

**1982 No. 1381 (S. 160)**
**COURT OF SESSION, SCOTLAND**
**Act of Sederunt (Rules of Court Amendment No. 5) (Applications under Matrimonial Homes (Family Protection) (Scotland) Act 1981) 1982**

*Made - - - - - 22nd September 1982*  
*Coming into Operation 14th October 1982*

The Lords of Council and Session under and by virtue of the powers conferred upon them by section 16 of the Administration of Justice (Scotland) Act 1933 (a) and of all other powers enabling them in that behalf, do hereby enact and declare—

*Citation and commencement*

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of Court Amendment No. 5) (Applications under Matrimonial Homes (Family Protection) (Scotland) Act 1981) 1982 and shall come into operation on 14th October 1982.

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

*Procedure for applications under the Act.*

2. In the Rules of Court (b), in Chapter III (Special Actions), at the end, add the following new section—

“SECTION 10 — APPLICATIONS UNDER THE MATRIMONIAL HOMES (FAMILY PROTECTION) (SCOTLAND) ACT 1981

**188D.** (1) In this rule—

- (a) “the Act” means the above Act;
  - (b) a reference to a section by number is a reference to the section of that number in the Act;
  - (c) any expressions used in this rule and in the Act have the meaning assigned to them by the Act.
- (2) Subject to paragraphs (3) and (4), an application to the court for an order under any provision of the Act shall be made by petition.
- (3) An application to the court for an order under the following provisions of the Act and of those provisions as applied by section 18 shall be made by motion—
- (a) section 3(4) (*interim* order for regulation of rights of occupancy etc.);
  - (b) section 4(6) (*interim* order suspending occupancy rights);
  - (c) section 5 (variation and recall of orders regulating occupancy rights and of exclusion orders);

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(a) 1933 c.41.

(b) S.I. 1965/321.

- (d) section 15(1) (order attaching power of arrest), if made after the application for matrimonial interdict;
  - (e) section 15(2) and (5) (variation and recall of matrimonial interdict and power of arrest);
  - (f) proviso to section 18(1) (extension of period).
- (4) An application to the court for an order under the provisions of the Act referred to in paragraphs (3) and (5) may be made in a consistorial action—
- (a) in the case of a provision referred to in paragraph (3), by motion;
  - (b) in the case of a provision referred to in paragraph (5), by including supporting conclusions, averments and pleas-in-law in the summons or defences, or by minute.
- (5) The provisions of the Act referred to in paragraph (4) are—
- (a) sections 2(1)(e) and 2(4)(a) (authorisation of non-essential repairs);
  - (b) sections 2(3), (4)(b) and (5)(b) (apportionment of expenditure);
  - (c) section 3(1) (declaration, enforcement, restriction, regulation and protection of occupancy rights);
  - (d) section 3(2) (use of furniture and plenishings);
  - (e) section 3(7) (compensation for loss of use of occupancy, use of furniture etc.);
  - (f) section 4(1), (4) and (5) (exclusion orders);
  - (g) section 7 (order dispensing with consent);
  - (h) section 13(1) (transfer of tenancy order);
  - (i) section 13(9) (vesting order).
- (6) If an application is made by minute in a consistorial action under paragraph (4) and answers to that minute are lodged in the action, then whether or not the minute and answers are adjusted, they shall not be included with the other pleadings in the action in the form of a closed record, but shall be made up separately in the form of a closed record; and rule 168A(5) shall apply to that record as it applies to the record made up from the adjusted pleadings.
- (7) The applicant shall, subject to paragraph (8) intimate the writ or the terms of the motion by which the application is made—
- (a) in any application under the Act, to the other spouse, and in any application under section 18 or to which section 18 applies, to the other partner;
  - (b) in an application by a third party under sections 7 and 8(1), to both spouses;
  - (c) in an application under sections 2(1)(e), 2(4)(a), 4, 7, 13 and 18, if the entitled spouse or partner is a tenant or occupies the matrimonial home by the permission of a third party, to the landlord, or as the case may be, to the third party;

