

LEGAL PRACTITIONERS' PERSPECTIVES ON THE COHABITATION PROVISIONS OF THE FAMILY LAW (SCOTLAND) ACT 2006

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PART 1. BACKGROUND: SETTING THE SCENE

CHAPTER 1. INTRODUCTION

"The Scottish Ministers aim to provide a clearer statutory basis for recognising when a relationship is a cohabiting relationship; and a set of principles and basic rights to protect vulnerable people either on the breakdown of a relationship, or when a partner dies. The Scottish Ministers do not intend to create a new legal status for cohabitants. It is not the intention that marriage-equivalent legal rights should accrue to cohabiting couples, nor is it the intention to undermine the freedom of those who have deliberately opted out of marriage or of civil partnership. The Scottish Ministers consider it vital to balance the rights of adults to live unfettered by financial obligations towards partners against the need to protect the vulnerable. [Scottish Executive 2005a, para 65]

Scotland, in common with many other Western jurisdictions, has since the 1960s experienced relatively rapid demographic change. More individuals are now living in non-traditional family forms, and – a more recent trend – many more children are being born to parents who are not married.¹

How the state, and family law in particular, should respond to such increased diversity in family life can be a hotly contested political question.² On one view, classically exemplified by a remark attributed to Napoleon, cohabitants ignore the law (of marriage) and so the law ignores them. On this “formalist” view, unless a couple comply with the form of relationship (marriage) prescribed by law, they cannot expect the law to protect their interests. Others, by contrast, are concerned that cohabiting families face many of the same practical problems as married families, and that family law should be not formalist but “functionalist”, intervening to protect whoever may be vulnerable when relationships end. Some would go as far as to assimilate the position of cohabitants and spouses.³ Others, concerned to preserve the distinctiveness of the

¹ See further in chapter 2.

² Note, for example, current debates around the recognition of marriage through the tax system, prompted by the Conservative Manifesto 2010, p 41.

³ See by way of recent example reform of Australian family law: Family Law Act 1975, as amended in 2008. See also New Zealand’s Property (Relationships) Act 1976 and Family Proceedings Act 1980, both as amended in 2002 and subsequently.

institution of marriage and/or the autonomy of those who have not elected to join that institution, seek a middle course.⁴

The Family Law (Scotland) Act 2006 introduces new financial remedies for cohabitants on relationship breakdown and on death of one partner.⁵ Reflecting the policy articulated in the opening quotation above, the Act does not set out to afford to cohabitants the same rights and protections in this field as divorce and succession law afford to spouses and civil partners, but instead aims to create a middle way between the protection afforded to spouses and civil partners and no protection at all. This approach is intended to recognise the various reasons why people choose to live together without formalising their relationship in marriage or civil partnership and to preserve the legal distinctiveness of those institutions, whilst also providing some measure of protection to those who are economically vulnerable at the end of cohabiting relationships, together (indirectly) with their children. Introducing some measure of financial provision in private law for cohabitants may also help reduce the burden on the public purse that may otherwise arise in supporting those experiencing economic hardship.

The relevant parts of the Act having come into force in May 2006, the new law has now been in operation long enough to warrant an examination of the operation of the principal provisions relating to cohabitation. Such a review is useful for Scotland, to evaluate the Act's operation and identify any problems which might require the amendment of either primary legislation or rules of court, and to feed into ongoing reform discussions (notably in relation to succession law – see Scottish Law Commission 2009). In the absence of data about the overseas cohabitation schemes,⁶ empirical research about the operation of the new Scottish law may also be of interest

⁴ See for example the recommendations of the Law Commission for England & Wales (Law Com 2007); Sweden's Cohabitees Act 2003; the cohabitation provisions in Ireland's Civil Partnership Bill.

⁵ We describe the law in detail in chapter 3 and Appendix 4.

⁶ There has been no research, for example, into the practical operation of New Zealand laws which both amended remedies available to spouses on divorce and death and extended those new laws to cohabitants in 2002; nor are we aware of any large scale research into the various cohabitation laws which have operated in Australian states and Canadian provinces since the 1970s and 1980s; for one Australian study, see Millbank (2000).

to policy-makers in other jurisdictions, such as the Republic of Ireland⁷ and England & Wales⁸ which have yet to introduce financial remedies for cohabitants.

The law having been in force for only four years (just over three when our fieldwork began), our findings necessarily give an “early days” impression at a time when there is relatively little reported case law under the Act. Unsurprisingly, practitioners and judges are still feeling their way. We would recommend that further research be undertaken after the Act has been in force for ten years, in order to see how law and practice in this area develop over time.

This report is in three parts. Part 1 sets the scene by outlining the background to the study—its social context, its law and policy context and the research methodology. Part 2 presents the findings of the main, empirical component of the study. The findings from the online questionnaire are followed by the in-depth telephone interviews and the vignettes presented to family lawyers. Part 3 discusses the findings in relation to future directions, first in Scotland and then any potential implications that they might have for England and Wales. Appendix 4 discusses all reported cases as of March 2010 involving the relevant parts of the 2006 Act.

⁷ The Civil Partnership Bill 2009, currently at Committee stage in the Dáil Éireann, would, as well as introducing same-sex civil partnership, enact the Law Reform Commission’s recommendations relating to cohabitants (2006).

⁸ We consider the potential implications of our findings for England and Wales in chapter 9.

CHAPTER 2. THE SOCIAL CONTEXT OF COHABITATION IN SCOTLAND

The growth in unmarried cohabitation in Scotland, as in other western post-industrial societies, was one of the important drivers of law reform culminating in sections 25 to 29 of the Family Law (Scotland) Act 2006, the subject of this research study. To briefly set the social context for the study, we present here an overview of the diversity of family structures in Scotland, how that is likely to look in the future and a statistical profile of the population in Scotland of cohabiting adults, compared with the population of adults living in married partnerships.

DIVERSITY OF FAMILY STRUCTURES

Family structures change and develop constantly and are still doing so. The 2006 Act more nearly reflects the diversity in the make-up of families. Across Great Britain the structure that has been until quite recently considered to be the norm, i.e. the nuclear family of two parents of opposite sex and married to each other, is steadily changing. *Social Trends* (ONS 2009) shows that, since the 1960s, there have been several long-term trends that have affected UK families, the most significant being:

- rises in the numbers of people cohabiting
- rises in the number of children being born to unmarried parents
- rises in the number of people living alone and
- a fall in marriage rates.

There has, indeed, been a marked increase in the number of people cohabiting:

- 24% of unmarried men aged 16 to 59 in 2006 were cohabiting in Great Britain; 11% were doing so in 1986;
- 25% of unmarried women aged 16 to 59 in 2006 were cohabiting in Great Britain; 13% were doing so in 1986 (ONS 2009 p. 21).

A glimpse of the make-up of Scottish society can be seen in the Scottish Household Survey 2007-08 (Scottish Government 2009), where the marital status of a representative sample of all adults aged 16 and over was as follows:

- 48% were married
- 10% were cohabiting/ living together
- 0% were in civil partnerships (i.e. less than 0.5%)
- 27% were single/ never married

- 8% were widowed
- 6% were divorced
- 2% were separated (Table 2.2.1d).

The trend in Scotland towards increasing cohabitation rates has been evident for some time. The General Register Office for Scotland, reporting on the 2001 census data, shows that married couple families represented 43% of all families in contrast with 51% in 1991, while the percentage of cohabiting couple families rose from 4% in 1991 to 7% in 2001. It is projected that the 2011 census will show a continuation of this increasing trend. The report also shows that when all categories of family types are considered then dependent children were more likely to be in lone parent or cohabiting couple families in 2001 than in 1991 (quoted in Morrison et al 2004, p. 2).

Pre-marital cohabitation has now become the norm, while cohabitation is the most common type of first co-resident partnership. As we discuss below, cohabitation rates vary considerably by age.

In addition to these changes in partnership patterns, the context of parenthood has also changed. In the most recent Registrar General's Annual Review of Demographic Trends for Scotland (General Register Office of Scotland 2009, p. 25), reporting 2008 data, just over half (50.1%) of all births in Scotland were extramarital, the great majority of which (93%) were registered by both mother and father and many of which were to cohabiting couples. This rate is about twice that of only twenty years ago: 24.5% of births in 1988 were extramarital.

The generational changes are illustrated by women's experiences of family events compared across age groups (ONS 2009 p. 22), reflecting the trends of delayed marriage and motherhood and increasing levels of cohabitation, in 2001-03:

- 1% of women aged 55 to 59 had cohabited before the age of 25
- 21% of women aged 25 to 29 had done so
- 75% of women aged 55 to 59 had been married before the age of 25
- 24% of women aged 25 to 29 had been
- 51% of women aged 55 to 59 had become a mother before the age of 25
- 30% of women aged 25 to 29 had done so.

FAMILY STRUCTURES - LOOKING TO THE FUTURE

In the Scottish Government's 2006 working paper entitled *Trend Analysis: Life Course* (part of the Futures Project) such shifts were expected to continue (Scottish Executive 2006). This working paper identifies key trends that are likely to have an impact on Scotland by 2025. One such trend is the pattern of partnering, and increased cohabitation, which demonstrates the changing attitudes toward what has been regarded as the traditional family grouping. While the paper stresses the need to understand trends in marriage and divorce in the context of increasing cohabitation, delayed parenting, lone parenthood and living alone, it does appear that family formations are becoming 'more fluid' (point 22) than previously had been the case with most people experiencing a number of different family formations and transitions during their adult lives.

The paper identifies how cohabitation 'has moved from a minority to a dominant family type in the UK' (point 23). However, the durability of such partnerships is an important aspect for the development of government policy and legislation because, as the report points out, 'these cohabitations rarely last long-term' (op. cit.) [i.e. *as unmarried unions*; they may end in separation or death, or translate to marriage]. Furthermore, the report highlights the growing trend for cohabitation and parenthood to go hand-in-hand. Governmental policy related to the support of children is likely, therefore, to be affected by the growth in cohabitation, since current cohabiting relationships are less stable than married ones and since there is an increasing number of children born into them, this would be likely to lead to growing numbers of children facing family transitions. The report also expects the incidence and the duration of cohabitation to increase over time, as cohabitation is more common among younger people.

The report underlines the changes in attitudes towards both marriage and cohabitation with the latter being seen as both a prelude and an alternative to marriage. While this change in attitude is age related, with younger people being more tolerant in their attitudes, the report observes in point 28 that this attitudinal trend does not appear to be endless as a plateau in opinion now seems to have been reached (Scottish Executive 2006, p. 6), quoting evidence that the most recent cohort is no more liberal than its immediate predecessors.

SOCIAL ATTITUDES TOWARDS COHABITATION

Other social surveys have shown a similar shift in attitudes (often generational) towards marriage, cohabitation and family life. In 2006, for example, 66% of those surveyed in Great Britain thought there was little social difference between being married and living together and only 29% felt married couples made better parents than unmarried ones (ONS 2009 p. 20). Nonetheless, 56% of adults surveyed agreed marriage was the best kind of relationship and 64% of respondents agreed that marriage was financially more secure than cohabitation (op cit). Similar attitudes prevail in Scotland. A 2004 module of the Scottish Social Attitudes Survey found there is support, though less than in the past, for marriage as the preferred setting for having children. In 2004, 48% of respondents thought that people who want children should marry, a lower proportion than the 55% of respondents in 2000 who thought so (Wasoff and Martin 2005, p. 49).

The myth of the common law marriage

A majority of the Scottish population believed, mistakenly, in both 2000 and 2004, as measured by the Scottish Social Attitudes Surveys, that common law marriage existed in Scotland, giving unmarried couples who had lived together for some time the same legal rights as married couples.⁹

A STATISTICAL PROFILE OF COHABITATION IN SCOTLAND

In the remainder of this chapter, we elaborate further on the nature and extent of the differences between the population of cohabiting and married adults in Scotland, drawing on published data from *Scotland's Population--the Registrar General's Annual Review of Demographic Trends*, the Scottish Household Survey 2007-2008, and our own secondary analysis of the Scottish Household Survey 2005-2006, the most recent available dataset.

As noted earlier, according to the most recent Scottish Household Survey 2007-2008 (2009, p. 12), 10% of adults aged 16 or over were cohabiting or living together, compared to 48% who were married. Based on the General Register Office for

⁹ In 2000, 58% of a nationally representative sample agreed with the proposition: "As far as you know, do unmarried couples who live together for some time have a 'common law marriage' which gives them the same legal rights as married couples?", declining to 51% in 2004 (Wasoff and Martin 2005, p. 42). Such a belief appears in others jurisdictions also, see Wang (2007) for comments on China and the USA. Cf ch 3 on the law of marriage by cohabitation with habit and repute.

Scotland's estimate of the size of the Scottish population in June 2008 of 5,168,500 (GROS 2009) and that 72% were aged 16 and above (3,721,320), there was an estimated population of 372,000 cohabiting adults in Scotland in 2008.

Cohabitation and marriage by age

Cohabitation is most prevalent in younger age cohorts, compared with marriage which is more prevalent for older adults. Tables 2.1, comparing the age distributions of cohabiting and married adults, shows that over four fifths, 81%, of all cohabitants are aged 44 or less, with majority (57%) aged 34 or less. The peak ages for cohabitation are between 25 to 34 years; 36% of all cohabiting adults are in this age group. In contrast 88% of married adults are aged 35 or more, with two thirds aged over 45 years.

Table 2.1. Cohabitation and Marriage by Age (column percents) 2007-08

	Cohabiting	Married/CP	All
16-24	21	1	16
25-34	36	11	15
35-44	24	22	18
45-59	14	34	24
60-74	4	26	19
75+	1	7	9
Total	100%	100%	100%
N	1,768	10,426	24,610

Derived from Table 2.2b, Scottish Household Survey 2007/08 (2009): <http://www.scotland.gov.uk/Resource/Doc/283301/0085783.pdf>, p. 12

Table 2.2 shows the proportions of each age cohort who are either cohabiting or married. We can see that about one quarter of the 25 to 34 age cohort (24%) are cohabiting, compared to just over one third (34%) who are married (GROS 2009).

Table 2.2. Cohabitation and Marriage by Age (row percents) 2007-08

	Cohabiting	Married/CP	All	N
16-24	13	4	100%	1,870
25-34	24	34	100%	3,200
35-44	13	57	100%	4,370
45-59	5	66	100%	5,988
60-74	2	65	100%	5,934
75+	1	39	100%	3,247
All	10	48	100%	24,610

Derived from Table 2.2a, Scottish Household Survey 2007/08 (2009): <http://www.scotland.gov.uk/Resource/Doc/283301/0085783.pdf>, p. 12

Cohabitation and housing

These significant age differences between the two populations of married and cohabiting adults will also account, to some extent, for some of their other key differences. For example, in relation to housing, in 2005-06, 35% of married adults, compared with 9% of cohabiting adults, owned their homes outright (own analysis of the Scottish Household Survey 2005-06) Table 2.3). Some of this difference may be due to age, but not all differences can be explained by age differences, for example, cohabiting adults are twice as likely (24%) as married adults (12%) to rent their homes from social landlords, and even more likely to be private rented sector tenants (13%, compared to 4%), all factors that will bear upon the likelihood of a claim should the relationship break down.

Table 2.3. Housing tenure by whether cohabiting or married, (column percents) 2005-06

	Cohabiting	Married/CP	Total
Owned outright	9	35	31
Buying with help of loan/mortgage	52	48	49
Rent - LA/SH	17	9	10
Rent - HA, Co-op	7	3	4
Rent - private landlord	13	4	5
Other	2	2	2
Total (N)	2572	14917	17489
	100%	100%	100%

Source: own analysis of Scottish Household Survey 2005/06.

Looking more closely at housing tenure for a particular age cohort, namely 25 to 34, the peak period for cohabitation, we can see that not all housing tenure differences are

age-related. While 56% of cohabiting adults in this age group are buying their own homes with a mortgage, 71% of married adults are doing so. In comparison, 11% of married adults and 22% of cohabiting adults aged 25 to 34 rent from a social landlord, and 10% and 16% respectively from private landlords.

A further housing dimension in which cohabiting adults differ from their married counterparts is in the type of house in which they live, a difference also that is likely to be partly due to age differences. Cohabiting adults are much more likely than married adults to live in a flat (42%, compared to 17%), and less likely (33%, compared to 61%) to live in a detached or semi-detached house.

Table 2.4. Property type by whether individual is cohabiting or married (column percents), 2005-2006

	Cohabiting	Married/CP	Total
Detached house	13	32	29
Semi-detached house	20	29	27
Terraced house	25	23	23
Flat/maisonette	42	17	20
Total	100%	100%	100%
N	2571	14916	17487

Source: Own analysis of Scottish Household Survey 2005/06

These differences in housing tenure and property type are related to the spaciousness of accommodation. The Scottish Household Survey defines this in terms of bedroom standard, and whether the household is above, at, or below the bedroom standard for the household size in which a person lives. We find in our analysis of the SHS 2005-06 that 43% of cohabiting adults live in houses at or below standard, compared to 24% of married adults in these categories, most of these in the 'equal to standard' category.

As far as neighbourhood and community circumstances are concerned, a standard measure of area deprivation is the Scottish Index of Multiple Deprivation (SIMD). By this measure, cohabiting adults are twice as likely to live in a deprived area as married adults; 21% of cohabiting adults, compared to 10% of married adults live in the most deprived 15% of SIMD data zones. When asked how they would rate their area as a place to live, cohabiting adults were almost twice as likely as married adults to say it was fairly poor or very poor (9% compared with 5%).

Cohabitation, marriage and household income and employment

The social class differences between cohabiting and married adults are not large. Nor are the differences in the highest educational qualification obtained. Nonetheless, there are other important economic differences that may also be due, in part, to age differences.

For example, the published tables of the 2007/08 Scottish Household Survey report that cohabiting women are more likely than married women to work full-time, with the majority, 52%, of cohabiting women in full time employment, compared to 37% of married women. In contrast, 17% of cohabiting women and 30% of married women are in part-time employment (Scottish Government 2009, p. 49). However, when we control in the 2005/06 SHS for the presence of children aged under 16 in the household, we find that the full-time and part-time employment rates of cohabiting and married women are very similar (e.g. 31% of married women and 27% of cohabiting women worked full time in 2005/06).

There are also significant income differences, as shown in Table 2.5 below. The mean income of cohabiting adults is £25,799, and of married adults £32,870. Cohabiting adults also receive more income from benefits (mean= £4335 p.a.) than married adults (mean=£2900 p.a.).

Table 2.5. Total Net Annual Income by whether cohabiting or married, 2005-06

	Mean (£)	Median (£)
Married	32,870	30,084
Cohabiting	25,799	24,146

Source: Own analysis of Scottish Household Survey 2005/06

Differences persist between the ages of 25 and 59, even when controlling for age.¹⁰ For example, looking more closely at incomes for the age cohort 25 to 34, the peak period for co-resident partnership formation, we find that the median income of cohabiting adults is £22,323 p.a., compared to £27,213 p.a, and that the difference in mean incomes is more than £5,000 p.a.

¹⁰ The incomes of cohabiting adults aged below 25 and 60 or more are higher than those of married adults, although the numbers of these in the dataset are small.

Cohabitation and the presence of children in the household

The household types in which cohabiting and married couples live also differ, as Table 2.6 shows, with cohabiting adults more than twice as likely as married couples to be living in a small adult household, consisting of two adults and no children. While 41% of cohabiting adults live in a household with dependent children (compared to 34% of married adults), it is most often (31%) with one or two children (compared to 22% of married adults living with one or two children), rather than three or more. Of those who have children living in their households, cohabiting adults have fewer children (mean= 1.6, median= 1) than married adults (mean= 1.8, median=2).

Table 2.6. Household type by whether cohabiting or married (column percents) 2007-08

	Cohabiting	Married/CP	All
Small adult	46	22	20
Small family	31	22	15
Large family	10	12	10
Large adult	8	16	16
Older smaller	4	27	16
Other	1	1	11
All	100%	100%	100%
N	1,768	10,426	24,610

Derived from Table 2.2.7b, Scottish Household Survey 2007/08 (2009)

Although these differences are, to an extent, age-related, if one looks more closely at different age cohorts, some important differences remain. For example, as in Table 2.7 which compares the household types of cohabiting and married adults aged 25 to 34, just over half of cohabiting adults in this age group (54%) live in childless households, compared to 31% of married adults in the same age cohort. Thus, cohabiting adults in that age cohort are less likely than married adults to live in households with children.

Table 2.7. Household type by whether cohabiting or married (column percents) 2005-06, adults aged 25 to 34

	Cohabiting	Married/CP	All partnered adults
Small adult	51	29	37
Small family	35	55	48
Large family	9	12	11
Large adult	4	2	3
Other	2	2	2
All	100%	100%	100%
N	907	1467	2374

Source: Own analysis of Scottish Household Survey 2005/06

Marriage, cohabitation and cultural differences

The foregoing illustrates the extent to which the population of cohabiting adults is different from the population of married adults on a range of socio-economic indicators. However, there are cultural differences too, with cohabiting adults less likely to be religious than married people, as shown in Table 2.8 below. While 55% of cohabiting adults state they have no religion, only 30% of married adults say so. Although some of this difference may be generational, much of it persists when comparing cohabiting and married adults within one age cohort. For example, looking only at 25 to 34 year olds, 58% of cohabiting adults, compared to 42% of married adults, state they have no religion.

Table 2.8. Religion by whether married or cohabiting (column percents), 2005/06

Religion	Married/CP	Cohabiting	Total
None	30%	55%	34%
Church of Scotland	45%	24%	42%
Other Christian	22%	21%	22%
Non-Christian	3%	1%	2%
Total	100%	100%	100%
N	14918	2571	17489

Source: Own analysis of the Scottish Household Survey 2005/06

The duration of cohabitations and the incidence of cohabitation breakdown

Haskey (2001a, p. 58), using British survey data to sketch a statistical profile of cohabitation in Great Britain and drawing on other research, reports that cohabiting unions, whether first or subsequent unions, are more likely to end in separation than marriages, and that both marriages and cohabitations of younger couples are more

fragile than those of older couples. Reporting tentative results of a pilot British study and noting the complexity of measurement, he states that the median duration of first cohabitations that ended was twenty six months, and later cohabitations failing more quickly. He concludes with the observation: “Given that union breakdown is even higher amongst cohabiting couples than married couples, the number of cohabiting relationships which fail is large, and set to increase further” (2001a, p. 67).

Analysis of British Household Panel Survey data suggests that cohabiting unions last for a median length of 2 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 3 years before moving to either marriage or separation (Morrison et al 2004, p. 2). More recent British data finds that median durations have become longer; the mean duration of *current* relationships in 2006 was 6.9 years, compared with 6.5 years in 2000. For couples with children, the corresponding mean was 8.5 years (median 7 years) in 2006. (Barlow et al. 2008, p. 33). There are no nationally representative Scottish data providing the incidence of cohabitation breakdown or the end of cohabitation by death. Given the scale of cohabitation as outlined earlier in this chapter, the scale of cohabitation separation cases under the 2006 Act is well below the likely scale of separations of cohabiting relationships in the population overall, a point to which we return in chapters 5 and 9. The Financial Memorandum to the Family Law (Scotland) Bill (Scottish Executive 2005b, para. 20) roughly estimated that about 10% of cohabitants whose relationships end, about 2000 cases a year, would go to court to reach a financial settlement.

Conclusion

This statistical profile comparing cohabiting and married adults in Scotland demonstrates that the two populations differ in a number of key respects that will influence the likelihood and substance of any financial claims in family law. Most important are their different age distributions, cohabiting adults being a younger population in general than married adults. Some other differences are due to an extent to age and lifecourse differences, but many persist even when controlling for age. Cohabiting adults have lower annual incomes, receive more income from benefits, are less likely to be home owners and more likely to be tenants in both the social rented and private rented sectors. They are more likely to live in a flat rather than a house, in smaller accommodation, in a deprived area and be less satisfied with the area in which

they live. In the peak period for partnership and family formation, between the ages of 25 and 34, they are less likely than married adults to have children, and if they do have children, they have smaller family sizes.

CHAPTER 3. THE LEGAL AND POLICY CONTEXT

THE POSITION BEFORE THE 2006 ACT

Prior to the 2006 Act, the financial remedies potentially available to a cohabitant following separation or on death were very limited. Parties would often simply be left to their strict rights (or lack of rights) under the law of property.¹¹ The parties' rights would thus depend, for example, on whether they had taken the title to the home in which they lived together in joint names, and on whether they had included a survivorship destination in that title or written wills providing for the survivor in the eventuality of the other's death. Had they not done so (as would often be the case – in relation to title to a house – where one party moves into a home already owned by the other), the party who was not on the title and/or not provided for in any will would be left in a potentially vulnerable position when the relationship ended.

Marriage by cohabitation with habit and repute

Marriage by cohabitation with habit and repute was the last form of irregular marriage recognised by Scottish law,¹² and so not strictly speaking a law pertaining to cohabitation as such. A couple who had not gone through a valid ceremony of marriage were presumed to have tacitly agreed to be married, and so were treated in law as spouses, where they lived together as husband and wife in Scotland for a period of time long enough to sustain an inference that they had tacitly agreed to marry. They must, crucially, have been free to marry (so neither must have been married to another living person), had the capacity to do so, and generally been thought by their friends and community to be married (Thomson 2006a, 1.14 et seq). As Thomson observes, since the doctrine required parties to pretend that they were married when (in normal terms) they were not, "it was one of the few situations where Scots law recognised rights arising from bad faith" (ibid, 1.17). However, where the doctrine applied, a declarator of marriage could be obtained and the marriage registered as such.¹³

¹¹ See Gretton and Stevens (2009), ch 9 on co-ownership. The ownership of the credit balance of bank accounts depends on who contributed the money and their intention in so doing: on this and related questions of property ownership, see Butterworths Scottish Family Law Service, para B73 et seq, pointing to A246 et seq, as modified for cohabitants.

¹² The other two forms were abolished by the Marriage (Scotland) Act 1939.

¹³ Marriage (Scotland) Act 1977, s 21.

“Cohabitants” who enjoyed the benefit of this doctrine would thus be removed from the category of cohabitant entirely and acquire the rights and obligations of spouses.

Of greater concern, in practice, were the many thousands of couples to whom the doctrine could not apply. It could not rescue those many cohabitants who wrongly believe in the “common law marriage myth”: that there is no need to pretend to be married because they nevertheless enjoy the same legal status as spouses purely by virtue of living together. We therefore turn to consider the remedies available to couples in that position pre-2006.

Unjustified enrichment

Unlike England and Wales, where considerable use has been made of the law of constructive trusts in relation to the shared home on cohabitants’ separation, the focus in Scottish law has been on the remedies¹⁴ offered by the law of unjustified enrichment.¹⁵ This potentially offers a remedy in relation to money spent on property owned by the other party, improvements made to such property or services provided for the other party’s benefit.¹⁶ Any remedy (mostly likely one of “recompense” – the payment of a sum of money¹⁷) would not compensate the pursuer for the loss or disadvantage sustained, but would instead reverse the consequent enrichment of the defender, even if the loss were greater.¹⁸ Moreover, it would be necessary to show that that enrichment was an unjustified one. Where the transfer was made by way of gift or under a contract, the consequent enrichment would be justified. But all other enrichments are not necessarily unjustified, and it would be necessary to bring the case within the scope of a ground for relief specifically recognised by law.

¹⁴ Mere personal claims, not property rights.

¹⁵ See MacQueen (2009).

¹⁶ But note the considerable difficulties in establishing a claim for unjustified enrichment on the basis of such non-financial, domestic contributions (Carruthers 2000, pp. 68-69).

¹⁷ Cf the remedies of “repetition” – the straightforward return of money transferred to the enriched party; and “restitution” – the transfer of property.

¹⁸ This makes unjustified enrichment a poor substitute for principles of economic disadvantage and the economic burden of caring for children where the loss sustained may be substantially greater than the value of the home-making or child-care services performed.

The leading case in the cohabitation context is *Shilliday v Smith*,¹⁹ which demonstrates the use of the *condictio causa data causa non secuta*: the argument for recovery based on the claim that the pursuer had transferred value to the defender “for a future purpose which failed to materialise” (MacQueen, 2009, p 32). It would be necessary for the pursuer to argue, in this context, that the transfer had been made on the understanding (it seems, not necessarily agreed by the parties to be a formal condition of the transfer²⁰) that the parties were planning to marry or were planning to live together in a particular property, but never did. MacQueen suggests that in cases where the parties had no intention to marry, but rather to continue to cohabit indefinitely, the better argument (not used in the modern case law) would be one of *causa finita*: that the state of affairs in light of which the transfer was made no longer exists (ibid, 35).²¹

The inadequacy of the law of unjustified enrichment (and other areas of private law) to deal with the economic hardship that can arise following the end of a cohabiting relationship, particularly perhaps arising from domestic contributions, was a key driver for reform in this area. As Carruthers (2000, 71) put it, “the application of principles of unjustified enrichment to the problems potentially facing former cohabitants upon the termination of the cohabiting relationship more closely resembles a counsel of despair rather than one of perfection”. Writing a few years later, MacQueen (2010) offered a more upbeat assessment following further academic exegesis of the law in the wake of *Shilliday v Smith*, above. But our findings suggest that many family law practitioners regard this as a highly problematic and unsatisfactory area of law for use in cohabitation cases.

Occupancy rights

A cohabitant²² who has no right under the general law to occupy property of which the other party is owner or tenant can apply to court for the grant of occupancy rights for up to six months (renewable) in relation to that shared home under the Matrimonial Homes

¹⁹ 1998 SC 725. See also *Grieve v Morrison* 1993 SLT 852; *Satchwell v McIntosh* 2006 SLT (Sh Ct) 117.

²⁰ Though cf the decision in *Grieve v Morrison*, above. This is one of the many technical question marks that arises in attempting to use unjustified enrichment in this area.

²¹ Cf *Satchwell v McIntosh*, above.

²² Since 2006, this includes same-sex cohabitants.

(Family Protection) (Scotland) Act 1981, s 18. However, in owner-occupied cases, this could – and can still – ultimately provide only short-term occupation protection: there is no power between cohabitants to delay or refuse a decree of division and sale, or to restrain sale by a sole owner. In the case of certain types of rented property, by contrast, a transfer of the tenancy may be ordered.²³

Remedies for the benefit of children of the parties

Children are entitled to receive child support from their parents under the Child Support Act 1991, as recently amended by the Child Maintenance and Other Payments Act 2008. In addition, to the extent that the Child Maintenance and Enforcement Commission (the successor to the Child Support Agency) does not have jurisdiction, a child is also entitled to aliment, not only from his or her parents, but also from anyone who has accepted the child as a child of his or her family.²⁴ Like child support, aliment can be awarded only in the form of a periodical allowance or payments of an occasional or special nature (such as school fees); lump sums and other capital awards or property transfers for the benefit of a child are not available under Scottish law.²⁵

The position on death

Prior to 2006, cohabitants had no place in Scottish succession law. Not included amongst those with prior or legal rights which cannot be defeated by a will, or amongst the list of statutory heirs who stand to inherit in the event of intestacy, a surviving cohabitant would generally have to depend upon his or her partner having made a will.²⁶ The only exception related to rented homes, to which a cohabitant would in certain cases have a statutory right of succession;²⁷ and the deceased's pension might, by nomination or by the exercise of the pension trustees' discretion, make some provision for the survivor. By contrast, children of the deceased cohabitant would enjoy

²³ Matrimonial Homes (Family Protection) (Scotland) Act 1981, s 13 (applicable by virtue of s 18(3)); see generally Butterworths Scottish Family Law Service, para B25, and A213-219.

²⁴ Family Law (Scotland) Act 1985, s 1.

²⁵ Contrast Schedule 1 to the Children Act 1989 (England and Wales): Malcolm (2008).

²⁶ In case of co-owned property, a survivorship destination clause could ensure that the surviving co-owner take over legal ownership of the entire property on the other's death.

²⁷ Housing (Scotland) Act 1988, s 31; Housing (Scotland) Act 2001, s 22 and Sch 3.

the legal right of “legitim” (one-third of the value of the moveable estate²⁸ where there is a surviving spouse; one-half if there is no spouse) and be first to inherit from the free estate²⁹ on intestacy.³⁰

Relevance post-2006

The rights of and remedies for children clearly remain applicable in all cases without alteration (save that on intestate death, their rights are now postponed behind satisfaction of the cohabitant’s claim, see below). The position of the cohabitant is now principally dealt with by the rights and remedies created by the 2006 Act. But where a cohabitant finds that a claim for his or her own benefit of the Act is not available, for example because the time limit for bringing a claim has expired, it may still be possible, for example, to bring a claim in unjust enrichment.³¹

Marriage by cohabitation with habit and repute has been abolished prospectively (with one narrow exception) for relationships that began after commencement of the Act.³² It could still in theory apply to relationships that began earlier, but this would depend upon the parties having held themselves out as being married, an increasingly anachronistic possibility now that cohabitation no longer attracts social stigma in most communities. The argument will eventually die out as the last pre-2006 relationships come to an end.

THE FAMILY LAW (SCOTLAND) ACT 2006

The provisions for cohabitants in the 2006 Act originate in, but do not wholly correspond with, recommendations made by the Scottish Law Commission in 1992. Those recommendations were picked up by the new Scottish Executive in 2004 and enacted by the Scottish Parliament shortly thereafter. In the following sections, we describe the provisions of the Act, noting contrasts with the Commission’s original

²⁸ Essentially, all property other than land (including buildings) and rights connected with land: see Gretton and Stevens (2009), para 1.20-1.21.

²⁹ That portion of the estate, if any, remaining after debts, taxes, and legal and prior rights had been satisfied.

³⁰ Succession (Scotland) Act 1964, s 2.

³¹ See McQueen (2010).

³² Family Law (Scotland) Act 2006, s 3.

recommendations and, in particular, comparing the position of a cohabitant with that of a spouse (or civil partner) in equivalent circumstances: see Appendix 3 for the text of ss 9 and 11 of the 1985 Act. In Appendix 4, we describe and analyse the reported case law considering the 2006 Act provisions as available at March 2010.

“COHABITANTS”

The definition of “cohabitant” governs eligibility to bring a claim under the Act. Section 25 defines a “cohabitant” for the purposes of ss 26-29 as either member of a couple who live or lived together as if they were husband and wife (if of the opposite sex) or as if they were civil partners (if of the same sex). This formula is familiar from elsewhere in Scottish family law. It then goes on to state that in determining for the purposes of those sections whether A is a cohabitant of B, the court shall have regard to the length of time they were living together, the nature of their relationship during that time, and the nature and extent of any financial arrangements during that period.

The drafting of s 25 has been criticised by Thomson (2006b, 30) as being “intellectually incoherent”, apparently re-defining in subsection (2) the definition set out in subsection (1).³³ The checklist in s 25(2) ought instead to have been directed to determining whether the test in s 25(1) was satisfied. Thomson suggests that, alternatively, the factors should have been made relevant to the exercise of the judges’ discretion in making award; indeed, where the court has a discretion (particularly under s 29), the judges have sometimes taken the sort of factors listed in s 25(2) into account in deciding what if any order to make. Norrie (2006, 59) is doubtful that any court would find that a couple were living together as husband and wife but then disqualify them as cohabitants as a result of any its evaluation of the factors in s 25(2).

The Scottish Law Commission (SLC) (1992) had recommended against requiring that the parties should have cohabited for a minimum period as a precondition for eligibility to bring a claim under the legislation. While the duration of the relationship is relevant to whether the parties were “cohabitants” at all, the 2006 Act adopted this approach in so far as it does not fix a prescribed period. The Commission took the view (*ibid*, para 16.4), in the context of claims on separation, that the economic advantage/disadvantage principles would be “self-limiting”: relevant contributions generating a claim would be less likely to arise following a very short relationship or

³³ The Scottish Law Commission’s draft Bill contained no checklist akin to s 25(2).

sustain only a minimal claim; and might not be made over the course of a very long relationship with low levels of mutual commitment. On death, the court's wide discretion would enable it to consider the duration of the relationship in deciding what award, if any, to make. So, on this view, a fixed minimum duration requirement is not a necessary precondition for providing a remedy.

COMPARING THE 1985 AND 2006 ACT REGIMES ON SEPARATION

Very deliberately, the provisions creating financial relief between cohabitants on separation under 2006 Act do not replicate the law of financial relief between spouses on divorce,³⁴ contained in the Family Law (Scotland) Act 1985. It is worth setting out here the common ground and, more importantly, the distinctions between those two schemes. We also note points at which the 2006 Act diverges from the recommendations of the Scottish Law Commission and its Draft Bill.

The right to certain household goods

Section 25 of the 1985 Act creates a means of resolving ownership of certain goods when there is no proof of ownership, whether the issue arises during the marriage or following its end. It provides that goods acquired both during marriage and earlier, in prospect of the marriage, for joint domestic purposes are jointly owned. Money, securities, motor cars etc., and domestic animals are excluded, as are any goods acquired by gift or succession from a third party. Importantly, the section specifically provides that the presumption of joint ownership is not rebutted by the mere fact that one partner purchased the property alone or contributed more than the other to the cost of acquiring it: s 25(2).

The equivalent provision for cohabitants in s 26 of the 2006 Act is of considerably more limited scope and effect. It applies only to goods acquired during the cohabitation, not before, and crucially, the presumption of joint ownership can be rebutted by proof that the parties contributed to its acquisition in unequal shares. Where the presumption is rebutted, ownership is determined by the general law and so, amongst other things, by the parties' financial contributions to the acquisition of the asset.

³⁴ Any reference to spouses, divorce and cognate expressions should, unless expressly indicated otherwise, be taken to include civil partners, dissolution etc, as the law relating to the two types of relationship is very largely identical. The law of Scotland relating to civil partnership is found in the Civil Partnership Act 2004, Part 3.

This distinction between the two Acts reflects the Scottish Law Commission's analysis of the possible roles this sort of presumption can play (SLC 1992, paras 16.9-16.10). At a practical level, a presumption can help resolve disputes regarding ownership where the evidence necessary to prove ownership in the usual way is not available. However a presumption can, if strong, go rather further by simply making irrelevant the question of who bought what: in so doing, it "introduces an element of common property". The Commission thought it appropriate that spouses should enjoy the latter feature of a strong presumption, but it was not thought apt to the situation of cohabitants. While spouses might be expected to view their assets as jointly owned (regardless of the strict legal position), cohabitants are arguably less likely to do so, particularly (but by no means only) in shorter relationships, such that imposing co-ownership on them might not accord with their wishes. Section 26 of the 2006 Act therefore allows the presumption to be rebutted by evidence of actual ownership of the asset in question. No reported case has yet considered this provision. Malcolm (2007) concluded from her questionnaire that "common sense" was enabling parties to resolve issues relating to this provision quickly. We had few findings on this provision, but the scope for rebutting the presumption by producing receipts for the purchase of assets clearly provides room for argument.

Property acquired from savings in housekeeping allowance

Section 26 of the 1985 Act and section 27 of the 2006 Act contain a somewhat anachronistic provision dealing with the ownership of assets acquired from the savings made from a housekeeping allowance provided by one spouse or cohabitant to the other. Such assets are presumed to be owned in equal shares, in the absence of other agreement. In the case of spouses, this can (perhaps somewhat implausibly) include the family home. But in the case of cohabitants, this asset is expressly excluded from the operation of the rule.³⁵ No reported case has yet considered this provision and our interviewees regarded it as useless.

Financial provision and property division on relationship breakdown

Financial relief on divorce is governed by ss 8-23 of the 1985 Act. By contrast, just one section of the 2006 Act – s 28 – deals with the equivalent issue for cohabitants. The drafting of s 28 has been criticised by several commentators (Thomson 2006b, Norrie

³⁵ It is interesting to note that the Scottish Law Commission had not recommended this restriction: SLC (1992), Draft Bill clause 35.

2006). It fails to delineate clearly between the different types of orders that may be made, the different purposes to which those orders might be put, and the factors that might be relevant to deciding whether to make such an order.³⁶ Indeed, the drafting of s 28 departs quite substantially from the Scottish Law Commission's Bill.

Different powers

The first thing to note is the considerably more limited range of orders available to a judge dealing with separating cohabitants, compared with the powers at his or her disposal in a divorce case. In the latter case, the judge can order payment of a capital sum, the transfer of property, the payment of a periodical allowance,³⁷ can make various orders relating to pension funds, and also has power to make a wide range of "incidental orders", for example, to order the sale or valuation of an asset, to regulate occupation of the parties' home, to allocate liability for outgoings in respect of the home, to determine use of its contents, and so on.³⁸

By contrast, while this is a matter for debate, on one view, the judge apparently has only one tool³⁹ at his or her disposal on the separation of cohabitants: to order payment of a capital sum.⁴⁰ This can be effected by way of instalments or by a one-off complete payment, and its execution can be postponed; but that is apparently all the flexibility permitted: 2006 Act, s 28(7). It has been complained that, particularly in the case of orders designed to cover childcare costs, this is less than desirable.⁴¹ It would be far preferable for the court to have the power to order periodical payments, whose

³⁶ In particular, section 28(2), which purports to describe the types of order which can be made, is interrupted in (b) by the designation of one particular purpose to which an order might be put; that issue is otherwise dealt with in ss 28(3)-(6).

³⁷ Though this type of order cannot be made pursuant to the principle of fair sharing of matrimonial property or as a response to the economic advantage/disadvantage principle: s 13(2).

³⁸ 1985 Act, s 8(1); the full range of "incidental orders" is catalogued in s 14.

³⁹ The court can also make "such interim order as it thinks fit": s 28(2)(c).

⁴⁰ Thomson (2006a, 205 and 2006b, 33) suggests that periodical payments *can* be ordered under s 28(2)(b), but the courts have – despite their evident frustrations – not followed that view: see case summaries of *CM v STS* [2008] CSOH 125 and *Falconer v Dods* 2009 FamLR111 in Appendix 4. Section 28(7) might be thought to exclude periodical payments, in relation to which the reference to payment by instalments, as an alternative to payment on one date, would be otiose.

⁴¹ See *CM v STS* [2008] CSOH 125.

quantum can be varied as circumstances change over what may be several years. Without that power, the court must try to predict future circumstances in order to quantify a capital sum in relation to this expenditure now.⁴²

It is also important to note, on a procedural level, that claims under this section must be brought within one year from separation: s 28(8). We explore practitioners' experience of this rather tight time bar in our findings chapters.

Different starting points of principle

Here the law governing spouses and cohabitants diverges sharply as the starting point in each case is very different. The starting point between spouses on divorce is "fair" (with a presumption of equal) sharing of the net value of a defined pool of "matrimonial property" on a specific date, regardless of strict legal ownership: see the principles set out and elaborated in ss 9(1)(a), 10 and 11(7) of the 1985 Act. This matrimonial property pool will often include the matrimonial home and/or its contents (whether acquired before marriage for use by the spouses as a family home and/or its contents,⁴³ or acquired during marriage) together with any other assets (including certain pension rights) acquired during the marriage other than by gift or inheritance from a third party: s 10(4), (5).

No such "fair sharing" principle operates between cohabitants, and so there the starting point is that each party leaves the relationship with whatever property they own under the general law, perhaps augmented to a limited extent by the operation of ss 26 and 27, just discussed. As the sheriff in *Falconer v Dods*⁴⁴ recently put it:

[7] The rebuttable presumption at the stage of the dissolution of a marriage or civil partnership is that property will be shared fairly if it is shared equally. The rebuttable presumption at the end of cohabitation is that each party will retain his or her own property.

⁴² See Lord Matthews's concerns about the potential for injustice this creates: *CM v STS*, *ibid*.

⁴³ Cf if acquired by one spouse before the marriage with no intention that it would serve as a family home for these parties: *Mitchell v Mitchell* 1995 SLT 426.

⁴⁴ 2009 FamLR 111.

In *CM v STS*, Lord Matthews expressed his uncertainty about “why some greater concession to a concept of community property was not included in the 2006 Act”.⁴⁵ An answer may be found in the Scottish Law Commission’s Report (SLC 1992, para 16.15), which concluded that there was “no adequate justification” for applying the equal sharing principle to cohabitants. To do so would risk imposing a sharing regime on couples who had deliberately not married in order to avoid that depth of economic relationship. It might be argued that it is open to cohabitants to make their own agreement waiving access to any such statutory sharing scheme.⁴⁶ The counter-argument is that the law should not impose a regime that may be thought to be at odds with the way that many (even most) cohabitants view their relationship, thus requiring all those couples to act proactively to avoid that regime. It can also be argued that extending the sharing regime to cohabitants would undesirably dilute the special status of marriage, which the Scottish Executive (as it then was) was at pains to uphold (Scottish Executive 2005a, para 70-1).

More limited grounds for adjustment away from the starting point

In case of divorce, there are a further four principles pursuant to which the judge can order a capital sum, transfer of property or (except under the first of these four) order payment of a periodical allowance. In summary, these provide for:

- fair account to be taken of any economic advantage derived by either from the other’s contributions and of any economic disadvantage suffered in the interests of the other person or the family: s 9(1)(b) and (2)
- fair sharing of the economic burden of caring post-divorce for a minor child of the marriage: s 9(1)(c)
- reasonable financial provision for up to three years to enable a spouse who had become substantially dependent on the other’s financial support to adjust to the loss of that support: s 9(1)(d)
- reasonable financial provision for the alleviation of serious financial hardship that, at the time of the divorce, seems likely to arise because of it: s 9(1)(e).

