

NATIONAL REPORT: SCOTLAND

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A. General

1. What kinds of formal relationships between a couple (e.g. different/same-sex marriage, different/same-sex registered partnership, etc.) are regulated by legislation? Briefly indicate the current legislation.

Scots law recognises two types of formal relationships between a couple: marriage and civil partnership. The formation of marriage is regulated primarily by the Marriage (Scotland) Act 1977 and civil partnership by the Civil Partnership Act 2004. Both Acts have recently been significantly amended by the Marriage and Civil Partnership (Scotland) Act 2014 which changed the meaning of marriage to include both different- and same-sex couples.¹

Civil partnership was introduced in 2004² as a legal relationship for same-sex couples. With very minor differences, it was designed to be the legal equivalent of marriage. Between the introduction of civil partnership in 2004 and the coming into force of the Marriage and Civil Partnership (Scotland) Act in December 2014, Scots law had two formal relationships regulated by law in very similar terms: marriage which was open only to different-sex couples and civil partnership which was open only to same-sex couples. The effect of the reforms introduced by the 2014 Act is that marriage now includes either same-sex or different-sex couples³ while civil partnership remains restricted to same-sex couples.⁴ The Scottish government has indicated that it plans to consult in the future on possible reform of civil partnership.

The contemporary legal regulation of both marriage and civil partnership focuses on formation and dissolution. There are detailed legal rules concerning formation of the relationships,⁵ grounds for divorce (marriage)⁶ and dissolution (civil partnership)⁷ and statutory principles for property sharing and financial provision on divorce or dissolution⁸ but there is very little legal regulation of the intervening relationship itself. Scots law operates a system of strict separation of property during marriage or civil partnership by means of a provision to the effect that neither relationship will affect the property or legal capacity of the parties.⁹ The only significant exception to

¹ Marriage (Scotland) Act 1977, S. 26(2).

² Civil Partnership Act 2004.

³ Marriage is now defined as meaning 'marriage between persons of different sexes and marriage between persons of the same-sex', Marriage (Scotland) Act 1977, S. 26(2).

⁴ Civil Partnership Act 2004, S. 1.

⁵ Marriage (Scotland) Act 1977; Civil Partnership Act 2004, S. 85-100.

⁶ Divorce (Scotland) Act 1976.

⁷ Civil Partnership Act 2004, S. 117-122.

⁸ Family Law (Scotland) Act 1985, S. 8-16.

⁹ Family Law (Scotland) Act 1985, S. 24.

this absence of legal regulation of the relationship is the obligation of aliment, or maintenance, which applies between spouses and civil partners.¹⁰ Although highlighted as a significant legal consequence of marriage or civil partnership, and one which distinguishes these formal relationships from informal relationships, in practice parties rarely seek to enforce their right to aliment except in the context of relationship breakdown. The relative absence of legal regulation of the relations between spouses and civil partners is important to bear in mind when considering the treatment of informal relationships.

It should also be noted that Scots law to a very great extent respects the autonomy of spouses, and now civil partners, to regulate the consequences of their relationships. Marriage contracts, ante-nuptial, post-nuptial and separation agreements have a long and well-established history in Scots law and, in the context of separation at least, are commonly used in contemporary families.¹¹ They are legally enforceable, do not require judicial scrutiny or approval and are open only to very limited challenge. While there is little research evidence in respect of agreements between unmarried couples, and they have rarely come before the courts, it is widely assumed that cohabitation agreements would be equally respected by Scots law.¹²

2. To what extent, if at all, are informal relationships between a couple regulated by specific legislative provisions? Where applicable, briefly indicate the current specific legislation. Are there circumstances (e.g. the existence of a marriage or registered partnership with another person, a partner's minority) which disqualify the couple?

Informal relationships between couples are regulated by Scots law where they fall within the definition of 'cohabitation'. Within the context of family law, cohabitants have some protection in respect of occupancy of the family home,¹³ there are statutory presumptions of joint ownership¹⁴ and, where the relationship comes to an end by death¹⁵ or otherwise,¹⁶ a cohabitant may apply to the court for a discretionary payment.

Informal relationships are legally recognised and given some protection by the Matrimonial Homes (Family Protection) (Scotland) Act 1981 in respect of occupancy of the family home. The 1981 Act was designed to provide greater security to a spouse or cohabitant who has no legal title to the family home, according to general

¹⁰ Family Law (Scotland) Act 1985, S. 1-7.

¹¹ For recent research into the use of separation agreements in Scots family law, see J. MAIR, F. WASOFF and K. MACKAY, *All Settled? A study of legally binding separation agreements and private ordering in Scotland* (unpublished report), University of Glasgow, 2013, available at: eprints.gla.ac.uk/85810, at chapter 2.

¹² F. WASOFF, J. MILES and E. MORDAUNT, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (unpublished report), University of Cambridge, Nuffield Foundation, 2010, available at: crfr.ac.uk/assets/Cohabitation-final-report.pdf, at pp. 77-84.

¹³ Matrimonial Homes (Family Protection) (Scotland) Act 1981.

¹⁴ Family Law (Scotland) Act 2006, S. 26 and 27.

¹⁵ Family Law (Scotland) Act 2006, S. 29.

¹⁶ Family Law (Scotland) Act 2006, S. 28.

property law, by granting them occupancy rights. It also introduced a framework of orders which can be used by the court to regulate occupancy of the home in the context of domestic violence. While non-entitled spouses have automatic occupancy rights,¹⁷ a non-entitled cohabitant must apply to the court for grant of occupancy rights,¹⁸ with any grant of occupancy rights being subject to a maximum period of six months.¹⁹

More recently, new rights for cohabitants in respect of financial provision and property were introduced by the Family Law (Scotland) Act 2006.²⁰ The 2006 Act introduced presumptions of equal ownership concerning ownership of household goods²¹ and rights in money and moveable property derived from a household allowance.²² It also provided cohabitants with a right to apply to the court for a discretionary payment where cohabitation ends otherwise than by death²³ and where their cohabitant dies intestate.²⁴

Although the detailed definition in each Act is slightly different,²⁵ the broad basis of cohabitation is the same: it involves living together as if husband and wife. Originally cohabitation was defined for different-sex couples by reference to marriage and for same-sex couples by reference to civil partnership but, since the introduction in 2014 of same-sex marriage, cohabitants are now all defined by reference to marriage. Two people are cohabiting where they are or were not married or in a civil partnership with each other but are or were living together as if married to each other.²⁶ Although the test is based on the concept of living together 'as if they were married', there is nothing to indicate any intention to limit cohabitation to those who possess legal capacity to marry. In fact, the absence of such capacity has sometimes been highlighted as part of the justification for introducing legal protection to couples who were not able to benefit from formalised relationships.²⁷

Beyond the scope of family law, there is also some statutory recognition of cohabitants in terms of social security entitlement,²⁸ housing,²⁹ compensation for

¹⁷ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 1.

¹⁸ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 18.

¹⁹ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 18(1): this six month period may be extended for subsequent period or periods, in each case not exceeding six months.

²⁰ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 25-29A.

²¹ Family Law (Scotland) Act 2006, S. 26.

²² Family Law (Scotland) Act 2006, S. 27.

²³ Family Law (Scotland) Act 2006, S. 28.

²⁴ Family Law (Scotland) Act 2006, S. 29.

²⁵ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 18(1) and (2); Family Law (Scotland) Act 2006, S.25.

²⁶ Interpreted in accordance with the Marriage and Civil Partnership (Scotland) Act 2014, S. 4(2) and (3).

²⁷ See e.g. Scottish Law Commission, Paper No 86, *The Effects of Cohabitation in Private Law*, 1990 at para. 6.8 where the possibility of a surviving spouse and a surviving cohabitant was acknowledged.

²⁸ Social Security Contributions and Benefits Act 1992, S. 137(1); Social Security Administration Act 1992, S. 78.

²⁹ Housing (Scotland) Act 2001.

negligent death³⁰ or personal injury³¹ of a cohabitant and application for temporary relief from creditors in respect of the family home.³²

- 3. In the absence of specific legislative provisions, are there circumstances (e.g. through the application of the law of obligations or the law of property) under which informal relationships between a couple are given legal effect (e.g. through the application of the law of obligations or the law of property)? Where applicable briefly indicate the leading cases**

The starting point for Scots family law is that marriage, and equally civil partnership, do not affect the property rights or legal capacity of either party to the relationship³³ and it is well established that in questions of property or obligations it is the general rules which apply regardless of the personal relationship which exists between the parties.³⁴ It is therefore not surprising that a similar approach would be taken to informal relationships.

It is possible that the law of unjustified enrichment might be used to compensate an unmarried cohabitant where he or she has contributed to the improvement of property owned solely by the other cohabitant. In practice, however, this remedy has been very little used. *Shilliday v Smith*³⁵ is the leading case and here the woman was successful in recovering money which she had spent on improving and repairing her partner's home while they were cohabiting. Despite occasional interest in unjustified enrichment, particularly where, as in this case, contribution has been made in the expectation of a forthcoming marriage which does not subsequently take place, there is relatively little evidence of its use in practice.³⁶

- 4. How are informal relationships between a couple defined by either legislation and/or case law? Do these definitions vary according to the context?**

Informal relationships between couples are defined under the heading of 'cohabitation'. There are two principal statutory definitions within the scope of family law: in S. 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and S. 25 of the Family Law (Scotland) Act 2006. Both initially relied on comparison with the model of living together as husband and wife but were extended to include living together as husband and wife, for opposite sex couples, and living together as civil partners, for same-sex couples. The effect of the Marriage and Civil Partnership (Scotland) Act 2014 is to change the legal meaning of marriage

³⁰ Damages (Scotland) Act 2011.

³¹ Administration of Justice (Scotland) Act 1982.

³² Mortgage Rights (Scotland) Act 2001, S. 1.

³³ Family Law (Scotland) Act 1985, S. 24(1).

³⁴ This approach is clearly seen in *MacLure v MacLure* 1911 SC 200 and *Millar v Millar* 1940 SC 56.

³⁵ *Shilliday v Smith* 1998 SC 725.

