

## Divorce in Scotland

### Key Points

- Divorce in Scotland has a distinct and long history with divorce available in common law since 1560, and the first statute in 1573.
- Adultery and desertion were the only grounds for divorce until 1938 when other fault-based grounds were added. Support grew to move towards a 'no fault' approach in the 1960s and 1970s.
- The current law on the grounds for divorce is set out in the Divorce (Scotland) Act 1976, which created a single ground for divorce, namely, the irretrievable breakdown of a marriage. This can be proved by adultery, behaviour, desertion or non-cohabitation for 2 years, or if only one party consents, for 5 years.
- In 2000, over three quarters of all divorces were granted on non-cohabitation grounds, compared with half that proportion less than twenty years earlier.
- One of the most far-reaching features of family change has been the much greater likelihood of divorce than a generation ago, with divorce today socially commonplace. Divorce and separation, rather than death, is now the most common reason for a child not to live in the same household as both its parents.
- Data on divorce is not the only indicator of relationship breakdown, since it will not reflect separations either in marriages where parties are not yet divorced, or the end of non-marital cohabitations.
- Divorce is more likely for those who married young, especially as teenagers, who had cohabited before marriage, either with the person they married or someone else, who are unemployed or on low incomes, whose parents were divorced, or who were previously divorced themselves.
- The proportion of divorces with children under 16 present has fallen from 61% in 1960 to 47% in 1991. This proportion has continued to fall, despite the increase in the median duration of marriages ending in divorce, and in 1997, fewer than one fifth of all divorces involved dependent children.
- Recent estimates suggest that about 25% of children will experience their parents' divorce at some stage before they are 16. Over 80% of divorces involving dependent children were awarded on fault-based grounds, such as adultery or behaviour, compared with only a minority without children using fault based grounds
- The practical consequences of divorce are a central concern of family law. Since the Children (Scotland) Act 1995 came into force, with its framework of parental rights and responsibilities, the post-divorce living arrangements of children have been described in terms of the legal terms of residence and contact, which have replaced the earlier terms of custody and access.

## Divorce in Scotland

Divorce is not only a social and legal institution that is the legal dissolution of a marriage, but is also a major life transition, with often negative emotional, social and practical consequences for many of the individuals touched by it. It can be seen as a process of transformation in personal and family life and a matter of public concern, as well as a legal event. Divorce is often portrayed as a personal and family tragedy, but it can also offer hope and provide a bridge from an unhappy family life to the possibility of more positive family experiences in the future. Divorce is a private and personal matter, which has far-reaching consequences for families and society as a whole.

### A Brief History of Divorce in Scotland

Divorce as a legal institution, has a long history in Scotland, beginning with the Reformation. Before then, the only remedies for a failed marriage were separation (where the parties, though living apart, remained legally married and not free to re-marry) and nullity (a seldom-used declaration that the marriage was never valid). To some extent, the legal history of divorce reflects shifting church and state attitudes, and the earliest approaches to divorce were on fault grounds, reflecting religious practice and seen as remedies for violations of matrimonial vows. Divorce for adultery has been available in common law since 1560, and the first statute on divorce, in 1573, added the ground of desertion. This is in contrast to England, where judicial divorce was first introduced in 1857.

Divorce was fairly infrequent for almost 400 years until the twentieth century, partly because it was expensive, and carried great social stigma. There were only 118 cases of divorce recorded for the period from 1684 to 1770, mainly on grounds of adultery. Thereafter the numbers rose sharply: 786 divorces from 1770 to 1830, though still with a much lower incidence than the present day. (Leneman, 1996).

The incidence of divorce remained low until the twentieth century when it began to rise as well as change in character. In 1900, there were 144 divorce decrees (GROS, 2001), increasing by more than ninety-fold to the peak number of over 13,000 in 1985. The divorce rate rose sharply at the end of the two World Wars. Adultery and desertion remained the only grounds for divorce until 1938 since when they have been extended several times, first in 1938 by the Divorce (Scotland) Act 1938, which added the grounds of cruelty, incurable insanity (the only non-fault ground), sodomy and bestiality to adultery and desertion. Thus it is only since 1939 that divorce could be used as a remedy for domestic violence.

