, or equivalent); or (iii) under 20 and one parent receives Child Benefit in respect of that child. Applications can be brought by the receiving-parent, paying-parent, or a child over 12 years who lives in Scotland.

However, CMS does not have jurisdiction to deal with all aspects of child support in Scotland, and where it does not, reference should be made to the 1985 Act. For example, the 1985 Act should be used in relation to a claim for aliment, where the paying-parent is not habitually resident in the UK.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

A statutory formula is used by CMS to calculate the level of weekly support to be paid by the paying-parent to the receiving-parent in respect of a qualifying child in terms of the paying-parent's gross weekly income (see http://www.gov.uk/calculate-your-child-maintenance for more information).

CMS may access the paying-parent's yearly gross income from HM Revenue and Customs (HMRC) and double-check whether any other factors should be taken into account (for example, pension contributions are deducted from the paying-parent's gross income).

CMS takes into account the number of children the paying-parent has to pay maintenance for, including other children living with them, and any arrangements that have been made directly with the receiving-parent. Deductions will also be made for the average number of nights per year that the child is resident with the paying-parent.

When the court is asked to make an order for aliment under the 1985 Act, it will do so provided that such support is reasonable in the circumstances, having regard to the needs and resources of the parties, the earning capacities of the parties, and generally all the circumstances of the case.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Parents are obliged to aliment their children until the age of 18; or, until their children reach the age of 25 so long as they are reasonably and appropriately undergoing instruction at an educational establishment, or training for employment or for a trade, profession or vocation.

For example, a child of 21 years could apply to the court for aliment whilst they were at university. The level of support to be paid, if any, will be determined according to criteria noted at question 5.2 above. The needs and resources of the student would be relevant (for example, the court may require evidence about the student's earning capacity or access to student loans).

5.4 Can capital or property orders be made to or for the benefit of a child?

It is important to note that there is no similar provision in Scotland to the English & Welsh provision under Schedule 1 of the Children Act 1989.

However, in the context of seeking financial provision on divorce or dissolution of a civil partnership, it is possible to ask the court to make provision for sharing the economic burden of caring for a child of the marriage under 16 years, or a child under 16 who has been accepted by both partners as a child of the family. This provision is not greatly employed in Scotland as, in most cases, fair sharing of the matrimonial property is sufficient for meeting the additional capital costs associated with caring for children.

In an action for financial provision arising from the cessation of cohabitation, an order may be sought requiring that payment is made to the applicant in respect of any economic burden of caring, after the end of cohabitation, for a child of whom the cohabitants are the parents. However, this provision has not been used to any great extent and, where it has been used, it has been criticised for producing inconsistent results: it is difficult for the court to accurately quantify future additional care costs when the test demands that you must consider economic disadvantage which has already been suffered by the applicant.

5.5 Can a child make a financial claim directly against their parents?

Yes, it is possible for Scottish children at age 12 or over to make an application to the CMS.

A child under the age of 16 may raise an action for aliment at court if they have a general understanding of what it means to do so. A child at 12 or more is presumed to be of sufficient age and maturity to have such an understanding. Children over the age of 16 can, of course, raise actions too (see question 5.3 above).

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried?

The Children (Scotland) Act 1995 states that a person with statutory parental responsibilities and rights (PRRs) in respect of a child is responsible for: safeguarding and promoting that child's health, development and welfare; providing direction and guidance to the child; maintaining personal relations and direct contact on a regular basis; and, acting as the child's representative.

A mother has PRRs in relation to her child whether or not she is or has been married to the child's father.

A father has PRRs if married to the child's mother. This applies even where the father is not named on the child's birth certificate. The parents do not have to be married on the date of conception, but they do have to be married subsequently.

If a child's father is not married to the mother at the time of conception, or subsequently, he will acquire PRRs if he is registered as the child's father in a register of births in the United Kingdom (this is only possible for births registered after 4 May 2006).

There are other ways to obtain PRRs: not only is it possible to make an application for PRRs to court, but PRRs may be obtained in assisted reproduction, surrogacy or adoption cases.

6.2 At what age are children considered adults by the court?

The Children (Scotland) Act 1995 states that a child means a person under the age of 18 years.

However, those with PRRs only have a responsibility to provide guidance to a child until that age. The other PRRs noted above cease to apply when the child reaches the age of 16.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Apart from the responsibility to provide guidance, PRRs (and relative orders) cease to apply when the child reaches the age of 16 years.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

Section 11 of the Children (Scotland) Act 1995 sets out a comprehensive, but non-exhaustive, list of possible orders that can be sought in relation to a child. At all times the court retains discretion: it can make any order relating to PRRs as it sees fit.