³⁶ See e.g. *Satchwell v McIntosh* 2006 SLT (Sh Ct) 117; *McKenzie v Nutter* 2007 SLT (Sh Ct) 17; *Thomson v Mooney* 2014 Fam LR 15. For further discussion, see G. JUNOR, 'Unjustified enrichment in the family context', *Family Law Bulletin*, 2012, pp. 2-4.

to include both same-sex and different-sex marriage and it is provided that cohabitation will be defined in relation to marriage for all couples.³⁷

For the purposes of regulating occupancy of the family home, S. 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 defines cohabitants as two persons living together as if they were married. It is further provided that:

‘In determining whether [...] two persons are a cohabiting couple the court shall have regard to all the circumstances of the case including –

(a) the time for which it appears they have been living together; and

(b) whether there is any child –

(i) of whom they are the parents; or

(ii) who they have treated as a child of theirs.’³⁸

In practice, there is little evidence of this definition being considered by the courts, with only a handful of reported cases on cohabitants since the Act came into force. The reported cases, which do consider the definition, do not look in detail at the relationship between the parties but focus instead on the date when the test for cohabitation requires to be met. If an applicant seeks to bring herself within the scope of the definition, does she need to show that she was still cohabiting at the time of application? A very literal interpretation of the words in S. 18, and the use therein of the present tense, was adopted in *Verity v Fenner*³⁹ where it was held that the test was not satisfied where the couple was not still ‘living together as husband and wife’ at the date of the proof. In *Armour v Anderson*,⁴⁰ both at first instance and on appeal, a more purposive approach was applied which acknowledged the underlying aim of the legislation and the undesirability of requiring a party to remain living together with an abusive partner in order to qualify under the terms of the Act. The court gave its opinion to the effect that the test under S. 18(3) was not whether they were still in fact living together at the point of application but whether they were cohabiting in the relevant home ‘when the conduct which gave rise to the application occurred’.⁴¹

The second statutory definition is set out in S. 25 of the Family Law (Scotland) Act 2006 and it establishes the threshold for access to a range of property and financial awards in the context of cohabitation and the breakdown of cohabitation. S. 25(1) defines a cohabitant as either member of a couple who are living together as if they were married.⁴² While this is a vague and highly discretionary test to apply, particularly in light of the fact that Scots law provides very little statutory definition or regulation of the marriage relationship, it is arguably a familiar test.⁴³ Facts and

³⁷ Marriage and Civil Partnership (Scotland) Act 2014, S. 4(2), (3) and (4).

³⁸ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 18(2).

³⁹ *Verity v Fenner* 1993 SCLR 223.

⁴⁰ *Armour v Anderson* 1994 SLT 1127.

⁴¹ *Armour v Anderson* 1994 SLT 1127, at 1132.

⁴² For the avoidance of doubt, it is confirmed that such a couple must not be in a formal relationship with each other, i.e. either marriage or civil partnership: Marriage and Civil Partnership (Scotland) Act 2014, S. 4(3).

⁴³ F. MCCARTHY, ‘Defining cohabitants’, *Scots Law Times*, 2014, pp. 143-145, at p. 143.

witnesses rather than legal principles are central and frequently the 'issue is a clear one of credibility and reliability'.⁴⁴

Section 25 has been strongly criticised for its 'intellectually incoherent' drafting⁴⁵ due to the fact that the requirement in subsection (1) is followed by subsection (2), which provides:

'In determining [...] whether a person ('A') is a cohabitant of another person ('B'), the court shall have regard to –

- (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.'

The absence of any connecting word between subsections (1) and (2) has given rise to uncertainty. Is the test for cohabitation the broad test of living together as if married, in subsection (1), or must it include the specific factors set out in subsection (2)? To date, there have been relatively few applications under the Act, which have required the court to apply S. 25 as, in the majority of reported cases, it has been accepted or admitted that the parties were in fact cohabiting. Where the question has arisen, however, the uncertainties and inherently discretionary nature of the test emerge. In some cases it appears that the court is recognising the 'gatekeeping' function of S. 25 and is willing to accept the existence of cohabitation in order to enable the applicant to proceed with his or her claim.⁴⁶

In *Garrad v Inglis*,⁴⁷ the sheriff took the view that the three factors listed in S. 25(1)(b) were not exclusive and suggested a longer list of factors which might be considered:

'(1) the length of time during which the parties lived together, (2) the amount and nature of the time the parties spent together, (3) whether they lived under the same roof in the same household, (4) whether they slept together, (5) whether they had sexual intercourse, (6) whether they ate together, (7) whether they had a social life together, (8) whether they supported each other, talked to and were affectionate to each other, (9) outward appearances, (10) their financial arrangements, whether they shared resources, household and child-care tasks, (11) the intentions of each party and whether any of them were communicated to the other party, and (2) physical separation.'⁴⁸

It was made clear in *Garrad v Inglis* that no single factor was conclusive and this is a point which has been stressed in several cases. In particular, the issue has arisen as to

⁴⁴ *Fairley v Fairley* 2008 Fam LR 112 at para. 3.

⁴⁵ J.M. THOMSON, *Family Law in Scotland*, Bloomsbury Professional, London, 2006, at p. 30.

⁴⁶ As happened, e.g. in the first application under s29 where it was found that the applicant had title to make a claim but the court assessed the value of the claim at nil: *Savage v Purches* 2009 SLT (Sh Ct) 36, discussed further in F. MCCARTHY, 'Rights in succession for cohabitants: *Savage v Purches*', *Edinburgh Law Review*, 2009, pp. 325-329.

⁴⁷ *Garrad v Inglis* 2014 GWD 1-17.

⁴⁸ *Garrad v Inglis* 2014 GWD 1-17, at para. 9.

whether a couple must in fact be living together in the same house in order to satisfy the definition of cohabitation. On appeal in *B v B*,⁴⁹ the sheriff principal observed that 'undue concentration on the words *living together* is both wrong in law and inequitable. Strict application of the requirement that cohabitants live together ignores the realities of life.'⁵⁰

5. Where informal relationships between a couple have legal effect:

a. When does the relevant relationship begin?

The statutory tests for cohabitation, discussed in Question 4 above, are based on assessment of the factual scenario of living together as husband and wife. It is a key feature of the Scottish provisions that there are no fixed time periods and no minimum requirements of a period of living together before the parties will be found to satisfy the test for cohabitation. If the question arises, it is a matter for the court to decide when the parties commenced living together as husband and wife: 'a question of objective fact to be determined having regard to the particular circumstances of the particular case.'⁵¹

b. When does the relevant relationship end?

As discussed in part (a), the question is one of fact for the court to decide. In terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, the question which has arisen is whether the fact that the relationship has already ended prior to the court application is fatal to a finding that the applicant falls within the definition of cohabitant. A very literal interpretation of the words in S. 18, and the use therein of the present tense, was adopted in *Verity v Fenner*⁵² where it was held that the test was not satisfied where the couple was not still 'living together as husband and wife' at the date of the proof. In *Armour v Anderson*,⁵³ a more purposive approach was applied which acknowledged the underlying protective aim of the legislation and the undesirability of requiring a party to remain living together with an abusive partner in order to qualify under the terms of the Act. The court gave its opinion to the effect that the test in S. 18(3) was not whether they were still in fact living together at the point of application but whether they were still cohabiting in the relevant home 'when the conduct which gave rise to the application occurred.'⁵⁴

The date when cohabitation ends is a question of considerable importance in respect of claims under the 2006 Act as there is a strict time limit within which any such claims must be raised.⁵⁵ A significant proportion of cases which have been reported to date, are preliminary hearings dealing with the question of whether a claim has been submitted within the time limit of one year. The Court of Session on appeal in

⁴⁹ *B v B* 2014 GWD 30-593.

⁵⁰ *B v B* 2014 GWD 30-593, at para. 36.

⁵¹ *Garrad v Inglis* 2014 GWD 1-17, at para. 8.

⁵² *Verity v Fenner* 1993 SCLR 223.

⁵³ *Armour v Anderson* 1994 SLT 1127.

⁵⁴ *Armour v Anderson* 1994 SLT 1127, at 1132.

⁵⁵ Family Law (Scotland) Act 2006, S. 28(8).

Simpson v Downie has confirmed that compliance with the statutory time limit is essential: 'it is only compliance with the time limit which validates an application and clothes the court with the necessary jurisdiction.'⁵⁶

Research into the views and experiences of legal practitioners concerning the provisions found that time limits were identified by 76% of the sample of 97 solicitors as being a problem.⁵⁷ Subsequent cases have tended to confirm this early view that the imposition of a short time limit does cause problems. Particularly in the context of a long relationship, it can be difficult to pinpoint the precise date at which cohabitation ceased. The sheriff principal, on appeal in *B v B*, cautioned against 'undue concentration' on physical living together in the same house. She observed, with reference to a couple who had cohabited over a period of 23 years, that:

'Physical separation is not conclusive of or determinative of the end of cohabitation [...] The importance of the emotional and supportive qualities that characterise partnership or being husband and wife should not be underestimated.'⁵⁸

6. To what extent, if at all, has the national constitutional position been relevant to the legal position of informal relationships between a couple?

Neither Scotland nor the UK has a formal written constitution and so this question is not relevant. There is no particular protection provided for the family or family relationships.

7. To what extent, if at all, have international instruments (such as the European Convention on Human Rights) and European legislation (treaties, regulations, and directives) been relevant in your jurisdiction to the legal position of informal relationships between a couple?

While international instruments have been of considerable significance to the legal recognition of same-sex relationships, the introduction of civil partnership and the redefinition of marriage to include both different and same-sex relationships, there is little direct evidence of their influence on the regulation of informal relationships.

8. Give a brief history of the main developments and the most recent reforms of the rules regarding informal relationships between a couple. Briefly indicate the purpose behind the law reforms and, where relevant, the main reasons for not adopting a proposal.

Before setting out the recent reforms in Scotland in respect of informal relationships, it should be noted that until 2006 Scots law continued to recognise a form of irregular marriage, which might in itself be regarded as a type of informal relationship.

⁵⁶ *Simpson v Downie* 2013 SLT 178, at para. 13.

⁵⁷ F. WASOFF, J. MILES and E. MORDAUNT, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (unpublished report), University of Cambridge, Nuffield Foundation, 2010, available at: crfr.ac.uk/assets/Cohabitation-final-report.pdf, at p. 55, Table 5.4.

⁵⁸ *B v B* 2014 GWD 30-593, at para. 36.

Irregular marriage, of which there were originally three recognised forms, survived in Scotland much later than in other jurisdictions. Marriage by exchange of present consent and marriage *per verba futuro subsequente copula* were abolished by S. 5 of the Marriage (Scotland) Act 1939 and marriage by cohabitation with habit and repute survived until its abolition by S. 3 of the Family Law (Scotland) Act 2006. While this form of marriage, which required evidence of a substantial period of cohabitation as husband and wife together with general repute of marriage, was widely regarded as out of date and of little relevance, its continued existence is noteworthy in the context of increased recognition of informal relationships. Irregular marriage was a very pragmatic way of extending protection to couples who lived together as if they were married but without having complied with the formal requirements of legal ceremony and registration. It was principally the pretence or deceit involved in establishing repute that seemed out of date in contrast to the increasingly common practice of couples openly cohabiting without marriage.

