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Marriage: a meaningful relationship?

For family lawyers with an interest in marriage, the latter decades of the 20th Century were lean times. Marriage was a settled subject. From the 19th Century Married Women's Property Acts through to no-fault divorce and financial provision in the 1970s and 80s, a century of legal reform had groomed a somewhat aged model and made it suitably modern for contemporary family law.¹ Nagging doubts remained about declining social relevance, accompanied by growing interest in alternative relationships, but these were concerns which tended to divert our gaze away from marriage itself and towards the other, newer possibilities: cohabitation, civil union, Pacs,² mother/child dyad,³ friendship.⁴ Marriage itself attracted relatively little attention.

Then into that quiet and settled landscape, there blew "a perfect storm."⁵ At the centre of the storm was same sex marriage but, caught up along with it, were calls and concerns from every perspective: conservative, liberal, religious, secular, feminist, functional, expressive.⁶ Far from being calm, settled and slightly overlooked, marriage has become fiercely contested and deeply controversial. Marriage is now at the centre of a struggle between conservatives and liberals, those who wish to preserve and those who wish to reform but, no matter the particular perspective or

¹ For an overview of this period of modernisation throughout Europe, see M Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective*, 2006, Intersentia, chapter 13.

² For example, R Probert and A Barlow, "Displacing marriage – diversification and harmonization within Europe" (2000) 12 *Child and Family Law Quarterly* 153; C Martin and I Thery, "The Pacs and marriage and cohabitation in France" (2001) 15 *International Journal of Law, Policy and the Family* 135.

³ MA Fineman, "Why Marriage?" (2001) 9 *Virginia Journal of Social Policy and the Law* 240.

⁴ J Eekelaar, *Family Law and Personal Life*, 2006, OUP, chapter 2.

⁵ An image borrowed from LD Wardle, "Marriage and Other Domestic Relationships: Comparative and Critical Equality Analysis of Differences in Form and Substance" (2012) 26(3) *Journal of Civil Rights and Economic Development* 663.

⁶ Some indication of the range of perspectives can be found in three recent edited collections on marriage: JA Nichols (ed), *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*, 2011, Cambridge University Press; M Garrison and ES Scott (eds), *Marriage at the Crossroads: Law, Policy and the Brave New World of Twenty-First-Century Families*, 2012, Cambridge University Press; J Miles, P Mody and R Probert (eds), *Marriage Rites and Rights*, 2015, Hart Publishing.

purpose, the predominant message is clear: marriage matters and what is at stake is its value; its essence; its meaning.⁷

What's law got to do with it?

So what is marriage; this concept so closely guarded by some and sought after by others? What does it mean? Not from a romantic, religious, personal or political perspective but from the perspective of family law.⁸ In recent commentary on marriage, the point is frequently made that, while marriage is a legal event, it “is not only a legal event”;⁹ while it is a legal contract, it is “not just a legal contract”.¹⁰ This acknowledgement of wider meaning, however, is often taken as a point of departure from which to explore these other meanings: the broader significance, the value of marriage beyond law. Relatively rarely¹¹ does reflection turn inwards to scrutinize the “legal event”; the “legal contract”. Perhaps it is assumed that the legal essence of marriage is so well understood, and so firmly embedded in family law, that it requires no explanation.¹² Value-laden marriage is a difficult institution for contemporary family law, with its preference for private ordering and its stance of apparent neutrality. Family lawyers may simply have lost the necessary language to discuss matters of meaning, in anything beyond the barest words of definition.¹³

Difficult questions perhaps are best avoided. Certainly in Scotland, there is a long established pattern of lawyers and law reformers “avoiding the question” when it

⁷ The importance of “meaning” particularly within the political debates concerning same sex marriage is highlighted in C Johnson, “Fixing the meaning of marriage: political symbolism and citizen identity in the same-sex marriage debate” (2013) *Continuum: Journal of Media and Cultural Studies* 242.

