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The Regulation of Cohabitants in Scottish Succession Law

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M.A (Hons) LL.B

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Degree of LL.M. (by Research)

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Abstract

Ten years ago, cohabitants in Scotland had no statutory rights in respect of their deceased partner's estate. Section 29 of the Family Law (Scotland) Act 2006 gave cohabitants the right to apply to the court for discretionary provision from their deceased partner's intestate estate. This thesis examines the process of making such an application and the way that the provisions have been applied in practice. The juxtaposition of the Family Law (Scotland) Act 2006 and the existing rules for intestate succession in the Succession (Scotland) Act 1964 is considered, with particular focus on the subordination of cohabitants' rights to the succession rights of a surviving spouse, and the negative impact that this may have on children. It is concluded that the current succession framework is incapable of protecting cohabitants and children in reconstituted families. Potential measures are considered to displace the traditional primacy of marital succession rights, and provide a fair and flexible system of succession law that is capable of dealing with complex family structures.

Declaration

I declare that this thesis is my own work, and has not been plagiarised. Where information or ideas are obtained from any source, this source is acknowledged in the footnotes.

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Inheritance Tax Act 1984
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Social Security Act 1986
Supplementary Benefits Act 1976

New Zealand Statutes

Property (Relationships) Act 1976

List of Abbreviations

CHR:	Cohabitation with habit and repute
DWP:	Department for Work and Pensions
FL(S)A 1985:	Family Law (Scotland) Act 1985
FL(S)A 2006:	Family Law (Scotland) Act 2006
IHT:	Inheritance tax
GRO:	General Register Office
SLC:	Scottish Law Commission
SSA:	Scottish Social Attitude

Introduction

In recent years there has been a significant increase in cohabitation in Scotland,¹ and a decline in the popularity of marriage.² These progressive social changes have led to an increased demand for a framework of succession law capable of protecting both marital and non-marital unions.³ This thesis considers whether the Family Law (Scotland) Act 2006 (FL(S)A 2006) was an appropriate legal response to that demand, and whether it provides an effective means of protecting cohabitants whose relationship ends by death.

Prior to 2006, some cohabitants were able to claim spousal succession rights by establishing that they had formed a marriage by cohabitation with habit and repute with their deceased partner.⁴ Alternatively, a cohabitant could rely on the basic principles of unjustified enrichment in order to pursue financial recompense following the death of a partner.⁵ However, a surviving cohabitant had no statutory right to financial provision or redistribution of property on the death of their partner. With increasing trends of cohabitation, it became apparent that there was a significant disparity between the social status of cohabitants and their legal status in succession law.

In the early 2000s, the Scottish Executive recognised that the legal vulnerability of cohabitants sat ‘uncomfortably’ alongside the rising number of cohabiting couples living in Scotland,⁶ and undertook to legislate a set of principles and basic rights for cohabitants in succession.⁷ This response is now enshrined in sections 25 and 29 of the FL(S)A 2006. The FL(S)A 2006 confers upon

¹ Scottish Executive, 2005, ‘Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey’ figs.13 and 14.

² Registrar General for Scotland, 2003, ‘Scotland’s Census 2001: The Registrar General’s 2001 Census Report to the Scottish Parliament’ p.26 Table 4

³ Wasoff, F., Martin, C., 2005. ‘Scottish Social Attitudes Survey 2004 Family Module Report’. Scottish Executive Social Research. p.7 para 1.5

⁴ A cohabiting couple could be married in this way if they had acquired a general reputation of being married.

⁵ See, for example, *Shilliday v Smith* 1998 SC 725

⁶ Scottish Executive, 2005, ‘Family Law (Scotland) Bill, Policy Memorandum’, p.13 para 64

⁷ Scottish Executive, 2005, ‘Family Law (Scotland) Bill, Policy Memorandum’, p.13 para 65

cohabitants the right to apply to the court for provision from their deceased partner's intestate estate.⁸

The Family Law (Scotland) Bill Policy Memorandum,⁹ published by the Scottish Executive, indicates that there were three core policy objectives behind the FL(S)A 2006. These policy objectives were: (i) to update the law to reflect the reality of family life in modern Scotland,¹⁰ (ii) to preserve the 'special place' of marriage in Scottish society,¹¹ and (iii) to safeguard the best interests of Scottish children.¹² This thesis reviews the extent to which the FL(S)A 2006 satisfied these goals. It is argued that the Executive has satisfied the second objective (preserving the primacy of marriage), but in doing so, has jeopardised cohabitants and children, particularly in the context of reconstituted families. This thesis puts forward the case for displacing the legal primacy of marital succession rights to create a flexible system of succession law that is capable of protecting adult partners and children in complex family structures.

Demographic trends and changes in social attitudes towards cohabitation are examined in chapter 1. The increasing incidence of cohabitation is examined against a backdrop of declining trends in marriage, to provide an overview of the social landscape prior to the enactment of the FL(S)A 2006. The legal status of cohabitants prior to 2006 is also examined, particularly the extent to which forms of irregular marriage and the law of unjustified enrichment provided insufficient protection to cohabitants upon the death of their partner.

Sections 25 and 29 of the FL(S)A 2006 are considered in chapter 2, to identify the extent to which this statutory framework is equipped to protect cohabitants in succession. Particular scrutiny is given to the legislative definition of 'cohabitant', and to the discretionary process of valuing cohabitants' claims.

⁸ Family Law (Scotland) Act 2006 s.29

⁹ Scottish Executive, 2005, 'Family Law (Scotland) Bill, Policy Memorandum'

¹⁰ Scottish Executive, 2005, 'Family Law (Scotland) Bill, Policy Memorandum' p.1 para 4

¹¹ Scottish Executive, 2005, 'Family Law (Scotland) Bill, Policy Memorandum', p.14 para 71

¹² Scottish Executive, 2005, 'Family Law (Scotland) Bill, Policy Memorandum', p.1 para 4

The legal privilege of marriage is then considered in Chapter 3. The succession rights of a spouse under the Succession (Scotland) Act 1964 are outlined and compared with the rights afforded to cohabitants by the FL(S)A 2006. These rights are considered in the context of reconstituted families when the deceased is survived by multiple adult partners. The extent to which it is possible to preserve the legal primacy of marital succession rights *and* protect cohabitants or the deceased's children is then considered.

Possible measures to reconstruct the hierarchy of Scottish succession law are considered in chapter 4. The Scottish Law Commission has recently recommended repeal of section 29 of the FL(S)A 2006 and replacement with a new formula for calculating cohabitants' awards. The new provisions will displace the legal primacy of marriage when the deceased is survived by both a spouse and a cohabitant, by giving both survivors a stake in the same sum. These recommendations are examined with reference to an existing body of case law in England and Wales and corresponding provisions in the law of New Zealand.

Chapter 1 - Social Trends

In recent decades, Scotland has experienced rapid demographic changes to the structure of family life. The number of cohabiting couples has increased dramatically,¹³ whilst the number of new marriages has declined.¹⁴ This chapter provides an overview of the social matrix in Scotland prior to the FL(S)A 2006. Emergent demographic patterns in cohabitation and marriage are analysed with reference to census data and social attitude surveys. Following this discussion is a detailed consideration of the legal status of cohabitants prior to the enactment of the FL(S)A 2006. It will be demonstrated that at this time there was a disparity between cohabitants' social status and their legal status in succession law. This disparity was the incentive for the introduction of the cohabitation provisions of the FL(S)A 2006.

1.1 Demographic Trends

1.1(a) Increasing Trends of Cohabitation

There is limited data available to accurately trace trends of cohabitation over time. In fact, prior to the 1990s, cohabitants were largely statistically invisible. Until 1991, responses to the national census that indicated cohabitation, such as 'common-law spouse' or 'de facto spouse' (derived from write-in answers), were not recognised as an independent category.¹⁵ Such households appeared on the national census results as 'households with no family', 'lone parent families with others' or as '2-family households' depending on the existence of children.¹⁶ The standard classification of family composition in the national census first included the category of 'living together as a couple' in 1991.¹⁷

¹³ Booth, A., Crouter, A. C., Landale, N. S., 2002. 'Living Together: Implications of Cohabitation on Families, Children, and Social Policy' Routledge p.3

¹⁴ Morrison, A et al. 2004. 'Family formation and dissolution: Trends and attitudes among the Scottish population. Scottish Executive.' Centre for Research on Families and Relationships. pp.2-3

¹⁵ Office of Population Censuses and Surveys General Register Office for Scotland, 1992, '1991 Census: Definition, Great Britain' p.37 para 7.20

¹⁶ Office of Population Censuses and Surveys General Register Office for Scotland, 1992, '1991 Census: Definition, Great Britain' p.37 para 7.20

¹⁷ Office of Population Censuses and Surveys General Register Office for Scotland, 1992, '1991 Census: Definition, Great Britain' p.37 para 7.19

This option was incorporated into Scotland's census shortly thereafter. However, those who are shown as 'living together as a couple' in the household composition results may still have their marital status classed as 'single', as the marital and civil partnership table does not provide an option for cohabitation.¹⁸

Despite the limited duration of data gathering, a clear increase in cohabitation can be identified in the last three decades.¹⁹ There is evidence to suggest that in 1996, there were approximately 1.5 million heterosexual cohabiting couples in the UK.²⁰ At that time, heterosexual cohabiting couples accounted for 4% of all recorded families in Scotland.²¹ There is no data available to accurately demonstrate these figures in terms of same-sex cohabitants, as at this time, same-sex cohabiting couples were classed as 'ungrouped individuals' in the national census.²²

By 2001, the number of opposite sex cohabiting couples in the UK had increased significantly, to 2.1 million.²³ At that time, heterosexual cohabitants accounted for 5% of all recorded families in Scotland,²⁴ and a further 2% were same-sex cohabitants.²⁵ Cohabitation was particularly popular among Scots aged 16-34. Approximately 90% of 16-19 year olds living in a couple, and 40% of couples aged 20-34, were cohabiting.²⁶ The incidence of cohabitation was drastically lower in the over-50 age bracket, with only 5% of couples aged 50-

¹⁸ National Records of Scotland, 2013 '2011 Census: Key Results on Households and Families, and Method of Travel to Work or Study in Scotland – Release 2C' Statistical Bulletin, National Statistics, p.40 para 10

¹⁹ Scottish Executive, 2005, 'Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey' figs.13 and 14.

²⁰ Office of National Statistics, 2015, 'Families and Households 2015' Table 1

²¹ Scotland's Census 2001, 'The Registrar General's 2001 Census Report to the Scottish Parliament' p.14

²² Morrison, A et al. 2004. 'Family formation and dissolution: Trends and attitudes among the Scottish population. Scottish Executive.' Centre for Research on Families and Relationships p.3

²³ Office for National Statistics, 2012, 'Reference Table: Families and Households, 2011' Table 1

²⁴ Registrar General for Scotland, 2003 'Scotland's Census 2001. The Registrar General's 2001 Census Report to the Scottish Parliament' General Register Office for Scotland, National Statistics, Edinburgh p.14

²⁵ Scotland's Census 2001, 'The Registrar General's 2001 Census Report to the Scottish Parliament' p.14

²⁶ General Register Office for Scotland, 2003, 'CAST' p.10 at 'CAST05' Theme table on 'All People', Scotland' in '2001 Census, 2001 Reference Volume', National Statistics, Edinburgh

59 cohabiting with their partner.²⁷ It has been inferred that the incidence of cohabitation will continue to increase with time,²⁸ as the younger generation accounts for an increasing proportion of Scotland's population.²⁹ Census results from 2011 confirm that the trend continues to rise, such that cohabitants now account for 11% of all couples, aged 16 or over in Scotland.³⁰

1.1(b) Declining Trends of Marriage and Divorce

Despite the significant increase in cohabitation, marriage remains the principal family form in Scotland. However, the available data indicates that the popularity of marriage is declining, with many couples choosing to delay marriage until later in life, or reject it altogether.³¹

By 2001, marriage was at its lowest ebb since records began.³² At that time, marriage accounted for 86% of all couples living in Scotland.³³ However, while the number of married individuals living in Scotland remains statistically high, the dwindling number of new marriages recorded each year indicates a general decline in popularity. The number of registered marriages each year has decreased steadily since the 1960s, from a high of approximately 44,000 in 1968 to as low as 30,000 in 2001.³⁴ The numbers are now remaining relatively static at this lower figure,³⁵ despite recent changes to legislation. Civil Partnership came into effect in December 2005, by virtue of the Civil

²⁷ General Register Office for Scotland, 2003, 'CAST' p.10 at 'CAST05 Theme table on 'All People', Scotland' in '2001 Census, 2001 Reference Volume', National Statistics, Edinburgh

²⁸ Barlow, A., 2002, 'Cohabitation and Marriage in Scotland: Attitudes, Myths and the Law' In: Curtis et al eds. 'New Scotland, New Society? Are Social and Political Ties Fragmenting?' Edinburgh: Polygon p.74

²⁹ Registrar General for Scotland, '2001 Population Report Scotland' General Register Office for Scotland, Edinburgh p.2 Figure 1

³⁰ Scotland's Census, 2014, 'Census 2011: Detailed characteristics on Population and Households in Scotland – Release 3D'

³¹ Miller, G., 2006, 'Household Change – Scotland in a European Setting: A literature review and analysis', National Records of Scotland p.12 para 37

³² Barlow, A. James, G. 2004 'Regulating Marriage and Cohabitation in 21st Century Britain' The Modern Law Review, Blackwell Publishing, Oxford, Volume 67, March 2004, No 2. p.1 n2

³³ General Register Office for Scotland, 2003, 'CAST', p.10 at 'CAST05 Theme table on 'All People', Scotland' in '2001 Census, 2001 Reference Volume', National Statistics, Edinburgh

³⁴ National Registers of Scotland, 2014 'Table MT.1: Marriages, Scotland, 1855 to 2014' in 'Marriage and Civil Partnership Time Series Data'

³⁵ National Registers of Scotland, 2014, 'Table MT.1: Marriages, Scotland, 1855 to 2014' in 'Marriage and Civil Partnership Time Series Data' and Morrison, A et al. 2004. 'Family formation and dissolution: Trends and attitudes among the Scottish population. Scottish Executive.' Centre for Research on Families and Relationships p.2

Partnership Act 2004. However, this has had little impact on the overall figures, as the number of recorded civil partnerships has remained relatively stable at approximately 500 per year.³⁶ Similarly, same-sex marriage came into effect in December 2014, by virtue of the Marriage and Civil Partnership (Scotland) Act 2014, at which time 367 were registered, although a large proportion of these were conversions from civil partnership.³⁷ Any impact that this may have on the marriage trends remains to be seen.

Along with a general decline in the popularity of marriage, there is evidence to suggest that the average age at the date of marriage is increasing. Between 1981 and 2001, the average age at marriage among men increased from 29.1 years to 34.8 years, and among women from 27.4 years to 32.3 years.³⁸ These figures have since lowered slightly and have settled at 32.9 years and 31.0 years for men and women respectively.³⁹ The increase in age at marriage has been attributed to couples cohabiting, as an alternative to, or in preparation for marriage.⁴⁰ However, it has also been suggested that the increase in age is partly attributable to the rising proportion of marriages that are second marriages.⁴¹ Taken together, these data suggest that from the early 2000s, many Scots were choosing to delay marriage or forego it altogether.⁴²

Overall, the proportion of the Scottish population living as a couple has remained almost constant over recent decades.⁴³ Of those couples, an increasing number are choosing to cohabit, particularly amongst the younger generation,

³⁶ National Registers of Scotland, 'Table MT.3: Civil Partnerships by sex and Council 2005 to current year' in 'Marriage and Civil Partnership Time Series Data'

³⁷ National Registers of Scotland, 2015, 'Table MT.1: Marriages, Scotland, 1855 to 2014' in 'Marriage and Civil Partnership Time Series Data'

³⁸ Registrar General for Scotland, 1996 'Annual Report of the Registrar General of Births, Deaths and Marriages For Scotland 1996', Government Statistical Service p.121 Figures 7.1 and 7.2

³⁹ National Records of Scotland, 2013, 'More marriages in Scotland', National Records of Scotland

⁴⁰ Registrar General for Scotland, 2002, 'The Registrar General's Annual Review of Demographic Trends: Scotland's Population' General Register Office for Scotland p.41

⁴¹ Second marriages now account for 1 in 4 of all marriages in Scotland, Registrar General for Scotland, 2002, 'The Registrar General's Annual Review of Demographic Trends: Scotland's Population' General Register Office for Scotland p.41

⁴² Miller, G., 2006, 'Household Change – Scotland in a European Setting: A literature review and analysis', National Records of Scotland p.12 para 37

⁴³ Morrison, A. et al. 2004. 'Family formation and dissolution: Trends and attitudes among the Scottish population. Scottish Executive.' Centre for Research on Families and Relationships p.2

and fewer are choosing to marry. However, those marriages that occur are statistically less likely to end in divorce. By 2001, the number of divorces in Scotland was the lowest recorded since 1982, at approximately 9,800.⁴⁴ The figure rose slightly in 2002 to almost 11,000.⁴⁵ However, the numbers have since continued to fall.⁴⁶ The decline in divorce has been attributed to the increase in cohabitation, as the breakdown in cohabiting relationships is not subject to formal divorce proceedings.⁴⁷

1.1(c) Parenting

Marriage is still a stronghold for child-rearing, with almost two-thirds of Scottish children living in a married-couple household.⁴⁸ However, increasing numbers of children are being born and/or raised in cohabiting couple families.⁴⁹ In 1999, 4% of dependent children in Scotland were being raised by cohabitants.⁵⁰ By 2001, this had increased to 10%.⁵¹ At that time, a total of approximately 103,000 Scottish children were living in a cohabiting-couple family.⁵² 58,000 of those children were the biological child of both cohabitants, and the remaining 45,000 were parented by one cohabitant and step-parented by the other.⁵³ From the data, it is clear that there are now many Scottish adults

⁴⁴ Prior to the 1980s, there was a marked increase in the number of divorces, and the levels decline thereafter. Registrar General for Scotland, 1996 'Annual Report of the Registrar General of Births, Deaths and Marriages For Scotland 1996', Government Statistical Service p.130 Figure 8.1

⁴⁵ Morrison, A. et al. 2004. 'Family formation and dissolution: Trends and attitudes among the Scottish population. Scottish Executive.' Centre for Research on Families and Relationships p.2

⁴⁶ General Register Office for Scotland, 2006, Vital Events Reference Tables 2005

⁴⁷ Registrar General for Scotland, 2002, 'The Registrar General's Annual Review of Demographic Trends: Scotland's Population' General Register Office for Scotland p.44

⁴⁸ Morrison, A. et al. 2004. 'Family formation and dissolution: Trends and attitudes among the Scottish population. Scottish Executive.' Centre for Research on Families and Relationships p.3

⁴⁹ A cohabiting couple-family is defined as 'two people living together as a couple but not married to each other, with or without their child(ren). The child(ren) may belong to both members of the couple or to only one.' Per General Register Office for Scotland, 2003, 'Scotland's Census 2001: Supporting Information' Version 1

⁵⁰ Morrison, A. et al. 2004. 'Family formation and dissolution: Trends and attitudes among the Scottish population. Scottish Executive.' Centre for Research on Families and Relationships p.3 table 2

⁵¹ Morrison, A. et al. 2004. 'Family formation and dissolution: Trends and attitudes among the Scottish population. Scottish Executive.' Centre for Research on Families and Relationships p.3 table 2

⁵² National Registers of Scotland, 2003 'Theme 16: Theme table on all dependent children, Scotland' in '2001 Census: 2001 Reference Volume'

⁵³ National Registers of Scotland, 2003 'Theme 16: Theme table on all dependent children, Scotland' in '2001 Census: 2001 Reference Volume'

and children living in non-traditional family models, and a large number of reconstituted families in Scotland, headed by cohabiting parents.