⁴⁵ [2008] CSOH 125, [260].

⁴⁶ As to which, see below.

These principles are fully set out in s 9 and elaborated upon in s 11 (reproduced in Appendix 3). Of these, only the first two find any parallel in the 2006 Act.

The Scottish Law Commission (1992, para 16.15) specifically rejected the application of the last two principles to cohabitants, reflecting then public opinion survey evidence against the extension of any maintenance obligation to cohabitants post-separation (as well as the lack of duty to aliment each other during the relationship).⁴⁷ Just as equal sharing was thought to impose too deep an economic relationship on cohabitants, who have not made a formal commitment to each other, so too, on this view, was any sense of a purely needs-based obligation. Reflecting this position, these two principles are not included in the 2006 Act.

The economic burden of caring for children after cohabitation

The Commission had taken the view that the economic burden of childcare was dealt with by the Child Support Act (SLC 1992, para 16.16). Whilst that might have been true of that Act under its original formula (which included a component for the support of the primary carer), it is less clear that subsequent child support formulae cater for that element.⁴⁸ The costs of formal childcare on which so many lone parents now have to rely in order to be able to undertake paid employment can be so high that the relevant aspect of childcare tax credits do not meet the bill. It should therefore be possible to seek additional support for this item (just as the courts retain their power to order aliment for a child in relation to educational costs).⁴⁹

The 2006 Act therefore allows an order to be made “in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents”: s 28(2)(b). There are three points to note about this provision.

⁴⁷ The SLC also specifically rejected any extension of the duty of aliment to cohabitants: para 16.5-16.6. Interestingly, the Scottish Social Attitudes Survey 2004 found that public opinion was only marginally less supportive of a support obligation owed to an economically weaker separated cohabitant (of 10 years’ standing) than one owed to a spouse [40%, compared to 50%], even if no children are present (Wasoff and Martin 2005, 16). A particularly striking aspect of that finding is the rather low level of public support for such provision even between spouses.

⁴⁸ See the arguments of the Law Commission for England and Wales on this point: Law Com CP 179 (2006), from para 6.199.

⁴⁹ Child Support Act 1991, s 8(7). It seems that this power does not cover the costs of nursery school or child-minding for very young children: see *Re L M (a minor)*, 9 July 1997, unreported English Court of Appeal decision.

First, it is worded differently from the corresponding principle in the 1985 Act: there is no reference here to the burden being “shared fairly” between the cohabitants; nor is there any equivalent in the 2006 Act of s 11(3) of the 1985 Act, which lists seven specific factors to which the court must have regard in exercising its discretion to make provision under that principle. It is not clear why these are omitted from the 2006 Act, not least since they cast useful light on the sorts of practical issues at which the principle might be directed.⁵⁰ Indeed, there is no parallel in the 2006 Act of s 8(2)(b) of the 1985 Act, which sensibly requires the court only to make such order as is reasonable given the parties’ resources.⁵¹

The second thing to note about the principle as adopted by the 2006 Act is that it is confined to the burden of caring for a child of whom both cohabitants are in law the parent, even though other “relevant children” (accepted by the parties as a child of the family: s 28(10)) are relevant to the economic advantage/disadvantage principle. Contrast the 1985 provision, which applies to the burden of caring for any child accepted by both parties as a child of the marriage.⁵²

Finally, it should be noted that this principle is not in theory confined to meeting the costs of formal childcare necessary to enable the parent with whom the children live to work; it may also be used to recognise the adverse impact that continuing childcare responsibilities may have on the earning capacity of that parent, and on his or her ability to fund adequate accommodation.⁵³ Indeed, in the 1985 Act context where this

⁵⁰ The suggestion in the Scottish Executive’s response to the Justice Committee’s Report on the Bill (at p 17) that this sort of detail was omitted in order to emphasise the difference between cohabitation and marriage, with respect, rather misses the importance of many of these features of the 1985 Act in fleshing out the detail of the principles, and so more clearly delineating the judicial discretion.

⁵¹ We discuss the courts’ reaction to this omission in our account of the 2006 Act case law in Appendix 4: see in particular *CM v STS* [2008] CSOH 125 .

⁵² The duty to aliment such a child will apply to the defender who has accepted the child as a child of his family (Family Law (Scotland) Act 1985, s 1(1)(d)), which may be thought to make the exclusion of any independent claim for the primary carer of such a child under s 28(2)(b) all the more odd. Indeed, the child in question could be the child of the defender and not of the pursuer: see concerns raised by the Family Law Sub-Committee of the Law Society of Scotland in its Written Submission on the Bill.

⁵³ This potential of s 9(1)(c) is particularly important if the line in *Dougan v Dougan* 1998 SLT (Sh Ct) 27 is adopted: the sheriff in that case applied the economic disadvantage principle in an entirely retrospective manner, rejecting any notion that it might also apply to deal with any prospective damage to earning capacity and loss of earnings post-divorce arising from continuing childcare obligations. We comment on this issue in chapter 8.

tool is available, property transfer orders may be made pursuant to this principle (Thomson 2006a, 7.18). Not so under the 2006 Act. It is presumably in relation to this sort of claim that the factors in s 28(3) – which inquire about economic advantage and disadvantage – are relevant.⁵⁴ It is not at all clear how these factors could be relevant to a claim essentially based on the costs of professional childcare, and the courts have effectively ignored s 28(3) in that context.⁵⁵

Economic advantage and disadvantage

The centrepiece of the 2006 Act is an economic advantage / economic disadvantage principle, which is inspired by s 9(1)(b), but again only loosely and in quite a different context. The Scottish Law Commission's Draft Bill expressly required the judge only to make an order on the basis of proven economic advantage or disadvantage if he or she was also satisfied "that having regard to all the circumstances of the case it is fair and reasonable to make such an order": clause 36(2). Neither that Bill, nor the 1985 Act, contain any equivalent of the elaborate balancing exercise set out in s 28(5)(6).⁵⁶ Taken all together, the various subsections of section 28 require the judge, in deciding whether to make an order for a capital sum under s 28(2)(a) to consider:

- first, whether the defender has derived any economic advantage from contributions [including indirect and non-financial, especially domestic contributions: s 28(9)] by the pursuer,
- and then to determine whether that advantage has been offset by economic disadvantage suffered by the defender in the interests of the pursuer or any relevant child;⁵⁷
- second, whether the pursuer has suffered any such economic disadvantage,
- and then to determine whether that has been offset by any economic advantage derived by the pursuer from the defender's contributions.

⁵⁴ But note that the more elaborate balancing provisions of s 28(4)-(6) are not relevant here.

⁵⁵ See for example *CM v STS* [2008] CSOH 125, discussed in Appendix 4.

⁵⁶ These subsections were introduced during the passage of the Bill through Parliament.

⁵⁷ Note that in this context, any child accepted by both parties as a child of the family is included, not just a child of both parties (as is the case under the economic burden of childcare principle): s 28(10).

It is clear that it is not necessary to establish that the pursuer both conferred economic advantage on the defender and suffered economic disadvantage in the family's interests: one or the other is enough. But countervailing disadvantages and advantage need to be brought into account to see whether the balance lies. It may be a fair reading of the Act that these are the *only* considerations to which the court can have regard in deciding whether to order payment of a capital sum pursuant to this principle and, if so, of what amount: note again, for example, the lack of provision requiring the judge to consider the parties' resources.⁵⁸

At best, s 28 seems unnecessarily cumbersome when compared with the more straightforward instruction in s 11(2)(a) of the 1985 Act: "to have regard to the extent to which the economic advantages or disadvantages sustained by either person have been balanced by the economic advantages or disadvantages sustained by the other person". The crucial point of comparison with the 1985 Act regime, however, is that there the different starting point (equal sharing of matrimonial property) will – in most cases – already have gone some way to remedy economic imbalance between the parties (see s 11(2)(b)) and so the economic advantage/disadvantage principle has tended to have only a residual role.⁵⁹ By contrast, under the 2006 Act it will have to do almost all of the work.

FINANCIAL PROVISION ON DEATH

We turn now to the position on death, where comparisons with the position of a surviving spouse are unhelpful owing to the uniqueness in Scottish succession law of the new remedy created for a surviving cohabitant. Section 29 of the 2006 Act permits a cohabitant to bring a claim against the estate of his or her deceased partner, where the deceased was domiciled in Scotland at death. The Scottish Law Commission had made recommendations for both testate and intestate cases (that is to say, whether or not the deceased had left a valid will disposing of the estate). But, pending a further review by the Commission of succession law as a whole,⁶⁰ the 2006 Act created a

⁵⁸ Contrast the declared intention of the Executive that the courts should be able to "consider any and all relevant factors when deciding whether to make an award": Official Report, 15 December 2005, Justice 1 Committee, col 21922, Justice Minister, Cathy Jamieson MSP. Thomson (2006b, 34) reminds us that a court could have regard at least to the factors set out in s 25(2) by determining that the pursuer is not eligible to claim at all.

⁵⁹ Contrast the few cases where there has been relatively little matrimonial property to share.

⁶⁰ We discuss this project and its recommendations in chapter 8.

remedy only for cases where the deceased had left no valid will. Cohabitants have not, however, been added to the list of persons entitled to be appointed executor-dative, to administer the estate.

The remedy created by section 29 broke entirely fresh ground in Scots succession law, departing from the orthodox model of fixed legal entitlements in favour of discretionary provision. Provision can only be made from the “net estate”: i.e. what remains after payment of inheritance tax, liabilities of the estate that have priority over the rights of a surviving spouse, and the legal and prior rights (under the Succession (Scotland) Act 1964) of any surviving spouse. This ensures that where the deceased is survived by both a cohabitant and a spouse from whom he or she has not been divorced the spouse’s status as such is recognised, despite the likelihood that the marriage is moribund. In low value cases, the spouse’s rights might exhaust the entire estate, leaving the cohabitant with nothing, regardless of the circumstances of that relationship and the financial position of the two survivors. Interestingly, the legal rights of the deceased’s *children* do not have to be met before the cohabitant’s claim is assessed, implicitly allowing the cohabitant to be provided for at the children’s expense. We explore practitioners’ experience and potential implications of this in later chapters.

Section 29 confers an exceedingly wide discretion on the court. It provides no guidance about the objective which the court should be seeking to achieve in making any order, and only a limited set of factors to which the court should have regard:

- the size and nature of the deceased’s net intestate estate
- any benefit received or to be received by the survivor on or in consequence of the death from somewhere other than the estate (e.g. under a pension scheme)
- the nature and extent of any other rights against, or claims on, the deceased’s net intestate estate, and
- any other matter the court considers appropriate.

There is no indication at all about the criteria by which what is “appropriate” might be determined, save that s 29(4) sets a ceiling by reference to what a surviving spouse would have obtained on intestacy in the circumstances of the particular case. In this respect, the Act is considerably less helpful than the Scottish Law Commission’s Bill,

clause 37(1) of which, in asking whether “reasonable” financial provision had been made for the cohabitant, would have additionally directed the court to consider:

- the length of the cohabitation
- the existence of any children resulting from the relationship between survivor and deceased
- the nature and extent of any contributions made by the survivor from which the deceased derived economic advantage, and
- the nature and extent of any economic disadvantage suffered by the survivor in the interests of the deceased or their children

Unlike s 28 on separation, s 29 is more generous in terms of the types of order that may be made: there is power here to order the transfer of both heritable and moveable property: s 29(2); but even less generous than s 28 in terms of time bar: the survivor must bring his or her claim within six months of death: s 29(6). This time limit corresponds with other aspects of Scots succession law,⁶¹ but leaves grieving survivors having to act extremely quickly in distressing circumstances.⁶² By contrast, the Scottish Law Commission would have allowed the court, on cause being shown, to permit a late application to be made (SLC 1992, clause 37(3)). We explore the impact of this short time bar and support recommendations for change to this rule in later chapters.

OPTING OUT OF THE 2006 ACT

Under general principles of Scottish law, it is presumed as a matter of statutory interpretation that parties are free to renounce the right to bring any pecuniary claim.⁶³ There is a strong tradition in Scottish family law in favour of party autonomy in this respect,⁶⁴ compromised only to a relatively limited extent (in the spousal context) by s

⁶¹ Creditors of the estate have six months from death in which to lodge their claims against the estate, after which the executor is free to distribute the estate on the basis of the then known liabilities: Gretton and Steven (2009), para 25.53.

⁶² Note also Nicholson’s observations (2007) that in practice winding up estates takes considerably longer than six months in any event.

⁶³ SLC (1992), para 16.47, referring to the maxim “quilibet potest renunciare juri pro se introducto”, *The Laws of Scotland, Stair Memorial Encyclopaedia*, vol 22, para 121-128.

⁶⁴ See *Thomson v Thomson* 1981 SC 344, 1982 SLT 521, *Elder v Elder* 1985 SLT 471, *Milne v Milne* 1987 SLT 45. Contrast the paternalism which has dominated English law in this regard:

16 of the 1985 Act, which now permits a court to set aside all or part of an agreement where it was “not fair and reasonable at the time it was entered into”: see generally Thomson (2006a, 7.22).⁶⁵ That aside, marriage and separation contracts are, and always have been, fully enforceable in the ordinary way; unlike in the English context, no general public policy concerns have deprived them of binding force. By contrast with the recommendations made for cohabitants in England & Wales, the 2006 Act contains no statutory formality requirements for agreements waiving claims under the Act,⁶⁶ nor is there any special statutory jurisdiction for setting such agreements aside on grounds more generous than those afforded by the general law, akin to s 16 of the 1985 Act.⁶⁷

Agreements waiving the right to bring claims under the Act may be made at the point of separation, or in anticipation of the possibility of a future separation or death. The practitioner texts include various styles for more or less comprehensive agreements disapplying the Act; these go on (at the very least) to make a clear agreement about the ownership of the home in which the parties live and about what should happen to it in the event of separation.⁶⁸ The purchase of a home will often trigger an agreement between cohabitants, since this is one of the few events that may take cohabitants (while they are together) to see a lawyer.

The 2006 Act did not include a provision, recommended by the Scottish Law Commission (1992, para 16.46), which would have expressly stated that a contract between cohabitants or prospective 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.⁶⁹ This omission may simply reflect wide

Hyman v Hyman [1925] AC 601, *MacLeod v MacLeod* [2008] UKPC 64; Matrimonial Causes Act 1973, s 34. The decision of the Supreme Court in *Radmacher v Granatino*, heard in March 2010 on appeal from [2009] EWCA Civ 649 is expected later this year.

⁶⁵ This was based on the recommendation of the Scottish Law Commission: (1981) para 3.190 and following.

⁶⁶ Though the Requirements of Writing (Scotland) Act 1995, s 1(2) will require certain types of agreement to be in writing by virtue of their subject matter.

⁶⁷ See generally Norrie (2011).

⁶⁸ E.g. the styles in *Butterworths Scottish Family Law Service*, at F76: Style 10(iv), clause 2; Style 10(vii), clause 1; Style 10 (viii) clause 4.

⁶⁹ See also Law Commission for England and Wales: Law Com No 307, para 5.5-5.10.

agreement that this is already the law (where the contract is clearly one regulating the parties' property affairs, and not a contract for payment for illicit sex⁷⁰), and that a "belt and braces" provision saying so would therefore be otiose.

The position described above appears to us to be the best interpretation of the law, despite the lack of case law on the point. We take this view notwithstanding statements made by the Executive during the passage of the Act that "it does not intend that a cohabiting couple could unilaterally [sic]⁷¹ opt out of these particular provisions of the Bill" (Written submission from the Scottish Executive, 19 April 2005, 18th Meeting of Justice 1 Committee). Scottish law's presumption that statutory pecuniary claims may be waived is clear. It was anticipated by the Scottish Law Commission that it would apply in this context just as it does in relation to pecuniary claims arising on divorce and following death (1992, para 16.47). As we have seen, until 1985, spouses had the right to make their own agreements that would govern on divorce limited only by the general law (which would vitiate an agreement on grounds such as error, fraud, undue influence or misrepresentation). It would be very surprising if cohabitants (who, after all, have undertaken no formal step akin to marriage in entering into their relationship) should have less right than spouses to regulate their own financial affairs and to waive their rights to bring a statutory claim, certainly without the 2006 Act itself expressly depriving them of that right. The fact that s 27 of the 2006 Act allocates statutory ownership that may, expressly, be rebutted by contrary agreement does not detract even by necessary implication from an entitlement to waive the right to bring a pecuniary claim under s 28; after all, equivalent provisions for spouses in the 1985 Act do not have that effect. Since spouses are free (subject to s 16) to contract out of any part of the scheme of financial relief afforded by that Act, including those more or less loosely extended to cohabitants (s 9(1)(b) and (c)), it seems to us difficult to argue that there is a sufficiently strong public interest in preventing cohabitants from reaching such agreements to rebut the presumption that they may waive the right to bring a claim.⁷² As we shall see in chapter 6, while some of our interviewees (for various

⁷⁰ See for recent example the view of Hart J in *Sutton v Mishcon de Reya and Gawor & Co* [2003] EWHC 3166, at [22].

⁷¹ The use of "unilaterally" here seems inappropriate, when the reference is to a couple rather than one member of that couple opting out. Self-evidently, while one partner could renounce his or her own right to bring a claim, he or she could not unilaterally preclude the other partner from doing so.

⁷² On this issue, see *Stair*, *ibid*, para 125, which specifically notes the approach taken in relation to financial provision on divorce.

reasons) doubted the wisdom of waiving claims under the Act, only one doubted the legal effect of agreements purporting to do so, and many more described agreements, often executed in the context of a property purchase in order to fix ownership of the shared home, intended to disapply the Act.

REPORTED CASES DECIDED UNDER THE 2006 ACT

In Appendix 4 we provide a description and analysis of cases decided under the 2006 Act and reported up to March 2010.

CONCLUSION

This chapter has set out the provisions of ss 25 to 29 of the 2006 Act, comparing them to the position prior to the Act, to the recommendations of the Scottish Law Commission and to the corresponding sections of the 1985 Act, noting also some early legal commentary on these provisions. The Act opens new territory and not without problems, highlighted by the early commentators. Those commentators highlighted both theoretical and operational question marks that arise from the Act's current shape and drafting. As our discussion of the reported case law to date shows (Appendix 4), some of those issues have been played out in the early judicial decisions under the Act, and new problems have arisen. Particularly during these early days of the Act's operation, the uncertainty that surrounds various aspects of the legislation is likely to trouble practitioners seeking to use the new legislation.

The next Part of this Report moves on to examine the findings from the empirical component of our study.

CHAPTER 4. THE RESEARCH CONTEXT: METHODOLOGY

THE AIM OF THE RESEARCH

The aim of the research was to develop an understanding of the operation of the cohabitation provisions of the Family Law (Scotland) Act 2006.

OBJECTIVES

The means of achieving this aim was by focussing on the experiences and perspectives of legal practitioners in relation to the use of the provisions in the first three years of the legislation by examining:

- how the provisions were being used
- how frequently the provisions were used
- the circumstances in which they were used
- the type of issues covered
- the cost of using them
- the effect of using them on pursuers, defenders and relevant children
- the benefits and difficulties the provisions have brought for both potential pursuers and defenders.

These objectives, formulated in the original research funding application, formed the basis of both the questionnaire and the interview schedule.

ADVISORY GROUP

An Advisory Group was established consisting of 11 members, drawn from a wide range of stakeholder groups: social science and legal academics, advocates, the Family Law Association, the Scottish Government Justice Department, the Law Society of Scotland, Ministry of Justice, the Scottish Legal Aid Board, a Sheriff Clerk's Office and the voluntary sector. The purpose of the group was to provide information and guidance, along with comments, suggestions and reflections on all aspects of the project, including the development of the research instruments and on the findings as they emerged. Two meetings were held toward the beginning and the end of the project; however, a number of members gave on-going help throughout the project. We were also assisted by four advocates acting as key informants, providing us with helpful background data related to the numbers of opinions they had written on the relevant provisions.

INITIATION REPORT

An Initiation Report was prepared for the first Advisory Group meeting to set the context of the research at the outset, by referring to the background and early days of law reform in Scotland, the reported cases and articles related to the cohabitation provisions of the 2006 Act. Finally the report examined the situation in England and Wales, where there were (at that time) two Bills before Parliament proposing new financial remedies for cohabitants on separation: we discuss these in chapter 9.

Since the research team for this project was working in three different geographical sites across Scotland and England (*cf A Note on Team Work* below) and since team members came from different disciplinary backgrounds, the writing of this report was a means of briefing each member, while drawing the team together by establishing working practices and building an understanding of respective strengths and weaknesses.

TWO STAGES OF FIELDWORK

There were two stages of fieldwork: the purpose of phase one was to begin with a wide lens and then to focus more narrowly and deeply during phase two. Having established the context of the research in the Initiation Report, phase one of the fieldwork aimed to gather wide, general information on the current state of play from a range of family law practitioners, with the focus moving in more closely for phase two where, along with other topics, issues raised during phase one were examined in detail.

PILOTING THE RESEARCH INSTRUMENTS

Three lawyers were invited to pilot the questionnaire, but because of holidays in the event only two did so. Each was questioned over the telephone seeking their comments. Similarly, two pilot interviews were conducted, one face-to-face and one over the telephone (*see A Note on Telephone Interviewing* below). Again their comments were sought at the end of the interview and a useful re-ordering of some of the sections of the interview schedule followed.

ANALYSIS

The data from both data sources were analysed qualitatively using NVivo and quantitatively using SPSS.

QUESTIONNAIRE

Identification of potential respondents

The first phase was an online/ postal questionnaire originally sent to 385 family lawyers. This database was developed mainly from two sources, namely the membership of the Family Law Association and the list of family law solicitors published by the Law Society of Scotland. However, in considering the reported cases it became obvious that there were some solicitors whose cases had come to court who were not identified by either of our two sources. The solicitors connected to all the reported cases were identified wherever possible and added to the database. Where such identification proved impossible someone from the relevant firm was added. It was clear that some lawyers with experience of this area of family law were not family lawyers but rather lawyers practising family law. Clients do not necessarily choose their lawyer by identifying the branch of the law in which their case sits; many simply return to the firm they have used before perhaps when buying a house or they simply walk down their high street and choose because it is close by. These last methods have no regard to the specialisms of the firm so chosen.

An interesting phenomenon occurred as the questionnaires were being returned, as it was noticed that some came from lawyers who we had never contacted. The most likely explanation for this was that a colleague within their own firm had passed on the questionnaire.

Once the emails containing the questionnaire web link had been sent out the contact list of lawyers was amended, because there were about 50 that were not delivered. Some emails failed and each person was then checked on the Law Society of Scotland website. This led to some being removed from our sampling frame as no trace of the individuals could be found. Some emails were easily corrected, but some could only be corrected by telephone calls to their firms. At this stage a few extra names were added to the original list, which finally totalled 366.

From the outset, as the questionnaires began to be returned, it was obvious that the overwhelming majority of respondents shared two characteristics: (1) they were members of the Family Law Association and (2) they had experience of working with the provisions of the 2006 Act. This began to ring alarm bells, because the research had two focuses, one being to gather the experience and perceptions of the lawyers working with the provisions, but the other being to get a sense of just how widespread

was the use of the provisions. This last could only be achieved if lawyers with no experience of cases in this field actually answered the questionnaire and it seemed they were very reluctant to do so. As the closing date for the return of the questionnaire arrived there were only 26 replies.

Low initial response rate

Initially, it was thought that the reason for the slow rate of return was that the questionnaire was sent out over the summer holiday period. This was always going to be a risky strategy, but such an issue is not unusual in research timetables and, in this case, it was not certain that this was a major problem. It was also thought, initially, that those who were not responding could well have had no cases, thus requiring a nil return to be submitted. To that end an email was sent to those who had not submitted their questionnaires, asking how many cases the recipient had dealt with (*cf Revised Plan of Action* below), stressing the need for nil returns. Examination of the 28 replies to this question showed that the common factor linking the respondents was not that they had encountered no cases (or even very few cases) but rather that they worked in small firms (i.e. between one to four partners). Possibly the reason for lawyers not completing the questionnaires, therefore, was more likely to be pressure of work as there might be only one family lawyer in the firm.

Revised plan of action

The poor response rate led to a plan of action that was repeatedly revised and developed as further attempts were made to persuade lawyers to complete the questionnaires. The strategy included:

- sending repeated email reminders by the Family Law Association and by the research team
- re-sending the questionnaire by email with a further letter attached by the research centre for the work, the Centre for Research on Families and Relationships
- where necessary sending hard copies of the questionnaire
- placing an article and news item in the Family Law Bulletin and the Journal of the Law Society of Scotland and on their websites
- sending emails of thanks to those who had completed questionnaire asking them to remind their colleagues to do so
- sending an email asking a single question – How many cases?

- two members of the research team attending the FLA's annual conference and AGM

All this covered a period of five months, from July to November 2009, and each brought in more responses, albeit in small quantities at a time. Each stage stressed the aim of gaining as wide a picture as possible of how the provisions were or were not being used, so nil returns were actively sought.

Having endeavoured to boost the number of responses, the end result was 97 questionnaires returned, some of them only partial responses. While a response rate of 26.5% (97/366) is commonplace for online and postal questionnaires, it had been hoped for something better. Nonetheless, the 97 returned questionnaires contain a wealth of information from a wide spectrum of family solicitors.

Use made of assistance

A range of assistance was offered in connection with the questionnaire. While the help of the Advisory Group in the development of the questionnaire is considered below, individual members of the group assisted in other ways. For example, one member was of particular help in identifying some of the individual lawyers from the case reports. Then, names were suggested for the piloting of the questionnaire. Furthermore, assistance was given in flagging-up the questionnaire, bringing it to the attention of lawyers by the Family Law Association emailing members directly and an item appearing in the Family Law Bulletin to coincide with sending out of the questionnaires. A further news item appeared in the Journal of the Scottish Law Society; as this appeared well after the questionnaires had been sent, it was turned to good use as a reminder to those who had not completed their questionnaires.

Questionnaire online

For ease of analysis, the intention was for respondents to complete the questionnaire online, so the approach was made by email. The attachment, however, was presented as a formal letter on university headed notepaper.

Questionnaire topics

The questionnaire topics were as follows:

1. *Background Information* – covering the respondent's work and practice
2. *Case Numbers* – numbers and types of cases encountered by the respondent, showing separation and death cases

3. *Explaining and Advising* – exploring how the respondent found initial meetings with clients
4. *Case Paths* – exploring the perceptions of respondents on why cases took particular courses
5. *How the Provisions are Used* – exploring the nature of cases giving rise to claims, alongside the workability of some aspects of the provisions
6. *Costs Involved* – covering the approximate cost of cases to clients and how well respondents thought legal aid was working
7. *Conclusion* – asking for more information about the respondents themselves.

The full questionnaire can be found in Appendix 1.

INTERVIEWS

Identification of potential interviewees

Using the questionnaire returns as a sampling frame, 23 respondents were invited to take part in the second phase of the fieldwork, an in-depth semi-structured interview. This constituted about one quarter (23/97) of the questionnaire respondents. In the event 19 (about 20%) were actually interviewed. This population included family lawyers who also acted in the capacity of mediators and collaborative lawyers, along with a sheriff.

Interviewees were chosen to achieve a balance based on questionnaire respondents using the following criteria: sex and age of interviewee, geographical area of practice, size and nature of firm, number of cases encountered, and whether a separation or a death case had been described in the questionnaire.

The interviews were in-depth, semi-structured MP3 recorded telephone interviews. Normally semi-structured interviews would follow the same basic format for each interviewee, although follow-up questions might well vary. In these interviews, however, the schedule was personalised, since the interview was very much a follow-up to the completed questionnaire. Such personalisation occurred at points throughout the interview where specific information from the questionnaire return was used as a basis to seek more in-depth comments and reflections (*cf Interconnectedness of Fieldwork* below).

The interview covered the following topics:

1. *Background of Interviewee from Questionnaire* – the background picture of the interviewee's work and practice
2. *Vignettes* – either a separation or a death scenario depending on questionnaire answers
3. *Case Numbers and Types* – numbers and types of cases encountered related to the cohabitation provisions
4. *1985 and 2006 Acts* – stepping back from their own cases to look at the Act itself and make some reference to the earlier Act
5. *Benefits and Difficulties for Clients* – what the Act offers clients in practice
6. *Aspects of the Provisions that work and those that don't* – their experience and perceptions relating to what aspects of the provisions are working and not working
7. *Public Knowledge and Understanding of the Provisions* – querying how well known they thought the provisions of the Act actually are in the general population
8. *How Cases Progress* – barriers to cases progressing, reasons for there being few reported cases, types of court involvement
9. *Level of Satisfaction at Outcomes* – levels of satisfaction felt by clients.

The interview schedule can be found in Appendix 1.

When confirming the date and time of the interview, these topics (along with the vignette) were sent to the interviewees to prepare them; however, no specific questions were sent.

THE USE OF VIGNETTES

An interesting aspect of the interviews was the use of vignettes (see Appendix 1), the purpose of which was to allow reflections to be gathered from all interviewees on a common set of circumstances. This was important because, although interviewees reflected on numerous cases over the course of the interviews, each case was very different from the others. Two vignettes were prepared and, depending on whether the interviewee had written about a case of separation or of death in their questionnaire, the relevant one was selected. It was emailed ahead of the interview to save time by giving thinking time.

Mostly this was welcomed, although in a few instances it caused minor panic in case the interviewee was meant to come up with a perfect set of right answers. Most

interviewees were well focussed, some displaying a forensic sharpness in their answers; some, however, were very nervous: indeed, all felt that the vignettes were like an exam question! This was turned to a positive note by the interviewer making a joke of it. Some interviewees were not well focussed mainly because the interview took place in the middle of a working day in the midst of larger and more pressing concerns, so they had not reminded themselves of the details of the vignette before the start of the interview; this initially made for hesitant answers and pauses while they read the scenario again.

Efforts were made to fix times at the start of the day in order to ensure fewer interruptions. One interview was interrupted because of an unexpected court appearance and several were re-arranged because of such court appearances or pressure of work. In the main, however, the interviews ran well to schedule with interviewees who willingly gave up a considerable amount of time freely.

A NOTE ON TELEPHONE INTERVIEWING

All but one of the interviews were conducted over the telephone. At the outset, there was some discussion regarding whether telephone or face-to-face interviews would be the more effective. The researcher felt quite strongly the latter would be preferable, so two pilot interviews were conducted, one of each. The researcher was impressed with the quality of the telephone interview, so decided to conduct the rest by telephone. The quality was good for two reasons, firstly the recording equipment was effective and secondly, as professionals accustomed to conducting business by telephone, the interviewees were, for the most part, focussed and able to answer readily when speaking about their own work.

The interviewer, however, had to review her own style of relating to those being interviewed. Clearly, over the telephone no use of body language could be made to encourage interviewees – only verbal support. However, there is fine line between encouraging interjections and irritating interruptions!

INTERCONNECTEDNESS OF FIELDWORK

When a questionnaire forms the first phase of fieldwork and interviews the second phase, it can often be the case that the only connection between the two is that the questionnaire forms the means of choosing the interviewees. Indeed, this was the case in this work but, more importantly, the interview schedule was devised in such a way that it picked up on some items from questionnaire responses to explore them in detail.

For example, the questionnaire asked the respondent to rank order from a given list the aspect of the provisions that they found to be the most problematic, while the interview then examined the answer in more depth.

A NOTE ON TEAM WORK

The team consisted of three people, each with different expertise. The team was geographically spread with one member in Cambridge, one in Edinburgh and one in a remote area of Scotland. Team meetings were usually face-to-face, although one conference call was also used. For a team to operate when so dispersed a number of factors need to be met:

- trust – accepting that work would progress
- clear lines of communication – especially important during pieces of collaborative writing
- frequent communication – being available
- supportive atmosphere – playing to each person's strengths, being able to ask for assistance and clarification

Such points could be from any basic manual on how to manage a team; but, because of the distances and the use of electronic and telephone communication, it was even more important that they worked here.

Trust

Since work was apportioned to each team member there needed to be a level of trust between each person that the work would progress. This was particularly important in connection with the researcher, who was the only full-time member of the team. Clearly, it helps if team members already know each other.

Clear lines of communication

This was the most challenging aspect of the teamwork to get right, and was most tested during pieces of collaborative writing. Contact was initially maintained through email as work was sent back and forth using the track change facility in the word processing package as the means of commenting upon and annotating modifications in each draft document. However, this reached a point where it no longer worked as team members had different preferences about the use of track changes. Furthermore, it became cumbersome for the team to maintain a discussion about changes on the document itself, exploring the need for alterations, then their acceptance, rejection or

adaptation; nor did it work when this was attempted by means of parallel emails. It all took too long and often resulted in misunderstandings.

Much better was the next plan where one set of track changes was sent and any subsequent points were discussed directly over the telephone. This speeded the work considerably, as it allowed for proper discussion of proposed changes, thus removing the need for separate, time-consuming emails explaining which changes had been incorporated and which had not. It should be stressed here that the feelings of frustration were not all felt by the team member who was the recipient of the track changes, but applied also to the member who had sent the changes. The lesson to learn from this is not so much to limit track changes (although that might be a good idea anyway!) but rather to remember what it is like being on the receiving end of electronic communications and to deal with documents increasingly cluttered with comments and changes. There are times when it is simply more encouraging and efficient to speak to each other rather than rely totally on electronic means of communication.

This team found that, although working styles did not differ greatly, how members used language did on occasion differ. For example, there were some suggested redrafts that were for the lawyer not simply a matter of style but of accuracy, which were initially understood by the social scientist to be the former. Equally, there was the need for the lawyer to ensure that the language used was comprehensible to a lay readership.

Supportive atmosphere

This worked well as each member had a different set of skills so each person was able to play to her strengths. When assistance and/ or clarification was needed one team member could ask another for such help and it was offered openly. Sometimes this took the form of a straightforward explanation of, say, a legal term or research practice, at other times it developed into a dialogue (cf. An ethical note).

CONCLUDING ON AN ETHICAL NOTE

As the interviews were being planned and interviewees recruited, efforts were made to include a number of lawyers who had been involved in some of the reported cases, since they were expected to have particular experience on which to reflect. This raised the practical issue of how to mention their reported cases during the interview. This turned out to be no problem at all, partly because interviewees were very willing to talk about these cases, but also because they were all in the public domain. Only one issue

arose in connection with a reported case where it was felt by team members (although not by the lawyer interviewed) that a particular quotation might reveal a little too much about a client. This was resolved quite simply by removing any reference that could identify either the interviewee or the client. Slightly more difficult was how to talk about on-going cases, the details of which were still subject to legal privilege (this issue developed into an electronic dialogue within the team as legal protocol met social science protocol). In the event, lawyers spoke readily of such cases when illustrating points, although they made no mention of any details that could lead to any identification of the cases. Therefore, if these cases were to be mentioned in any pieces of future writing resulting from the research, neither the cases nor the lawyers would be identifiable. All the questionnaire respondents and subsequent interviewees were given a code number but, where a quotation might lead to identification, even the code number was removed. This is important because, as everyone in Scotland knows Scotland is a village, and members of any profession are all very well known to one another!

PART 2. RESEARCH FINDINGS

CHAPTER 5. FINDINGS FROM THE ONLINE QUESTIONNAIRE

As discussed in the methodology chapter, the online/postal questionnaire aimed to collect information from as broad a cross section of family lawyers as possible about their experiences and views of working with ss 25 to 29 of the 2006 Act. The questionnaire was returned by 97 solicitors, with varying levels of completion. A number of solicitors with no or minimal levels of cases involving ss 25-29 completed only some of the questions about themselves, their firms and their caseloads, hence the relatively large amount of missing information about their last cases. Nonetheless these returns were helpful in providing us with a sense of the scale of cohabitation cases that family solicitors were dealing with. In this chapter we present findings from the online/postal questionnaire about the sample, their caseloads, their last case and general reflections about the cohabitation provisions of the 2006 Act.

THE SAMPLE

Of those respondents who replied to the particular question:

- Most respondents (58%) were aged over 40, and over two thirds (69%) were aged between 30 and 50. One quarter were aged over 50.
- Almost all (95%) described themselves as white, Scottish or British.
- Over three quarters (77%) were women.
- Compared to the distribution of the Scottish population, there was a relatively high concentration of solicitors located in Edinburgh (29%), and relatively few (23%) from Glasgow or Strathclyde, where over half the Scottish population live.
- The great majority of respondents were 'dedicated' family lawyers, with over half of the sample (55%) describing at least 90% of their work as being in family law. Fewer than 10% of respondents described family law as occupying less than half of their practice.
- 56% of respondents worked in firms that accepted legal aided cases under ss 25-29. This contrasted with the very small number of solicitors whose firms

stated on the Family Law Association website that they accepted legal aid cases. Some solicitors who stated in the questionnaire that they did not accept legal aid cases reported during the interviews that they did accept legal aid cases.

- The great majority of respondents (94%) are members of the Family Law Association (not surprising in light of our method of drawing the sample). Despite the preponderance of dedicated family lawyers in the sample, relatively few (17%) report that they practise as lawyer/mediators. Somewhat surprisingly, particularly in comparison to the numbers of lawyer mediators, over one third (37%) reported that some of their practice was devoted to practising collaborative law.

CASE LOAD

In the absence of published administrative civil judicial statistics for Scotland to provide some insight into the number of cases reaching court involving the cohabitation provisions of the 2006 Act, we asked respondents about their own estimated case loads. We use the term ‘case’ in this context to mean clients who presented themselves at least once to the solicitor in circumstances of potential relevance to the cohabitation provisions of the Act, rather than referring only to those that progressed beyond a single visit.⁷³ Just over half of respondents (49; 50.5%) reported they dealt with at least 7 cases involving ss 25-29 since 2006, as the table below shows.

Table 5.1. Case numbers involving ss 25-29 of the 2006 Act

Case numbers	Frequency	Percent	Cumulative Percent
0	6	6	6
1-3	18	19	25
4-6	24	25	50
7-10	21	22	71
over 10	28	29	100%
Total	97	100%	

⁷³ The question that was asked was: “We are interested to know about the approximate numbers and types of cases you have encountered relating to sections 25 to 29 of the 2006 Act. . . . About how many cases have you dealt with in relation to sections 25-29 of the Act, since it came into force in May 2006?”

As a very broad brush exercise, we use these estimates to conservatively estimate the order of magnitude of the total volume of cases involving ss 25-29 since 2006. Whilst not claiming any great precision, we can multiply the middle of each range by the number of cases in that range, and add these figures together: $[18 \times 2 + 24 \times 5 + 8.5 \times 21 + (\text{say}) 12 \times 28 = 670$ cases for respondents]. The actual number of cases with which respondents were involved is likely to be somewhat lower than this since there will be some (unknown) degree of double counting because two solicitors may have been involved on either side of a single case. Scaling up from the sample to the population is not likely to be proportionate since many non-responders were likely to have smaller relevant case numbers. We therefore project that the number of cases dealt with by solicitors who did not respond would add an unknown but marginal number to the sample estimate, and that the total volume of cases dealt with by solicitors relating to ss 25-29 is of the order of around 1000 cases since 2006. Comparing this figure to the number of cohabiting adults in Scotland as estimated by the General Register Office for Scotland (about 372,000; see chapter 3), the most probable inference is that only a fairly small minority of cohabiting couples whose relationships end are making use of these provisions so far. As we shall see, these are not representative of the population of cohabiting adults as a whole. Comparing this number to the number of divorces since 2006, and bearing in mind that a divorce, unlike a cohabitation separation, is likely to end a relationship of longer duration and requires court action of some kind, even if only minimally,⁷⁴ we can see that the number of cases using the cohabitation provisions of the 2006 Act is also a smaller order of magnitude than the number of divorces.

One can only speculate as to why but one possibility could be that some who might benefit are unaware of the remedies available in the 2006 Act. We could conclude that there is a need for more public legal education about what legal remedies now exist at the end of a cohabiting relationship, a point to which we return in the next chapter. Of course, as a population, cohabiting couples are younger and have fewer resources to redistribute at the end of a relationship than married couples (cf chapter 3), and for many such cohabitants, the provisions of the 2006 Act would not be relevant. Other possible factors that could account for low case numbers are:

- Ignorance of provisions, as noted above

⁷⁴ There were 13,075 divorces in 2006; 12,810 in 2007 and 11,474 in 2008 (General Register Office for Scotland 2009, p. 90).

- Limited nature of provisions
- The parties have no property to redistribute
- Any redistribution has been agreed by other means, e.g. joint ownership, the deceased's will
- Any redistribution was agreed privately by the couple, without solicitors, with each partner leaving with their own property and assets after a short cohabitation.

Family lawyers may well encounter cases where ss 25-29 might be applicable, but consider that it is nonetheless better not to proceed. This might occur in circumstances where the cost of the action exceeds the amount of a reasonable claim, or where the outcome is too uncertain to risk raising an action. When asked whether they had been able to identify cases where no claim was the best course of action, the great majority of respondents (80%) who answered this question said they had. We consider this issue further later in the report.

PROFILE OF RESPONDENTS' LAST CASE

Respondents were asked if their last completed case that involved sections 25-29 of the Act was a separation or succession case. Nearly four fifths of respondents who answered this question (50/63 cases; 79%) had dealt with a separation case. This may reflect to a small extent the nature of the sample, since family lawyers in at least some, and perhaps many, firms do not deal with wills/succession cases which are often handled in private client departments. However, this pattern is likely to be due mainly to the relative youth of cohabitants. Consequently, there were a relatively small number of succession cases reported (13), and thus we over-sampled from these for our interview sample.

Cohabitants, as a population, are less likely than spouses to have children. Nevertheless it might be that the presence of children provides an incentive for taking legal advice or action when cohabiting relationships end, whether or not clients were aware of the cohabitation provisions of the 2006 Act. There were dependent children in only a large minority of cases: 45% of separation cases and 42% of succession cases.

As the table below shows, about three quarters (73%) of the 'last cases' involved relatively long-standing cohabitations, of 6 or more years, the median for both separation and succession cases somewhere in the interval 6 to 10 years. This is

longer than the median durations of cohabitations in the wider population, the majority of which tend either to end in separation or move to marriage after a duration of three years (see Morrison et al (2004), discussed in chapter 3). Just over one third of cohabitations (35%) were for periods of over ten years, and only 8% were for two years or less. Just under one quarter (23%) of succession cases involved long cohabitations of over 20 years. In England and Wales, a minimum duration of cohabitation is proposed before parties can raise an action at its conclusion (cf. chapter 9). The great majority of these cases would have met that condition, raising the question of whether a minimum duration requirement is necessary.

Table 5.2. Last case separation or succession by length of cohabitation

length of cohabitation		separation	succession	Total
less than a year	N	2	0	2
	%	4%	0%	3%
1-2 years	N	1	2	3
	%	2%	15%	5%
3-5 years	N	9	3	12
	%	18%	23%	19%
6-10 years	N	21	3	24
	%	42%	23%	38%
11-15 years	N	10	2	12
	%	20%	15%	19%
16-20 years	N	3	0	3
	%	6%	0%	5%
20+ years	N	4	3	7
	%	8%	23%	11%
Total	N	50	13	63
	%	100%	100%	100%

In these 'last' cases, the great majority of clients (84%), and the other party (81%) were in paid employment. Nearly three quarters (71%) of clients were reported to be aged over 35, suggesting the 2006 Act is little used by the population of younger cohabitants, the majority of the cohabitant population, who are likely to have fewer assets to divide on separation and are less likely to die than married people. Respondents represented the pursuer in over three quarters of cases, and women slightly more often than men (44% men; 56% women). In the great majority of cases (88%), both sides were legally represented. Just under one third of clients in separation cases (31%) were legally aided, at least in part, and 17% of the other parties were

legally aided. In succession cases, only two out of 13 were legally aided in whole or part. About one quarter of cases (6/24) that were legally aided reported some difficulties over legal aid, some of which were resolved in the course of the action.

Nearly four fifths of clients (79%) were home owners, a higher proportion than the home ownership rate of cohabitants generally (cf. chapter 2). A concern about the future of a family home might be a factor that triggers clients to seek legal advice, despite the absence of any power to order the transfer or long-term arrangement for the occupation of that property in the 2006 Act.

The clarity of the 2006 Act provisions seems to be problematic for at least some clients, although clients were somewhat better able to understand the advice they were offered than the information provided. The last cases were evenly divided between those for whom understanding was and was not easy. This perhaps, again, underlines a need for public legal education targeted to potential users of the legislation. In about 63% of cases, solicitors reported that it was easy for clients to understand their advice.

When asked to choose from a list of possible case outcomes, solicitors responded as in Table 5.3 below. While just over one third of cases (36%) were settled without court involvement, an even higher proportion, 42%, were resolved with court involvement. This figure is surprisingly high in light of the settlement culture of family law, and is an issue we pursued in the telephone interviews. As we shall discuss, court involvement might mean very little, i.e. raising and immediately sisting an action to be within the time limits.