Marriage by cohabitation with habit and repute was abolished by the Family Law (Scotland) Act 2006 which at the same introduced some new legal rights for cohabitants. The legal position of cohabiting couples was considered by the Scottish Law Commission in 'The Effects of Cohabitation in Private Law'.⁵⁹ Following consultation, recommendations were published in 1992 in their 'Report on Family Law'.⁶⁰ The Scottish Law Commission stated two initial conclusions: first, that there was a clearly established need for 'some limited reform' and secondly, that such reform 'should neither undermine marriage, nor undermine the freedom of those who have deliberately opted out of marriage.'⁶¹ They were quite clear that cohabitation was not marriage and that it would be inappropriate to apply all of the legal consequences of marriage to it but some more limited provisions should be introduced. It was concluded, for example, that it would not be appropriate to extend the obligation of aliment (maintenance) to cohabitation.⁶² The distinction between marriage and cohabitation was highlighted in particular in the context of financial provision on termination of the relationship. The Scottish Law Commission concluded that, while there should be some provision for discretionary awards, there should not be a comprehensive framework comparable to that which applies on divorce or dissolution of a civil partnership. Such an approach was firmly rejected on the basis that it would 'impose a regime of property sharing, and in some cases continuing financial support, on couples who may well have opted for cohabitation in order to avoid such consequences.'⁶³

The Scottish Law Commission's draft Bill, published in 1992, was not taken forward and in fact it was not until 2005 that draft legislation, which was to become the Family Law (Scotland) Act 2006, was introduced by the Scottish government. The provisions which were finally included in the 2006 Act undeniably had their origins

⁵⁹ Scot Law Com, No 86, 1990.

⁶⁰ Scot Law Com, No 135, 1992.

⁶¹ Scot Law Com, No 135, 1992, para. 16.1.

⁶² Scot Law Com, No 135, 1992, para. 16.5.

⁶³ Scot Law Com, No 135, 1992, para. 16.15.

in the Commission's original Report but their form had changed.⁶⁴ While the idea of rights for cohabitants was broadly welcomed, the precise detail of the provisions which were finally adopted has been much criticised and concerns which were already being raised during the legislative process have subsequently given rise to questions in the courts 'which are not free from difficulty'. New statutory provisions can be expected to require a 'settling in' period but nine years later it is difficult to see much evidence of the provisions working well. Despite guidance from the UK Supreme Court in the case of *Gow v Grant*⁶⁵ there continues to be considerable uncertainty as to how to interpret and apply the key provisions, and in particular S. 28. The operation of strict statutory time limits is also seen as problematic.

9. Are there any recent proposals (e.g. by Parliament, law commissions or similar bodies) for reform in this area?

There are proposals for reform of the law of testate and intestate succession which would affect cohabitants. The Scottish Law Commission published its 'Report on Succession' in 2009⁶⁶ and the Scottish government has now indicated its intention to proceed with reform in this area. The proposed reform would involve repeal of the existing provision by which a surviving cohabitant may apply for a discretionary award on intestacy.⁶⁷ The current provision has been criticised for its strict time limit, its restriction to intestacy and its highly discretionary nature. To date there have been very few cases brought under S. 29 and thus there is very little guidance as to how the courts might deal with applications. This has heightened concern about the vague and discretionary nature of the provision. The Scottish Law Commission has proposed a new provision which would apply to both testate and intestate estates. The proposal is that, within one year of death, the surviving cohabitant could apply to court for financial provision which would be calculated on the basis of an 'appropriate percentage'. In assessing the appropriate percentage, the court would take into account three factors: the length of cohabitation, the interdependence, financial or otherwise, of the partners during cohabitation and what the survivor contributed to the couple's life together financial or otherwise.⁶⁸ The percentage could not exceed 100% of the share to which a surviving spouse or civil partner would have been entitled, and in the case of both a surviving spouse and cohabitant, the appropriate percentage would be applied to one half of the available estate.

B. Statistics and estimations

10. How many marriages and, if permissible, other formalised relationships (such as registered partnerships and civil unions) have been concluded per annum? How do these figures relate to the size of the population and the age profile?

⁶⁴ E.E. SUTHERLAND, 'From 'bidie-in' to cohabitant: the perils of legislative compromise', *International Journal of Law, Policy and the Family*, 2013, pp. 143-175.

⁶⁵ *Gow v Grant* 2012 SLT 829.

⁶⁶ Scot Law Com, No 215, 2009.

⁶⁷ Family Law (Scotland) Act 2006, S. 29.

⁶⁸ Scot Law Com, No 215, para. 4.14.

Where relevant and available, please provide information on the gender of the couple.

There has been a significant decline in marriage in Scotland since the 1970s, although since the mid-90s the rate appears to have stabilised to some extent. In 1974, 41,171 marriages were registered, in 2000 there were 30,367 and in 2013, 27,547.⁶⁹ Civil partnership was introduced during 2005 and in the first partial year, 84 partnerships were registered. The numbers peaked in 2006 at 1,047 and in 2013 there were 530 registered civil partnerships. The numbers are roughly equal between male and female same-sex couples. The population in Scotland has been relatively stable over the past 50 years, with a total in 2013 of 5,327,700.

In terms of age at marriage, there is a very clear trend towards couples postponing marriage with the average age in 2013, at first marriage, being 33 for men and 31 for women. In 1974, 5,156 men and 11,963 females entered into marriage between the ages of 16 and 19. For this age group, by 2013 the numbers had reduced to 53 men and 186 women. Between the 1970s and the mid-90s, the most common age range for couples to marry was between 20 and 24 but since then it has shifted to 25-34. In 2013, 14,313 women and 13,199 men married between the ages of 25 and 34.⁷⁰

11. How many couples are living in an informal relationship in your jurisdiction? Where possible, indicate trends.

In the most recent statistics for the UK as a whole, in 2014 there were 18.6 million families in the UK and of these 12.5 million were married couple families. Clearly, marriage based families remain the most common form. Cohabiting couple families are, however, the fastest growing type of family, having increased by 29.7% since 2004.⁷¹ In 1990, when the Scottish Law Commission proposed the introduction of some legal rights for cohabitants, they noted that around '2% of households are now headed by a cohabitant.'⁷² More recently, Census figures indicate that in 2001, 7% of households in Scotland were cohabiting couples and this had risen to 9% by 2011.

12. What percentage of the persons living in an informal relationship are:

The Census 2011 indicates the percentage of cohabiting couples in Scotland according to age, although the age ranges used (indicated below) do not match exactly with those requested.⁷³

a. Under 25 years of age?

⁶⁹ General Registry Office of Scotland, *Marriage and Civil Partnership Time Series Data*, 2014.

⁷⁰ General Registry Office of Scotland, *Marriage and Civil Partnership Time Series Data*, 2014.

⁷¹ Office for National Statistics (ONS), *Social Trends: Families and Households 2014*, Statistical Bulletin, January 2015.

⁷² Scot Law Com, No 86, *The Effects of Cohabitation in Private Law*, 1990, para. 1.3.

⁷³ National Records of Scotland, *Scotland's Census 2011*: accessible at scotlandscensus.gov.uk/bulletin-figures-and-tables.

Census 2011: under 24: 9%.

b. Between 26-40 years of age?

Census 2011: 25-34: 35%.

c. Between 41-50 years of age?

Census 2011: under 35-49: 36%.

d. Between 51-65 years of age?

Census 2011: under 50-64: 17%.

e. Older?

Census 2011: 65-74 years of age: 3%, 75-84 years of age: 1%, and 85 years of age and above: less than 0.5%.

13. How many couples living in an informal relationship enter into a formal relationship with each other:

- a. Where there is a common child?**
- b. Where there is no common child?**

There are no detailed statistics available on these specific questions although a recent report into cohabitation observed that, across the UK as a whole, analysis of British Household Panel Survey data indicated that 'about 60% of cohabitations result in marriage.'⁷⁴

14. How many informal relationships are terminated:

- a. Through separation of the partners?**
- b. Through the death of one of the partners?**

No statistics are available on this question in Scotland and the author is not aware of any relevant research evidence.

15. What is the average duration of an informal relationship before its termination? How does this compare with the average duration of formalised relationships?

UK research tends to indicate that informal relationships are likely to be of shorter duration than marriage.⁷⁵ It is also indicated that the 'duration of cohabitation has

⁷⁴ F. WASOFF, J. MILES and E. MORDAUNT, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (unpublished report), University of Cambridge, Nuffield Foundation, 2010, available at: crfr.ac.uk/assets/Cohabitation-final-report.pdf, at p. 14.

⁷⁵ J. HASKEY, 'Demographic Aspects of Cohabitation in Great Britain' *International Journal of Law, Policy and the Family*, 2001, pp.51-67 at p.58.

lengthened over time, from a median of just over two years in the early 1980s to nearly three years' in the period 2000-04.⁷⁶

There is an absence of detailed data relating to Scotland but researchers in 2010 summarised a range of relevant sources as follows:

'Analysis of British Household Panel Survey data suggests that cohabiting unions last for a median length of two years before either making a transition into marriage, or dissolving. About 60% of cohabitations result in marriage and the majority of the remainder dissolve within 10 years. Data from the Scottish Social Attitudes Survey in 2000 suggest that the median length of cohabitation in Scotland is three years before moving to either marriage or separation.'⁷⁷

16. What percentage of children are born outside a formal relationship? Of these children, what percentage are born in an informal relationship? Where possible, indicate trends.

There has been a marked increase in Scotland in the percentage of children born outside marriage over recent decades. In 1971, 8% of children were born outside marriage, with this rising to 42% by 2000. The majority of children are now born outside marriage: 51% in 2013.⁷⁸ The Registrar General observed in his most recent annual review that: '[t]he proportion of births registered solely in the mother's name – generally around 6-7% in the 1980s and 1990s – has fallen over the past 13 years to 5% in 2013, suggesting that the increase in births to unmarried parents has been in babies born to unmarried parents who are in a relationship.'⁷⁹

17. What is the proportion of children living within an informal relationship who are not the couple's common children (excluding foster children)?

According to the 2011 Census, 6% of all family types within Scotland were made up of cohabiting couples with dependent children.⁸⁰ Looking only at families with dependent children, marriage based families were still by far the most common: 54% compared to 15% based around a cohabiting couple. Within cohabiting couple families with dependent children, approximately two-thirds comprised common children of the couple and one-third comprised children of one partner only.⁸¹

⁷⁶ E. BEAUJOUAN and M.N. BROLCHAIN, 'Cohabitation and marriage since the 1970s', *Population Trends*, 2011, pp. 31-55, at p. 44.

⁷⁷ F. WASOFF, J. MILES and E. MORDAUNT, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (unpublished report), University of Cambridge, Nuffield Foundation, 2010, available at: crfr.ac.uk/assets/Cohabitation-final-report.pdf, at p. 14.

⁷⁸ National Records of Scotland, *Scotland's Population: The Registrar General's Annual Review of Demographic Trends*, 2013, available at: nrscotland.gov.uk/files//statistics/annual-review-2013/rgar-2013.pdf, at p. 20.