1.2 Social Attitudes Towards Cohabitation and Marriage

The recent demographic changes have been accompanied by changing social attitudes towards cohabitation and marriage. Social acceptance of cohabitation, as a legitimate partnering and parenting structure, has now been achieved almost universally across the UK.⁵⁴ The Scottish Social Attitudes (SSA) Survey 2000 asked 1500 respondents if it was 'alright' for a couple to live together, without intending to get married. 65% of respondents agreed, and a further 18% gave a neutral response.⁵⁵ The same survey also asked whether it was a 'good idea' for a couple to cohabit before they get married. 55% of respondents confirmed that they agreed with this proposition, while a further 25% neither agreed nor disagreed.⁵⁶ At this time, marriage was still a highly valued institution in Scotland, with 61% of respondents agreeing that marriage is 'the best kind of relationship'.⁵⁷ The results from the SSA survey four years later, confirm that support for this proposition had lowered slightly with only 58% of respondents agreeing.⁵⁸ There was also a notable decline in this belief among respondents aged 18-34.⁵⁹

⁵⁴ Barlow, A. James, G., 2004, 'Regulating Marriage and Cohabitation in 21st Century Britain' *The Modern Law Review*, March 2004, volume 67, No.2 p.143

⁵⁵ Scottish Social Attitudes Survey 2000, Table 'MARVIE11: Allright cpl live togAB2.10bC2.33bS2.02b'

⁵⁶ Scottish Social Attitudes Survey 2000, Table 'MARVIE12: Good idea liv.tog 1stAB2.10cC2.33cS2.02c'

⁵⁷ Scottish Social Attitudes Survey 2000, Table 'Variable MARRY3: Marr.best kind relatnAB2.11cC2.34cS2.03c'

⁵⁸ Scottish Social Attitudes Survey 2004, Table 'Variable marry3: Married still best kind relationshQ2.15a'

⁵⁹ Morrison, A. et al. 2004. 'Family formation and dissolution: Trends and attitudes among the Scottish population. Scottish Executive.' Centre for Research on Families and Relationships p.3 See also Hinds and Jamieson 2002, table 3.1 hinds, K. and Jamieson, L, 2002, 'Rejecting Traditional Family Building? Attitudes to Cohabitation and Teenage Pregnancy in Scotland' table 3.1 In: Curtis et al eds. *New society 'Are Social and Political Ties Fragmenting?'* Edinburgh: Polygon

In both years, the majority of respondents believed that couples ought to get married if they want to have children.⁶⁰ However, there was a decline in the belief that unmarried couples made for inferior parents.⁶¹ An age cohort was apparent in 2004, with less than a third of 18-24 year old respondents deeming marriage the preferred relationship form for parenting.⁶²

The data suggests a broad acceptance of the new social trends in Scotland, and a decline in the *a priori* belief that cohabitation is inferior to marriage. This general social acceptance has been met with the expectation that cohabitation ought to attract some legal protection similar to marriage, particularly that a cohabitant should have a stake in the distribution of the estate following the death of a partner.⁶³ The SSA Survey 2004 asked respondents:

‘Imagine another unmarried couple without children who have been living together for ten years and live in a house bought in the man’s name. Say he dies without making a will. Do you think the woman should or should not have the same rights to keep the house as she would if she had been married to the man?’⁶⁴

An overwhelming 88% of respondents agreed that the woman in the scenario should inherit the home.⁶⁵ Similarly, the vast majority of respondents thought that a cohabitant should be entitled to the same rights to pensions and inheritance tax concessions as a spouse.⁶⁶ An Executive-commissioned survey in 2005 also indicated support for parity of treatment between cohabitants and spouses. In this survey, 81% of 1,000 respondents thought that a cohabitant

⁶⁰ Scottish Social Attitudes Survey 2000, Table ‘Variable MARVIEW6: Want kids ought2marryAB2.10aC2.33aS2.02a’, and Scottish Social Attitudes Survey 2004, ‘Table “Variable marview6: People who want children ought to marryQ2.14a’

⁶¹ Scottish Social Attitudes Survey 2000, Table ‘Variable MARRT1: Marr.cpl better parntAB2.11aC2.34aS2.03a’, and Scottish Social Attitudes Survey 2004, Table: ‘Variable marry1: Married couple make better parentsQ2.14c’

⁶² Morrison, A et al. 2004. ‘Family formation and dissolution: Trends and attitudes among the Scottish population. Scottish Executive.’ Centre for Research on Families and Relationships p.3

⁶³ Wasoff, F and Martin, C, 2005. ‘Scottish Social Attitudes Survey 2004 Family Module Report’. Scottish Executive Social Research p.7 para 1.5

⁶⁴ Scottish Social Attitudes Survey 2004, Table ‘Variable cohsh2b: Unmarried woman should inherit house? Q340’

⁶⁵ Scottish Social Attitudes Survey 2004, Table ‘Variable cohsh2b: Unmarried woman should inherit house? Q340’

⁶⁶ Scottish Social Attitudes Survey 2004, Table ‘Variable cohshd4: Should pay pension to unmarried partner? Q336’ and Table ‘Variable cohshd6: Unmarried partner exempted from inherit taxQ337’

should have a right to claim from their partner's estate, whether testate or intestate, and even when the deceased is also survived by a spouse.⁶⁷

It is not possible to extrapolate from these conclusions what public opinion would be in relation to every potential configuration of cohabitation. However, the results tend to support the view that there is strong societal support for the legal protection of cohabitants when their relationship ends by death.

1.3 The Legal Status of Cohabitants pre 2006

1.3(a) Marriage by Cohabitation with Habit and Repute

The law of Scotland made some provision for cohabiting couples prior to 2006, but this legal protection was limited. Most of the law on the constitution of marriage was statutory, in terms of the Marriage (Scotland) Act 1977. However, a form of irregular marriage, known as marriage by cohabitation with habit and repute (CHR) was recognised in the common law. In essence, if a man and woman, who were free to marry each other, cohabited as husband and wife for a considerable period of time and were generally regarded as being husband and wife, they were presumed to have consented to be married. If the presumption was not rebutted, the couple were held to be married by CHR.⁶⁸

By virtue of a marriage by CHR, a cohabitant was able to claim spousal succession rights against their deceased partner's intestate estate.⁶⁹ However, this protective mechanism was only available to a limited amount of couples. The doctrine was only applicable to couples that had the capacity to marry.⁷⁰ It therefore excluded same-sex partners and couples where one of the parties was already married to another person. Furthermore, it was inapplicable to those

⁶⁷ Scottish Executive, 2005, 'Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey' figs.13 and 14

⁶⁸ Clive, E. M., 1982, 'Husband and Wife in Scotland', 2nd Edition, W. Green, Edinburgh p.59 and see *Campbell v Campbell* (1866) 4 M 867 p.925

⁶⁹ Reid, K., De Waal, M., Zimmerman, R., 2015, 'Comparative Succession Law: Volume II: Intestate Succession' Oxford University Press, Oxford p.396

⁷⁰ Clive, E. M., 1982, 'Husband and Wife in Scotland', 2nd Edition, W. Green, Edinburgh p.59, and see, and *Campbell v Campbell* (1866) 4 M 867 p.925

who did not make the pretence of being married, and who therefore lacked the requisite reputation that they were, in fact, husband and wife.⁷¹

Those couples that fell within the scope of marriage by CHR could encounter a number of practical difficulties, due to the informal nature of the relationship.⁷² In practice, less than 10 marriages by CHR were established by Decree of Declarator of the Court of Session, each year from 1946-1996.⁷³ However, marriages by CHR could exist independently of any court decree.⁷⁴ It follows that there may have been any number of undeclared and unregistered marriages by CHR in Scotland.⁷⁵ In light of the fact that marriages by CHR required to be dissolved by formal divorce proceedings,⁷⁶ the regime had the potential for former partners of a deceased to claim succession rights against the estate, on the basis of a covert marriage by CHR. Subsequent partners, who believed they were married by CHR to the deceased, could therefore lose their succession rights to any person who could establish an earlier marriage by CHR, undissolved by divorce.⁷⁷ For these reasons, the Scottish Law Commission (SLC) denounced the doctrine of marriage by CHR as ‘an inadequate, and statistically insignificant, protection for cohabitants in the conditions now prevailing.’⁷⁸

⁷¹ Thomson, J., 2011, ‘Family Law in Scotland’ 6th revised edition, Bloomsbury Professional p.24

⁷² Singh, D. 1996, ‘Cohabitation relationships revisited: Is it not time for acceptance?’ The Comparative and International Law Journal of Southern Africa, Vol 29, No.3 November 1996, p.317

⁷³ Registrar General for Scotland, 1996 ‘Annual Report of the Registrar General of Births, Deaths and Marriages For Scotland 1996’, Government Statistical Service, p.126

⁷⁴ Though many third parties would require a decree of declarator or evidence of the marriage in order to treat the couple as married, Scot Law Com, 1990. ‘Family Law, Pre-consolidation reforms’ DP No. 85 p.5, s.2.2

⁷⁵ Scot Law Com, 1990. ‘Family Law, Pre-consolidation reforms’ DP No. 85 pp.5-6 para 2.2

⁷⁶ Scot Law Com, 1990. ‘Family Law, Pre-consolidation reforms’ DP No. 85 p.9 para 2.7

⁷⁷ Scot Law Com, 1990. ‘Family Law, Pre-consolidation reforms’ DP No. 85 p.64 para 7.7

⁷⁸ Scot Law Com, 1990. ‘Family Law, Pre-consolidation reforms’ DP No. 85 p.8, para 2.5

1.3(b) Unjustified Enrichment

A general remedy of unjustified enrichment is available in Scots law.⁷⁹ An action for return of an unjustified enrichment can be raised against an individual or their estate. A cohabitant may be able to pursue some reparation, following the death of their partner, by way of a claim under this doctrine.

An action of unjustified enrichment allows an individual to recover contributions they have made to another person, on the basis that the recipient has no legal basis on which to retain that enrichment.⁸⁰ An action must fall within one of three recognised categories, distinguished by the way in which the recipient acquired the enrichment. Firstly, when the enrichment was the result of an intentional conferral of wealth, but there was some element to the transfer that rendered it invalid, for example mistaken payment to the wrong recipient.⁸¹ Secondly, when the enrichment was imposed upon the recipient, for example where an individual carries out unauthorised improvements to the recipient's heritable property.⁸² Finally, when the recipient took the enrichment without authorisation.⁸³ Cohabitants' claims have fallen mainly within the first two categories.⁸⁴

An individual's prospects of successfully recovering an enrichment depend on their ability to establish that the enrichment was unjustified. There are several recognised *condictiones* that may lead to such a finding. A full discussion of these *condictiones* is outwith the scope of this paper. However, the most prominent *condictio* for cohabitants is the *condictio causa data causa non secuta*. This will arise when a transfer was made for a future purpose that did not materialise, for example, in contemplation of a marriage that did not take

⁷⁹ See generally MacQueen, H., 2009, *Unjustified Enrichment Law Basics*, 2nd Edition, W. Green

⁸⁰ *Shilliday v Smith* 1998 SC 725

⁸¹ MacQueen, H., 2010, 'Unjustified Enrichment and Family Law', Edinburgh School of Law Working Paper Series, University of Edinburgh p.2

⁸² See, for example, *Shilliday v Smith* 1998 SC 725 where the pursuer paid for works rendered to a house owned by her cohabitant.

⁸³ MacQueen, H., 2010, 'Unjustified Enrichment and Family Law', Edinburgh School of Law Working Paper Series, University of Edinburgh p.2

⁸⁴ MacQueen, H., 2010, 'Unjustified Enrichment and Family Law', Edinburgh School of Law Working Paper Series, University of Edinburgh p.2

place.⁸⁵ Thus, an individual who cohabited with her partner, with a view to marrying in the future, could reclaim any contributions she had made to his wealth, if he died before the date of marriage.

Unjustified enrichment is a remedy of last resort. The rule of subsidiarity prevents an individual making a claim of unjustified enrichment where another unexhausted legal remedy is available, whether by common law or under statute.⁸⁶ Unjustified enrichment is therefore discordant with the doctrine of marriage by CHR, as any cohabitant that could pursue a claim in succession on the basis of a marriage by CHR, could not use the remedy of unjustified enrichment unless they established that their contributions to the relationship had a legal basis,⁸⁷ for example a gift or contractual loan.

Moreover, the remedy of unjustified enrichment is not a substitute for succession rights because succession rights are not based on what has been 'earned'. Unjustified enrichment provides a cohabitant with a remedy to recover only contributions that they made to their deceased partner's wealth. It may be argued that non-financial contributions such as housekeeping and childcare are services rendered, which may then give rise to a remedy of recompense.⁸⁸ However, the doctrine does not provide a clear or certain remedy for a cohabitant, unless it can be established that they gave an identifiable and recoverable contribution to their partner.

1.3(c) Miscellaneous Provisions for Cohabitants pre 2006

There was some other provision for cohabitants before 2006. An individual was able to claim damages for the wrongful death of their cohabitant under the Damages (Scotland) Act 1976.⁸⁹ A cohabitant was also able to apply to a court

⁸⁵ MacQueen, H., 2010, 'Unjustified Enrichment and Family Law', Edinburgh School of Law Working Paper Series, University of Edinburgh p.2

⁸⁶ *Transco Plc. v Glasgow City Council* 2005 S.L.T 958 per Lord Hodge at para 13

⁸⁷ MacQueen, H., 2010, 'Unjustified Enrichment and Family Law', Edinburgh School of Law Working Paper Series, University of Edinburgh p.4

⁸⁸ Hellwege, P., 2000, 'Rationalising the Scottish Law of Unjustified Enrichment' *Stellenbosch Law Review* 11.1 p.50

⁸⁹ Damages (Scotland) Act 1976 Schedule 1 para 1(aa) (added by the Administration of Justice Act 1982 s.14(4))

for occupancy rights to the family home, in terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981.⁹⁰ The law also recognised cohabitation for income-related benefits,⁹¹ succession to statutory tenancies,⁹² and various mental health purposes.⁹³ In light of these provisions, and the potential for marriage by CHR or unjustified enrichment claims, in the early 2000s, the question was not whether the law should recognise cohabitants. Rather, the question was, whether the existing provisions for cohabitants were adequate.

It may be suggested that the common law remedies for cohabitants in relation to succession could have been abolished with no replacement framework, as cohabitants are free to protect themselves by way of writing a will or cohabitation agreement, or taking out certain insurance policies.⁹⁴ However, a recent study⁹⁵ of 1009 Scots conducted research into the incidence of wills in the Scottish population. Responses to the study indicated that only one third of respondents had a will.⁹⁶ Those results were subdivided by the relationship status of the respondents. Only 17% of cohabitants who were cohabiting with their partner had written a will, compared with 50% of those who were married.⁹⁷ The Scottish Law Commission recognised that it is unrealistic to expect all cohabiting couples to make adequate private legal arrangements to protect themselves, and that a certain level of statutory intervention is necessary to provide a safeguard.⁹⁸

⁹⁰ Matrimonial Homes (Family Protection) (Scotland) Act 1981 s.18

⁹¹ Social Security Act 1986 ss.20(3)(c) and 20(11)

⁹² Rent (Scotland) Act 1984 s.3 and schedule 1 and Housing (Scotland) Act 1988, s.31(4)

⁹³ Mental Health (Scotland) Act 1984 s.53(5) (definition of 'nearest relative')

⁹⁴ Scot Law Com, 1992, 'Report on Family Law' No 135 p.115 para 16.1

⁹⁵ Scottish Consumer Council, 2006, 'Wills and Awareness of Inheritance Rights in Scotland' Scottish Consumer Council, Glasgow

⁹⁶ Scottish Consumer Council, 2006, 'Wills and Awareness of Inheritance Rights in Scotland' Scottish Consumer Council, Glasgow p.6

⁹⁷ Scottish Consumer Council, 2006, 'Wills and Awareness of Inheritance Rights in Scotland' Scottish Consumer Council, Glasgow p.7 Chart 3

⁹⁸ Scot Law Com, 1992, 'Report on Family Law' No 135 p.115 para 16.2

1.4 The Statutory Response

The FL(S)A 2006 was the product of fourteen years of consultation and development. The SLC consultation document *Reform on Family Law 135*,⁹⁹ recommended that:

‘Where a cohabitation is terminated by death the surviving cohabitant should not have automatic rights of intestate succession or fixed rights to a legal share of the deceased’s estate but should be able to apply to a court for a discretionary provision out of the deceased’s estate’.¹⁰⁰

Following public consultation, the Scottish Executive published a family law Green Paper *Improving Scottish Family Law*,¹⁰¹ and subsequent White Paper, *Parents and Children*,¹⁰² which made recommendation in line with the SLC’s original policy recommendations. Further public consultation ensued in 2004, with the Scottish Executive’s *Family Matters: Improving Family Law in Scotland*.¹⁰³

Legislation to implement the terms of the 1999 White Paper was introduced in February 2005, as the Family (Law) Scotland Bill. The associated Policy Memorandum states that one of its core policy objectives is ‘to provide a clearer statutory basis for recognising when a relationship is a cohabiting relationship; and a set of principles and basic rights to protect vulnerable people either on the breakdown of a relationship, or when a partner dies’.¹⁰⁴

The FL(S)A 2006 came in to force as part of Scots law on 4th May 2006. It created a statutory framework to regulate cohabitants when the relationship is terminated by death or otherwise. Under sections 25 and 29 of the FL(S)A 2006, a cohabitant may apply to the court for discretionary provision from their late partner’s intestate estate.¹⁰⁵ In theory, it equips the court to decide

⁹⁹ Scot Law Com, 1992, ‘Report on Family Law’ No 135

¹⁰⁰ Scot Law Com, 1992, ‘Report on Family Law’ No 135 p.124 para 16.37

¹⁰¹ Scottish Office Home Department, 1999, ‘Improving Scottish Family Law’ The Scottish Office Home Department, Edinburgh

¹⁰² Scottish Executive, 2000, White Paper ‘Parents and Children’ Scottish Executive

¹⁰³ Scottish Executive, 2004, ‘Family Matters: Improving Family Law in Scotland’

¹⁰⁴ Scottish Executive, 2005 ‘Family Law (Scotland) Bill Policy Memorandum’ p.13 para 65

¹⁰⁵ Family Law (Scotland) Act 2006, s.29

cohabitants' succession claims, without the reputational requirements of marriage by CHR, and without the requirement for retrievable contribution of unjustified enrichment.