Where parents dispute the care arrangements for children, a parent may apply to court for a 'residence order' which regulates the arrangements for where and with whom a child should live. A 'contact order' may also be applied for: this is an order regulating the arrangements for maintaining personal relations and direct contact between a child under the age of 16 and a person with whom the child is not, or will not be, living.

The court does not automatically make orders in relation to children in the event of divorce. However, the court must regard the welfare of any child of the parties under 16 years as the primary consideration at the point at which divorce is sought.

6.5 What factors does the court consider when making orders in relation to children?

Where an order in terms of section 11 of the Children (Scotland) Act 1995 is sought, the legal test applied by the Scottish courts is straightforward: the court shall regard the welfare of the child as its paramount consideration and shall not make any order unless it considers that it would be better for that child that the order be made than that none should be made at all.

Beyond that, the court is required, taking account of the child's age and maturity, to give the child an opportunity to indicate whether he or she wishes to express a view, and if the child does so wish, then to give the opportunity and to have regard to the views as the child might express. A child of 12 years or more is presumed to be of a sufficient age and maturity to form a view.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

The law recognises that it would be practically impossible to require that those with PRRs consent to each and every decision to be made about their child. As such, any person with PRRs may normally take decisions in relation to their child's health and wellbeing without the consent of the other parent.

However, there is one situation in which consent of both parents with PRRs is required: where one parent seeks to remove a child from the United Kingdom, even if only temporarily, say for a holiday, the consent of the other parent is required.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

Care arrangements for the children can vary widely from case to case. In general, it is more common for children to have their primary residence with their birth mother, with the other parent exercising residential contact on an alternate weekend basis, and perhaps once during the week.

Having said that, however, over the past decade, shared-care arrangements as between both parents have become much more commonplace than they once were. It can no longer be said that there is an absolute presumption of residence in favour of the birth mother.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Yes, they are.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

The court may appoint a reporter for the sole purpose of seeking the views of the child, or to prepare a report with recommendations more generally. The court-appointed reporter would usually be an independent solicitor or advocate.

The court is also required to provide the child with the opportunity to be heard, albeit that the child's views are not necessarily determinative given that the welfare of the child is the paramount consideration.

Assuming a child wishes to be heard, the court rules prescribe that a form be sent to the child so that she/he may record their views in writing. However, this method has been criticised for not being child-friendly. There are other ways to take a child's views, including being interviewed by the judge/sheriff in chambers, communicated through another individual, or instructing a child psychologist to take and relay the views to court. Children can also become a party to the action in certain circumstances.

6.10 Is there separate representation for children in your jurisdiction?

Yes, at age 12, a child is presumed to be of sufficient age and maturity to instruct their own solicitor, and may do so if they so wish.

6.11 What methods of dispute resolution are available to resolve disputes relating to children?

The dispute resolution models noted at question 2.12 above may also be utilised by parents to reach agreement about the care arrangements for any children they have together. However, the jurisdiction of the Scottish courts to determine any question about

the care or upbringing of a child cannot be ousted by the parties entering into a Minute of Agreement. The court must regard the welfare of the child as its paramount consideration, and so cannot be bound by any contractual agreement between parents.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

No; where one parent seeks to remove a child from the United Kingdom, the consent of the other parent is required.

In contrast, there is no statutory prohibition preventing internal relocations, whether within, or as between, the constituent parts of the UK. There is no need for the relocating parent to seek the consent of the other parent, or permission from the court. Having said that, however, the relocating parent may wish to seek permission from the court so that the position is put beyond doubt.

7.2 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

If a parent wishes to relocate, and the other parent has not provided consent, then the would-be relocating parent must ask the court to grant a specific issue order authorising the child's removal from the jurisdiction for the purposes of relocation.

The legal tests applied by the Scottish courts are noted above at question 6.5. Recent judicial guidance has made it clear that although there is no strict legal onus of proof in relocation cases, it is for the parent who wishes to relocate with the child to demonstrate that it is positively better for the order to be made. Some factors cited with approval include:

- the reasonableness of the proposed move abroad;
- the motive of the parent wishing to take the child abroad;
- the importance of the contact with the other or absent parent in the child's life;
- the importance of the child's relationship with siblings, grandparents or other members of the extended family who are left behind;
- the extent to which contact (if appropriate) is able to be maintained;
- the extent to which the child may gain from a relationship with family members as a result of the proposed move;
- the child's views, where he or she is of any age to express them;
- the effect of the move on the child;
- the effect of refusal of the specific issue order on the applicant, particularly where that parent already has a residence order;
- the effect of refusal on the welfare of the child; and
- whether it is better for the child to make the order than that no order should be made.