⁷⁹ National Records of Scotland, *Scotland's Population: The Registrar General's Annual Review of Demographic Trends*, 2013, available at: nrscotland.gov.uk/files//statistics/annual-review-2013/rgar-2013.pdf, at p. 20.

⁸⁰ National Records of Scotland, *Scotland's Census 2011*, TableDC1109SC.

⁸¹ National Records of Scotland, *Scotland's Census 2011*, Table DC1114SC.

18. How many children are adopted within an informal relationship:

There are no statistics available in Scotland to answer this question. It should be noted, however, that this is an area of law which has changed relatively recently as a result of the Adoption and Children (Scotland) Act 2007. Prior to the 2007 reforms, joint adoption was only open to spouses or civil partners and in any other case there could only be sole adoption. The key concept which now applies in respect of prospective adopters is that of 'a relevant couple' and where prospective adopters are part of a relevant couple, the default position is that they will adopt jointly. There are only limited exceptions which would permit either party to adopt alone. A 'relevant couple' includes parties who are (1) married to each other; (2) civil partners or (3) living together as if husband and wife in an enduring relationship.⁸² In 2013, there were 489 registered adoptions in Scotland of which the vast majority were by couples: 350 (different-sex) and 14 (same-sex).⁸³

a. By one partner only?

Where a prospective adopter is part of a 'relevant couple' then he or she would normally have to adopt a child jointly with his or her partner. Adoption by one partner only is possible where the other partner is incapable of applying for adoption by reason of physical or mental ill health.⁸⁴

b. Jointly by the couple?

Since the Scots Adoption and Children Act 2007, where the prospective adopter is part of a 'relevant couple' the adoption will usually be a joint adoption.⁸⁵ The only exceptions to this are where the other party either is incapable of applying for adoption due to ill health⁸⁶ or is the parent of the child.⁸⁷

c. Where one partner adopted the child of the other?

One partner to a relevant couple may adopt where the other partner is the parent of the child concerned.⁸⁸

19. How many partners in an informal relationship have been in a formal or an informal relationship previously?

Information on this question is not available for Scotland but some indication can be found in statistics concerning cohabiting couples across the UK as a whole. The

⁸² Adoption and Children (Scotland) Act 2007, S. 29(3).

⁸³ General Register Office for Scotland, *Vital Events Reference Tables 2013*, available at: gro-scotland.gov.uk/statistics/theme/vital-events/general/ref-tables/2013.

⁸⁴ Adoption and Children (Scotland) Act 2007, S. 30(1) and (5).

⁸⁵ Adoption and Children (Scotland) Act 2007, S. 29.

⁸⁶ Adoption and Children (Scotland) Act 2007, S. 30(5).

⁸⁷ Adoption and Children (Scotland) Act 2007, S. 30(3).

⁸⁸ Adoption and Children (Scotland) Act 2007, S. 30(3).

Office for National Statistics in a report on cohabitation in 2012 indicated clear distinctions in terms of age. While 95% of cohabiting couples between the ages of 25 and 35 had never been married, this declined significantly across older age groups: 75% between 35 and 44; 41% between 45 and 64 and 13% between 65 and 74. Of cohabiting couples who had previously been married or in a civil partnership, but were now divorced/dissolved, the percentages were 3% in the age range 25-34; 20% in the age range 35-44; 48% in the age range 45-64; 64% in the age range 65-74 and 44% above 75.⁸⁹

C. During the relationship

20. Are partners in an informal relationship under a duty to support each other, financially or otherwise:

In Scots law, the private law duty of support is known as the obligation of aliment.⁹⁰ The presence of this obligation is one of the key legal distinctions between formal and informal relationships. While there is an obligation of aliment between spouses and partners in marriage and civil partnership,⁹¹ there is no such obligation between cohabitants. Extending the obligation of aliment to cohabiting couples was an option considered by the Scottish Law Commission, both in its Discussion Paper and Report, but it was concluded that it was not appropriate to extend aliment to informal relationships.⁹²

There is no legal obligation to provide mutual support between spouses and civil partners, other than the financial obligation of aliment, and similarly there is no such obligation in the context of informal relationships.

a. Where there are no children in the household?

As explained above, the general position is that there is no legal obligation on partners to an informal relationship to support each other. This is distinct from the obligation of aliment, which applies between spouses and between civil partners, regardless of the presence or absence of children.⁹³

b. Where there are common children in the household?

As explained above, there is no duty of support between partners to an informal relationship and this is unaffected by the presence of children. All parents, however, owe a duty of support to their children in terms of the private law obligation of aliment⁹⁴ and this will apply in the context of an informal relationship. The duty to support arises because of the parent/child relationship and is not affected by the

⁸⁹ Office for National Statistics, *Short Report: Cohabitation in the UK 2012*.

⁹⁰ Family Law (Scotland) Act 1985, S. 1.

⁹¹ Family Law (Scotland) Act 1985, S. 1(1)(a) – (bb).

⁹² Scot Law Com, *Report on Family Law*, No 135, 1992, paras 16.5 – 16.6.

⁹³ Family Law (Scotland) Act 1985, S. 1.

⁹⁴ Family Law (Scotland) Act 1985, S. 1(1)(c).

nature of the relationship between the adults. The private law obligation of aliment exists in conjunction with a public law system of child support,⁹⁵ which is intended to ensure that non-resident parents contribute appropriately to the maintenance of their children.

c. Where there are other children in the household?

As explained above, parties to an informal relationship owe no obligation to support each other. Parents do however owe an obligation to their children and the obligation of aliment extends to any child who has been 'accepted' as a child of the family.⁹⁶ While a cohabitant does not therefore owe any legal duty of support to his or her partner, he or she does owe a duty of aliment to the child of such a partner if that child has been accepted as a child of the family.

21. Are partners in an informal relationship under a general duty to contribute to the costs and expenses of their household?

Scots law imposes no legal duty on parties to an informal relationship to contribute to household costs but nor is there any such obligation on couples in formal relationships. This is entirely a matter for individual agreement. There is some commentary in cohabitation cases, which reiterates this point. It is observed, for example, in *Harley v Thompson*⁹⁷ where, one partner was financially better off than the other and as a result contributed more to living costs of the couple:

'The pursuer has deeper pockets and she knowingly committed to a relationship where she would inevitably be the main breadwinner. Any negative impact on the pursuer's financial position is part and parcel of family life [...] Any loss should lie where it falls.'⁹⁸

22. Does a partner in an informal relationship have a right to remain in the home against the will of the partner who is the owner or the tenant of the home?

According to the general law of property, a non-entitled person has no legal right to remain in the home without the consent of the owner or tenant. The strict application of this rule, within the context of marriage, could be seen in the cases of *MacLure v MacLure* 1911 SC 200 and *Millar v Millar* 1940 SC 56 where the Scottish courts made it clear that in any dispute it was the patrimonial rather than the matrimonial relationship which was relevant. The entitled spouse could have the non-entitled spouse legally removed from the home in exactly the same way that he or she could remove a stranger. This approach applies equally to partners in an informal relationship. The only situation where a non-entitled cohabitant has the right to remain in the home against the will of the entitled cohabitant is where he or she has obtained statutory occupancy rights in terms of the Matrimonial Homes (Family

⁹⁵ Child Support Act 1991.

⁹⁶ Family Law (Scotland) Act 1985, S. 1(1)(d).

⁹⁷ *Harley v Thompson* 2014 GWD 36-673.

⁹⁸ *Harley v Thompson* 2014 GWD 36-673, at para. 8.

Protection) (Scotland) Act 1981. These are discussed more fully in the answer to Question 23, below.

23. Are there specific rules on a partner's rights of occupancy of the home:

In terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, a cohabitant, who does not have legal title to the family home, is entitled to apply to the court for statutory occupancy rights. Where a couple is living together as if they were married, S. 18 provides that:

'the court may, on the application of the non-entitled partner, if it appears that the entitled partner and the non-entitled partner are a cohabiting couple in that house, grant occupancy rights therein to the applicant for such period, not exceeding six months, as the court may specify.'

Unlike the automatic occupancy rights of a non-entitled spouse,⁹⁹ the grant of these rights to a cohabitant is discretionary and limited to a maximum period of six months although this can be extended, for further period or periods of six months.¹⁰⁰

a. In cases of domestic violence?

The right to apply for statutory occupancy rights is not restricted to the situation of domestic violence although that is the context in which it is most likely to be exercised. The 1981 Act also sets out a range of orders which the court may make to regulate occupancy of the house, including regulatory orders and an order to exclude the non-applicant from the property where it is considered necessary in order to protect the applicant, or any child of the family, from harmful conduct and domestic interdicts.¹⁰¹ These orders can be sought and made, either where there is one entitled and one non-entitled partner, who has obtained statutory occupancy rights, or where there are jointly entitled partners.

While these are important and significant statutory rights, in theory, there is a doubt as to the extent to which they are used in practice. Even in the case of marriage, where spouses automatically have occupancy rights, there is relatively little evidence of regulatory orders and exclusion orders being sought and it seems likely that they are even rarer in the context of informal relationships where the cohabitant may first have to obtain statutory occupancy rights.

b. In cases where the partner owning or renting the home is absent?

As explained in (a) above, the possibility of seeking occupancy rights is not limited to the situation of domestic violence and therefore a cohabitant could make an application where their partner is for some reason absent from the home. There are no reported cases to show how the courts would approach such an application but

⁹⁹ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 1.

¹⁰⁰ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 18(1)(b).

¹⁰¹ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 18(3).

one issue might be interpretation of the requirement that the parties are indeed 'living with each other'.¹⁰²

Although relatively little use has been made of the regulatory orders set out in the 1981 Act, and in particular of exclusion orders, one provision which has been more frequently used is S. 13 which provides for the transfer of tenancy. By means of this section, the court may order transfer of tenancy from the entitled to the non-entitled spouse or civil partner and by means of S. 18(3) this is extended to apply to a non-entitled cohabitant who has secured occupancy rights. Where such an order is made, provision can also be made for just and reasonable compensation to be paid to the entitled party.¹⁰³ This might be useful as a means of providing long-term security to the non-entitled cohabitant in the situation where their partner is absent.

24. Are there specific rules on transactions (e.g. disposal, mortgaging, subletting) concerning the home of partners in an informal relationship:

a. Where the home is jointly owned by the partners?

Where a property is jointly owned, the parties may dispose of it by mutual agreement or, if they cannot agree, either may apply to the court for an order of division and sale. This is part of the general law of property and the court has no discretion in the matter.¹⁰⁴ Where the home is jointly owned by spouses or civil partners, the court does have discretion in terms of S. 19 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and may refuse or postpone the granting of decree. There is, however, no equivalent provision in respect of partners to an informal relationship. They are treated in the same way as any other owners in common and are entitled to order of division and sale.

b. Where the home is owned by one of the partners?