The Scottish fault-based statutory framework for divorce began to change in the 1960s and 1970s when support grew to move towards a 'no fault' approach, such as in the recommendations in 1956 of the Royal Commission on Marriage and Divorce. The law on divorce, with limited reform in the Divorce (Scotland) Act 1964 and in common law, began to shift towards treating divorce as a means of ending a failed marriage rather than as punishment for a matrimonial offence. This shift in attitude was partly in response to demographic change and changing social attitudes, but it was also a response to fears about the manipulation of the legal system, as well as a wish not to add to the bitterness and conflict of divorce.

The move in a no-fault direction and the simplification of divorce processes also marks a shift in the interest the state has taken in regulating intimate

adult relationships, and in ending their legal consequences. Non-cohabitation grounds do not, on the whole, look backward to the rights and wrongs of a marriage and the interest of the state has shifted away from looking at past misdeeds with a greater emphasis on present and future arrangements.

### Present divorce law

The present statutory framework that governs the grounds for divorce has moved further in the direction of a no fault approach (though not getting there entirely), and, at the time of writing, further reform in a no-fault direction is promised.

The current law on the grounds for divorce is set out in the Divorce (Scotland) Act 1976, which created a single ground for divorce, namely, the irretrievable breakdown of a marriage. This must be shown, or proved, by at least one of these facts (confusingly referred to commonly as 'grounds'):

- Adultery by the defender (the spouse of the party raising the divorce action)
- Behaviour by the defender
- Wilful desertion for 2 years
- 2 years non-cohabitation, where the defender consents to the divorce, or
- 5 years non-cohabitation where the defender's consent is not required.

Thus, while the single ground for divorce, 'irretrievable breakdown of a marriage', has a simplicity and 'no-fault' ring to it, the means of proving the marriage has broken down can still be by establishing 'fault' as well as 'non-cohabitation'. An incentive to use 'fault' means of proof remains if a couple do not wish to wait as long as the separation period for a divorce, and it appears that couples with children are much less likely to use the non-cohabitation grounds than couples without children (Scottish Executive, 2000, 4.2). In 2000, over three quarters of all divorces were granted on non-cohabitation grounds, compared with half that proportion less than twenty years earlier.

A 'no-fault' approach is generally favoured by Government since it is thought this reduces conflict during divorce. The Scottish Executive have recommended in the 2000 family law White Paper, *Parents and Children* that the period of separation should be reduced from two to one year, if both parties consent, and from five to two years otherwise. This follows a recommendation to the same effect in 1989 by the Scottish Law Commission. Legislation on this issue is expected early in the next Parliament.

### Demography of divorce

One of the most far-reaching features of family change has been the much greater likelihood of divorce than a generation ago, so that today, divorce is socially commonplace. Though it has lost much of its

Table 1. Divorces, by ground, Scotland, 1981 to 2000, percent of total

Year	Ground for divorce			Non-cohabitation		All divorces
	Adultery (%)	Behavior (%)	Desertion (%)	2 yrs and consent (%)	5 years (%)	
1981	17	42	2	25	14	9,875
1985	13	38	1	35	13	13,371
1990	10	31	1	44	14	12,266
1995	8	26	1	48	18	12,243
2000	5	19	<1	53	23	11,142

Derived from General Register Office Scotland 2000 Annual Report (2001) table 8.1

social stigma, divorce is still viewed negatively by many people, as seen in the regular vociferous debates about family values and lone parenthood. Nevertheless, divorce and separation, rather than death, is now the most common reason for a child not to live in the same household as both its parents. In 2000, the marital status of about 7% of the adult population of Scotland was divorced (Scottish Executive, 2001a, 29).

The most significant recent period of change was during the 1960s and 1970s, when the incidence of divorce grew sharply. During the 1980s and 1990s, the number of divorces in Scotland has remained at a fairly steady plateau of about 12,000 divorces per year, as shown in Table 2 below.

