

Family Law for Conveyancers and Private Client Lawyers

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Overview of Presentation

- A review of the law covering the rights of cohabitants in particular those covered under Section 28(2)(a) of the Family Law (Scotland) Act 2006.
- A brief look at Section 29 of the Act
- Cohabitation Agreements
- Gifted/inherited money and the impact on matrimonial property
- Pre-nuptial Agreements
- Questions?

Who is a Cohabitant?

Section 25

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

What factors do the court take into account?

- The length of the period during which the couple have been living together (or lived together)
- The nature of their relationship during that period and
- The nature and extent of any financial arrangements subsisting, or which subsisted, during that period.

What orders can the court make?

Section 28(2): On the application of a Cohabitant (the “applicant”) the appropriate Court may, after having regard to the matters mentioned in sub-section (3):

- make an Order requiring the other cohabitant (the Defender) to pay a capital sum of an amount specified in the Order to the Applicant;
- 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;
- make such interim Order as it thinks fit.

Section 28(3)

- Those matters are:
 - Whether (and if so, to what extent) the Defender has derived economic advantage from contributions made by the applicant;
 - Whether (and if so, to what extent) the applicant has suffered economic disadvantage in the interests of (1) the Defender; or (2) any relevant child.

An offsetting exercise

Section 28(5): 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:

- The applicant; or
- Any relevant child.

Section 28 (6)

The second matter is the extent to which any economic disadvantage suffered by the Applicant in the interests of:

- The Defender; or
- Any relevant child

is offset by any economic advantage the Applicant has derived from contributions made by the Defender.

Warning!

!!Time bar Alert!!

- Section 28(8) makes clear that any application under this section shall be made not later than one year after the day on which the cohabitants cease to cohabit
- Vital to pin point date of separation
- Flag up importance of obtaining specialist advice
- Courtney's Executors v Campbell (2016) CSOH 136

Section 28 Caselaw

- **Gow v Grant 2013 SC (UKSC) 29**
 - Fairness a clear driver to such claims
 - Claims need to be interpreted broadly
 - Rough and ready determination
 - Two stage process – looking at beginning and end of cohabitation
- **Whigham v Owen (2013) CSOH 29**
 - It was felt that awards in cohabitation cases should be lower than Divorce Cases
 - Award of £250,000
- **M v S (2017) CSOH 151**
 - Two heads of claim: historic loss of earnings (from Full Time to Part time) and half the increase in value of the farm they lived in
 - Award of £912,000

Possible Reform ?

- Should there be separate regimes for financial provision for separating spouses and cohabitants? (is this an indication that the law on divorce should be extended to cohabitants? Is that the right way forward?)
- Whether the definition of cohabitant is apt in the 21st Century.
- What purpose is served by sections 26 and 27 ? (deals with household contents and money/property)
- What is the purpose of an award under section 28(2)(a) or (b)?
- Should a wider range of remedies be available?
- Is the definition of child in section 28(2)(b) too narrow?
- Does the test in section 28(3)-(6), meet the policy aims of certainty, fairness and clarity? If not, how might it be improved?
- Should resources be taken into account?
- Should provision be made to set aside or vary cohabitation agreements in certain circumstances?
- Is the time limit for claims under section 28 too short? If so, should it be extended or should there be judicial discretion to allow late claims?
- Should the remedy of unjustified enrichment be available to former cohabitants (in addition to / instead of) a claim under section 28?

So what can be learned?

- Cohabitation Agreements should be considered
- Clients should know there are implications for their decision to cohabit
- Prevention is better than cure

Quick Word on Section 29 Cases

- Application to Court by survivor for provision on intestacy

Section 29 (1) outlines that this section applies where:

- A cohabitant (the deceased) dies intestate;
- Immediately before the death the deceased was (1) domiciled in Scotland; and (2) cohabiting with another cohabitant (the survivor).

What awards can the court make?

- Section 29(2): Subject to subsection (4) on the application of the survivor, the Court may:
 - (a) after having regard to the matters mentioned in sub-section 3, make an Order – (1) for payment to the survivor out of the deceased's net intestate estate a capital sum of such amount as may be specified in the Order; (2) 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.

What will the court consider?

Section 29(3)

- (a) the size and nature of the deceased's net intestate estate;
- (b) any benefit received, or to be received, by the survivor – (1) on, or in consequence of the deceased's death; and (2) 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.

Section 29(4)

- An Order or interim Order under sub-section (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.

Warning

- !!Time Bar!!

Section 29 (6) makes clear:

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

- Reform?

Cohabitation Agreement

- Scenario 1

Property being bought in joint names but the parties are contributing different amounts as far as the deposit are concerned.

- Scenario 2

Title being taken in one person's name only.

What is Matrimonial Property?

- Section 10 of The Family Law (Scotland) Act 1985
- “all the property belonging to the parties, or either of them at the relevant date which was acquired by them (or him) (otherwise than by way of gift or in succession from a third party) before the marriage for use by them as a family home or as furniture or furnishings for such home or during the marriage but before the relevant date”.
- The net value of matrimonial property shall be taken to be shared fairly between the parties when it is shared equally or in such other proportions as are justified by special circumstances.
- *Cunningham v Cunningham* FAM LR12

So how should you deal with all of this in practice?

- Explain that the use of the funds to purchase the house has implications in family law.
- Ask the clients to consider how they wish to take title.
- Explain it could be taken in unequal shares but specialist family advice should be taken in relation to how that would effect the investment being made.
- Advise that a Post Nuptial Agreement could be entered into and explain that they should both take independent legal advice on this.
- Importantly flag up that there are likely to be family law implications and specialist family advice should be sought.

Prenuptial Agreements

- What are they for?
- What can they cover?

Setting Aside the Agreement

Section 16 of the Family Law (Scotland) Act

The Court may make an Order setting aside or varying:

- Any term of the Agreement relating to periodical allowance where the Agreement expressly provides for the subsequent setting aside or variation by the Court of that term;
- The Agreement or any term of it where the Agreement was not fair and reasonable at the time entered into.
- *Gillon v Gillon* (1995) SLT 678

Principles

- The agreement should be examined from the point of view of both fairness and reasonableness.
- All relevant circumstances leading up to and prevailing at the time of execution of the agreement need to be considered, including quality and nature of legal advice given to either party.
- Evidence that some unfair advantage has been taken by one party of the other, by reason of circumstances prevailing at the time of negotiations may have a cogent bearing on the determination of the issue.
- The court should not be unduly ready to overturn agreements validly entered into.
- The fact that it transpires that an agreement had led to an unequal and possibly a very unequal division of assets does not by itself necessarily give rise to any inference of unfairness or unreasonableness.

Conclusion

- There are family law implications in the work you do
- Written Agreements should be encouraged
- Specialist Family Advice should be sought
- Providing clients with the best possible service

Any Questions?

Thank you for listening!

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