Table 5.3. Solicitors' description of the case outcome, (column percents)

	Frequency	Percent	Valid Percent
did not progress beyond introductory meeting*	6	6	10
settled without court involvement	22	23	36
unresolved, no longer ongoing	8	8	13
resolved with court involvement	26	27	42
Total responding	62	64%	100%
Missing	36	36%	
Total	97	100%	

* one respondent who stated that the case did not progress beyond an introductory meeting also gave a second response that the case was settled without court involvement.

When asked why some cases do not progress, of the 59 respondents who replied to this question, 61% (36) stated that uncertainty of the law and so of the potential claim

or defence as the most important reason, and a further 19% (11) gave this reason as the second most important reason, clearly placing this reason as the most important overall. Also a significant barrier to progress was the financial cost of proceeding, stated by 27% (16) as the most highly ranked barrier, and by 41% (24) as the second most important barrier. Also mentioned by 30 solicitors as the first, second or third ranking barrier to case progression was the lack of evidence of each party's relevant income and expenditure necessary to sustain or defend a claim. While the first reason, uncertainty of the law, might improve over time as a body of case law and experience develops, the other reasons relate to problems of evidence and the cost of legal action, both of which are more generic problems in family law rather than specifically relating to the 2006 Act. Nonetheless they show the sensitivity of the operation of this specific legislation to conditions that pertain in the wider context of family law practice.

When asked how long the case took from first client contact to the close of the case file, the majority of those who responded to this question, 60%, said it was a year or less (there was a high level of non-response, 45%). Succession cases (7/12) were more likely than separation cases (14/41) to take over a year to resolve. The cases that took more than one year were more likely to be legally aided in part or full than those taking a year or less to conclude, were more likely to involve clients who were home owners and were more likely to involve other disputes over residence or contact. The great majority of cases that took over one year from start to finish (17/21; 81%) were resolved with court involvement, compared to only 19% (6/32) of those resolved in a year or less.

For all cases for which we had information, the median cost to clients was reported to be about £1500. In the cases that were resolved, about two thirds of respondents (66%) considered that the outcome was sufficiently generous or even overly generous to their client.

Succession cases

Focusing specifically on the 13 succession cases in the dataset, we found that most of them (9) were handled by dedicated family lawyers, i.e. over 90% of whose work was in family law, and all but one of whom were members of the Family Law Association. The majority (9) worked in firms that accepted legal aid cases, and most (8) had dealt with at least seven cases since 2006 that involved any of the relevant provisions of the 2006 Act.

With regard to their last (succession) case, five involved dependent children and all cases related to cohabitations of at least one year's duration, with the median duration between six and ten years. In eight cases, the surviving cohabitant was in paid employment, and in seven, the deceased had been in paid employment prior to death. The deceased was a home owner in nine cases. Three cases involved same sex couples. In ten cases, the respondent acted for the surviving cohabitant, the remainder for another heir. The other side was also legally represented in 11 cases. Only a few cases involved legal aid for either side: of all cases described by our respondents, only two had involved legal aid, in both instances for our respondent's client and not for the other side. In the two legally aided cases, no difficulties with legal aid were reported. Nine cases were resolved with court involvement, two settled without court involvement and a further two did not progress beyond the first meeting. This very high proportion of cases involving the courts, as mentioned above and discussed at greater length in the chapter reporting findings from the telephone interviews, is likely to be due largely to the need to raise and immediately sist an action arising from concerns with the short, six month time limit from the date of death for initiating a claim.

Nature of any other disputes

We were also interested to know what other disputes may have been present in the 'last case'. There was a high level of non-response to this question (46 to 48 responded to this set of questions). All responses were in separation cases, and only a small minority (8/46; 17%) reported other disputes were involved: about residence or contact, or about the occupancy of the family home (8/48; 17%), the remainder being disputes about other matters.

SOLICITORS' GENERAL REFLECTIONS ABOUT THE OPERATION OF THE 2006 ACT

We asked solicitors to identify from a list of possible problems what they thought to be problematic areas of the 2006 Act, and then to rank order the three most significant of the unworkable aspects of its cohabitation provisions.

Table 5.4. Solicitors' views about what are the problem areas of the cohabitation provisions of the 2006 Act.

	Percent	Number/total number who responded to the question
Interpretation, proof and quantification of economic advantage and disadvantage	89	55/62
Width of court's discretion	85	51/60
Time limits	76	45/59
Establishing the date of separation	60	35/58
Succession issues	36	17/47
Definition of cohabitation and being eligible to apply	30	17/57
Jurisdictional issues	20	11/54
Other concerns	26	8/31

As Table 5.4 shows, the three most commonly cited reasons were, in order of frequency:

- The interpretation, proof and quantification of economic advantage and disadvantage
- The width of court's discretion
- Time limits from the dates of separation or death for making a claim.

All of these were regarded as problematic by over three quarters of those who responded. These 'top three' problematic aspects of the Act are also shown in Table 5.5 below. A majority also thought that establishing the date of separation was a problem area of the Act.

Table 5.5. Solicitors' rank ordering of the most unworkable aspects of the of the cohabitation provisions of the 2006 Act.

Aspect	Ranked first	Ranked second	Ranked third	Total (N)
Interpretation, proof and quantification of economic advantage and disadvantage	59% (27)	19% (8)	10% (4)	39
Width of court's discretion	11% (5)	47% (20)	15% (6)	31
Time limits	22% (10)	12% (5)	33% (13)	28
Establishing the date of separation	4% (2)	5% (2)	18% (7)	11
Succession issues	4% (2)	5% (2)	5% (2)	6
Definition of cohabitation and being eligible to apply	0	12% (5)	10% (4)	9
Jurisdictional issues (e.g. cross-border cases)	0	0	8% (3)	3
Other concerns	0	2% (1)	3% (1)	2
Total (N)	52	43	40	

Thus, the three most highly ranked amongst the problem areas identified (by a majority of respondents to these questions) were: first, the interpretation, proof and quantification of economic advantage and disadvantage, mentioned by 39 of 52 respondents; second, the width of the court's discretion, mentioned by 31 of 52 respondents; and third, time limits for raising an action, mentioned by 28 of 52 respondents. The first two reasons could potentially improve as solicitors gain further experience and case law develops. However the third aspect, time limits, are intrinsic to the legislation as it currently stands. These reasons all parallel the reasons solicitors gave as to why cases do not proceed.

The most problematic areas of the Act, and their rank ordering, were broadly similar when comparing solicitors who were dedicated family lawyers, with 90% or more of their work in family law, with other solicitors in our sample, and comparing solicitors who had dealt with the largest number of cases involving ss 25 to 29 of the 2006 with those with less experience. There was some indication that the more experienced solicitors reported a greater number of problem areas of the Act than their less experienced colleagues.

CONCLUSION

This chapter has documented the experience of a cross-section of family lawyers in implementing ss 25 to 29 of the 2006 Act, based on returns to an online/postal

questionnaire. Most responses came from practitioners whose predominant practice, over 90%, was in family law. Just over half of respondents had dealt with at least 7 cases involving these sections of the Act since its inception in 2006. From their responses, we broadly estimate that the total volume of cases involving these provisions is about 1000 cases over the three years that the 2006 Act has been in force. This volume of cases is well below the rate of the termination of cohabiting relationships either by separation or death in the Scottish population.

Respondents were asked to tell us about their last case involving ss 25 to 29 of the Act, whether that involved only one meeting or something more substantial. Nearly four fifths of these cases involved separation. Nearly three quarters of all 'last' cases involved relatively long-standing cohabitations, the median duration being between 6 and 10 years, considerably longer than the median duration of cohabitations in the Scottish population, as described in chapter 3. Very few cases involved short cohabitations of two years or less. The last cases also involved older cohabitants, with nearly three quarters aged 35 or more, probably reflecting the likelihood that younger cohabitants are less likely to be bereaved or to have assets to divide on separation. Just over two fifths of cases involved dependent children. In the great majority of cases, both pursuers and defenders were legally represented, were in paid employment and were home owners. Only a minority of cases were supported by legal aid in whole or in part. Respondents reported that many clients found it difficult to understand the information they were given and, to a slightly lesser extent, the advice provided. This perhaps points to a need for public legal education, directed to potential users of the legislation. Respondents reported that just over one third of these last cases were settled without court involvement, a slightly higher number (42%) were resolved with court involvement, a high figure that is likely to be largely due to having raised and then immediately sisted an action in order for the case to comply with the time limits of the legislation. Three fifths of cases took a year or less between the first client contact and the close of the case. The cases that took longer than one year to resolve were more likely to be succession cases, more likely to involve clients who were home owners, more likely to involve legal aid, more likely to involve another dispute over residence or contact, and more likely to be resolved with court involvement.

When asked to reflect in general about what they regarded as the most problematic aspects of the cohabitation provisions of the 2006 Act, the great majority of respondents gave the following three issues, in order of frequency:

- The interpretation, proof and quantification of economic advantage and disadvantage
- The width of court's discretion
- Time limits from the dates of separation or death for making a claim.

These are also issues that were pursued in the in-depth interviews, to which we turn in the following chapter.

CHAPTER 6. FINDINGS FROM THE IN-DEPTH INTERVIEWS

NEW LEGISLATION WITH, AS YET, UNFULFILLED POTENTIAL

The cohabitation provisions of the 2006 Act had been in operation for three years when this research began; so when practitioners, i.e. lawyers, were interviewed their views reflected the fact that it was relatively new legislation, still bedding-in. The provisions were seen as having the potential to be effective say “*in 10 years’ time*” [47]⁷⁵ because the problems being experienced by practitioners and clients alike were:

... not really to do with how it’s drawn or who’s in the net or who’s out the net and what the remedies are, it’s because it’s new, and that’s the problem we have in advising people. ... [I]n 10 years’ time you could say – Well, there you go, Janet’s⁷⁶ given up a house – tick; she’s got two small children – tick; she’s not working – tick; oh she’s guaranteed, she’ll get 50%. And there’s Mrs Bloggs, no children, but she’s given the man 25 years of her life, oh she’ll get 25%. I think all of that will come in time. I don’t think it’s a criticism of the legislation, I think there just has to be that settling in time. [47]

Others also thought that once this new legislation had settled into place, parameters would become clear as more cases:

... come through, just in the same way as divorce ones, and you’ll get your spectrum and then you’ll be able to say right, your client falls here on the range. And that’s exactly what we’re all waiting for. So that will develop appropriately over time: it’s just a pain just now. [268]

Lawyers needed to be patient, adopting a dispassionate approach to new legislation, taking the long view, a point illustrated by a comparison with the introduction of the 1985 Act:⁷⁷

⁷⁵ Throughout the numbers after quotations refer to the codes given to interviewees. There are a few occasions where, for reasons of confidentiality, no codes are attributed.

⁷⁶ See Appendix 1: Vignettes

⁷⁷ The Family Law (Scotland) Act 1985, which, *inter alia*, reformed the law of financial provision on divorce.

I just think it's going to take a long time, I've been practising long enough to know what the law was pre-1986. ... I remember at that time, 1st of October 1986, thinking – Well, a lot has changed, it's going to be quite different, – and then nothing actually happened for ages and ages. It was only after about five or 10 years that you really get into the swing of it. I remember all the excitement at that time of any cases that came before the court ... and you would analyse and try and draw conclusions, but that's a bit dangerous because it doesn't really give you a true flavour particularly in the question of pensions; because when the '85 Act came into force, pensions were a matrimonial asset and then didn't say how you valued them. And there was loads of cases thereafter, about how you value pensions and I took one of the first ones to court. When you read it now, it's embarrassing, completely cock-eyed and approaching it from the wrong view point, but there you go! [29]

Since the 2006 Act is relatively new there remains a level of uncertainty about its operation that no longer is true of the older 1985 Act. Add to its newness the fact lawyers do not use the cohabitation provisions very frequently and that there are very few reported cases setting out the thinking of the courts, it is hardly surprising that there was still uncertainty about its effects. When advising a spouse or civil partner pursuing a divorce or a dissolution, interviewees felt they could offer fairly accurate advice relating to possible outcomes whereas for a separating cohabitant it was far less sure:

The key difference is predictability. ... I can work through the '85 Act and all the principles and special circumstances and everything else and have a reasonably good idea how I'm going to advise my clients or at least be able to tell them, maybe, two possible outcomes. ... With the 2006 Act, I struggle ... to give them any sense of where we're going with their outcome. [174]

Thus, when advising a client seeking a divorce it is:

... very much more straightforward, simpler, quicker to advise ... you can give them an overview at your first meeting as to what issues are going to apply and what are not. [360]

whereas in a cohabitation case it is so “*much more an amorphous concept*” [360] with a greater range of issues that may or may not apply, along with a tight deadline.

ASPECTS OF THE PROVISIONS WELCOMED BY PRACTITIONERS

... something for us to focus on during the end of a cohabitation relationship.

[174]

The 2006 provisions were welcomed as having something to offer some clients: *"I think so, I mean it varies from person to person"*, [353] and because before the Act *"there was nothing, literally nothing"* [123] for cohabitants – an exaggeration, of course, because there were routes that cohabitants could in theory take on separation or on intestate death pre-2006. The two main routes, both considered by interviewees to be both difficult and expensive, were raising an action of declarator of marriage by cohabitation with habit and repute and raising a claim for unjustified enrichment. The former was seen as culturally dated since it stemmed from a time when it was socially unacceptable to cohabit. The latter, although still used post-2006, was considered to be: *"Too complex, the old unjustified enrichment stuff – ahh, she said sighing – really difficult!"* [123] There were two occasions indicated by interviewees when an unjustified enrichment claim might still be used: firstly when a client had delayed in seeking advice thus placing them outwith the time bar for a claim under the Act and where, for example, the pursuer had contributed to improvements to the family home but was not a title holder; or secondly where:

... a cohabitant ... finds that the partner died leaving a will (which takes section 29 out of the frame), leaving his whole estate to somebody else – whereas they have, over a long period of time, contributed to the household, the running of the household. [179]

Thus, while unjustified enrichment was, and remains, a claim that cohabitants could use, interviewees considered such a course of action as unlikely because even before the 2006 Act, when it was the only course available, it was not easy to prove.

Improvement on what had existed

The Act was seen, in the main, as being better than what had previously existed: *"just having provisions whereby you can make some sort of financial claim"* [372] and, therefore, interviewees welcomed the fact that there was legislation at all, because the Act *"does give people a bit, a bit of a lifeline if they're the weaker party certainly"*. [353] It was also considered a better route than an unjustified enrichment claim: *"it helps that there is clarity as to a remedy that couples can claim where they have made*

disproportionate contributions to a house". [306] It was, therefore, an improvement on what had preceded it:

... because where they had the potential to make some kind of financial claim against a partner in the past it was very difficult to do that: it was very difficult to quantify it and [there was] very little guidance as to how it would be approached. [306]

Thus, the provisions were considered to be "*better than nothing ... I do accept it's better than nothing*". [272]

Recognition of an entitlement

A number of interviewees welcomed the provisions because previously, when faced with a separating cohabitant, lawyers had no choice other than "*to tell the woman – I'm sorry there's nothing there. And now you can say – Well, let's try a cohabitation claim⁷⁸ then, and take the circumstances from that*". [123] Thus, at the most basic level, the provisions were welcomed because they acknowledged "*the fact that cohabitants have recognised rights*", [148] so, in that sense "*I suppose I welcome the fact that there is a recognition of an entitlement on the part of cohabitantes*", [249] albeit with the rider that "*It could have been done better, as anything could always be done better*". [108] Furthermore, the provisions allow the cohabitants to establish a stance:

... to say – No, you can't just ignore me. I'm here and I don't necessarily have to go through an expensive ... marriage by cohabitation and repute declarator, I can just lodge an action in the sheriff court. So, you can't just ignore me – so, I suppose it gives them the status and locus, if you like, to start talking. [29]

Provides the basis for negotiation

The provisions offered a foundation for negotiation between the parties since they provided "*a massive bargaining tool; so forget the detail ... the fact that you can put in a claim at a nice early opportunity is a help, a massive, massive help ... that is the biggest benefit*" [47]. Interviewees were searching for the:

⁷⁸ Lawyers tended to refer to separation claims as cohabitation claims and succession claims as death claims.

... nice strong negotiating base, the ability to say to people – Okay, I can put in a cohabitation claim here ... where the woman has ... got two kids, she's been dependent ... and where I can say – Well, I'll just put in a cohabitation claim and take my chances – then that's fine. I think it works from that point of view. [123]

Potential to assist some cases

While considering the legislation had little to offer the “*more usual case, the more normal case*”, [174] it was thought that for the “*extreme cases*” the provisions had the potential to be beneficial:

... where people have invested large sums of money in a relationship and ... well before the 2006 Act, [it was] incredibly difficult to argue that it was not some form of gift from the other party or to try to control it at all. ... [O]f course, that maybe have been the intention that we only deal with extreme cases in this Act, but I rather suspect it wasn't; ... so, that's the advantage that, in extreme cases, it is there to solve an injustice. [174]

Principle correct

While some interviewees supported the principle of the Act: “*yes, its principle is correct, and I applaud that*”, [70] many were loath to go so far as actually welcoming the provisions, but rather indicated that while they “*supporte[d] ... all the principles contained in the Act ... There's nothing in it I have any objection to, probably better phrasing it that way*”. [268]

Death cases

There was some support for the principle of death claims under section 29 of the Act:

... the right to claim provision on death is extremely welcome, because that was a very difficult scenario for somebody to have to establish a marriage ... [by cohabitation with habit and repute] ... So, I would say that must be very welcome. [360]

Although it was recognised that “*greater clarity would be helpful*” [306] because of:

... the vagueness of the provision for quantifying claims and the shocking decision in *Savage against Purches*⁷⁹ is really not helpful. So, I think we need greater clarity as to how the quantification of claims should be approached. [306]

Separation cases

The provisions were helpful where “*the emphasis is on whether or not people have children*” [329] enabling claims “*where there are costs for a child that would otherwise not be recoverable*”, [306] such as claims “*for a share of future child care costs*”. [372] Taking the example of the vignette,⁸⁰ where the property was in the name of the economically stronger person, the provisions offered a “*much clearer legal framework within which to make a claim*” [329] making it more likely that the stronger party would make an offer as interviewees thought it likely that the defender seemed child-centred. Questionnaire respondents characterised their clients as having cohabited for quite lengthy periods of time, an issue further explored by interviewees: “*people who have had a fairly substantial cohabitation almost akin to, you know, a reasonable length marriage*”. [70] In so doing, they demonstrated that the fear the provisions would be mis-used by those with very short cohabitations was not proving to be the case in practice.⁸¹ In lengthy cohabitations the Act was seen as having the potential “*to correct an unfairness on separation*”. [360] However, even this interviewee, who saw such potential, qualified the comment with: “*I think it’s very, very difficult to use in practice*”.

Some aspects seen as both positive and negative

There were some aspects of the provisions that were seen in both a positive and a negative light. These are considered in detail below,⁸² suffice to say here – it was thought that the section 28 provision of “*a general capital sum payment ... [was] very woolly*” but had the advantage of affording “*a lot of flexibility to the court*”. [99] So, accepting the negative fact that “*it’s not clear exactly how much [an award] ... should be*” [372] it was seen as a plus that it relied on:

⁷⁹ 2009 FamLR 6

⁸⁰ See Appendix 1: Vignettes.

⁸¹ See section *To whom should the Act apply?* Below.

⁸² See sections *Width of Courts’ Discretion* and *Time Limits* below.

... just discretion. There's various things the sheriff could take into account, the idea being that the sheriff can deal with each case, and it turns on its own particular facts [372].

Furthermore, the imposition of time limits, fraught with difficulties as they are, “*can be a good thing in a way*”, [249] as could the restrictive nature of the provisions:

I don't think it should be as wide ranging as some people have hoped. ... But in terms of provision about the capital sum and for indirect, non-financial contributions, et cetera, I think that's fine, and if it's balanced by the other party losing I think that's a fair, balanced strike. [99]

ASPECTS OF THE PROVISIONS NOT WELCOMED BY PRACTITIONERS

Quantification of economic advantage/disadvantage

The questionnaire analysis highlights “interpretation, proof and quantification of economic advantage and disadvantage” as being the most unworkable aspect of the provisions by a majority of respondents (89%) who replied to this question.

The interview analysis showed there were a number of inter-related issues that made arguing economic advantage/ disadvantage difficult to pursue to a successful conclusion, namely explaining the concept to clients and then relating it to their situation, agreeing what constitutes an advantage and a disadvantage, and then proving the claim. In a separation case this could involve trying to supply proof of who paid for what under what circumstances.

The quantification of the balancing act was seen as well nigh impossible to argue to any meaningful extent by some interviewees:

... you've got the defender's economic advantage and contributions, and those contributions can be financial or non-financial, and then ... to what extent has that been offset by the defender's economic disadvantage suffered in the interests of ... an applicant or any child? [372]

However, surprise was also expressed relating to some of the preparation in the reported cases:

... to be honest I'm a wee bit concerned about the extent and quality of the preparation which is described in some of the cases. Especially ... after ... the M

against S⁸³ [case where] ... it was going a very arithmetical route, setting everything out. Yes, ok, this is the way we're going to go. But subsequent cases have raised the same problems repeatedly. [360]

Time and again interviewees compared their divorce work with their cohabitation work:

I don't know whether people are ... a wee bit wary of the Act, because it's new territory and it is complicated territory, where I think the 1985 Act is very clear. I mean there's a lot in it, but it's very clear and ... you fit your circumstances into it and you can look for your guidance and your principles and see what applies. This is so much smaller but to me more complicated. It's quite intense trying to disentangle which bits apply and which don't. [360]

In a divorce it was considered to be much more straightforward, since there would be “a schedule of matrimonial assets and liability”, which is then tallied up and normally leads to a 50:50 split: whereas, “it's not the same approach with cohabitation claims, it is much more ... grey and gooey” [29] as there was a lack of guidance in quantifying the giving up of a career, the loss of opportunity or an enforced house move. Cohabitation cases were thought to take much longer than divorces cases and demanded more detailed work to establish a “complete financial history, not just of somebody's career. ... You're getting into much more detail in ... these claims”. [360] While the complexity and interdependence of finances was nothing unusual, simply reflecting how people lived their lives, the level of detail expected by some sheriffs had left lawyers struggling to find proof of income and expenditure:

... if the sheriff is saying we want to know who's been paying for what, people ... can never produce bank statements back more than about two months, so actually getting the information can be very, very difficult unless people have been organised. [The defender] ... couldn't even tell us where he banked. He was very disorganised.

The starting points were of particular concern: in a divorce those were clear – equal sharing, an exact date of marriage and an understanding of matrimonial property, whereas with a cohabitation none of that applied “*how do we work out what ... cohabitee property is? Is there a definition of cohabitee property? I'm not aware that*

⁸³ *CM v STS* [2008] CSOH 125; see Appendix 4.

there is". [372] It should be noted, here, that the Act sets out no requirement for any pot of "cohabitee property" to be identified.

When considering property, the use of the "housekeeping allowance" was seen as "archaic". [70] There was real difficulty in seeing how clients' situations actually fitted this provision. Thus, section 27 was seen as useless, since it was considered to be unlikely that any claims would arise from it. No one thought it likely that a housekeeping account would be used to buy another property. Of greater concern would be the house contents. The Act was seen to offer "*some certainty for people in that situation*", but the nature of the rebuttable presumption in s 26(3) then raised a potential problem: "*Let's show the receipts – and you can see a scenario where it could be argued for days on end*". [99]

In essence, then, the problems were identified by interviewees as being: no identifiable "pot" of property to be divided (i.e. no equivalent of matrimonial property); no yardstick for such a division (i.e. no presumption of equal sharing);⁸⁴ and the potentially acute difficulty of quantifying any advantage or disadvantage (a principle not regularly relied on heavily in divorce cases where the fair (equal) sharing of matrimonial property principle is pre-eminent). The "*lack of framework*", [173] offering guidance, along with the lack of any equal sharing "*yardstick*" [372] led to an unhappy combination making it very difficult to inform a client of their best and worse case scenarios: "*you feel a bit like you're almost getting a gut reaction to what sort of money are we talking about*". [372] The lack of a statutory framework meant that "*it's been left to acquire a common law framework and no one can afford to run it to get that common law framework*", [268] making practitioners feel as though they were "*guessing, effectively. ... And that's, not something ... lawyers necessarily like to do.*" [70] Furthermore, the case law that had been built was considered to be "*so far down the polar end of the scale that it didn't help*", although it had "*scared a lot of people, quite rightly so, I might add, ... into settling*". [268]

Without a statutory framework, deciding the approach to take could prove to be very tricky, since lawyers felt that whichever strategy they might adopt it might not accord with what any particular sheriff might be looking for:⁸⁵

⁸⁴ See Family Law (Scotland) Act 1985 ss 9-11; Appendix 3.

⁸⁵ See section *Width of Courts' Discretion* below.

... if I look at assessing it like a personal injury case, in terms of services provided ... if you're for the female partner who has ... given up work ... and you're arguing there's an advantage, disadvantage situation – is that what the court wants to hear? Or, is the court going to say – No, well that's completely the wrong approach. [70]

Clearly, this is an issue of concern when client's money is being expended on what might prove to be a false route. Everything was seen to depend on procedure, with the sheriff offering no guidance to indicate whether s/he approves of the approach taken until the end when the judgment is given: *“there are not a series of hearings where the sheriff will say – I don't think that's well founded, I want to see this information”*. [70] Furthermore, sheriffs were seen as being likely to take different approaches partly because of *“their individual personalities”* but also in terms of *“how interventionist they would be”*. [70] It was thought unlikely that any sheriff would want to express an opinion tying another sheriff to that way of thinking, since it would be unknown, at that point, who would be dealing with the case. The difficulty of pre-determining what a particular sheriff would consider to be a suitable approach or a line of pertinent argument was highlighted by another interviewee:

... it was when I approached the X case, we didn't really know what the court was looking for. And the sheriff, it turned out, ... had expectations that he would be given the same information as you might get in a marriage, which was not the expectation of either myself or the other solicitor.

A note on ~ no property transfers

... for married couples who are joint owners, one can have the property transferred to the other, for cohabitants [who are separating] that's not an option, it's effectively sale or nothing. [372]

Apart from the substantial difference in the principles on which the granting of financial relief on divorce and on the separation of cohabitants is determined, there are also significant differences in the available remedies. Interviewees particularly highlighted the emphasis on capital awards, and the courts' inability to order that a particular asset be transferred between parties (a property transfer order). The lack of such property transfers was seen as *“one of the failings of the legislation”* [306], and a capital award, was viewed as a *“very, very blunt instrument”* [306] leading to potentially valuable, income-generating assets or a home being sold in order to raise the cash necessary to satisfy a capital order.

These problems were highlighted in one case where there was both a family home and businesses run by the pursuer but all in the defender's name. It was the wish of the pursuer to continue to run the businesses and to buy out the defender. However, the lack of property transfer orders meant that could not be negotiated:⁸⁶ *"You can't really allow for anything more sophisticated"* [306] than the payment of a capital sum:

... in that case unfortunately and sadly ... both the family home and the businesses were sold. And she ... is receiving some capital, but that doesn't actually properly recompense her for her loss of livelihood ... because what she gets is a share of what was left of the businesses once all the creditors were paid off and now has no means of supporting herself. So, from her point of view, the outcome was tragic and she found it very difficult to be advised by senior counsel that there was nothing that could be done in the court to prevent a sale of the businesses.

At one and the same time the legislation was seen as rigid and very wide in terms of the court's discretion, leading to *"the worst of all worlds, because we have a very narrow remedy – a capital sum, but quite subjective ways of identifying what that sum should be"*. [306]

Width of courts' discretion

The questionnaire analysis showed the second most unworkable aspect of the provisions, mentioned by 85% of respondents, was the "width of the courts' discretion". The interview analysis revealed that this was seen, at one and the same time, as both a positive and a negative aspect of the Act. For example, while recognising as a strength the breadth of the Act, there was a line of argument that would prefer the introduction of a qualifying period of some years prescribing the length of the cohabitation, since allowing claims for short relationships was not seen as beneficial.⁸⁷ A further example of this duality was seen in the lack of guidance contained in the Act to direct courts which factors to take into account when addressing financial claims. It could be seen as a positive aspect since:

⁸⁶ Though note the possibility of undertakings, addressed in chapter 8.

⁸⁷ See chapter 5, section *Profile of Respondents' Last Case* and Table 5.2.

... every case is unique and has its own set of circumstances. And you can see the problem that the CSA have got into ... trying to administer a very strict formula. ... Sometimes it just doesn't work. [29]

However, the negative aspect (*cf* previous section) was that much depended on individual sheriffs to take a view and because there are so many sheriffs “*with widely different views, it's pot luck. You might get a sheriff that is sympathetic and another one that isn't*”. [29] Dealing with a range of approaches from different sheriffs was not an unusual aspect of a lawyer's work; it was highlighted here because the provisions were new and their discretion broad. However, it did mean that lawyers were not helped when using existing case law since there was no common approach:

... some sheriffs are saying – Well let's look at the 1985 Act and use cases under divorce law to try and justify what we are doing under the 2006 Act. Whereas other sheriffs are saying – No, this is a completely different regime and we need to look at it very differently. ... [T]here's not ... really a principle that everybody is following. [353]

The lack of the equivalent of a set of “*section nine principles*”⁸⁸ ... [along with] *no body of case law*” impacts on both lawyers and sheriffs alike “*there's no resource for you ... to advise, and likewise there's no resources for the sheriff*”. [70]

Such concerns existed also in relation to death cases, where one interviewee considered there was a need for guidance to indicate how the court should use its discretion, since there was a “*huge problem ... coming down the track in the discretion given to the court in the section 29*”. [108] A specific example of a sheriff using his discretion in a death case was offered by another interviewee, who considered that in *Savage v Purches*⁸⁹ the sheriff chose to use his discretion in a section of the Act where that had not been intended:

... on a proper interpretation of the section 29(3) provisions, I don't think we should have been looking at a lot of the qualities of the relationship because, again, there wasn't this balancing exercise in the 2006 Act section 29 principles. But, of course, what the sheriff chose to do was simply to use the 29(3)(d)

⁸⁸ See Family Law (Scotland) Act 1985, s 9.

⁸⁹ 2009 FamLR 6.

provisions to say – I’m going to use my discretion in all the circumstance of this case to do exactly what I want to do, and to look at whether or not this man is a worthy beneficiary. And because I choose to deem his distress as being evidence of lack of distress ... we end up with the outcome we end up with. [173]

Reflecting on the fact that when the Act was under consideration there was a political unwillingness to allow a bereaved cohabitant to do any better than a widow,⁹⁰ another interviewee queried the approach a court could take: *“Is the court to pretend that if it looks sufficiently like a marriage then she’ll be treated to that extent like a widow? If that’s what it means then it should say that”*. [108]

Time limits

Time limits were cited by 76% of respondents as the third most problematic aspect of the provisions, while the interview analysis demonstrated this to be a major concern. Although there was a general appreciation that time bars were needed, there was unease about their lengths: *“It’s not like an accident claim where they’ve got three years to remember about it”*. [268] Of the two, the time limits for death cases caused most concern, although some interviewees felt equally strongly about the time bar for separation cases.

Death cases

The need to wind up estates in a timely fashion was well understood, so the need for a time bar was accepted for the sake of beneficiaries; however, *“as a litigator I’m aware of the time difficulties ... I’m aware of liability if we don’t get them”*. [268] Nevertheless, there was a strong general concern that the six month time bar for death cases was too short. There were a number of reasons:

Grieving may take longer than six months

Working to a tight deadline might be good for some beneficiaries, but that needed to be balanced against *“the fact that six months is a very short time for someone who’s suffered a bereavement and is ... fragile ... and ... may make bad decisions because they’re not at their most robust”*. [306] There was no time to come to terms with the

⁹⁰ Section 29(4) prevents that outcome.

death: “you’ve got six months and it’s gone. By the time you get over the grieving process it’s gone”. [268]

A badly injured surviving cohabitant may miss deadline

If the death had occurred, say, in a car crash where the surviving cohabitant had also been badly injured, the survivor could be discharged from hospital after the six month time bar, still in need of care “to find that the case has been wound up and this other person’s got her property. Now, in the past that had happened.” [99]

Impossible to extend the six months

Section 29 was considered to have been particularly badly drafted⁹¹ since there is no discretion to allow a longer period, nor, according to interviewees, is there any “methodology for raising your action if the family are deliberately hanging back and refusing to seek appointment as executor dative”.⁹² [179] To that end there was a suggestion that the clock should start ticking away the six months from the date of appointing the executor dative, thus removing the incentive for a family to do nothing. Some interviewees suggested that the time limit should be extended to one year, even though “it’s linked to the existing law relating to succession, ... it’s always a worry ... when somebody comes in and says their partner has died. You get out the diary. That’s a constant fear”. [148]

Time bar causes litigation: an unintended consequence

The very shortness of the time available leads to more court proceedings being started (albeit immediately sisted – i.e. suspended) than would be necessary with a longer period: “more are raised than there might otherwise be because of this quite strict timescale”.⁹³ [329] This practice is commonly used in order to allow the parties to negotiate whilst leaving the potential pursuer safe in the knowledge that prolonged negotiations that fail to reach a settlement will not leave him or her too late to bring proceedings. This was considered to be especially so in the case of a sudden bereavement as “cases are litigated where they would otherwise not be, because you

⁹¹ A point examined also in Part 4 of Scottish Law Commission 2009: see chapter 8 below.

⁹² See chapter 8, section *Raising an action where there is no executor-dative* – for full discussion of this point setting out just such a methodology.

⁹³ See chapter 5 Table 5.3.

have to get something into court". [306] After a death it would not be unusual for the surviving cohabitant to take some weeks before taking action and those weeks quickly become months, immediately flashing up warnings for the lawyer: "*your diary is full of time bar, time bar, time bar, get it in. And if someone has to apply for legal aid you have to do it immediately*". [306] Furthermore, by six months there may be no executor appointed, the estate may still be unclear and there may be difficulties accessing information:

... six months is a very short period of time to instigate action and it has meant ... you've had to ... put an action into court and then just immediately sist it, whilst you consider to negotiate. I think it's unhelpful, sometimes with a death it's very sensitive and you are talking about ... hav[ing] to raise a court action here. [29]

Increasing family tension

Since the tightness of the six month deadline could well lead to a raised then sisted action, it was felt that this could breed family tension as it could make a surviving cohabitant appear to be "*money-grabbing to the rest of the family*". [70]

*Both time bars should be the same*⁹⁴

When suggesting what the time limit in death cases should be, some interviewees felt that it might be more equitable if one year applied in both separation and in death cases: "*I don't like there being two separate time periods. It's far simpler if ... a year covers all cohabitants*". [268] As death claims may very well be interwoven with separation claims, it was felt to be difficult to work to two different time limits. However, some interviewees did consider that there should be two different time limits:

I'm hesitating even to go as far as a year, but I do think six months is very tricky, I think nine months would be better, just ... a wee bit more of a window to try and explore what is happening and whether there is any chance of some sort of settlement. I think a year for the breakdown of a relationship is fine ... it's really the death one, because it is more sensitive. [29]

⁹⁴ See Scottish Law Commission (2009), para 4.31.

Separation cases

Clients in separation cases appear to miss the one year deadline for a number of reasons. Some, for example, are solely focussed on matters related to their children and seem uninterested in making a claim on their own behalf:

I had a phone call from someone this morning ... about a child-care issue and she was saying to me – Yes, I've been separated from my partner for over a year – immediately you're conscious that that deadline has expired. [372]

Other clients delay in seeking advice because, initially, they may try to sort things out themselves, only going to a solicitor when they have reached breaking point, which can lead to months of delay. Others do nothing because they are unaware they may have a claim until a friend or relative draws their attention to the possibility or they read an item in the press or, indeed, their solicitor raises the issue during a consultation about other matters (see below).

As in death cases, the time limit can lead to cases being raised then sisted instead of being negotiated, in order not to fall foul of the bar:

If someone came to see you eight months after they'd separated, you'd really have to be saying to them – We really need to raise an action now, you need to be applying for legal aid. And so the other side gets the intimation of legal aid, and you're polarising things, so that ... means that you're less likely to negotiate and that can make things harder. [329]

Having a lengthier time limit would enable clients to consider their positions and relationships with greater care:

... litigation is not good for people. ... [it's useful] to be able to say ... – You've got to wait a bit ... we've got time to sort things out – as opposed to people dashing in. ... There's no breathing space, you're right in there. [272]

A note on ~ lack of public knowledge of provisions

The big problem in [the] cohabitation statute – ... public education. [108]

Running as a theme through many of the interviews was the need for education to address the level of public ignorance of the law, perceived by interviewees.⁹⁵ The lack of public knowledge of this legislation formed two sides of the same coin:

... people don't know that they have a claim to make, the time bar comes. ... And secondly (and constitutionally it may be more important) people don't know that they may have a claim against them. ... They don't know that they should be considering opting out ... they have been statutorily opted in and they don't know it. [108]

Many interviewees were very exercised that the level of “widespread ignorance” [272] of the provisions was so profound, because “*if the public don't know about it, they'll not claim. ... The trouble ... is that people don't know there's a question to ask, so they don't ask it and don't find out*”. [108] The lack of awareness led some clients to seek advice very late in the day (with all the associated problems outlined above) as it takes time for them to face their problems while being unaware of the ticking time bar clock. Other clients took up opposing stances; either they thought the same rules apply to cohabitation as to marriage or that they were entitled to nothing as they were not married.

It would not be true to say that there was public ignorance of the whole Act, since other aspects, such as parental rights, were known. Since media publicity of the Act had focussed mainly on shortening the period for divorce based on the grounds of separation, for some interviewees the cohabitation provisions had had so little impact, they saw clients entering their offices:

... in exactly the same situation as they always came in. ... They're not coming in because they know there are provisions, they're coming in because they were in the same circumstances that people have always been in where somebody's died or left them, and they just don't know what's going to happen next, they don't know what their rights are. [123]

It was recognised that the exact level of ignorance of the general public was difficult to gauge since lawyers would generally only see clients who knew they were entitled to make a claim, as those who were ignorant of their rights: “*they're not going to make an*

⁹⁵ Such public ignorance also extended to the belief in the myth of common law marriage (Wasoff and Martin 2004) understood by our interviewees to be a term still used by older clients.

appointment ...just in case". [47] However, there appeared to be the beginning of a shift as some interviewees were seeing clients, in the last twelve to eighteen months, who "*don't necessarily know what the provisions are ... [but] who have an inkling that there might be something*". [249]

Some interviewees went further and queried the level of knowledge of some legal practitioners: "*it's staggering the number of lawyers that think the term civil partnership means cohabiting*" [306], so perhaps it was to be expected that "*some Scots solicitors are unaware*" [108] of the nature of the cohabitation provisions in the Act.

There was a general view that, were England to introduce provisions for cohabiting couples, the level of awareness in Scotland would rise immediately. It was expected that as the media afforded in-depth coverage to the English situation, the awareness of "*Joe Public who might read in the Courier or ... the Sunday People advice column*" [70] would develop in Scotland:

... when the English cohabitation statute comes in, it will be on the "Six O'clock News", it will be on "News at Ten" it will be on "Question Time". It will be within the plot of "Coronation Street" and "EastEnders", everybody will know about it. What have we got? – "Taggart". ... It's got to be in the plot of popular Scottish soaps, otherwise people will not know for a generation. [108]

The following were seen as possible means of increasing public knowledge of the provisions:

- conveyancing departments of law firms
- legal profession and advice centres
- FLA and Law Society advertising
- friends, relations, mates in the pub
- government publications
- media – magazines, press, radio
- internet
- school curriculum

While there was general agreement that public information campaigns could be very useful, there was also a recognition that the target population of cohabitants was difficult to reach and that the message to be publicised was not a simple one, as the provisions were limited and lacked clarity.

PRIVATE ORDERING AND COHABITATION AGREEMENTS

The use made of cohabitation agreements

Scottish family law and practice have for some time promoted the increased use of private ordering, where out-of-court processes are key (Myers and Wasoff 2000). In the context of this research this would be effected by cohabitation agreements disapplying the provisions of the 2006 Act and setting out what would happen to the parties' property should their relationship end in separation. These agreements can be used in a similar way to pre-nuptial and other marital agreements and can be entered into before or at any time during a cohabitation. So, were such agreements much in evidence?

How common

Interviewees varied widely when commenting on how common cohabitation agreements had become. A number of interviewees considered that they were "Very rare" [173]; *"In my experience, quite rare. ... I'm disappointed that they're quite rare"* [174]; *"... very uncommon. I've just had a couple and I was expecting a swamp of them"*. [108] Clearly, interviewees had expected agreements to have become much more common: *"I've dealt with one in all the time that I've been practising."* [372] While *"nobody's actually asked for one ... you don't tend to see people coming in off the street, all that often, wanting advice about it,"* [151] this interviewee did advise clients *"just going through a divorce and taking up with somebody else, that's the person that's most likely to be in the situation."* [151]

One of the main reasons for their being uncommon was lack of knowledge (see above): *"people often ... [come] stumbling into the office [but] not because they actually know there is an Act out there that might give them some sort of rights":* [29]

And even when you advise them ... I've got one ... just now ... the chap ought to have a cohabitation agreement: but you just find it humanly difficult to say to her – Look honey our love will keep us together forever, sign this. ... It is, in human terms, very difficult to do; it's much more common to have a pre-nup in a second marriage. It's not part of [the] culture. [108]

Other interviewees agreed: *"it's just a social thing, if you're setting up home with somebody – Let's sign something in case it doesn't work out – people just feel uncomfortable about it"*. [29] Importantly, some interviewees also reported that,

although they were frequently consulted over agreements, clients did not follow through: “*There are people who almost get there but don’t quite*”. [29] One interviewee described agreements she had drawn up for cohabiting couples who were planning to marry, so they were:

... labelled ... pre-nup ... but I have put provision in for the possibility that this relationship continues as cohabitation. [However], ... pure cohab agreements ... for people who have no intention to marry ... I can only think of having done one within the last two years, maybe three years ago. [173]

However, there were interviewees who thought agreements were “*becoming more common*”. [29; 179; 268]

It was also felt that much depended on “*the profile of your practice*” [306] with more affluent clients being more likely to seek out such agreements because “*they’re organised professional people and ... there’s more money at stake*”. [306] In these cases “*a deposit for a house isn’t £5,000, it’s £150,000 ... therefore, people will sign an agreement when it’s that amount of money*”. [306] Other interviewees agreed with one who speculated that the reason for their lack of experience in drawing up both cohabitation and prenuptial agreements was related to “*the nature of the geographical area and the classes that I work with*”. [360]

Equally varied were opinions as to whether such agreements were a good or a bad idea, from: “*I think they make entirely good sense, given the legislation*” [174] to: “*I fight shy of them, I don’t like them*”. [123] Those who were pro-agreement thought they afforded an opportunity for clients to take preventative advice that would enable them to organise themselves before embarking upon cohabitation, purchasing a house together or making their wills. Those who were anti-agreement queried their legality: “*I’m not sure and I don’t think anybody else is as to what their status in law would be if anything went wrong*”.⁹⁶ [123] Another thought they were “*fraught with difficulty*” [173] because if they were to be of any use they needed to be detailed:

... and by definition the vast majority of people who are entering into cohabitation, it seems they are doing so either without knowing what the implications are, or precisely because they don’t want to get bogged down in formalities... . And when you start to talk to people about – Well, what do you

⁹⁶ For further discussion on this issue see chapter 3, section *Opting out of the 2006 Act*.

want to happen to payment of this mortgage? and – What happens if, in fact, he pays the mortgage but you pay the bills? How do you want to deal with that? How are you going to prove that? How are you going to evidence that? – You know, people are, as I would be, I'm sure, you just think – Oh God, I've not got the will to live, you know! [173]

One interviewee, who admitted: *“I'm not, if I'm honest, a huge fan of this legislation”,* [306] preferred clients were made aware of their legal position and entered into agreements or executed wills to cover it. Other interviewees took a similar line, stressing the need for property rights to be accurately recorded: *“don't bother doing agreements, let's get the property in joint names and then there's no hassle about it”.* [123] Several interviewees did, indeed, comment on the fact that they had not drawn up cohabitation agreements simply because wealthier cohabitants actually jointly owned their property, so *“how much better are they going to do than that? Because I think it's accepted ... it's going to be difficult to argue for pensions and that sort of thing”.* [329]

What cohabitation agreements cover

The great thing about a cohabitation agreement is you can tailor it. You don't even have the fair and reasonable criteria. [108]

Just as with other aspects of cohabitation agreements, opinion varied as to what such an agreement should contain and, more significantly, just how practical very detailed agreements would prove to be when tested at the point of a relationship breakdown: *“sometimes I'll just try to keep it simple and say ... – I can't cover every eventuality ... if you intend to marry or sell this property and buy another one, come back and see me”.* [306] This interviewee considered it better to have several short agreements that work rather than *“something that's twenty pages long [where] ... I can't envisage every possible scenario that might arise”.* [306] Such complicated agreements were considered to be *“a minefield”.* [306] Therefore, while there was agreement that such documents could be tailored to suit the personal circumstances of the client, there was concern that to make them very detailed aiming *“to cover every eventuality on the parties separating”* was a mistake *“because, of course, circumstances are always unpredictable”.* [174] It was seen as impractical because:

... the 2006 Act is merely guidelines, it's not like the Family Law (Scotland) Act [1985] for divorce where you can define and say, this is not matrimonial property, it was bought before marriage and therefore you will have no claim on it; very difficult to second guess how the guidelines might be used in the future. [174]

There was one group of clients, however, who did prefer more detailed agreements – “*the second time-rounders*”. [47] These people generally wanted “*a more detailed agreement that regulates – here’s what I own at the point you and I set up home and [here’s what] I want to take ... with me [should we part]*”. [47] Often with their own children and often asset-rich, they may already have had “*their fingers burned before, in a previous divorce*” [47] and now required a watertight agreement. This client group is considered in more detail below.