The enactment of the FL(S)A 2006 exhibits progressive legal reform. However, in order to determine whether the FL(S)A 2006 is better equipped than its predecessors to protect cohabitants in succession issues, the relevant provisions must be examined in depth. The practical application of sections 25 and 29 of the FL(S)A 2006 are examined in chapter 2, in line with the Executive's stated policy objectives. The examination will determine if the provisions are firstly, a 'clear statutory framework', and secondly, the extent to which that framework is capable of protecting cohabitants when their relationship ends by death.¹⁰⁶

¹⁰⁶ Scottish Executive, 2005 'Family Law (Scotland) Bill Policy Memorandum' p.13 para 65

Chapter 2 - The Family Law (Scotland) Act 2006

The Scottish Ministers aimed to provide ‘a clearer statutory basis for recognising when a relationship is a cohabiting relationship; and a set of principles and basic rights to protect vulnerable people either on the breakdown of a relationship, or when a partner dies.’¹⁰⁷ Sections 25 and 29 of the FL(S)A 2006 now provide a statutory regime for cohabitants when the relationship ends by death. However, the legislation lacks clarity. This chapter examines sections 25 and 29, and how they have been applied in case law, to determine whether judicial interpretation has refined the scope of these provisions.

2.1 Preliminary Requirements

Under section 29 of the FL(S)A 2006, a cohabitant has the right to apply for discretionary provision from their deceased partner’s intestate estate.¹⁰⁸ For a legally relevant claim under section 29, three preliminary requirements must be satisfied: (i) the deceased must have been domiciled in Scotland; (ii) the deceased must have died intestate, or partially intestate; and (iii) the applicant must have cohabited with the deceased ‘immediately before the death’.¹⁰⁹ This latter requirement has caused concern that certain couples will fall outwith the scope of section 29: for example, a couple that shared a home, but who were separated for a period prior to the death, by reason of hospitalisation.¹¹⁰ It has been suggested that in such cases, the courts would adopt a ‘common sense approach’, such that if the survivor could establish that the relationship had continued to be one of care and support, albeit without a shared home, an application under section 29 would be competent.¹¹¹ It may also be relevant to

¹⁰⁷ Scottish Executive, 2005, Family Law (Scotland) Bill, Policy Memorandum, p.13 para 65

¹⁰⁸ Family Law (Scotland) Act 2006 ss.29(2)

¹⁰⁹ Family Law (Scotland) Act 2006 ss.29(1)(b)(i), 29(1)(a) and 29(1)(b)(ii)

¹¹⁰ Scottish Law Commission, 2009 ‘Report on Succession’ Scot Law Com No 215 para 4.12

¹¹¹ Malcolm, K., Kendall, F., Kellas, D., 2012, ‘Cohabitation’ 2nd Edition, W. Green: Edinburgh, p.7 para 1.04

establish whether either party formed other relationships during the period of separation.¹¹² However, this issue has not yet been judicially considered.

An action under section 29 must be raised within six months of the relevant death.¹¹³ The court has no discretion to extend this period, other than in cross border mediations.¹¹⁴ This appears to reflect the so called ‘six month rule of executry’, whereby an executor cannot be compelled to pay any debts of the estate, other than privileged debts, until a period of six months has lapsed since the death.¹¹⁵ This rule exists in order to allow persons with a claim on the estate to make their claim known.¹¹⁶ A cohabitant’s claim under section 29 is therefore treated as if it were a debt against the estate. The ‘debt’ is constituted by calling the deceased’s executor as a defender in the action.¹¹⁷ A potential difficulty arises if no executor is appointed within the six-month period. However, in such cases, an alternative procedure is available. The applicant may raise an action against the estate, seeking decree *cognitionis causa tantum*, and naming all known heirs on the estate as defenders.¹¹⁸ By obtaining decree in this form, the surviving cohabitant’s claim can be constituted as a liquid debt against the estate, in respect of which diligence can then be done.¹¹⁹

Further practical difficulties may be encountered as a result of the six-month time bar. It is considered too short a period to allow the parties to negotiate an out-of-court settlement,¹²⁰ and may therefore lead to costly litigation. Additionally, a cohabitant may be time-barred where an estate is rendered

¹¹² Sutherland, E., 2008, ‘Child and Family Law’, 2nd Revised Edition, W. Green para 16(255)(f)(f), and Kearney, B., et al., 2014, ‘Scottish Family Law Service’ (Update 54, December 2014) Lexis Nexis Butterworths, para [B12]

¹¹³ Family Law (Scotland) Act 2006 s.29(6)

¹¹⁴ Family Law (Scotland) Act 2006 s.29A inserted by the Cross-Border Mediation (Scotland) Regulations 2011 (SSI 2011/234)

¹¹⁵ Wilson & Duncan, 1995, ‘Trusts, Trustees and Executors’ 2nd Edition, SULI/W. Green p.528 para 34-08

¹¹⁶ Scottish Law Commission, 2009, ‘Report on Succession’ Scot Law Com No 215 p.76 para 4.31

¹¹⁷ Ordinary Cause Rules 33B.2(2)(a) and Rules of the Court of Session, r.49.90(1)

¹¹⁸ Macphail’s Sheriff Court Practice, 2006, 3rd Edition, SULI/W. Green p.182 para 4.106, and Currie on Confirmation of Executors, 1995, 8th Edition, W. Green, p.244 para 6.99

¹¹⁹ Malcolm, K., Kendall, F., Kellas, D., 2012, ‘Cohabitation’ 2nd Edition, W. Green: Edinburgh p64

¹²⁰ Malcolm, K., Kendall, F., Kellas, D., 2012, ‘Cohabitation’ 2nd Edition, W. Green: Edinburgh p62

intestate due to the reduction of a Will outwith the six-month period,¹²¹ or in the more obscure example of a deceased's death which is declared under the Presumption of Death (Scotland) Act 1977, and the date of death is found to be over six months prior to the decree of declarator.¹²²

An early version of the Family Law (Scotland) Bill incorporated a provision that would allow the court to extend the six-month time limit on cause shown. However this was removed from the Bill at stage 2.¹²³ In 2009, the SLC recommended incorporating such judicial discretion, alongside an increased time limit of one year.¹²⁴ The Scottish Government sought opinion on these recommendations in the 2014 public consultation paper on *Technical Issues Relating to Succession*.¹²⁵ However, the consequences of extending the time limit required further consideration and so the issue also features on the more recent *Consultation on the Law of Succession*.¹²⁶ At the time of writing, the time limit for cohabitants' claims remains at six months.

Applications that satisfy these preliminary requirements of intestacy, residence and that are made within the time limit will proceed in two stages: firstly, establishing title, in terms of section 25, and secondly, valuation, in terms of section 29. These stages will be examined in turn.

2.2 Establishing Title

2.2(a) Defining 'Cohabitant'

Title to a section 29 claim is established by satisfying the court that the applicant lived with the deceased as if they were in a formalised relationship.¹²⁷ The Family Law (Scotland) Bill Policy Memorandum appears to reject using a marriage analogy to define cohabitation, in favour of prescribing a non-

¹²¹ Scottish Law Commission, 2009 'Report on Succession' Scot Law Com No 215 para 4.31

¹²² Presumption of Death (Scotland) Act 1977 s.2(1)(a)

¹²³ Scottish Parliament, 2005, 'Justice 1 Committee, Official Report, 23 November 2005'

¹²⁴ Scottish Law Commission, 2009 'Report on Succession' Scot Law Com No 215 p.77 para 4.32 Recommendation 43

¹²⁵ The Scottish Government, 2014, 'Technical Issues Relating to Succession' Chapter 4 p.24

¹²⁶ Scottish Government, 2015, 'Consultation on the Law of Succession'

¹²⁷ Family Law (Scotland) Act 2006 s.25(1)

exhaustive list of characteristics of a cohabiting relationship.¹²⁸ Nonetheless, section 25(1) of the FL(S)A 2006 defines ‘cohabitant’ as:

‘either member of a couple consisting of—

- (a) a man and woman who are (or were) living together as if they were husband and wife; or
- (b) two persons of the same sex who are (or were) living together as if they were civil partners.’¹²⁹

Unlike marriage by CHR, there is no reputational requirement that the couple be living together ‘*as* husband and wife.’¹³⁰ Rather than pretence, the FL(S)A 2006 definition is based on similarity.

In order to make the comparison between cohabitation and marriage,¹³¹ the court must be able to identify in the cohabiting relationship, those essential qualities that comprise a marriage. In certain situations, the court has made this assessment with relative ease. The Sheriff in *Windram v Windram and a third party*,¹³² found no apparent difficulty in concluding that the cohabitants in question had behaved like conventional spouses. The couple had shared a close, stable relationship for 24 years, during which time the deceased provided financial care for the family, while the pursuer provided the domestic care and childcare for their two children.¹³³ This was described as a ‘normal’ domestic situation for a married couple.¹³⁴ However, it is arbitrary to expect every cohabiting relationship, or indeed every marriage, to exhibit such convention. A husband and wife may jointly own property or co-parent children, for example, but neither of these is essential to the existence of the marriage.¹³⁵ The absence of any ‘typical’ feature that can be associated with a marital relationship, does not affect the validity of the marriage itself. Separated spouses are equally as

¹²⁸ Scottish Executive, 2005, Family Law (Scotland) Bill, Policy Memorandum, p.15 para 75

¹²⁹ Family Law (Scotland) Act 2006, s.25(1)

¹³⁰ Clive, E. M., 1982, ‘Husband and Wife in Scotland’, 2nd Edition, W. Green, Edinburgh p.59, and see *Campbell v Campbell* (1866) 4 M 867 p.925

¹³¹ Throughout this thesis the word ‘marriage’ is used to incorporate both marriage and civil partnership unless otherwise stated.

¹³² *Windram v Windram and a third party* 2009 Fam LR 157

¹³³ *Windram v Windram and a third party* 2009 Fam LR p160 per Sheriff J M Scott QC para [3]

¹³⁴ *Windram v Windram and a third party* 2009 Fam LR p160 per Sheriff J M Scott QC para [3]

¹³⁵ McCarthy, F, 2014, ‘Defining Cohabitation’ SLT 2014, 31, p.143

married from the day of the wedding to the conclusion of divorce papers.¹³⁶ Therefore, the only essential feature of marriage is the fact that the relationship is formally registered.¹³⁷ This is the only characteristic that cohabitants, by definition, do not share.¹³⁸ Given the diversity inherent in adult relationships, it is doubtful if cohabitation can be defined by analogy to marriage.¹³⁹

2.2(b) Conducting the Assessment

The definition of ‘cohabitant’ within section 25(1) is supplemented by the terms of section 25(2). This subsection provides a list of factors to which a court shall have regard when determining whether a couple has lived together as if they were married. The list comprises:

- (a) the length of the period during which A and B have been living together (or lived together);
- (b) the nature of their relationship during that period; and
- (c) the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.¹⁴⁰

The Family Law (Scotland) Bill Policy Memorandum explained that the listed factors were intended to focus attention on ‘a shared life with elements of interdependence’.¹⁴¹ It was thought that section 25(2) would allow the court to identify ‘short-term, uncommitted and more casual cohabitation’¹⁴² and exclude it from the regime.

There is no guidance as to how the assessment should be conducted. The list is neither exhaustive nor determinative, such that an applicant can satisfy the definition of ‘cohabitant’ without exhibiting all or any of the listed factors. The intention was that ‘facts and circumstances will, over time, build up an understanding of the situations in which recourse to the courts is likely to

¹³⁶ McCarthy, F, 2014, ‘Defining Cohabitation’ SLT 2014, 31, p.143

¹³⁷ McCarthy, F, 2014, ‘Defining Cohabitation’ SLT 2014, 31, p.143

¹³⁸ McCarthy, F, 2014, ‘Defining Cohabitation’ SLT 2014, 31, p.143

¹³⁹ McCarthy, F, 2014, ‘Defining Cohabitation’ SLT 2014, 31, p.143

¹⁴⁰ Family Law (Scotland) Act 2006, s.25(2)

¹⁴¹ Scottish Executive, 2005, Family Law (Scotland) Bill, Policy Memorandum, p.15 para 75

¹⁴² Comments by Wilson, M., in Scottish Parliament, 2005, ‘Justice 1 Committee, Official Report, Wednesday 16th March 2005’

succeed'.¹⁴³ However, in the ten years since the Act came into force, the fact of cohabitation has been disputed very rarely within reported case law.¹⁴⁴ It therefore remains somewhat unclear how an assessment of cohabitation should proceed. There is no guidance to indicate the relevant weight to be given to each feature of the relationship, nor which of those features, if any, are essential to establishing cohabitation. If an award is to be compensatory in nature, to recognise the contributions that the applicant made for the benefit of the deceased and their family during the relationship, the financial arrangements of the couple will be the most relevant factor.¹⁴⁵ Alternatively, if the purpose of an award is to provide for a cohabitant's future needs, the court may give more weight to the nature of the relationship, as doing so may reveal the extent to which the deceased expected to provide for his cohabitant, or that the survivor could reasonably have expected to be provided for. The omission of a guiding principle for making a cohabitant's award means that the relevant weight to be given to each feature of the relationship ultimately depends on the purpose that a given court intends the award to fulfil.

2.2(b)(i) The Duration of the Relationship

The court will consider the duration of the relationship when determining whether the applicant was a cohabitant. The FL(S)A 2006 was intended to protect cohabitants in 'lengthy, enduring relationships'.¹⁴⁶ A minimum eligibility period of two years cohabitation was considered in the early stages of the Family Law (Scotland) Bill, such that no one could be a cohabitant for the purposes of the Act until the relevant relationship had subsisted for two years.¹⁴⁷ However, a strict eligibility period, was said to be too 'rigid and unresponsive' to particular cases.¹⁴⁸ As such, the court has discretion to take account of the duration of the relevant cohabitation, and to judge what is fair

¹⁴³ Scottish Executive, 2005, Family Law (Scotland) Bill, Policy Memorandum, p.14 para 68

¹⁴⁴ McCarthy, F, 2014, 'Defining Cohabitation' SLT 2014, 31, p.143

¹⁴⁵ Scottish Law Commission, 2009 'Report on Succession' Scot Law Com No 215 para 4.3

¹⁴⁶ Scottish Executive, 2005, Family Law (Scotland) Bill, Policy Memorandum p.14, para 67

¹⁴⁷ Comments by Henry H. in Scottish Parliament, 2005, 'Justice 1 Committee *Official Report*, (16 November 2005)'

¹⁴⁸ Comments by Henry H. in Scottish Parliament, 2005, 'Justice 1 Committee *Official Report*, (16 November 2005)'

and reasonable, given all the circumstances of that relationship.¹⁴⁹ While longevity may indicate eligibility for a claim in succession, the Act does not explicitly exclude shorter relationships. That said, some clarity is provided in case law. In *Windram*, 24 years was clearly a sufficient duration to indicate that a couple lived together as husband and wife.¹⁵⁰ In *Savage v Purches*,¹⁵¹ the Sheriff deemed a shorter cohabitation of two and a half years not so short as to indicate the sort of transience that would bar an application.¹⁵² However, in the latter example, the court required to give weight to certain other features of the relationship to counterbalance its short duration.¹⁵³ With little other practical clarification available, it remains to be seen whether the threshold will be refined.

Practical difficulties may arise in determining the start of the relevant relationship. While in theory, cohabitation occurs overnight, commencing on the date a couple move in together, this rule may not be applicable in every case. For example, two people may live together as housemates or as landlord and tenant, and begin a romantic relationship some time after they begin sharing a home.¹⁵⁴ There is no guidance on determining the point at which such a relationship would transform into eligible cohabitation. A further potential difficulty arises with regard to determining the end of the legal cohabitation when the couple exhibited a period of physical separation prior to the death. In order to make a claim in succession under the Act, the relationship must have endured until the death of one partner.¹⁵⁵ As established, this may be problematic for couples that shared a home, but who were separated prior to the death for reasons outwith their control. Similarly, it is unclear whether a temporary disruption to cohabitation will ‘reset the clock’. Should a cohabiting couple break up temporarily, it is unclear whether reunion would continue the

¹⁴⁹ Comments by Cathy Jamieson in Scottish Executive, ‘Plenary *Official Report*, (15 Dec 2005)’ col 861951

¹⁵⁰ *Windram v Windram and a third party* 2009 Fam L.R. p.160

¹⁵¹ *Savage v Purches* 2009 SLT (Sh Ct) 36

¹⁵² *Savage v Purches* 2009 SLT (Sh Ct) p.41 para [11]

¹⁵³ *Savage v Purches* 2009 SLT (Sh Ct) p.42 para [16]

¹⁵⁴ McCarthy, F, 2014, ‘Defining Cohabitation’ S.L.T. 2014, 31, p.145

¹⁵⁵ Family Law (Scotland) Act 2006 s.29(1)(b)(ii)

original relationship or commence a new legal relationship for the purposes of the 2006 Act.