⁸ The absence of a statutory definition of marriage in many US states was a point explored by Walter J Wadlington in “Marriage: An Institution in Transition and Redefinition” in SN Katz, J Eekelaar and M Maclean (eds), *Cross Currents: Family Law and Policy in the US and England*, 2000, chapter 11. See too N Barker, *Not the Marrying Kind: A feminist critique of same-sex marriage*, Palgrave Macmillan, 2013, in particular chapter 1.

⁹ J Eekelaar, “Evaluating Legal Regulation of Family Behaviour” (2010) 1 *International Journal of the Jurisprudence of Family Law* 17, 26.

¹⁰ C Sorgjerd, *Reconstructing Marriage: The Legal Status of Relationships in a Changing Society*, 2012, Intersentia, 3.

¹¹ Although there is increasing interest in revisiting the legal meanings and definitions of marriage: eg, WJ Wadlington, “Marriage: An Institution in Transition and Redefinition” in SN Katz, J Eekelaar and M Maclean (eds), *Cross Currents: Family Law and Policy in the US and England*, 2000, chapter 11; N Barker, *Not the Marrying Kind: A feminist critique of same-sex marriage*, Palgrave Macmillan, 2013, 19-20.

¹² N Barker, *Not the Marrying Kind: A feminist critique of same-sex marriage*, Palgrave Macmillan, 2013, 19-20.

¹³ CE Schneider, “The Languages of the Law of Marriage” in M Garrison and ES Scott (eds), *Law, Policy and the Brave New World of Twenty-First-Century Families*, 2013, CUP, chapter 12.

comes to the meaning or essence of marriage. Rarely have we looked at marriage as a legal concept, as opposed to examining the mechanics of its constitution or the detail of its consequences. Looking back to 19th Century treatises on the law of husband and wife¹⁴ or further back to the founding fathers of Scots law, the Institutional Writers,¹⁵ the legal meaning of marriage was principled and clear. There was a coherent model, which made an explicit link between the discrete elements of the regulatory framework: the exchange of consent and the state of matrimony to which that consent gave access. Legal marriage required both elements, they were interdependent and each informed the other:

The relation of husband and wife is constituted by marriage, which may be defined (if there is any need of defining it)¹⁶ a union for life, formed by consent, between male and female, for the purposes of living in family and rearing children.¹⁷

While this legal model was both clear and coherent, it was increasingly out of date.

Subsequent reform followed two separate paths: one focusing on the event, the wedding, and the other on the contract, what it means to be husband and wife and, throughout this process of reform, Scots law and lawyers have repeatedly avoided the question of what marriage means. From the late 19th Century until the introduction of same sex marriage in 2014,¹⁸ there have been multiple commissions and committees tasked with formal review of legal marriage but each time, for various reasons, they have avoided the need, or missed the opportunity, to look at marriage as an integrated whole. Looking only at specific aspects of the law, they have tended to imply that there *is* something more to marriage but that “something more” happens not to be the topic of current review. Thus the essence of legal marriage remains elusive and it is always to be found elsewhere.

¹⁴ P Fraser, *Husband and Wife according to the Law of Scotland*, 2nd ed, 1876-78, Edinburgh.

¹⁵ Stair, *The Institutions of the Law of Scotland* (1681), edited by DM Walker, 1981, Edinburgh; Hume, *Lectures on the Law of Scotland, 1786-1822*, edited by GCH Paton, Edinburgh 1939-58.

¹⁶ Even then, there was a reluctance to define.

¹⁷ Hume, *Lectures on the Law of Scotland, 1786-1822*, edited by GCH Paton, Edinburgh 1939-58, 19.

¹⁸ The Marriage (Scotland) Act 1977 was amended by the Marriage and Civil Partnership (Scotland) Act 2014 to permit both same sex marriage and different sex marriage, with the first same sex marriages being solemnised just after midnight on 30 December 2014.

