

Justice Committee

Family Law (Scotland) Act 2006

Written submission from Professor Jane Mair and Dr Frankie McCarthy, University of Glasgow

The submission relates solely to the provisions on cohabitation contained in the 2006 Act, sections 25-29. In summary, our concerns are as follows:

General issues

- The law of adult relationships is in need of root-and-branch review, which cannot be carried out in the abbreviated time frame allocated for the current review exercise. The issue should be referred to the Scottish Law Commission for consideration.
- The Government is currently [consulting on extensive reform to the law of succession](#), which may result in a complete overhaul of section 29 of the 2006 Act. Succession issues should not be considered in isolation from the other cohabitation provisions in the Act.

Specific issues

- The definition of “cohabitant” in section 25 has caused difficulty for the courts, since it is impossible to say what it means to live together “as if husband and wife”, or how the factors set out in section 25(2) relate to that definition. Cohabitants should be defined as a couple committed to a shared life, with a longer list given of factors which tend to demonstrate such a commitment.
- Section 28 empowers the court to make an order for financial provision on the breakdown of cohabitation. The purpose of the order should be specified – for example, to ensure the parties’ needs are met after the relationship, to compensate a partner who suffered loss as a result of the relationship, to share out the assets of a relationship or some combination of the above.
- It seems the court is empowered only to make an order for a capital sum under section 28. It would be sensible to allow the court the flexibility of a range of orders, including transfer of property and transfer or sharing of a pension.
- The one year time limit on raising an action under section 28(8) should be lengthened to at least two years, with discretion to extend the time limit on cause shown.

GENERAL ISSUES

1. The need for review

The law of adult relationships has changed drastically over the past 15 years. These changes have taken place on a piecemeal basis, with the UK-wide introduction of civil partnership for same-sex couples in 2004, followed by the Scottish cohabitation provisions in 2006, then the introduction of marriage for same-sex couples in the Marriage and Civil Partnership (Scotland) Act 2014. Scots family law has drifted into a situation where there are three forms of regulated relationships: marriage, civil partnership and cohabitation. There is no adequate theoretical or functional framework underpinning the distinctions between these distinct legal relationships

and, if that is not addressed, the law in practice will become increasingly complex, incoherent and ineffective.

The fundamental tension inherent in current law is summed up by these two separate statements in the Scottish Executive guidance document [Family Matters: Marriage in Scotland](#) (2006):

Marriage is special, it is the pillar around which so much of the strength of family life is built, and it deserves to be cherished.¹

Families now come in all shapes and sizes and every family is important no matter how it is formed.²

The provisions of the 2006 Act, and the way they are being applied in practice, highlight the problems of statutory compromise. Thorough review is needed to establish the place of marriage in Scotland, what this means for civil partnership and where cohabitation fits into the framework.³

The focus on maintaining a distinction between marriage and cohabitation, emphasised in the [Policy Memorandum](#) which accompanied the Family Law (Scotland) Bill,⁴ may also have led to the explicit non-use of existing Scots law on financial provision on divorce to influence the law on cohabitation. This is very unfortunate. Recent [Nuffield-funded research by Professor Mair](#) has revealed a strong consensus amongst practitioners as to the strength of our legislative provision on divorce, which is seen an example of Scots family law at its best. It is held in very high regard by lawyers, easily understood by parties and has had a very significant impact in encouraging private negotiation and settlement and thus reducing the burden on the courts.

The research has confirmed how well the provisions of the 1985 Act work in practice and highlights some of the areas of concern expressed by solicitors in respect of the 2006 Act: *“it’s very, very difficult to advise clients at the moment about cohabitation claims because it’s so woolly ... whereas the ’85 Act has got a bit more direction”*. [Solicitor 11]

Comparing the two Acts: *“the 2006 Act – really it’s how long is a piece of string? ... It’s very difficult to advise clients in those circumstances, because the judicial discretion is so broad and there is so little guidance that you just don’t know”*. [Advocate 21]

Both: *“the structure and clarity of the Act is admirable. ... Clive got this right. ... I like the construction ... there’s a logic to it”*. [Solicitor 13]

¹ Scottish Executive (2006), *Family Matters: Marriage in Scotland*, p 13.