For one interviewee the wisdom of making an agreement stemmed from the default nature of the legislation⁹⁷ because “*before the 2006 Act, there wasn’t a legal relationship. Now the law will impose one on you*”. [108] Clients wishing to avoid the application of the Act were faced with a choice “*either to exclude it by an agreement or else create a bespoke one that suits you*”. [108] To that end, it was suggested by this interviewee that such agreements could very well cover such matters as:

- childcare
- how children not of the relationship should be considered, including a deed of arrangement under the Children (Scotland) Act 1995, s 3(5)
- protection of assets that the parties are taking into the relationship
- how those assets should be dealt with on break-up of the relationship
- whether a large debt on a credit card would be a joint responsibility.

However, if the first suggestion made above “*to exclude it by an agreement*” is followed then clients may choose to subscribe to an agreement that “*simply says – there will be no other claims*”. [306] Interviewees considered that the most likely clients to follow that route were those who would not only be well organised, but would also have significant amounts of money. The reason that such clients chose this type of cohabitation agreement was because they took:

... the view – Well, we’re organising our house, we’re organising our wills, we’re organising our bank accounts, actually we don’t want to be in a position where the law imposes remedies on us. [306]

Not all interviewees felt at ease with such an approach, since putting “*in a catch-all, this waives all your rights under the 2006 Act*” [70] and there was too much uncertainty of

⁹⁷ i.e. the fact that the Act automatically opts in all cohabitants by virtue of the fact of their relationship.

what that might come to mean. This interviewee did not feel able to recommend the same path as for married clients when:

... there would be a disclaimer and a waiver at the end. ... I've specifically not done that in cohabitation situations because I don't want ... to bind my client where ... I don't feel fully advised and conclusively about what the potential rights are. [70]

It was felt that if the separation occurred in 10 or 15 years' time then there could well be "a body of precedents set ... [W]hen it's all so new I would be very careful ... particularly in a situation where they may well go on to have children". [70]

Cohabitation agreements that covered houses owned in unequal proportions appeared to be quite frequently drawn up and were commonly called "unequal deposit agreements", [268] by interviewees: "I've had quite a few cohabitation agreements drafted up over the last couple of years on behalf of trusts and other family members". [99] This type of agreement is analysed further below when the triggers leading to agreements are considered. Suffice to note here that the issue to be covered by the agreement was one of protection because the parents were asking: "what the rights would be of the partner if they gave their children certain assets and trusts and things like that and money, how could they protect that?" [99]

Worthless agreements

While, some interviewees expressed their doubts about the legal status of agreements, others described situations where they had been asked to refer to such agreements only to find that they were worthless. One interviewee explained what was "quite a common problem", [70] where clients sought "advice at the time of purchasing the[ir] property [and] ... have a minute of agreement drawn up" [70] only to find that because it is not foremost in clients' minds, being more interested in their new house together: "nobody's really that bothered at the time and it's not signed". [70] Another interviewee described being presented with a document drawn up by the couple themselves: "very ineptly and it created a lot of difficulty". [108] Where a document had been signed by a party, who had not been legally represented, one interviewee raised doubts as to "whether they have even really been alive to what those provisions are". [173] This

underlines the need, according to several interviewees, for each party to be separately advised before signing any such agreement.⁹⁸

What triggers clients to seek an agreement?

Since the level of knowledge of the provisions of the 2006 Act remains low amongst the general public, interviewees indicated that very few, if any, clients would make an appointment specifically to draw up a cohabitation agreement. So what are the triggers that cause individuals to seek help from lawyers? The most common trigger appeared to be the purchase of a property, especially where cohabitants did not contribute equal amounts of money leading, as we have seen above, to the drawing up of “*unequal deposit agreements*”. [268] Such agreements were considered “*technically ... [to be] a cohabitation agreement, but not under the provisions of the new Act*” [353] and were used as a means to “*regulate the position ...because there is the presumption of gift if we don't record it*”. [70]

These triggers can take the form of “once bitten twice shy” (or “*the second time-rounders*” mentioned above) since, if a client has no direct experience of a failed relationship “*they always think this is going to last forever*”. [29] However, as noted, if a person has already “*been through a divorce or separation that has been difficult, and they have perceived ... that they've lost money or gained money, ... they are a lot more protective*”. [29]

House prices have risen hugely in recent decades, even accepting the current financial climate; so when a house is sold it may realise a large sum of money. Furthermore, it is not uncommon for adults to have serial relationships with ensuing complexities of family structures. These two phenomena, when taken together, mean that some individuals feel they have a large amount of money they wish to protect when entering a new relationship. For example, when a divorcee invests money from a former matrimonial home into a new house with a cohabitant she seeks “*to protect that investment for her children of her marriage*”. [148] In that case the lawyer drew this to the attention of the client when dealing with the divorce; but it can also apply to “*rich people getting involved with poor people ... [they] like to have a wee chat*” [268] again, very often, to protect their children's inheritance. Similarly, cohabitants who had

⁹⁸ For further discussion see Chapter 8, section Agreements.

experienced a failed relationship “*where they feel that they went into ... [it] blindfolded*” [179] might wish to preserve their property from any claim by a new partner. [174]

Many interviewees indicated that clients were routinely sent to them as family lawyers from the conveyancing departments of their firms:

I think the conveyancing department are probably pretty switched on in that regard, and realise that if you've got a young couple who are buying a house together and one of them is putting up £75,000 and one of them is putting up £5,000, there really has to be advice offered as to what should happen if the relationship falls apart – the separation of the relationship and proper accounting between the parties. [179]

It is clear that the role of conveyancing departments is central to how family lawyers now advise clients with unequal deposits: “*we try and get our conveyancing department to be very alert to people who are coming in and producing different amounts of money*” [29] because at that point such clients needed “*to have some sort of agreement*” [29] for their own protection. One interviewee indicated that firms were now very alive to the need for such advice after an action of professional negligence against a firm of solicitors: “*where a conveyancer purchased a house for a couple and didn't advise the couple that they either should take the title in different proportions or enter into an agreement*” [306] because if the couple later separated “*there wouldn't be an effective remedy for recovering unequal deposits*”. [306] The case had “*had a very strong impact on conveyancers*” [306] and caused firms to re-assess their training: “*we've ... had our property department have quite a lot of training ... to be alive to these kind of situations and the problems that can ensue afterwards*”.⁹⁹ [70]

The unequal deposit agreements can be triggered from two categories of client either: “*it's the second time round and they're a bit older and ... a wee bit wiser*” [47] or moneyed parents helping a child to set up home with another person by paying a substantial deposit on a house: “*the parents can quite often drive the child to come in and get some sort of pre-cohabitation agreement ... And I do that reasonably often*”. [47] A number of interviewees had experience of agreements being triggered by

⁹⁹ See also *Verona Burnett v Menzies Dougal WS and others* 2005 CSIH 671 where the pursuer averred that a failure by the firm of solicitors to have executed a Minute of Agreement regulating the liabilities of herself and her co-purchaser to repay the loan secured over the property had resulted in a loss to her of more than £20,000.

parental contributions to house purchase: *“money coming from the parents and ... the driving force behind it was the parents rather than the couple”*. [372] Now that it is no longer possible to arrange high percentage mortgages, in some cases parents or family members are providing deposits or are buying property *“to avoid inheritance tax”* [99] and this forms the other important trigger for cohabitation agreements. When they give *“£20,000 or whatever as a deposit, or £30,000 ... they are a bit more clued up in saying – Ok I’m quite happy to give you this, but we need some sort of protection”*. [29]

Styles used by firms

In drawing up cohabitation agreements lawyers used styles, which were either drafted from published examples such as the *“Butterworth Scottish Family Law Service”* [108] or from *“the FLA ... style separation agreement”*, [70] or were developed from *“a spousal separation which we then changed to suit cohabitants”*. [268] Most interviewees had customised any published version they had used and some used different styles from colleagues in the same firm. Generally, interviewees were not as satisfied with their cohabitation styles as they were with their pre-nuptial styles, as one interviewee commented, in divorce *“you’re seeing other solicitor’s agreements and sometimes you quite like the look of their agreement and you maybe take a little bit from it. I think we all do that”* [47] and in that way styles improved.

Since cohabitation agreements were normally bespoke, some interviewees were a little loath to call their starting point a style. Where an agreement is drawn up to cover unequal contributions to a house, as we saw above, interviewees considered it necessary to advise clients that they should be separately represented on that point: *“therefore there has to be a degree of compromise if, you like, and discussion”* [179] since the two firms would be using different styles.

CLIENT SATISFACTION

Managing expectations¹⁰⁰

In contrast to their own views of case outcomes, interviewees considered that clients were *“often very disappointed by the outcome”*, [123] so when describing a disappointed client, interviewees typically indicated that s/he would hold *“fairly*

¹⁰⁰ See also chapter 7 section *The likelihood of court involvement: negotiation preferred to litigation* for another example of the importance of managing client expectations.

unrealistic expectations". [249] Therefore, it was considered that the most important prerequisite for clients to feel a level of satisfaction with the outcome of their cases was for their advisors "to manage expectations". [123] The actual outcome *per se* cannot be expected to deliver satisfaction, it must be allied to client expectation. There are "many clients who you think – My goodness, you've no idea how lucky you are! And they don't feel lucky because they have a different expectation level". [173] There are other clients where "you feel that it's a shame that they didn't have a little bit more fire in their belly" [173] because their case was strong but they lacked the will to try, although a better outcome could have been achieved for them.

Managing clients' expectations was, therefore, "the critical component" [173] in the process leading to client satisfaction. So much so, that when interviewees indicated they found the Act difficult to use it was because:

... I can't give a client a proper level of expectation beforehand. ... I can't necessarily give a divorcing client a definitive level of expectation but I can give them a broad sweep. I can give them a range of outcomes and I can say to them this is within that range of outcomes, it's at the better end or the less good end but it's within that range. And I can't do that [here]. [173]

The process of managing expectations needed to begin immediately once a client sought advice. The difference between the divorce of spouses and the separation of cohabitants needed explaining as the outcome of the latter is "a kind of ... cushion ... rather than a full blown ... equal share",¹⁰¹ [29] because the provisions are "more restricted and limited in scope". [29] If the clients had sought advice at the outset of their cohabitations, managing their expectations when things went wrong was much simpler: "The happy clients I have under this legislation are the ones I explain it to in advance and enter into an agreement, so they feel smug that they're covered". [306] Clients were less likely to feel strongly dissatisfied if both parties were treated equally: "a good Sheriff will actually leave them both feeling as if they've had a wee bit of a kicking". [47]

Client satisfaction is very difficult for a lawyer to measure, because there are always doubts about reactions of clients: "People can be very practical ... and they just make the best of a bad job and move on". [148] However, once embarked on the judicial

¹⁰¹ See Chapter 7 section *Dim prospects for Janet in claiming economic disadvantage* – where a capital order is also seen in terms of a cushion.

process the main aim of most clients is “*just finishing it, is all people want to do*”, [123] so there is “*a huge satisfaction that an end has come and that people have treated them well*”. [47]

Achieving acceptable outcomes differed as between defenders and pursuers; separation cases and death cases; divorce cases and cohabitation cases. For a defender in a separation case, where their purpose may include self-protection, the acceptable outcome could be one of damage limitation and is clearly different from that of a pursuer, who may have lower expectations since “*if you get something for them, it’s probably better than what they would have got before, because there hasn’t been a framework in which to make that claim*”. [148]

Equally, a contrast was seen in types of cases with clients in death cases being:

... reasonably comfortable with ... what they came out with, because they probably appreciated that had ... [the Act] not been there, they wouldn’t have anything. So, even getting 50% [of their claim] was an acceptable outcome to them. [29]

Whereas, in a separation case the client was less likely to be satisfied because the circumstances of a separation worked against that: “*it’s not like, you know it’s a happy time in your life*” [70] and because they could still be “*arguing and fighting, [and] ... if you are acting for the party seeking some sort of payment they are, by and large, not getting very much*”. [29]

Finally, it was felt that there would be fewer “*satisfied clients under this legislation than those going through a divorce*”, [306] the reason being that a defender, commonly but not always male, would feel aggrieved: “*I didn’t marry her, why should I have to pay her anything?*” [306] while the pursuer would feel equally aggrieved because she would be getting less than if she had been married, so “*Nobody is happy ... it is much harder to have happy clients*”. [306]

DOES THE ACT PROTECT THE MOST VULNERABLE?

It was noted earlier that a key policy objective of these provisions was to protect vulnerable cohabiting partners and the children of these relationships – so, did interviewees think the Act actually helps the most vulnerable?¹⁰²

... it comes back very much to the practicalities. As a matter of theory – yes, the Act does potentially provide remedies where remedies didn't exist before, but those are only real remedies if you're able to access them, and if you can't actually access them they form no useful remedy to you whatsoever. [173]

Highlighting a case of marriage by cohabitation with habit and repute, pre-dating the Act, this interviewee described just such a vulnerable client who, having cohabited for 35 years:

... was very economically disadvantaged by the relationship ending. ... She was one of the people who presumably this Act was designed to try and help. Now this Act would not have helped her, because she was a vulnerable woman, she wasn't educated, she wasn't articulate, and she didn't have access to funds. Now this Act would not have enabled her to better her position, because she would not have been able to absorb and stomach the risk that was involved. [173]

In what has been called the “extreme cases”¹⁰³ [174] the Act was welcomed; but for the vulnerable client, making a small claim, the Act did not address their needs, such as “*terribly, terribly sad, tragic cases ... would not have been remedied*”. [173] Such a case was highlighted in the vignette,¹⁰⁴ where the pursuer could fall into a benefit trap if she were in receipt of a modest capital sum, because that could be sufficient to rule her out of welfare benefits and yet she would still be left without sufficient means of support or accommodation.

¹⁰² Vulnerable is taken to mean being without the means of surviving independently and therefore likely to become reliant on welfare benefits.

¹⁰³ See above section *Aspects of the Provisions Welcomed by Practitioners*.

¹⁰⁴ See chapter 7, section *Practical problems and managing the dispute towards a low-cost, negotiated settlement*.

A major reason why such small claims, made with legal aid,¹⁰⁵ did not progress was said to be the Scottish Legal Aid Board's claw back facility:

... economically disadvantaged ... are precisely the people who are not going to be able to afford to pursue these things, ... [because] if you have somebody who's legally aided there is no exempt amount ... as there would be in a divorce action. So, if you have somebody who is successful in preserving an asset or recovering an asset then they will have to pay for the value of the legal fees from the value of anything they get back. ... At the moment if you're in a divorce action you get your first, I think it's just over five grand, you get that free if you like and then you pay back your legal fees from the value of the asset above and beyond that. That isn't available to a cohabitant. So, even somebody who has the benefit of legal aid is going to have to have a really bloody good case with a very good chance of success before it's going to be worth their while. [173]

TO WHOM SHOULD THE ACT APPLY?

We explored in detail in chapter 3 the meaning of the term cohabitant. Interviewees recognised that the term "cohabitant" (and consequently "cohabitation") could be complex, making it difficult to define since "*there are varying degrees*" [306] of cohabitation, so:

... defining a cohabitation is the first issue and defining when a couple cease to cohabit is also difficult. And many of the reported cases, certainly two of the proofs I've done so far, have had issues over that. [306]

This had led to widely varying views on:

... what is appropriate on the breakdown of cohabitation. ... And that's the problem. And different sheriffs and judges will approach it in different ways. So I think it's difficult to have certainty in advising people, even with the legislation. [306]

While the Act does attempt to define some characteristics of cohabitation, it does not prescribe any minimum period, although it could be said that the cases lawyers are seeing self select. Where the cohabitation is of short duration, unless a substantial

¹⁰⁵ See also chapter 8, section *Legal Aid*.

financial contribution or sacrifice had been made at the outset of the relationship, then it would be unlikely that there would be any claim to be made. Thus cohabitations of short duration could very well rule themselves out.¹⁰⁶ Furthermore, since the cost of litigation is of prime importance cases also self select (in part for that reason), since: *“Sometimes it’s immediately apparent ... if there are no resources or there’s no money there to be had”* [249] then it is pointless attempting to pursue a claim. However, the cost to the client can also be emotional: *“it takes a very brave, possibly foolhardy person, to take this on ... [with a] very, very, very thick skin, and deep pockets”*. [173]

At the most obvious level the Act sets out to provide some rights and protections for cohabitants if they separated from their partners or if one died intestate. However, in putting such rights and protections in place the Act also placed potential responsibilities on cohabitants. Thus, all cohabitants, regardless of when they began to cohabit, have been opted into the provisions, whether they have cohabited for 20 years or for two or less. Therefore, at one end of this spectrum there are those with very long-term, committed relationships and at the other end, say, young people who cohabit as a stepping stone in their lives or because it is convenient – it’s what their friends are doing, it’s better than living alone or at home, they have a sexual partner but no long-term plans or commitments. One interviewee related his own situation before he had married, when he would have been:

... upset if I was in the relationship but not having tied up my finances and made a full commitment to a person, that suddenly I should be told that the other person might be entitled to seek a share or a capital sum from me of my assets or my money or whatever.

To be opted into a piece of legislation where the only recourse was to opt out by legal agreement was for this interviewee overkill, since his cohabitation was never intended to be a serious, committed relationship. Thus, for some, the Act was a step too far:

I think it’s too much intrusion in people’s private lives, leaving people who have decided not to get married just cohabiting, forcing them to make financial payments when at the outset it’s been in nobody’s contemplation. So I think it’s illogical. I’m not in favour of it at all. [151]

Such wholesale opting-in had, in a commonly held view amongst interviewees:

¹⁰⁶ See chapter 5, Table 5.2.

... forced people to seek legal advice and enter into an agreement where otherwise they would have not required to do so. So, I'm not a huge fan about the legislation being there. [306]

In practice, this research shows very few clients from short-term cohabitations seeking advice;¹⁰⁷ however, that begs two questions. Firstly, should such short-term cohabitations be viewed in the same light as long-term relationships or are they qualitatively different and, therefore, too significantly different in essence? Secondly, should legislation be seeking to protect people from themselves? The Act sets out to offer some rights and protection to those who had not ordered their own lives and were vulnerable as a consequence. However, it is worth noting that there were some interviewees who, having expressed strong opinions about there being any cohabitation legislation at all, did acknowledge that when it came to those they considered vulnerable then some protection was needed:

... but there's always been that small percentage ... and that's the problem isn't it? The vulnerable. ... I've acted for many nice ladies over the years who are by no means unenlightened nor uneducated and they do find themselves in the situation that the lady in your scenario¹⁰⁸ was in and those are the ones that require the protection. [47]

The Act is retrospective in operation, in that it applies to relationships which began, but did not end, before its implementation; so there was a further concern in relation to the opting-in of all cohabitants as to whether the provisions should have been retrospective in this manner or whether they should have been:

... written in a different way to actually start creating rights on property in a much wider sense; then it could have perhaps been written to apply only to cohabitations which commenced after the Act, or to periods of cohabitation after the Act, giving people the right to opt out of its provisions, if they chose. [360]

The notion of the deserving cohabitant

When considering whether all cohabitants should be included in the provisions or whether only certain categories should qualify, it becomes difficult to avoid the notion of

¹⁰⁷ See chapter 5, Table 5.2.

¹⁰⁸ See Appendix 1: Vignettes.

the deserving cohabitant. While some interviewees considered “*it was appropriate for some protection to be given to cohabitants*”, [179] there was also concern about exactly which cohabitants might be helped by the Act:

I worry that almost unconsciously the Scottish Executive set up a system for deserving cohabitants, or they had in mind the deserving cohabitant. Whereas what we now have is something very much more extensive than that; but I don't know whether or not I think that's a good thing or bad thing ... if you're going to offer a protection, then you don't offer it to the deserving cohabitant who's been there for 20 years. I think it has to be there also for the undeserving cohabitant.
[179]

A similar concern was expressed by another interviewee whose case load dealt with “*the more common, short term ... relationships ... [whereas] I think these provisions in the Act are really designed for ... the previous marriage by cohabitation*”, [29] that is, the longer term relationships, described above as “the deserving cohabitant”. Many interviewees did not consider it wise that all cohabitations should be treated in the same fashion by the legislation:

... one can see if you are committed and been cohabiting for a long period of time that it would be reasonable to think that you have some sort of rights: but where do you draw the line? Lots of people live together for a few years, four or five years, and maybe then decide to separate. Should you put these people into the same category as others like Eleanor,¹⁰⁹ or people living together for longer? Of course, the Act doesn't have any specified time, so theoretically you could have somebody with a very short relationship seeking some sort of payment and I'm not sure that's what it was designed for, but it gives that possibility.¹¹⁰ [29]

With such a range of relationships all coming under the single term of cohabitation it was seen as impossible to cover all eventualities:

... we can't become a nanny state and try and cover everybody in every type of relationship. So, I think that is very important, that we are not imposing

¹⁰⁹ See Appendix 1: Vignettes.

¹¹⁰ See Scottish Law Commission (1992) for discussion of why qualifying periods of cohabitation were not recommended.

regulations onto people who don't want these regulations to be imposed onto them. [353]

There were those who thought that a distinction should have been made between categories of cohabitants:

I remember going to a seminar where a very well respected authority in family law had said that they should have been giving these rights to deserving cohabitants and not to cohabitants across the board. ... The deserving cohabitants would be the nice, wee lady in your scenario¹¹¹ ... and the like. But ... there obviously was a difficulty in terms of having that in the legislation. [47]

Another way of distinguishing between cohabitants might have been to:

... say the woman must have children before she can claim. I think most women who will have good claims will be women who've sacrificed careers to have children: but there will always be one or two who don't have children but who are, for a whole host of reasons, still deserving. [47]

In practice, it was suggested, that sheriffs would invoke their broad discretion to distinguish between cohabitants by considering some of the factors identified in ss 25 and 29:

... the nature of the relationship, ... how long they've been together, ... how committed they were to one another, whether or not their finances were intertwined, whether or not they had joint accounts, whether or not they'd chosen to have children, ... perhaps purchased property together. [372]

WHY HAVE SUCH PROVISIONS AT ALL?

The Act offers cohabitants a number of rights and protections in private law that they previously had not enjoyed. It could be said that in attempting to do so, the Act more nearly reflects the diversity in the make-up of families as they currently exist.

¹¹¹ See Appendix 1: Vignettes.

Spouses and cohabitants distinctly different

A key tenet of the Act was that, while it set out to provide greater fairness and protection for cohabitants, it did not seek to replicate the divorce provisions of the 1985 Act: it does not offer separating cohabitants what the 1985 Act offers those who are divorcing.¹¹² In general, interviewees thought it was right that there should be such a difference between spouses and cohabitants:

... it's right that those that have chosen not to get married should not have the same rights as those who are married ... and ... it is absolutely correct, from a social policy point of view, that there is a difference in the financial positions of those that are married and those that are not. [306]

Therefore, they were satisfied that the 2006 provisions should not be “*extended much further than the shadow*” [108] of section 9.¹¹³ Thus, the Act did not set out to establish an alternative to marriage or civil partnership nor confer on cohabitation a quasi-marital legal status:¹¹⁴

I welcome the fact that it didn't try and go as far as marriage did. ... I think that was a benefit, because there was some concern I think that we were going to enter into a completely ... different regime for cohabitants. And I don't think that would have been welcomed in Scotland. [353]

This “*clear distinction*” [123] between the rights conferred on a spouse and on a cohabitant was, for many interviewees, essential and needed to be maintained:

... there is a legal framework in place, you can benefit from that legal framework if you're both agreed, and that's fine. So why are we giving rights to people who have decided that they will not follow the ... legal framework? You know, society works on the basis of certain rules, regulations; if you follow them, that's fine, you

¹¹² See the comparison of the two Acts in chapter 3; and note Family Law Bulletin [2009] for comment on *Jamieson v Rodhouse* 2009 FamLR34, highlighting how the assets in that case would have been apportioned had the couple been married and the claim brought under the 1985 Act.

¹¹³ The interviewee was referring to the s 9 principles on divorce set out the Family Law (Scotland) Act 1985.

¹¹⁴ Scottish Law Commission 1992, para 16.1

gain the protection; if you choose not to, then again, that's your choice. Much the same as people who make wills ... it's the easy way to do it. [123]

Many interviewees, although working with the provisions, were equally unconvinced: “*I'm not at all clear why we should be protecting the private life of unmarried couples*” [174] as they did “*not believe that there should be financial provision for cohabitants*”, [173] finding “*difficulty with cohabitants acquiring rights*” [47] – “*Why don't people get married?*” [148]

I don't know if I really welcome any of it at all. ... I'm personally very much against cohabitants having any rights at all, quite frankly, I think if they want rights they should get married. [151]

This belief covered both separation and death cases alike:

My firm view in terms of separation and death claims was that it was better largely unlegislated and left to people to regulate their own lives. [306]

Their view of the future was clear: “*stop eroding the fabric of society by giving rights to people who cohabit*” [123] and increase public education so that people regulate their own lives for themselves, putting houses in joint names, making wills and marrying:

... so the framework's there, use it: and if you don't, well, that's the consequences. ... I feel why not just get married? If you don't want to get married, then why are you looking for the protection from the law? [123]

Legal protection vs interference in private lives

Another important principle of the 2006 Act was the intention to strike a balance between providing legal protection for cohabiting couples while not creating a legal framework that overly interfered with the private life of an individual.

A choice made by individuals

Seen as “*a very difficult balance*” [29] to achieve, nonetheless it was generally considered to be a very important principle at which to aim, because it was based on an understanding that individuals had made a distinct choice in relation to how they wished to live and regulate their own lives: “*people have choices in life and if they choose to live together, but not get married, then there must be a choice there to a certain extent*”: [29]

I think people choose to live together and not be married because they do not want that regulation of their relationship. So, I think that is a perfectly reasonable position and I think that the law that we had pre-May '06 was in 95% of cases precisely what it should have been. If you choose not to be married – you're a responsible adult, you're making an informed decision, you are moving into your partner's half million pound house and it's in his name and you know fine well what you're doing. [47]

Having made that choice then it follows that they wish “*to regulate things themselves and I presume that they do so and we don't see those couples*”. [148] So, while accepting that there should be no official interference in how individuals chose to order their own lives: “*people have got to be free to do what they want, and have chosen not to marry, with all the responsibilities and obligations that that entails*”, [372] many interviewees tempered their attitude for those who had separated:

... at the same time, obviously, that can be very unfair to people. ... They're perhaps paying money towards the mortgage or whatever and then ... if it wasn't for the Act they wouldn't have any claim, or it would be very difficult to establish a claim. [372]

and for those who had been bereaved:

That said, I can see that without it [i.e. s 29] there are a number of cases where people are genuinely very hard done by without legislation, and that's particularly acute in the death claims. [306]

However, interviewees emphasised that, just because cohabitation now carried no social stigma, marriage and cohabitation should not be viewed as being equivalent: “*there is a distinction between people who are married and people who are cohabiting*” [29] and should cohabitants “*be treated exactly the same way as people who've decided to get married?*” [329] To that end:

... if people actively choose not to marry, ... they shouldn't then, by the back door, be given the same rights as a married couple. Marriage is a very definite legal framework that people choose to enter into, which gives them certain rights and obligations. And I think if people have actively chosen not to do that, then the 2006 Act certainly shouldn't be giving cohabiting couples the same rights as married couples. So I would agree that that's the right way of doing things. [249]

Marriage is a change of status, intended to be permanent; cohabitation, however, was understood to cover many different forms of relationships founded on different intentions and ranging from the considered choice of a committed, long-term, relationship characterised by its permanence to one of fleeting impermanence into which people had drifted: *“People are living together all the time now. They're falling into relationships and I don't think it's right that they should be regulated by any strict legal regime”*. [353]

Many cohabitations not based on choice

When the legislation was devised: *“it was felt that if people chose not to get married then, that was a decision that they made”*. [272] However, in many cases this was not true so the Act was built on *“a wrong assumption”*. [272] It was taken for granted that *“people were choosing to cohabit knowingly, rather than marry, and so you shouldn't interfere with that”*, [272] which for this interviewee did not sit well with the experience of clients who:

... drift into it, they don't make any decision at all about it. And then they find that they have the most appalling mess on their hands when they separate. And I don't think this Act does a hell of a lot to help them. It just doesn't go far enough. ... People like me are obviously trying to pick up the pieces and pick up the mess, so we're always seeing the bad cases, I suppose. [272]

However, it was also suggested that just because people drift through their lives that was not sufficient reason to protect them from their own actions through legislation: *“Well, they should think about it, I don't have a lot of ... sympathy with them”*. [151] Therefore, while trying to protect individuals who failed to regulate their own lives the Act encroached too far: *“it's very hard on people who ... are suddenly finding claims made against them and nobody had envisaged that at all”*. [151] Equally, it was considered that the Act had taken a step too far in death cases:

... you could almost argue that in one sense section 29 has gone too far, because I know people who cohabit who do not want to intermingle their financial affairs. They're quite happy living together in what is a long-standing relationship, but they keep their finances separate and they have discussed and have agreed that they will not necessarily be providing each other financial support on death of one of them. Now that's a lifestyle choice, and I think that's a lifestyle choice that people are free to make. [179]

Of course, such a choice could be protected by the individuals entering into a cohabitation agreement that excludes claims under the Act or, since s 29 claims only arise on intestacy, it is easy to exclude a cohabitant from any possibility of inheritance by the simple expedient of making a will. Perhaps not surprisingly, interviewees were critical of clients who failed to regulate their own lives thereby causing expensive problems for themselves at the point of separation or death:

I prefer that clients are aware of their legal position and that they enter into agreements or wills to cover it. And certainly from the death claims perspective if they have a will, as the law presently stands, that would be the end of that in terms of any claim. [306]

However, this was considered to be something of a counsel of perfection as people had to be persuaded to take advice to “enable them to map out how their future relationship financially is going to operate” [306] since, in the main, individuals did not approach relationships with care and consideration, but rather:

... threw themselves into relationships with rose tinted glasses. [They] don't think of the consequences of [the] death of one of them where there is no will. Then you find that you have an awkward situation arising between the family of the deceased cohabitant and the cohabitant themselves. And particularly where it's older cohabitants, where they've been in a previous relationship, there are quite often young adult children who bitterly resent the surviving cohabitant. [306]

It was seen by some as admirable, in theory, that the Scottish Parliament had at least made the attempt to legislate for cohabitants: “it's good that there has been some kind of recognition of how our social structure has changed”; [70] but some interviewees thought that, in reality, translating the theory into practice was impossible and actually made matters worse because of “the wooliness ... and actually I don't think it provides much help for anybody”. [70] The result was understood to be a philosophical, academic exercise that government should not be undertaking:

... it's very admirable ... in terms of principle but actually ... stick to what you can do, rather than striving ... for jurisprudential balance that I don't think necessarily can be achieved. [70]

CONCLUSION

Family lawyers gave the cohabitation provisions of the 2006 Act a cautious welcome seeing them as having some benefits but also unfulfilled potential. However, there were concerns and this chapter has uncovered two distinct sources for those concerns – problems stemming from the fact that the cohabitation provisions are new and still bedding in, and problems that are intrinsic to the legislation itself. In considering the first, it is true to say that the Act is still relatively new and there are only a handful of reported cases to offer lawyers guidance of the courts' interpretation of the provisions; therefore lawyers felt uncertain and unsure how best to advise their clients. However, the relative newness of the legislation should not be allowed to mask the second concern where the problems are at least in part intrinsic to the legislation, such as using the economic disadvantage/advantage claim; the width of the courts' discretion, where the price of flexibility could be said to uncertainty; and the time limits associated with both separation and death claims. This mixture of intrinsic and early day effects is examined in greater detail in chapter 8.

These factors alone, however, do not fully account for interviewees being critical of the provisions. As noted, some lawyers had reservations about conferring even limited rights associated with marriage to cohabitants. Why? It would be simplistic and unfair to say that Scottish family lawyers are conservative by nature and, therefore, objected to the provisions because they had views against social and family change *per se*. A possible reason, offered tentatively, could be that because of the nature of their work, some family lawyers have a strong code of personal responsibility and, therefore, a degree of intolerance of those whom they consider fail to take responsibility for their own lives, thereby rendering themselves vulnerable if their cohabitations break down or if their partners die intestate. Such a code could also influence their specific views about the legislation itself, in that interviewees preferred individuals to be pro-active in protecting their own interests by making wills, for example, and by putting their houses in joint names, while some interviewees also recommended clients enter into cohabitation agreements.

It is possible to locate the professional thinking of family lawyers (i.e. the thinking that underlies their expressed concerns) along a continuum, one end of which could be described as libertarian, incorporating personal rights and freedom to choose, with the other end of the continuum encompassing protection and welfare. So, at the former end is the view that legislation should provide a framework for choice in which individuals have rights that can be exercised to further their own preferences, taking

responsibility for those preferences and for bearing their consequences, without external interference. This position sees excessive interference from the legal system as a breach of personal rights, because it limits the freedom to choose and imposes a set of obligations between individuals. At the other end of the continuum is the view that law should serve a protective or welfare role, recognising that not all individuals choose wisely, or indeed choose at all, and that some choices will have adverse, unforeseen consequences. In terms of social justice, this view considers that the state and law must provide a safety net for those who are left vulnerable as a result of the adverse consequences arising either from their own actions or inactions, or from those of others on whom they depend.

Thus, at the libertarian end of the continuum, in terms of this research the creation of legal provisions for cohabitants (albeit with an opt-out by way of a cohabitation agreement, as discussed above) can be understood as the action of big government that may well (despite the opt-out) pose a threat to personal autonomy by appearing to be overly interfering in the private lives of individuals and the private choices so made, in this case whether or not to marry. Such a libertarian stance considers such rights as a protection for the individual against the actions of the majority where that majority operates through the state – so public ordering, in this case the introduction of the cohabitation provisions, should be minimised.

While interviewees expressed sympathy and a willingness to do what they could for clients who needed a remedy or the protection of law, it also appeared that their normative position tended towards the libertarian end of the continuum. Thus, a number of interviewees agreed with the limited approach taken by the provisions of the 2006 Act, while some thought the provisions should be even more limited or should not exist at all. Being located, in this way, more toward a libertarian stance, this coloured the outlook of a number of interviewees on the specific provisions discussed in this chapter as they struggled to see the good in provisions that could undermine private ordering.

CHAPTER 7. FINDINGS FROM THE VIGNETTES

INTRODUCTION

Interviewees were to be forgiven for feeling like they were going “back to law school”, as the vignettes inevitably had the feel of an examination question. But as one interviewee remarked:

...every case is a bit like an exam question, because the Act is so tricky and we have not a lot of case law to sort of guide us and what case law is there is not terribly helpful ... [29]

The vignettes provided a common set of facts for interviewees to analyse, enabling us to compare approaches and issues emerging from those facts. This usefully supplemented the wider discussion of examples from interviewees’ individual case loads. The vignette was usually addressed towards the start of the interview, but interviewees often referred back to it later in the interview and as new points occurred to them. Some took a considerably more detailed approach to the vignette than others, whose response was more broad-brush.

There were two vignettes, one based on a succession problem, the other on separation. These are reproduced at the end of Appendix 1. Interviewees were given one vignette each, corresponding with the category of their last case (as recorded in their questionnaire answers), giving us 7 responses to the succession vignette and 12 to the one on separation.

THE SUCCESSION VIGNETTE

Advice pre-2006

The advice pre-2006 could be succinctly summarised as ‘*Tough*’ [268] and ‘*Make a will! If you want to protect your cohabitant; make a will.*’ [179]

The advice that would have been put to Eleanor before the 2006 Act offered a stark scenario as she, in her own right, would have had no recourse to any claim on the estate of her dead partner: “*Sorry about this, Eleanor, really sorry about this, you are whistling, my pet*”. [123] The advice offered regarding the children would have covered “*the executry rules for the kiddies*”, [268] since they would have had rights: “*because*

they're his children, and they'll always have a right ... and I don't know what the wife or the children would do, but you're whistling, my pet". [123]

As now, the death in service benefits would not have been totally secure because even though *"You've got a nomination under the pension scheme ... the trustees have total discretion in this". [123]*

The main advice remained the same whether before or after the 2006 Act *"Stop relying on trusting somebody, it doesn't work" [123]*, because it remains possible, post-2006, to disinherit a surviving cohabitant by the simple expedient of writing a will leaving the estate elsewhere. But pre-2006, wills and property arrangements would have been the only way to ensure that a surviving partner would have anything: *"really, I'm sick of telling people that! ... And also, pet, get the house transferred into your name, with a survivorship clause, you know, into joint names". [123]* *"Had they wanted the partnership to have given her extra entitlements then they should have reached an agreement about that or he should have put it in his will". [99]*

The family home would have been a real issue as pre-2006 Eleanor would have had *"no occupancy rights" [174]* and, therefore, she would have had *"only ... a limited period of time to allow her to get alternative accommodation". [174]* Thus, *"the 2006 Act, for all its limitations, at least achieves something in that situation". [174]*

However, the issue of the extension to the house, which was built during her time in residence, was picked up by one interviewee:

The only thing that this person could claim for would have been the extension because that's an improvement and a capital asset which may or may not have been funded by her efforts. That would be an unjustified enrichment, which is a hellishly problematic concept to try and deal with. [268]

Advice post-2006

A practical approach

As would be expected of practitioners, several interviewees approached the exercise with a very practical outlook, concerned to secure a number of procedural or extra-legal issues (or legal issues not directly related to any 2006 Act claim) before addressing the substance of the claim under s 29. In advising Eleanor, they raised the following issues.

The time bar

The immediacy of the time limit of six months in death cases was not lost on interviewees: *“before I did anything else ... it’s three months since he died - Eleanor, you have three months to get this action into court and served, it’s crucial ... we move this ahead quickly”*. [123] So, this interviewee, while searching out the whereabouts of the wife, highlighted the need to put emergency legal aid into place: *“I can’t leave her, it’s a six month one and it’s really, really difficult to remember that that’s a really tight timescale”*. [123]

It was widely felt that the impending time bar for a claim under s 29 would almost inevitably mean having to raise and then sist an action now, since it would be extremely unlikely that all necessary information could be gathered (especially from the pension provider) or negotiation undertaken within the three months remaining until the six months cut off point – but the aim, having secured Eleanor’s position with a raise and sist, would be to negotiate a settlement:

This one would not be resolved without court action in any way, shape or form. ... The case would have to be raised ... then be sisted immediately thereafter. I’ve got one in my cabinet like that just now. It’s just sisted until we see how everything settles down. ... I have never settled one of these without going to court. I’ve recommended doing nothing without going to court, but I’ve never settled one without going to court. [268]

It was considered to be well nigh impossible to reach a negotiated solution in this case in the three months that were available before the time bar would cut in, since at the very least *“the chances of getting the pension company to move quick[ly] enough”* [173] to declare what their position was going to be, enabling Eleanor, in turn, to understand the level of her provision *“within that three month period ... is unlikely”*. [173] But while there was general agreement that this case would inevitably have court involvement, the nature and level of that involvement was a matter of debate:

... it has to have court involvement ... whether or not it would be resolved with a defended proof I don’t know, but I think the likelihood is that there would certainly be an action raised. And ... I suspect ... the likelihood of us being able to get an agreed resolution, unless everybody is very much singing with one voice, within three months is unlikely. [173]

The pension position

Interviewees saw any claim under the 2006 Act in the wider context of issues to be dealt with following a death and were therefore alive to the position regarding the death-in-service benefit and the potential for any additional adult dependant's pension, both of which would require that immediate contact be made with the pension provider to put it in the picture. Although the death in service benefit "*is ... discretionary ... on the part of the employers*" [29], it was considered to be of immense potential help to Eleanor: "*so I would ... be saying ...- Look you should make some enquiries first of all just to find out how secure that is. Just to try and put some sort of reassurance on her*". [29] But it was noted that while such a benefit can be "*fairly generous ... it's really just monetary, it's not going to help her on the house front*". [29] Furthermore, if her claim went to a court hearing it was suggested that this very settlement might lead to her being awarded little more as "*it might be considered that she has received a sufficient lump sum in terms of the death in service benefits from the pension*". [99]

The mortgage and other finance

Interviewees were also concerned to secure the immediate position regarding the home and mortgage payments, which would require that contact be made now with the mortgage lender. It was asked whether there was life insurance or an endowment policy that could now cover the mortgage; whether the estate could at least be encouraged to see the benefits of the house remaining occupied for the time being to prevent it falling into disrepair. As to Eleanor's access to funds, it was asked whether there were any joint accounts: the bank should be contacted immediately.

A push for negotiation

On the vital point of negotiation, the view was:

You are really having to be forced to say to people, well unless there is significant sums of assets here, we ought to really try and resolve this because it is just not going to be feasible to argue this with any degree of certainty as to what the outcome is going to be and a complete gamble. [29]

But there was general agreement that, while much "*depends ... on the individuals*", [29] this case would certainly have court involvement to some degree, because – time bar problems aside – raising an action creates a negotiating stance in the face of legal uncertainty

... it's been my experience that, whilst I have to certainly initiate court action on death cases, we have managed to resolve them, but it is very much a negotiating stance, because it is so uncertain as to what the courts would do in any particular set of circumstances. [29]

The impact of the surviving wife

This vignette was complicated by the existence of the surviving spouse, a scenario that is far from fanciful. A couple of interviewees had experience of cases with both surviving spouse and cohabitant.

The principal significance in law of the wife is that the cohabitant's claim under s 29 can take effect only against the "net estate", which is that part of the estate that remains after, inter alia, the spouse's prior and legal rights have been satisfied. Interestingly, the Act does not require that the legal rights of surviving issue be met before the cohabitant's claim is assessed, and we return to that theme below.

Some interviewees arguably over-estimated the potential impact of the wife's claims. A spouse's prior right to the dwelling house, furniture and plenishings¹¹⁵ only applies to a property in which the surviving spouse had been ordinarily resident at the time of death – and, as only one interviewee expressly (if tentatively) suggested, there was no question of that on these facts. So the spouse's rights would only entail the prior right to £42,000 cash¹¹⁶ and the legal right (*jus relictæ*) to one-third of the net moveable intestate estate. On the rather limited facts provided, it was not clear whether the cash sum would exhaust the estate, but some interviewees appeared to assume that it would (or would nearly do so), and so delivered a very gloomy prognosis for Eleanor. As for advice to the wife, all rather depended on what the client's attitude was, several indicating one way or another that they would view it as '*slightly smelly*' [173] for her to want to press her position in the circumstances. Experience suggested that once people were advised that they had rights, they tended to want to assert them rather than be sympathetic. Even so, a couple of interviewees said that they would advise her about the impact of any claim she brought on the other potential heirs, not least her own child and the children of David and Eleanor. Nevertheless, the advice here was

¹¹⁵ Succession (Scotland) Act 1964, s 8.

¹¹⁶ *Ibid*, s 9.

otherwise straightforward: she has her prior and legal rights, she would be at least the preferred candidate to be confirmed as executrix-dative.¹¹⁷ However, the most hard-nosed advice given here was that she should hang back from getting appointed as executrix until the time limit for 2006 Act claims has expired, in the expectation that this would, in effect, to prevent Eleanor from bringing her claim at all by leaving her with no executor of the estate against whom she can issue her writ under section 29:¹¹⁸

I've been asked on both sides. We're acting for the cohabitant, nobody's coming forward to be appointed, what do we do? The advice is you've got to do something, because you can't hang back and wait for one of the family to be appointed as executor-dative. If more than six months has gone by you're time barred. And equally when I've been asked by solicitors acting for a member of the family, I've said well if you don't do anything for six months it's possible that the cohabitant won't take advice, time mislay and suddenly find that she's time-barred. [179]

The conflict of interests between cohabitant and her children - executorship

The issue of appointing an executor raises another deeply problematic procedural point exposed by this vignette, which would arise with or without a surviving spouse. It concerns the conflict between the cohabitant's claim under section 29 and the impact that a successful claim would have on the interests of her own children (or the other child of the deceased) in the free estate, which may be reduced or even extinguished. Where there is no surviving spouse (or the spouse does not wish to act as executor), then the executorship falls to those children as next-of-kin. But, if aged under 16, they can only act with a legal representative or (if the matter is litigated) a curator *ad litem*. Can the surviving cohabitant, as parent of those children, get herself appointed as executrix *qua* legal representative for the children? This was seen by some as problematic because while the children have legitimate claims, they are "*conflicting with Eleanor's and the wife's*" [123] and, therefore, the children need to be separately represented because "*somebody needs to be appointed to deal with the children*".

¹¹⁷ She would be the only candidate if her prior rights exhaust the entire estate; otherwise she would share the right to be appointed concurrently with – but be preferred over – the next-of-kin who prima facie stand to inherit the free estate (here, the surviving issue, who if under 16 would have to be legally represented): See Currie on Confirmation of Executors (8th ed, 1995), ch 6.