When the Morison Committee reported on the *Marriage Law of Scotland* in 1937,¹⁹ their remit was not to engage in substantial consideration of marriage but only to consider the rules relating to “the constitution of marriage”.²⁰ For the Kilbrandon Committee in 1969,²¹ their focus was again on the solemnisation of marriage and not “the rights, obligations or relations which follow”.²² For both, “[t]he institution of marriage itself”²³ was placed beyond the scope of their review. While these Committees focused on weddings and marriage registration, the Scottish Law Commission concentrated on the consequences of marriage but they too, in similar fashion, recommended isolated reforms without reference to any unifying model.²⁴

The recent debate, which preceded the introduction of same sex marriage in 2014, provided a fresh opportunity to consider “the core” of marriage²⁵ but once again Scots family law avoided engagement. Scrutiny of the Marriage and Civil Partnership (Scotland) Bill²⁶ was conducted by the Scottish Parliament’s Equal Opportunities Committee, reflecting the fact that same sex marriage was really more about equality and human rights than about family law. In the report of the Committee, there was much discussion and argument over the personal, philosophical and religious meaning(s) of marriage but, notably absent from the conversations was the voice of family law. “[M]arriage is about love”²⁷; “marriage is about commitment, children and complementarity”²⁸ but there was no clarification of what marriage “is about” in law. When asked for guidance as to whether there was a definition of marriage, the Cabinet Secretary responded that “there is clearly a definition in law ...”²⁹ but failed to specify what that definition might be.

¹⁹ Report of the Committee on the Marriage Law of Scotland (Morison Committee) (1937)

²⁰ Morison Report, p.4

²¹ Report of the Committee on the Marriage Law of Scotland (Kilbrandon Committee) (1969)

²² Morison Report, p.4

²³ Kilbrandon Report, p.7.

²⁴ Eg, the Scottish Law Commission’s Consultative Memorandum on *Some Obsolete and Discriminatory Rules in the Law of Husband and Wife*, No 54, 1982 which looked at a collection of rules which had become “anachronisms” and had as its focus provisions which were “inconsistent with the legal and social position of married women”, at para 1.1.

²⁵ LC McClain, “Love, Marriage and the Baby Carriage: Revisiting the Channelling Function of Family Law” (2006-07) 28 *Cardozo Law Review* 2133, 2152.

²⁶ The Bill and its accompanying documents can be accessed on the Scottish Parliament website at <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/64983.aspx>.

²⁷ Equal Opportunities Committee 5th Report, 2013 (Session 4), para 29: available at http://www.scottish.parliament.uk/S4_EqualOpportunitiesCommittee/Reports/eoR-13-05w-rev2.pdf.

²⁸ *Ibid*, para 90.

²⁹ *Ibid*, para 41.

Individual reviews and reforms have focused on particular aspects of marriage law, no doubt for good reason but, nonetheless, the combined effect has been the gradual, and perhaps unconscious, uncoupling of previously integrated elements. A century after the Victorian reformers first began the process of modernisation, we now have a much clearer, more efficient and administratively more certain system for the regulation of weddings³⁰ but we have little shared legal understanding of the “wedded state”³¹ and therein lurks the doubt as to what it is that defines legal marriage: where its fundamental meaning lies.

What makes it marriage?

The classic legal model of marriage depended on the symbiosis of two elements: matrimonial consent and the status of husband and wife. Marriage required both and each reflected and reinforced the other. The required consent was “matrimonial consent”, that is consent to be husband and wife, and what it meant to be husband and wife was clearly constructed by legally defined spousal obligations. The relationship of living together as husband and wife was premised on consent having been exchanged and it was that matrimonial consent which distinguished a couple living as husband and wife from a couple living together “in sin”, in concubinage or in some other form of relationship. The legal meaning of marriage subsisted in neither of these elements singly but rather was to be found in their reinforcing circularity:

cohabitation as husband and wife is a manifestation by daily conduct of the parties having consented to contract that relation inter se. It is a holding forth to the world, by the manner of daily life, by the conduct and demeanour of the parties, that the man and woman who live together have agreed to take each other in marriage.³²

If we accept that the value of contemporary marriage is to a considerable extent “conferred upon it by those who enter it”,³³ then the process of trying to define its value in legal terms may be regarded as of little import. Marriage is whatever each

³⁰ As set out in the Marriage (Scotland) Act 1977.