Where the home is owned by one of the partners, the other has no legal right to remain in the home against the wishes of the owner. There is some modification of this strict property law approach in terms of S. 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 which enables a cohabitant to apply to the court for grant of statutory occupancy rights. While statutory occupancy rights grant some legal security to a non-entitled cohabitant, their effect is limited and in particular they do not offer any protection against third party dealings.¹⁰⁵ In the context of marriage or civil partnership, the occupancy rights of a non-entitled spouse are protected against any dealings of the entitled spouse with a third party and, even where the entitled spouse has sold the property to a third party, the third party has no right to occupy the property.¹⁰⁶ There is no similar protection available to cohabitants. Even if a non-entitled cohabitant has obtained statutory occupancy rights in the family home, those rights will be defeated if the entitled partner disposes of the home.

¹⁰² Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 18(1).

¹⁰³ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 18(1).

¹⁰⁴ *Grant v The Governors of George Heriot's Trust and Others* 1906 13 SLT 986.

¹⁰⁵ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 18(5).

¹⁰⁶ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 6.

c. Where the home is jointly rented by the partners?

Where the home is jointly rented by the partners, either partner may apply to the court for an order vesting the tenancy in their name solely, in terms of S. 13(9) of the Scots Matrimonial Homes (Family Protection) Act 1981. If the court grants such an order, it may provide for the payment by the applicant of just and reasonable compensation to the non-applicant.

d. Where the home is rented by one of the partners?

Where the home is rented by one of the partners, the non-entitled partner may apply to the court for an order transferring the tenancy into their name, in terms of S. 13(9) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981. In deciding whether to grant such an order, the court shall have regard to all of the circumstances of the case, the suitability of the applicant to become the tenant and his or her capacity to fulfil the obligations of the lease.¹⁰⁷ Circumstances for consideration include:

- the conduct of the cohabitants in relation to each other and otherwise;
- their respective needs and resources;
- the needs of any child of the family;
- the extent to which the home is used in connection with either cohabitant's trade, business or profession;
- whether the non-applicant has offered to make available any suitable alternative accommodation.¹⁰⁸

25. Under what circumstances and to what extent can one partner act as an agent for the other?

It is possible that one partner might act as agent for the other but this is regulated entirely by the general law of agency. There is no specific provision for cohabitants.

26. Under what circumstances can partners in an informal relationship become joint owners of assets?

Joint ownership is an option available to any parties under the general law of property. There are no special rules in relation to couples, whether in informal or formal relationships, and their position as owners is unaffected by their personal relationship. The approach has been summed up as follows: 'Where the couple buys property together, they are treated no differently to strangers and they own the property in proportion to their contributions to the price.'¹⁰⁹ It is a fundamental principle of the law of marriage that it has no effect on the property or legal capacity

¹⁰⁷ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 13(3).

¹⁰⁸ Matrimonial Homes (Family Protection) (Scotland) Act 1981, S. 3(3)(a)-(e).

¹⁰⁹ E.E. SUTHERLAND, *Child and Family Law*, W. Green/Thomson, Thomson/W Green, Edinburgh, 2008, at para. 13-060.

of the parties.¹¹⁰ It is therefore not surprising that there are no special rules in respect of cohabitants.

27. To what extent, if at all, are there specific rules governing acquisitions and/or transactions in respect of household goods? In answering this question briefly explain what is meant by household goods.

There are no rules governing acquisition or transactions in respect of household goods. The acquisition of household goods is regulated, as is the acquisition of any other assets, according to the general rules of property law. There is, however, a rebuttable presumption of equal shares in household goods.¹¹¹ Household goods are defined in S. 26(4) of the Family Law (Scotland) Act 2006 as follows:

‘any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation in any residence in which the cohabitants are (or were) cohabiting for their joint domestic purposes, but does not include –

- (a) money;
- (b) securities;
- (c) any motor car, caravan or other road vehicle; or
- (d) any domestic animal.’

It is notable that it is easier to rebut this presumption than the similar presumption which applies in the context of marriage and civil partnership.¹¹² The latter provides that the presumption shall not be rebutted simply on the basis of evidence to the effect that ‘the goods in question were purchased from a third party by either party alone or by both in unequal shares’.¹¹³ No such exception applies to cohabitants and therefore the presumption may be easily rebutted by evidence of purchase or intention.

28. Are there circumstances under which partners in an informal relationship can be regarded as joint owners, even if the title belongs to one partner only?

In respect of heritable property, ownership depends on registered title and there is no special provision for the situation of partners in an informal relationship. It should be noted, however, that there is similarly no special treatment of partners in a formal relationship: marriage or civil partnership. Ownership is a matter for the general rules of property and takes no account of the personal relationship between the parties. There may be a possibility of arguing that, although title is registered in the name of one partner, it is held in trust for the other or for the couple.¹¹⁴ This is not however a possibility which has been explored or developed to any extent in Scots law.

¹¹⁰ Family Law (Scotland) Act 1985, S. 24.

¹¹¹ Family Law (Scotland) Act 2006, S. 26.

¹¹² Family Law (Scotland) Act 2006, S. 25.

¹¹³ Family Law (Scotland) Act 2006, S. 25(2).

¹¹⁴ See *Barbour v Marriott* 2012 GWD 18-398.

29. How is the ownership of assets proved as between partners in an informal relationship? Are there rebuttable presumptions?

In general, ownership is established according to the ordinary rules of property law. In respect of heritable property, ownership is established on the basis of registered legal title to the property and, in respect of moveable property, it will be established by evidence of acquisition. There are two exceptions, both contained in the Family Law (Scotland) Act 2006, which apply to establishing ownership of assets within the context of an informal relationship of cohabitation.

Section 26 of the Family Law (Scotland) Act 2006 provides that: 'It shall be presumed that each cohabitant has a right to an equal share in household goods acquired (other than by gift or succession from a third party) during the period of cohabitation.'¹¹⁵ The presumption applies where any question of ownership arises during or after cohabitation.¹¹⁶ Household goods are defined in S. 26(4) as follows:

'any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation in any residence in which the cohabitants are (or were) cohabiting for their joint domestic purposes, but does not include –

- (a) money;
- (b) securities;
- (c) any motor car, caravan or other road vehicle; or
- (d) any domestic animal.'

While this presumption is similar to one which applies in the context of marriage and civil partnership,¹¹⁷ it should be noted that it is more limited. The scope of household goods applies only in respect of items acquired during the period of cohabitation and does not extend, as it does in the context of formal relationships, to goods acquired in prospect of the relationship. It is also significantly easier to rebut the presumption in the context of cohabitation than it is in marriage or civil partnership. The equivalent presumption of equal ownership in respect of spouses or civil partners provides that it shall not be rebutted simply on the basis of evidence to the effect that 'the goods in question were purchased from a third party by either party alone or by both in unequal shares'.¹¹⁸ No such exception applies to cohabitants and therefore the presumption may be easily rebutted by evidence of purchase.

A second presumption is set out in S. 27 of the Family Law (Scotland) Act 2006. It applies where:

'Any question arises (whether during or after cohabitation) as to the right of a cohabitant to –

- (a) money derived from any allowance made by either cohabitant for their joint household expenses or for similar purposes; or

¹¹⁵ Family Law (Scotland) Act 1985, S. 26(2).

¹¹⁶ Family Law (Scotland) Act 1985, S. 26(1).

¹¹⁷ Family Law (Scotland) Act 1985, S. 25.

¹¹⁸ Family Law (Scotland) Act 1985, S. 25(2).

(b) any property acquired out of such money.’¹¹⁹

In such circumstances, and ‘subject to any agreement between the cohabitants to the contrary, the money or property shall be treated as belonging to each cohabitant in equal shares.’¹²⁰ The parties’ sole or main residence is expressly excluded from the scope of ‘property’ in this provision.¹²¹

30. How is the ownership of assets proved as regards third parties? Are there rebuttable presumptions?

As a general rule, ownership of assets will be established according to the normal rules of property. In respect of land and heritable property, ownership is established by means of registered title. Ownership of moveable assets will be established according to evidence of acquisition, for example, receipts showing purchase. These rules of property law apply regardless of the existence of any personal family relationship. There are two statutory presumptions, as discussed in Question 29, which apply to household goods and to money or property derived from an allowance provided by either cohabitant for joint household purposes.¹²² The presumptions state that they apply when any question of ownership arises and they may therefore also apply as regards third parties. It should be remembered, however, that these presumptions apply only to a restricted range of assets and the presumptions may be relatively easily rebutted.

31. Under what circumstances, if any, can partners in an informal relationship become jointly liable for debts?

Liability is established according to the general rules of obligation and partners to an informal relationship will be jointly liable only where they jointly incurred the debt.

32. On which assets can creditors recover joint debts?

As a general rule, joint debts and liabilities are incurred in respect of cohabitants in the same way they would be incurred in respect of any joint parties. There are, however, specific provisions to protect the family home and some assets used within the home and these operate to protect cohabitants as well as those in formal relationships with the debtor. The provisions are detailed and beyond the scope of this report but include the possibility of applying to the court for an order suspending, for a reasonable period of time, the rights of a creditor to sell the family home,¹²³ protection for assets kept and used in the debtor’s household¹²⁴ and land including a family dwellinghouse.¹²⁵

¹¹⁹ Family Law (Scotland) Act 2006, S. 27(1).

¹²⁰ Family Law (Scotland) Act 2006, S. 27(2).

¹²¹ Family Law (Scotland) Act 2006, S. 27(3).

¹²² Family Law (Scotland) Act 2006, S. 27(3).

¹²³ Mortgage Rights (Scotland) Act 2001, S. 2.

¹²⁴ Debt Arrangement and Attachment (Scotland) Act 2002, S. 1-9.

¹²⁵ Bankruptcy and Diligence (Scotland) Act 2007.

- 33. Are there specific rules governing the administration of assets jointly owned by the partners in an informal relationship? If there are no specific rules, briefly outline the generally applicable rules.**

There are no specific rules governing the administration of jointly owned assets by cohabitants. The normal rules of property apply.

D. Separation

- 34. When partners in an informal relationship separate does the law grant maintenance to a former partner? If so, what are the requirements?**

There is no obligation of maintenance (in Scots law, 'aliment') during an informal relationship and similarly there is no such obligation following separation. On divorce or dissolution of a civil partnership, the obligation of aliment ceases and there is no provision for ex-spousal or ex-partner maintenance. Instead either party may apply to the court for financial provision. Similar but much more limited and discretionary provisions were introduced by S. 28 of the Family Law (Scotland) Act 2006 to provide for some financial provision on the breakdown of cohabitation. It would be highly misleading to describe any of these provisions as 'maintenance'. Both the provisions for divorce/dissolution and the much more limited provisions which apply on termination of cohabitation place emphasis on a one-off, clean break settlement rather than continuing maintenance.