2.2(b)(ii) The Nature of the Relationship

The nature of the relationship will also be relevant to determining whether the applicant and the deceased were cohabiting. According to the Scottish Executive, ‘we use the term “nature” to carry the overall sense of being a couple.’¹⁵⁶ As such, the court is required to identify the abstract concept of ‘couplehood’. This has not yet been illustrated in a section 29 case. However, valuable jurisprudence can be drawn from cases where the cohabiting relationship ended by separation rather than death. Such cases are determined by section 28 of the FL(S)A 2006, which also requires an applicant to establish title in terms of section 25. In *M v T*,¹⁵⁷ the Sheriff indicated that the relevant factors are those which were used to establish marriage by CHR.¹⁵⁸ These include: the amount and nature of time spent together; living under the same roof; sleeping together; having sexual intercourse together; eating together; having a social life and other leisure activities together; supporting each other; talking to each other; being affectionate to each other; sharing resources; and sharing household and child-rearing tasks.¹⁵⁹ These factors may be illustrative of the type of loving, committed relationship that warrants legal protection. However, it is peculiar that the Sheriff would directly rely on the test used for establishing marriage by CHR, when the FL(S)A 2006 was intended to be progressive reform of the old law. That said, *M v T* sets out that in addition to the traditional test, the court should also have regard to the way the relationship was presented to the public.¹⁶⁰ In this case, it was held that the relevant relationship had endured despite the couple sleeping in different bedrooms, ceasing their sexual relationship, and discussing separation, on the basis that

¹⁵⁶ Scottish Executive, ‘Response to the Justice 1 Committee Stage 1, Report 14’ para 16

¹⁵⁷ *M v T* 2011 G.W.D. 40-828

¹⁵⁸ Clive, E. M., 1997, ‘The Law of Husband and Wife in Scotland’ 4th Edition, SULI/W.Green

¹⁵⁹ Clive, E. M., 1997, ‘The Law of Husband and Wife in Scotland’ 4th Edition, SULI/W.Green paras 21.075-21.081

¹⁶⁰ *M v T* 2011 G.W.D. 40-828 paras 26-30

they had ultimately presented themselves as a couple to their respective families throughout.¹⁶¹

In *Harley v Robertson*,¹⁶² the Sheriff departed from the traditional test and determined that the essence of ‘living together as husband and wife’ is stability.¹⁶³ This was another section 28 case in which the fact of cohabitation was conceded by the defender. However, the Sheriff stated obiter that had the fact of cohabitation been in dispute, he would not have found it to be established as the relevant relationship was so lacking in stability.¹⁶⁴

2.2(b)(iii) *Financial Arrangements*

The court will consider the nature and extent of any financial arrangements subsisting, or which subsisted, during the relationship, to determine whether it falls within the scope of section 25. In the early stages of the Family Law (Scotland) Bill, the Scottish Executive stated that ‘evidence of mutuality in the couple’s financial affairs’ would be a clear marker of the kind of cohabitation to which the provisions would apply.¹⁶⁵ The basis of this assertion was that pooled income would show a high degree of trust and commitment between parties to a relationship. To reflect this, efforts were made to amend the draft Bill to refer to ‘financial interdependence’.¹⁶⁶ This amendment was ultimately rejected. Section 25 instructs the court to consider the ‘financial arrangements’ of the couple. As such, there is no strict correlation between financial interdependence and eligibility. A cohabitant may conduct their own financial affairs, independently of their partner, without diminishing the value of the cohabiting relationship. This was illustrated in *Savage*, as legal cohabitation was established despite the fact that the pursuer did not contribute to mortgage payments for the shared home, the couple did not share a bank account, and the

¹⁶¹ *M v T* 2011 G.W.D. 40-828 para 32

¹⁶² *Harley v Robertson* 2012 G.W.D 4-68

¹⁶³ *Harley v Robertson* 2012 G.W.D 4-68

¹⁶⁴ *Harley v Robertson* 2012 G.W.D 4-68 Discussion para 38

¹⁶⁵ Scottish Executive, 2005, ‘Response to Justice 1 Committee Stage 1 Report (August 2005)’ p.16

¹⁶⁶ Scottish Executive, 2005, ‘Response to Justice 1 Committee Stage 1 Report (August 2005)’ p.16

deceased kept elements of his financial wealth private.¹⁶⁷ Similarly, in *Windram*, the family's assets, including their home, were held in the deceased's name. The couple did not share a bank account, and the family was supported primarily by the deceased's income. However, it was found that the pursuer had surrendered her own separate financial interests in the course of the relationship and allowed her minimal finances to be merged with those of the deceased. The court concluded that because the pursuer had placed herself in a position of dependency on the deceased, she had committed herself fully to the relationship, and was therefore entitled to an award for financial provision and transfer of property under section 29.¹⁶⁸

2.3 Valuing the Claim

2.3(a) Cohabitants' Rights in Succession

Having established title, a cohabitant's claim will proceed in terms of section 29 of the FL(S)A 2006. In drafting section 29, the Executive relied on the earlier SSA survey 2004 as a 'baseline of evidence'.¹⁶⁹ This survey indicated public support for parity of treatment of cohabitants and spouses in succession law.¹⁷⁰ Given this public support, and the fact that the Executive chose to define cohabitation by analogy to marriage, it would seem to follow logically that the succession rights of a cohabitant ought to reflect those of a spouse. However, in terms of the FL(S)A 2006, a cohabitant's rights are vastly inferior. A spouse enjoys absolute entitlement to a fixed proportion of their deceased spouse's estate, whether the deceased died testate or intestate.¹⁷¹ In contrast, an eligible cohabitant has the right to apply to a court for provision from their deceased partner's net intestate estate, and it is entirely within the discretion of the court whether or not the claim should be met. A cohabitant has no corresponding protection from disinheritance.

¹⁶⁷ *Savage v Purches* 2009 SLT (Sh Ct) 36

¹⁶⁸ *Windram v Windram and a third party* 2009 Fam L.R. p157 at p.162

¹⁶⁹ Wasoff, F. Martin, C. 2005. 'Scottish Social Attitudes Survey 2004 Family Module Report' Scottish Executive Social Research p.7 para 1.2 and p.9 para 1.11

¹⁷⁰ Chapter 1 pp.14-15

¹⁷¹ Legal rights in testate cases, and prior rights and legal rights in intestacy, per Succession (Scotland) Act 1964, ss.8-9

One element of spousal protection has been extended to cohabitants by virtue of section 26 of the FL(S)A 2006. This section provides a rebuttable presumption of equal ownership of household goods that were acquired during the period of a couple's cohabitation. Household goods are defined as any goods, including decorative or ornamental goods, kept or used in the cohabitants' home for joint domestic purposes.¹⁷² The definition specifically excludes any such items that were acquired by way of gift or inheritance from a third party,¹⁷³ and the provision does not cover money, securities, vehicles or domestic animals.¹⁷⁴ In practical terms, the effect of section 26 is that the contents of the cohabitants' home may be subject to equal sharing upon termination of the cohabitation. Thus on the death of one cohabitant, it is presumed that the survivor is the owner of one half of those contents, whilst the other half will form part of the deceased's estate. This provision mirrors section 25 of the Family Law (Scotland) Act 1985 which created a similar presumption for spouses. By virtue of sections 26 and 29 together, cohabitants have rights that sit somewhere between singledom and marriage.¹⁷⁵

2.3(b) The Process of Valuation

The court has almost total discretion to decide the value of an award made under section 29. The maximum sum available to a cohabitant is the amount that the applicant would have received had they been married to the deceased.¹⁷⁶ However, in practice, a cohabitant has yet to receive this maximum sum in the reported case law. In *Windram*, the pursuer received approximately £11,000 less than she would have been entitled to if she had been married to the deceased, despite the court accepting that she had exhibited a family life with the deceased akin to a long-term marriage.¹⁷⁷

¹⁷² Family Law (Scotland) Act 2006 s.26(4)

¹⁷³ Family Law (Scotland) Act 2006 s.26(2)

¹⁷⁴ Family Law (Scotland) Act 2006 s.26(4)

¹⁷⁵ Comments by Fraser, M., in Scottish Executive, 'Plenary *Official Report*, (15 Dec 2005)', col 862066

¹⁷⁶ Family Law (Scotland) Act 2006 s.29(4)

¹⁷⁷ *Windram v Windram and a third party* 2009 Fam LR 157 para [18]

Some guidance is available to the court as to the relevant factors to consider when determining the appropriate value and nature of any award. Section 29(3) provides that the relevant matters are:

- (a) the size and nature of the deceased's intestate estate;
- (b) any benefit received, or to be received, by the survivor –
 - (i) on, or in consequence of, the deceased's death; and
 - (ii) from somewhere other than the deceased's net intestate estate;
- (c) the nature and extent of any other rights against, or claims on, the deceased's net intestate estate; and
- (d) any other matter the court considers appropriate.¹⁷⁸

2.3(b)(i) The Size and Nature of the Estate

The first factor that the court will consider is the size and nature of the deceased net intestate estate.¹⁷⁹ An intestate estate comprises the deceased's entire moveable estate and his heritable estate in Scotland insofar as it is not disposed of by a valid testamentary disposition.¹⁸⁰ However, in terms of section 29, a surviving cohabitant only has a claim against the intestate estate after the deduction of inheritance tax, other debts and liabilities of the estate, and the prior rights and legal rights of any surviving spouse.¹⁸¹ The court must consider the size and nature of that remaining portion of the estate in order to value a cohabitant's award. In order to determine the debts and liabilities of the estate, the court will require to calculate the expenses of administration of the estate. A potential issue arises in that the administration expenses may include the cost of litigation arising from the section 29 claim itself, as the cost of defending the action may be borne by the estate, if so ordered by the court. However, it has been suggested that the court should only consider the expenses of administration incurred 'in the ordinary administration of the estate', and that

¹⁷⁸ Family Law (Scotland) Act 2006 s.29(3)

¹⁷⁹ Family Law (Scotland) Act 2006 s.29(3)(a)

¹⁸⁰ Heritage outwith Scotland is subject to *lex situs* i.e. distribution in accordance with the law of the country in which it is situated.

¹⁸¹ Family Law (Scotland) Act 2006 s.29(10)

this will not include the cost of litigation.¹⁸² This proposition is supported by case law concerning the succession rights of a spouse or children, where litigation was necessary to establish the pursuer's right to make a claim on the estate, and the court held that the litigation costs were not relevant to the calculation of the claim.¹⁸³

The nature of the net intestate estate will have a bearing on the type of order that the court will make for a cohabitant. Section 29 empowers the court to make an order for payment of a capital sum or a transfer of property to the survivor from the deceased's net intestate estate¹⁸⁴. If the estate comprises mainly heritable property, the court may make an order for transfer to the surviving cohabitant of some of that heritable property. Alternatively, the court might consider the possibility of selling the heritable property, and any associated difficulties with doing so, in order to determine if it is appropriate to make an award for payment of a capital sum to the surviving cohabitant.

2.3(b)(ii) Non-Estate Benefits Received by the Applicant

The court is required to take into account any benefit received, or to be received, by the surviving cohabitant as a result of their partner's death, where that benefit comes from somewhere other than the deceased's net intestate estate.¹⁸⁵ This will generally cover benefits such as life insurance payments, pension benefits and similar. The value of those benefits received by the survivor may militate against any further payment or transfer of property under section 29. *Savage* provides an illustrative example. In *Savage*, the pursuer was in receipt of a lump sum of £124,840 from an occupational pension scheme set up by the deceased, and payment of an annual pension of £9,530 as an adult dependent on the deceased. The Sheriff accepted that the benefit to be received by the pursuer in consequence of the death had an aggregate value in excess of

¹⁸² Malcolm, K., Kendall, F., Kellas, D., 2012, 'Cohabitation' 2nd Edition, W. Green: Edinburgh, p.58 para 1–63

¹⁸³ *Russel v Attorney General* 1917 S.C. 28 and *Cumming v Brewster's Trustees* 1972 S.L.T (Notes) 76.

¹⁸⁴ Family Law (Scotland) Act 2006 s.29(2)(a)

¹⁸⁵ Family Law (Scotland) Act 2006 s29(3)(b)

£420,000.¹⁸⁶ It was held that the pursuer was amply provided for by way of this benefit, and that accordingly there was no need for any additional provision by way of an award under section 29.¹⁸⁷ It has since been suggested that the Sheriff in *Savage* did not adopt the correct approach to quantify the pursuer's non-estate benefit.¹⁸⁸ In this case, the pursuer was to receive annual income by way of the pension plan. Those pension payments would be subject to tax. The value of the benefit actually received by the pursuer might have been properly assessed in terms of his annual income from the pension payments, accounting for the deduction of tax. It is unlikely in the circumstances of that case that the pursuer would have been found entitled to an award under section 29, even if the court had accounted for taxation. However, in other circumstances it may be relevant to assess the net benefit that the surviving cohabitant will actually receive.

2.3(b)(iii) Other Rights Against, or Claims on the Estate

The court is required to consider the nature and extent of any other rights against, or claims on, the deceased's net intestate estate.¹⁸⁹ These will generally consist of surviving family members' claims for prior rights or legal rights, and claims against the free estate.¹⁹⁰ Any award to a cohabitant will reduce the inheritance of those other heirs. The court must therefore strike a balance between competing inheritance rights. It has been suggested that much will depend on the proximity of the deceased's heirs.¹⁹¹ For example, if the only surviving successor is a remote relative, the court is likely to give less weight to their right in comparison with the cohabitant. However, to date, the issue has been characterised by tension between cohabitant's claims and the legal rights of the deceased's children. In such cases, the court will take into account various circumstances. These circumstances include the age of the deceased's

¹⁸⁶ *Savage v Purches* 2009 SLT (Sh Ct) 36 p.42 para [14]

¹⁸⁷ *Savage v Purches* 2009 S.L.T. (Sh Ct) 36 p.42 para [14]

¹⁸⁸ Malcolm, K., Kendall, F., Kellas, D., 2012, 'Cohabitation' 2nd Edition, W. Green: Edinburgh, p.46 para 1–46

¹⁸⁹ Family Law (Scotland) Act 2006 s.29(3)(c)

¹⁹⁰ However, it may also include outstanding claims of third parties against the estate, for example an incomplete litigation.

¹⁹¹ Malcolm, K., Kendall, F., Kellas, D., 2012, 'Cohabitation' 2nd Edition, W. Green: Edinburgh, p.46 para 1–47

children, with adult children perhaps being considered less favourably than young children,¹⁹² to whom an obligation of aliment was owed by the deceased.¹⁹³ Secondly, it may be relevant to consider whether the surviving cohabitant is a parent of the deceased's children. The Sheriff in *Windram* found that, as the pursuer was the mother of the deceased's children, it was in the best interests of those children to make an award to the pursuer. An award was made under section 29 for transfer of the family home and a capital sum that would allow her to repay the outstanding standard security on the property, in order that the pursuer and children could continue to reside there. In this case, the award left the deceased's estate with substantial capital to satisfy the children's legal rights.¹⁹⁴ It remains to be seen where the court will strike the balance when the deceased's estate is of a more modest value.

2.3(b)(iv) Any Other Matter

Section 29(3) provides that the court may take into account 'any other matter' it considers appropriate to the application. In *Fulwood v O'Halloran* it was said that 'Subsection (3) is extremely wide in its scope. Its precise and unequivocal terminology brings within its ambit the opportunity to present an exceedingly broad range of facts and circumstances that might be deemed appropriate in the particular circumstances of any given case.'¹⁹⁵ In *Savage*, counsel for the Pursuer attempted to limit the scope of this subsection by submitting that the court should not look at the cohabitation itself, and should only be concerned with matters arising after the death of the deceased.¹⁹⁶ However, the court did not uphold this view, and found that the circumstances of the relationship during the deceased's lifetime were relevant to the valuation of the claim. It seems the court would therefore be entitled to consider those factors set out in section 25(2), namely: the duration of the relationship, the nature of the

¹⁹² Malcolm, K., Kendall, F., Kellas, D., 2012, 'Cohabitation' 2nd Edition, W. Green: Edinburgh, p.46 para 1-47

¹⁹³ Family Law (Scotland) Act 1985 ss.1(1)(c) and 1(5)(a)and(b)

¹⁹⁴ *Windram v Windram and a third party* 2009 Fam L.R. 157 p162 para 15-18

¹⁹⁵ *Fulwood v O'Halloran* 2014 G.W.D 11-196 para 38

¹⁹⁶ *Savage v Purches* 2009 S.L.T (Sh Ct) 36 p.37 para [7]

relationship and the couple's financial arrangements.¹⁹⁷ In *Savage*, for example, the short duration of the relationship militated against an award to the pursuer.¹⁹⁸ In *Bell v Whittman* and *Windram*, where the cohabitation lasted substantially longer, the duration of the relationship served to strengthen the pursuer's claim.¹⁹⁹

The pursuer's financial situation may also be relevant to the value of any award in their favour. It has been suggested that it would be open to a defender to demonstrate that the surviving cohabitant is of independent financial means and therefore has no real need for a substantial award under section 29.²⁰⁰

Additionally, either party to an action may present evidence as to any economic advantage or disadvantage suffered as a result of the relationship. The concepts of economic advantage and disadvantage are familiar in cohabitants' separation cases brought under section 28 of the FL(S)A 2006. In such cases, the court is tasked with correcting 'any clear and quantifiable economic imbalance that might have resulted from cohabitation'.²⁰¹ The court is not explicitly given this direction in terms of section 29. However, in *Fulwood v O'Halloran*,²⁰² the Sheriff commented 'Such is the generous scope of subsection 3(d) that the defender was correct to concede that it permitted a pursuer who brought an action under section 29 to invite the court to consider questions of economic advantage and disadvantage when deciding whether to make an order under the section'.²⁰³ Similarly, in *Savage* it was considered relevant that the pursuer had experienced an improved standard of living as a result of his relationship with the deceased, and that he had received a number of substantial gifts from the deceased,²⁰⁴ although this was not categorised under the heading of 'economic advantage'. The Sheriff in *Windram* carried out an assessment of the pursuer's

¹⁹⁷ Malcolm, K., Kendall, F., Kellas, D., 2012, 'Cohabitation' 2nd Edition, W. Green: Edinburgh, p.48 para 1-48

¹⁹⁸ *Savage v Purches* 2009 S.L.T (Sh Ct) 36 p.41 para [16]

¹⁹⁹ *Bell v Whittman* Unreported March 12, 2010, Sheriff C.A.L. Scott, Glasgow and *Windram v Windram and a third party* 2009 Fam L.R. 157 p.162

²⁰⁰ Malcolm, K., Kendall, F., Kellas, D., 2012, 'Cohabitation' 2nd Edition, W. Green: Edinburgh, p.49 para 1-50

²⁰¹ *Gow v Grant* 2010 Fam L.R. 21

²⁰² *Fulwood v O'Halloran*, 2014 G.W.D 11-196

²⁰³ *Fulwood v O'Halloran*, 2014 G.W.D 11-196 para 39

²⁰⁴ *Savage v Purches* 2009 SLT (Sh Ct) 36 p.38 para 13 and p.29 para [3]

financial position before, during and after the cohabiting relationship, finding that the pursuer had foregone the opportunity to establish herself financially, as she had placed herself in a position of dependency on the deceased from a young age. An award under section 29 was therefore necessary to ensure her financial stability in the future.²⁰⁵ It has been suggested that the courts have thus far been reluctant to categorise these factors with specific reference to economic advantage and disadvantage.²⁰⁶ However, these types of arguments have been readily presented to the courts within the context of section 29(3)(d).