³¹ Hume, *Lectures on the Law of Scotland, 1786-1822*, edited by GCH Paton, Edinburgh 1939-58, at 26.

³² *Campbell v Campbell* (1867) 5M (HL) 115, per Lord Westbury at 140.

³³ J Eekelaar, “Evaluating Legal Regulation of Family Behaviour” (2010) 1 *International Journal of the Jurisprudence of Family Law* 17, 27

couple wants it to be. But is that what family law believes? As it has retreated from defining either matrimonial consent or the concept of living together as husband and wife, has the law created space for couples to inspire these concepts with their own meaning? Or does family law continue to build on the premise that marriage has some distinctive and objectively determined meaning? And if there is something distinctive about marriage where does that distinctiveness lie: in the wedding or in the wedded life?

These are not idle musings on a purely academic question but they are matters of increasing urgency in a family law framework which has expanded beyond the law of husband and wife to incorporate the law of civil partners and of unmarried cohabitants. In the UK, civil partnership was introduced in 2004 as a political compromise for same sex couples,³⁴ which “import[ed] almost the entire body of law relating to marriage into the new institution” but without using the word “marriage”.³⁵ When same sex marriage became legal,³⁶ civil partnership was retained and so now there are two distinct institutions, each almost identical to the other, with the anomaly that marriage is open to both same sex and different sex couples, while civil partnership remains restricted to the former.³⁷ In Scotland, there are also limited rights for unmarried cohabitants,³⁸ who qualify to claim³⁹ on the basis that they have lived together as if they were husband and wife.⁴⁰

Is it all about the wedding?

³⁴ Civil Partnership Act 2004.

³⁵ J Eekelaar, “Why People Marry: The Many Faces of an Institution” (2007) 41 Family Law Quarterly 413, at 425.

³⁶ By the Marriage (Same Sex Couples) Act 2013 in England and Wales and the Marriage and Civil Partnership (Scotland) Act 2014 in Scotland.

³⁷ Department for Culture, Media & Sport, *Civil Partnership Review (England and Wales) – Report on Conclusions*, 2014: accessible at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324174/Civil_Partnership_Review_Report_PDF.pdf. The Scottish government is currently consulting on what to do with civil partnership but the early indications are that it will not be reformed.

³⁸ Family Law (Scotland) Act 2006, ss25 – 29.

³⁹ *Ibid*, s25.

⁴⁰ *Ibid*, ss28 and 29. For discussion of the difficulties of this compromise position on cohabitants see EE Sutherland, “From ‘Bidie-in’ to ‘Cohabitant’ in Scotland: The Perils of Legislative Compromise” (2013) International Journal of Law, Policy and the Family 143; F McCarthy, “Playing the percentages: New Zealand, Scotland and a global solution to the consequences of non-marital relationships?” (2011) 24 New Zealand Universities Law Review 499.

If we are looking for the essence of what makes marriage distinctive, might it lie in the wedding? While marriage rates have been steadily declining for many decades, those “couples who *do* wish to marry want their wedding to be a ‘full flourish’”.⁴¹ In popular culture, the wedding has become a highly personalised event, a celebration of the couple and imbued with the meaning of their own relationship, but what does it mean for family law?⁴²

Scots family law is unusual in that until very recently it did not require a wedding in order to create a marriage. For Canon law, the essence of marriage was consent, and focus on this consensual nature led Scots law to retain irregular marriage long after it was abolished in other jurisdictions. Historically, although the majority of marriages were regular, a substantial number were irregular in that they came into being without ceremony or other formality.⁴³ While two forms of irregular marriage were abolished with effect from 1940,⁴⁴ the third, marriage by cohabitation with habit and repute, continued until 2006.⁴⁵ Framed as outdated, unruly and uncivilised,⁴⁶ throughout a lengthy campaign for reform, the final abolition of irregular marriage in 2006 was both inevitable and apparently positive. Without doubt, the peculiar legal requirements of marriage by cohabitation with habit and repute had become unsuited to contemporary society.⁴⁷ A different narrative, however, could have been constructed: one which highlighted the functional equivalence of couples who live in similarly committed lifestyles, regardless of public ceremony and which recognised the benefits of enabling the courts to treat as marriage “associations which have been marriages in all but name”.⁴⁸ Set against what is known of contemporary social

⁴¹ J Haskey in J Miles, P Mody and R Probert (eds), *Marriage Rites and Rights*, 2015, Hart Publishing, at 51.

