Justice Committee

Family Law (Scotland) Act 2006

Written submission from Kirsty Malcolm

Please note that whilst I am a practising member of the Faculty of Advocates, a member of the Advocates Family Law Association and associate member of the Family Law Association (solicitors group), the following views and comments are mine alone based on my own personal experience of the operation of the relevant sections of the Family Law (Scotland) Act 2006 [hereinafter "the 2006 Act"].

Cohabitation – sections 28 and 29 of the 2006 Act

I would suggest that the key area for consideration in any inquiry as to the working of the 2006 Act is the part that makes various provisions in respect of cohabitants, primarily sections 28 and 29. In practice sections 25, 26 and 27 are not known to have caused any difficulty, with advisors and parties being able to understand, interpret and apply these sections in most cases.

Whether or not the couple are properly considered to be "cohabitants", in terms of section 25, has only rarely been challenged in the courts, as most parties or their surviving family, seem to accept that where a claim is being made under section 28 or 29 it is against a background where the people involved have in fact been living together as husband and wife or civil partners. In addition, more often than not, the period they have been together is in excess of a year, and frequently it is many years. In cases where the claimants have only lived together for a relatively short period of time there is generally, however, a clear basis for a claim for financial provision to be made, e.g. one party contributed large amounts of capital for a property purchased in the others sole name. Concerns therefore over having a specified minimum period of cohabitation before a claim could be brought have been unfounded, and the present regime does indeed appear to be self-regulating in this area as anticipated.

One aspect of section 25, however, causes a significant amount of litigation as it bears directly on the application of the time restriction in section 28; that is when did the parties, as a matter of fact, stop living together as husband and wife, or civil partners? It is clearly a very important question as if it was out with either the one year period within which a claim can be brought, the potential to make a claim is lost absolutely. The date upon which a couple may have ceased to cohabit is crucial, and it has to date been the area that has brought about the most litigation. The problem arises primarily from the fact that each couple will live their lives "as a couple" in their own unique way. To date the courts have been able to resolve this type of dispute, after assessing the factual circumstances of each particular case, and having regard to the manner in which the parties concerned were living or indeed had stopped living together. It is not an issue that prevents or hinders the operation of section 28, and it is not one that I can see a mechanism for avoiding. To try and legislate in some way to cover these issues would be far too prescriptive, and in certain cases undoubtedly would result in unfairness and claims being lost where the party concerned was exactly the type of person the legislation was designed to help.

Section 28

The application of section 28 continues to cause consternation amongst the legal profession who, despite some guidance on the approach to be taken having come through the Supreme Court decision in *Gow v Grant 2013 S.C. [UKSC] 1,* continue to struggle with issues of applicability and quantification. There is very limited published case law on the application of the section, and it is not entirely clear why Sheriffs are not publishing on the Scotcourts website the judgements they make in these cases. I am also aware that many cases will settle due to the perceived risks of litigating to a conclusion where there is no certainty of outcome. However overall either through settlement or the decision of the court, where there is the basis of a claim, former cohabitants are receiving financial awards. The circumstances the legislation was particularly keen to address, that of vulnerable parties and where there were children of the relationship, based on my experience, are being met, albeit the levels of award may be relatively low.

It is impossible in my view to provide any further guidance within the legislative framework that would facilitate the understanding or the application of section 28 because, as was identified at the time these provisions were in contemplation, each case will turn very much on its own facts and circumstances. A body of precedent will build up, and possibly is there already but simply needs to be collated and published, which will allow for more certainty to develop. Whilst heavily criticised, it is difficult to see what might take the place of section 28, and because there is a need, in my view, for the possibility of a financial award in appropriate cases, albeit difficult to work with, the current arrangements provide a remedy that was missing before.

There are however limitations to the operation of section 28 by virtue of only providing for the payment of a capital sum, whereas often property transfers would be more appropriate and facilitative.

Section 29

The operation of section 29 since 2006 is also hard to gauge due to the lack of reported case law. Those cases that there have been do in my view demonstrate that this can be an effective remedy, and can assist surviving families in particular where an untimely and unexpected death has occurred. The court has been afforded a wide discretion and again that has been shown to be wholly appropriate as the facts and circumstances of each case will vary significantly. My own view is that applied properly section 29 does meet expectations and sufficient guidance, on factors that may be relevant in reaching a decision, is given such that advising on outcomes is easier.

The problematic area is the six month time limit within which to bring a claim. This is under discussion in the context of other consultations on reform of succession generally, but my view is that there should be an option to make an application late, subject to being on cause shown. This provision existed in a first draft of the Bill that became the 2006 Act, and it is not entirely clear why it was ultimately dropped. I understand the policy behind the time limit, I believe, and do not demur from that but due to the operation of the law in other areas, e.g. reduction of a will, application of

the *conditio si testator sine liberis decesserit,* there will be occasions where the objective of protecting the financially vulnerable inevitably fails. There are also ways of seeking to take a tactical advantage in certain circumstances of that time limit, which can lead to failed claims.

Other key provisions

Section 3: The non-retrospective nature of the abolition of marriage by cohabitation and repute has been beneficial, allowing some to rely on this where necessary, but they are few and far between and will now disappear with time. This section undoubtedly reflects social change not least the fact that the 2006 Act itself allows for former cohabitants to seek financial provision, whereas historically all they could potentially fall back upon was irregular marriage.

Sections 11 -14: These changes to the grounds of divorce work well in practice. Many parties now take advantage of being able to raise divorce proceedings after two years where no other grounds exist, and where generally legal advice is not to rely on obtaining consent after one year where financial matters are dependent on that consent being forthcoming. This allows an earlier resolution for couples and gives them the opportunity to "move on" which is better for them as individuals and for any of their children.

Section 16: Undoubtedly relied on a great deal in practice in securing fair settlements at a time of great volatility in the property markets, both downwards as well as up. It has removed the lacuna that previously existed which led to unfairness.

Section 19: The number of times this may have saved an otherwise uncontemplated outcome is not known, but a lot of the time the precise terms of a title are not known and agents forget to consider the possibility of there being a special destination. I know that comfort is taken from the existence of this provision when settling divorce actions, on the basis that once divorced any potential problems are removed.

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