2.3(b)(v) Factors Outwith the Scope of Section 29

There are undoubtedly a wide range of factors that may be considered by the court when valuing a cohabitant's claim. However, there is one particular matter that is outwith the scope of the court's discretion. The succession rights of a surviving spouse can never be considered in competition with those of a cohabitant.²⁰⁷ The Scottish Executive indicated that a major policy objective behind the FL(S)A 2006 was to preserve the 'special place' of marriage in society.²⁰⁸ Section 29 specifically preserves the payments due to a surviving spouse by way of prior rights and legal rights, such that the rights of any surviving spouse will be satisfied before the cohabitant's claim is considered.²⁰⁹ As a result, where a deceased is survived by a spouse and a cohabitant, any award made to that cohabitant is payable at the expense of the deceased's children or other successors entitled to the free estate. This may yield controversial consequences for the deceased's children, where they are not children of the surviving cohabitant. These issues will be examined in chapter 3. This examination will firstly consider legal primacy of marriage in succession law and secondly will consider the consequences of preserving that primacy on a cohabitant and on children of the deceased.

²⁰⁵ *Windram v Windram and a third party* 2009 Fam L.R. 157 p.162 paras [15]-[18]

²⁰⁶ Malcolm, K., Kendall, F., Kellas, D., 2012, 'Cohabitation' 2nd Edition, W. Green: Edinburgh, p.50 para 1-50

²⁰⁷ Malcolm, K., Kendall, F., Kellas, D., 2012, 'Cohabitation' 2nd Edition, W. Green: Edinburgh, p.51 para 1-52

²⁰⁸ Scottish Executive, 2005, Family Law (Scotland) Bill, Policy Memorandum, p14 para 71

²⁰⁹ Family Law (Scotland) Act 2006 s.29(10)

Chapter 3 - The Legal Primacy of Marriage

The Family Law (Scotland) Bill Policy Memorandum states that ‘The Scottish Ministers are clear that marriage has a special place in society and that its distinctive legal status should be preserved.’²¹⁰ As such, the FL(S)A 2006 maintains a clear line between the succession rights of a spouse and the rights available to cohabitants.²¹¹ This chapter considers the legal primacy of marriage, and compares the succession rights of a spouse with those rights afforded to a cohabitant by section 29 of the FL(S)A 2006. Following this discussion, the issue is examined in the context of reconstituted families, to assess the consequences that preserving the primacy of marriage may have on the children of the deceased. The conclusion is drawn that maintaining the legal primacy of marriage is not consistent with the Executive’s aims of protecting cohabitants and the interests of children.

3.1 Spousal Succession Rights

3.1(a) Prior Rights

The law of intestate succession was fundamentally altered by the Succession (Scotland) Act 1964. The most radical change was the introduction of statutory ‘prior rights’ of the surviving spouse.²¹² A surviving spouse is now the ‘principal’ beneficiary on intestacy.²¹³ In terms of the Succession (Scotland) Act 1964, a surviving spouse has a prior right in the deceased’s dwellinghouse and the furniture and plenishings, and a further right to a cash sum.²¹⁴ These prior rights are postponed to the estate’s debts and liabilities, but take priority over all other claims.

²¹⁰ Scottish Executive, 2005, Family Law (Scotland) Bill, Policy Memorandum, p.14 para 71

²¹¹ Guthrie, T. Hiram, H. 2007, ‘Property and cohabitation: understanding the Family Law (Scotland) Act 2006, (legislative comment) Edin L.R 2007, 11(2) p.209

²¹² SME WILLS AND SUCCESSION (Volume 25), 3. Intestate Succession, (3) The Modern Law of Intestate Succession’ (b) Intestate Succession and Rights in Estates p.688

²¹³ SME WILLS AND SUCCESSION (Volume 25), 11. Administration of Estates, (3)

Appointment of executor, (c) Executor Dative p.1046

²¹⁴ Succession (Scotland) Act 1964 ss.8-9

Section 8(1) of the 1964 Act provides that a surviving spouse is entitled to receive the deceased's 'relevant interest' in a dwellinghouse, in which the spouse was ordinarily resident.²¹⁵ This will generally include the deceased's right of ownership in heritable property owned solely by the deceased, or in which the deceased had a *pro indiviso* share. The deceased's relevant interest is subject to any heritable debt secured on the property. The surviving spouse is entitled to receive the deceased's relevant interest up to a statutory maximum value - currently £473,000.²¹⁶ If the deceased's interest in the property exceeds the statutory maximum, the surviving spouse will not inherit the property itself, but will be entitled to a monetary sum of £473,000.²¹⁷ In the event that the deceased's estate comprises more than one dwellinghouse in which the survivor was ordinarily resident, the surviving spouse must select one of those properties to which this prior right will attach.²¹⁸

Under section 8(3) a surviving spouse also has a prior right to the deceased's 'furniture and plenishings'.²¹⁹ Furniture and plenishings include a range of household contents, but exclude money, heirlooms or any items used for business purposes.²²⁰ The surviving spouse is entitled to such property up to a statutory maximum value - currently £29,000.²²¹ As with the dwellinghouse right, if the estate comprises the furniture and plenishings of more than one dwellinghouse, the survivor must select the furniture and plenishings from one of those properties.²²² The right to the dwellinghouse and the right to the furniture and plenishings are independent of each other. Thus, the furniture and plenishings selected need not be those from the chosen dwellinghouse.²²³

²¹⁵ Succession (Scotland) Act 1964 ss.8(1) and 8(4)(a)

²¹⁶ Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011, SSI 2011/436

²¹⁷ Succession (Scotland) Act 1964 s.8(1)(a)(ii)

²¹⁸ Succession (Scotland) Act 1964 s.8(2)(B)

²¹⁹ Succession (Scotland) Act 1964 s.8(3)

²²⁰ Succession (Scotland) Act 1964 s.8(6)(b)

²²¹ Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011, SSI 2011/436

²²² Succession (Scotland) Act 1964 s.8(3) Proviso

²²³ Scottish Law Commission, 2007, 'Discussion Paper on Succession' Scot Law Com DP No 136 p.9 para 2.11

After satisfaction of the section 8 prior rights, a surviving spouse has a further right to financial provision.²²⁴ The value of that provision depends on whether the deceased is survived by issue (children, grandchildren, great-grandchildren, etc.). If the deceased has no issue, the spouse is currently entitled to receive £89,000.²²⁵ If the deceased is survived by issue, however remote,²²⁶ the spouse's provision is reduced to £50,000.²²⁷ Where there are insufficient funds in the estate to meet the financial right, it is satisfied by transferring the entire estate to the surviving spouse.

The property or sum actually received by a surviving spouse will depend on the composition of the estate between heritable and moveable property, as prior rights are asset-specific.²²⁸ However, in most cases, the prior rights of a surviving spouse will exhaust the entire estate.²²⁹

3.1(b) Legal Rights

A surviving spouse is also entitled to 'legal rights', derived from common law.²³⁰ Legal rights are exigible against the net moveable estate, both in testate succession and on intestacy. In testate cases, the net moveable estate will be the entire moveable estate, after the deduction of debts and liabilities only. On intestacy, the prior rights of a surviving spouse must also be deducted.²³¹

A surviving spouse is entitled to a cash sum equivalent in value to one half of the net moveable estate, if the deceased is not survived by issue. However, if the deceased has issue, the spouse's share is reduced to one third. The deceased's issue are then entitled to a further third.²³²

²²⁴ Succession (Scotland) Act 1964 s.9(1)

²²⁵ Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011, SSI 2011/436

²²⁶ Succession (Scotland) Act 1964 s.36(1)

²²⁷ Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011, SSI 2011/436

²²⁸ Nichols, D., 2010. 'Reform of the law of succession: the report in outline' Edin. L.R. 2010, 14(2), 307 and Scot Law Com report no 215 para 2.2

²²⁹ Thomson, J., 2011, 'Family Law in Scotland' Sixth Edition, Bloomsbury Professional, West Sussex p.74

²³⁰ *Jus relictæ* for a widow or *jus relictii* for a widower. Civil partners have 'legal rights'. For the sake of clarity 'legal rights' is used throughout.

²³¹ Succession (Scotland) Act 1964 s.10(2)

²³² *Legitim*

Where a testamentary disposition contains a provision in favour of a spouse or issue, the beneficiary must elect either to accept the bequest or to claim their legal rights.²³³ However, where the deceased left a will purporting to disinherit their spouse or children, that spouse or child may still claim their legal rights.²³⁴ As such, a surviving spouse is protected from disinheritance to a certain extent.²³⁵

3.1(c) Succession to the Balance of the Estate

In testate cases, the balance of the estate after the satisfaction of legal rights will be distributed in terms of the deceased's will.

On intestacy, any estate remaining after the satisfaction of prior rights and legal rights falls to the 'free estate'. The free estate can comprise both heritable and moveable property, and is distributed in terms of section 2 of the Succession (Scotland) Act 1964.²³⁶ Section 2 provides a statutory list of successors in order of preference. The list includes the deceased's children, parents, siblings, a surviving spouse, and more remote relatives respectively.²³⁷ Accordingly, the surviving spouse may also have a stake in the deceased's free estate, but only where the deceased is not survived by children, parents or siblings.²³⁸

3.1(d) Applicability

The Succession (Scotland) Act 1964 and the common law rules of legal rights apply equally to newlyweds and long-standing marriages. If a married couple separate but do not divorce, they will still have succession rights against each other's estate.²³⁹ A surviving spouse cannot claim the prior right in the dwellinghouse or furniture where the parties have ceased cohabiting in the

²³³ Succession (Scotland) Act 1964 s.13

²³⁴ Scottish Law Commission, 2007, 'Discussion Paper on Succession' Scot Law Com DP No 136 p.37 para 3.4

²³⁵ Gretton, G. L., Steven, A. J. M., 2013, 'Property, Trusts and Succession', 2nd edition, Bloomsbury Professional: West Sussex p.403 para 26.8

²³⁶ Succession (Scotland) Act 1964 s.2(1)

²³⁷ Representation allows the issue of predeceasing successors to claim. Succession (Scotland) Act 1964 s.5(1)

²³⁸ Subject to the operation of representation (n.29)

²³⁹ See Gretton, G. L., Steven, A. J. M., 2013, 'Property, Trusts and Succession', 2nd edition, Bloomsbury Professional: West Sussex p.390 para 25.30 for discussion.

dwellinghouse as the survivor will not satisfy the ‘ordinarily resident’ requirement.²⁴⁰ However, the prior right to financial provision and a spouse’s legal rights are extinguished only by decree of divorce.²⁴¹ As such, the succession rights that accrue to a spouse are not based on what is ‘fair’ in the circumstances.²⁴² Rather, these rights are bestowed on an individual purely by virtue of their legal status as a spouse.

3.2 Cohabitants’ Rights

3.2(a) The Order of Entitlement

The Scottish Executive did not intend to create marriage-equivalent rights for cohabiting couples.²⁴³ Therefore they did not create a fixed system of succession rights for cohabitants.²⁴⁴ The long title of the FL(S)A 2006 states that it is ‘to make provision conferring rights in relation to property, succession and claims in damages for persons living, or having lived together as if husband and wife or civil partners’.²⁴⁵ However, the right afforded to cohabitants under section 29 is simply procedural. It can most accurately be described as the right to make a claim to the court to confer benefit on the cohabitant where no such right would otherwise arise.²⁴⁶ Thus, it is not in itself a right in succession.²⁴⁷

It has been suggested that the order of entitlement on intestacy is (i) debts, (ii) prior rights, (iii) a spouse’s legal rights, (iv) a cohabitant (v) the legal rights of issue, (vi) free estate.²⁴⁸ Strictly speaking, the rights of children are postponed to a cohabitant’s award.²⁴⁹ Thus, in the distribution of an estate, a cohabitant who has been successful under section 29 of the FL(S)A 2006 will be placed

²⁴⁰ Succession (Scotland) Act 1964 s.8(4)(a)

²⁴¹ and equally to civil partners in terms of dissolution of the partnership. Although parties can depart from this general provision by renouncing their rights in a separation agreement.

²⁴² *Kerr v Mangan* No 2 2015 S.C 17 p.24

²⁴³ Scottish Executive, 2005, Family Law (Scotland) Bill, Policy Memorandum p.13 para 65

²⁴⁴ Kerrigan, J., 2016, ‘Legal Rights and the Future’ S.L.T 6, 23-26 at p.25

²⁴⁵ Family Law (Scotland) Act 2006

²⁴⁶ *Kerr v Mangan* No 2 2015 S.C 17 p.27 para 37

²⁴⁷ Kerrigan, J., 2008, ‘Section 29 of the Family Law (Scotland) Act 2006 – the case for reform?’ S.L.T 26, pp.175-178 at p.176

²⁴⁸ Gretton, G. L., Steven, A. J. M., 2013, ‘Property, Trusts and Succession’, 2nd edition, Bloomsbury Professional: West Sussex p.404 para 26.10

²⁴⁹ Family Law (Scotland) Act 2006 s.29(10)(c)

between a spouse and the deceased's children. However, in terms of section 29(3)(c) of the FL(S)A 2006, the court must determine the appropriate value of a cohabitant's award with due regard to the 'nature and extent of any other rights against, or claims on, the deceased's net intestate estate'.²⁵⁰ This will include the legal rights of the deceased's children. Therefore, it may be more accurate to say that in terms of entitlement, an eligible cohabitant and the deceased's issue are equal, such that their claims against the estate are considered simultaneously.

3.2(b) A Discretionary Right

Prior to the enactment of the FL(S)A 2006, the Scottish Government published their proposals for cohabitants rights to claim on intestacy in the 2004 consultation paper *Family Matters: Improving Family Law in Scotland*.²⁵¹ Responses to the consultation were generally supportive of the new procedure for cohabitants.²⁵² However, some indicated a level of ideological resistance to the Bill on the basis that creating any rights for cohabitants would 'undermine' marriage.²⁵³ As a result, the Executive endeavoured to create rights for cohabitants that would not, in any circumstances, interfere with the succession rights of a spouse.²⁵⁴ The proposed solution was to give the court discretion to decide cohabitants' claims on a case-by-case basis.

²⁵⁰ Family Law (Scotland) Act 2006 s.29(3)(c)

²⁵¹ Scottish Government, 2004. 'Family Matters – Improving Family Law in Scotland'

²⁵² Scottish Executive, 2005, Family Law (Scotland) Bill, Policy Memorandum, p.16 para 16 para 77

²⁵³ Scottish Executive, 2005, Family Law (Scotland) Bill, Policy Memorandum, p.16 para 77, see for example, Catholic Church, 2006, 'Family Matters Consultation Responses' the Scottish Government, p.3 section 4

²⁵⁴ Scottish Executive, 2005, Family Law (Scotland) Bill, Policy Memorandum, p.14 para 71

The discretionary regime has its roots in the SLC's 1992 *Report on Family Law*.²⁵⁵ In this report, the SLC suggested that a discretionary system is the preferred means of regulating cohabitants, as a cohabiting relationship is 'of a less certain character' than a marriage.²⁵⁶ The report reads:

'The main advantage of a discretionary system for cohabitants is that it can take account of the widely differing circumstances of different cases, including the duration of the cohabitation, the presence of children, the rights or claims of a surviving spouse (if any), the rights of other relatives (if any), the terms of the deceased's will and the date when it was made, the extent of the contributions or sacrifices made by the surviving cohabitant which were to the benefit of the deceased, and so on. This flexibility is probably of more value in cohabitation cases than in any other class of case.'²⁵⁷

Such a discretionary system would allow the courts to identify those cohabiting relationships worthy of legal protection. However, it would also allow the court to identify and exclude those that did not meet the set criteria.

The SLC envisaged that a cohabitant would be able to make a claim on the grounds that 'the disposition of the deceased's estate was not such as to make such financial provision for the applicant as would be reasonable to expect the applicant to receive having regard to all the circumstances of the case.'²⁵⁸ It seems, from this, that the SLC intended the provisions to be applicable in both intestate and testate cases, such that a cohabitant could challenge a will that did not make sufficient provision for them.²⁵⁹

The recommendations of the SLC were largely implemented by sections 25 and 29 of the FL(S)A 2006. However, the provisions are limited such that a cohabitant only has a claim against their deceased partner's net intestate estate.