⁴² For discussion of changing trends in weddings, see R Probert, “From this Day Forward? Pre-marital Cohabitation and the Rite of Marriage from the 1960s to the Present Day” in J Miles, P Mody and R Probert (eds), *Marriage Rites and Rights*, 2015, Hart Publishing, 57 and, specifically in the Scottish context, SR Charsley, *Rites of Marrying: The wedding industry in Scotland*, 1991, Manchester University Press.

⁴³ For an indication of the levels of irregular marriage, see E Gordon, “Irregular Marriage and Cohabitation in Scotland 1855-1939” *Official Policy and Popular Practice* (2015) 58 *The Historical Journal* 1059; B Dempsey, “Making the Gretna Blacksmith Redundant: Who Worried, Who Spoke, Who Was Heard in the Abolition of Irregular Marriage in Scotland” (2009) 34 *Journal of Legal History* 23.

⁴⁴ *Marriage (Scotland) Act 1939*, s5.

⁴⁵ It was abolished, prospectively, by the *Family Law (Scotland) Act 2006*, s3.

⁴⁶ See *Report of the Royal Commission on the Law of Marriage*, 1868 at xxviii.

⁴⁷ Scottish Law Commission, *Family Law: Pre-Consolidation Reforms*, Discussion Paper 85, 1980, para 2.4.

⁴⁸ Kilbrandon Committee on *The Marriage Law of Scotland*, Cmnd 4011 (1969), para 143.

attitudes,⁴⁹ the view that “the rite of marriage has lost much of the social significance it once had”,⁵⁰ not to mention the cost of weddings, the legal shift from the old “irregular” view of marriage, which was prepared to overlook the absence of a wedding, to the new, which regards the wedding as the essential signifier, becomes of less obvious merit.

In other ways, weddings have also moved to the fore in Scots family law. Scotland has a long established reputation as a wedding destination. Unlike many European jurisdictions, it offers both civil and religious marriage and in contrast to England, where the regulation of marriage formation is beset by complexity and structural constraint,⁵¹ the Scottish system is simple and flexible. Most recently, choice has been further extended beyond religious or civil weddings through the authorisation of celebrants of non-religious “belief organisations”, initially on a temporary basis and now as the result of a statutory amendment which has replaced the previous category of religious celebrant with a new category of “religious or belief”.⁵²

There is undoubtedly demand for humanist and other belief weddings in Scotland⁵³ and the statutory amendment was not a matter of any controversy, but simply a small step in the progress of religious and belief equality. In England, by contrast, the government refused to legalise humanist marriage ceremonies and instead referred the matter to the Law Commission for detailed consideration. While there is much to be said for the ease of change which resulted from the flexible, responsive and pragmatic Scottish system, the deliberations of the English Law Commission make explicit some of the uncertainties which remain unconsidered in Scotland.⁵⁴ Permitting couples to design their own ceremony and to construct their individual vows enables

⁴⁹ J Eekelaar and M Maclean, “Marriage and the Moral Bases of Personal Relationships” (2004) 31 *Journal of Law and Society* 510, 517-523.

⁵⁰ R Probert, “From this Day Forward? Pre-marital Cohabitation and the Rite of Marriage from the 1960s to the Present Day” in J Miles, P Mody and R Probert (eds), *Marriage Rites and Rights*, 2015, Hart Publishing, at 57.

⁵¹ As is evident in Law Commission, *Getting Married: A Scoping Paper*, 2015, chapter 1: available at www.lawcom.gov.uk.

⁵² *Marriage (Scotland) Act 1977*, s8, as amended by the *Marriage and Civil Partnership (Scotland) Act 2014*, s12.