- 35. What relevance, if any, upon the amount of maintenance is given to the following factors/circumstances:**
- a. The creditor's needs and the debtor's ability to pay maintenance?**
 - b. The creditor's contributions during the relationship (such as the raising of children)?**
 - c. The standard of living during the relationship?**
 - d. Other factors/circumstances (such as giving up his/her career)?**

As there is no obligation of maintenance, this question is not relevant.

- 36. What modes of calculation (e.g. percentages, guidelines), if any, apply to the determination of the amount of maintenance?**

As there is no obligation of maintenance, this question is not relevant.

- 37. Where the law provides for maintenance, to what extent, if at all, is it limited to a specific period of time?**

As there is no obligation of maintenance, this question is not relevant.

- 38. What relevance, if any, do changed circumstances have on the right to continued maintenance or the amount due?**

As there is no obligation of maintenance, this question is not relevant.

- 39. Is the maintenance claim extinguished upon the claimant entering:**
- a. Into a formal relationship with another person?**
 - b. Into an informal relationship with another person?**

As there is no obligation of maintenance, this question is not relevant.

- 40. How does the creditor's maintenance claim rank in relation to:**
- a. The debtor's current spouse, registered partner, or partner in an informal relationship?**
 - b. The debtor's previous spouse, registered partner, or partner in an informal relationship?**
 - c. The debtor's children?**
 - d. The debtor's other relatives?**

As there is no obligation of maintenance, this question is not relevant.

- 41. When partners in an informal relationship separate, are specific rules applicable to the determination of the ownership of the partners' assets? If there are no specific rules, which general rules are applicable?**

When cohabitants separate, there is no provision for property sharing and ownership of assets will be determined according to the general rules of property. Ownership of heritable property is determined according to registered title and moveable property according to evidence of the person who bought or otherwise acquired it. There are two exceptions in the form of statutory presumptions which apply to ownership of household assets¹²⁶ and money or property derived from a household or similar allowance provided by either cohabitant.¹²⁷

- 42. When partners in an informal relationship separate, are specific rules applicable subjecting all or certain property (e.g. the home or household goods) to property division? If there are no specific rules, which general rules are applicable?**

Unlike on divorce or dissolution of civil partnership, where the first principle of financial provision is fair sharing of matrimonial property,¹²⁸ there is no provision for sharing of partnership property on termination of cohabitation. In the Scottish Law Commission's *Report on Family Law*, published in 1992, they concluded that a system of property sharing on termination of cohabitation was not appropriate.¹²⁹ This conclusion was followed in the Family Law (Scotland) Act 2006 which introduced some rights for cohabitants but specifically did not include provision for property

¹²⁶ Family Law (Scotland) Act 2006, S. 26.

¹²⁷ Family Law (Scotland) Act 2006, S. 27.

¹²⁸ Family Law (Scotland) Act 1985, S. 9(1)(a).

¹²⁹ Scot Law Com, No 135, para. 16.15.

division. In several claims for financial provision, it appears that what the parties are seeking is really some form of property sharing but the courts have consistently confirmed that this is not appropriate in terms of the legislation. In *Selkirk v Chisholm*, the sheriff observed that 'an award to a cohabitant [...] is quite distinct from financial provision awarded to a spouse [...] on divorce. There is no concept akin to matrimonial property, equal sharing or fair sharing.'¹³⁰

43. Do the partners have preferential rights regarding their home and/or the household goods? If so, what factors are taken into account when granting these rights (e.g. the formal ownership of the property, the duration of the relationship, the needs of each partner, the care of children)?

The starting point is that all assets belong to the legally entitled owner and there are no preferential rights regarding the home or the household goods. There is a statutory presumption of equal ownership of household goods (discussed in detail at Question 29, above). Although either party may apply to the court for a financial order on the termination of cohabitation,¹³¹ the statute makes no provision for a property transfer order.

44. How are the joint debts of the partners settled?

The relationship between the partners has no effect on their liability and debts remain the responsibility of the individual by whom they were incurred. Parties may be jointly liable where they have incurred joint debts. There are no rules specifically covering partners in an informal relationship and this is a matter governed by the general rules of obligation.

45. What date is decisive for the determination and the valuation of:

a. The assets?

There is no provision for sharing of partnership assets and therefore this question is not relevant in Scots law.

b. The debts?

There is no specific provision for settlement of partnership debts and therefore this question is not relevant in Scots law.

46. On what grounds, if any, and to what extent may a partner upon separation claim compensation upon the basis of contributions made or disadvantages suffered during the relationship?

The Family Law (Scotland) Act 2006 introduced a significant new provision by which application for financial provision could be made to the court on the termination of

¹³⁰ *Selkirk v Chisholm* 2011 Fam LR 56, at para. 98.

¹³¹ Family Law (Scotland) Act 2006, S. 28.

cohabitation otherwise than by death.¹³² Application must be made within one year of the date when cohabitation ceased.¹³³ Although S. 28 has been welcomed as a significant new protection for cohabitants, it has also been widely criticised for poor drafting, lack of clarity and absence of clear aims and principles. These criticisms are particularly apt when S. 28 is compared with the very detailed and well understood provisions which govern financial provision on divorce or dissolution.¹³⁴ It was hoped that through time guidance and clarity would emerge as the courts became increasingly familiar with the cohabitation provisions but although the number of cases is beginning to grow, including an important decision from the UK Supreme Court in *Gow v Grant*,¹³⁵ there is still considerable uncertainty.

Section 28 provides as follows:

- '(2) On the application of a cohabitant ('the applicant'), the appropriate court may, after having regard to the matters mentioned in subsection (3) -
- (a) make an order requiring the other cohabitant ('the defender') to pay a capital sum of an amount specified in the order to the applicant;
 - (b) make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are parents;
 - (c) make such interim order as it thinks fit.
- (3) Those matters are -
- (a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and
 - (b) whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of -
 - (i) the defender; or
 - (ii) any relevant child.
- (4) In considering whether to make an order under subsection (2)(a), the appropriate court shall have regard to the matters mentioned in subsections (5) and (6).
- (5) The first matter is the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interests of -
- (a) the applicant; or
 - (b) any relevant child.
- (6) The second matter is the extent to which any economic disadvantage suffered by the applicant in the interests of -
- (a) the defender; or
 - (b) any relevant child,
- is offset by any economic advantage the applicant has derived from contributions made by the defender.'

¹³² Family Law (Scotland) Act 2006, S. 28.

¹³³ Family Law (Scotland) Act 2006, S. 28(8).

¹³⁴ In particular, S. 8-14 of the Family Law (Scotland) Act 1985.

¹³⁵ *Gow v Grant* [2012] UKSC 29.

It is further provided that 'contributions' includes indirect and non-financial contributions, including caring for the house or any 'relevant child'.¹³⁶ A relevant child is a child of whom the cohabitants are parents or a child who has been accepted as a child of the family.¹³⁷ 'Economic advantage' is defined as including gains in capital, income and earning capacity.¹³⁸

Several problems have been identified with S. 28. Unlike the provisions relating to financial provision on divorce which provide the courts with a range of orders, including capital payment, property transfer, periodical allowance and pension orders,¹³⁹ S. 28 only mentions a capital sum payment. Arguably, the general reference to 'an order' in S. 28(2)(b) could be interpreted as including a range of different types of order but to date that is not an approach which has been taken by the courts. Instead they have proceeded on the basis that they can only make a capital payment order albeit it can be payable in instalments.¹⁴⁰

Perhaps the most difficult aspect of S. 28 is the question of how to take into account the matters mentioned in subsection (3), that is the extent to which the defender has derived economic advantage from the contributions made by the applicant and the extent to which the applicant has suffered economic disadvantage in the interests of the defender or any relevant child. Must there be both advantage and disadvantage or is it sufficient for the applicant to establish that she has suffered a disadvantage without showing an advantage for the defender? How are the additional matters in subsections (5) and (6) to be taken into account? In several cases, the courts have engaged in detailed and complex assessment of advantage and disadvantage and the extent to which each has been offset within the context of the relationship. A further complexity is the extent to which an order under S. 28(2)(b) is a stand-alone order based on the economic burden of childcare or whether it too requires a balancing exercise between advantage and disadvantage during the cohabitation.

To date, awards under S. 28 have been limited and much of the court time appears to have been taken up with trying to understand and apply the difficult wording of the statute. This contrasts with the approach adopted in *Gow v Grant*, the one decision of the UK Supreme Court on S. 28, where an award of £39,500 was made under S. 28(2)(a). In considering how the courts should apply the provisions, the Supreme Court looked for the underlying principle of the section and concluded that it was 'fairness'. Lady Hale suggested a rather different approach to that which has been adopted by the Scottish courts to date:

'Who can say whether the non-financial contributions, or the sacrifices, made by one party were offset by the board and lodging paid for by the other? That is not what living together in an intimate relationship is all about. It is much more practicable to consider where they were at the beginning of their cohabitation

¹³⁶ Family Law (Scotland) Act 2006, S. 28(9).

¹³⁷ Family Law (Scotland) Act 2006, S. 28(10).

¹³⁸ Family Law (Scotland) Act 2006, S. 28(9).

¹³⁹ Family Law (Scotland) Act 1985, S. 8.

¹⁴⁰ As, e.g., in *M v I* 2012 GWD 11-205, where the sheriff made an award of £5000 in respect of the burden of childcare, payable in five annual instalments.

and where they are at the end and then to ask whether either the defender has derived a net economic advantage from the contributions of the applicant or the applicant has suffered a net economic disadvantage in the interests of the defender or any relevant child.’

This may seem a very sensible approach but it is difficult to discern it within the current statutory provision, which focuses to such an extent on the offsetting process. While there was much to be welcomed in the clarity and insight of the Supreme Court’s judgment, there remains uncertainty as to how the principle of fairness can be accommodated in what is undeniably a poorly constructed statutory provision. In a recent sheriff court appeal decision, the sheriff principal observed that he was ‘left with some unease that too much reliance on the broad approach of fairness runs the risk of doing violence to the terms of S. 28(3)(a)’.¹⁴¹

E. Death

47. Does the surviving partner have rights of inheritance in the case of intestate succession? If yes, how does this right compare to that of a surviving spouse or a registered partner, in a marriage or registered partnership?

Unlike a spouse or civil partner, cohabitants have no automatic rights of inheritance in the case of intestate succession. In terms of S. 29 of the Family Law (Scotland) Act 2006, a cohabitant may however apply to the court for a discretionary award in the case that their partner dies intestate (discussed in Question 48, below).