¹¹⁸ We discuss this issue in chapter 8.

[123] This situation, which also arose in *Windram v Windram*¹¹⁹ (which had not been decided or reported at the time of our interviews), “*can cause all sorts of potential difficulties*” [29]:

... whereby you have the mother of the children and there is an immediate conflict in potential claims, because although Eleanor might then be seeking or contemplating, some sort of claim on the estate, she has a conflict with her two younger children. ... Is it appropriate that she lodges a claim on their behalf, or should she be stepping to one side and getting somebody else to look after them because of the potential conflict? [29]

All who commented on this situation were uncomfortable about it, some going so far as to say that Eleanor could not assume executorship. Moreover, it was suggested that because of the nature of an executor’s responsibility it would be impossible to settle a case such as this without a full hearing:

... executors have a fiduciary¹²⁰ responsibility to, amongst other things, maximise the value of the estate for the beneficiaries, whoever they may be. I think there is a question mark. . . . Certainly, if I was acting for an executor I would only be wanting to do that with the consent and concurrence of all of the residuary beneficiaries, which, again, I think lends it difficulties at a practical level to how you deal with this, because if, for example, the residuary beneficiaries are going to be represented by Eleanor, again, you’re fraught with difficulties. So, I would have thought in all likelihood that an action would be raised and quite possibly end up being defended. [173]

¹¹⁹ 2009 FamLR 157.

¹²⁰ A fiduciary responsibility is owed by those holding positions such as executorships that demand the utmost good faith to the person on whose behalf they act (here, the heirs). For present purposes, the most important implications of this are that executors must not place themselves in such a position that their personal interests conflict with their fiduciary duty as executor, and must not act in their capacity as executor in a way that will personally benefit them or a third party, without the heirs’ consent to the relevant transaction.

We explore this issue further in chapter 8, in light of the decision in *Windram v Windram*.

The lack of guidance for the exercise of the section 29 discretion and so for likely outcomes

Section 29 has been heavily criticised for the lack of guidance it provides:

The court is being asked to do the impossible: to balance conflicting family interests without any guidance on the relative weight to be given to the needs and interests of each party. (Scottish Law Commission 2009, para 4.7)

Unsurprisingly, our interviewees therefore found it difficult to articulate a clear approach to the resolution of the problem in the vignette, some perhaps were also inhibited by concerns about the potential reach of the spouse's rights. Those who touched on this issue catalogued the usual sorts of issues – the length and commitment of the relationship; the degree of financial interdependence; her care for the children; her financial situation now; the value of the house (including the increase in value attributable to the extension); what proportion of the total value at stake was represented by the pension that Eleanor has in hand; and so on – but with no very clear sense of how these factors might impact on the outcome.

Some – perhaps influenced by the outcome in *Savage v Purches*¹²¹ – felt that the fact she had the pension rights might incline a court to give her little more. This interviewee considered that this reported case offered:

... an illustration, if ever there was one, of the enormous risks of having such a discretionary approach, because the decision there, and what my interpretation of the judgment is, in large part coloured by and shaded by the personal responses that the sheriff had to the parties, which is hugely concerning. And the difficult thing is, how do I say to Eleanor whether or not a sheriff is going to think there is a 'whiff of avarice' about this? - You've had a death in service lump sum, you may well have had an adult dependant's pension, your children are going to be provided for, get on with your life. It's a very, very difficult one. [173]

¹²¹ 2009 FamLR 6.

It was generally felt that the children had a clear claim on the estate, being “*the people who are most likely to benefit.*” [99] This was so regardless of whether they were children of the relationship: “*all three children, it doesn’t matter by whom he had the children, it doesn’t matter who the mother is – if they’re his children, they have rights in his estate.*” [123]

A major factor here was also the feeling expressed by one interviewee that sheriffs, rightly or wrongly, would find it difficult to make provision for the cohabitant at her children’s expense:

The interests of the children are very important. ... The Court has a very difficult balancing act. I mean where spouse claims in these circumstances, the children will only get something if the spouse’s prior rights don’t eat up the whole estate. ... Where you’ve got the overlay of a possible section 29 claim, that’s where I think many of these cases are being settled, because the cohabitant fears that the sheriff will say, are there children here? Yes, there are children, hold on a minute, I can’t overlook the interests of these children. Because sheriffs are in many other cases called on to operate in an environment where the interests of the child ... [are] paramount. [179]

This is an interesting issue, because the statute clearly puts satisfaction of the cohabitant’s claim ahead of the children’s legal rights (which, unlike the surviving spouse’s rights, are not deducted from the estate from which the section 29 claim may be met).¹²² But it does take us back to the question of the conflict of interest between cohabitant and children. As was highlighted by the sheriff in the *Windram* case,¹²³ if the children’s claims are given precedence, the cohabitant could be placed in an extremely vulnerable position – essentially left to the mercy of her own children, once they attained majority, as to whether they would allow her to remain in the home.

It is interesting then to compare the outcome reached in the recent decision in *Windram* with suggestions made by some interviewees about various deals that might be struck in Eleanor’s case. One interviewee outlined a “*cooperative arrangement ...*

¹²² See definition of “net estate” in s 29(10). One interviewee appeared, erroneously, to think that the children’s claims *must* be met first. Another interviewee erroneously thought that the oldest child had a priority position, ahead of the other children; but the law does not distinguish between children of the deceased.

¹²³ 2009 FamLR 157.

an entirely practical solution for a family who were prepared to work together”, [174] in which:

. . . the deceased’s family pulled together with the cohabitee to produce a solution for the children. The solution being that the cohabitee was allowed to occupy the property as long as the property was eventually going to be transferred to the children. So there was a very cooperative arrangement there, but at the end of the day, the cohabitee did not benefit financially but had the security of the accommodation to allow supporting the children. [179]¹²⁴

Such an outcome was seen as mixed for Eleanor, some positives, some negatives: it would “give her the security; but does not give her any financial settlement so she has to work for herself and support her children but she has the accommodation available”. [174]

Another interviewee described taking an approach in which:

the surviving cohabitant has effectively taken about half the estate and the other half has gone to the family. It seems to be a reasonably equitable way of trying to deal with it. [29]

It will be interesting to see whether *Windram* – in which, by contrast with some of the gloomy outcomes suggested for Eleanor, the house was transferred to the cohabitant outright – encourages practitioners acting for cohabitants in such cases to take a more robust approach. But even after *Windram*, trying to predict the likely outcome for pursuers such as Eleanor may still be regarded as:

the six million dollar question ... the nub of the problem... I have no idea. [173]

THE SEPARATION VIGNETTE

Advice pre-2006

You’re in trouble! Very little she can do about it. ... The comment would have been, -- Why didn’t you get married?[272]

¹²⁴ There had also been a surviving spouse in this case, but she decided not to take part.

In general, interviewees considered the position for cohabitants before the 2006 Act to have been bleak: *"I would have been hanging my head when the woman left and thinking, 'Oh dear, what can we possibly do for this woman?' Very, very little to be honest. Very, very little".* [47]

Child support

Advice pre-2006 would have centred on *"the question of the child support"*, [108] ensuring that Janet received proper entitlement for the children. Before 2006, Janet would have had no claim in her own right: *"no, nothing for Janet at all"*; [70] so no discussion of *"economic disadvantage as such ... there wouldn't be a claim to quantify"*. [360] It was generally agreed that Janet would be likely only to get child support: *"I think probably that she would get her child support and possibly not an awful lot else"*. [249] Indeed, child support itself is limited in focus: *"you wouldn't be looking at the ... compensation for the economic burden of future childcare"* though *"what you would be looking at ... is Kenneth actually paying something towards it"*. [360]. This interviewee suggested that:

... your negotiation would ... be very practically focussed. You'd be looking at where the limitations are in their finances, what they are both going to need and what either one of them can pay. Trying to achieve a practical resolution... [360]

Indeed, some interviewees did consider that Kenneth might pay a little more than the basic assessment required by the CSA formula, provided negotiations were cordial:

Well, in so far as the children are concerned, it would be you're entitled to what the CSA would assess but you might be better to appeal to his better nature and hope that, if he's child-centred, he'll offer you more and, therefore, you'd have an even greater focus on trying to be amicable in my view. [306]

That Janet and Kenneth should remain amicable was an important issue for several interviewees because they would have to have a continuing relationship as joint parents, despite their separation.

Unjustified enrichment and other claims surrounding the house and contents

The other issue that would have been given serious consideration pre-2006 would have been a claim for unjustified enrichment. However, no one thought that unjustified enrichment was either a positive or even an adequate or very useful claim to pursue since:

It's very, very expensive and very difficult to prove an unjustified enrichment claim. So I would be advising her against that. But at the same time, negotiating with him to try and get some of that money back. [353]

All these unjustified enrichment, and all these kind of cases, they're very, very difficult legally. [329]

Furthermore, it was generally thought that any claim seeking a “*capital sum would be difficult*” [148] and prospects of success slim. While one interviewee tentatively suggested an argument based on “*something about possibly constructive trusts¹²⁵ or something like that*” [372], others simply thought that “*Janet would have had to move out of the house as soon as he wanted to sell it*”: [151]

In relation ... to the house, she's got no real rights ... to stay there. She could maybe apply for some kind of occupancy right for a short period. I'm just ferreting desperately for provision before the Act. [148]

Given these sorts of problems, “*from a pragmatic point of view I would be discouraging her from financial claims other than child support*”. [306]

Marriage by cohabitation with habit and repute

There was no enthusiasm for raising an action of declarator of marriage by cohabitation with habit and repute:

I don't think there's anything in the situation that suggests they've been holding themselves out as husband and wife. ... It was very difficult to establish marriage by cohabitation, particularly these days when everybody knows that folks aren't married when they're living together. [372]

Advice post-2006

In terms of the 2006 Act, this was a pretty standard separation scenario, with a mixture of potential economic disadvantages and advantages to be weighed up and child-care to be considered. Interestingly, interviewees addressing this problem tended to home in on the economic disadvantage and advantage balancing exercise. The fact that the time bar clock ticks a little less loudly in separation cases than in succession cases

¹²⁵ See chapter 2.

allowed a little more time for early consideration of the merits of the potential Family Law Act claim, helped by Kenneth's conciliatory stance, for the time being.

In general terms, on one view, it was said that "*Janet's definitely in a much better position as a result of the 2006 Act.*" [329] However, some interviewees considered her situation now to be only just better: "*it's very useful that we've got an Act, but it's not a major player here. It's not a major player*". [108]

Practical problems and managing the dispute towards a low-cost, negotiated settlement

Despite the focus on the substance of the claim described above, interviewees remained practically-minded, for example, mindful of the impact of a claim on Janet's welfare benefit entitlement; issues surrounding legal aid (addressed below); and the affordability for both Janet and Kenneth of various options regarding housing and the fate of the home (particularly given the lack of power in the legislation to order a transfer of property in satisfaction of a successful claim).

The likelihood of court involvement: negotiation preferred to litigation

While it was considered that "*the Act is vague in some ways (and appallingly vague in section 29)... it's clear enough here that you can negotiate a settlement surely, surely*". [108] Moreover, while the lack of case law made it difficult to advise clients, it was suggested that this meant "*people are settling because they know what they're getting, rather than risking going to court*". [151] There was a strong feeling that "*the majority of cases do resolve without court involvement*". [151] Naturally, much "*depends ... on the personalities involved*" [151], but here there was a general expectation in relation to the facts of our vignette that "*that this might resolve itself, because they seem to be behaving sensibly*". [272]

Moreover, reflecting the settlement culture of family lawyers, it was generally agreed that more would be achieved for each party, especially the children, by an amicable approach – by negotiation rather than litigation:

"From a human perspective there's the fact that we have two child-centred parents where there's going to be a lot of contact between them over young children". [306]

"I would hope that they would continue to have a good relationship with their father and I would certainly encourage Janet to bear that in mind". [148]

It was seen as vital to avoid the negative outcome where *"the relationship between the two of them [i.e. Janet and Kenneth] would become so embittered that she would use the children as some kind of weapon". [148]*

It was also clear from the facts that there was very little money here about which to argue, unless the:

... the house has risen astronomically in value. In which case ... you would probably be saying, "Can you use that as a means of providing Janet with a deposit, Kenneth with a deposit, and sharing the benefit of that?" [360]

The advice and attitude of both lawyers involved was important: *"as a solicitor you would be trying your best to sort it out, both of you would, because you'd be so aware of the costs". [329]* However, it was recognised that lawyers vary in the propensity to negotiate or litigate:

I tend to find a lot depends on which of my family law colleagues is on the other side of it. I think there are those amongst us who perhaps like to take things to court; there are those who would try and do anything to avoid that. And I think a lot of that might well depend on who I had on the other side of it. [249]

Whether it was ethical for a lawyer to advise Kenneth to sit tight and do nothing was a debatable point; nevertheless, it was certainly seen as a possible tactic: *"from Kenneth's point of view, you know, he could be quite smart and string it out. And then I think most family lawyers wouldn't do that, but some would". [329]*

Much would therefore depend on parties' negotiating stances:

... if you're getting a situation where there's no offers coming from the other side, they're basically saying we're not prepared to offer you anything. I think only in that case would you progress it, to try and force the issue. But I think if they had some sort of reasonable proposal to make, I don't think you would risk court action, or you wouldn't risk taking it to proof. I mean that's what the situation is in a divorce case anyway, but particularly so in a cohabitation case, it would have to be a more stark situation where they're saying we're offering nothing. [372]

In order to steer the dispute towards a negotiated settlement, it would also be necessary to manage client expectations carefully and to avoid wasteful dispute on low-value items.

The limited assets at stake and the question of legal aid

The limited assets at stake made it of the highest importance that there was a negotiated outcome rather than a litigated one, as one interviewee commented:

There's not nearly enough money here to litigate, not nearly. Now I'm assuming here that the parties are not going to be on legal aid because if they're on legal aid well, they're not sitting across my desk.¹²⁶ And assuming they're not on legal aid, there's woefully inadequate money to litigate. Certainly it's a case that should settle. [108]

There was some discussion about whether either or both parties would qualify for legal aid. Most importantly, however, there was no point in an outcome that would simply be “*enough to pay your legal fees. That's not in anybody's interests*”. [372] Indeed, there was general agreement that it would not be sensible for Janet to pursue this case through the courts, because she would be incurring significant expenses and even though she would be on legal aid, unlike a divorcing spouse, she would enjoy no exemption from the claw back by the Scottish Legal Aid Board.¹²⁷ So the preferred way forward was negotiation. There was a perceived downside here to legal aid if both qualified as “*fortunately or unfortunately ... it's more likely they'll go to court. ... I always encourage people, particularly people with small children, to try and sort something out*”. [47] Set against that, however, was the prospect that legal aid would only be made available to cover emergency work, if Janet's prospects of success were slim.

¹²⁶ It was said that some firms would not do legal aid work on money cases; another expressed concern that legally aided cases might be more likely to go to court, but the lack of claw back exemption was still a vital point to bear in mind.

¹²⁷ We discuss this issue in chapter 8. The claw back entitles the SLAB to recover its costs from the sums recovered by the pursuer in the legal proceedings supported by the Board. In the case of divorcing spouses, a portion of the capital recovered is exempted from this.

The effect of the time bar

Despite the clear preference for negotiation over legal action, several interviewees said that they might feel obliged to raise an action for Janet because of the time bar. It has become a common tactic to raise then sist an action. This was done for two main reasons, firstly to fall within the time bar of one year should negotiation fail, and secondly to put pressure on the other party. Clearly, raising an action for either of these reasons was seen as quite distinct from taking the matter further in court: “*I’m not encouraging people to progress cohabitation claims. Raising them and sisting them is one thing - ... progressing them is another matter*”. [372] Thus, raising and sisting was used as a route with its own end, rather than a step on the way to either an options hearing or going to proof. Even when negotiations were underway, the time bar left lawyers little option but to raise then sist:

The only action that I have raised was because I realised that we were negotiating and were becoming horribly close to the year. And so you end up raising, when otherwise you wouldn’t have done. And in fact the one that I had to raise, the other side wouldn’t give me her address ... I had to rush it into court, because I realised I was really close to the year expiring. [329]

Sometimes, this course of action was perceived to be the only means of avoiding a claim for professional negligence:

So ... to cover your own back ... when you start becoming close to the year you can’t take any risks, even if it’s a very, very poor case, completely as a risk management thing. You might be saying to your client - Look I don’t think we’ve got a strong case here, but in order to protect your position, either you tell me you don’t want to proceed with it, or we have to raise to protect your position. And you would get emergency legal aid to do that. [329]

However, not all interviewees considered raising and sisting actions to be helpful:

... if there’s a will to actually sort something out, then for one party to immediately dash in and raise an action ... it makes the other party think ... they’re in some way being threatened, which, of course, they are. [272]

But even this interviewee conceded that “*if we can’t reach agreement then she would have to raise an action*”. [272]

In some ways the problem posed by time bar is less acute than in succession cases as there is a whole year to run – but that may not be long enough to negotiate a settlement in many cases. Moreover, pinpointing the date on which the clock starts ticking (i.e. determining the date of separation) is considerably harder in separation cases than for succession claims. So it might still be necessary to protect the would-be pursuer’s position by raising and sisting an action when (on the gloomiest interpretation of the facts) the end of that year looks like it may be getting close, even at the expense of that tactic being perceived by the other side as threatening. But it is important to note that the effect of the short time limit was said, quite simply, to be that:

more [writs] are raised than there might otherwise be because of this quite strict timescale. [329]

Handling the merits of the case and fashioning a settlement

When it came to dealing with the merits of this case, our interviewees’ views and approach very much reflected their concerns about the legislation generally: the problems with proving and quantifying claims and the uncertainty generated by the court’s discretion.¹²⁸ The upshot was that while Janet’s expectations could hardly be high after she’d left her first appointment (see above, on the need to manage client expectation), Kenneth would not be certain about the strength of his position either.

Dim prospects for Janet in claiming economic disadvantage?

Perhaps reflecting the outcomes in what few cases had been reported by the time the interviews were taking place, interviewees were generally unenthusiastic about prospects for Janet receiving a significant award, certainly based on s 28(2)(a). Interviewees tended to consider that Janet’s economic disadvantage would be counter-balanced by advantages enjoyed by her during the relationship and/or by possible disadvantage incurred by Kenneth:

Well one of the things I would have to say to her is that I think that prior to 2005 it was probably all water under the bridge, and so she’s really got to look at from 2005 onwards... [151]

¹²⁸ See questionnaire analysis in chapter 5.

But even that post-twins period was not thought by most to be likely to yield an award for Janet, because of her enjoyment of Kenneth's support from that point.

Most also gave relatively little attention to the arguable potential for making substantial claims (aside from claims based on the burden of child-care) based on continuing economic disadvantage (for example relating to ongoing opportunity costs in terms of earning capacity and pension entitlements) that pursuers might experience for several years following separation, despite their best efforts to recover their position.¹²⁹ Clearly, the benefit of the lifestyle enjoyed during the relationship cannot counterbalance this continuing disadvantage.

But some of those who did address this possibility felt that on these facts, where Janet had been out of work for only a few years, it was likely that she would be able to recover her earnings fairly quickly, by returning to work in the bank when the children started school and with the assistance of tax credits. It was considered unlikely that "*the court would be particularly generous to her as regards disadvantage to her career*" [306] because she would probably return:

... at the same grade and usually it's difficult to show that four years out will be material to her career progress in that type of role. So, I don't necessarily think her career gap provides a huge economic disadvantage. And certainly at the time during the relationship when she wasn't working she had the corresponding benefit of being supported by him. [306]

The need to provide the court with detailed information about Janet's salary both in the past and into the future, should she return to work should not be too difficult: "*banks are better than some professions in terms of being able to work out grades, ... because they're very structured, it's one of the better professions to be able to argue*". [306]

Interviewees who considered placing an emphasis on negotiating an outcome thought that it could lead to Kenneth "*paying ... a reasonable amount of aliment ... and possibly a few thousand pounds as a goodwill gesture*". [70] Negotiation, it was felt, could possibly achieve:

¹²⁹ Interviewees may have been neglecting or otherwise under-estimating the potential future losses that Janet would sustain: we discuss this issue and associated case law in chapter 8.

A capital payment ... [for] Janet, which would enable her perhaps to move on, maybe not buy another house, as she has not got enough income, but something to give her a cushion. [148]

A child-centred solution instead

The focus for most was instead on achieving a child-centred solution, several picking up on the fact that Kenneth's conduct so far suggested that he was himself quite child-centred:

"he's moved out of the house and left her there and it's his house, so ... that flags somebody that cares quite a lot about their kids" [306] and:

... he seems to be a decent enough bloke, in that he is still coming around and seeing the children and paying everything, he's paying the bills. He agrees the children should live principally with Janet. [272]

It was suggested that not all solicitors adopt a child-centred approach. But most interviewees went straight to the question of the children. At the most basic level Janet would receive child support payments for the two children of the relationship:

... within this level of funding I would be trying very, very hard to reach a settlement. And I think my focus would be on the twins and on finding a way for Janet to work part-time and claim tax credits so she's got a reasonable standard of living, and getting some money for childcare. Maybe [this would be a] more ... pragmatic approach. [306]

But consideration was also commonly given to the potential for a s 28(2)(b) claim, which was viewed as Janet's strongest suit, especially since the expense of that was one of the stated reasons she gave up work in the first place: "*She would be entitled to make a claim in respect of the costs of childcare under the Act over and above CSA child support*". [306] In working out what childcare payment Janet would receive, one interviewee suggested that the parties would be "*encourage[d] ... to agree the figures themselves ... we tend to ... use the CSA guidelines ... in coming up with a figure*". [249]¹³⁰ But the need to avoid any double-counting with child support was noted.

¹³⁰ Depending on exactly what is meant here, this approach could deprive s 28(2)(b) of its own force – however calculated, it is clear that it should *supplement* child support.

It was hoped “*that Kenneth might be tempted to pay ... more than the minimum dictated [by child support rules] because ... Janet’s having to put the children in ... full-time childcare ... to allow her to work at all.*” [249] There were, however, differing views as to the likelihood of Kenneth agreeing to offer additional monthly payments. One view was that Kenneth may well “*contribute to childcare, particularly if he feels Janet is going back to work and there’s a ... [possibility of his having] quite a lot of time with his children*”. [306] Another also felt it likely that Kenneth might “*also agree, ... if she did want to go back to work, to meeting some of the childcare on a 50:50 basis*”. [353] However, a bleaker view was also expressed:

I wouldn’t be giving Janet much hope that she would be getting an additional payment because she has these very young children. Longer term ... the chances of her getting some additional monthly payment because of the age of the children would not be high. I don’t think that would be attractive to sheriffs because they tend not like that in divorce cases. [47]

Beyond this, interviewees hoped they would be able to negotiate a more substantial period of time “*for Janet to look at what was happening, where she was headed; whether it was months or years would probably depend on what they wanted for the children*”. [148] Such negotiations would, in part it was thought, depend on how child-centred Kenneth was and how important his twins were to him

If some payment was to be made, it was felt that the most likely outcome would be to follow the clean break approach adopted by those seeking a divorce. Indeed, a potential way forward for Kenneth to settle the case in a child-centred way was seen to be as follows:

[H]is income ... is £29,000. ... [Y]ou’d start out by working the CSA assessment off that and then say - Well, that’s what you’re going to have to pay. Over and above that what can you afford to pay in relation to the children? And he may, rather than paying her from income, because his salary isn’t hugely high, he may say - Well, if this house is being sold, actually, what I’ll do is set some capital aside for childcare costs. And she may be persuaded to settle on that basis because of the risk of litigating. [306]

The home

The most significant asset was the family home, which was in Kenneth’s sole name, and many interviewees considered its future. It was noted that “*there isn’t anything in*

the legislation that allows Mum to insist on a transfer of the property". [47] So, however much

... sheriffs would be not unsympathetic to mums with young children wanting to retain property ... a sheriff can't order that ... [so] that would have to be by agreement of the parties [47]

The aim of this interviewee would have been to achieve the equivalent of "a 50:50 split of the house". [47] In order to achieve this, the interviewee would have emphasised the "fact that she's had these children, the fact that she's supported him". [47] However, it was conceded that

... in terms of the very, very limited case law we have it seems to be that you have to produce some kind of audit trail and everything that's done here would have to be tracked. [47]

Indeed, acknowledging that parties to a private settlement are free to agree whatever they like, regardless of limitations on the court's powers (most notably the lack of facility to order a property transfer¹³¹) one interviewee went so far as to suggest an outright transfer of the home to Janet in settlement of all her claims. But the viability of this option would depend on how much equity Kenneth had in the property and Janet's ability to pay the mortgage herself. Most interviewees regarded it as more or less inevitable, given the resources available to Janet and Kenneth, that the house would probably have to go – or at least that Janet and the children had no long term future in it, especially if (as many felt it to be) Janet's claim under s 28(2)(a) was weak.

Kenneth's financial position was important: "*the difficulty would be to pay for a house that he is not living in; what does he want to do if he moves on, meets someone else? It would be a hard one*". [148] Indeed, it was expected by some that Kenneth would end up with the house simply because "*it's in his name and because it was his prior to the relationship commencing*". [70] Therefore, Janet and the children would need to find alternative accommodation. Indeed, other interviewees assumed that "*he's going to have to sell the house ... if he wants to provide for the family ... [and] have any certainty*". [272]

¹³¹ We discuss this issue in chapter 8.

The realities of Kenneth's income level would likely mean that, while he "*would not want to ... have his children turfed out into the street*" [372], he would simply not be able to afford to keep this home going for Janet and the children whilst also funding his own accommodation. The most likely outcome for Janet in terms of housing would be that she would find rented accommodation for herself and the children:

... as she's not working. ... Janet ... [needs to be] exploring ... what accommodation has she got available to her in the ... longer term, because she should be ... looking into council accommodation, or private rented accommodation. If she's not earning at the moment, then potentially she could claim for housing benefit, but I suppose that will depend as well what she's getting from, or what she's likely to get from Kenneth in terms of child support [372]

Accepting that Janet would have to move from the house, the timing of that move was thought to be

... crucial because it has to be dealt with at a time when Janet has rented accommodation available to her and the children. And I can imagine that I think Janet's solicitor's advice would be that she ties up any cessation of occupancy rights in moving out with her financial settlement. I suppose she would be sort of balancing one against the other. [372]

This could ease a resolution as the property issue could "*be resolved and exchanged for a cessation of occupancy rights from Janet*". [372]

Detailed use of economic advantage and disadvantage

It was interesting to observe that, whilst clearly aware of the relevance of these principles, relatively few of our interviewees engaged in detail with the language and concepts of economic advantage and disadvantage (particularly the former) as they applied to Janet and Kenneth's case. One interviewee who took a close look at these issues thoughtfully commented that:

... because the focus of the case law is very much on actually requiring to quantify properly your economic disadvantage claim ... you would very much need to dig out the statements and work out exactly what she'd contributed. [306]

As to Janet's economic disadvantage claim, this interviewee had this to say, following some detailed reflections about the complexity of and difficulty in untangling Janet and Kenneth's economic circumstances during their long cohabitation:

... she's had a career gap of four years, and she worked in a bank before. Given the ages of the children now, if the cost of childcare could be dealt with ... she could, in my view, and would indeed be expected, to return to work part-time. As a single woman she would get tax credits and given the level at which she's earning, I suspect that part-time salary with tax credits, particularly when we factor child maintenance into account ... I think will mean that arguably she wouldn't be worse off in terms of income.

Conclusion

Our interviewees' advice about Janet's position in this case may, overall, sound rather gloomy. In part, it simply reflects the realities of low-value cases where – whilst the Act may not require the court to have regard to the interviewee's resources in making its award¹³² – solicitors negotiating for their clients will be all too aware of the inevitable constraints that limited assets impose on what can be achieved in practice.

But it is also worth reiterating that, whilst some interviewees were doubtful about this, in general, Janet was considered to be in a better situation after the 2006 Act than before:

When you compare and contrast how it would have been. ... And that's a common scenario as well [i.e. the circumstances of the vignette], which is why it's good that there has been some kind of recognition of how our social structure has changed and why it needs to be; otherwise poor old Janet would be altogether stuck with the CSA and that's ... not great for anybody. [70]

¹³² As has been observed judicially, for example, in *Falconer v Dods* 2009 Fam LR 111, at [63].

PART 3: FUTURE DIRECTIONS?

CHAPTER 8. WHERE NEXT FOR SCOTLAND?

The policy objective is to introduce greater certainty, fairness and clarity into the law by establishing a firm statutory foundation for disentangling the shared life of cohabitants when their relationship ends. (Scottish Executive 2005a, para 64)

One key task of any research which aims to evaluate a policy or legislative initiative is to examine the extent to which it meets its stated policy objectives. A further task is to identify whether or not that policy has had unintended consequences, and whether these impede the realisation of the particular policy objectives or of other policy objectives within the context in which the policy operates. Our findings suggest that, less than four years in, law and practice under the 2006 Act are still some way from achieving the stated objectives. As we have seen, the width of the discretion available under both ss 28 and 29, and the problems that can be experienced in attempting to prove and quantify economic advantage and disadvantage, leave clients and their advisers uncertain about their position. The Act's drafting renders key aspects of the law less than clear. Various practical obstacles preclude the achievement of fair outcomes in some cases where financial relief is deserved. Most notable amongst these are the time limits in the Act, which have the effect of unnecessarily increasing demands on the courts and potentially exacerbating or creating conflict.¹³³

The Act has undoubtedly achieved a lot for Scottish cohabitants and their children. Most fundamentally, it has created financial remedies where none previously existed,¹³⁴ recognising the value of financial contributions and the economic sacrifices that often arise from cohabitants' home-making and childcare activities. In so far as unjustified enrichment might have offered a solution in some cases, MacQueen (2010) observes that the Act, "while by no means free of difficulty, is a more direct route to the issues at stake between the parties than the common law concepts...". The Act therefore provides practitioners and their clients with a potential claim with which to enter into negotiations for settlement when cohabitation ends, whether by death or separation.

¹³³ Several of the problems that we found in the course of our research were highlighted by Kirsty Malcolm's smaller questionnaire study in 2007.

¹³⁴ The pre-2006 remedies were at best difficult to operate, and at worst simply failed to respond to particular types of problem: see ch 3 for brief summary.

Some, of course, consider that these supposed benefits are not desirable as a matter of policy, that financial relief at the end of relationships should be confined to spouses and civil partners; indeed, some of our interviewees hold that opinion. Scotland has resolved that policy debate in favour of reform. However, it is also fair to acknowledge that, at this stage of the Act's life-cycle, many of the Act's strengths may be felt to lie principally at a normative level. Our research has identified various operational problems creating barriers that prevent many potential beneficiaries of the Act from realising the benefits which it was intended to confer.

We consider that the difficulties being experienced to date can be broadly placed in two categories, with some having elements of both:

- **“Intrinsic” problems:** problems which arise from the scheme as currently enacted which can only be ameliorated by reform of the primary legislation.
- **“Early days” effects:** problems being felt now which may ameliorate over time as the Act beds down, practitioners become more familiar with its operation, and the apparently wide discretion created by the Act is reined in by clearer judicial guidance. This “early days” phenomenon is one that affects any new piece of legislation, particularly one that breaks new ground rather than building incrementally on something that was there before.

In this section, we examine the operation of three main areas of the law: the definition of “cohabitant”; issues pertaining to s 28 claims on separation; and issues pertaining to s 29 claims on death. We also provide separate notes on legal aid and agreements.

IDENTIFYING ELIGIBLE COHABITANTS

As we have already noted, the drafting of s 25 has been criticised by commentators (Thomson (2006b), Norrie (2006)), the checklist in s 25(2) having not been properly related to the basic definition of cohabitant in s 25(1). The Scottish Law Commission recommended a new formulation in its recent *Report on Succession* (2009, para 4.11 et seq). This, inter alia, offers a longer checklist of factors to which the court should have regard in seeking to identify whether a given relationship amounts to cohabitation. The Policy Memorandum accompanying the Bill anticipated that “facts and circumstances will, over time, build up an understanding of the situations in which recourse the courts is likely to succeed” (Scottish Executive 2005a, para 68). However, while problems of proof will inevitably sometimes arise in borderline cases, our research did not find any substantial problems with identifying cohabitation in practice.

As we reported in chapter 5 (Table 5.4), only 30% of questionnaire respondents selected “definition of cohabitation and being eligible to apply” as a problem area, none ranked it as the top problem, and only nine of those who answered the question ranked it as the second or third most unworkable aspect of the Act (Table 5.5). Establishing the date of separation – so, having found cohabitation, determining whether and when it has finished – was more problematic, a majority selecting this as a problem area. Importantly, this issue is linked to the substantial problem with time bars, which we discuss below.

One aspect of the Act which we think on the basis of our data can be regarded as a *success* of the Act is the lack of minimum duration requirement for eligibility to bring a claim either on separation or death, an issue which was much debated during its passage through the Scottish Parliament. The absence of such a requirement does not appear to have created problems. The Scottish Law Commission had promoted this approach on the basis that the rules that they were recommending:

... would either be self-limiting (in the sense that a short cohabitation or one involving little mutual commitment would be likely to give rise to minimal legal consequences) or would involve sufficient discretion to enable a court to take account of all the relevant circumstances of the case. (SLC 1992, para 16.4)

The Scottish Ministers agreed, the Policy Memorandum accompanying the Bill remarking that:

... there is more to be lost than gained [by including a minimum duration requirement]. It would be arbitrary, rigid and unresponsive to individual cases; would create problems of proof; could distort behaviour; and could lead to especially harsh outcomes in relation to discretionary awards on death (Scottish Executive 2005a, para 67).

The findings from our questionnaire regarding the duration of the relationship in the respondent’s most recent case potentially involving the cohabitation provisions of the 2006 Act show very few relationships of less than two years, and relatively few of less than five years: Table 5.2. There is therefore limited evidence of “nuisance claims”, in so far as these might be manifested by claims brought after only short relationships. The Act therefore appears in practice to meet the Executive’s intention to create safeguards only for those in “long-standing and enduring relationships” (Scottish Executive 2005a, para 67).

ISSUES RELATING TO SECTION 28: FINANCIAL CLAIMS ON SEPARATION

First, a comment on the preponderance of questionnaire respondents' "last case" being cases of potential claims arising on separation rather than death. Separation claims are always likely to outnumber death claims in light of the current age structure of the cohabiting population and the fact that more affluent couples are more likely to have made wills, thereby removing themselves from the scope of the Act.¹³⁵

Our research highlighted two central problems with the operation of section 28, the first two of which can be classified as "intrinsic" to the Act, the last of which has both intrinsic and "early days" aspects:

- the one-year time bar for bringing claims after the date of separation
- the lack of remedial flexibility
- the interpretation, proof and quantification of economic advantage and disadvantage, combined with concerns about the width of the court's discretion.

The time bar

The time limits in the Act were identified by 76% of questionnaire respondents as a problem area, with 22% of those who answered the follow-up question ranking it as the worst problem: Tables 5.4 and 5.5. The time bar that arises one year after separation, without possibility of extension, reflects the Scottish Law Commission's original recommendation. However, our research clearly demonstrates that the time bar is having unintended and undesirable¹³⁶ consequences. Particularly, perhaps, given the uncertainty that may surround the date of separation – the crucial date from which the time-bar clock starts to tick – practitioners advising petitioners are commonly raising and then immediately sisting actions. This ensures that negotiations can begin or continue without the petitioner needing to worry that they might persist beyond the one-year anniversary of separation, depriving them of the possibility of bringing a claim should the negotiations fail to yield a settlement. This has obvious consequences:

¹³⁵ Cf the recent recommendations of the Scottish Law Commission (2009) which would extend its new scheme to both testate and intestate cases.

¹³⁶ But not unforeseen: the Faculty of Procurators and Solicitors in Dundee raised precisely this point in their Written Submission to the Justice Committee on the Bill.

- unnecessary use of the courts, imposing a burden on court administration and a cost to the parties¹³⁷
- whilst it might usefully concentrate minds and propel people towards early settlement, raising and sisting an action also has the potential for exacerbating conflict between parties, thereby (ironically) undermining the parties' inclination to settle informally, which may in turn have negative effects on any children of the couple
- inefficient use of legal aid for raising and sisting

While a time limit is clearly necessary in order to enable couples to put past relationships behind them, the one-year limit does seem rather short in practice.¹³⁸ It might also be thought curious, for a set of provisions which otherwise have quite a discretionary approach and do not fix a minimum duration requirement for eligibility to apply, that no discretion should be afforded on this point. We would therefore suggest that either the time limit should be generally extended (say, to two years¹³⁹) and/or the courts should be empowered by statute to extend time in individual cases where the circumstances (exceptionally?) warrant such extension, given the respective interests of pursuer and defender. We emphasise that this problem in the Act, and its undesirable consequences, are intrinsic to the primary legislation. The passage of time will not ameliorate it. Amending legislation will be necessary to cure it, if change is thought desirable.

¹³⁷ In terms of court fees alone, the dues for the Initial Writ in a Family action in the Sheriff Court are £80; for a motion to sist, £40, and to recall the sist at a later date in order to enable the proceedings to go ahead, a further £40: potentially £160 in total. The equivalent sums for the Court of Session are £135 and £45 respectively, potentially £225 in total.

¹³⁸ International comparisons are instructive: Australian law (Family Law Act 1975, as amended, s 44(5)-(6)), which reflects the law previously in force in most Australian states, has a two year period, with leave to extend in two specific circumstances; the Irish Civil Partnership Bill adopts a two-year period, save in exceptional circumstances (cl 193, as initiated); the Law Commission for England & Wales recommended the same: (2007) para 4.147 et seq.

¹³⁹ The responses to the consultation exercise for the Law Commission for England & Wales on the equivalent point are instructive here: Law Com (2007), *ibid*. It should be noted in particular that the Commission's final recommendation of two years with power to extend in exceptional circumstances was based in part on the findings of an empirical study which cast valuable light on the time it realistically takes parties to attempt negotiated settlement.

The limited range of remedies

Another intrinsic problem emerged from our interviews, rather than the questionnaire, but the feedback from interviews on this issue is strong. On one view,¹⁴⁰ section 28 permits the courts to make just one type of final order: payment of a capital sum.

Childcare costs

As judges in reported cases have complained (notably Lord Matthews in *CM v STS*¹⁴¹), if correct, this is particularly awkward for the resolution of childcare cost claims under s 28(2)(b), where the flexibility of periodical allowances would be far better suited to the purpose of these orders, since they which can be varied over time as childcare requirements change, very possibly unforeseeably. As we discussed in chapter 3, the Scottish Law Commission made no recommendation for claims in relation to childcare costs as part of its scheme because of its understanding of the child support system then in operation. It therefore did not consider what form of order might suit that type of claim. The 2006 Act adopted the Commission's scheme of remedies, but – unlike the Commission – *did* include the principle relating to the economic burden of childcare after separation. We would add our voice to that of Lord Matthews in *CM v STS* in suggesting that additional remedial flexibility be provided for this type of claim, noting that periodical allowances can be made under the 1985 Act pursuant to the equivalent principle in s 9(1)(c): see s 13(2). In so far as the legislation might be thought simply to be unclear on this point, clarification that periodical payments may be awarded for this purpose would be welcome.

We would also, incidentally, draw attention to the exclusion from these claims of the costs of caring for a child who is not a child of both cohabitants. Particularly in a case where the person caring for the child is not the child's parent, but the other party is, this would seem odd. But it may also be argued that precluding a remedy here undermines wider child welfare objectives by reducing the income potentially coming into that child's household.¹⁴²

¹⁴⁰ Cf the view of Thomson (2006b), amongst others, who argues that s 28(2)(b) may entail periodical payments, a view that the courts to date have not followed. See chapter 3, n 40.

¹⁴¹ [2008] CSOH 125.

¹⁴² Though there will be an obligation on the parent (or a non-parent who has accepted the child as a child of his family) to aliment the child: Child Support Act 1991 (parents only) and Family Law (Scotland) Act 1985, s 1. This matter was debated quite extensively during the passage of the Bill (though principally in relation to a point regarding same-sex couples which has now to a

The lack of property transfer and other incidental orders

Returning to the question of the types of order that may be made, our research demonstrates that there are also problems associated with limiting awards under s 28(2)(a) to capital sums. Whilst such awards (payable by instalments) provide an apparently straightforward “clean break” following separation, family life (especially following its demise) is often less than clean and simple to resolve. A capital award can operate as a blunt instrument where the more delicate point of a surgeon’s knife is needed to tease apart the parties’ interdependent economic existence. Counter-productive consequences may flow from the court’s inability, for example, to order the transfer of a particular asset in satisfaction of a claim,¹⁴³ or to order that a home be retained for occupation by one party for a defined period, until a later sale or reversion of that property to its owner. Assets with considerable use-value (such as a home) or income-generating capacity (such as a business) may in practice have to be sold to yield the capital sum necessary to meet the award, in the process depriving both parties of the potential use or income-value of the asset. Vulnerable parties may not be protected by this sort of outcome, undermining one key objective of the legislation. Indeed, the position of *both* parties to a dispute may, ironically, be worsened by it. We also note that the 2006 Act offers no scope for orders to take effect over pension funds.

Parties able to negotiate a settlement might be expected to work around this restriction on the court’s powers, since they can agree upon whatever mechanism they like for transferring value between them. But the limited menu of orders available may dissuade some defenders from adopting that more generous stance; and where adjudication is required, unless the courts is prepared to accept an undertaking from one party to do something which the court itself has no power to order, the court may be left with a rather limited set of impractical options.

While we recognise the policy objective to retain a clear distinction between the financial relief afforded to cohabitants on separation and financial relief on divorce, we would suggest that this particular issue be revisited. The basis upon which relief is granted is very different for cohabitants: there is no equal sharing of a pool of assets;

large extent been dealt with by amendments to the law of parentage of children born via assisted reproduction). More generally, the views of professional bodies on this question during the debates on the Bill were mixed.

¹⁴³ This can be done in divorce cases, pursuant to the economic advantage/disadvantage principle.

nor is there any purely needs-based or rehabilitative relief. That might be thought to keep cohabitation and marriage sufficiently distinct without also differentiating the tools available to the court to effect the justice which the applicable principles require in an individual case.¹⁴⁴ Just as a minimum duration requirement may arbitrarily impede access to justice, so too may a limitation on the type of orders available to the court.

Balancing economic advantage and economic disadvantage

As is evident from the responses to our questionnaire (chapter 5, Tables 5.4 and 5.5), the aspects of the 2006 Act which undoubtedly most troubled respondents were the interpretation, proof and quantification of economic advantage and disadvantage, together with the perceived width of the court's discretion in operating these principles. The associated uncertainty was the major factor given by our questionnaire respondents as an explanation for cases not progressing.¹⁴⁵

As we noted above, the Executive said – not of this issue, but in relation to establishing cohabitation – that “facts and circumstances will, over time, build up an understanding of the situations in which recourse to the courts is likely to succeed” (Scottish Executive 2005a, para 68). The same could have been said of the operation of the concepts of economic advantage and disadvantage. We consider that respondents' concerns about these concepts may substantially (though not wholly) be alleviated as practitioners and courts become acclimatised to them and develop standardised ways of handling them.

Superficially familiar given their place in financial provision on divorce, these concepts have in fact received relatively little attention under the 1985 Act. This in large part reflects reliance in that context on the fair sharing of matrimonial property, together with further relief afforded pursuant to the principles in s 9(1)(d) and (e), which are often regarded in themselves as sufficient to correct an imbalance between the parties arising from any economic advantage derived and/or disadvantage suffered, such that specific provision under s 9(1)(b) will not be required: see s 11(2)(b).¹⁴⁶ In some divorce cases, economic advantage or disadvantage may be taken into account in a fairly broad brush way in fashioning the overall award, without attempting to quantify this

¹⁴⁴ This approach was advocated by the Justice 1 Committee in its Report on the Bill: SP Paper 401, para 197, but rejected by the Scottish Executive in its response to that Report.

¹⁴⁵ See chapter 5.

¹⁴⁶ See for example *Welsh v Welsh* 1994 SLT 828; *Coyle v Coyle* 2004 Fam LR 2.

aspect of the claim with any precision.¹⁴⁷ For example, the court may simply transfer the family home to the wife, thus giving her its value in excess of a half-share of the matrimonial property pool in full satisfaction of her claims (Thomson 2006a, pp 180-1). It has generally only been in those relatively unusual cases where there is no matrimonial property to share between the parties that the concepts have received much attention in the context of divorce.¹⁴⁸ Nevertheless, commentators have criticised the courts for not making more of the principles in the divorce context (ibid, pp 181-2, 191-2).

In recommending this principle for cohabitants' cases, the Scottish Law Commission remarked that:

Although a claim based on contributions and sacrifices could often not be valued precisely, it would provide a way of awarding fair compensation, on a rough and ready valuation, in cases where otherwise none could be claimed. [1992, para 16.20, emphasis added]

However, where the economic advantage/disadvantage principle provides a stand-alone basis for relief (putting to one side for now the economic burden of caring for the children) rather than for marginal adjustments, it might be felt to demand rather closer, forensic attention than has tended to be the case under the 1985,¹⁴⁹ particularly when it comes to quantifying a capital award. It is interesting to note here that the 2006 Act has no equivalent of the instruction in the 1985 Act that "fair account should be taken" of economic advantage/disadvantage. Its absence from the 2006 Act might encourage the courts dealing with cohabitation cases to take a more precise, compensatory approach (see case summaries in Appendix 4, notably *CM v STS*¹⁵⁰ and comments made in *Gow v Grant*¹⁵¹) than has been adopted in divorce cases (note in particular comments of Lady Smith in *Coyle v Coyle* that a "step by step calculation of sums due

¹⁴⁷ E.g. *Cunniff v Cunniff* 1999 SC 537.