Although the absolute number of divorces has declined slightly, the relative frequency of divorce, compared to marriage, seen by the ratio of divorces to marriages, is continuing to rise. Since the mid 1990s, there have been about 40% as many divorces as marriages per year, compared to fewer than 5% before World War II. In 1999, there was

**Table 2. Total number of divorces granted by the Court of Session and sheriff courts 1990 - 1999**

Year	1960	1965	1970	1975	1980	1985	1990	1995	1999
Total number of divorces	1600	2456	4270	7795	10530	13373	12272	12249	11863

Sources: Scottish Executive Justice Department, 2001, 30 (Table 6.1) and Morris et al, 1993, 51.

one divorce for every two first marriages (Scottish Executive, 2001b, 12)

While these figures tell us something about how 'normal' divorce has become as a social phenomenon, they are not 'the divorce rate' since they do not accurately estimate the risk of partnership dissolution, for two reasons. The first is that the number of divorces in any given year will depend on the number of marriages in previous years, rather than in the same year. The second is that divorce is not the only indicator of relationship breakdown, since it will not reflect separations either in marriages not yet ended in divorce or in the end of non-marital cohabitations.

### Who divorces?

The risk of divorce does not fall equally across all social groups. There is now a clear body of evidence in many industrialised countries that points to divorce being more likely for: those who married young, especially as teenagers; those who had cohabited before marriage either with the person they married or someone else (although the rise in cohabitation may change this); those who are unemployed or on low incomes; those whose parents were divorced; or those who were previously divorced themselves (Clarke and Berrington, 1999). In Scotland in 2000, about one third of divorces were between couples where one of the partners was aged under 21 at the time of their marriage. While other data for Scotland on unequal risks of divorce are not available, there is no reason to think this pattern is different than in comparable countries.

The average duration of marriages that end in divorce has become longer; half of all divorces in 2000 dissolved marriages of 13 years or more, compared to 9 years in the early 1970s (GROS, 2001).

### Children and divorce

The divorces that generate the greatest public concern are those where dependent children are involved. The proportion of divorces with children under 16 present has fallen from 61% in 1960 (when such

statistics were first collected) to 47% in 1991 (Morris et al, 1993, 27). This proportion has continued to fall, despite the increase in the average duration of marriages ending in divorce, and in 1997, fewer than one fifth of all divorces involved dependent children (about 2200) (Scottish Office Home Department, 1999, Annex B). One possible explanation consistent with this statistic is that couples with children may be staying together for the children's sake, at least until the youngest child is 16. Nevertheless, a substantial number of children aged under 16 are still affected by their parents' divorce. Recent estimates suggest that about 25% of children will experience their parents' divorce at some stage before they are 16. The process of divorce in the great majority of divorces involving children points to a higher level of conflict than for divorcing couples without children. There was a very high proportion in 1997 (over 80%) of divorces involving children awarded on fault-based grounds, such as adultery, behaviour or desertion, compared with only a minority without children using fault based grounds. However, one must be cautious not to read too much into such statistics, since the use of fault based

grounds may be instrumental, rather than an indicator of conflict, since these are the only means to obtain a divorce without a wait of two, or even five, years. It is easy to imagine why a couple with children might need or wish to resolve a marriage breakdown more quickly. This pattern could change if family law reform proposals made in 1999 are enacted to reduce the period of separation from two

years to one, for divorces where both parties consent.

Divorces that involve children generate public concern because of the anxiety that divorce damages children. The growing body of research evidence across many economically developed countries confirms that a larger minority of children who experience family disruption do less well than children who grow up in intact families (Thomson and Amato, 1999; Burghes, 1994; Rodgers and Pryor, 1998; Utting, 1995; Cummings and Davies, 2002). These long term ill effects include poorer educational qualifications, poorer mental health, living in poverty in the medium and longer term, early pregnancy and parenthood and higher levels of smoking, drinking and drug use. In Scotland, a study of about 1,000 young people found that children still living with both biological parents at age 15 were least likely to experience such 'negative' outcomes as use of illicit drugs, lack of qualifications, unemployment, or early pregnancy (Sweeting and West, 1996). However, this evidence, based on the West of Scotland Twenty-07 Study, a longitudinal survey of the health and social circumstances of a youth cohort living in Glasgow, also suggests that the form of family disruption may be significant, as outcomes vary depending whether the loss of a parent is through separation or death. For example, the proportion of young people who used drugs was 20% for those living with both parents, higher (37%) among those losing a parent through separation – but higher still (47%) for those losing a parent through death. Early pregnancy too was more common among those whose parents were separated (14%) than among those living with both parents (6%) – but higher again among those losing a parent through death (40%). This study also found that young people reporting more conflict with parents were more likely to have health problems and lower self-esteem.