²⁵⁵ Scottish Law Commission, 1992, 'Report on Family Law' Scot Law Com. No 135

²⁵⁶ Scottish Law Commission, 1992, 'Report on Family Law' Scot Law Com. No 135 Part XVI at p.122 para 16.29

²⁵⁷ Scottish Law Commission, 1992, 'Report on Family Law' Scot Law Com. No 135 Part XVI at p.122 para 16.29

²⁵⁸ Scottish Law Commission, 1992, 'Report on Family Law' Scot Law Com. No 135 Part XVI at p.123 para 16.33

²⁵⁹ Malcolm, K., Kendall, F., Kellas, D., 2012, 'Cohabitation' 2nd Edition, W. Green: Edinburgh, p.42 para 1-40

The Executive does not defend the decision to restrict the scope of the provisions to intestacy in the Family Law (Scotland) Bill Policy Memorandum. However, it has been suggested that the Executive restricted section 29 to intestate estates was because the SLC was engaged with a review of protection from disinheritance, and that this review would consider the issue: there was no point of principle involved.²⁶⁰

A cohabitant's claim on intestacy under the FL(S)A 2006, is subject to close scrutiny of the court. The court will conduct an assessment of the relationship, having regard to those factors listed in sections 25 and 29, namely: the duration of the cohabitation; the nature of the relationship; the financial arrangements of the couple; the size and nature of the estate; any benefit to be received by the survivor in consequence to the death; other claims on the estate.²⁶¹ There is no instruction for the court to regard the reasonable expectations of the surviving cohabitant, and thus no indication about the objective of the assessment. Moreover, the court can now have regard to 'any matter' considered appropriate to the claim.²⁶² As such, the court has unlimited discretion when deciding the outcome of a cohabitant's claim, save the fact that any surviving spouse's succession rights are preserved intact.²⁶³

In 2010, the Centre for Research on Families and Relationships conducted a study of 97 family lawyers who had experience dealing with sections 25-29 of the FL(S)A 2006.²⁶⁴ The study asked respondents what they thought to be the most problematic aspects of the provisions. 85% of respondents cited the 'width of the court's discretion' as an issue.²⁶⁵ One respondent in particular

²⁶⁰ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.68 para 4.8

²⁶¹ Family Law (Scotland) Act 2006 ss.25(2)(a)-(c) and 29(a)-(c)

²⁶² Family Law (Scotland) Act 2006 s.29(3)(d)

²⁶³ Family Law (Scotland) Act 2006 s.29(10)(c)

²⁶⁴ Wasoff, F., Miles, J., Mordaunt, E., 2010, 'Legal Practitioners' perspectives on the cohabitation provisions of the Family Law (Scotland) Act 2006, Centre for research on families and relationships

²⁶⁵ Wasoff, F., Miles, J., Mordaunt, E., 2010, 'Legal Practitioners' perspectives on the cohabitation provisions of the Family Law (Scotland) Act 2006, Centre for research on families and relationships, p55 Table 5.4

described the process of section 29 claims as ‘pot luck’.²⁶⁶ Others suggested that the court’s discretion is liable to be abused, citing the decision in *Savage* as an example:

‘...But, of course, what the sheriff chose to do was simply to use the 29(3)(d) provisions to say – I’m going to use my discretion in all the circumstances of this case to do exactly what I want to do...’²⁶⁷

In *Whigham v Owen*,²⁶⁸ Lord Drummond Young acknowledged the unrestricted nature of the FL(S)A 2006, stating that ‘... the court must arrive at an award under section 28 or 29 without any proper guidance in the legislation as to what the amount of that award should be.’ It is extraordinarily difficult, if not impossible to predict the outcome of a section 29 case,²⁶⁹ and as such, equally difficult for a legal practitioner to advise a cohabitant about a prospective claim. Thus, courts, legal practitioners and cohabitants alike have to deal with the uncertainty of the provisions. However, this uncertainty was described by the SLC as ‘the price to be paid’²⁷⁰ for flexibility that is necessary to deal with cohabitation cases.

3.3 Appointment as Executor

An executor dative is an executor appointed by the court to administer and distribute an intestate estate. A spouse has a general right to be decerned executor dative *qua relict*²⁷¹ of the deceased and it is generally accepted that a spouse has an exclusive right to that office where they are entitled to inherit the whole of the deceased’s intestate estate by way of prior rights.²⁷²

²⁶⁶ Wasoff, F., Miles, J., Mordaunt, E., 2010, ‘Legal Practitioners’ perspectives on the cohabitation provisions of the Family Law (Scotland) Act 2006, Centre for research on families and relationships, p.70 respondent [29]

²⁶⁷ Wasoff, F., Miles, J., Mordaunt, E., 2010, ‘Legal Practitioners’ perspectives on the cohabitation provisions of the Family Law (Scotland) Act 2006, Centre for research on families and relationships, pp.70-71 respondent [173]

²⁶⁸ *Whigham v Owen* [2013] CSOH 29, S.L.T. 483 p486 para [8]

²⁶⁹ *Kerr v Mangon* No 2 2015 S.C 17 p.24 para [18]

²⁷⁰ Scottish Law Commission, 1992, ‘Report on Family Law’ Scot Law Com. No 135 Part XVI at p.122 para 16.29

²⁷¹ A gender neutral term for ‘widow’ or ‘widower’

²⁷² *Kerr, Petitioner*, 1968 S.L.T (Sh Ct) 61 although there is now conflicting case law – see: *Murray, Petr* 2012 SLT (Sh Ct) 57 where it was held that a surviving spouse whose prior rights

A surviving cohabitant may only be appointed as executor dative in certain circumstances. Firstly, it is possible for a cohabitant to be appointed as executor *qua creditor*. In order to be confirmed as an executor creditor, the creditor must have a liquid debt against the estate. The amount of the debt must be clear;²⁷³ the sum must be due; and the debt must be proved or admitted.²⁷⁴ If a cohabitant established a claim under section 29 of the FL(S)A 2006 by decree *cognitionis causa tantum*,²⁷⁵ they may be entitled to be decerned as an executor creditor over that part of the estate to which they are entitled.

Secondly, a cohabitant may be appointed as executor *qua legal representative* of the deceased's child.²⁷⁶ The deceased's child is entitled to be appointed as executor dative of the estate.²⁷⁷ If such a child is under the age of sixteen, they will be unable to petition for appointment in their own right.²⁷⁸ The child's parent can petition to act on the child's behalf.²⁷⁹ However, a conflict of interest may arise if the executor then wishes to make a claim for provision from the estate under section 29 of the FL(S)A 2006. The executor, on behalf of her child, would have a fiduciary responsibility to maximise the value of the estate for the beneficiaries and at the same time, be seeking to have at least part of that estate made over to her under section 29. In such cases, a curator *ad litem* may be appointed to defend the action and to represent the children's interests in the proceedings.²⁸⁰ This scenario was illustrated in *Windram*.²⁸¹

exhausted the entire estate did not have an exclusive right to be appointed as executor dative, and accordingly the deceased's son could be decerned as executor dative qua son of the deceased.

²⁷³ Except in the cases of the price of goods fixed by a contract, or rent which is fixed by contract.

²⁷⁴ Currie, J. G., 1996, 'Currie on Confirmation of Executors' 8th Edition, W. Green para 6.92

²⁷⁵ Welsh, T., 2006, 'Macphail's Sheriff Court Practice', 3rd Edition, SULI/W. Green, p.182 para 4.106, and Currie, J. G., 1996, 'Currie on Confirmation of Executors' 8th Edition, W. Green p.244 para 6.99

²⁷⁶ Formerly '*executor qua guardian*'. This has now been changed to '*qua legal representative*' to avoid confusion with a guardian of an adult under the Adults with Incapacity (Scotland) Act 2000. See Macphail, I., 2004, 'Dative Petitions: Persons with Parental Responsibilities and Rights' Practice Note No 3, 204, Sheriffdom of Lothian and Borders

²⁷⁷ Succession (Scotland) Act 1964 s.2(1)

²⁷⁸ Age of Legal Capacity (Scotland) Act 1991 s.1

²⁷⁹ Kerrigan, J., 2008, 'Section 29 of the Family Law (Scotland) Act 2006 – the case for reform?' S.L.T 26, pp175-178 at p.177

²⁸⁰ Currie, J. G., 2011 'Currie on Confirmation of Executors' 9th Edition, W. Green para 8-74

²⁸¹ *Windram v Windram and a third party* 2009 Fam L.R. 157 pp.159-160 para [11] and p.157

3.4 A Note on Inheritance Tax

IHT is payable on estates²⁸² with a value exceeding the nil-rate band (currently £325,000).²⁸³ The standard rate of IHT is 40% on all transfers above that value.²⁸⁴ The Inheritance Tax Act 1984 provides that transfers between spouses are exempt from IHT.²⁸⁵ A spouse can therefore inherit an unlimited value of assets from the deceased without paying IHT. Additionally, a spouse can make use of the transferable nil-rate band.²⁸⁶ This allows a spouse to claim their deceased partner's unused nil-rate band. Thus, on the second death, the estate could potentially make use of a nil-rate band of up to £650,000. Neither of these provisions apply to cohabitants. In *Holland (Executor of Holland, Deceased) v Inland Revenue Commissioners*²⁸⁷ the Special Commissioners confirmed that the IHT exemptions for spouses do not extend to cohabiting couples.

The Scottish Parliament cannot change the rules pertaining to IHT for cohabiting couples in Scotland, as the matter is reserved to Westminster. As such, transfers between cohabitants, including awards made under section 29 of the FL(S)A 2006, will be subject to IHT at the standard rate.

3.5 Preserving the Succession Rights of a Spouse

3.5(a) Consequences for Cohabitants

The FL(S)A 2006 is ill-equipped to deal with reconstituted families where the deceased's estate is of low to modest value. Section 29 of the FL(S)A 2006 provides that a cohabitant may only have a claim on the deceased's estate after the payment of debts and liabilities, and the deduction of the prior rights and legal rights of a spouse.²⁸⁸ In many cases, where the deceased is survived by a

²⁸² Including chargeable lifetime transfers

²⁸³ HM Revenue & Customs, 2015, 'Inheritance Tax Thresholds' Guidance, The Scottish Government

²⁸⁴ Inheritance Tax Act 1984 s.7

²⁸⁵ Inheritance Tax Act 1984 s.18

²⁸⁶ Inheritance Tax Act 1984 ss.8A–C

²⁸⁷ *Holland v Inland Revenue Commissioners* [2003] S.T.C (S.C.D.) 43

²⁸⁸ Family Law (Scotland) Act s.29(10)(c)

spouse (presumably estranged) and a cohabitant, the succession rights of the spouse will render the cohabitant's claim of little or no value.

It has been estimated that in 2007 the average value of all estates in Scotland (both testate and intestate) was £147,822.²⁸⁹ Earlier figures indicate that the value of an intestate estate is likely to be less than half the value of a testate estate.²⁹⁰ These figures may have increased marginally over time, and as such it has been suggested that the average value of an intestate estate in Scotland, to which the FL(S)A 2006 can be applied, is in the region of £100,000.²⁹¹

An estranged spouse, who is not resident in the deceased's home, will not have a prior right in the dwellinghouse or the furniture and furnishings.²⁹² However, they will have a prior right to a cash sum of £89,000 or £50,000 depending on the existence of children or other issue.²⁹³ In most cases, this prior right will exhaust the entire estate, or leave a small amount remaining. The spouse will then be entitled to legal rights to the value of one third or one half of the remaining moveable estate, again, depending on the existence of children. Only after satisfaction of these rights will the cohabitant have a claim against the estate.

The Scottish Executive commissioned a survey in 2005 to explore attitudes towards the law on succession.²⁹⁴ This survey asked 1,000 respondents whether they thought a cohabitant should be entitled to claim a share of the deceased's estate where the said deceased is also survived by an estranged spouse. 81% of

²⁸⁹ Reid, D., 2008, 'From the cradle to the grave: politics, families and inheritance law', Edin. L.R. 2008, 12(3), 391-417 at p.413

²⁹⁰ Jones, H.E., 1990, 'Succession Law' Scottish Office Central Research Unit Papers, p.15, para 4.14, Table 2

²⁹¹ See Reid, D. 2008 'From the Cradle to the Grave: Politics, Families and Inheritance Law' 12 Edinburgh Law Review pp.391-417 at p.413, Jones, H. E., 1990, 'Succession Law'. Scottish Office Central Research Unit Papers p.5, Table 2

²⁹² Succession (Scotland) Act 1964 s.8(4) and Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011, SSI 2011/436

²⁹³ Succession (Scotland) Act 1964 s.9(1) and Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011, SSI 2011/436

²⁹⁴ Scottish Executive, 2005, 'Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey' figs.13 and 14

respondents agreed that the surviving cohabitant should be so entitled.²⁹⁵ The FL(S)A 2006 does provide a procedure whereby a cohabitant could make such a claim, albeit only on intestacy. However, given the preservation and primacy of the spouse's rights against the estate, the cohabitant's claim is likely to be of little or no value. Thus, the FLS(A) 2006 has created the right to claim in principle, but it is not equipped to generate results of value to the cohabitant.

3.5(b) Consequences for Children

The Scottish Executive indicated that a major policy objective behind the Family Law (Scotland) Bill was to safeguard the best interests of children.²⁹⁶ The Bill was intended to 'ensure that family law protects the best interests of children regardless of the type of family they belong to.'²⁹⁷ However, there is an implicit bias in the FL(S)A 2006 towards adult partners and away from children.²⁹⁸ As a cohabitant's claim cannot interfere with the succession rights of a spouse, it follows that the cohabitant's award must be provided for at the children's expense.²⁹⁹

To determine the appropriate value (if any) of a cohabitant's award, the court will require to strike a balance between the interests of the cohabitant and those of the deceased's children. This has proven relatively uncontroversial where the children concerned are of the cohabiting relationship. In such cases, it may be justifiable to make an award to the surviving parent, in order to safeguard the best interests of the whole family. *Windram* provides an illustrative example of such a situation.³⁰⁰ However, the situation is rather more complex

²⁹⁵ Scottish Executive, 2005, 'Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey' figs.13 and 14

²⁹⁶ Scottish Executive, 2005, Family Law (Scotland) Bill, Policy Memorandum p.1 para 4

²⁹⁷ Scottish Executive, 2005, Family Law (Scotland) Bill, Policy Memorandum pp.1-2 para 5

²⁹⁸ Guthrie, T., Hiram, H., 2007, 'Property and cohabitation: understanding the Family Law (Scotland) Act 2006' Legislative Comment, Edin. L.R. 11(2), 208-229 p.229 and Hiram, H., 2006, 'New Developments in UK Succession Law' Vol. 10.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW, p.15 s3

²⁹⁹ Wasoff, F., Miles, J., Mordaunt, E., 2010, 'Legal Practitioners' perspectives on the cohabitation provisions of the Family Law (Scotland) Act 2006, Centre for research on families and relationships p.31

³⁰⁰ *Windram v Windram and a third party* 2009 Fam L.R. 157

in the context of reconstituted families. In the event that the deceased is survived by a cohabitant and children of a prior relationship, any award made to the surviving cohabitant will diminish the children's inheritance to their absolute disadvantage. It remains to be seen how the courts would approach such a situation.

The issue is further complicated by the addition of a surviving spouse. In the event that the deceased is survived by a spouse, a cohabitant and children of either relationship, the only individual who enjoys absolute protection by the current law is the spouse, as their succession rights are preserved. Any sum remaining after the satisfaction of those rights falls to be divided between the surviving cohabitant and the children. Where the estate is of sufficient value it may be possible to protect all parties. However, given that the current rules pertain to intestate estates that are likely to be of modest value,³⁰¹ it is unlikely that the court could secure both the interests of the children and the surviving cohabitant.

The current law is not durable enough to cope with complex reconstituted family models. A heavy-handed approach might be to remove the estranged spouse from the equation. However, the SLC has recently suggested a somewhat more sophisticated solution. The SLC's 2009 *Report on Succession*³⁰² recommends repeal of section 29 of the FL(S)A 2006 and envisages a new regime, under which a cohabitant and a spouse would have a stake in the same sum. This regime is examined in chapter 4, to determine the extent to which it is better equipped than the FL(S)A 2006 to deal with complex family structures.

³⁰¹ Reid, D. 2008 'From the Cradle to the Grave: Politics, Families and Inheritance Law' 12 *Edinburgh Law Review* pp.413-414

³⁰² Scottish Law Commission, 2009, 'Report on Succession', Scot Law Com No 215

Chapter 4 - Recommendations of the Scottish Law Commission

As part of their Seventh Programme of Law Reform,³⁰³ the SLC undertook a comprehensive review of the law of succession. It concluded that the current combination of the Succession (Scotland) Act 1964 and the FL(S)A 2006 do not reflect modern society.³⁰⁴ As such, the SLC's 2009 *Report on Succession*³⁰⁵ recommends overhaul of the existing succession rights and the addition of a new formula for calculating cohabitants' claims. This chapter examines the SLC's proposals to determine the extent to which they are equipped to protect cohabitants in succession. Following this discussion, the recommendations are examined in the context of reconstituted families to determine whether they cater for complex modern family structures. The conclusion is reached that the SLC regime would better achieve the ambitions of the Scottish Executive as it has the flexibility to cope with the complexities of reconstituted families. However, some alterations are suggested in order to ensure that the deceased's adult partner will retain the family home.

4.1 A Cohabitant's Claim

The SLC recommends that section 29 of the FL(S)A 2006 should be repealed and replaced with a new 'simpler' provision.³⁰⁶ The new provision will entitle a cohabitant to claim a percentage of the sum to which they would be entitled if they were married to the deceased.³⁰⁷ The results of a 2005 public attitude survey, *Attitudes Towards Succession Law*,³⁰⁸ indicate that there is strong public support for cohabitants to be protected from disinheritance. Therefore, unlike

³⁰³ Scottish Law Commission, 2004, 'Seventh Programme of Law Reform' Scot Law Com No 198, paras 2.21-2.30

³⁰⁴ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.1 para 1.2

³⁰⁵ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215

³⁰⁶ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.69 para 4.9 recommendation 37

³⁰⁷ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.68 para 4.8

³⁰⁸ Scottish Executive, 2005, 'Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey' Scottish Executive Social Research

section 29 of the FL(S)A 2006, the new system will give cohabitants the right to claim against both testate and intestate estates.³⁰⁹

As with proceedings under section 29 of the FL(S)A 2006, a cohabitant's claim will proceed in two stages, namely: (i) establishing that the applicant was the deceased's cohabitant, and (ii) valuing the award.³¹⁰ The recommendations for each stage will be examined in turn.