¹⁴⁸ E.g. *Dougan v Dougan* 1998 SLT (Sh Ct) 27.

¹⁴⁹ Though Thomson (2006b, 34) notes that the courts have sometimes taken a "somewhat cavalier approach" to the balancing process in economic advantage/disadvantage claims on divorce in cases where there was little or no matrimonial property to share, awarding quite substantial sums. Judges may be more reluctant to do that in the cohabitation context.

¹⁵⁰ {2008} CSOH 125.

¹⁵¹ 2010 FamLR 21.

under each principle” is not required).¹⁵² Malcolm (2007) suggested that some practitioners were taking a personal injury style approach to the assessment of s 28 claims in the earliest days of the 2006 Act. The reported cases to date have certainly been insistent that s 28 claims must be firmly based on evidence demonstrating the values of claimed advantages and disadvantages.¹⁵³ Indeed, cases under both the 1985 and 2006 Act provide clear examples of how this might be done, whether using the evidence of the pursuer’s past or present employer’s pay scales and associated benefits, including pension; evidence of performance in post from appraisals; evidence from personnel manager;¹⁵⁴ or from a past colleague on similar career trajectory;¹⁵⁵ or from the pension fund.¹⁵⁶

It is important that further case law should settle some points of principle relating to the operation of economic advantage and disadvantage; in our view, these cannot appropriately be left entirely to the discretion of individual judges. One such issue is the question of halving economic disadvantage, controversially applied in *CM v STS*.¹⁵⁷ Whatever the answer is to the question of halving, the law on this point must be clear, and so an appellate decision would be very welcome. Another problem evident from the reported case law is the different approaches to the characterisation of particular types of contribution as economic advantage or disadvantage.¹⁵⁸ A further important point is the treatment of future losses: despite the decision in *Dougan v Dougan* under the 1985 Act that s 9(1)(b) cannot deal with future losses, it seems that the trend of opinion is in favour of recognising within this principle the impact on future earning-

¹⁵² 2004 Fam LR 2, para 50.

¹⁵³ Cf the willingness in some 1985 Act cases to take a more informal approach, accepting as “common sense” that the wife’s economic position will have deteriorated having given up work during the marriage and so concluding “on an overall view” that there was an imbalance between the parties: *Cunniff v Cunniff* 1999 SC 537, 543-4; though compare the same judge’s insistence in *Ali v Ali (no 3)* 2003 SLT 641 that such claims must be properly evidenced, and not merely averred: p 647.

¹⁵⁴ *Dougan v Dougan* 1998 SLT (Sh Ct)

¹⁵⁵ *Coyle v Coyle* 2004 FamLR 2.

¹⁵⁶ This and various other types of evidence listed here were adduced in *CM v STS* under the 2006 Act.

¹⁵⁷ [2008] CSOH 125.

¹⁵⁸ See discussion of several of the s 28 cases in Appendix 4.

power of absence from the labour market during the relationship.¹⁵⁹ The principle addressing the economic burden of childcare can certainly be pressed into action to meet this sort of loss; but that principle will only apply where there are still dependent children at home. So it is important that consensus be reached on this point of principle. We would strongly support the inclusion of future loss of earning capacity that continues to flow from job sacrifice during the relationship, in order to ensure that the economic disadvantage principle is best able to relieve one of the principal forms of economic vulnerability that arises in these cases.

This is particularly important given the tendency of courts to find that *past* economic disadvantage (i.e. loss of earnings during the relationship) is offset by the pursuer's having been supported by the defender during the relationship. It is fair to observe that the need to conduct a balancing exercise in relation to all past advantages derived and disadvantages sustained does involve a substantial evidential burden. It may be interesting to compare the recommendations of the Law Commission for England and Wales in this regard (Law Commission 2007), which would focus exclusively on the parties' positions going forward from the point of separation. On that approach, gains and losses that did not continue to have an impact on the parties at separation would simply be ignored, thus potentially ruling out argument and evidence about long-distant events.

It must be accepted that, however broadly or narrowly framed, a principle which requires an individualised examination of the gains and losses incurred over the course of a relationship will necessarily involve a degree of complexity and cost. Evidence must be adduced to prove the relevant facts and provide some basis for quantifying an award. This will clearly be easier in cases where the parties have, for example, retained relevant financial records than in those where they have not. Some of our interviewees were concerned that the difficulties that can arise in consequence may be preventing some vulnerable clients from accessing any remedy; indeed, the confinement of remedies to the relief of economic advantage/disadvantage arising from parties' contributions to the relationship, rather than, for example, purely needs-based relief (regardless of the source of the need), will itself have that effect. But we think that it is also fair to conclude that much (though by no means all) of the difficulty currently experienced by practitioners with the economic advantage/disadvantage tests may be

¹⁵⁹ See *Cahill v Cahill* 1998 SLT (Sh Ct) 96, *Coyle v Coyle* 2004 FamLR 2; and, under the 2006 Act, *CM v STS* [2008] CSOH 125.

regarded as “early days” effects. With further, clearer guidance from the courts over time and increased practical experience of using the provisions in a larger number of cases, we would anticipate that family law practitioners will find ways of working with these provisions and feel more confident advising on them, just as they now feel very much at home operating the 1985 Act.¹⁶⁰

ISSUES RELATING TO SECTION 29: PROVISION ON DEATH

Our research highlighted two central problems with the operation of section 29, both of which can be classified as “intrinsic” to the Act:

- the very short, unextendable time bar which requires the survivor to bring his or her claims within six months from the date of death.
- the width of the discretion and lack of guidance for judges considering claims under s 29.

We then discuss two further apparent problems which might be resolved satisfactorily without amendment of the primary legislation.

The time bar

Our research makes clear the problems encountered by clients in cases under s 29 as a result of the short time bar, which had already been flagged up “loud and clear” by Malcolm (2007).¹⁶¹ Not only is the time bar here shorter than it is on separation, but the emotional context of death may make the practical problems that flow from that brevity even more acute. As in the case of separation, this has knock-on effects (not least resources implications) for court administration and the Scottish Legal Aid Board as potential pursuers feel obliged to preserve their position by raising and immediately sisting an action under s 29 before attempting to negotiate a settlement, and to make an emergency application for legal aid. The original Scottish Law Commission Bill would have allowed for an extension of the time bar in exceptional cases (SLC 1992, Draft Bill clause 37(3)) and the original version of the Bill reflected that position, but the

¹⁶⁰ See the remarks of interviewee [29] and others, recorded at the start of chapter 6.

¹⁶¹ See also Nicholson (2007).

power to extend was removed during the Bill's parliamentary passage¹⁶² and so did not find its way into the 2006 Act.

However, this issue was recently revisited by the Scottish Law Commission in its examination of succession law (SLC 2007, 2009). In its 2007 Discussion Paper, the Commission took the view that the six-month time bar was acceptable (SLC 2007, para 4.48), but was persuaded by consultees to make a different recommendation in its Report. Consultees had expressed concern about problems with the appointment of executors-dative and the identification of heirs making the six-month period impracticable (SLC 2009, para 4.31). It was also noted that a longer period would give parties longer to negotiate (without, we would add, having to raise and sist an action in the meantime). So it has been recommended that:

Unless on cause shown the court otherwise permits, any application for a proportion of the deceased's estate should be made within the period of 1 year commencing on the date of the deceased's death. [Recommendation 43]

Thus not only would the limitation period be doubled, there would also be a discretion to permit even later application in appropriate, exceptional cases.

The Scottish Government's initial response to the Commission made no particular comment on this aspect of the Report.¹⁶³ As discussed above, our respondents are equally concerned about the brevity of the limitation period in separation cases: one year from date of separation – the same period as recommended here for succession cases. While one year is considerably better than six months, even one year may be too short; having a power exceptionally (in what sort of cases?) to allow actions to be brought after that time would therefore be important. However, what is clear from our

¹⁶² Concerns had been expressed by the Family Law Sub-Committee of the Law Society of Scotland about the possibility of an executor winding up the estate nine months after death, only to be faced with a cohabitant's claim and no funds with which to pay it: 25 May 2005, Justice Committee 1, 17th meeting, col 1964. The fact that an estate had been paid out already could surely be taken into account by the court in deciding whether to extend time, or by providing that the order in such a case be made against the beneficiaries (who, it might be said, are the true defenders in any event) rather than the executor; as the Sub-Committee suggested, an executor might also be given an exemption from liability for having distributed the estate six months from death when a fresh claim later arose.

¹⁶³ Available at http://www.scotlawcom.gov.uk/downloads/minresp/minresp_rep215.pdf

evidence is that the current time bar is not the “sensible and workable period”¹⁶⁴ that the Executive expected it would be, and so, *we would support this recommendation.*

The width of the discretion

The other major problem experienced by respondents with s 29 is the width of the judge’s discretion, given the lack of guidance about the purpose of provision under s 29 and the rather unhelpful checklist of factors. As the Scottish Law Commission put it:

There is no express aim or purpose for the exercise of the court’s discretion. Put another way, the court is not told what it should be trying to achieve by making an award. In addition, the factors to be considered are potentially infinite. The court is being asked to do the impossible: to balance conflicting family interests without any guidance on the relative weight to be given to the needs and interests of each party. [SLC 2009, para 4.7]

Our interviewees were giving their views about the Act, and the Scottish Law Commission concluded its recent project, before the decision in *Windram v Windram*¹⁶⁵ was made (or reported). But despite the clarity and good sense of the *Windram* decision on its particular facts, it is highly doubtful that it will substantially assuage the fundamental concerns of either our interviewees or the Commission about the current form of s 29.¹⁶⁶ It would take a considerable amount of case law for the judges to create a clear set of parameters for the operation of s 29.

The key recommendation of the Scottish Law Commission is that s 29 of the Family Law (Scotland) Act 2006 should be repealed and replaced by a new statutory regime providing succession rights for cohabitants in both testate and intestate cases. That new regime would entitle surviving cohabitants to a percentage of what they would have received had they been the deceased’s spouse or civil partner.¹⁶⁷ That

¹⁶⁴ Official Report, 23 November 2005, Justice 1 Committee, col 2390, The Deputy Minister for Justice (Hugh Henry MSP).

¹⁶⁵ 2009 FamLR 157.

¹⁶⁶ Though the Commission did note the dearth of reported case law, at the time of its Report, when only *Chebotareva v Khandro* 2008 FamLR 66 and *Savage v Purches* 2009 FamLR 6 had been reported: SLC 2009, para 4.5

¹⁶⁷ See also SLC 2009 para 4.24-4.30 about how to deal with cases involving both a surviving cohabitant and a spouse/civil partner.

percentage (which could be as much as 100%¹⁶⁸) would be fixed by reference to three factors *alone*:

- the length of the period of cohabitation,
- the interdependence, financial or otherwise, of the parties during cohabitation, and
- what the survivor contributed to their life together, whether financial or otherwise (for example in running the household, or caring for the deceased and their children). (SLC 2009, para 4.14-4.21)

Crucially, the court would *not be entitled* to take account of other matters such as the size of the estate (possibly unknown at this point), any benefit received by the survivor outside the estate (e.g. under a pension scheme) or the identity and needs of any beneficiaries or heirs. This would ensure that the court's inquiry was focused exclusively on the extent to which the particular cohabitant "*deserves to be treated as the deceased's spouse or civil partner for the purposes of the rules of succession*" (SLC 2009, para 4.19: emphasis in original). By ignoring entirely the size of the estate, the presence of other heirs etc, it could be said that the court's inquiry would effectively be aimed at determining the scale of something akin to a "fixed" prior right, rather than at making discretionary provision in light of all the circumstances.

However, the percentage-of-spouse's-share approach also reflects the concern not to treat cohabitation like marriage. While the Report reflects public opinion that "strongly supports some protection from disinheritance" (SLC 2009, 4.10), it clearly distinguishes between the succession rights of spouses, which exist purely by virtue of their legal status viz a viz the deceased, and those of a surviving cohabitant. The latter's rights should reflect the de facto quality of the relationship which the couple had:

Put another way, unlike a spouse or civil partner, a cohabitant has to "earn" her right to a share of an intestate estate or to be protected from disinheritance. To that extent the distinction between marriage and civil partnership and cohabitation should be maintained. This means that as with section 29 proceedings, an element of judicial discretion will be involved. [SLC 2009, 4.10]

¹⁶⁸ The Commission sketches illustrative cases at para 4.15-4.17.

But that discretion would be somewhat more limited and more clearly directed under the Commission's new recommendations than it is under the current law.

The Scottish Government's initial response to the Report is somewhat tentative, expressing a desire to undertake its own consultation both on the idea that cohabitants should have claims in testate as well as intestate cases, and on the specific scheme recommended by the Commission.¹⁶⁹

Our findings do not qualify us to express a clear view about the suitability of the detail of the Commission's particular recommendations. We did not ask our respondents in terms about the Commission's recommendations.¹⁷⁰ Notably, our questions did not probe the issue of whether any provision for cohabitants was appropriate in testate cases (where, it might be said, the deceased had at least thought at some stage to make a will, and so might have been expected to make provision for the cohabitant had he or she wished to do so; but that would not guarantee that a long-forgotten will, made several years before cohabitation, would not unintentionally defeat any claim).

However, what is clear from our research is practitioners' current dissatisfaction with the very strong discretion that s 29 affords. The 2006 Act was in this regard far looser than the then Scottish Law Commission recommendations (SLC 1992) on which the Act was based. As enacted, s 29 effected a marked departure from the general trend of Scottish family and succession law, which prefer a framework of structured principles and fixed rules over judicial discretion. The current law leaves practitioners in considerable difficulty in working out the right approach to take to s 29 and so an appropriate basis on which to attempt to settle claims. This can have one of two unfortunate effects: first, some (many) economically vulnerable survivors who should receive some financial provision will be deterred by the uncertainty and cost of proceeding from pursuing their claims at all; alternatively, survivors who can afford the fight (both financially and emotionally) may be motivated to take their case all the way to adjudication, rather than settle for whatever the executors together (more importantly) with the true defenders, the heirs, are prepared to offer. Neither is a desirable outcome. While some degree of discretion is warranted to tailor outcomes to some extent to the features of individual cases, practitioners and their clients need

¹⁶⁹ Available at http://www.scotlawcom.gov.uk/downloads/minresp/minresp_rep215.pdf

¹⁷⁰ They were mentioned spontaneously by just one interviewee, who raised an issue in connection with the payment of executor's expenses from the estate.

firmer foundations on which to build negotiated settlements than s 29 currently provides.

On the basis of our evidence from practitioners, the broad discretion, which is intrinsic to the legislation, undermines its wider objectives, as well as the broad policy objective of encouraging private ordering within a clear framework of principles that characterises so much else in Scottish family law. One of the chief successes of the 1985 Act, for example, is its clear framework of principles. We respectfully disagree with the view of the Scottish Executive, expressed during the passage of the 2006 Act,¹⁷¹ that for legislation to provide further guidance to the courts would “jeopardise” their “independence”. Without such guidance, the courts are left entirely uncertain of their task and the law is left fundamentally unclear for those wishing to settle their disputes privately. *We would urge the Scottish Government to give serious consideration to reform which provides firmer guidance to delineate the court’s role in succession cases involving cohabitants.*

Other problems with section 29

Two other issues emerged clearly from our research,¹⁷² both of which might be dealt with satisfactorily without a change to the primary legislation:

- The apparent problem of what the survivor should do where there is no executor-dative to sue
- The conflict of interests where the surviving cohabitant is appointed executor-dative on behalf of minor children (the deceased’s heirs) and then sues him- or herself in that capacity as claimant under s 29

Raising an action where there is no executor-dative

Some of our interviewees raised serious concerns about the apparent problem that can arise where no executor-dative has been appointed, or indeed where the only candidates for that appointment are deliberately hanging back. The six-month time bar

¹⁷¹ In the Ministerial Response to the Justice 1 Committee’s Stage 1 Report, p 20.

¹⁷² See discussion surrounding the succession vignette, chapter 7.

may come and go without there having been any executor against whom to bring the claim as defender,¹⁷³ and so, it seems, the survivor loses by default.

It would clearly defeat the purpose of s 29 if a surviving cohabitant could be deprived of the right to bring a claim by the simple device of the family deliberately delaying the appointment of an executor-dative. Nicholson (2007) suggested that provision be made for a judicial factor to be appointed and then served with s 29 applications. A recent comment by Nichols in the *Family Law Bulletin* (2010) suggests a number of other arguable avenues for avoiding this problem, one of which has been approved in an unreported decision of Lord Brailsford. Nichols records that the cohabitant in this decision was allowed to proceed along lines traditionally taken by creditors of the deceased in such circumstances: to raise an action for what is known as a decree *cognitionis causa tantum*, which calls all those known to have an interest in the deceased's net (intestate) estate.¹⁷⁴ Nichols suggests that if the time limit is very soon to expire, the surviving cohabitant should lodge the s 29 application *quam celerrime*, calling an heir as defender, and then amend to add the other known heirs as defenders and convert the action into one for decree *cognitionis causa tantum*.

So it would appear that the current law does provide a solution to the problem highlighted by our interviewees. But it might be helpful to have a reported decision on this point from an authoritative court, to bring the issue firmly to the attention of practitioners and judges, or for the apparent lacuna in the rules of court to be filled, by expressly acknowledging this procedural route – which exists at common law – to bring an action in cases where there is no executor.

The conflict of interests between the cohabitant and the parties' child

Another problem which exercised some interviewees was the conflict of interests that arises where the surviving cohabitant is also parent of the deceased's children. Where there is no surviving spouse or civil partner, those children are entitled to act as executor, but where they are still minors can only act via a legal representative. So the cohabitant-parent can secure her appointment as executor *qua* legal representative,

¹⁷³ As required by Ch 33B of the Ordinary Cause Rules (sheriff court) and Rule 49 of the Rules of the Court of Session.

¹⁷⁴ The survivor had in fact raised an ordinary action calling all the heirs on intestacy as defenders, in the absence of an executor. The judge allowed the action to be amended (after the six months had expired) to an action for decree *cognitionis causa tantum*.

thereby incidentally creating an executor against whom her own action under s 29 can be brought.

The conflict of interest here is self-evident. It has been observed that the problem stems from the fact that the court rules fail to recognise that the true defenders are the heirs. Our interviews were conducted before the decision in *Windram v Windram*¹⁷⁵ was reported. As we discuss in Appendix 4, that case shows that the conflict can be alleviated in litigated cases by appointing a *curator ad litem* to represent the children's interests (as heirs *prima facie* entitled to inherit the entire estate), to resist the cohabitant's application under s 29 or negotiate a settlement.¹⁷⁶ If no litigation has been commenced, an independent legal representative could be appointed for the child (this might be possible under s 11 of the Children (Scotland) Act 1995) in order to ensure that the child's interests are properly protected in any settlement of the cohabitant's claim. But it is far from clear how that could be guaranteed unless a third party steps in to defend the child's interests, or the executor's own legal advisers (if any) push for such an appointment to be made.¹⁷⁷

The Scottish Law Commission, while cognisant of the problem, did not make any recommendation about this issue, taking the view that it fell outwith their terms of reference (SLC 2009, para 3.92). However, it would again be helpful if, at the very least, the Rules Council could amend the court rules in order to provide clearer guidance about how such cases should be handled. Meanwhile, *Windram* provides a good practice model.

LEGAL AID

One other issue which did not come through strongly from our questionnaires but about which several of our interviewees expressed concern is an apparent anomaly in the operation of legal aid rules. As has been rehearsed in the journals (*Family Law Bulletin*, editorial, issue 101), claims under the 2006 cohabitation provisions are subject to the normal rule that the Scottish Legal Aid Board has the right to "claw back" its expenditure on assisted parties' cases from the financial awards made in those

¹⁷⁵ 2009 FamLR 157.

¹⁷⁶ See also Nicholson's suggestion (2007) that a judicial factor be appointed

¹⁷⁷ We are grateful to the advocate on our Advisory Group for discussion of this point.

proceedings. In matrimonial and civil partnership cases, by contrast, an exemption applies to the first £5,239 of any money or the value of any property recovered in proceedings under the 1985 Act.¹⁷⁸

The Editor of the *Family Law Bulletin* suggests that the failure to extend the relevant regulations to cohabitation claims may have been the result of oversight, rather than a deliberate policy decision. If so, it would seem that insufficient attention was given to how the Act would integrate with wider features of the family justice system. The Scottish Legal Aid Board is certainly aware of the position, but no statement has yet been made regarding any change to the rules.

Our evidence indicates two particular problems with the absence of an exemption. On the one hand, it inhibits low value claims from going ahead; but what may seem objectively negligible may, subjectively, be of immense value to an economically vulnerable pursuer. On the other hand, it can make it difficult for defenders to decide where to pitch an offer to settle the claim: they may need to offer a legally-aided pursuer substantially more than the legal costs incurred to date in order to make the offer acceptable to the pursuer. We would urge the Scottish Legal Aid Board to examine this issue at the earliest opportunity.

AGREEMENTS

As we noted in chapter 3, the Executive appears to have intended that parties should not be able to opt out of the 2006 Act remedies by agreement, apparently overlooking the implications of the general law doctrine which presumes that parties are entitled to waive access to statutory pecuniary claims. It is at least strongly arguable that cohabitants are entitled to exclude the operation of the Act. Our interviewees generally assumed this to be the case, variously describing both specific opt-out agreements and agreements regarding property ownership (e.g. simply providing that the home is jointly owned) which were understood have that effect.¹⁷⁹

Assuming that the right to waive claims under the Act exists, questions arise about the circumstances in which such waivers are made, and the powers of the courts where

¹⁷⁸ Civil Legal Aid (Scotland) Regulations 2002, rule 33(b).

¹⁷⁹ We do not know from our interview data whether the latter type of agreement contained express opt-out clauses (of the sort provided in the Butterworths Scottish Family Law Service styles referred to in chapter 3).

there are doubts about the fairness of an agreement containing such a waiver. As we noted in chapter 3, the 2006 Act contains no equivalent of s 16 of the Family Law (Scotland) Act 1985, which permits a court to set aside or vary all or part of an agreement between spouses or civil partners regarding financial provision on divorce where that agreement was not fair and reasonable at the time it was entered into. Even this safeguard is relatively modest: there is no power to set aside on the grounds that the agreement has become unfair over the course of time in light of changed circumstances. But it does allow for closer scrutiny of the agreement at the time that it was made than the general law would permit.

The weight of opinion amongst our interviewees would certainly not support depriving cohabitants of the right to opt-out: several were adamant that it was an important safeguard of their autonomy that they should have that right, if they were to be subject to this sort of scheme at all. But it may be appropriate, and compatible with the Act's objective to protect the vulnerable, to ensure a slightly higher level of policing of such agreements than the general law alone affords. Several of our interviewees considered it important that clients should receive separate legal advice before signing an agreement waiving rights under the Act, as is the case in practice in the majority of minutes of agreement between separating spouses.¹⁸⁰ It may be appropriate to consider whether a provision akin to s 16 of the 1985 Act should be introduced into the 2006 Act.

CONCLUSION

Overall, our view of the legislation is one of potential as yet unrealised. While some will consider that simply by existing the legislation goes too far, and others will consider that it is too conservative and so does not go far enough, we consider that it is better having the Act in place than not. To date, the Act has not imposed an inordinate burden on the Scottish family justice system (as we discuss in greater detail in the next chapter) and has not generated any substantial operational problems, *pace* the raising and sisting of actions to comply with the time bar. Of the problems that have undoubtedly arisen, some can only be dealt with by amendment of the primary legislation and/or changes to the court rules, as appropriate. Others will ameliorate

¹⁸⁰ Wasoff, McGuckin and Edwards (1997), 26. Though interestingly under s 16 of the 1985 Act, the fact that the parties were advised by the same lawyer will not of itself make the agreement unfair: *Worth v Worth* 1994 SLT (Sh Ct) 54; see further Thomson 2006a, 7.22 and notes thereto.

over time. The arrival of any new law is bound to be accompanied by uncertainty and scepticism about its operation, despite the genesis of some of the 2006 provisions in the 1985 Act. While increased experience will certainly not alleviate the problems entirely, we would expect that in ten years' time or so practitioners and courts will feel more confident and comfortable operating the Act.

One final point to note is our interviewees' observations about lack of public awareness of the legislation. The introduction of new remedies in any part of the law is only useful if their intended beneficiaries are made aware of their existence. Moreover, as one of our interviewees observed, the possibility of opting out of the 2006 Act's remedies by agreement is only useful to those who are aware that they will otherwise be subject to the Act. Public information (and misinformation) in family law, in particular, is a well-known problem, as the persistence of the common law marriage myth demonstrates. We would encourage governmental and non-governmental agencies to consider what further steps might productively be taken to bring the cohabitation provisions to the attention of relevant parts of the Scottish population.

CHAPTER 9. IMPLICATIONS FOR ENGLAND AND WALES?

INTRODUCTION

Although this research concerns Scottish law and practice, there is considerable interest in England and Wales in the Scottish experience. In England and Wales, a surviving cohabitant of two years' standing has since 1995 been entitled to apply for family provision in the event of death (testate or intestate) of his or her partner.¹⁸¹ Various recommendations have been made for the introduction of financial remedies between cohabitants on relationship breakdown, most recently by the Law Commission and since then in two recent Private Members' Bills supported by the family solicitors' organisation Resolution. But as yet, England and Wales has no equivalent to those provisions of the Family Law (Scotland) Act 2006 which apply on separation.

Following publication of the Law Commission's Report (Law Commission 2007), Parliamentary Under-Secretary of State in the Ministry of Justice, Bridget Prentice MP, made a written ministerial statement on 6 March 2008, in which the following remarks were made in relation to the position in Scotland:

... The [Law Commission's] report has been carefully considered and the government has decided it wishes to seek research findings on the Family Law (Scotland) Act 2006, which came into effect last year. This Act has provisions which are similar in many respects to those which the Commission recommends.

The Scottish Executive intend to undertake research to discover the cost of such a scheme and its efficacy in resolving the issues faced by cohabitants when their relationships end.

The government propose to await the outcome of this research and extrapolate from it the likely cost to this jurisdiction of bringing into effect the scheme proposed by the Law Commission and the likely benefits it will bring. For the time being, therefore, the government will take no further action.

¹⁸¹ Inheritance (Provision for Family and Dependants) Act 1975, as amended by the Law Reform (Miscellaneous Provisions) Act 1995, implementing recommendations of the Law Commission; previously, certain cohabitants could claim as a "dependant": s 1(1)(e). This legislation is being reviewed by the Law Commission in its current project on succession law.

The decision has been reached because of the need for government to obtain accurate estimates of the financial impact of any new legislation and the likelihood that we can obtain a view of financial impact by drawing on the Scottish experience of similar law reform.

In light of this interest in the Scottish experience, this chapter considers whether our findings have any implications for reform in England and Wales. Since English law already provides remedies on death, our findings about experience of s 29 of the 2006 Act are of considerably less relevance south of the border than our findings relating to ss 25 to 28. Our focus here is therefore on the position on separation. We begin by sketching the recent history of reform activity in England and Wales.

RECENT REFORM ACTIVITY IN ENGLAND AND WALES

During the passage of the Civil Partnership Act 2004, members of the House of Lords questioned the lack of any specific regime of financial remedies on separation for cohabiting couples. In light of concerns about the financial hardship that might therefore arise, the Law Commission was asked to review the law with a view to possible reform. There followed an intensive two-year project, with the publication of a consultation paper (Law Commission 2006) and final Report making recommendations for reform, but with no draft Bill (Law Commission 2007). In briefest summary, the Report recommended the introduction of a statutory scheme under which cohabiting couples would be entitled to apply for financial relief on separation provided they satisfied certain eligibility criteria, but not where they had reached an agreement disapplying the scheme (“an opt-out agreement”). In the latter case, the parties’ own financial arrangements (if any) and the general law would apply.

There followed in 2007 a consultation exercise, *Living Together* (Resolution 2007) run by the Odysseus Trust and Resolution, the specialist family law solicitors’ group in England and Wales. This led to the Cohabitation Bill presented during the 2008-09 parliamentary session by Lord Lester of Herne Hill. This Bill received a Second Reading in the Lords in March 2009, but ran out of time during the Committee Stage in the summer, during which various amendments were moved by Lord Lester with former President of the Family Division, Dame Elizabeth Butler-Sloss.¹⁸² Running alongside this in the House of Commons was a Ten Minute Rule Bill presented by Mary Creagh

¹⁸² Parliamentary material at <http://services.parliament.uk/bills/2008-09/cohabitation.html>

MP; due to receive its Second Reading in July 2009, it also ran out of time.¹⁸³ The Lester Bill was very different from the Law Commission recommendations in several key respects, and even more different from the Scottish legislation. We compare all three in the next section.

Like the Law Commission and Resolution, both Lord Lester and Mary Creagh were concerned about the inadequacy of the laws that currently apply in England and Wales at the breakdown of cohabitation, and the financial hardship to which this can give rise. In cases involving children, the lack of adequate private law remedy¹⁸⁴ may contribute to child poverty, leaving the disadvantaged parent and child relying on welfare benefits, and so, as Mary Creagh observed in an interview on Radio 4:

... we need to make sure that the law exists to protect people, so it isn't the tax payer [who pays]. I had a constituent who was sleeping with her daughter on one sofa and she was sleeping on the other sofa. They were effectively destitute after a 14 year relationship. And you and me, the tax payer, paid for her housing and paid for her income support, not her partner, not the father of her child. [BBC 2009]

Recent reform of child support law, which places the emphasis on voluntary agreements for the payment of child support, may well impact on these cases.¹⁸⁵

DIFFERENT REFORM CONTEXTS: A COMPARISON OF THE SCHEMES

Before we can determine what, if any, light is cast on possible future reform in England and Wales by our findings about the recent Scottish experience, it is necessary to highlight the points of similarity and – more often – difference between the two jurisdictions and the schemes adopted or proposed for each. Space precludes our offering here an overview of the general law background against which the schemes do or would operate, or which do or would apply in the absence of a special family law

¹⁸³ Parliamentary material at <http://services.parliament.uk/bills/2008-09/cohabitationno2.html>

¹⁸⁴ The deficiencies of provision for the benefit of the child in Schedule 1 to the Children Act 1989 are explained in the Law Commission's consultation paper: (2006), from para 4.34.

¹⁸⁵ See Child Maintenance and Other Payments Act 2008, amending the Child Support Act 1991. It remains open to the parent with care to claim maintenance via the Child Maintenance and Enforcement Commission where no satisfactory agreement can be reached with the non-resident parent.

statute providing remedies between cohabitants on separation. We have outlined the pre-2006 position in Scotland in chapter 3. Readers are referred to the Law Commission's Consultation Paper (2006, including overview) and Report (2007) for an account and criticism of the current law in England and Wales.

Despite superficial similarities, there are important differences between the 2006 Act, the Law Commission's recommendations and Lord Lester's Bill. We attempt to summarise these difference in the table below, and then provide an expanded commentary, drawing out some of the potential implications of Scottish reform for the position in England and Wales.

Table 9.1. Comparison of main features of ss. 25-28 of the Family Law (Scotland) Act 2006, the Law Commission recommendations and Lord Lester's Bill

Issue	2006 Act	Law Commission	Lester Bill
<i>Eligibility</i>	Cohabitant defined by reference to marriage analogy and list of factors. No minimum duration or children required.	Cohabitants defined as couple sharing joint household, who are either parents of joint child, or satisfy minimum duration set between two to five years.	Cohabitants defined as two people living together as a couple, who are either parents of joint child, have joint residence order for a child, or have lived together for two years
<i>Time bars</i>	One year from separation	Two years from separation, unless granted leave to apply later given exceptional circumstances	As Law Commission
<i>Orders</i>	Payment of capital sum (in one go or by instalments) and interim award only. No property transfer, periodical payments, ¹⁸⁶ pension sharing etc.	Full range of orders: lump sum (capital) payments (including by instalment), property transfer, property settlements, order for sale, pension sharing, periodical payments (but only for childcare costs)	Similar range of orders as Law Commission, but periodical payments to be available prima facie for no more than three years, unless necessary to avoid exceptional hardship arising as a result of the cohabitation or to pay for childcare that enables that parent to work
<i>Basis of</i>	Balance of economic	Retained benefit /	Wide discretion to

¹⁸⁶ Though note the view of several commentators that these should be treated as available under s 28(2)(b).

<i>relief</i>	<p>advantage / disadvantage</p> <p>Economic burden of post-separation childcare</p>	<p>economic disadvantage, as defined in the Report, and in both cases only as retained/ongoing post-separation.</p> <p>Short list of discretionary factors for deciding amount of relief and type of order. As far as reasonable and practicable given those factors, reverse any retained benefit and then share equally any remaining economic disadvantage, subject to economic equality ceiling.</p>	<p>achieve “just and equitable” outcome, trammled by: a principle of self-support; a ceiling on any award of the applicant’s “reasonable needs”; (explicitly) no presumption of equal sharing; and long list of 15 varied factors, firstly the welfare of any “relevant child”, and including economic advantage retained / disadvantage remaining</p>
<i>Opt out agreements</i>	<p>No specific formal requirements peculiar to the cohabitation context; no family law jurisdiction to set aside, so agreements containing waiver of right to apply under the Act are probably binding under the general law¹⁸⁷</p>	<p>Agreements in writing and signed making clear intention to disapply statutory scheme would be prima facie binding. No need for legal advice or disclosure.</p> <p>Jurisdiction to set aside in case of manifest unfairness arising from circumstances in which agreement made or circumstances arising when agreement comes to be enforced that were not foreseen at time agreement made</p>	<p>Agreements in writing, signed and witnessed, parties having each received separate legal advice, certificated by the advisor. No need for disclosure.</p> <p>Jurisdiction to set aside similar to Law Commission.</p>

Eligibility criteria for the new scheme

One marked difference between the 2006 Act and the two English schemes is the lack of minimum duration requirement in Scottish law. Imposing a minimum duration requirement, especially if there is no jurisdiction to set the requirement aside in exceptional circumstances, may be said arbitrarily to exclude some couples from the

¹⁸⁷ Note discussion in chapter 3 of the Scottish Executive’s apparent intention on this issue.

scope of the law. From a Scottish perspective, the “self-limiting” nature of the remedies under the 2006 Act is said to preclude the need for a minimum duration requirement: only if an imbalance of economic advantage or disadvantage can be proved is a remedy warranted. Matters might be different were eligibility to give rise to any automatic entitlement, say to a half-share of a pool of property acquired during the relationship, but none of the schemes being addressed here carries that consequence.

Nevertheless, a minimum duration requirement for childless couples has always been a key feature of reform recommendations in England and Wales and is found in many other jurisdictions.¹⁸⁸ A minimum duration requirement is commonly seen as making reform more politically and socially acceptable, on the basis that the passage of time is a good proxy for commitment, thought by many to be an essential prerequisite for any remedy to be available. Setting a minimum duration requirement may also have the effect of limiting pressure on court and other family justice system resources, by automatically excluding many separating couples from the reach of the scheme – though that is not to say that they would thereby be removed from the justice system, as they may simply endeavour to use whatever alternative remedies the general law provides.¹⁸⁹ It is notable that Lord Lester moved an amendment to his own Bill in Committee stage to raise the minimum duration from two to five years.

However, as we shall see below, in light of our findings about the operation of the law in Scotland to date, a minimum duration requirement may not be regarded as necessary (for practical purposes) for the sort of schemes being advocated for England and Wales.

Limitation periods (time bars)

Both English schemes are more generous than Scottish law in affording the applicant two years in which to bring a claim, rather than just one year, and also in permitting an extension beyond that point in exceptional circumstances. The Law Commission gave examples in its Report of the sorts of situations that it had in mind in which such a

¹⁸⁸ The Irish Civil Partnership Bill even imposes such a requirement, albeit a lesser one, for couples with children (cl 170, as initiated).

¹⁸⁹ Court statistics for England and Wales do not allow for any determination of the numbers of cohabiting couples currently trying to resolve their differences using property, trusts law etc or Sch 1 to the Children Act who might otherwise be more suitably dealt with by a new family law scheme.

power might be used, concerned to ensure that the types of case in which the power might be used should be narrowly limited (Law Commission 2007, para 4.154). As we saw in chapter 8, the short time limit in Scotland has given rise to substantial problems for pursuers and apparently resulted in a far greater burden being imposed on court administration through the raising and immediate sisting of actions than might otherwise be the case.

Available orders

There is considerable difference between Scottish law and the reforms advocated for England and Wales in relation to the orders available to the court to effect whatever transfer of value between the parties is required by the principles on which relief is based. The two English schemes both offer a more fully-equipped tool box than Scottish law, the Lester Bill being more generous than the Law Commission recommendations regarding the uses to which periodical payments might be put. As we have seen, the apparent confinement of Scottish courts to the award of capital sums by way of final order was seen by our interviewees as a limitation on the usefulness of the 2006 Act remedies. A more flexible range of orders might well make the remedies more practically useful for a wider range of cases, and so better ensure some measure of protection for vulnerable parties.

Basis on which relief granted

The Law Commission scheme

A casual glance might suggest that the basis for relief in the Scottish Act was advocated by the Law Commission for England and Wales. However, closer inspection reveals quite substantial differences. The Law Commission devised its own concepts – retained benefit” and “economic disadvantage”, both defined differently from their Scottish equivalents, arising from “qualifying contributions” – and a specific framework within which to quantify relief based on them. One difference is reflected in that terminology, for example, not “economic advantage” but instead “retained benefit”. This reflects a clear intention to exclude protracted analysis of what we refer to in our discussion of the cases in Appendix 4 as “water under the bridge”, which has featured heavily in the reported cases to date under the 2006 Act. The Law Commission took the view that since past earnings losses by a homemaker would often be largely offset by the value of accommodation and support provided by the other party, such arguments should simply be excluded. The focus of the Law Commission scheme is instead forward-looking: (in the case of retained benefit) on capital, income or earning

capacity that has been acquired, retained or enhanced and is still in hand at the point of separation; and (in the case of economic disadvantage) on present and future losses, including lost future earnings,¹⁹⁰ the future cost of paid childcare,¹⁹¹ and a diminution in current savings (including pension) as a result of expenditure or earnings lost during the relationship.¹⁹²

The Law Commission's recommendations have been met with various criticisms. Many disagree – for all sorts of reasons – with the basic policy: some want cohabitants to be subject to the same law as spouses; others oppose any reform; others again promote alternative schemes, of which Lord Lester's Bill is an example. Other commentators have criticised various aspects of the recommended scheme, expressing concern in particular about complexity and problems that might be encountered attempting to prove and quantify claims: see Probert (2007), Douglas et al (2008).

The Law Commission was not asked to provide a draft Bill, but it is worth noting that, compared with the Scottish Act, its recommendations (on which statutory drafting could be based) offer fuller definition of key concepts and detail on how its recommended basis of relief would operate, thereby reducing the need for later judicial elaboration.¹⁹³ While different views can of course be taken on various points of detail, it may be said that the general *approach* of the Law Commission's scheme (creating a "structured" or "principled" discretion) would mean that solicitors in England and Wales, while presented with a rather longer set of statutory provisions, would at least be spared some of the uncertainty experienced by Scottish family lawyers on key points of principle, which is inhibiting private ordering and deterring some deserving pursuers from pressing their claims at all.¹⁹⁴

¹⁹⁰ The *Dougan* point, discussed in chapter 8, is thus clearly resolved in favour of the applicant.

¹⁹¹ Treated as an aspect of economic disadvantage, rather than as a free-standing principle relating to the economic burden of caring for a child.

¹⁹² Though it would often remain necessary in order to prove a claim based on these principles to examine past history, for example, of mortgage payments or contributions to pensions. See generally Law Com (2007), para 4.33-4.36.

¹⁹³ The Scottish Law Commission's 1992 Report, containing the cohabitation recommendations, provided no analysis of the principles, implicitly relying on the developing experience under the 1985 Act, which was itself based on the (more fully argued) Scottish Law Commission Report (1981), para 3.91 et seq., but the English document is rather more detailed.

¹⁹⁴ For example, the Law Commission recommendations and associated discussion address: what may properly be characterised as retained benefit or economic disadvantage; the halving of economic disadvantage (cf the confusion created by *CM v STS* [2008] CSOH 125 on this

The Lester Bill

The Lester Bill is different from both the 2006 Act and the Law Commission scheme, advocating a far wider discretion than both. This brings the usual pro and con: it would provide individualised remedies tailored to the circumstances of particular cases; but it would provide relatively little guidance to both practitioners and courts in operating the scheme: for criticism, see Probert (2009); for comment on similar sorts of schemes, see Law Commission (2007), App C.

The objective of provision under the Bill would be to achieve a result that is “just and equitable” (cl 8(1)(b), there being no presumption that that entails equal sharing of any property (cl 8(2)(c)), but seeking to render both parties self-supporting as soon as reasonably practicable, and in any event giving the applicant no more than is required to meet his or her “reasonable needs” (cl 8(3)).¹⁹⁵ The court is then directed by cl 9 in determining an application for financial relief to have regard to a list of 15 factors, the last of which is “any other circumstance which the court considers relevant”; first consideration would be given to the welfare of any “relevant child”. The items on this list are very varied, giving little clear indication between them about what the objective of relief is to be or how it might be quantified (within the parameters set by cl 8). The Bill may thus suffer, even more acutely, from the sort of uncertainty currently being experienced under the 2006 Act. As Probert (2009) observes, “the lack of structure leaves ample scope for discretion”, a feature that some might cherish but with which many others, our findings suggest, would struggle.

Facility to opt out of the scheme by agreement

Here too there is a significant difference between Scottish law and the reform proposals south of the border. Scottish law is apparently¹⁹⁶ content to allow an individual to waive a pecuniary claim without imposing any particular formality requirements for doing so or subjecting that decision to closer scrutiny than the general

point); the treatment of gifts; the interaction of the scheme with certain aspects of the general law.

¹⁹⁵ That last restriction, given cl 6(4) which bars resort to the law of implied trusts, raises a difficult question about the continued role of the law of trusts, which might have conferred on the applicant rather more than he or she “needs”. At the very least, applicants would still have a strong incentive to invoke the complex and costly law of trusts instead of (if not alongside) the Bill.

¹⁹⁶ See discussion of the Scottish Executive’s intentions here in chapter 3.

law would afford. By contrast, the traditional approach to agreements waiving rights in a family context in England and Wales is more paternalistic. Hence both Law Commission and Lester Bill, to varying extents, impose special formality requirements on opt-out agreements. The Law Commission did not recommend independent legal advice as a precondition for the enforceability of these agreements. While the Lester Bill did impose that precondition, it is interesting to note that Resolution's latest recommendations for reform of *marital* agreements would require only that the parties had *reasonable opportunity* to take independent legal advice on their agreement (Resolution 2010). This would potentially make such agreements more accessible (in terms of cost) to a wider range of couples, while also ensuring that the agreement was made in a context where advice could have been obtained if desired.

Both English schemes would also confer on the court a statutory jurisdiction to set aside a *prima facie* binding agreement on grounds more expansive than the general law would afford (and more expansive than is afforded in the matrimonial context in Scotland by s 16 of the 1985 Act): namely, that its enforcement would give rise to manifest unfairness (intended to be a high hurdle)¹⁹⁷ in light either of circumstances surrounding the making of the agreement, or of a change in circumstance by the time at which enforcement is sought which had not been foreseen at the time the agreement was made. Given the significant differences between the schemes in Scotland and England and Wales in this area, we do not think that there are any direct implications for the latter from the Scottish experience.

IMPLICATIONS FOR ENGLAND AND WALES?

What then, if anything, does recent Scottish experience suggest for any future reform in England and Wales? Considerable caution must be exercised in seeking to draw conclusions for England and Wales from the Scottish experience owing to the differences between the 2006 Act and the schemes advocated for England and Wales, together with the different contexts (in terms of the wider legal framework) in which they would operate. However, we think there are some clear lessons and messages from our Scottish findings that may assist the formulation and execution of policy south of the border.

¹⁹⁷ Cf Resolution (2010) on marital agreements: no enforcement if that "would cause substantial hardship to either party or to any minor child of the family".

Limitation period (time bar) – implications for caseload

Our findings show that a short limitation period (in Scotland, one year from separation) gives rise to unintended and undesirable consequences, not least:

- an impediment to the use of alternative dispute resolution procedures, for fear that time will run out before lawyer-led negotiations or mediation can be completed
- an increased burden on court administration and other parts of the family justice system, including legal aid, arising from pursuers/applicants feeling compelled to protect their position (e.g. whilst attempting ADR) by raising and then immediately sisting a court action.

A longer limitation period, of the sort recommended by the Law Commission for England and Wales and adopted by the Lester Bill, is clearly to be preferred.