⁵³ From a relatively modest 434 humanist ceremonies in 2006, the figure in 2014 was 3551 and numbers continue to grow: the latest annual statistics for all marriages by type of ceremony are available at: <http://www.nrscotland.gov.uk/files//statistics/vital-events-ref-tables/2014/section-7/14-vital-events-ref-tab-7-5.pdf>.

⁵⁴ Law Commission, *Getting Married: A Scoping Paper*, 2015: available at www.lawcom.gov.uk.

them “to make their commitment to each other in a way that is meaningful for them”⁵⁵ but, as the Law Commission indicated, this must be subject to some limit. It “does not and should not mean that the law should regard any expression of commitment as a marriage”.⁵⁶ Without clearer definition of what legal marriage is, however, it is difficult to see where to draw this line.

Wedding ceremonies tell us more about fashion than about marriage but the wealth of current rituals and symbolism stand in stark contrast to the rather empty concept of contemporary legal marriage.⁵⁷ “Belief” weddings are well known for promoting the celebration of the individuals⁵⁸ but in Scotland civil weddings, once thought of as simple, business like affairs, are also changing. With minimal legal prescription, local registrars are encouraging couples to write their own promises and vows and to incorporate rituals such as the intermixing of sand, the lighting of “Unity” candles and the ancient Celtic ceremony of “handfasting”. Weddings offer couples the opportunity to make their own meaning, in the presence of their own communities, but the extent to which that meaning is constrained by any underlying legal model has barely been considered in Scots family law. It is only in the context of immigration law and policy, dominated by the spectre of the “sham marriage”, that the link between a wedding and a “genuine relationship”⁵⁹ is made explicit. More broadly the question remains unresolved as to whether “marriage has become a matter of form, effected where prescribed procedures are followed ... or involves matters of substance that go to the root of the marriage relationship”.⁶⁰ While couples who marry in Scotland are free to create the wedding of their choice, in the absence of explicit legal spousal obligations, there is little clarity about to the extent to which, by creating their own vows, they are also defining their own version of matrimony: a marriage “created by the couple, for the couple”.⁶¹

⁵⁵ Ibid, para 3.9.

⁵⁶ Ibid.

⁵⁷ A point highlighted in SR Charsley, *Rites of Marrying: The wedding industry in Scotland*, 1991, Manchester University Press, 13.

⁵⁸ See, eg, the website of Humanist Society Scotland; the biggest provider of belief ceremonies in Scotland: https://www.humanism.scot/humanist-ceremonies/weddings_civil_partnerships.

⁵⁹ Immigration and Asylum Act 1999, s24(5)(b).

⁶⁰ *H v H* 2005 SLT 1025 at 1033.

⁶¹ M Gallagher, “What is Marriage For? The Public Purposes of Marriage Law” (2001) *Louisiana Law Review* 1 at 3.

Or is it the way of life?

While weddings have moved to the fore in Scotland, the legal parameters of the relationship of husband and wife have all but disappeared. Scots family law operates a system of strict separation of property during marriage,⁶² parentage and parenting are almost, although not quite, divorced from marriage,⁶³ divorce is available on no-fault grounds⁶⁴ and, although there are principles for property sharing on divorce,⁶⁵ there is also extensive autonomy allowing couples to contract out of their application. While the obligation of financial maintenance during marriage remains,⁶⁶ there is little other explicit prescription as to what it means to live together as husband and wife. Scots law, however, continues to use the phrase “living together as husband and wife” as if it were a term of art, “a familiar concept,”⁶⁷ and it is left to the courts to try to discern within it some objective meaning.

Living together as husband and wife, or rather its absence, goes towards the establishment of irretrievable breakdown as grounds for divorce. A couple are held “to cohabit with one another only when they are in fact living together as man and wife”⁶⁸ and while the courts, on occasion, have had to determine this issue, the vast majority of divorce actions are undefended and thus the decision is commonly left to the couple. The date at which a couple cease to cohabit is also relevant, and potentially more contentious, in the context of financial provision on divorce.⁶⁹ The starting point for financial provision is fair sharing of the fund of matrimonial property:⁷⁰ that is property acquired during the marriage and before the “relevant date”.⁷¹ The relevant date is the date at which the couple ceased to cohabit.⁷² While fixing the relevant date can have a significant impact on the value of matrimonial property, it is often a matter of negotiated agreement between the parties, thus avoiding the need for the court to scrutinise their relationship. Some insight into how

⁶² Family Law (Scotland) Act 1985, s24.

