

The structure of family life in Scotland is changing



By John Forsyth,
Legal Journalist

Jany Scott QC is described in the 2015 Chambers Directory as a 'star individual', praised as an absolute authority on family law at the Scottish Bar. But she could have been a social worker in middle England. John Forsyth follows her journey and wonders where next?

Jany Scott is a significant figure in family law in Scotland.

She chairs the Faculty of Advocates family law group. She is editor of Green's Family Law Reports. She has successfully argued two cases before the UK Supreme court, *Principal Reporter v K* (2010) and *Gow v Grant* (2012), that have been seen as milestones in the development of human rights law and family law in Scotland respectively. As a part time sheriff since 2005 some of her judgments have drawn complimentary commentary for their clarity and humanity.

She also has a hinterland which includes her enthusiasm for her garden in the Scottish Borders and her role in 'Friends of Petra School' a charity to support a school in Bulawayo, Zimbabwe, that provides excellent education to children in the midst of some difficult times in the country.

But looking back to her younger self, neither her specialism nor her geographical location were predictable.

"I suppose I had a very English childhood. When I was at school I was going to be a teacher. My father was a head teacher and then an educational adviser. My mother was a teacher then deputy head. And I have a sister who is a teacher. My brother in law is a teacher. I went to Newnham College, Cambridge to do history with some indignation. At the time I really wanted to do social work at Lancaster.

"I'm doing something I absolutely love. Why should I change that for a job where somebody else tells me what to do in areas of law I don't want to operate in in places I don't necessarily want to be. Why would I stop doing all the things I really enjoy to do something I don't really want to do?"

"Even after I graduated and then qualified in law, moving to Scotland certainly wasn't a plan. I was practicing as a solicitor in Oxford when my dear husband got a job here. So we packed up and off we went."

Jany qualified as a solicitor in Scotland and worked as an in house lawyer for British Agencies for Adoption and Fostering. "It was a half time job which suited me with young children at the time – but of course it grew arms and legs."

But Jany still had a desire for the frontline of legal practice. A friend suggested that instead of resuming work as a solicitor she should aim for the bar. She qualified as an advocate in 1992.

But even then, why family law?

"I'm enthusiastic about it. It matters. It was a relatively unglamorous area of the bar then. It wasn't seen as where the action was and I suppose some advocates were quite reticent about claiming it as a specialism. But it is now very vibrant with lots of very talented advocates and excellent juniors coming through. With some of the high value divorce cases these days we are actually dealing with bigger sums than most of our commercial colleagues. We have to get on top of commercial issues, company law, taxation and pensions. And of course there are the children and family life issues."

Children and family issues have certainly tested the Scottish courts as much those south of the border over the last 25 years. On one hand they need to hold the line on basic principles while on the other acknowledging the rapid changes in family life as it is lived.

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The economic circumstances of most families have changed with more women in the workplace, often as the main breadwinners in a relationship. The interaction of the family law 'rights' in terms of both the European Convention and the UN Convention on the Rights of the Child have influenced on how family law should be applied.

It has been a bumpy ride for the Scottish Courts from time to time.

"I think the courts have become more alert to the importance of Article 8 of the ECHR, the right to family life. It didn't actually change our domestic law but people began to think about it in a different way. Society is changing."

Jany admits to some pride in the two cases she argued before the UK Supreme Court – on both occasions successfully persuading the court to overturn decisions of the Court of Session.

In *Gow v Grant* (2002) the Supreme Court decided that the Scottish court had taken too narrow a view of the law in its decision on the financial consequences of the separation of Mrs Gow and Mr Grant after their relationship ended. They had lived together but were not married. The Supreme Court took a broader view of the fairness that should be applied.

In *Principal Reporter v K* Jany again persuaded the Supreme Court that an unmarried father who had "established family life" with his daughter had been wrongly excluded from meetings of the children's panel to discuss her welfare.

Beyond these cases there has been tension between the Scottish courts and the UK Supreme Court on a range of cases with the suggestion that the London-based judges are out of touch with Scottish sensibilities. Is it possible for Jany to put her finger on the source of the divergence of approach?

She laughs as anyone would when put on the spot with a career-threatening question.

"At one level, I enjoy arguing a case at the Supreme Court because there are two judges, Lady Hale and Lord Wilson, whose background is in family law and know where I'm coming from. In Scotland it's rare to argue before a family lawyer. That's just how the appointments have gone. But it's also clear that the Supreme Court has an acute understanding of how human rights law must imbue every judicial decision."

And the winds of change have not yet tempered. The law and the legal arguments will have scant chance to settle for some time yet.

"The structure of family life in Scotland is changing. We saw that in *Principal Reporter* when we realised that more than half of our children are born to parents who aren't married. Marriage is no longer the norm. Partners who become parents are not necessarily of the opposite sex. There is movement into 'reconstituted' families in which children find themselves living together with one of their parents and with another parent and his or her children who are not biologically related to them. There's more IVF pregnancy and surrogacy. There's a change in the nature of family life and the law is going to have to cope with new variations of old issues."

Having pointed out that there are few law specialists in the upper echelons of the Scottish judiciary it seems only reasonable to wonder why she isn't doing something about it. The response is decisive.

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When I became a lawyer I thought I was going to be a provincial solicitor in England. It is pure accident that led me here. I love the work. I love my garden and my vegetables. But I never set out to be 'a leading figure'. As far as I'm concerned the story is never about me. I'm a specialist in telling other people's stories. That's the way I like it."