² Scottish Executive (2006), *Family Matters: Marriage in Scotland*, p 1.

³ For further discussion, see J Mair, “Belief in Marriage” (2014) 5 *International Journal of the Jurisprudence of the Family* 63.

⁴ It is noted at para 71 that: “the Scottish Ministers are clear that marriage has a special place in society and that its distinctive legal status should be preserved.”

Not only was it seen as being: “*user friendly for family law solicitors*” [Solicitor 17] but also: “*it’s easy to explain to a client*”. [Solicitor 06].⁵

A root-and-branch review of the law of adult relationships would allow us to revisit the question of whether cohabitation law should build on the good practice model contained within the existing regulation of financial provision on divorce.⁶

2. Existing consultation

A Government consultation on reform to the law of succession, including proposals for extensive reform to the succession rights for cohabitants contained in section 29 of the 2006 Act, closed in September 2015. The Government has not yet published its views on the consultation or made known whether the reforms are likely to be implemented. Reforming the cohabitation provisions in the 2006 Act without knowing what further reform may come from the succession consultation seems likely to lead to inconsistent and incoherent law. These issues should be treated together.

SPECIFIC ISSUES

1. Definition of cohabitant in section 25

The definition of “cohabitant” in section 25 has caused difficulty for the courts, since it is impossible to say what it means to live together “as if husband and wife”. The concept of living together as if married has little substance, due to the underlying legal question mentioned earlier: should marriage be treated as “special” in terms of its legal consequences? It is also not clear how the factors set out in section 25(2) relate to the concept of living as if married. The drafting here has been described as “intellectually incoherent”.⁷ In practice, the courts have tended to pay little attention to the specific factors mentioned in section 25(2), referring instead to a wider range of factors such as those listed in [Garrad v Inglis](#):⁸

(1) the length of time during which the parties lived together, (2) the amount and nature of the time the parties spent together, (3) whether they lived under the same roof in the same household, (4) whether they slept together, (5) whether they had sexual intercourse, (6) whether they ate together, (7) whether they had a social life together, (8) whether they supported each other, talked to and were affectionate to each other, (9) outward appearances, (10) their financial arrangements, whether they shared resources, household and child-care tasks, (11) the intentions of each party and whether any of them were communicated to the other party, and (12) physical separation.⁹

⁵ The full report will be available on the Nuffield website shortly. For brief discussion, see E Mordaunt, “[Standing the test of time?](#)” (2014) *Journal of the Law Society of Scotland*.

⁶ For further discussion of the potential benefits of building Scots cohabitation law in tandem with divorce law, including a comparison with New Zealand law which takes this tandem approach, see F McCarthy “[Playing the percentages: New Zealand, Scotland and a global solution to the consequences of non-marital relationships](#)” (2011) 24(4) *New Zealand Universities Law Review* 499-522.

⁷ J.M. Thomson, *Family Law in Scotland* (6th ed), 2006, 30.

⁸ 2014 GWD 1-17.

⁹ At para 9.

The focus of the court decisions to date seems to have been on the stability of the relationship, and the reasonable expectation by the parties that it will continue. When this is lost, for example by one party explicitly informing the other that they are seeking to separate, the cohabitation will be over. If it is commitment to a stable relationship that gives rise to a claim by a cohabitant, this should be explicitly stated in the legislation. A list of factors which might tend to demonstrate this level of commitment (sharing a home, interdependent finances, an intimate relationship, co-parenting) could then be included, but with no one factor being determinative.¹⁰

2. The purpose of an award following breakdown of cohabitation

It is not clear whether an award under section 28 is designed to share the assets of the couple as if winding up a company, or to compensate one party for losses sustained at the hands of the other, or to provide for the needs of a party who may be economically vulnerable following the breakdown of the relationship, or whether any other purpose may be appropriate. Without a defined purpose, it is difficult to know how to take into account the matters mentioned in subsection (3), that is the extent to which the defender has derived economic advantage from the contributions made by the applicant and the extent to which the applicant has suffered economic disadvantage in the interests of the defender or any relevant child.¹¹ A further complexity is whether an order under section 28(2)(b) is a stand-alone order based on the economic burden of childcare or whether it too requires a balancing exercise between advantage and disadvantage during the cohabitation.