⁶³ Children (Scotland) Act 1995, s3.

⁶⁴ Divorce (Scotland) Act 1976, s1(2)(d) and (e).

⁶⁵ Family Law (Scotland) Act 1985, s9.

⁶⁶ Family Law (Scotland) Act 1985, s1(1)(a) and (b).

⁶⁷ *Harley v Robertson* 2012 GWD 4-68.

⁶⁸ Divorce (Scotland) Act 1976, s13(2).

⁶⁹ Regulated by the Family Law (Scotland) Act 1985, ss8 – 14.

⁷⁰ *Ibid*, s9(1)(a).

⁷¹ *Ibid*, s10(4).

⁷² Or alternatively the date on which the divorce summons is served, whichever is earlier: *ibid*, s10(3). Cohabitation is defined in s27(2) of the 1985 Act in the same terms as in the Divorce (Scotland) Act 1976, s13(2).

the courts will determine non-cohabitation is offered by the decisions of *Banks v Banks*⁷³ and *Bain v Bain*.⁷⁴ It is a matter of fact in each individual case and determination of when a couple cease to live together as husband and wife will depend to some extent on what might be described as their normal relationship. In some cases that “normal” is “depressing, if not distressing”,⁷⁵ with a couple being judged still to be cohabiting as husband and wife even where there had been no sexual relations for many years and despite “the absence of any affection”.⁷⁶

It is somewhat ironic that the richest source of contemporary commentary in Scots law on the relationship of husband and wife is to be found in the developing law of unmarried cohabitation.⁷⁷ Eligibility to claim as a cohabitant, for discretionary financial provision when cohabitation comes to an end by reason of separation or death, depends on meeting the test of “living together as husband and wife”.⁷⁸ With a lack of clarity as to what this means within the context of marriage and in light of evidence that “[b]ehavioural expectations in informal unions vary”,⁷⁹ the challenge for the courts is clear. While in the earliest cases under the new legislation, cohabitation was admitted, perhaps as the possibility of financial awards becomes more established, parties are more frequently challenging the assertion that they have lived as husband and wife.⁸⁰ Although cohabitation is widely regarded as a “modern” lifestyle, there is a notable reliance on a very old-fashioned model. One sheriff cited a judicial description from 1948 of living together as husband and wife as: “the wife rendering housewifely duties to the husband and the husband cherishing and supporting [her] as a husband should do”.⁸¹ While he commented disparagingly that this was “scarcely an accurate description of a modern marriage”,⁸² it is notable that the withdrawal of cooking and laundry services, much more than the absence of sexual relations, are determinative of the end of cohabitation as husband and wife.

⁷³ 2005 Fam LR 116.

⁷⁴ 2008 Fam LR 81.

⁷⁵ 2005 Fam LR 116 at para 36.

⁷⁶ *Ibid.*, at para 37.

⁷⁷ Family Law (Scotland) Act 2006, ss25 – 29.

⁷⁸ *Ibid.*, s25.

⁷⁹ ES Scott, “A World Without Marriage” (2007) 41(3) Family Law Quarterly 537 at 548.

⁸⁰ F McCarthy, “Defining Cohabitation” (2014) 31 Scots Law Times 143.

⁸¹ *Gutcher v Butcher*, 2014 GWD 31-610, at para 13.

⁸² *Ibid.*

While for many years Scots law, and the Scottish courts, have tended to avoid detailed engagement with what it means to live together as husband and wife, within marriage, they are now being forced to discover its meaning within the context of informal cohabitation. The difficulties are increasingly evident and as one sheriff commented, cohabitation is “not the relationship of husband and wife albeit the definition ... uses the analogy of living together as husband and wife”.⁸³

Still meaningful?