The position of a cohabitant contrasts with that of a surviving spouse or civil partner who has substantial rights of succession on intestacy. These are governed by the Succession (Scotland) Act 1964. According to S. 8 of the 1964 Act, a surviving spouse has what are called ‘prior rights’ by means of which he or she is entitled to inherit the dwelling house in which the deceased was ordinarily resident at the date of death, up to a limit of £473,000. In addition, prior rights include furniture and plenishings owned by the deceased in said dwelling house, up to a limit of £29,000. The surviving spouse is also entitled to receive financial provision from the intestate’s estate of £50,000, where there are issue (however remote) or £89,000 otherwise.¹⁴²

After satisfaction of the surviving spouse or civil partner’s prior rights, there is also provision for legal rights. Legal rights are payable from the moveable estate and they also depend on whether or not there are children of the deceased. If there are children, the surviving spouse or partner is entitled to one third of the free moveable estate and if there are no children, he or she is entitled to one half.

As highlighted above, a surviving cohabitant may now apply for a discretionary award on intestacy but any such award can only be paid out of the deceased’s net intestate estate. In calculating the net value of that estate, various liabilities, including

¹⁴¹ *Smith-Milne v Langler* 2013 Fam LR 58.

¹⁴² Succession (Scotland) Act 1964, S. 9(1).

prior and legal rights of a surviving spouse or civil partner, must first be satisfied.¹⁴³ It is further provided that any order must not have the effect of awarding a surviving cohabitant an amount which exceeds that to which he or she would have been entitled as a spouse or civil partner.¹⁴⁴

48. Does the surviving partner have any other rights or claims on the estate (e.g. any claim based on dependency, compensation, or maintenance) in the case of intestate succession?

Section 29 of the Family Law (Scotland) Act 2006 introduced the right for a cohabitant to apply to the court for provision on intestacy. Any application must be made within six months of the date of death.¹⁴⁵ Although this new provision was regarded as offering significant protection for cohabitants, there are very few reported cases of its use. The strict time limit has been highlighted as limiting the effectiveness of the provision and it has been suggested that some families may deliberately 'delay the administration of their deceased relative's estate to frustrate a claim on the part of the surviving cohabitant.'¹⁴⁶ An application may be made where the deceased died intestate and immediately prior to death was domiciled in Scotland and cohabiting with the applicant.¹⁴⁷

Section 29 provides that, on application by the surviving partner, the court may make an order for payment of a capital sum or transfer of property from the deceased's net intestate estate.¹⁴⁸ It is clear that any such order is discretionary and in reaching their decision the court must take into account:

- '(a) The size and nature of the deceased's net 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.'¹⁴⁹

The deceased's net intestate estate is defined as what remains after satisfaction of inheritance tax, other liabilities of the estate and the prior and legal rights of a surviving spouse or civil partner.¹⁵⁰ Clearly, except in the case of significant assets, a substantial part of the deceased's estate could be taken up by the succession rights of a surviving spouse or civil partner, although it should be noted that the legal rights of any children do not take priority over the claim of a cohabitant. This was a

¹⁴³ Family Law (Scotland) Act 2006, S. 29.

¹⁴⁴ Family Law (Scotland) Act 2006, S. 29(3).

¹⁴⁵ Family Law (Scotland) Act 2006, S. 29(6).

¹⁴⁶ J. KERRIGAN, 'Time Limits and the Family Law (Scotland) Act 2006', *Scots Law Times*, 2013, pp. 125 et seq., at p. 127.

¹⁴⁷ Family Law (Scotland) Act 2006, S. 29(1).

¹⁴⁸ Family Law (Scotland) Act 2006, S. 29(2).

¹⁴⁹ Family Law (Scotland) Act 2006, S. 29(3).

¹⁵⁰ Family Law (Scotland) Act 2006, S. 29(10).

relevant factor in *Windram, Applicant*¹⁵¹; one of only a handful of cases to have been reported to date. Here the couple had cohabited for 24 years and had two children who were both under the age of 16. According to the rules of intestate succession, the children would have inherited the whole estate. On application by the mother under S. 29, she was awarded transfer of the family home and an additional capital sum of £34,000.¹⁵² The facts and circumstances of this particular case did not disclose any significant conflict between the interests of the cohabitant and the interests of the children. In practice, she wished to be able to remain in the family home and to support their children in that environment. It does, however, highlight the potential for conflict between a surviving cohabitant and children.

49. Are there specific rules dealing with the home and/or household goods?

There are no specific rules dealing with the home or household goods.

50. Can a partner dispose of property by will in favour of the surviving partner:

a. In general?

In general, an individual has freedom of testation and this includes the possibility of leaving property by will to a surviving partner. Spouses, civil partners and descendants have legal rights in respect of moveable property but heritable property may be disposed of entirely according to the will of the individual.

b. If the testator is married to or is the registered partner of another person?

Scots law is generally regarded as protecting against the possibility of disinheritance and it does so by means of 'legal rights'. A surviving spouse or civil partner has legal rights to a share of the moveable estate of the deceased and in this way they have some protection against the possibility of disinheritance. Where the deceased was married at the time of death but had no issue, the surviving spouse or civil partner is entitled to one half of the net moveable estate. The testator is free to dispose of the rest of his or her estate.

c. If the testator has children?

Scots law is generally regarded as protecting against the possibility of disinheritance and it does so by means of 'legal rights'. Where the deceased was married or in a civil partnership and had surviving issue, each is entitled to one third of the net moveable estate. Otherwise, the testator is free to dispose of his or her estate.

51. Can partners make a joint will disposing of property in favour of the surviving partner:

a. In general?

¹⁵¹ *Windram, Applicant* 2009 Fam LR 152.

¹⁵² As compared to £45,000 capital sum she would have received if married.

There is no provision in Scots law for the making of a joint will. It is often common practice for spouses or partners each to make what are described as 'mirror wills' but individuals nonetheless retain freedom of testation over their own estate.

b. If either testator is married to or is the registered partner of another person?

As above, there is no provision in Scots law for the making of a joint will.

c. If either testator has children?

As above, there is no provision in Scots law for the making of a joint will.

52. Can partners make other dispositions of property upon death (e.g. agreements as to succession or gifts upon death) in favour of the surviving partner:

a. In general?

The most common way by which this might happen in Scotland is where partners are joint owners of a house or other heritable property. Frequently joint owners will include a special destination, in the form of a survivorship clause, in the legal title to the property. The effect of this is that, on the death of one of the partners, his or her share will pass automatically to the other and will not form part of the deceased's estate.

b. If either partner is married to or is the registered partner of another person?

As explained above, if there is a survivorship clause in the title to heritable property, the deceased's share will pass automatically on death to the surviving partner and will not form part of the estate. It is therefore a way of avoiding any claim or entitlement of a surviving spouse or civil partner.

c. If either partner has children?

As explained above, if there is a survivorship clause in the title to heritable property, the deceased's share will pass automatically on death to the surviving partner and will not form part of the estate. On intestacy, children have legal rights which apply only to moveable property and therefore a survivorship clause in title to heritable property is not likely to affect them. The special destination will however have the effect of excluding the heritable property concerned from the overall estate of the deceased which may affect any bequests in the deceased's will.

53. Is the surviving partner entitled to a reserved share¹⁵³ or to any other rights or claims on the estate (e.g. any claim based on dependency, compensation, or maintenance) in the case of a disposition of property upon death (e.g. by will, joint will, or inheritance agreement) in favour of another person?

¹⁵³ See Regulation no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession [2012] OJ L 201/107.

A surviving partner has no fixed entitlement on the estate of his or her deceased partner.

54. Are there any statistics or estimations on how often a relationship is terminated by the death of one of the partners?

There are no such statistics or estimations available.

55. Are there any statistics or estimations on how common it is that partners in an informal relationship make a will in favour of the other partner?

There are no such statistics or estimations available.

56. Are there any statistics or estimations on how common it is that a partner in an informal relationship is the beneficiary to the other partner's life insurance?

There are no such statistics or estimations available.

F. Agreements

57. Are there specific rules concerning agreements between partners in an informal relationship? Where relevant, please indicate these specific rules. If not, which general rules apply?

There are no specific rules concerning agreements between cohabitants. As a general rule, Scots law respects the autonomy of parties to make agreements concerning their family relationships and this is particularly evident in the context of marriage. Antenuptial, post-nuptial and separation agreements have a long history of use and enforcement in Scotland and they have been widely used. In modern family law, separation agreements are commonly used to regulate the consequences of relationship breakdown. They are binding without the need for any judicial scrutiny or approval and it is assumed that agreements between cohabitants would be similarly binding. Apart from challenges brought to agreements on the basis of general contract law, for example, alleging lack of consent, undue influence or misrepresentation, there is no other provision to vary or set aside cohabitation agreements. In respect of divorce or dissolution of civil partnership, S. 16 of the Family Law (Scotland) Act 1985 gives the court statutory power to vary or set aside a financial provision agreement on the basis that it was not fair and reasonable at the time it was concluded. No comparable power applies in the context of termination of cohabitation.

In the past there was an argument that cohabitation agreements might be unenforceable on public policy grounds in that they related to 'furtherance of illicit sexual intercourse'. When cohabitation was considered by the Scottish Law Commission, they expressed the view that such an argument was out of date and no

longer appropriate but nonetheless recommended, for avoidance of doubt, that a provision be included in legislation to the following effect:

‘A contract between cohabitants relating to property or financial matters should not be void or unenforceable solely because it was concluded between parties in, or about to enter, this type of relationship.’¹⁵⁴

No such provision was in fact included in the Family Law (Scotland) Act 2006 although it might be argued this was simply due to widespread acceptance that cohabitation contracts were lawful and enforceable.

58. Are partners in an informal relationship permitted to agree on the following issues:

The answer, in theory at least, is that it appears open to partners to an informal relationship to make agreements regulating any or all of these matters. There is nothing expressly stated in Scots law which would restrict such agreements but similarly there is little empirical evidence of their use. Anecdotally it is reported that agreements of various kinds are becoming more common between cohabitants but these are not issues which have been tested before the courts.

a. The division of tasks as between the partners?

There would appear to be nothing to prevent partners entering into such an agreement but it is questionable whether the court would regard it as legally enforceable. The argument might be made that there was no intention to create a legally binding agreement.

b. The contributions to the costs and expenses of the household?

As with all of these issues, there is no empirical evidence either in case law or academic research, demonstrating the use of such agreements. It appears, however, that such agreements are contemplated by statute. S. 27 of the Family Law (Scotland) Act 2006 introduces a presumption of equal ownership where:

‘Any question arises (whether during or after cohabitation) as to the right of a cohabitant to –
(a) money derived from any allowance made by either cohabitant for their joint household expenses or for similar purposes; or
(b) any property acquired out of such money.’¹⁵⁵

This presumption of equal ownership is however ‘subject to any agreement between the cohabitants to the contrary’.¹⁵⁶

c. Their property relationship?

¹⁵⁴ Scot Law Com, *Report on Family Law*, No 135, 1992, para. 16.46.

¹⁵⁵ Family Law (Scotland) Act 2006, S. 27(1).

