

FINANCIAL PROVISION FOR CHILDREN BORN OF NON MARITAL RELATIONSHIPS IN SCOTLAND

The child of unmarried parents in Scotland is no better or worse off than the child of parents who are married when it comes to considering the options available for financial provision. The reality is that in Scotland very little has been done legislatively to provide for financial provision for children, either of a marriage or non marital relationship, beyond a basic right to be maintained. At common law children have limited rights to make claims on the estate of a deceased parent, but beyond that there is no mechanism for a child or the parent of a child to seek specific financial provision for the benefit of the child.

The right to be maintained

The Family Law (Scotland) Act 1985 section 1 established the categories of person who have an obligation to aliment another person. Among others this section imposes an obligation on the mother or father to aliment his or her child; and on a person to aliment a child where they have accepted that child as a child of the family. There is no qualification of marriage. The obligation arises out of being the biological or adoptive parent, or where as a matter of fact the person has assumed the role of parent. In relation to civil partners no specific changes to the 1985 Act were introduced. To establish a claim against a civil partner as a parent one would rely on the obligation to aliment that a person accepting a child as a child of the family would have.

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

The people with a title to claim aliment are:

- A person (including a child) to whom the obligation of aliment is owed.

- The parent or guardian of the child where the child is under 18
- A person with whom the child lives or who is seeking a residence order in respect of the child, where the child is under 18.

In section 3 of the 1985 Act the orders that can be obtained through the courts are set out. They include orders (1) for making periodical payments, for definite or indefinite periods, or until the happening of a specified event and (2) orders against a party to meet specific expenses such as inlying expenses (costs associated with having the child) or educational expenses.

When assessing the level of aliment to be paid the court must take account of the following factors: the needs and resources of the parties, the earning capacity of the parties, and generally all the circumstances of the case. Most applications for aliment would be determined with reference to the income of the parties, but where it is appropriate to do so regard can be had to capital resources. If that is done the payment made would still however be considered alimentary in nature, and not a payment of capital. For example an order to pay school fees might be mean the sums due are paid from capital, but the nature of the payment would still be considered alimentary.

Since the introduction of the Child Support Act 1991 the jurisdiction of the courts in Scotland to hear or consider claims for aliment of children has largely been superseded. Originally it was anticipated that such claims for children would be considered in stand alone applications, within the context of divorce or similar proceedings, in applications for parental rights and responsibilities, and in actions for declarator of paternity. Now however the role of the courts is limited to considering claims where the paying parent is abroad and outwith the Child Support Agency's jurisdiction or use is being made of the "top up" provisions in section 8 of the Child Support Act. Applications to the court can of course still be made for the payment of school fees.

A child of 18 years or older can apply to the court for aliment whilst they are at university, or college, or perhaps in an apprenticeship where they earn only a very small

amount whilst training. The use of this provision has become more common since the introduction of student loans. The tests to be applied in determining the level of support are the same as before; needs and resources and earning capacities of the parties.

Support for the child beyond maintenance

In terms of financial provision for children during their parents' lifetime, whether in relation to capital, property or income there is nothing else available in Scotland. There are claims available to parents of children that rely on the existence of the children in support of them, but these are not designed for the benefit of the child directly.

The Family Law (Scotland) Act 1985 and the Family Law (Scotland) Act 2006 set out the orders for financial provision available to a spouse on divorce in relation to the 1985 Act, and to a former cohabitant on cessation of the relationship in relation to the 2006 Act. In the 1985 Act in determining the nature and extent of any financial provision to be made for a spouse on divorce the court can take into consideration the economic burden of caring for a child under 16 and the extent to which that will be shared between the parents. This principle is designed to ensure that where a financial settlement based on the standard provision of equal sharing does not go far enough to assist the parent with ongoing care for the children, an unequal division of the assets can be ordered. It might be argued in support of the transfer of the matrimonial home where that would not otherwise be justified, or for a larger capital sum payment. Additional costs associated with childcare, providing family size accommodation, other arrangements for paying maintenance are just some of the factors the court will be asked to consider when a claim under this principle is being made.

Under the 2006 Act a former cohabitant can apply to the courts for an order for payment "in respect of any economic burden of caring for a child of whom the cohabitants are the parents." The drafting of the new legislation has made this an optional order for a cohabitant to seek, but then it ties the need for such an order into the general test of demonstrating that one has suffered an economic disadvantage in the course of the

cohabiting relationship for the benefit of the other party or a child. It is unclear how it is intended the test will apply in such claims. Also the nature of such payments has yet to be discussed judicially, but it seems likely that it will include regular payments from income perhaps to meet such costs as childcare. Whatever approach is taken, the orders are available only for the adult and as a form of relief for them. They do not directly benefit the child.

Claims for capital or property

In Scotland we have nothing equivalent to the orders available under schedule 1 of the Children Act 1989 whether the parents were married or not. All that we do have relates to claims on the death of a parent.

A child has the right at common law to a claim in the estate of a deceased parent. That is the case whether they die testate or intestate. Known as legitim or legal rights it is a right vested in the child or children automatically by operation of law. On testacy the legitim fund or “bairn’s part” amounts to one third of the value of the moveable estate where there is a surviving spouse and one half where there is not. On intestacy the position is slightly different in that the child has a right to the legitim fund, and also to a share in the free estate, being the balance of the moveable estate and any heritage not required to meet the surviving spouse’s statutory prior rights and common law legal rights of ius relictii/relictiae. The division of the moveable estate remains the same, so that where there is no surviving spouse the legitim fund is one half of the moveables, and where there is a surviving spouse it is one third. The whole of the free estate is available to any children.

For children of a non marital relationship, the same rights exist as for children of married parents. Difficulties arise in a number of circumstances however;

- When the deceased parent is not registered as the father of the child, before a claim will be met the child will need to obtain a declarator of paternity.
- For children of parents in a same sex cohabitant relationship the children would have to be the biological children of the deceased or have been adopted by the deceased parent before a claim would be possible.

- For children of parents in an opposite sex cohabitant relationship where the deceased is not the biological parent then the child would have had to have been adopted.
- Unmarried couples and civil partners cannot currently make a joint application for adoption therefore a child will only ever have a right to claim in the estate of one of them as the adopter. Any other claim would have to be based on biological parentage.

Summary

In conclusion therefore it can be said that in Scotland we have very little scope to seek financial provision for children, whether they are children of a marriage or children of a non marital relationship. They have a right to be maintained extending to the costs of education, and in certain circumstances will have rights in the estate of a deceased parent. We have no provisions which would require the payment of capital for the child, or the settlement or transfer of property for the benefit of the child. Having just had a major review of the family law legislation, encapsulated in the Family Law (Scotland) Act 2006 in terms of which we introduced certain rights for cohabitants, but no additional provisions for children, it seems unlikely that the position will be changed any time in the near future.

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