7.3 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

In practice, the burden is on the would-be relocating parent to persuade the court that it is better for the child that the relocation takes place. It is not enough for the would-be relocating parent to simply say that the proposed plans are in the child's best interests; rather, there should be clear evidence of why relocation is sought, and the applicant should provide evidence that post-relocation life, in terms of education, healthcare, employment, will be positively better for the child. This is a high bar, which means that it is more common for relocation applications to be refused, rather than granted.

7.4 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Scotland, by virtue of being a territorial unit of the UK, is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) and Council Regulation (EC) 2201/2003 (Brussels II *bis*).

Disputes about child abduction between EU Member States, with the exception of Denmark, are now governed by Brussels II *bis*. For all other contracting states/countries, reference should be the Hague Convention.

Both the Hague Convention and Brussels II *bis* provide remedies for the immediate return of a child wrongfully removed from, or wrongfully retained in, a country other than the country of the child's habitual residence. The remedy is open to those who have been exercising 'custody rights' at the time of removal or retention from the country in which the child is habitually resident.

A parent who believes that their child has been wrongfully removed from Scotland or wrongfully retained in another contracting state should apply to the Justice Department of the Scottish Government (i.e. the Scottish Central Authority). The Scottish Central Authority will then liaise with the Central Authority of the country to which it is believed the child has been abducted so that appropriate proceedings can be raised in that country.

Where a child has been wrongfully removed to, or retained in, Scotland, the Scottish Central Authority will issue a certificate which automatically entitles the applicant to receive free legal aid in respect of raising a Scottish court action for return. Free legal aid is not normally provided to the abducting parent.

John West
SKO Family Law Specialists
Forsyth House
93 George Street
Edinburgh, EH2 3ES
United Kingdom

Tel: *+44 131 243 2583*
Email: *John.West@sko-family.co.uk*
URL: *www.sko-family.co.uk*

John is a Solicitor with SKO and works in Edinburgh and London.

Having undertaken a specialist family law traineeship at SKO, John's practice covers the broad range of family law matters, including international and domestic financial and child law issues.

John has a particular interest in two technical areas: pensions law as it relates to family law where he is the main contact in SKO for pension trustee clients; and European Union family law – he has written, and lectured, on the Maintenance Regulation and Brussels II *bis* and their interaction with domestic UK legislation. He is regularly asked to present on these, and other issues, having already delivered presentations at conferences organised by the International Academy of Family Lawyers and the Law Society of Scotland, amongst others.

John was the first Student Director of the University of Edinburgh's Free Legal Advice Centre. He has retained his connection with the Centre and is now on the Board, and a supervising solicitor for them. John also tutors on the undergraduate family law course, again at the University of Edinburgh.

Rachael Kelsey
SKO Family Law Specialists
Forsyth House
93 George Street
Edinburgh, EH2 3ES
United Kingdom

Tel: *+44 131 243 2583*
Email: *Rachael.Kelsey@sko-family.co.uk*
URL: *www.sko-family.co.uk*

Rachael is one of the founding Directors of SKO. She is accredited as a Specialist in Family Law and as a Family Mediator by the Law Society of Scotland. Rachael has been recognised for many years as a first tier 'Ranked Lawyer' in both *Chambers & Partners* and *The Legal 500*.

Rachael works in Edinburgh and London, practising Scots law. She advises on the full range of family law matters, with a particular interest and expertise on jurisdictional issues in family law cases, with over 90% of her practice now having some kind of jurisdictional element to it.

Rachael is Fellow and Secretary of the International Academy of Family Lawyers, having previously been Counsel to the Academy. She was a founding member of the group set up to institute a bespoke arbitration scheme in Scotland – Family Law Arbitration Group Scotland.

SKO Family Law Specialists has unrivalled expertise and experience in a number of areas of family law practice, delivering first-class legal advice with discretion, accessibility, sensitivity and pragmatism.

Established in 2008, SKO is now the largest niche family law practice in Scotland, with more lawyers accredited by the Law Society of Scotland as specialists in the disciplines of family law, child law and family mediation than any other firm in Scotland, and an unrivalled network of contacts in the UK and abroad.

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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.co.uk