¹⁵⁶ Family Law (Scotland) Act 2006, S. 27(2).

As above, partners to an informal relationship may make agreement as to their respective property rights. Such an agreement might be used to rebut the statutory presumption in S. 26 of the Family Law (Scotland) Act 2006 to the effect that household assets are owned jointly. It should be remembered however that ownership of heritage depends on registered title and therefore joint ownership cannot be created simply by agreement between the parties.¹⁵⁷

d. Maintenance?

In principle, there is nothing to prevent a cohabiting couple making an agreement as to maintenance.

e. The duration of the agreement?

There is no specific regulation of the duration of any agreement between cohabitants. Scots law does not distinguish between ante-nuptial, post-nuptial and separation agreements in the context of marriage and therefore it would be unlikely for any restrictions to be placed on cohabitation contracts.

59. Are partners in an informal relationship permitted to agree on the legal consequences of their separation?

Although there is no specific statutory provision to this effect, it is generally assumed that they may. Separation agreements are a very common method of regulating the consequences of divorce and dissolution in Scotland. They are very well established and require no judicial scrutiny or approval. Anecdotally it is thought that, there is increasing use of such agreements by couples in informal relationships.

60. Are the agreements binding:

a. Between the partners?

It is widely assumed that cohabitation agreements are binding on the parties, subject to compliance with the general rules of contract requiring capacity and consent. There is little empirical evidence of their use in practice although anecdotally they are thought to be increasingly common.

b. In relation to third parties?

It is assumed that agreements between cohabitants would be binding for all purposes but there is little definitive authority. A recent case highlighted the possibility of challenge, by a trustee on sequestration, to an agreement between cohabitants as to equal ownership of assets.¹⁵⁸ In the absence of evidence of transfer for value, such an agreement might be set aside as a gratuitous transaction.

¹⁵⁷ See *Johnston's Trustee v Baird* 2012 CSOH 117.

¹⁵⁸ *Johnston's Trustee v Baird* 2012 CSOH 117.

61. If agreements are not binding, what effect, if any, do they have?

As discussed in the answer to Question 60, above, it is thought that agreements between cohabitants are binding and therefore this question is not relevant.

62. If specific legislative provisions regulate informal relationships, are the partners permitted to opt in or to opt out of this specific regulation?

The possibility of opting in or out of legislative provision is most likely to arise in the context of the provisions of the Family Law (Scotland) Act 2006. While there is no specific provision in the legislation dealing with this issue, it is widely assumed that parties may indeed make their own agreements by which they could opt out of the statutory regulation. The 2006 Act provisions have been strongly criticised for their lack of clarity and discretionary nature and it is likely that some couples may seek to achieve greater clarity and certainty by means of their own bespoke agreement.

63. When can the agreement be made (before, during, or after the relationship)?

This is not an issue expressly regulated by Scots law but, by analogy with agreements in the context of marriage, it would be reasonable to assume that they can be made at any time. Scots law does not distinguish between ante-nuptial, post-nuptial or separation agreements and it would therefore be reasonable to expect a similar approach to agreements made in the context of informal relationships.

64. What formal requirements, if any, govern the validity of agreements:

There are no formal requirements governing the validity of agreements between parties to an informal relationship. In Scotland, such agreements are often referred to as a Minute of Agreement and they are simply a form of contract. The format of the Minute of Agreement is by no means restricted to cohabitation agreements but can be used in a wide variety of situations where parties wish to reduce to writing their agreement. Such agreements have however become very commonly used to regulate the consequences of separation or divorce and they might similarly be used in the context of informal relationships.

a. As between the partners?

If agreement is reached between partners, it is likely to be recorded in a formal written agreement, often described in Scotland as a Minute of Agreement. Agreements between partners are enforceable, subject to the general rules of contract and there are no formal requirements. Such agreements are commonly registered for preservation and execution in a public register, the Books of Council and Session, and, by registration, they become directly enforceable, with the same effect as a court decree.

In order to create a binding contract between the parties, no particular form is required but in order to have it accepted by the Keeper of the Registers, the deed must be self-proving according to the Scots Requirements of Writing Act 1995; meaning that it must be signed by both parties and witnessed. The process of registration ensures the preservation or safe keeping of the agreement and provided the agreement includes consent to registration for execution, it will also result in the grant of warrant for execution of summary diligence. This allows the parties to enforce their agreement by means of summary diligence if necessary without recourse to the court.¹⁵⁹

b. In relation to a third party?

As above, there are no requirements for formal validity.

65. Is independent legal advice required?

There is no specific requirement of independent legal advice, or indeed any legal advice. Parties may make their own private agreement. In practice, however, agreements are usually made with the involvement of solicitors and, to strengthen the agreement against any possible contractual challenge, parties would be well advised to take independent legal advice.

66. Are there any statistics or estimations on the frequency of agreements made between partners in an informal relationship?

There are no official statistics on the frequency of agreements between partners to an informal relationship although two recent research reports offer some comment on their use. In research published in 2010 into legal practitioners' perspectives on the operation of the 2006 Act provisions on cohabitation, '[i]nterviewees varied widely when commenting on how common cohabitation agreements had become', with the researchers observing that it was clear that 'interviewees had expected them to have become much more common.'¹⁶⁰ In a study of a random sample of 600 family-based agreements, registered in Scotland in 2010, only five had been made by cohabitants.¹⁶¹

67. Are there any statistics or estimations regarding the content of agreements made between partners in an informal relationship?

¹⁵⁹ For further discussion of the use of minutes of agreement in Scots family law see J. MAIR, F. WASOFF and K. MACKAY, *All Settled? A study of legally binding separation agreements and private ordering in Scotland* (unpublished report), University of Glasgow, 2013, available at: eprints.gla.ac.uk/85810, at chapter 2.

¹⁶⁰ F. WASOFF, J. MILES and E. MORDAUNT, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (unpublished report), University of Cambridge, Nuffield Foundation, 2010, available at: crfr.ac.uk/assets/Cohabitation-final-report.pdf, at p. 77.

¹⁶¹ J. MAIR, F. WASOFF and K. MACKAY, *All Settled? A study of legally binding separation agreements and private ordering in Scotland* (unpublished report), University of Glasgow, 2013, available at: eprints.gla.ac.uk/85810, at p. 27.

No detailed evidence relating to the content of agreements is available. In-depth interviews with a sample of 19 family law practitioners in 2009-10 offered some insight into their views as to what might be included but little evidence as to what is in fact included in cohabitation agreements. The point was strongly made that cohabitation agreements can be 'bespoke': 'the great thing about a cohabitation agreement is you can tailor it.'¹⁶²

G. Disputes

68. Which authority is competent to decide disputes between partners in an informal relationship?

Any legal disputes between partners to an informal relationship can be resolved by the civil courts – the sheriff court or Court of Session – in the same way as any legal dispute between other, unrelated parties. The specific statutory rights which apply to cohabitants, in terms of the Family Law (Scotland) Act 2006 or the Matrimonial Homes (Family Protection) (Scotland) Act 1981 would usually be referred in the first instance to the local sheriff court.

69. Is that the same authority as for spousal disputes?

Yes, these are the same courts which would deal with spousal disputes.

70. Can the competent authority scrutinise an agreement made by the partners in an informal relationship? If yes, what is the scope of the scrutiny?

The starting point in Scots law is that there is a longstanding tradition of respecting the autonomy of parties to make their own agreements. This is well established within the context of marriage and it is widely assumed that a similar approach would be adopted in respect of informal relationships although this is largely untested in the courts. Within marriage or civil partnership, parties may enter into agreements before or during the relationship or on separation and these agreements are enforceable without any requirement of judicial scrutiny or approval.

Equally there is no provision for scrutiny of agreements between partners to an informal relationship. It is simply assumed that these will be treated as contracts in the same way as an agreement between two unrelated parties. It is of course open to either party to an agreement to challenge it in court on the basis of the general rules of contract, for example that it was entered into under duress or fraud. Beyond those general rules of contract, there is no specific provision for agreements between cohabitants.

¹⁶² F. WASOFF, J. MILES and E. MORDAUNT, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (unpublished report), University of Cambridge, Nuffield Foundation, 2010, available at: crfr.ac.uk/assets/Cohabitation-final-report.pdf, at pp. 79-84.

71. Can the competent authority override or modify the agreement on account of fairness towards a partner, the rights of a third party, or on any other ground (e.g. a change of circumstances)?

As explained above, there is no provision for any authority to scrutinise agreements other than the civil courts in the context where one party seeks to challenge the agreement on general contractual grounds, for example, of duress.

72. What alternative dispute-solving mechanisms (e.g. mediation or counselling), if any, are offered or required with regard to disputes arising out of informal relationships?

A range of alternative dispute resolution methods is available in Scotland, including mediation, collaborative law and arbitration. These are available to parties to informal relationships in the same way they would be available to any other parties seeking to resolve a dispute. There is no provision for compulsory reference to ADR and parties make use of ADR on a voluntary basis. The main forms of ADR in Scotland include mediation,¹⁶³ lawyer mediation and, more recently, family arbitration.

73. What are the procedural effects of an agreement on ADR between partners in an informal relationship? Can any partner seize the competent authority in breach of the ADR clause?

This is entirely a matter for agreement between the parties.

74. Are there any statistics or estimations on how common it is that partners in an informal relationship include an ADR clause in their agreement?

There is little evidence in general in respect of the number of agreements made between partners in an informal relationship and no evidence specifically in relation to the inclusion of an ADR clause.

In a recent study of separation agreements,¹⁶⁴ predominantly between married couples,¹⁶⁵ from a sample of 600 agreements, only one specified that it had been reached using mediation and a further five contained terms to the effect that any future dispute arising from the agreement would be referred to mediation.¹⁶⁶ It

¹⁶³ www.relationships-scotland.org.uk offers counselling, mediation and family support; www.calmscotland.co.uk provides solicitor mediation and www.flagscotland.com is the recently established Family Law Arbitration Group Scotland.

¹⁶⁴ J. MAIR, F. WASOFF and K. MACKAY, *All Settled? A study of legally binding separation agreements and private ordering in Scotland* (unpublished report), University of Glasgow, 2013, available at: eprints.gla.ac.uk/85810.

¹⁶⁵ From a random sample of 600 family agreements registered in 2010, only five related to cohabiting couples.

¹⁶⁶ J. MAIR, F. WASOFF and K. MACKAY, *All Settled? A study of legally binding separation agreements and private ordering in Scotland* (unpublished report), University of Glasgow, 2013, available at: eprints.gla.ac.uk/85810, at p. 84.

should be stressed that there is no requirement to declare in the agreement what means had been used but nonetheless there is relatively little evidence of the use of ADR in practice. The high incidence of negotiated settlement, as opposed to judicial resolution, is however an indication of the widespread practice of solicitor led negotiation, which might itself be regarded as a form of ADR.