Much “current legal discourse [about marriage] is polarized”⁸⁴ and in that atmosphere there is a danger of arguments becoming associated with one extreme or the other. There is a strong narrative which presents marriage as “an institution in crisis”⁸⁵ and against that it can be difficult to raise questions of meaning. Much contemporary family law struggles with the place of principles and values. It wants to be modern (postmodern) and responsive but in places it clings to the remnants of an older, more prescriptive ideology. It wants to be simple and clear but, in the drive to be flexible and pragmatic, it can lose coherence and become chaotic. There is “suspicion” of “legal enforcement of spousal commitment”⁸⁶ but in the absence of clear commitment, meaning becomes difficult to discern. These tensions are not new but in the context of a revived interest in marriage they are increasingly troubling. Many jurisdictions are engaged in the process of reforming the rules in an area, which in apparently simpler times, we called the Law of Husband and Wife. In so doing, they are all faced with broadly similar evidence of demographic change and social behaviour, and although the individual reforms of different jurisdictions may differ in degree, there is a common theme around the extent to which marriage remains in some way legally “special”.

Scotland is one of many jurisdictions struggling with the remnants of the privileged status of marriage while trying to respond to demographic change and social demand

⁸³ Ibid, at para 34.

⁸⁴ S Lifshitz, “The Pluralistic Vision of Marriage” in M Garrison and ES Scott (eds), *Marriage at the Crossroads: Law, Policy and the Brave New World of Twenty-First-Century Families*, 2013, CUP, 260.

⁸⁵ M Gallagher, “What is Marriage For? The Public Purposes of Marriage Law” (2001) 62 Louisiana Law Review 1, 18.

⁸⁶ ES Scott, “Social Norms and the Legal Regulation of Marriage” (2000) 86 Virginia Law Review 1901, 1963.

for other legally recognised formats. The mixed messages that Scots law sends are summed up in two separate statements from a recent government publication designed to give guidance on marriage and family law:

Marriage is special, it is the pillar around which so much of the strength of family life is built, and it deserves to be cherished.⁸⁷

Families now come in all shapes and sizes and every family is important no matter how it is formed.⁸⁸

The problem is often identified as a problem of social and demographic change but family law itself “is a critical but often unappreciated part of the problem”.⁸⁹ To some extent Scots law holds onto the notion that marriage is still special and yet it has failed or omitted to identify what it is that makes it special. While reformers try to respond to changing family life and to the needs of contemporary society, their failure to deal with these underlying tensions has an impact. The absence of clear legal meaning in marriage is not simply an interesting oddity, in stark contrast to the deeply held and strongly expressed philosophical and moral meanings in current discourse, but increasingly the cause of artificial distinctions in practice.⁹⁰ Resolving the tensions is by no means an easy task but we should begin to try.⁹¹ During the quiet years when marriage received little scrutiny, we could get by with only vague references to its “well established meaning” or to its “universal understanding”. Now that it is once more the centre of attention, the lack of meaning and the absence of contemporary definition is increasingly troubling. If marriage is to be retained as a special institution in law then it needs more careful scrutiny to clarify what it is that makes it special and what family law expects from it. It is of course possible that, in

⁸⁷ Scottish Executive, Family Matters: Marriage in Scotland: accessible at <http://www.gov.scot/Resource/Doc/113328/0027452.pdf>.

⁸⁸ Ibid.

⁸⁹ C Huntington, “Postmarital Family Law: A Legal Structure for Nonmarital Families” (2016) 67 *Stanford Law Review* 167, 170.

⁹⁰ *Steinfeld v Secretary of State for Education* [2016] EWHC 128.

⁹¹ There may be no easy answers but at least we are beginning to ask the questions: CE Schneider, “The Languages of the Law of Marriage” in M Garrison and ES Scott (eds), *Law, Policy and the Brave New World of Twenty-First-Century Families*, 2013, CUP, at 258.

the process of searching for meaning, we will decide that family law has moved “beyond marriage”.⁹²

⁹² LC McClain, “Love, Marriage and the Baby Carriage: Revisiting the Channelling Function of Family Law” (2006-07) 28 *Cardozo Law Review* 2133, 2182.