

Justice Committee

Family Law (Scotland) Act 2006

Written submission from Jennifer Gallagher, Partner, Lindsays Solicitors

Sections 25 to 29

Section 28/29 cases (financial provision on end of cohabiting relationship)

Members of the public do not have a clear idea of what the law actually provides. They either believe that the regime is the same as the framework around financial provision on divorce or alternatively that there are no legal rights at all. It would be better if the Scottish Government made sure clear information was available for people about what the framework is here in Scotland. Many online sources are not specific to Scotland and members of the public do not always realise that the law in Scotland is different to other parts of the UK.

Quantifying claims under section 28 is very difficult. Evidence should be taken on ways the terms of section 28 can be made clearer – for example should there be a non-exhaustive list of situations where a claim would arise? Should there be a definition of “cohabitation property”? Should the legislation specifically rule out taking guidance from the provisions of the Family Law (Scotland) Act 1985 relating to financial provision on divorce or rule that in?

The court can only order payment of a sum of money. Consideration should be given to allowing the court to order transfer of property as well.

Evidence should be taken on whether there should be provision for an aliment type claim for a cohabitant. In some cases one party may be financially dependent on the other in a way that if they were married a claim for interim aliment/aliment would be appropriate and would be pursued. The legislation as it currently stands involves a different legal test to the test applied when looking at an aliment claim. Aliment involves examining the needs and resources of the parties. There is provision for interim orders as the court sees fit in section 28 but I am not aware of any cases where an interim award under section 28 has been made to alleviate immediate financial hardship following a separation. I have dealt with cohabitants (usually women) who are main carers to young children who either have only a small income from PT work or no income at all. Their cohabitant has a good income from full time work. Often for good reasons related to the family circumstances the decision has been taken that the woman will remain at home and look after the family in the expectation the partner will provide financial support. On separation that support is withdrawn. The section 28 claim may not be clear cut and may require considerable work to flesh it out. In that period the woman is left with no remedy beyond applying for additional state benefits, seeking more work (which may not be available/practical) and obtaining child support (which may be insufficient).

Section 19 – Consideration should be given to registering divorce decrees so that searches undertaken at the time of sale/transfer of a property would disclose the decree of divorce.

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