The range of orders available – achieving fair outcomes

Our findings show that the limited range of orders available under the 2006 Act on separation, whilst consistent with the intended limited scope of the legislation, can (in some circumstances) undermine the objectives of the legislation to achieve fairness to both parties. The flexibility of periodical allowances/payments is clearly called for in relation, at least, to childcare costs. The power to order the transfer of property, to make orders regulating occupancy rights of the family home, etc recommended for England and Wales by both the Law Commission and the Lester Bill would clearly be useful, enabling the courts to tailor more nuanced outcomes for families following separation that make better economic sense than a capital sum may do.¹⁹⁸

Eligibility to bring a claim and the associated question of caseload

What lessons are to be drawn from Scotland on this issue depends on what one is trying to achieve through an eligibility test, and so what functions one wishes such a test to have. On one level, eligibility tests serve a normative function: identifying those relationships which, quite aside from the substantive strength of the claim to be

¹⁹⁸ Note also the fact that capital sums, even with an exemption from full clawback, are vulnerable to immediate recovery by the legal aid authorities; cf awards of property over which the legal aid authorities may instead take a security interest whose execution can be deferred.

asserted, are deemed to “deserve” to be included within a special family law jurisdiction at all. On a more practical level, where one sets eligibility will determine the maximum number of claims that might in theory be brought: if eligibility is heavily restricted (say, by a long minimum duration requirement for childless cases), large numbers of potential cases will be ruled out *in limine*.

We focus here on what our findings suggest for the second point. Despite the lack of minimum duration requirement in the 2006 Act, it seems clear from our questionnaire findings (in the absence of court data) that there has not been a flood of cases in the first three or so years of the Act’s operation. As discussed in chapter 5, we were seeking to measure not cases that necessarily came to court, but “cases” that consisted (at a minimum) of clients who had had at least one meeting with a solicitor in which any of ss 25-29 of the 2006 Act had potential relevance. As an absolute maximum, we estimate in chapter 5 that there were 1000 such “cases” in total of *all* relationship durations, of which short relationships constituted a small fraction.

This is a very small proportion of the Scottish cohabiting population, and even of the *separating* cohabiting population.¹⁹⁹ Moreover, an even tinier proportion would appear to be placing any substantial burden on court resources, other than the minimal cost of raising and sisting actions to come within the time bar.

It is interesting to place our findings in the context of predictions that were made in the Financial Memorandum that accompanied the Scottish Bill (Scottish Executive 2005b). It was anticipated that the great majority of couples would not apply to court. That may be right in so far as the vast majority of cases will be settled privately, rather than adjudicated – but not necessarily, our findings suggest, without an *application* being made to court, though that is commonly sisted and never progressed, as a way of coping with the short time bar. Our findings would suggest that the Memorandum was correct, at least in relation to childless relationships, in stating that:

Many cohabitations are of short-term duration or are casual relationships in which the parties have not become significantly financially intertwined. It would neither be necessary nor appropriate for people emerging from such relationships to

¹⁹⁹ It is far harder to gauge the size of this population accurately, but the Financial Memorandum accompanying the Bill hazarded a figure of 21,800 relationships ending every year: Scottish Executive 2005b, para 102.

seek financial support from one another through the courts. [Scottish Executive 2005b, para 101]

However, it is important to note that our estimate of no more than 1000 *clients since 2006* is also substantially less than the prediction in the Financial Memorandum accompanying the Bill that around 2000 *cases arising on separation per annum* (10 per cent of relationships estimated to end each year) “will be likely to proceed through the court as one party seeks financial support from the other” (Scottish Executive 2005b, para 104). Our findings may partly reflect an “early days” effect here, not least as public awareness of the Act does not seem to be high, and this may be deflating current use of the Act. The number of cases (whether overall, somehow reaching the courts, or being adjudicated there) might increase over time. But there is still a very long way to go before the number of cases going to court reaches the predictions made during the Bill’s parliamentary passage, itself a modest estimate.

Based on these caseload estimates, it was in turn estimated in the Financial Memorandum that these cases would give rise to additional costs to the Scottish Court Service of £104K, plus £126K in judicial salaries. It was also estimated that the additional burden on the legal aid fund would be £2.96M. We do not have figures from either the Scottish Court Service or the Scottish Legal Aid Board that show how accurate these predictions have proved to be to date. But based on our data, we imagine that the costs to date have been considerably less.

In seeking to draw conclusions from all this for England and Wales, as in any policy learning across countries, it is important to acknowledge the different legal background in the two jurisdictions. Cohabitants in England and Wales currently have at their disposal at least two courses of action not available in Scotland – the law of implied trusts and Schedule 1 to the Children Act 1989 – which, whilst widely acknowledged to be inadequate to meet the needs of many separating cohabitants, are currently used in the absence of any other remedy. In attempting to calculate the likely costs of any reform to the family justice system and legal aid budget, it is important to bear in mind that reform would not simply create entirely new business. It would, to some extent,²⁰⁰ provide a more appropriate, productive and possibly more cost-effective avenue for clients who are currently battling to use other, less workable parts of the law, with associated costs to the system.

²⁰⁰ Calculating this is difficult in the absence of reliable court statistics, but the Legal Services Commission may have relevant data for assisted cases.

As a side note: as to whether an exemption should be provided from the legal aid claw back for cases under a new reform, akin to that available on divorce, that is a resource decision for Government. But we would draw attention to the effect that the lack of exemption appears to be having in Scotland, in dissuading pursuers from taking on objectively low-value (but subjectively valuable) claims; and inducing defenders to have to consider making over the odds offers in order to achieve settlement.

It is important also to notice the characteristics of the clients in our questionnaire respondents' last case. They were, compared with the general Scottish cohabiting population, older, had relationships of longer duration, and more often lived in owner-occupied accommodation. It would therefore appear that the Scottish law is, at least for the time being, only been accessed by a rather specific, self-selecting sector of the cohabiting population. As we noted in chapter 8, questionnaire respondents describing their last cases identified very few relationships of less than two years' duration, and relatively few under five years, which would suggest that a minimum duration requirement is not needed in order to keep such cases out, at least in the context of a self-limiting scheme akin to that of the 2006 Act. Imposing a minimum duration of two years would have made hardly any difference to the number of potential cases seen by solicitors; one of five years would have excluded only around a fifth of those last seen by our respondents. On the other hand, it might be said that imposing a minimum duration requirement of two years would have made only a very slight difference in the number of clients approaching solicitors, given the apparent self-selection of cases; so few if any potentially deserving clients would have been excluded by that approach. However, concerns about the arbitrariness and other potential problems associated with such a requirement, highlighted by the Scottish Ministers (see chapter 8), remain valid.

How one feels about these findings about the relatively low caseload depends on what one's principal concern is. On the one hand, one might be disappointed that the Act is not reaching some of the most economically vulnerable members of the cohabiting population. But this reflects an inherent limitation of *any* private law financial remedy: it is only as useful as the potential respondent's ability to satisfy a successful claim. Others may be cheered by the apparently low-level use of the legislation, as it implies relatively low costs for the family justice system and legal aid budget.

The basis of relief

Deciding on the appropriate basis for granting financial relief in any new system is in some ways the hardest issue. Any proposal has both pros and cons,²⁰¹ and so settling on a particular option involves weighing those factors and reaching some sort of compromise. A wide discretion, such as that created by the Lester Bill, will afford ample scope to consider the individual features of each case, but will not generally indicate how those individual features ought, as a matter of principle, to affect the outcome. As a result, this sort of scheme may not be felt to give adequate guidance to those wishing to settle their cases privately, particularly during the early days of the scheme's operation before a body of case law has provided additional pointers. A more structured scheme may provide more certainty and so facilitate private settlement, but at the cost of reduced flexibility in the face of idiosyncracies of particular cases. Schemes that provide a simple rule of near-automatic provision – say, of equal shares in a defined property pool – or needs-based provision, may offer ostensibly quick and easy (or quicker and easier) answers, but the outcomes that they produce may not be thought appropriate for all or even most cases potentially falling within the scheme. Schemes like the 2006 Act's and that recommended by the Law Commission which seek to overcome that problem by depending for their operation upon the proof of particular events, contributions or economic outcomes for parties will offer a more individualised response, but demand more concrete evidence for the proof and quantification of claims.

As we have highlighted above, despite their apparent similarity, there are differences between the Scottish Act and the English schemes which impede a simple reading across of implications for England and Wales. What the Scottish experience does show is that clear drafting, which is internally consistent and provides as much guidance to practitioners and courts as possible, without totally stifling the possibility of tailoring precise outcomes to individual circumstances, is essential if those advising clients are to feel confident in their role. Too much discretion is unhelpful. Some of the difficulties experienced to date in Scotland with the economic advantage/disadvantage principles would be shared by the Law Commission's scheme, in particular in proving and valuing the relevant benefits and sacrifices. As noted above, these are simply features of that type of scheme. But the case law does show how proof can be assembled in such

²⁰¹ The options were rehearsed extensively in the Law Commission's papers, (2006) and (2007).

cases: see for example the comprehensive evidence of economic disadvantage assembled in *CM v STS*.²⁰² Moreover, more detailed guidance of the sort in the Law Commission recommendations would resolve much of the uncertainty that exists at the level of principle in Scotland (for example, on such questions as the characterisation of particular facts as either retained benefit and economic disadvantage; the irrelevance of “water under the bridge”; the relevance of future loss of earnings; the halving of economic disadvantage or not). Whatever policy is ultimately adopted, clear and comprehensive drafting to resolve such points of principle would seem to us to be highly desirable.

CONCLUSION

The introduction of financial provision for cohabitants on death of one partner in England and Wales in 1995 was achieved with cross-party support as a “useful and uncontroversial measure of law reform”.²⁰³ By contrast, the question of remedies on separation in that jurisdiction excites heated debate. Some consider that introducing any financial remedies for cohabitants would undermine marriage, a contention that proponents of equivalent treatment of cohabitants strongly oppose. Others argue that the absence of such remedies wrongly leaves cohabitants without responsibility for each other’s financial situation on separation, and that the introduction of remedies distinctive from those available to spouses on divorce would alleviate hardship while maintaining the “gold standard” of marriage.

But it is not our job to rehearse or adjudicate on that debate here: our findings will not help resolve those questions. Our research instead provides some insight into possible practical consequences of one example of such reform for the family justice system and those operating within it. In evaluating the potential problems of any proposed new scheme, whether for England and Wales or another jurisdiction, it is important to bear in mind that all schemes take time to bed in and no scheme will be trouble-free. But it is, of course, also important to acknowledge that the law which currently operates in England and Wales in cohabitants’ cases is itself difficult and costly to operate, and widely regarded as producing outcomes in many situations which are unfair. A new

²⁰² [2008] CSOH 125

²⁰³ Hansard, HC Deb, vol 265 col 199, 31 October 1995, Parliamentary Secretary, the Lord Chancellor’s Department (Mr John M Taylor), speaking at the Third Reading of the Law Reform (Miscellaneous Provisions) Act 1995, which amended the Inheritance (Provision for Family and Dependents) Act 1975.

family law scheme for cohabitants could provide remedies better attuned to problems that arise on relationship breakdown, potentially in a more cost-effective way. The Scottish evidence to date points to the likelihood that the introduction of broadly similar provisions in England and Wales would not place significant additional demands on court and legal aid resources.

REFERENCES

- Barlow, A, Burgoyne, C, Clery, E, Smithson, J. (2008) 'Cohabitation and the law: myths, money and the media' in Park, A, Curtice, J, Thomson, K, Phillips, M, Johnson, M, Clery, E (eds) *British Social Attitudes: the 24th report.*, London: Sage, 2008, pp. 29-52.
- Butterworths Scottish Family Law Service*, (multiple editor, looseleaf service) Edinburgh: Lexis Nexis.
- Carruthers, J (2000) "Unjustified Enrichment and the Family: Re-visiting the Remedies" (2000) 5 *Scottish Law & Practice Quarterly* 59.
- Douglas, G, Pearce, J, and Woodward, H. (2008) 'The Law Commission's cohabitation proposals: applying them in practice'. *Family Law*, 38, 351.
- Edwards, L and Griffiths, A (2006) *Family Law*, 2nd ed., Edinburgh: Thomson/W Green.
- Ermisch, J and Francesconi, M (1999) *Cohabitation: not for long but here to stay*, Colchester: ISER.
- Fotheringham, J (2007) 'Cohabitation in Scotland', BBC News Moneybox, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/programmes/moneybox/6619207.stm>.
- General Register Office for Scotland (2009) *Scotland's Population 2008: The Registrar General's Annual Review of Demographic Trends*, Edinburgh: General Register Office for Scotland, <http://www.gro-scotland.gov.uk/files2/stats/high-level-summary/j11198/j1119801.htm>.
- Gordon, L and Nobbs, J, (2006) 'Cohabitation: the new legal landscape', *Journal of the Law Society of Scotland*, May 2006.
- Gretton, G and Stevens, A (2009) *Property, Trusts and Succession*, Edinburgh: Tottel Publishing.
- Haskey, J (2001a) 'Demographic aspects of cohabitation in Great Britain', *International Journal of Law, Policy and the Family*, Volume 15, Issue 1, pp. 51-67.
- Haskey, J (2001b) 'Cohabitation in Great Britain: past, present and future trends – and attitudes', *Population Trends*, No. 103, Spring 2001.
- Kiernan, K. and Mensah, F. (2010) 'Unmarried Parenthood, Family Trajectories, Parent and Child Well-Being,' in: Hansen, K., Joshi, H., and Dex, S., (eds) *Children of the 21st Century: From birth to age 5*, Bristol: Policy Press. pp 77-94.
- Kiernan, K., Barlow, A. and Merlo, R. (2006) 'Cohabitation Law Reform and its impact on Marriage,' *Family Law*, 36, 1074-1076.

- Law Commission for England and Wales (2006) *Cohabitation: The Financial Consequences of Relationship Breakdown*, Consultation Paper No 179 and Overview, London: Law Commission.
- Law Commission for England and Wales (2007) *Cohabitation: the Financial Consequences of Relationship Breakdown*, report Law Com 307, Cm 7182, London: Law Commission.
- Law Commission for England and Wales (2009) *Intestacy and Family Provision Claims on Death*, Law Com CP 191.
- Law Reform Commission of Ireland (2006) *Report: Rights and Duties of Cohabitants* LRC 82-2006.
- McCarthy, F (2009) 'Rights in Succession for Cohabitants: *Savage v Purches*', *Edinburgh Law Review*, vol 13, no 2, pp325 - 329
- MacQueen, H (2009) *Unjustified Enrichment*, 2nd ed. Edinburgh: W.Green.
- MacQueen, H (2010) 'After the Family Law (Scotland) Act 2006: still a place for unjustified enrichment?' *University of Edinburgh School of Law Working Paper 2010/01* Available at SSRN: <http://ssrn.com/abstract=1536600>.
- Malcolm, K (2007) 'Fair split?' Spring/Summer *Family Law Bulletin* 6 (journal of the Family Law Association in Scotland).
- Malcolm, K (2008) 'Financial Provision for Children Born of Non-marital Relationships in Scotland', *International Family Law* 244.
- Millbank, J (2000) 'Domestic Rifts: Who is using the Domestic Relationships Act 1994 (ACT)?' 14 *Australian Family Law Journal* 163.
- Morrison, A, Headrick, D, Wasoff, F, Morton, S (2004) *Family formation and dissolution: Trends and attitudes among the Scottish population*, Edinburgh: Centre for Research on Families and Relationships and The Scottish Executive, <http://www.scotland.gov.uk/Resource/Doc/47171/0029610.pdf>.
- Myers, F. and Wasoff, F. (2000) *Meeting in the Middle: A Study of Solicitors' and Mediators' Divorce Practice*, Edinburgh: Central Research Unit, The Scottish Executive.
- Nichols, D (2010) 104 *Family Law Bulletin* 1.
- Nicolson, A (2007) 'Executry and family law practitioners in conflict?', *Family Law Bulletin*.
- Norrie, K (2006) *The Family Law (Scotland) Act 2006: text and commentary*. Dundee: Dundee University Press.
- Norrie, K (2009) 'Where fact makes law', *Journal of the Law Society of Scotland*, May.
- Norrie, K (2011) 'Marital property agreements: Scotland' in Scherpe, J (ed), *Marital property agreements and private autonomy in a comparative perspective*, Oxford: Hart.

- Office for National Statistics (2009) *Social Trends No. 39*.
- Office of Public Sector Information (2006) *Family Law (Scotland) Act 2006*, http://www.opsi.gov.uk/legislation/scotland/acts2006/asp_20060002_en_2#pb12-11g25.
- Probert, R. (2007) 'A Review of Cohabitation: The Financial Consequences of Relationship Breakdown', *Family Law Quarterly* 41, 521.
- Probert, R. (2009) 'The Cohabitation Bill', *Family Law*, 39, 150.
- Resolution (2010) *Family Agreements: seeking certainty to reduce disputes*. London: Resolution.
- Reynolds, J and Mansfield, P (1999) 'The effect of changing attitudes to marriage on its stability', *High Divorce Rates: the state of evidence on reasons and remedies, Volume 1 (Papers 1-3) – Lord Chancellor's Department Research Series No. 2/1999*, London: Lord Chancellor's Department.
- Roodt, C (2009) 'Cohabitation: *Chebotareva v Khandro*', *Edinburgh Law Review*, vol 13, no 1, pp147 - 150
- Scottish Executive (2004), *Family Matters: Improving Family Law in Scotland*, Edinburgh: Scottish Executive.
- Scottish Executive (2005a) *The Family Law (Scotland) Bill Policy Memorandum*, Edinburgh: Scottish Executive, <http://www.scottish.parliament.uk/business/bills/36-familyLaw/b36s2-introd-pm.pdf>.
- Scottish Executive (2005b) *The Family Law (Scotland) Bill Explanatory Notes (and other accompanying documents)*, Edinburgh: Scottish Executive, <http://politicsforpeople.org/business/bills/36-familyLaw/b36s2-introd-en.pdf>.
- Scottish Executive (2006) 'Trends Analysis: Life Course', *The Futures Project: Trend Analysis [Working] Papers*, Edinburgh: Scottish Executive, <http://www.scotland.gov.uk/Resource/Doc/923/0029756.pdf>.
- Scottish Government (2009) *Scottish Household Survey Annual Report – Scotland's People*, Edinburgh: Scottish Government, <http://www.scotland.gov.uk/Publications/2009/09/01114213/23>.
- Scottish Law Commission (1981), *Report on Aliment and Financial Provision (Scot Law Com No 67)*, Edinburgh: Scottish Law Commission.
- Scottish Law Commission (1992) Report on Family Law, Scot Law Com No. 135, Part XVI at <http://www.scotland.gov.uk/library2/doc11/rfl-132.asp>.
- Scottish Law Commission (2007), *Discussion Paper on Succession*, (DP No 136), Edinburgh: Scottish Law Commission.
- Scottish Law Commission (2009) *Report on Succession*, (Scot Law Com No 215), Edinburgh: Scottish Law Commission.

Scottish Parliament Finance Committee (2005) Report on the Financial Memorandum of the Family Law (Scotland) Bill, Edinburgh: The Scottish Parliament,
<http://www.scottish.parliament.uk/business/committees/justice1/papers-05/j1p05-18.pdf>.

The Laws of Scotland, Stair Memorial Encyclopaedia, Edinburgh: Butterworths.

Thomson (2006a) *Family Law in Scotland*, 5th ed, Edinburgh: Tottel Publishing.

Thomson (2006b) *Family Law Reform*, Edinburgh: Thomson/W.Green.

Thomson (2008) 'Palimony – Scottish Style', *Scottish Law Gazette* 95.

Wang, A Y (2007) 'Unmarried Cohabitation: What can we learn from a comparison between the United States and China?', *Family Quarterly Review*, 41, 1, pp. 197-217.

Wasoff, F and Martin, C (2005) *Scottish Social Attitudes Survey 2004 Family Module Report*, Edinburgh: Scottish Executive.

Wasoff, F, McGuckin, A and Edwards, L (1997) *Mutual Consent: Written agreements in family law*. Edinburgh : Central Research Unit, The Scottish Office.

LEGISLATION

The Family Law (Scotland) Act 1985

The Children (Scotland) Act 1995

Civil Partnership Act 2004 (c 33)

The Family Law (Scotland) Act 2006

Human Fertilisation and Embryology Act 2008

CASES

Chebotareva v Khandro 2008 FamLR 66

CM v STS [2008] CSOH 125, 2008 SLT 871

Falconer v Dods 2009 Fam LR 111

Gow v Grant 2010 FamLR 21

Jamieson v Rodhouse 2009 FamLR 34

Raghunathan v Fairley [2008] CSOH 104, 2008 FamLR 112

Savage v Purches 2009 FamLR 6

Windram v Windram and a third party 2009 FamLR 157

APPENDICES

APPENDIX 1. RESEARCH INSTRUMENTS

ON-LINE QUESTIONNAIRE

LEGAL PRACTITIONERS' PERSPECTIVES ON THE COHABITATION PROVISIONS OF THE FAMILY LAW (SCOTLAND) ACT 2006

QUESTIONNAIRE

The purpose of this questionnaire is to gain an overall understanding of the workings of the cohabitation sections (ie ss 25 to 29) of the Family Law (Scotland) Act 2006. We are interested to gather your comments and views as a legal practitioner. We hope you will choose to submit your answers online; however, if you prefer you may post the completed questionnaire to the address at the end.

We would like to emphasise that all replies will be treated in confidence and all data will be anonymised. You are invited to answer the following questions as fully as possible, especially where explanations are requested. Where there is a choice offered, please circle your answer.

CONTACT DETAILS

1. (a) Name
- (b) Name of Firm
- (c) email
- (d) telephone

SECTION 1: BACKGROUND INFORMATION

We should like to ask about your work and practice

2. How long have you practised family law?
3. About what % of your work in the last 3 years has been in family law?
4. Are you a member of the Family Law Association? YES/ NO
5. Is any of your practice as a lawyer-mediator? YES/ NO
6. Is any of your practice as a collaborative lawyer? YES/ NO
7. Please briefly describe your firm, (eg large, city centre practice; small, locally-based community practice; etc)
8. Does your firm accept legally-aided clients?
9. Do you yourself work with legally-aided clients?

SECTION 2: CASE NUMBERS

We are interested to know about the numbers and types of cases you have encountered.

10. To date, there have been very few reported cases involving the cohabitation provisions of the Act. Why would you say that is so?
11. Given your experience, do you think it reflects practice in family law in general? [\(please explain\)](#)
12. Have you advised or otherwise encountered couples agreeing to waive their rights under the Act? YES/ NO
13. Have you been able to identify cases where no claim is the best course of action?
YES/ NO

What were the circumstances that led you to that conclusion?

14. About how many cases have you dealt with in relation to sections 25-29 of the Act, since it came into force in May 2006?
- NONE [\(go to Section 7, question 53\)](#) 1 – 3 4 – 6 7 – 10 over 10

CASES RELATED TO SEPARATION

Questions 15 – 25 relate to separation cases

15. About how many of your cases have related to separation?
16. Have most of your clients been: PURSUERS OR DEFENDERS?
17. Have most of your clients been: MALE OR FEMALE?
18. What proportion of those separation cases involved dependent children²⁰⁴?
- NONE SOME ABOUT HALF ALL/ MOST
19. What proportion of those separation cases were between same sex couples?
- NONE SOME ABOUT HALF ALL/ MOST
20. What proportion of those separation cases involved home owners?
- NONE SOME ABOUT HALF ALL/ MOST
21. What proportion of those separation cases involved cohabitants over the age of 35?
- NONE SOME ABOUT HALF ALL/ MOST
22. About how long had your clients cohabited? [\(please insert approximate client numbers for each range\)](#)
- (a) LESS THAN 2 YRS
- (b) BETWEEN 2 AND 5 YRS
- (c) BETWEEN 6 AND 10 YRS
- (d) BETWEEN 11 AND 20 YRS
- (e) OVER 20 YRS
23. Have most of your clients been in paid employment? YES / NO
24. Have most of their partners been in paid employment? YES / NO

²⁰⁴ NB throughout this questionnaire we are defining 'child' as one born of the relationship

25. Do you regard the outcomes reached in cases of separation as being:
insufficiently generous/ sufficiently generous/ too generous to pursuers?
Please explain your answer

CASES RELATED TO SUCCESSION

Questions 26 – 33 relate to succession cases

26. About how many of your cases have related to succession?
27. What proportion of those succession cases involved children?
NONE SOME ABOUT HALF ALL/ MOST
28. What proportion of those succession cases were between same sex couples?
NONE SOME ABOUT HALF ALL/ MOST
29. What proportion of those succession cases involved home owners?
NONE SOME ABOUT HALF ALL/ MOST
30. About how long had your clients in the succession cases cohabited? (please insert approximate client numbers for each range)
- (a) LESS THAN 2 YRS
 - (b) BETWEEN 2 AND 5 YRS
 - (c) BETWEEN 6 AND 10 YRS
 - (d) BETWEEN 11 AND 20 YRS
 - (e) OVER 20 YRS
31. In cases of succession did you act for:
- (a) deceased's partner? (please insert approximate client numbers)
 - (b) another heir? (please insert approximate client numbers)
32. What relation were the heirs to deceased?
33. Do you regard the outcomes reached in cases of succession as being:
insufficiently generous/ sufficiently generous /too generous to pursuers?
Please explain your answer

SECTION 3: EXPLAINING AND ADVISING

We would like to know how you find the initial meetings with clients

34. How easy is it, in general terms, for clients to understand the relevant provisions?
(please illustrate)
35. How easy is it, in general terms, for clients to understand the advice you give them?
(please illustrate)

SECTION 4: CASE PATHS

We would like to explore your perceptions of why cases take the courses they do

36. Of your cases about how many:

separation succession

- (a) involved only advice and assistance at an introductory meeting?
- (b) settled without any court involvement?
- (c) were resolved with court involvement?
- (d) are ongoing and not yet resolved?
- (e) have actively pursued a financial settlement?
- (f) were not resolved but are no longer ongoing?

37. If any of your cases were not resolved, but are no longer ongoing, please explain.

38. Considering your answers to no. 36: are these numbers what you expected?

YES/ NO

Please explain your answer

39. Have you *actively looked* for any test cases? YES/ NO

SECTION 5: HOW THE PROVISIONS ARE USED

We would like to explore the nature of cases that give rise to claims

Describe the characteristics of the cases that typically would give rise to a claim:

- 40. in separation cases, (eg likely to involve children; where one party might be made homeless; where one party is not in paid employment; etc)
- 41. in succession cases, (eg length of cohabitation; survivor financially dependent on deceased; etc)
- 42. Which sections of the Act have you used most frequently?

To what end have you used these sections?

Concerns have been raised both in reported cases and in articles written by practitioners of the workability of some aspects of the provisions.

43. Would you describe any aspects of the provisions as unworkable? Please explain your responses:

- (a) definition of cohabitation and being eligible to apply
- (b) time limits on making claims
- (c) establishing the date of separation
- (d) jurisdictional issues (eg cross-border cases)
- (e) width of the court's discretion
- (f) interpretation, proof and quantification of economic advantage/disadvantage
- (g) issues in succession
- (h) any others

44. What are the key differences you have found when bringing or defending claims on divorce under the 1985 Act and on the separation of cohabitants under the 2006 Act?

45. Have these differences caused you any difficulties? YES/ NO

Please explain your answer

46. What other benefits or difficulties, if any, have you encountered in the use of the provisions?

SECTION 6: COSTS INVOLVED

We would like to ask about the approximate cost of cases to clients, but because cases may vary greatly we ask about the extremes. Please indicate the total bill paid by the client.

47. About how much did your most expensive and least expensive *separation cases* cost in total?

LEAST EXPENSIVE MOST EXPENSIVE

48. About how much did your most expensive and least expensive *succession cases* cost in total?

LEAST EXPENSIVE MOST EXPENSIVE

We would like to know how well you think legal aid is working, in your own practice, in relation to cases involving ss 25 - 29

49. About how many of your clients have used the free Legal Advice and Assistance interview?

About how many of these cases progressed no further?

50. About how many of your clients have been able to pursue their cases with legal aid?

51. Have clients encountered any difficulties in trying to use the legal aid route?

YES/ NO

Please explain your answer

52. Have you encountered any difficulties in securing legal aid on the merits of a case where the client meets the income criteria:

where you have represented a pursuer? YES/ NO.

where you have represented a defender? YES/ NO

Please explain your answers

SECTION 7: AND FINALLY

A little more information

53. Please circle your age range:

below 30 30 - 40 41 - 50 51 - 60 over 60

54. Are you: MALE or FEMALE?

55. How would describe your ethnicity?

56. One final request - some respondents may be invited to take part in an in-depth interview once the questionnaires have been analysed. Would you be willing to be interviewed if asked? YES/ NO

Thank you for taking the time to answer these questions

INTERVIEW SCHEDULE

(adapted for each interviewee)

CODE XXX SEPARATION/ SUCCESSION

DATE.XX.XX.09

INTRODUCTION: BACKGROUND OF INTERVIEWEE FROM QUESTIONNAIRE

This interview is coded XXX.

Checking background picture of your work accurately noted.

HERE COMPILER A VERY BRIEF DESCRIPTION FROM THE Q BASED ON THE FOLLOWING

In the last 3 years about **X%** of your work has been in family law. You **are/ are not** a member of the Family Law Association and **you are/ are not** a lawyer-mediator, **you are/ are not** a collaborative lawyer. You have dealt with **X** number of cases in the last 3 years related to these provisions. Your firm **does/ does not** accept legally-aided clients **as do you yourself**.

Accurate picture?

Anything to add?

You indicated that you had dealt with more than 10 cases – in very round figures how many, more than 20?

How long practised as a family lawyer?

VIGNETTES

No right or wrong answers - collecting thoughts on common set of circumstances.

Main issues if acting for **Janet/ Eleanor?** (problems to highlight)

Main issues if acting for **Kenneth/ the wife?**

Much depends on how the other party reacts, what would be likely outcomes, especially for the children?

Likelihood of such a case being resolved with or without court involvement?

Advice offered before the 2006 Act?

CASE NUMBERS AND TYPES

Of cases dealt with, split between separation and succession? Proportion?

IF S/HE HAS DEALT WITH ANY CASES OF SUCCESSION

Any case with both a surviving spouse and a surviving cohabitant? (Rare?)

Any case where the deceased died outwith Scotland? Explore.

Any case that crossed jurisdictions? (succ or sep? Jurisdictions covered? Key issues?)

Any nuisance claims? (Sep or succ? How many? What form did they take?)

Cohabitation agreements - how common?

Triggers for such agreements?

Normally cover?

Ever called on to refer to such an agreement? Have they been signed?

Firm's 'style'?

Test cases?

Questionnaire indicated you had encountered cases where your advice had been not to pursue a case, for example you mentioned - '**HERE INSERT ANSWER TO q NOCLAIMREASON FROM Q**'.

Often offer such advice? Explore

1985 AND 2006 ACTS

When the 2006 Act was being devised there was an intention to strike a balance between providing legal protection for cohabiting couples while not creating a legal framework that overly interfered with the private life of an individual.

Such a balance important principle?

In general, the 2006 Act didn't set out to offer cohabitants the same provisions as those for people who are married or are civil partners. Approach works for clients?

Do you interpret the 2006 provisions in the light of the 1985 provisions on divorce?

Comfortable doing so? OR Why have you avoided doing so?

Key differences when using divorce provisions of '85 Act and separation provisions of 2006 Act?

Differences - benefits for clients or caused difficulties? Explain.

BENEFITS AND DIFFICULTIES FOR CLIENTS

Relevance of means of restitution under the general law used before 2006 Act?

Cohabitants better off with the 2006 Act than they were before and just using the general law?

Any benefits specifically for the economically weaker party?

Any benefits for any one else? (surviving cohabitants, heirs, defenders, dependent children)

Any of these benefits are more related to men than women or vice versa?

Has the Act caused difficulties for the economically weaker party?

Any difficulties for surviving cohabitants, other heirs, defenders, dependent children?

Any of these difficulties are more related to men than women or vice versa?

ASPECTS OF THE PROVISIONS THAT WORK AND THOSE THAT DON'T

Aspects of the 2006 Act you welcome?

Aspects known to raise concerns - and in questionnaire you indicated you had found **XX** most problematic, how has that been problematic? Explore.

PUBLIC KNOWLEDGE AND UNDERSTANDING OF THE PROVISIONS

Your impression that cohabitation provisions of this Act are widely known?

How could this be improved?

Encounter clients who think they have a common law marriage?

Any sign of the Act making difference to clients understanding the 'common law marriage myth'?

What causes most difficulty for clients as they try to understand the provisions?

How could this be improved for clients?

Presenting issues of clients seeking advice?

Any differences between the knowledge and understanding of spouses pursuing divorce and separating cohabitants? Explore.

HOW CASES PROGRESS

Questionnaire - range of reasons why cases didn't progress. You put **XX** as most common reason. Explore.

To date very few reported cases - why?

Balance of your cases have had court involvement at some level?

What has that court involvement actually consisted of?

LEVEL OF SATISFACTION AT OUTCOMES

Able to achieve acceptable outcomes for clients by using the 2006 Act?

Questionnaire wrote about a case of **separation/succession** where you represented a **pursuer/defender/ surviving cohabitant/heir**.

Client satisfied with the outcomes achieved in that case? Explore.

Had you represented other party would they have been satisfied? Explore.

Questionnaire - your last case you regarded outcome reached as being: **insufficiently generous/sufficiently generous/overly generous** to your client.

Why did you reach that conclusion? Explore.

That case was – 'resolved with court involvement'. Court involvement consist of?

The case lasted **XX** months – is that normal/ longer/ shorter than would have expected?

Do clients differentiate between feeling a level of satisfaction with the process they've gone through as compared with the outcome reached?

Anything else to add?

VIGNETTES

Separation vignette

Janet and Kenneth met in 2001 when they were both aged around 30. Janet, a widow, was renting the same flat that had been her matrimonial home, while Kenneth was living in a home he had purchased for £90,000 with the assistance of 90% mortgage finance. After a year, during which they spent more or less equal time together in each property, Janet gave up her flat to move into Kenneth's house. Both were then in paid employment, Kenneth as an engineer (earning £27,500, with a private pension), Janet as a bank clerk (earning £14,000 with an occupational pension). Although the house remained in his name, both contributed more or less equal proportions of their income towards the outgoings, mortgage included (so Kenneth was paying more in absolute terms). Janet also purchased an expensive new fridge and washing machine. Kenneth was made redundant in 2003. For the twelve months in which Kenneth retrained, they reduced their outgoings as far as they were able, used almost all Kenneth's savings and relied on Janet's salary to cover the outgoings on the property until Kenneth got a job in IT (now earning £29,000, with an occupational pension). In early 2005, Janet gave birth to twins. She intended to return to the bank after maternity leave. However, the burden of twins (and costs of professional child-care) were such that they decided that it would be better for her not to return to work until the children were at school, and then only part-time. Kenneth has therefore been the sole breadwinner since the twins' arrival.

The relationship recently broke down. Kenneth removed some of his personal possessions from the house four months ago and moved in with his brother. At the moment, he is still paying the mortgage and other bills, and visiting the property every weekend and during the week to see the children, who start school later this year. He agrees that the children should live principally with Janet. Janet is concerned about her financial situation, and is seeking advice from a solicitor about any claim she might bring.

Succession vignette

Eleanor comes to see you, her partner David having died 3 months earlier in a car accident caused by black ice on a remote highland road; no other vehicles were involved. She has just discovered (i) that David left no will and (ii) that he had not actually divorced his wife, who has just re-appeared having emigrated after leaving David and their child and is now claiming her rights as surviving spouse. David's parents both died years ago, but he leaves two younger siblings who are both well-established in life. Eleanor is very concerned about her position.

Eleanor and David lived together for 12 years and had 3 children residing with them, one now aged 17 from David's earlier marriage and two, now aged 8 and 6, of their relationship. Eleanor has always treated the oldest child as if she were her own. The family lived in a substantial 5 bedroom detached house, purchased by David (before he met Eleanor following his separation 14 years ago) for £200,000 with the assistance of 95% mortgage finance. In the year 2005 an extension was added taking the house from a 4 bed to the 5 bed-roomed house of today. This was financed by David by adding the cost to his mortgage. The house remained in his name alone.

David was the main breadwinner, working as a hospital doctor, while Eleanor went back to part-time work (2 days a week) as a hospital administrator once the youngest child went to school. David paid all the major outgoings, including the mortgage, on which there remains a substantial sum outstanding. Eleanor used her income for occasional food purchases and for clothing for herself and the children. David had a good occupational pension scheme under which he had nominated Eleanor to receive death-in-service benefits. Eleanor is particularly concerned about her right to stay in the family home and her ability to service the mortgage and other household bills.

APPENDIX 2. FAMILY LAW (SCOTLAND) ACT 2006, SECTIONS 25 TO 29

25 Meaning of “cohabitant” in sections 26 to 29

- (1) In sections 26 to 29, “cohabitant” means either member of a couple consisting of—
 - (a) a man and a woman who are (or were) living together as if they were husband and wife; or
 - (b) two persons of the same sex who are (or were) living together as if they were civil partners.
- (2) In determining for the purposes of any of sections 26 to 29 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.
- (3) In subsection (2) and section 28, “court” means Court of Session or sheriff.

26 Rights in certain household goods

- (1) Subsection (2) applies where any question arises (whether during or after the cohabitation) as to the respective rights of ownership of cohabitants in any household goods.
- (2) 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.
- (3) The presumption in subsection (2) shall be rebuttable.
- (4) In this section, “household goods” means 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.

27 Rights in certain money and property

- (1) Subsection (2) applies where, in relation to cohabitants, any question arises (whether during or after the 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.
- (2) 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.
- (3) In this section “property” does not include a residence used by the cohabitants as the sole or main residence in which they live (or lived) together.

28 Financial provision where cohabitation ends otherwise than by death

- (1) Subsection (2) applies where cohabitants cease to cohabit otherwise than by reason of the death of one (or both) of them.
- (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 the 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.

(7) In making an order under paragraph (a) or (b) of subsection (2), the appropriate court may specify that the amount shall be payable—

- (a) on such date as may be specified;
- (b) in instalments.

(8) Any application under this section shall be made not later than one year after the day on which the cohabitants cease to cohabit.

(9) In this section—

“appropriate court” means—(a) where the cohabitants are a man and a woman, the court which would have jurisdiction to hear an action of divorce in relation to them if they were married to each other; (b) where the cohabitants are of the same sex, the court which would have jurisdiction to hear an action for the dissolution of the civil partnership if they were civil partners of each other;

“child” means a person under 16 years of age;

“contributions” includes indirect and non-financial contributions (and, in particular, any such contribution made by looking after any relevant child or any house in which they cohabited); and

“economic advantage” includes gains in— (a) capital (b) income; and (c) earning capacity; and “economic disadvantage” shall be construed accordingly.

(10) For the purposes of this section, a child is “relevant” if the child is—

- (a) a child of whom the cohabitants are the parents;
- (b) a child who is or was accepted by the cohabitants as a child of the family.

29 Application to court by survivor for provision on intestacy

(1) This section applies where—

- (a) a cohabitant (the “deceased”) dies intestate; and

- (b) immediately before the death the deceased was—
 - (i) domiciled in Scotland; and
 - (ii) cohabiting with another cohabitant (the “survivor”).
- (2) Subject to subsection (4), on the application of the survivor, the court may—
 - (a) after having regard to the matters mentioned in subsection (3), make an order—
 - (i) for payment to the survivor out of the deceased’s net intestate estate of a capital sum of such amount as may be specified in the order;
 - (ii) for transfer to the survivor of such property (whether heritable or moveable) from that estate as may be so specified;
 - (b) make such interim order as it thinks fit.
- (3) Those matters are—
 - (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.
- (4) An order or interim order under subsection (2) shall not have the effect of awarding to the survivor an amount which would exceed the amount to which the survivor would have been entitled had the survivor been the spouse or civil partner of the deceased.
- (5) An application under this section may be made to—
 - (a) the Court of Session;
 - (b) a sheriff in the sheriffdom in which the deceased was habitually resident at the date of death;
 - (c) if at the date of death it is uncertain in which sheriffdom the deceased was habitually resident, the sheriff at Edinburgh.
- (6) Any application under this section shall be made before the expiry of the period of 6 months beginning with the day on which the deceased died.

- (7) In making an order under paragraph (a)(i) of subsection (2), the court may specify that the capital sum shall be payable—
- (a) on such date as may be specified;
 - (b) in instalments.
- (8) In making an order under paragraph (a)(ii) of subsection (2), the court may specify that the transfer shall be effective on such date as may be specified.
- (9) If the court makes an order in accordance with subsection (7), it may, on an application by any party having an interest, vary the date or method of payment of the capital sum.
- (10) In this section—
- “intestate” shall be construed in accordance with section 36(1) of the Succession (Scotland) Act 1964 (c. 41);
 - “legal rights” has the meaning given by section 36(1) of the Succession (Scotland) Act 1964 (c. 41);
 - “net intestate estate” means so much of the intestate estate as remains after provision for the satisfaction of—(a) inheritance tax; (b) other liabilities of the estate having priority over legal rights and the prior rights of a surviving spouse or surviving civil partner; and (c) the legal rights, and the prior rights, of any surviving spouse or surviving civil partner; and
 - “prior rights” has the meaning given by section 36(1) of the Succession (Scotland) Act 1964

The full text of the Act may be found at:

http://www.opsi.gov.uk/legislation/scotland/acts2006/asp_20060002_en_1

APPENDIX 3. FAMILY LAW (SCOTLAND) ACT 1985, SECTIONS 9 AND 11

9. Principles to be applied

(1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—

(a) the net value of the matrimonial property should be shared fairly between the parties to the marriage;

(b) fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family;

(c) any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties;

(d) a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce;

(e) a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

(2) In subsection (1)(b) above and section 11(2) of this Act—

“economic advantage” means advantage gained whether before or during the marriage and includes gains in capital, in income and in earning capacity, and “economic disadvantage” shall be construed accordingly;

“contributions” means contributions made whether before or during the marriage; and includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family.

...

11. Factors to be taken into account

(1) In applying the principles set out in section 9 of this Act, the following provisions of this section shall have effect.

(2) For the purposes of section 9(1)(b) of this Act, the court shall have regard to the extent to which—

(a) the economic advantages or disadvantages sustained by either party have been balanced by the economic advantages or disadvantages sustained by the other party, and

(b) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property or otherwise.

(3) For the purposes of section 9(1)(c) of this Act, the court shall have regard to—

(a) any decree or arrangement for aliment for the child;

- (b) any expenditure or loss of earning capacity caused by the need to care for the child;
 - (c) the need to provide suitable accommodation for the child;
 - (d) the age and health of the child;
 - (e) the educational, financial and other circumstances of the child;
 - (f) the availability and cost of suitable child-care facilities or services;
 - (g) the needs and resources of the parties; and
 - (h) all the other circumstances of the case.
- (4) For the purposes of section 9(1)(d) of this Act, the court shall have regard to—
- (a) the age, health and earning capacity of the party who is claiming the financial provision;
 - (b) the duration and extent of the dependence of that party prior to divorce;
 - (c) any intention of that party to undertake a course of education or training;
 - (d) the needs and resources of the parties; and
 - (e) all the other circumstances of the case.
- (5) For the purposes of section 9(1)(e) of this Act, the court shall have regard to—
- (a) the age, health and earning capacity of the party who is claiming the financial provision;
 - (b) the duration of the marriage;
 - (c) the standard of living of the parties during the marriage;
 - (d) the needs and resources of the parties; and
 - (e) all the other circumstances of the case.
- (6) In having regard under subsections (3) to (5) above to all the other circumstances of the case, the court may, if it thinks fit, take account of any support, financial or otherwise, given by the party who is to make the financial provision to any person whom he maintains as a dependant in his household whether or not he owes an obligation of aliment to that person.
- (7) In applying the principles set out in section 9 of this Act, the court shall not take account of the conduct of either party unless—
- (a) the conduct has adversely affected the financial resources which are relevant to the decision of the court on a claim for financial provision; or
 - (b) in relation to section 9(1)(d) or (e), it would be manifestly inequitable to leave the conduct out of account.

The full text of the 1985 Act may be found at:

http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1985/cukpga_19850037_en_1

APPENDIX 4. REPORTED CASES INVOLVING SECTIONS 25 TO 29 OF THE 2006 ACT

The terms of the Act itself give relatively little guidance to judges considering claims under the statute, particularly for exercising the wide discretion under s 29. At the time of writing (March 2010), there have been eight reported cases related to the cohabitation provisions of the 2006 Act, five under s 28 for claims made on separation, three under s 29 on death. We describe below, in chronological order, the cases so far decided under ss 28 and 29 respectively, with some commentary on key issues. While the Act talks in terms of “applicant” rather than the traditional “pursuer”, we adopt here the courts’ practice of continuing to use the traditional term.

Cases relating to claims on separation under s 28

Raghunathan v Fairley [2008] CSOH 104, 2008 Fam LR 112

This case was concerned exclusively with establishing the date on which the parties separated, raising no point of law about what constitutes “separation”: the dispute was a factual one about the timing of particular events which, it was clearly agreed, marked the parties’ separation. This was crucial as the two dates being contended for straddled the date on which the legislation came into force in May 2006. Only if separation had occurred after that date could the pursuer’s substantive claim under s 28 proceed. The judge found that the parties separated in June, permitting the pursuer to press her claim. The eventual outcome is not reported.