4.2 Establishing Title

Under the SLC's recommendations, title to claim is established by satisfying the court that the applicant was the 'cohabitant' of the deceased. The SLC defines 'cohabitant' as:

'a person who immediately before the deceased's death was living with the deceased in a relationship which had the characteristics of the relationship between spouses or civil partners'.³¹¹

To determine whether the applicant was living with the deceased 'in a relationship which had the characteristics of the relationship between spouses', the SLC provides a non-exhaustive list of factors to which the court should have regard. The list comprises:

- (a) whether they were members of the same household;
- (b) the stability of the relationship;
- (c) whether their relationship was sexual;
- (d) whether they had children together, or had accepted children as children of the family; and
- (e) whether the parties appear to family, friends and members of the public to be a married couple, civil partners or cohabitants.³¹²

³⁰⁹ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.69 para 4.19 recommendation 37(2)

³¹⁰ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.69 para 4.10

³¹¹ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.70 para 4.13 recommendation 38(1) and Succession (Scotland) Bill Draft, Part 4, s.22(1)

³¹² Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 pp.69-70 para 4.11 and Succession (Scotland) Bill Draft, Part 4, s.22(4)(a)-(e)

The list of factors derives from social security law in England and Wales. In *Crake v Supplementary Benefits Commission*,³¹³ Justice Woolf referred to the Supplementary Benefits Handbook of the time, from which he extracted six ‘admirable signposts’ that would assist a court, tribunal or commission to form a sustainable view of whether two people were ‘living together as husband and wife’ for the purposes of means-tested benefits.³¹⁴ Though the admirable signposts were designed for use in a social security context, they have since been used in England and Wales in various other legal contexts, including protective orders for victims of domestic violence under the Family Law Act 1996,³¹⁵ fatal accident claims under the Fatal Accidents Act 1976,³¹⁶ and succession claims under the Inheritance (Provision for Family and Dependants) Act 1975.³¹⁷ As such, there exists a body of case law from England and Wales that can aid the Scottish courts in their interpretation of the provisions. An international comparison can be drawn with the New Zealand Property (Relationships) Act 1976, which uses broadly similar criteria to determine whether two people are or were in a de facto relationship³¹⁸ for the division of property when that relationship ends.³¹⁹ Those corresponding provisions are: the nature and extent of common residence; whether or not a sexual relationship exists; the care and support of children; the reputation and public aspects of the relationship.³²⁰ Each of the admirable signposts will be examined with reference to the available UK and New Zealand case law.

³¹³ *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498 a case brought under the Supplementary Benefits Act 1976 Sch 1 para 3(1)(b)

³¹⁴ *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498 at 505 para g. The sixth signpost is ‘financial support’.

³¹⁵ See *G v F (Non-molestation order: jurisdiction)* [2000] Fam 186

³¹⁶ See *Kotke v Saffarini* [2005] EWCA Civ 221

³¹⁷ see *Gully v Dix* [2004] EWCA Civ 139 – note, this is currently the only avenue in England for cohabitants to seek redress after the death of a partner.

³¹⁸ A de facto relationship is defined as two persons who ‘live together as a couple and who are not married to, or in a civil partnership with, one another.’ Property (Relationships) Act 1976 s.2D(1)(b)-(c)

³¹⁹ Property (Relationships) Act 1976 s.1C(1)

³²⁰ Property (Relationships) Act 1976 s.2D(2)

4.2(a) Members of the Same Household

The first admirable signpost is that the parties are, or were, members of the same household.³²¹ The UK Department for Work and Pensions (DWP) has released a *Decision Makers' Guide*³²² ('the DWP guide') to assist courts, tribunals and commissioners alike to apply the admirable signposts. The DWP guide defines a household as 'a domestic establishment containing the essentials of home life... Household may refer to people held together by a particular kind of tie, even if temporarily separated'.³²³ This definition derives from earlier English case law. In *Kotke v Saffarini*,³²⁴ a fatal accidents claim, Justice Hepple extracted five propositions from the decisions in *Gully v Dix*,³²⁵ *Pounder v London Underground Ltd*,³²⁶ and *Santos v Santos*.³²⁷ Those propositions were intended to assist a court in identifying whether two parties shared a household. The propositions were: (i) that each case is fact sensitive; (ii) the relevant word for consideration is 'household' and not 'house'; (iii) living together is the 'antithesis of living apart'; (iv) parties will be in the same household if they are tied by their relationship; (v) the tie of that relationship may be manifest by various elements, not simply living under the same roof, but the public and private acknowledgement of their mutual society.³²⁸ Thus, it seems a couple must do more than share a house in order to be considered sharing a 'household'.

A similar approach has been adopted in New Zealand in for the purposes of the Property (Relationships) Act 1976. In terms of that Act, the court must consider the 'nature and extent of common residence' to identify a de facto relationship.³²⁹ The New Zealand courts have concluded that sharing a home is an 'important factor', but it is neither essential, nor conclusive evidence of a de

³²¹ *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498 at 505, and Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 pp.69-70 para 4.11 and Succession (Scotland) Bill Draft, Part 4, s.22(4)(a)

³²² Department for Work and Pensions, 2014. '*Decision makers' guide: Subjects common to all benefits: staff guide*', vol 3, Scottish Government, Chapter 11

³²³ Department for Work and Pensions, 2014. '*Decision makers' guide: Subjects common to all benefits: staff guide*', vol 3, Chapter 11 paras 11051-11052

³²⁴ *Kotke v Saffarini* [2005] P.I.Q.R P26

³²⁵ *Gully v Dix* [2004] EWCA Civ 139

³²⁶ *Pounder v London Underground Ltd* [1995] P.I.Q.R, p.217

³²⁷ *Santos v Santos* [1972] Fam 247

³²⁸ *Kotke v Saffarini* [2005] EWCA Civ 221 para 23.

³²⁹ Property (Relationships) Act 1976 s.2D(2)(b)

facto relationship.³³⁰ Thus, it seems, both in the UK and New Zealand, that the courts will look to other features of the relationship to determine whether the couple conducted a mutual home life.

A couple can share a household whilst still maintaining separate residences. In *Churchill v Roach*,³³¹ a succession claim in England under the Inheritance (Provision for Family and Dependants) Act 1975, the claimant and the deceased had maintained two separate properties. Judge Norris QC did not regard the two properties to be fatal to the application as it was ‘perfectly possible to have one household and two properties.’³³² However, in this instance it was held that the couple had ‘two separate establishments with two separate domestic economies.’³³³

There is no requirement that a couple live together every day of the week in order to establish that they share a household. This issue was examined in the England and Wales Court of Appeal in *Amicus Horizon Ltd v The Estate of Miss Judy Mabbott (Deceased) & Anr*,³³⁴ regarding succession to an assured tenancy. In this case it was not fatal to the application that the Appellant had divided his time between a home with the deceased and a home with his parents.³³⁵ Similarly, the New Zealand courts have accepted that ‘Couples may cohabit from time to time where, for example, one party has to spend long periods away from home for reasons of occupation, or is a member of the Armed Forces, or a merchant seafarer or otherwise.’³³⁶ Accordingly, it appears that in both the UK and New Zealand, a couple may share a household whilst exhibiting periods of physical separation. The relevant factor should be whether the relationship continued despite that separation. In order to dispel any doubt on the matter, the SLC recommends that there should be express provision within the new Scottish succession legislation that ‘A person should not be

³³⁰ See for example, *Excell v DSW* (1990) 7 FRNZ 239, [1991] NZFLR 241 (HC)

³³¹ *Churchill v Roach* [2002] EWHC 3230 (Ch)

³³² *Churchill v Roach* [2002] EWHC 3230 (Ch) p.11

³³³ *Churchill v Roach* [2002] EWHC 3230 (Ch) p.11

³³⁴ *Amicus Horizon Ltd v The Estate of Miss Judy Mabbott (Deceased) & Anr* [2012] EWCA Civ 895

³³⁵ *Amicus Horizon Ltd v The Estate of Miss Judy Mabbott (Deceased) & Anr* [2012] EWCA Civ 895 para 28

³³⁶ *Scragg v Scott* (2006) 25 FRNZ 942, [2006] NZFLR 1076 (HC) at [41]

regarded as having ceased to be the cohabitant of another person by reason only of circumstances such as hospitalisation, imprisonment or service overseas in the armed forces.³³⁷

4.2(b) Stability

The second admirable signpost is stability.³³⁸ Many of the reported cases from England and Wales stress the need for a ‘permanent and stable relationship’.³³⁹ However, the meaning of ‘stability’ remains elusive. The DWP guide provides a rudimentary list of activities that a couple ‘usually’ do together and for each other (including cleaning and laundry; decorating and gardening)³⁴⁰ and suggests that a decision maker should consider how a couple have divided up those tasks, and whether that has changed over the course of the relationship.³⁴¹ This would indicate that ‘stability’ means mere consistency in day-to-day life.

The New Zealand approach is somewhat more sophisticated. There is no specific instruction within the Property (Relationships) Act 1976 that the court should consider the ‘stability of the relationship.’ The court is required to consider such factors as ‘the nature and extent of common residence’, ‘whether or not a sexual relationship exists’, and ‘the degree of mutual commitment to a shared life’ and will assess how those factors of the relationship have changed over the duration of the relationship. For example, in the case of *CNC v NWMFC*,³⁴² the relevant couple had ceased to share a home. Thus they lacked stability in their living arrangements. However, the couple maintained a constant pattern of visitation and communication, which indicated that their

³³⁷ Scottish Law Commission, 2009, ‘Report on Succession’ Scot Law Com No 215 at Succession (Scotland) Bill Draft Part 4, s.22(5)

³³⁸ Scottish Law Commission, 2009, ‘Report on Succession’ Scot Law Com No 215 pp.69-70 para 4.11 and Succession (Scotland) Bill Draft, Part 4, s.22(4)(b)

³³⁹ See, for example *Helby v Rafferty* [1979] 1.W.L.R 13, *Watson v Lucas* [1980] 1 W.L.R. 1493 and *Chios Property Investment Co. Ltd. v Lopez* (1987) 20 H.L.R 120

³⁴⁰ Department for Work and Pensions, 2014. ‘*Decision makers’ guide: Subjects common to all benefits: staff guide*’, vol. 3, Chapter 11 at 11114

³⁴¹ Department for Work and Pensions, 2014. ‘*Decision makers’ guide: Subjects common to all benefits: staff guide*’, vol. 3, Chapter 11 at 11113

³⁴² *CNC v NWMFC* Hamilton FAM-2010-019-477, 6 April 2011

degree of mutual commitment to a shared life had endured.³⁴³ As such, an effective analysis of a couple's stability is entirely subjective and depends on a global analysis of all the features of the relationship. In this regard the Scottish succession system would benefit from following the New Zealand approach.

4.2(c) Existence of a Sexual Relationship

The third admirable signpost is the existence of a sexual relationship.³⁴⁴ The DWP guide states that 'a sexual relationship is an important part of a marriage' and therefore of living together like spouses.³⁴⁵ However, evidence of a sexual relationship does not, on its own, mean that two people should be classed as living together as if they were married. In *Ghaidan v Godin-Mendoza*,³⁴⁶ an English case concerning survivorship rights in terms of the Rent Act 1977, Lord Millett said: 'The expression "living together as man and wife" or as "husband and wife" is in general use and well understood. It does not mean living together as lovers... It connotes person who have openly set up home together as man and wife.'³⁴⁷ As such, a sexual relationship may be indicative but it will not be determinative of the issue.

³⁴³ *CNC v NWMFC* Hamilton FAM-2010-019-477, 6 April 2011 at [15] and [22] and Peart, N.S. 2013, 'Relationship Property and Adult Maintenance: Acts and analysis' Thomson Reuters, p.94 at (2)

³⁴⁴ Bonner, D., Hooker, I., White, R.C.A., 2006, 'Social Security Legislation 2006: Non means tested benefits' Volume 1, Sweet & Maxwell at p.79

³⁴⁵ Department for Work and Pensions, 2014. 'Decision makers' guide: Subjects common to all benefits: staff guide', vol. 3, Chapter 11 at 11108

³⁴⁶ *Ghaidan v Godin-Mendoza* (FC) [2004] UKHL 30

³⁴⁷ *Ghaidan v Godin-Mendoza* (FC) [2004] UKHL 30 para 92

The absence of a sexual relationship between the parties may indicate that the relationship was *not* of the requisite character. In *Re J (Income Support: Cohabitation)*,³⁴⁸ the Commissioner stated:

‘there must be strong alternative grounds for holding a relationship to be akin to that of a husband and wife when there has never been a sexual relationship, because the absence of such a relationship in the past does suggest that the parties may be living together for reasons other than a particularly strong personal relationship’.³⁴⁹

However, the fact that a couple did not have a sexual relationship prior to the death of one partner will not necessarily be fatal to an application. In such cases, it is suggested that the correct approach would be to determine whether the parties *ever* had a sexual relationship.³⁵⁰ This may allow the court to take account of the advancing age of the parties or periods of sickness or injury prior to the death. However, in succession cases particularly, it is difficult to justify intrusive inquiry into the sexual habits of couples. As such, succession practice could benefit from one procedural aspect of the social security rules. Social Security Officers are instructed not to question claimants about the physical aspect of their relationship. The commissioners, tribunals or courts may only rely on evidence that is voluntarily surrendered by the claimant.³⁵¹

4.2(d) Children

The Family Law (Scotland) Bill initially instructed the court to consider ‘whether the cohabitants have a child of whom they are the parents.’³⁵² This criterion was removed from the Bill at Stage 2,³⁵³ as it was found to be ‘anomalous to refer to a child only when the child is the genetic child of both [cohabitants]’.³⁵⁴ The admirable signposts have a wider scope. The fourth admirable signpost instructs the court to consider whether the parties had

³⁴⁸ *Re J (income support: cohabitation)* [1995] 1 F.L.R 660, at p.666

³⁴⁹ *Re J (income support: cohabitation)* [1995] 1 F.L.R 660 at p.665 para 12

³⁵⁰ *Re J (income support: cohabitation)* [1995] 1 F.L.R 660 at p.667 para 18

³⁵¹ *Commissioner's decision* R(SB) 17/81 para 6.2(d) per Commissioner Rice

³⁵² Family Law (Scotland) Bill [as introduced] s.18(4)(c)

³⁵³ Family Law (Scotland) Bill [as amended at Stage 2] s.18(4)

³⁵⁴ Justice 1 Committee, 2005, ‘Justice 1 Committee Report’ Session 2, Volume 1 paras 188-190

children together, or had ‘accepted children as children of the family’.³⁵⁵ As such, the court may take account of children born of the cohabiting union, and situations where the couple have accepted shared responsibility of raising a child.

In England and Wales the existence of a dependent child is considered strong evidence that a couple have made a mutual commitment to living together as if they were married.³⁵⁶ In *Kotke v Saffarini*,³⁵⁷ a case brought under the Fatal Accidents Act 1976, it was held that pregnancy ‘inevitably drew the couple more closely [together] because there was now a third person potentially to consider, rather than two.’³⁵⁸ However, the courts of England and Wales have not regarded ‘accepting children as children of the family’ with the same ‘inevitability’. In *Amicus Horizon Ltd.*,³⁵⁹ the fact that the appellant had assumed parenthood of the deceased’s daughter was not persuasive enough to establish that the couple lived together as if they were married.³⁶⁰ Thus, the courts seem to distinguish between biological parenthood and assumed parenthood. This distinction is familiar in Scots law. For example, Scottish stepchildren have no automatic inheritance rights to their stepparents’ estate unless they are formally adopted.³⁶¹ As such, distinguishing between biological parenting and assumed parenthood is not inherently controversial within a the SLC’s new regime.

4.2(e) Public Acknowledgement

The final admirable signpost is the degree of public acknowledgement of the relationship.³⁶² The act of getting married is a public declaration that a couple

³⁵⁵ *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498 at 505 and Department for Work and Pensions, 2014. ‘*Decision makers’ guide: Subjects common to all benefits: staff guide*’, vol 3, Chapter 11 at 11118

³⁵⁶ HM Revenue & Customs, ‘TCTM09340 – Decision Making, Joint or Single Claims, Considerations when deciding if two people should be treated as a couple’ at ‘TCTM09346 Dependent Children.’

³⁵⁷ *Kotke v Saffarini* [2005] P.I.Q.R., p.26

³⁵⁸ *Kotke v Saffarini* [2005] P.I.Q.R., p.26 at 27

³⁵⁹ *Amicus Horizon Ltd v Mabbott’s Estate* [2012] H.L.R. 42 p.666

³⁶⁰ *Amicus Horizon Ltd v Mabbott’s Estate* [2012] H.L.R. 42 p.664 at 27

³⁶¹ An adopted child is treated for succession purposes as a child of its adoptive parent(s): Succession (Scotland) Act 1964, s.9(1)(d),

³⁶² *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498 at p.505, and

consider their relationship to be permanent. The position is well stated in *Ghaidan*:³⁶³

‘From the earliest times marriage has involved a public commitment by the parties to each other. Whether attended by elaborate ceremonial or relatively informal, and whether religious or secular, its essence consists of a public acknowledgement of mutual commitment. Even primitive societies demand this, because the relationship does not concern only the immediate parties to it. The law may enable them to dispense with formalities, but not with public commitment.’³⁶⁴

As such, a cohabiting couple must present their relationship as a lifetime commitment in order to be considered living together as if they were spouses. The case of *Baynes v Hedger and Others*,³⁶⁵ an English succession claim, provides an example. In this case the question arose as to whether two women could be said to have been living together as civil partners when the couple had kept their relationship hidden from public view.³⁶⁶ In this case, a few of the deceased’s family members knew of the relationship, but the deceased was ashamed to reveal her sexuality to the public. The claim was unsuccessful, as the couple had not presented the relationship ‘openly’ to the outside world.