- (d) to such other persons as the court may order;  
and any such person may lodge answers or a minute, as the case may be, within such period as the court may allow, or if the application is by motion, may oppose the motion.
- (8) The court may, having regard to circumstances of any such application and on cause shown, dispense with any intimation required under paragraph (7).
- (9) Where an application is made to the court by motion under paragraph (3) on paragraph (4)(a), the terms of the motion shall be intimated to any person upon whom intimation requires to be made under paragraph (7) at least 7 days before the motion is enrolled, unless the court on cause shown orders a lesser period.
- (10) In any case where an application under the Act is made by summons in a consistorial action, intimation of the summons to any person under sub-paragraph (c) or (d) of paragraph (7) shall be made by endorsing on the summons a warrant in the following terms: "Warrant to intimate to (name and address) as a person with an interest in the order sought in the (number) conclusion of this summons"; and rule 160 shall apply to the execution of that warrant.
- (11) A sist under section 7(4) shall, in a consistorial action, apply only to such part of that action as relates to the enforcement of occupancy rights by a non-entitled spouse unless the court otherwise orders.
- (12) If, by virtue of section 15(1), a power of arrest is attached to an interdict, the applicant shall, as soon as possible after service of the interdict on the non-applicant spouse, ensure that there is delivered—
- (a) to the chief constable of the police area in which the matrimonial home is situated; and
  - (b) if the applicant spouse (within the meaning of section 15(6)) resides in another police area, to the chief constable of that other police area,
- a copy of the application for the interdict and of the interlocutor granting the interdict together with a certificate of service of the interdict, and shall immediately thereafter lodge in process a certificate of execution of delivery.
- (13) Where any matrimonial interdict to which there is attached a power of arrest, is varied or recalled or the power of arrest ceases to have effect by reason of decree of divorce or nullity being pronounced, the spouse who applied for the variation or recall or for divorce or nullity shall ensure that there is delivered as soon as possible—
- (a) to the chief constable of the police area in which the matrimonial home is situated; and
  - (b) if the applicant spouse (within the meaning of section 15(6)) resides in another police area to the chief constable of that other police area,

a copy of the application for variation or recall and of the interlocutor granting the variation or recall, or as the case may be, a copy of the interlocutor granting decree, and shall immediately thereafter lodge in process a certificate of execution of delivery.

- (14) The clerk of court shall notify the landlord of the making of an order granting an application under section 13(1) and section 13(9);
- (15) For the purposes of proof in any application to the court for an order under any provision of the Act, evidence submitted in the form of affidavits shall be admissible in place of parole evidence; and such evidence shall not be treated as being insufficient for the purposes of proof by reason only that it is not supported by parole evidence.”.

*Consequential amendments*

3. In the Rules of Court—

- (a) in Rule 160 (intimation), in paragraph (1)—
- (i) for the words “and 170D(4)(c)” substitute the words “179D(4)(c) and 188D(10)”; and
- (ii) for the words “or 18C” substitute the words “18C or 18D”;
- (b) in Rule 168A (defended actions), in paragraph 5, after the words “the pursuer shall” insert the words “subject to rule 188D(6)”;
- (c) in Chapter III, in the heading, after the words “Rules 186–188” add the words — “Section 7 — References and Applications under the Defamation Act 1952 — Rule 188A; Section 8 — Actions and Applications under the Presumption of Death (Scotland) Act 1977 — Rule 188B; Section 9 — Applications under Section 85 of the Fair Trading Act 1973 — Rule 188C; Section 10 — Applications under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 — Rule 188D”;
- (d) in Rule 189 (Outer House Petitions), after head (xxv) add the following head — “(xxvi) Petitions under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.”;
- (e) in the Appendix (Forms), after Form 18C insert the following form—

“Form 18D

FORM OF INTIMATION TO THIRD PARTY OR OTHER PERSON  
HAVING AN INTEREST IN AN APPLICATION UNDER THE  
MATRIMONIAL HOMES (FAMILY PROTECTION) (SCOTLAND)  
ACT 1981

To (name and address as in warrant)

Take Notice that proceedings, a copy of the writ in which is attached, have been raised by (name and designation) against (name and designation) in which the court may make an order affecting rights in a house (or in property) mentioned therein in which you have an interest, and that you may if you so desire apply to the court for leave to appear as a party to the proceedings within fourteen days after the expiry of days from the date of service hereof. The date of service hereof is reckoned as commencing on the expiry of 24 hours after the date of posting hereof.

Dated this (insert date of posting).

(signed) A.B.  
(solicitor for Pursuer)''

*Emslie,*  
Lord President,  
I.P.D.

Edinburgh,  
22nd September 1982.

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#### EXPLANATORY NOTE

*(This Note is not part of the Act of Sederunt.)*

This Act of Sederunt makes provision for applications to the Court of Session under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c. 59) by amending the Rules of Court of Session to make new procedural provisions in respect of such applications and certain consequential amendments.

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