There will be no other case exactly like this one, since the one-year time bar from date of separation that applies to claims under s 28 means that any relationship which ended on or around May 2006 will now be out of time in any event. But there will still be cases in which it will be argued that the date of separation was more than one year before the date on which proceedings are started so that the pursuer is too late to claim. Similar fact-finding exercises may therefore be required, unless pursuers are careful to protect their position by raising an action within a year of whatever might conceivably be argued to be the earliest separation date.²⁰⁵

²⁰⁵ See chapter 7 for interviewees’ discussion of the pressure of the time bar and the consequent need to raise (and then immediately sist) an action to protect the pursuer’s position during attempts to settle the claim by negotiation.

Jamieson v Rodhouse (Sheriff decision, Tayside Central and Fife at Kirkcaldy) 2009 FamLR 34

This was the first substantive decision on a s 28 claim, and resulted in a nil award. The parties had cohabited for some 30 years. They had no children together, but the pursuer had brought to the relationship a child, then aged nine but now well into adulthood, from a previous marriage; he was held to be a “relevant child”. The pursuer moved into the defender’s home at the start of their relationship (it is not recorded where she and her child had previously been living²⁰⁶), and they had throughout lived in properties held in the defender’s sole name. The mortgages on these properties were also in his name and he paid for improvements. Both parties had worked full-time throughout the relationship and were both now retired and in receipt of modest pensions. During the relationship, the defender had paid the mortgage, tax, utility and other principal household bills. The pursuer had bought food, clothes for herself and her child, and various household items; she had done all the housework. At the date of separation, the defender owned the home (in which there was £52,000 equity) and nearly £2,500 in ISAs. The pursuer had just £500 in an ISA, and the defender gave her a further £900. Each owned a car.

It was a key motif of the case that “no accurate figure” was produced to indicate the amounts of each party’s claimed income or expenditure, the values of the various houses bought over the years, and so on; the most recent mortgage taken out by the defender was undocumented, and even current figures – i.e. ones which did not call for a demanding trawl of the depths of the parties’ 30 year past together – were missing. Neither party had sought specification of documents (disclosure) from each other. This deficiency of evidence has turned out to be a common problem in cases brought under s 28. The sheriff in this case – like Lord Matthews in *CM v STS*, below – was critical of the fact that apparently no one had thought it relevant to document these figures, which was “unhelpful given what I was being asked to decide”,²⁰⁷ and self-evidently problematic for a pursuer on whom the burden of proof lies. By contrast, the sheriff in the most recent case, *Gow v Grant*, below, perhaps had a rather more accepting attitude to this problem.

²⁰⁶ Contrast the potential significance of this, demonstrated by *Gow v Grant*, below.

²⁰⁷ Decision, first paragraph.

The pursuer attempted, without success, to get around this problem in part by painting with a broad brush:²⁰⁸

*The pursuer was of the view that there was a figure of £50,000 capital in the final property and thus she should receive half that figure. Unfortunately that was based on a fair and equal sharing of the capital which was not what I understood was contemplated in terms of this legislation.*²⁰⁹

While that might indeed have been the appropriate outcome had the parties been married, fair (equal) sharing plays no role in the 2006 Act, and so the claim had instead to be formulated in terms of economic advantage and disadvantage. But in this regard, the case illustrates what might be called the “water under the bridge” problem. An examination of the advantages conferred and disadvantages sustained over the course of a long relationship (particularly where evidence of actual figures is scant) may readily lead to a conclusion that the situation is economically neutral: that the claimed advantages and disadvantages all cancel each other out, so that no award is forthcoming.

The pursuer argued that:

- she had made indirect, non-financial contributions to the defender’s advantage by way of her housework and care for the relevant child;
- she was disadvantaged by her burden of caring for and financially supporting the child (though there was no evidence of impairment to her employment or career development), and that the defender was correspondingly advantaged by not having that burden;
- the defender had been advantaged by his accumulation of capital across various house moves, an advantage not shared by the pursuer in terms of growing her own capital (though, unfortunately, absent evidence of the first property’s value, it was impossible to quantify the defender’s claimed capital gain with any precision).

²⁰⁸ She invoked the 1985 Act case *Dougan v Dougan* 1998 SLT (Sh Ct) 27 in support of a broad brush approach, but the judge rejected the relevance of 1985 Act cases: Decision, penultimate paragraph.

²⁰⁹ Decision, fifth paragraph.

The sheriff found that the pursuer had indeed conferred an economic advantage on the defender by way of her housework and payment for food. But he was unable to place any financial value on those contributions. Moreover, he was unable to find that the pursuer had, overall, sustained an economic disadvantage as she had had the advantage of the defender providing her and her child with a home rent-free, a contribution which (the sheriff appears to conclude) constituted an economic disadvantage to the defender. Nor, as noted already, was there any evidence that the pursuer's job prospects had been damaged. So, he concluded, the "economic position is in fact neutral".²¹⁰ As to the defender's presumably improved (though unquantified) capital position, the sheriff remarked that he appeared simply to be the beneficiary of house price appreciation (rather, we may infer, than of any relevant economic advantage conferred by the pursuer), and so in that regard essentially in the same position that he would have been in had there been no cohabitation, save that his food and housework had been provided for him.²¹¹

With respect to the sheriff, while he correctly set out the law, his analysis of the facts within the legal framework was not entirely clear. For example, he appears to undertake an offsetting exercise of disadvantage suffered against advantages derived *before* going on to refer to s 28(5) and (6), the subsections which require that step in the analysis.²¹² He also appears to oscillate between characterising the same facts as advantage conferred and disadvantage sustained: for example, is paying the mortgage on a property that one owns better construed as an economic advantage conferred on the other party who thereby avoids the need for pay for her own accommodation²¹³ (though it is not immediately clear how those contributions constitute a gain in capital, income or earning capacity for that party²¹⁴); or a disadvantage to the paying party²¹⁵ (which is problematic given that he benefits directly from making such payments)? However the effects of a contribution are characterised, it is important to guard against

²¹⁰ Decision, eleventh paragraph.

²¹¹ Decision, fourteenth paragraph.

²¹² Decision, tenth and eleventh paragraphs.

²¹³ Decision, tenth and twelfth paragraph.

²¹⁴ As required by s 28(9). On these issues, see further n 255 below.

²¹⁵ Decision, eleventh paragraph. Note also the apparent confusion of economic advantage and disadvantage in the pre-penultimate paragraph, in relation to the pursuer's job prospects.

double-counting (so that someone is not credited more than once with the benefit of what is essentially the same argument cast in different terms) and to adopt a consistent analysis of the facts.

However, while it may appear harsh that someone should leave a 30 year relationship with nothing to show for it, and while the judge's reasoning can in some respects be criticised, the 2006 Act does not obviously offer any other result on the facts as proved. The pursuer had apparently not suffered any impairment to her earning capacity (and so pension entitlement in her retirement), nor had she proved any substantial contribution, whether direct or indirect, towards the defender's ability to accumulate capital.

CM v STS [2008] CSOH 125, 2008 SLT 871

This case was the first, and so far only, decision of the Court of Session on any substantive aspect of the cohabitation provisions in the 2006 Act. The facts appeared to offer rather more hope for the pursuer, who had given up full-time employment (and suspended her job entirely at various points) during the parties' eight year relationship in order to care for their two dependent children, for whom she would continue to be primary carer following separation. On the other hand, the parties lived in a home owned by the *pursuer*, but the defender paid the mortgage and other principal household bills; a further mortgage, also paid by the defender, was taken out when the pursuer purchased the downstairs flat and the two premises were combined into one dwelling to accommodate their growing family. It was the lack of evidence regarding the valuation of this property which proved to be the pursuer's undoing.

The pursuer made two main claims: one for £50,000 under s 28(2)(a) in relation to the balance of economic advantage and disadvantage; and the other under s 28(2)(b) for a payment of £20,000 in respect of the ongoing economic burden of caring for the parties' children after separation. The first claim was based on the economic disadvantage suffered by the pursuer in the interests of the defender and their children in giving up full-time employment and losing opportunities to develop her career and accrue pension savings. She also argued that the defender had gained economic advantage through having been able to develop his education and, therefore, his career thanks to the pursuer looking after the children while he studied.

In the event, under s 28(2)(a) the defender was ordered to pay the pursuer just over £1,460; this sum was based on a rather minor matter²¹⁶ quite unrelated to the pursuer's principal claims, which entirely failed. In relation to the burden of childcare under s 28(2)(b), the defender was ordered to pay the pursuer of the sum of £13,000 by instalments of £400 per month.

The s 28(2)(a) claim

As in *Jamieson*, the judge here felt:

... at a distinct disadvantage. In the first place, while I mean no disrespect whatsoever to the defender [who represented himself], it would have been helpful to have the benefit of submissions from counsel on each side. Secondly, as may appear from my narrative, the evidence as to the parties' financial positions was, on a number of important matters, vague, to say the least. ... I am afraid that my own shortcomings in dealing with the matter will be amplified by the omissions to which I have referred and this case may prove to be of less assistance to others who follow than it might otherwise have been. [para 252 & 256]

While he was prepared to take “general account” of some matters on which the evidence was insufficient but perhaps could not reasonably be expected to be any better,²¹⁷ he could not skate over the issue of the house valuation.

The pursuer did, however, adduce substantial evidence from her employer and pension provider regarding the past, present and future economic disadvantage that she had sustained by giving up full-time employment. Lord Matthews analysed this evidence systematically, discretely identifying wage losses (less tax and – to avoid double-counting – pension deductions), pension losses, and loss of future opportunity.²¹⁸ The pursuer's claim in relation to past earnings losses fell victim to the “water under the bridge” argument described in relation to *Jamieson v Rodhouse*, above: those losses

²¹⁶ Regarding the benefit of certain endowment policies and a tax credit overpayment.

²¹⁷ At [259] and [296]. He did accept that “it must be very unusual relationship in where the parties, from day one, account for every penny in order to know which of them contributed”: at [268].

²¹⁸ From [286].

were cancelled out by the (largely assumed²¹⁹) value of the defender's financial support of her during the relationship.²²⁰ As to her claimed future losses, which the judge properly considered separately,²²¹ here the lack of evidence regarding the house valuation was crucial. The judge was prepared to find that the pursuer would, in other circumstances, have trained for and obtained a paralegal job.²²² He was also prepared to find a small economic advantage conferred by the pursuer's childcare enabling the defender to enhance his career. However, the defender had been paying the (increased) mortgage throughout the relationship, leaving the pursuer with the extended home. Unless the pursuer could demonstrate that the scale of her future economic disadvantage was greater than the increase in capital that remained in her hands as a result of the defender's mortgage payments, she could not show that she had been disadvantaged overall, and so her claim failed.²²³

Thomson (2008) has provided a penetrating criticism of Lord Matthews's approach to the s 28 exercise. The judge began by noting the very wide discretion afforded to the court,²²⁴ but then went on to adopt a questionable approach to s 28. Principal amongst Thomson's concerns is Lord Matthews's decision to halve each party's economic disadvantage, a decision taken on the basis that, while the 2006 Act gave no basis for equal sharing of assets, "the burden of cohabitation should be borne fairly, although there is no provision to that effect in the Act".²²⁵ This technique substantially reduces

²¹⁹ In the absence of direct evidence regarding the payments the defender made, assuming that his salary was no less than hers had been, and given the size of the mortgage debt: at [296]-[298].

²²⁰ Conclusion at [300].

²²¹ Future losses will not usually be offset by advantages conferred during the relationship which have no lasting effect.

²²² It is not wholly clear from the report how he settles on the figures on which he calculates this sum – the basic methodology is clear, but the source of the figures that he feeds into that formula is not, given his admittedly "broad axe" approach; this might have generated an underestimate. See from para [301]

²²³ See [309]-[314], noting in particular the duty on the pursuer to be frank in disclosing the value of her assets.

²²⁴ At [260].

²²⁵ At [290]. It is interesting to note that in *Dougan v Dougan* 1998 SLT (Sh Ct) 27, 29 the pursuer argued (in the context of s 9(1)(b) of the 1985 Act) that taking "fair account" of the economic disadvantage in that case would involve sharing it equally between the parties. While the sheriff did not comment on that argument, the award did in fact represent half the value of what the sheriff viewed as an admissible claim.

the value of economic disadvantage claims, in turn making it easier for defenders to offset such claims with economic advantage conferred (which is apparently not halved).²²⁶

But at this point, Thomson again criticises Lord Matthews for taking another wrong turn, here by failing to carry out the specific balancing exercise required by the statute. Subsections 28(5) and (6) clearly require the judge to ask (a) whether the economic advantage to the defender from the pursuer's contributions was offset by the defender's economic disadvantage; and (b) whether the pursuer's disadvantages were offset by the advantages she had derived from the defender's contributions. Instead, Lord Matthews appears to offset (a) the pursuer's disadvantage (or rather half of it) against the defender's disadvantage (again halved); and (b) the pursuer's advantage against the defender's. Thomson argues that this "seriously flawed [approach] ... has the potential to undermine section 28(2)(a) claims, as happened here" (ibid).

A possible further problem in Lord Matthews's judgment is his characterisation of the defender's side of the balance as economic disadvantage: the more natural characterisation of his payment of the mortgage (specifically), since it results in increased equity in the pursuer's hands, might be thought to be economic advantage which, under the Act, *is* properly offset against the pursuer's career disadvantage (whether halved or not). These are difficult issues. We have seen already (and see in later cases) the courts characterising apparently similar contributions in different ways in different cases. Characterisation clearly makes a difference to the application of the statutory tests, particularly if disadvantage is (rightly or wrongly) to be halved.

Notably, the halving approach has not been adopted in the only relevant subsequent case.²²⁷ However, given the immense difference that halving or not halving can have on a claim, an appellate decision should determine definitively whether this step should be taken. The Act clearly affords the judges some discretion, but it is not clear how wide that discretion is in s 28(2)(a) cases, given the structure more or less loosely

²²⁶ In operating a not dissimilar statutory provision, the New Zealand courts have had similar difficulty with the issue of halving: compare *P v P* [2005] NZFLR 689 (no halving of awards based on diminished earning capacity of applicant) and *X v X* [2007] NZFLR 502 (halving). Frustratingly, the recent Court of Appeal decision does not appear firmly to settle this issue: *X v X* [2009] NZCA 399.

²²⁷ *Gow v Grant*, below, where the issue is not even mentioned.

imposed by the terms of the statute. It would be highly undesirable for so vital an issue as halving to be left to the decision of individual sheriffs.

The s 28(2)(b) claim

In turning to the childcare claim, Lord Matthews made a number of interesting preliminary observations. He first highlighted the “potential for injustice”²²⁸ in so far as s 28(2)(b) apparently²²⁹ does not empower the courts to order periodical payments (which can be varied as circumstances change). They must therefore “indulge in certain speculation as to the future”, predicting the costs of looking after children over many years.²³⁰ He suggested that the matter might be better dealt with by the Child Support Agency (now the Child Maintenance Enforcement Commission),²³¹ but his alternative suggestion – that the courts be given power to order variable periodical payments in relation to these inherently unpredictable costs – is the better one. He also made a brief but important observation about the role of the primary carer:

[320] Whether the appropriate measure is the cost, say, of childcare in a nursery, for example, or the loss to a pursuer who had to give up a well paid job in order to look after the children depends, it seems to me, on the circumstances. In one case the cost of childcare might be greater than the loss of salary while it might be the other way around in another case.

But, having perhaps implied that the cheaper route should be taken, he went on:

[321] I do not think that there is any duty to minimise loss in these circumstances. It might well be thought to be in the children’s interests that their mother or father look after them rather than a nanny or a nursery and if that caused a greater financial loss then so be it.

²²⁸ At [262].

²²⁹ Cf the view of Thomson (2006b), noted above.

²³⁰ At [261]. The drafting of the statute is less than clear on this point: where s 28(2)(a) specifically talks in terms of an order “to pay a capital sum of an amount specified”, s 28(2)(b) refers to “an order requiring the defender to pay such amount as may be specified”. It may be open to conclude that (b) authorises periodical payments. However, that might be thought inconsistent with s 28(7), which specifically empowers the court, under either paragraph (a) or (b) to order payment by instalments, a direction that is clearly only pertinent to capital awards.

²³¹ At [262].

Who is to determine which course should be taken, if the parties are in dispute? While Lord Matthews again (without statutory basis) halves the award under s 28(2)(b),²³² in recognition of the fact that “the economic burden of looking after the children has to be shared fairly”,²³³ defenders will generally wish to pay less rather than more. This issue raises quite profound questions of social policy which, again, are not obviously best left to individual judges’ determinations. As it was, this pursuer had returned to work and so framed her claim in terms of the cost of childcare at the start and end of the school day and over school holidays. This meant that Lord Matthews was able to adopt a straightforwardly arithmetical (but still “broad axe”) approach based on the available figures²³⁴ (but necessarily making a number of assumptions about what would be required, and trying to factor in various contingencies), rather than having to explore the alternative of calculating an award based on diminution to earning capacity arising from childcare.²³⁵

As to halving, Lord Matthews alluded to the fact that the defender was earning more than the pursuer – which might militate in favour of sharing the costs proportionately by reference to their respective incomes, rather than simply 50:50 – but also noted that the defender would be caring for the children on one night a week and for part of the weekends.²³⁶ The costs actually incurred by the grandfather who helped care for the children, but for which he never sought any reimbursement from either parent, could not be included in the claim, as being (from the parents’ perspective) notional rather than actual costs.²³⁷

Lord Matthews made no explicit mention of the factors in s 28(3) in calculating this part of the award, despite the statutory instruction to do so. This is one of the many points

²³² Halving of this claim has been repeated: in *Falconer v Dods*, below.

²³³ At [350]-[352].

²³⁴ At [319] and [329].

²³⁵ There is no explicit mention in the judgment of the childcare component of tax credits to which the pursuer might be entitled, but these should be factored in as part of the income from which costs might be met. Since he halved the award, it might be fair to allow the pursuer’s half to be met in part by those credits.

²³⁶ At [351]-[352]

²³⁷ At [323]-[324]

of statutory drafting which have been criticised above.²³⁸ The economic advantage and disadvantage principles in s 28(3) have no obvious bearing on an order designed to help alleviate the economic burden of childcare post-separation, save perhaps in those cases where it is the pursuer's alleged ongoing loss of earning capacity which forms the basis for that claim.²³⁹ Lord Matthews's approach to this pursuer's claim, based as it was on actual childcare costs,²⁴⁰ suggests that s 28(3) will tend to be sidelined in such cases.²⁴¹

One final note from *CM v STS* concerns the statute's rather surprising silence on the question of the defender's resources.²⁴² Is it really the Scottish Parliament's intention that the court should make an order regardless of whether the defender can afford it? Taking a common sense approach, Lord Matthews commented that "it might be that courts will be slow to make an award which will plainly be unenforceable",²⁴³ and deliberately made the childcare order payable by way of monthly instalments, to spread the load.²⁴⁴

Falconer v Dods (sheriff decision, Tayside Central and Fife at Kirkcaldy) 2009 FamLR 111

This case again involved applications under both limbs of s 28(2). The parties had cohabited for five years and had one child together, the pursuer already having one other child from a previous relationship. At the start of the relationship, the pursuer had neither assets nor debts, whereas the defender had debts of £20,000. The defender bought a home for them in his sole name for £50,000 with the assistance of a large mortgage and two small sums from each party's parents, including a loan of £1,500

²³⁸ Recall that while s 28(3) applies to s 28(2)(b) claims, the specific balancing exercises set out in ss 28(5) and (6) do not. For comment, see Norrie (2006), 69-70.

²³⁹ That is the view of the sheriff in *Gow v Grant*, below.

²⁴⁰ This approach was repeated in *Falconer v Dods*, below.

²⁴¹ See also *Falconer v Dods*, below.

²⁴² Cf the 1985 Act, which expressly requires the court only to make such order as is "reasonable having regard to the resources of the parties": s 8(2); see also s 11(3)(g), in relation to the principle relating to the economic burden of childcare.

²⁴³ At [261].

²⁴⁴ At [355].

from the pursuer's father. The pursuer argued that she had suffered economic disadvantage, having at first been a student relying on loans and grants, and thereafter able only to work part-time in various posts and unable to undertake further training because of her care of parties' child. In relation to this, the sheriff noted that no specific evidence had been led about how her career might have been advanced. Nor had there been any exploration of the rather complicated issue of how to deal with the fact that the pursuer already had a child, whose existence might anyway have impeded her career: how, if at all, is the economic disadvantage to be attributed between the two relationships?²⁴⁵ Meanwhile, the defender had been employed full-time and enjoyed various promotions with salary increases (from c.£20,000 at the start of their relationship to c.£26,000 by its end). While she had paid some bills, notably for food, he had inevitably borne the larger share of the household bills, including the mortgage; the parties had no joint account. Overall, however, she contended that her financial and non-financial contributions had contributed to the increase in the value of the property owned by the defender.

Since their separation, the defender had become unemployed, in the pursuer's view, in order to avoid paying aliment for their son.²⁴⁶ The defender had sold the house for £90,000 on terms that the pursuer and child would rent it from the new owners. Once the defender had discharged his various debts, there was £6,000 left from the proceeds of that sale. He had offered this to the pursuer by way of settlement but had not paid, contending now that he had been badly advised and that the pursuer had no tenable claim against him.

The pursuer sought £10,000 under s 28(2)(a) and an award of £3,000 under s 28(2)(b). In relation to the latter, the pursuer expected to continue to work part-time until the child reached the later years of secondary school. Following on from the comments made above in relation to *CM v STS* on this point, it appears not to have been contended that the pursuer should increase her hours of work and rely more on paid childcare. But full account was taken of her benefits and tax credits income, alongside her earned income.²⁴⁷

²⁴⁵ Note the lack of formal finding in this case that the older daughter was a "relevant child" for the purpose of the statutory test.

²⁴⁶ Note, [24]. The sheriff appears to accept that there was an intention to evade payment: at [63].

²⁴⁷ Note, [23].

The sheriff's approach to the claim under s 28(2)(a) was clearly structured by the questions set out in ss 28(3)(5) and (6), but as in the previous cases, was hampered by the lack of concrete evidence on key points. The sheriff echoed earlier remarks about the need for full and frank disclosure from parties to these proceedings.²⁴⁸ He found that the defender had been economically advantaged by the pursuer's contributions, including (perhaps stretching the statutory concept of "contribution" here) his ability to borrow money from the pursuer's father for a deposit on the house, thus enabling him to acquire an asset which appreciated considerably in value during the relationship. There was no concrete proof of any relevant economic disadvantage suffered by the defender which might offset these advantages.²⁴⁹ While the sheriff was prepared to accept the likelihood that the pursuer would have had a better income had it not been for her childcare and household duties, he again felt hampered by the lack of concrete evidence as to the value of this loss.²⁵⁰ Having been unable to identify any quantifiable economic disadvantage on either side, he did not comment on the rightness or otherwise of halving such losses,²⁵¹ and had nothing against which to offset any economic advantage conferred on the pursuer by the defender. It might be said, however, that the pursuer must have enjoyed some economic advantage – in a "water under the bridge" way – during the relationship from the defender's payment of the principal household bills (other than food).²⁵² While his inability to find a clear economic disadvantage to the pursuer meant that he could not in terms undertake the offsetting

²⁴⁸ Note, [56].

²⁴⁹ Note, [57].

²⁵⁰ Contrast the detailed evidence adduced in *CM v STS* on this point.

²⁵¹ Note, [50]. He does acknowledge Prof Thomson's criticisms of *CM v STS*.

²⁵² It is not clear from the judgment, but the sheriff may have had these contributions of the defender in mind as the elusive economic disadvantage which – being unproved – could not be offset against the economic advantage he had derived: note, at [57]. As such, the case illustrates the difficulty of characterising certain contributions. Economic advantage requires a gain in capital, income or earning capacity for the receiving party: s 28(9). A defender covering a pursuer's living costs does not straightforwardly confer such a gain, unless it is to be argued that it effectively constitutes the provision of income in kind: meeting costs which the pursuer would otherwise have had to meet from income (which she may not have), and so treated in effect as a notional gain in income by the pursuer (spent on her behalf by the defender). There would certainly be good justice in permitting such financial support to offset loss of *past* earnings which forms the basis of many economic disadvantage claims. The alternative is to view material support of the pursuer as a disadvantage to the defender. We note that the Scottish Law Commission, when it originally recommended these principles for spouses in 1981, did not envisage that they would be used in relation to contributions which had not materially improved the other party's economic position: see SLC (1981) para 3.93.

exercise contemplated by s 28(6), the existence of those unquantifiable advantages might reassure us that little injustice was done to the pursuer on this point.

So the sheriff was left feeling that “a forensic and purely mathematical calculation of the capital sum due to the pursuer is ... impossible”, and concluded that “a broad approach is all that is open to me”. He noted that the defender had moved from being heavily indebted at the start of the relationship to having a credit balance of £7,500 (less the pursuer’s father’s loan of £1,500), and so, it seems, fixed on his award of £6,000 to the pursuer under s 28(2)(a).²⁵³

This rough and ready justice is open to question. It appears that the figure of £6,000 was based on the defender’s opportunity to acquire the appreciating asset of the house with the father’s assistance. But it is not clear that this is a relevant economic advantage derived from a *contribution from the pursuer*. Clearly, the loan would not have been forthcoming had it not been for the parties’ relationship; but, at best, it can only be classified as an indirect contribution on her part.²⁵⁴

The childcare costs claim was more straightforward, based on concrete figures regarding the cost of certain items of expenditure and, as in *CM v STS*, undertaken without regard to the questions in s 28(3).²⁵⁵ Moreover, it appears that it was accepted by the pursuer – and in turn by the sheriff – that these costs should be halved, and so met in equal shares by the parties.²⁵⁶ The sheriff noted that the Act does not require consideration of the parties’ resources, but – apparently in light of concerns about the defender’s intention to evade payment – declined to reduce or postpone the award, or to allow payment by instalments.²⁵⁷ It may be expected that a defender who, in good faith, will struggle to pay will be given rather more leeway.

Gow v Grant (sheriff decision, Lothian and Borders at Edinburgh) 2010 FamLR 21

²⁵³ Note, [60].

²⁵⁴ See s 28(9).

²⁵⁵ The sheriff acknowledged their relevance to the claim earlier in his judgment (note, [54]), but did not revert to them when he came to address the substance of the claim. In *Gow v Grant*, the sheriff remarked that the relevance to s 28(2)(b) of the factors in ss 28(3)(5) and (6) is “not immediately apparent”: note, [41].

²⁵⁶ See the figures set out in the pursuer’s submission underpinning this claim.

²⁵⁷ Note, [63].

The most recently reported case exhibited a similarly broad brush approach to valuation of the award, and raises further questions about the proper characterisation of particular contributions as generating economic advantage, economic disadvantage, or neither. It is understood that this case is being appealed, and so we may soon have the benefit of the first appellate decision under the Act.

The facts were somewhat different from previous cases, concerning a couple who had met in later life, both with previous marriages and adult children from those unions behind them. They cohabited for about six and a half years in the defender's house. The pursuer had previously lived in a flat which she owned but sold, with the defender's "adamant" encouragement. Having been asked by the defender at the start of their relationship not to take up any employment,²⁵⁸ she contributed rather less to the parties' regular outgoings than he did. The sale of her flat and the depletion of the proceeds of sale (largely) for the parties' joint benefit lay at the heart of the pursuer's claim. Following the parties' separation, the pursuer, now aged 72, was living in rented accommodation and unemployed, on a modest pension, and left with debts rather than assets (save for a half-interest in a time share). The home that she had previously sold for £50,000 was now worth £88,000. The defender, by contrast, retained his property, worth over £200,000. Although that home was now subject to a £64,000 mortgage (having been mortgage-free before the relationship), he had substantially improved his property, acquired a portfolio of shares (purchased with the profits of an investment made in the pursuer's son's business) and retained a part-time income, along with his pension.

Like previous sheriffs, Sheriff Mackie was not provided with comprehensive, documented evidence of the parties' regular income and expenditure, but she perhaps has the most accepting (realistic?) view of the sheriffs to date on this matter:

[67] Quantification of economic advantage and disadvantage and contributions by parties is unlikely to be precise having regard to the nature of relationships and the tendency to "pool" resources both financial and non-financial. It is also likely to be hampered ... by the absence of detailed vouching [presentation of documentary evidence] which parties, not anticipating the cessation of cohabitation, are unlikely to have retained. Inevitably, a "broad brush" approach is likely to be adopted.

²⁵⁸ Before the parties' relationship, she had been caring for her elderly father until his death.

Deriving no guidance from *Jamieson v Rodhouse*, *CM v STS*, or the 1985 Act,²⁵⁹ the sheriff closely followed the structure dictated by ss 28(5) and (6).²⁶⁰ While her overall approach was fairly broad brush, there is some tension between her rejection of precise calculation and her understanding of the objective as compensatory.²⁶¹

[41] “Having regard to” economic advantage and disadvantage does not mean that a precise calculation of loss requires to be made ...

[42] ... I do not believe that in making an order in terms of section 28 the court is attempting to balance the financial positions of the parties. As I have already pointed out there is no direction to achieve a fair division of the parties’ assets. It appears to me that what Parliament intended the court to do was to consider whether, having regard to what each party contributed to the relationship either financially or otherwise, there was any net economic disadvantage or loss arising as a result of the relationship which might be redressed by an order for payment of a capital sum. Such a payment appears to be more in the nature of compensation.

In consequence of that exercise, she found that the defender had enjoyed economic advantage from the pursuer’s financial and non-financial contributions²⁶² which was not offset by the debts that the defender had incurred during the relationship, as they were incurred voluntarily for his benefit (an improved house and personal investments).²⁶³ But despite this finding, the award appears to have been based almost entirely on the pursuer’s economic disadvantage which, it was found, was not *sufficiently*²⁶⁴ offset by the economic advantage that she had enjoyed. That disadvantage lay in the lost opportunity to enjoy the increase in value of the home that she originally owned and

²⁵⁹ The sheriff concluded that Parliament clearly intended a different approach under the 2006 Act, but went on somewhat sardonically to observe that just *what* that different approach is was not “immediately discernible from the wording of the provisions”: note, [39].

²⁶⁰ See note, [43], and then the analysis from [48] onwards.

²⁶¹ Contrast the view in *Coyle v Coyle* 2004 Fam LR 2 in relation to s 9(1)(b) of the 1985 Act that in taking “fair account” of economic advantage and disadvantage, the exercise is not one of compensation; see also *Dougan v Dougan* 1998 SLT (Sh Ct) 27, 30.

²⁶² Note, [49] and [51].

²⁶³ Note, [53].

²⁶⁴ Note, [65].

would not have sold had it not been for the relationship: she had not been struggling to pay the mortgage on it and had given it up only to further her relationship with the defender.²⁶⁵ As it was, she owned no property at all, had no prospect of doing so again and was renting.²⁶⁶ The increase in the value of her previous home, together with her extra contribution to the parties' timeshare,²⁶⁷ yielded the award of £39,500, which was not halved (and the question of halving was not mentioned).²⁶⁸

Various questions arise. First, while the economic advantage conferred on the pursuer may not have been as valuable as the appreciation in the value of her former home (which she was treated as having lost), the sheriff appeared to discount it entirely, rather than to allow it to offset the relevant portion of the pursuer's economic disadvantage.²⁶⁹ No reasons are offered for this. In *CM v STS*, by contrast, the defender's financial support of the pursuer was allowed to offset loss of earnings during the relationship. But it may be argued that the loss of the home and its increase in value is different because ongoing: no amount of "water under the bridge" bill-payment by the defender during the relationship (even assuming that it constitutes an "economic advantage" in the terms of the Act²⁷⁰) could alleviate that loss, since those payments gave the pursuer no cash in hand or income-generating capacity at the end of the relationship.²⁷¹ The better analogy would be with loss of earning capacity which continues to have effects after separation, and so which cannot be said to have been offset by financial support which is no longer provided.

The concept of economic disadvantage based on absence from the property market was not directly considered in *CM v STS*, despite Lord Matthews's acknowledgement that the defender in that case had been a home-owner until his relationship with the

²⁶⁵ Note, [4].

²⁶⁶ Note, [56].

²⁶⁷ This might have been better characterised as an economic advantage to the defender, in so far as he had in his hands at the end of the relationship a capital asset (his half-share of the timeshare) in part paid for by the pursuer (she having contributed more than half the price).

²⁶⁸ Cf *CM v STS*.

²⁶⁹ Note, [61]-[65].

²⁷⁰ See also n 255 above.

²⁷¹ The same could be said of the economic advantage supposedly conferred by the pursuer on the defender.

pursuer, from which time he had paid the mortgage on *her* property, leaving him at the bottom of the property ladder again.²⁷² But there are further conundra. For example, it was not contended by the pursuer in *Gow* that she should be awarded enough to acquire a new home.²⁷³ This perhaps reflects the fact that the pursuer spent the proceeds of her sale on matters of personal and joint benefit and so could not be said to have lost the benefit of the property's then value – she had simply redirected its value to cater for other wants.²⁷⁴ So the award was not seeking to restore the pursuer to the position that she would have been in had it not been for the relationship; indeed, there is no mandate for that approach in the Act. The “loss” for which the pursuer was compensated here may seem somewhat notional, but it is perhaps no more notional than the loss of earning arising from absence from the labour market, the paradigm form of economic disadvantage claim. It will be interesting to see whether and how this sort of argument features in future cases.

²⁷² *CM v STS*, at [141]. But he was at least, by virtue of having made those payments on her property, alleviated of any obligation to pay her a capital sum in relation to her economic disadvantage from labour market absence.

²⁷³ Note, [32].

²⁷⁴ This may be the significance of the observations at note, [57].

Cases relating to claims on death under s 29

Chebotareva v Khandro (sheriff decision, Tayside Central and Fife at Stirling), 2008 Fam LR 66

Like the first reported decision on s 28, the first on s 29 did not involve a substantive claim but preliminary questions. The principal issue here was whether the Act applied at all, given the requirement in s 29(1)(b) that the deceased be domiciled in Scotland at the date of death. The case involves no interpretation of any point of law, being concerned simply to make a finding of fact on this point. Subsidiary issues, which would only arise if it were found that the deceased was Scottish domiciled at death, concerned the jurisdiction of the sheriff under s 29(5)(b) (which turned on a finding that the deceased was habitually resident in the relevant sheriffdom at the date of death) and whether the parties were cohabiting. While the sheriff found in favour of the pursuer on the question of cohabitation, he found that the deceased had retained his domicile of origin in England, and so Scottish law did not apply.

The case illustrates the types of fact that might be taken into account in reaching a finding of fact regarding habitual residence and domicile. Evidence considered here included the electricity bills for the flat claimed by the pursuer to have been their habitual residence in Scotland; the council tax rebate claimed by the deceased on this flat on the basis that it was uninhabited; and the fact that the neighbours had neither heard any sounds coming from the flat nor seen the (apparently visually distinctive) deceased in the vicinity.

Savage v Purches (sheriff decision, Tayside Central and Fife at Falkirk) 2009 Fam LR 6

This was the first reported decision on a substantive claim under s 29. The claim failed, and it is worth comparing the facts of this case with the very different circumstances in *Windram v Windram and another*, below, where the claim was markedly successful.

The pursuer and deceased in *Savage v Purches* had cohabited in a “loving relationship”²⁷⁵ for two years and eight months in the defender’s property. The pursuer had significant assets of his own, including a flat, which he rented out, and various

²⁷⁵ Findings, para 14.

investments worth about £230,000. Having changed career during the relationship with the support of the deceased, the pursuer was now earning around £23,000 pa. having previously earned around £18,500 pa. The deceased had bought him a car and funded several foreign holidays for them both. Particularly when changing career, the pursuer had been largely dependent on the deceased. At no time had he paid rent or contributed to the defender's mortgage, though he paid for occasional shopping, ironing (which they sent out) and dog grooming. They had no joint account, had not discussed civil partnership, and the pursuer was not privy to all the deceased's financial affairs. On the deceased's death, the pursuer became entitled to a pension of over £9,500 pa, attributed a capitalised value of nearly £300,000,²⁷⁶ together with nearly £125,000 cash (a half-share in the lump sum payable under the deceased's pension scheme); this was determined at the discretion of the pension trustees, the pursuer having not been nominated by the deceased as his pension beneficiary on the relevant "expression of wish" form.

Under the Succession (Scotland) Act 1964 s 2(1)(c), the net estate – worth about £186,000 – would (subject to the pursuer's claim) pass to the deceased's closest relative, his half-sister (the defender), who had been appointed executrix dative and given the other half-share of the pension lump sum. The quality of the defender's relationship with the deceased was disputed, but the sheriff found it to have been close.²⁷⁷ Had the pursuer and deceased been civil partners, the pursuer's legal and prior rights would have entitled him to the whole estate, to the exclusion of the half-sister. The pursuer having no such entitlement, the point at issue was whether he should be awarded a discretionary capital sum from the estate under s 29.

Although it was not disputed that the pursuer was eligible as the deceased's cohabitant (s 25) to bring a claim under s 29, that claim was assessed at nil. It was implicitly accepted by the sheriff that s 29(4) imposes a ceiling on awards under s 29 – that they must be no more generous than the entitlement which a spouse would have – but that that does not mean the court must aim to award that amount. The legislation instead creates a wide discretion which can, in an appropriate case, properly be exercised to

²⁷⁶ The sheriff specifically approves this technique of ascertaining with the benefit of actuarial evidence what it would cost today to purchase a similar annuity, to give the pension income stream a capital value: see note, para 17.

²⁷⁷ The sheriff found the pursuer to be of limited credibility as a witness on this and certain financial matters: see Note, para 16, and earlier remarks at para 3-5.

grant no award. But the sheriff emphasised that, despite his negative findings with regard to the pursuer's credibility as a witness (and, it might be added, his remarks about the claim having a "distinct whiff of avarice"²⁷⁸) he was "not seeking to categorise him as an 'unworthy' beneficiary ... for I see no place in the legislation for such an approach within the exercise of my discretion".²⁷⁹

The nil award was reached having regard to a number of factors,²⁸⁰ in particular: the substantial benefits which accrued to the pursuer under the pension (s 29(3)(b)), which (it may be noted) substantially exceeded the value of the estate and added to the pursuer's existing, not inconsiderable asset pool. The sheriff remarked that the pension benefits "are on such a scale in themselves as to militate against the making of any award in favour of the pursuer". The sheriff was then "fortified" in that view by several further factors, brought into play by s 29(3)(d) which invites the court to take account of "any other matter the court considers appropriate": here, the duration of the relationship, viewed in context, and "financial matters germane to any intentions of the deceased on death".²⁸¹ The sheriff noted that the relationship "reflected but a small fraction of the adult life of the deceased", and should be viewed in light of the fact that the deceased had written no will in favour of the pursuer; this was particularly notable as the deceased had made a will, subsequently destroyed, in favour of a previous partner with whom he had had a 15-year relationship. The sheriff also highlighted the lack of joint account or other shared assets, and the lack of any discussion about setting up a joint account.

Windram v Windram and a third party (sheriff decision, Lothian and Borders at Jedburgh) 2009 Fam LR 157

The facts of *Windram* could not be more different from *Savage v Purches* in several respects. The pursuer and the deceased had started out in life together, having cohabited for 25 years since they first met aged 18 and 20. They had two children. Since the children's arrival, the parties' relationship had followed a "traditional" model, or as the sheriff put it, "their domestic situation could be described as 'normal' for a

²⁷⁸ Note, para 5.

²⁷⁹ Note, para 16.

²⁸⁰ Ibid.

²⁸¹ Note the echoes of s 25(2) factors here.

married couple”.²⁸² The pursuer gave up work to care for home and family while the deceased continued to work full time; the pursuer latterly worked part-time as a classroom assistant during school hours and contributed her modest wages to the household income. They had no joint account but had pooled their income to meet the household outgoings. Their various homes had all been held by the deceased in his sole name and the pursuer had no assets of her own. As the sheriff remarked, “having foregone the opportunity to establish herself in her twenties and thirties and part of her forties, [the pursuer] would have no certainty of a home during her later middle years and beyond”.²⁸³

The deceased’s death was untimely: he had been struck down by cancer so suddenly that the parties’ undisputed intention (formed in view of his illness) to regularise their position by marrying before his death was defeated. At the date of death, the older child was nearly 16, the younger still in primary school. The net estate (worth around £305,000, less the secured loan of c.£54,500 over the home) consisted of the family home, separate business premises with an adjoining flat, various fixtures, furnishings and other personal possessions, and the balances of several bank accounts.

Had the parties been able to marry, the pursuer’s legal and prior rights as spouse would have entitled her to the home and its contents, together with £45,000 in cash. As it was, the entire net estate would (subject to a successful claim by the pursuer under s 29) pass to the children under the Succession (Scotland) Act 1964. The pursuer would be left to the £25,500 received from the deceased’s pension scheme. Moreover, in theory, when the older child reached 16 (as he soon would), he would be entitled to call for the sale of the family home, and so render his mother homeless.

The issue was what provision if any ought to be made for the pursuer’s benefit. She wished to remain living in the family home, with the children, and to retain the house contents. The home was subject to a mortgage, and it was unclear whether she was in a position to meet the repayments or whether the bank would agree to the transfer of the house to her while the loan was outstanding.

²⁸² Note, para 3.

²⁸³ Note, para 15.

Before considering the substantive claim, it is important to note a procedural matter that arises from these facts and may be expected to arise again.²⁸⁴ Since the defenders in this case were minor children, it was necessary that someone act as executor dative *qua* guardian on their behalf. The pursuer had herself applied to adopt this role and been appointed. But that obviously raises a potential conflict of interest: how can the cohabitant act both as executor-dative and then bring a claim against the estate as a pursuer under s 29, effectively against herself wearing her executor's hat? To alleviate the conflict, a third party was appointed to act as curator *ad litem* to represent the interests of the two children, whose entitlements under the Succession Act would be depleted by any successful claim by the pursuer.

The third party argued on the children's behalf that this was a case in which the estate should pass entirely to the children. She had no better answer to the potential predicament of the pursuer, should her child in due course wish to sell the house from underneath her, than to say that it was "difficult to be fair to both the pursuer and the children".²⁸⁵

In the event, the pursuer received the deceased's interest in the family home, subject to the mortgage, and the furniture and plenishings belonging to the deceased in that property, together with a capital sum of £34,000 (c. £11,000 less than she would have received had she been a surviving spouse). This left the children with about £70,000 each from the rest of their father's estate. These sums, and the capital sum for the pursuer, would be raised by selling the deceased's business premises or using it as security for a loan, whilst letting it out to raise an income.

Sheriff Scott's decision has a purposive flavour, concerned to achieve an outcome that protected the practical interests of the pursuer, given a long relationship in which she had "surrendered her own separate financial interests" and "placed herself in a position of dependency on the deceased".²⁸⁶ Given the history, it would be unfair to leave her without any assets, in particular without the security of a home. Should the children inherit the house, they would have no obligation to preserve it for their mother's occupation; she, by contrast, would remain responsible to aliment them until they

²⁸⁴ See chapter 7 for our interviewees' experience of this point, which had been flagged up by Malcolm (2007) and Nicholson (2007). The interviews pre-dated *Windram*.

²⁸⁵ Note, para 11-12.

²⁸⁶ {ref}

reached the age of 25. That being so, transferring the family home to her would both give her long-term residential security and enable her to continue to provide both children with a home, and still leave the children with a sizeable inheritance from their father. Crucially, the capital sum component of the pursuer's award was calculated at a level which, together with her pension lump sum, would enable her to discharge the outstanding debt over the family home, with a balance remaining to meet the costs of maintenance and repair.

This result, the sheriff concluded, struck a fair balance between both the children's financial interests in their inheritance and the pursuer's interests. Indeed, it may be suggested that, for so long as the children remain factually dependent on their mother (as children increasingly do for prolonged periods after attaining majority), to do other than the sheriff did here would be artificially to separate the interests of family members whose medium-term futures and practical interests are inextricably linked.

CONCLUSION

As we reported in Part 2, practitioners currently feel somewhat uncertain in interpreting and applying the cohabitation provisions of the 2006 Act, not least given the limited extent of the reported case law. When we conducted our interviews, only six of the eight reported cases described in this Appendix had been decided, and of those only four actually dealt with substantive claims rather than disputes regarding preliminary issues (such as eligibility or jurisdiction to claim at all). Just as our interviewees had mixed views about the applicability of 1985 Act case law to separation cases under the new Act, so too judicial opinion on this question is split, though there is perhaps a slight trend against relying on those decisions in 2006 Act cases.²⁸⁷ The distinct body of case law that will over time build up under the Act will therefore be an important source of guidance for practitioners seeking to advise on and settle cohabitation claims.

²⁸⁷ *Jamieson v Rodhouse, Gow v Grant*; cf the view of Lord Matthews in *CM v STS*. Thomson (2008) criticised Lord Matthews' reliance on 1985 Act cases, urging caution because of the differences between the Acts, not least the equal sharing starting point that applies in most divorce cases; his commentary was noted without comment in *Falconer v Dods*.