This gives some indication of why the question of what exactly produces the adverse effects of family disruption is so complex. While no one doubts that a good marriage is better than a bad divorce, academic opinion is divided on the question of whether a bad marriage is better or worse for children than a good divorce.

## The practical consequences and process of divorce

Divorce not only marks the legal end of a marriage, but can also have serious practical consequences for all members of the family concerned. The practical questions of where partners and children will live and what happens to the home and finances are of central concern to family law. Of less concern to family law but nonetheless important are issues of child support and post divorce parenting arrangements and relationships, the emotional and psychological aftermath of divorce, and children's relationships to other kin, such as grandparents.

Since the Children (Scotland) Act 1995 came into force, with its framework of parental rights and responsibilities, the post-divorce living arrangements of children have been described in terms of the legal terms of residence (which parent(s) the child lives with) and contact (which is a parental right and obligation of a parent not living with a child to maintain regular personal relations and direct contact), which have replaced the earlier terms of custody and access. In fact, a court cannot award a divorce unless it is satisfied that satisfactory arrangements have been made for children. Normally the courts expect that a non-resident parent should be allowed reasonable levels of contact with their children, unless it would not be in the children's best interest for this to happen.

### Divorce professionals and private ordering

With divorce having become such a commonplace social and legal event, and with the growing emphasis on forward looking and no-fault approaches to it, it is not surprising that there has also been a tendency towards private ordering, or towards encouraging parties to negotiate their own agreement, with the input of lawyers or other professionals also working to assist divorcing couples with the decisions needed around this transition. This is compatible with trends towards being prospective, not retrospective, and with law resisting involvement in the detail of why adult partnerships broke down.

Contrary to the popular imagery of the litigious lawyer, the approach to dispute resolution during divorce preferred by Scottish family law solicitors is to help the parties reach a mutually agreed settlement by negotiation using informal, out of court means. The very great majority of all ordinary divorce actions in Scotland, over 90%, are undefended, showing that at least a sufficient level of agreement has been reached before the final, court stage which has become mainly an administrative matter, and only infrequently results in adjudication proceedings between adversarial lawyers. Also encouraging negotiation and mutual

agreement are the two other groups of divorce professionals who provide mediation services that have developed since the 1980s. These are local family mediation services affiliated to Family Mediation Scotland (FMS) and Comprehensive Accredited Lawyer Mediators (CALM), who are both qualified solicitors and trained mediators. Mediation is a process of "co-operative divorce" undertaken jointly and voluntarily by a couple, with the help of a mediator acting as impartially and neutrally as possible, to decide what are the best arrangements for them and their children (Wasoff et al, 2000).

### Conclusion

In many ways, divorce in Scotland has a very similar profile and consequences as divorce in other jurisdictions, such as England and Wales, Canada, the United States, Australia and Denmark. In the short to medium term, divorce is one of the main routes into lone parenthood, with its associated poverty and dependency on means-tested social security benefits, particularly for mothers. It can often result in housing insecurity and downward mobility for women and children, as well as other financial hardship. In the longer term, it is associated with higher rates of educational, developmental and employment disadvantage for children (although there is no consensus as to whether these effects are mainly the result of divorce or the conflict leading to it). It can contribute, through a loss of pension entitlement, to women's poverty in old age and to problems of providing care for elderly people by shrinking the pool of kin potentially available as informal carers. These are serious effects not only for the individuals concerned but for society as a whole.

Divorce is now an established risk of marriage and, like any risk, it applies to all those who marry and not only those for whom the risk eventually materialises, since we cannot predict which marriages will result in divorce. Divorce therefore changes marriage, and the expectations of marriage for those who remain married, as well as for those who divorce. Marriage as a form of social security is no longer an indissoluble contract, but is contingent. Divorce is one aspect of wider changes in family life and family transformation, and we can expect family values debates around such issues as how to reduce the incidence of divorce, or reduce its adverse consequences, or make it easier or harder, to continue.

Increasingly, permanent family ties are through parenthood, and vertical across generations, rather than horizontal through partnership formation. Divorce will remain a contested issue because it goes to the heart of what we expect of intimate partnership and of family life itself.

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