

Written evidence submitted by Kate Dowdalls [HAB0384]

1. What tests must cohabitants satisfy to claim remedies?

- i. Eligibility to claim financial provision on cessation of cohabitation, whether on separation or death, depends on satisfying the definition of “cohabitant” in section 25 of the Family Law (Scotland) Act 2006, as modified by section 4 of the Marriage and Civil Partnership (Scotland) Act 2014. Broadly, a person is a cohabitant (and therefore entitled to make an application) if they are either member of a couple living or who lived together as if spouses (whether of the same / different sexes). There is no minimum duration requirement.
- ii. The test for deciding what order may be made in a claim otherwise than on death is set out in section 28(3) – (6) of 2006 Act. The orders are: a capital sum; or “an amount ... in respect of the economic burden of caring, after the end of the cohabitation ...” for a child of the parties. The test is:
 - (a) whether (and if so to what extent) the defender has derived economic advantage from contributions made by the applicant; (offset by economic disadvantage suffered in the interests of the other cohabitant or a relevant child)
 - (b) whether (and if so to what extent) the applicant has suffered economic disadvantage in the interests of the other cohabitant or any relevant child; (offset by any economic advantage derived from contributions made by the other cohabitant.)

The offsetting provisions do not apply if the claim is for an amount in respect of the economic burden of child care.

The UKSC, in *Gow v Grant* 2013 SC (UKSC) 1; [2012] UKSC 29, said that: “fairness” is the principle that lies at the heart of decisions on financial provision under section 28; the language of “fairness” does not appear in the relevant provisions.

2. How effective are these tests?

- i. No real difficulties have been encountered in practice in relation to the test for eligibility, and the absence of a qualifying period is not widely criticised. Those (a minority) who favour a qualifying period are not agreed on what it should be, which supports the view of the legislators in 2006 and the Scottish Law Commission in 1992 that setting a qualifying time period would be arbitrary, rigid and unresponsive to individual cases.
- ii. In relation to the test by which claims for financial provision are determined, this has been widely criticised as being overly complex and not providing sufficient guidance to parties, their advisors and the courts. The guidance given by UKSC has not alleviated these concerns.

The test for claims for “an amount” in respect of the economic burden of child care is viewed as particularly troublesome as the test requires consideration of past economic advantage / disadvantage in circumstances where the order

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is intended to provide for the sharing of what is, essentially, a future economic burden.

A more principled approach has been called for, whereby clearer guidance is given to parties, their advisors and the courts.

3. What is the current law for cohabitants on death of a partner?

This is set out in s.29 of the 2006 Act.

A claim may be made by a bereaved cohabitant only on intestacy and must be made within 6 months of death (the Scottish Government has undertaken to increase that period to 1 year).

The remedies available are payment of a capital sum or transfer of heritable or movable property, from the deceased's net intestate estate (that is, after payment of IHT and other liabilities, and satisfaction of the legal and prior rights of any surviving spouse / civil partner).

In deciding what order to make, the court shall have regard to the size and nature of the estate, any other benefits that the bereaved cohabitant will receive in consequence of the death and the nature and extent of other rights against / claims on the estate. Any order made cannot exceed that which would have been made had the survivor been a spouse / civil partner of the deceased.

4. Could you tell us about the approach taken in Scotland in relation to parties regulating their affairs by way of a cohabitation agreement?

The 2006 Act contains no statutory provision regarding cohabitation agreements.

Such agreements are subject to the ordinary law of contract and will be given effect unless declared void under the usual rules of contract (ie the agreement is binding and valid unless reduced on grounds of extortion, fraud, facility and circumvention, undue influence and error). Agreements opting out of the statutory regime would therefore be given effect.

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