To date, awards under section 28 have been limited and much of the court time appears to have been taken up with trying to understand and apply the difficult wording of the statute.¹² In the leading case of [Gow v Grant](#)¹³, the Supreme Court looked for the underlying principle of the section and concluded that it was “fairness”. Lady Hale suggested a rather different approach to that which has been adopted by the Scottish courts to date:

Who can say whether the non-financial contributions, or the sacrifices, made by one party were offset by the board and lodging paid for by the other? That is not what living together in an intimate relationship is all about. It is much more practicable to consider where they were at the beginning of their cohabitation and where they are at the end and then to ask whether either the defender has derived a net economic advantage from the contributions of the applicant or the applicant has suffered a net economic disadvantage in the interests of the defender or any relevant child.

This may seem a very sensible approach but it is difficult to discern it within the current statutory provision, which focuses to such an extent on the offsetting process. While there was an initially positive response to the guidance provided by the Supreme Court, this has been short lived. In a recent sheriff court appeal decision, the sheriff principal observed that he was “left with some unease that too

¹⁰ For discussion, see F McCarthy, “Defining Cohabitation” 2014 SLT 143.

¹¹ For further discussion, see F McCarthy, “Cohabitation: lessons from north of the border” (2011) 23(3) *Child and Family Law Quarterly* 277-301.

¹² See Griffiths, Fotheringham & McCarthy, *Family Law* (4th ed, 2015), paras 13-93 to 13-98.

¹³ 2013 SC (UKSC) 1.

much reliance on the broad approach of fairness runs the risk of doing violence to the terms of s28(3)(a)".¹⁴

3. Orders available to the court following breakdown of cohabitation

On divorce, the court is able to make a range of orders in relation to financial provision, including capital payment, property transfer, periodical allowance and pension orders.¹⁵ By contrast, on the breakdown of cohabitation, section 28 only mentions a capital sum payment. Arguably, the general reference to "an order" in section 28(2)(b) could be interpreted as including a range of different types of order but to date that is not an approach which has been taken by the courts. Instead they have proceeded on the basis that they can only make a capital payment order albeit it can be payable in instalments.¹⁶

4. Time limits

The problems caused by the strict time limits under the 2006 Act are already well known. A significant proportion of cases which have been reported to date, are preliminary hearings dealing with the question of whether a claim has been submitted within the time limit of one year. The Court of Session on appeal in *Simpson v Downie* has confirmed that compliance with the statutory time limit is essential.¹⁷

Research into the views and experiences of legal practitioners concerning the provisions found that time limits were identified by 76% of the sample of 97 solicitors as being a problem.¹⁸ Subsequent cases would tend to confirm this early view that the imposition of a short time limit does cause problems. Particularly in the context of a long relationship, it can be difficult to pinpoint the precise date at which cohabitation ceased.

Professor Jane Mair and Dr Frankie McCarthy
9 February 2016

¹⁴ *Smith-Milne v Langler* 2013 Fam LR 58.

¹⁵ Family Law (Scotland) Act 1985, s8.

¹⁶ As, eg, in *M v I* 2012 GWD 11-205, where the sheriff made an award of £5000 in respect of the burden of childcare, payable in five annual instalments.

¹⁷ 2013 SLT 178, at para 13.

¹⁸ F. Wasoff, J. Miles and E. Mordaunt, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006*, 2010, 55, Table 5.4: unpublished report available at <http://www.cfr.ac.uk/assets/Cohabitation-final-report.pdf>.