Scottish Law Commission, 2009, ‘Report on Succession’ Scot Law Com No 215 pp.69-70 para 4.11 and Succession (Scotland) Bill Draft, Part 4, s.22(4)(a)-(e)

³⁶³ *Ghaidan v Godin-Mendoza* (FC) [2004] UKHL 30, [2004] 2 AC 557

³⁶⁴ *Ghaidan v Godin-Mendoza* (FC) [2004] UKHL 30, [2004] 2 AC 557 para 79

³⁶⁵ *Baynes v Hedger and Others* [2008] EWCH 1587 (Ch)

³⁶⁶ *Baynes v Hedger and Others* [2008] EWCH 1587 (Ch) paras 125 and 150

4.2(f) Applying the Admirable Signposts

The admirable signposts are a useful means to determine an emotional and intimate bond between parties to a relationship. However, the list is not exhaustive or determinative. The DWP guide states that ‘not all of the [admirable signposts] need be present’ to establish that a couple are, or were living together as if they were spouses.³⁶⁷ This reflects the position in the New Zealand Property (Relationships) Act 1976 which states that:

‘In determining whether 2 persons live together as a couple,–

- (a) no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them is to be regarded as necessary; and
- (b) a court is entitled to have regard to such matters, and attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.³⁶⁸

Accordingly, the Scottish courts ought not to approach the admirable signposts as a straightforward box-ticking exercise. The test is entirely subjective and the court will require to conduct an assessment of the whole relationship in order to determine whether a couple were cohabitants.

4.2(g) The ‘Appropriate Percentage’

Having established that the applicant was cohabiting with the deceased, the SLC proposes that the court should determine the extent to which the applicant should be treated as the deceased’s spouse for the purposes of succession. In contrast to section 29 of the FL(S)A 2006, under which the court can have regard to ‘any matter’ considered appropriate to the claim,³⁶⁹ the SLC recommends that the court should have regard to only three factors. These factors are:

- (a) the length of the cohabitation;
- (b) the interdependence, financial or otherwise, between the cohabitant and the deceased during the period of cohabitation; and

³⁶⁷ Department for Work and Pensions, 2014. ‘*Decision makers’ guide: Subjects common to all benefits: staff guide*’, vol 3, Scottish Government, Chapter 11 at 11105

³⁶⁸ Property (Relationships) Act 1976 s.3

³⁶⁹ Family Law (Scotland) Act 2006 s.29(3)(d)

(c) what the cohabitant contributed to the life together of the cohabitant and the deceased (whether such contributions were financial or otherwise) as for example, running the household, caring for the deceased and caring for their children or children accepted by them as children of the family.³⁷⁰

These factors are concerned solely with the quality of the relationship with the deceased.³⁷¹ They are intended to assist the court to determine the extent to which the surviving cohabitant *deserves* to be treated as a spouse. This extent is to be expressed as a percentage ('the appropriate percentage').³⁷²

Ascertaining the appropriate percentage might be said to raise many of the same issues as exist with the FL(S)A 2006. The SLC offers some examples of the types of relationships that might yield a particularly high or low percentage. However, this does not address the problem. There will always be cohabiting couples who clearly do or do not appear to conduct the relationship as if they were married. The difficulties arise where the proper characterisation is more arguable. As such, the SLC's system does not remove the inevitable difficulties of classifying adult relationships associated with the FL(S)A 2006. However, it does provide the court with more guidance as to the objective of making the assessment. The court is to be concerned only with the quality of the relationship. It should not be swayed by the value of the estate or any benefits to be received by the applicant in consequence to the death.³⁷³ The aim of determining the appropriate percentage is to reflect the quality and nature of the applicant's relationship with the deceased.³⁷⁴

³⁷⁰ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.73 para 4.21 recommendation 39(2) and Succession (Scotland) Bill Draft, Part 4, s.23(2)(a)-(c)

³⁷¹ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.72 para 4.19

³⁷² Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.73 para 4.21 recommendation 39(1) and Succession (Scotland) Bill Draft, Part 4, s.23(1)

³⁷³ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.72 para 4.19

³⁷⁴ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.68 para 4.7

4.3 Valuing the Award

The SLC proposes that the value of a cohabitant's claim will be based on the appropriate percentage. In similar terms to the FL(S)A 2006, a cohabitant will have a claim against the sum to which they would have been entitled if they had been the deceased's spouse.³⁷⁵ The value of the award will be the appropriate percentage of that sum. The court will have no discretion to depart from that percentage, giving a level of predictability to cohabitants' claims. The resulting award should reflect the quality of the applicant's relationship with the deceased.

4.3 (a) Resulting Entitlement

The SLC's Report makes wide-ranging recommendations to alter the existing succession rights of a spouse. The proposals depart from the traditional distinction between heritable and moveable property in an estate. A spouse's rights will be based on the value of the estate as a whole, regardless of its composition. A cohabitant's claim will correspond with the rights of a spouse, consequently, it is necessary to examine the SLCS's recommendations for spousal entitlement in various circumstances.

First, in the interest of simplicity, the SLC recommends that where a person dies leaving a spouse and no issue, the surviving spouse will be entitled to the deceased's whole intestate estate.³⁷⁶ Accordingly, if the deceased is survived only by a cohabitant, the surviving cohabitant will be entitled to the appropriate percentage of the whole intestate estate.

Second, where a person dies intestate, survived by a spouse and issue, the SLC recommends the introduction of a threshold sum (the proposed threshold is £300,000). The spouse will be entitled to the estate up to the value of the threshold sum. Any excess over that amount will be divided equally, half to the

³⁷⁵ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.72 para 4.20

³⁷⁶ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.12 para 2.5 recommendation 1 and Succession (Scotland) Bill Draft, s.2(2)

spouse and half to the issue.³⁷⁷ Accordingly, if the deceased is survived by a cohabitant and issue, the cohabitant will be entitled to the appropriate percentage of the threshold sum, plus half of any excess.

Third, where a person dies intestate survived by a spouse and a cohabitant, the value of the estate to which the spouse would be entitled (the ‘relevant amount’) will be shared between the cohabitant and the spouse. The cohabitant will be entitled to the appropriate percentage of half the relevant amount and the spouse should be entitled to the balance.³⁷⁸

Fourth, a surviving spouse will be protected from disinheritance. This will take the form of a right to a ‘legal share’.³⁷⁹ That legal share will amount to 25% of what they would have inherited if the deceased had died intestate. Accordingly, where the deceased dies testate survived only by a cohabitant, the cohabitant will be entitled to the appropriate percentage of a spouse’s legal share.³⁸⁰

Finally, where a person dies testate survived by a spouse and a cohabitant, the spouse will be entitled to their legal share. In addition, the cohabitant will also be entitled to a sum representing the appropriate percentage of the spouse legal share.³⁸¹

4.3(b) A Stake in the Same Sum

Under the FL(S)A 2006, where the deceased dies intestate and is survived by a spouse and a cohabitant, both will have rights against the estate. However, the succession rights of the spouse will usually exhaust the estate or leave little value with which to satisfy a cohabitant’s claim.³⁸² As such, the rigidity of prior

³⁷⁷ Scottish Law Commission, 2009, ‘Report on Succession’ Scot Law Com No 215 p.16 para 2.16 recommendation 3(1)-(2) and Succession (Scotland) Bill Draft, s.2(3) and 2(8)

³⁷⁸ Scottish Law Commission, 2009, ‘Report on Succession’ Scot Law Com No 215 p.76 para 4.30 recommendation 42(1) and Succession (Scotland) Bill Draft, s.24

³⁷⁹ Scottish Law Commission, 2009, ‘Report on Succession’ Scot Law Com No 215 p.33 para 3.5 recommendation 14 and Succession (Scotland) Bill Draft, ss.11 and 15

³⁸⁰ Scottish Law Commission, 2009, ‘Report on Succession’ Scot Law Com No 215 p.33 para 3.6 recommendation 15 and Succession (Scotland) Bill Draft, ss.11 and 15

³⁸¹ Scottish Law Commission, 2009, ‘Report on Succession’ Scot Law Com No 215 p.76 para 4.30 recommendation 42(2) and Succession (Scotland) Bill Draft, s.24

³⁸² See Chapter 3 pp.50-52

rights and legal rights has proven to be largely incompatible with cohabitants' claims in these circumstances. The SLC recommends displacing the absolute primacy of marriage, such that where the deceased dies intestate and is survived by a spouse and a cohabitant, both will have a stake in the same sum.³⁸³ Half of the spouse's inheritance will be preserved. The other half will be divided between the spouse and the cohabitant. Accordingly, it will not be possible in any circumstances for the cohabitant to receive more than the spouse.³⁸⁴ As such, a surviving spouse will still enjoy a generous amount of legal protection. However, the system will secure some inheritance for a cohabitant who has established that they deserve to be treated as if they were married to the deceased. As such, the SLC's system is equipped to protect both a surviving spouse and a surviving cohabitant to a certain extent.

4.3(b) Consequences of a High Threshold Sum

The threshold sum is the most significant element of the SLC's proposals.³⁸⁵ It is a structural device used when the deceased dies intestate and is survived by an adult partner and children. The threshold sum is reserved for the deceased's spouse (and/or cohabitant). The deceased's children will only be entitled to a share in the estate if it exceeds that figure.

The SLC tentatively recommended setting a threshold sum of £300,000.³⁸⁶ This figure was chosen to reflect the maximum value of a spouse's prior rights at the time the report was published (£366,000 where the deceased also leaves issue).³⁸⁷ The Scottish Executive has recently consulted on a range of potential figures for the threshold sum of which £300,000 was the lowest and £650,000

³⁸³ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.76 para 4.30 recommendation 42(1) and Succession (Scotland) Bill Draft, s.24

³⁸⁴ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 paras 4.27-4.29

³⁸⁵ Reid, D. 2010. 'Reform of the law of succession: inheritance rights of children' Edin L.R 14(2). P.319

³⁸⁶ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.15 para 2.14

³⁸⁷ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 pp.13-14 para 2.10

the highest.³⁸⁸ The reasoning behind increasing the threshold is to ensure that a surviving spouse will inherit the family home in most cases.³⁸⁹ However, HMRC figures indicate that the average UK house price in 2004 was only £153,000.³⁹⁰ Additionally, the average value of an intestate estate in Scotland is likely to be in the region of £100,000.³⁹¹ More robust data on the value of estates in Scotland is required to appreciate the impact of the Executive's recommended threshold sums. However, based on the limited data that is available, it is likely that even a threshold sum of £300,000 will exhaust the entire estate leaving nothing for the deceased's children. As such, it has been concluded that:

‘in the vast majority of cases the surviving spouse will take the whole estate under the new proposals and only the children of the wealthiest Scots will have a claim on an intestate estate’.³⁹²

It has been suggested that it is generally considered acceptable for a child to surrender their inheritance in favour of their surviving parent.³⁹³ This proposition is supported by the results of a 1988 study of Scottish wills.³⁹⁴ Many participants suggested that the initial transfer of wealth between spouses on the first death as ‘a temporary and transitional stage’, and that there is an expectation that the deceased's wealth will flow to the next generation on the death of the second spouse.³⁹⁵ As such, where the deceased is survived by an adult partner and children of that relationship, the transfer of wealth from the deceased's estate to the surviving parent may be relatively uncontroversial.

³⁸⁸ Scottish Government, 2015, ‘Consultation on the Law of Succession’ The Scottish Government pp.12-13 para 2.26

³⁸⁹ Scottish Government, 2015, ‘Consultation on the Law of Succession’ The Scottish Government pp.11-12 paras 2.21-2.25

³⁹⁰ HM Revenue & Customs, 2004, ‘Inheritance Tax’ Statistics, HM Revenue & Customs

³⁹¹ See Reid, D. 2008 ‘From the Cradle to the Grave: Politics, Families and Inheritance Law’ 12 *Edinburgh Law Review* pp391-417 at p.413, Jones, H. E., 1990, ‘Succession Law’. Scottish Office Central Research Unit Papers p.5, Table 2

³⁹² Reid, D. 2008 ‘From the Cradle to the Grave: Politics, Families and Inheritance Law’ 12 *Edinburgh Law Review* pp391-417 at p.413

³⁹³ Norrie, K. 2008. ‘Reforming Succession Law: Intestate Succession’ 12 *EdinLR* p.77

³⁹⁴ Munro, M. 1988, ‘Housing wealth and inheritance’ 17 *Journal of Social Policy* p432

³⁹⁵ Munro, M. 1988, ‘Housing wealth and inheritance’ 17 *Journal of Social Policy* p432; Norrie, K. 2008. ‘Reforming Succession Law: Intestate Succession’ 12 *EdinLR* p.77

However, the deceased's wealth will not 'flow to the next generation' in the context of reconstituted families where the deceased's adult partner is not a parent of the children. Rather the wealth will pass out of the deceased's bloodline and into the hands of the adult partner's family. A high threshold sum may therefore have controversial consequences in the context of reconstituted families.³⁹⁶

The 2015 Scottish Government consultation paper *Consultation on the Law of Succession* discusses the possibility of reducing the threshold sum where the deceased is survived by an adult partner and children of another relationship.³⁹⁷ However, both the Scottish Government and the SLC believe that succession law should not distinguish between first and second families.³⁹⁸ As such there may be merit in setting a lower threshold sum for all, at a figure which more accurately reflects the average value of Scottish estates. On this basis it has been suggested that a threshold sum of £200,000 may be more appropriate.³⁹⁹ A surviving spouse and/or cohabitant would be entitled to inherit this generous sum and it would increase the likelihood that the deceased's children would inherit something from the estate. However, given the figures suggested by the Scottish Executive in the consultation paper (£300,000-£650,000) it seems they have already rejected this lower figure. An alternative approach would be to incorporate a provision for adult partners (spouses and cohabitants) that specifically deals with the family home. Such a provision would allocate the house itself up to a specified value to an adult partner who was ordinarily resident there prior to the death,⁴⁰⁰ thus ensuring that in most cases the adult partner would retain the home. The remainder of the estate, after the transfer of the family home, would then be divided under the SLC's formula.

³⁹⁶ Reid, D. 2008 'From the Cradle to the Grave: Politics, Families and Inheritance Law' 12 *Edinburgh Law Review* p.408

³⁹⁷ Scottish Government, 2015, 'Consultation on the Law of Succession' The Scottish Government p.11 para 2.21

³⁹⁸ Scottish Government, 2015, 'Consultation on the Law of Succession' The Scottish Government p.11 para 2.21 and Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 pp.21-22 para 2.29

³⁹⁹ Scottish Law Commission, 2009, 'Report on Succession' Scot Law Com No 215 p.15 n.32

⁴⁰⁰ Reid, D. 2010. 'Reform of the law of succession: inheritance rights of children' *Edin L.R* 14(2). p.321

The SLC recognises the difficulties associated with legislating for reconstituted families, but has opted to keep the rules of succession ‘as simple as possible’.⁴⁰¹ The recommended ‘simpler’ provision for cohabitants is equipped to produce more predictable results in cohabitants’ claims. However, examination of the FL(S)A 2006 and the SLC’s recommendations for change suffices to show that the complicated dynamics of reconstituted families require careful consideration and complex, comprehensive legislation to ensure a fair distribution of the deceased’s estate. In order to deal with the complexities of reconstituted families, the SLC’s regime would benefit from a lower threshold sum or the addition of an asset-specific right to deal with the family home.

⁴⁰¹ Scottish Law Commission, 2009, ‘Report on Succession’ Scot Law Com No 215 p.12 para 2.3

Conclusion

The purpose of this thesis has been to examine whether section 29 of the FL(S)A 2006 is an effective means of protecting cohabitants when their relationship ends by death, and to question whether it is equipped to deal with modern family structures.

In recent years, Scotland has experienced significant changes to family structures. Demographic patterns in cohabitation and marriage in Scotland were discussed in chapter 1. The two key trends identified were an increasing incidence of cohabitation, and a decline in the popularity of marriage. It was concluded that the increasing number of cohabiting couples and increasing public acceptance of cohabitation as a legitimate family form created a demand for a statutory framework capable of protecting cohabitants when their relationship ends by death.

The efficacy of sections 25 and 29 of the FL(S)A 2006 was considered in Chapter 2. It was found that the process of assessing a cohabitant's claim under these provisions lacks direction. It was also found that the width of the court's discretion to value a cohabitant's claim renders the process uncertain and unpredictable.

The legal privilege of marriage was considered in chapter 3. It was found that a cohabitant's right to make a claim under the FL(S)A 2006 is vastly inferior to the succession rights of a spouse under the Succession (Scotland) Act 1964. It was also shown that the rigidity of spousal succession rights is largely incompatible with cohabitants' claims in the context of reconstituted families. This was shown by examining the division of an estate when the deceased is survived by both a spouse and a cohabitant, and the likelihood that the spouse's succession rights will exhaust the estate.

As a result of the findings in Chapters 2 and 3, an alternative approach to regulating cohabitants' claims in succession was considered in Chapter 4.

Recent recommendations of the SLC were analysed with reference to an existing body of case law in England and Wales and corresponding provisions in the law of New Zealand. It was found that the SLC's recommended provisions are better equipped to generate predictable results for a cohabitant, as the value of an award will correlate directly to the quality of their relationship with the deceased. It was also shown that the SLC's recommended system is capable of protecting adult partners in the context of reconstituted families, by displacing the primacy of marriage when the deceased is survived by both a spouse and a cohabitant, such that the spouse and cohabitant would have a stake in the same sum. The SLC's broader recommendations for succession rights were then considered in the context of reconstituted families. It was shown that reserving a large portion of the estate to the deceased's adult partner will generally exclude the claims of the deceased's children. This is largely incompatible with public perceptions of how property should be distributed on death. The two solutions offered were lowering the threshold sum reserved for a spouse or creating separate provision to deal with the family home. These options should be examined further to consider how they might operate in practice.

As noted from the outset of this thesis, rising trends of cohabitation in Scotland have increased the demand for a clear statutory framework capable of protecting cohabitants when their relationship ends by death. It is concluded that the FL(S)A 2006 is an inappropriate and ineffective legal response to that demand. This conclusion is reached because the FL(S)A 2006 is largely incompatible with the existing rules for intestate succession in the Succession (Scotland) Act 1964. It is recommended that there is clear potential for significant reform of cohabitants' rights and the broader system of intestate succession law. In conclusion, section 29 of the FL(S)A 2006 should be repealed and replaced with a flexible system of succession law that enhances the rights of cohabitants, and that displaces the absolute legal primacy of marriage thus securing some inheritance for the deceased's children.

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