



Law Society  
of Scotland



# Rights of cohabitants

Family Law (Scotland) Act 2006, sections 28 and 29

March 2019



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Each year we undertake new proactive public policy projects to address areas of the law that have failed to meet the needs of our modern society and keep up with technological developments. This year, we have committed to consider the reform of cohabitants' rights.

## Project objective

The objective of the project is to set out proposals for change to the law in relation to cohabitants and their rights to claim under sections 28 and 29 of the Family Law (Scotland) Act 2006. The project will raise awareness of the current issues with the law and provide a proposed solution. A list of the members of the working group is annexed to this paper.

We note the terms of recent Scottish Government publications which concern, in part, the issues raised by this project: the Analysis of the Written Consultation Responses and Scottish Government's Response to the Consultation on Technical Issues Relating to Succession<sup>1</sup> and a further consultation on the Law of Succession<sup>2</sup>, launched in February 2019. We also note work planned by the Scottish Law Commission in relation to the law of cohabitation during the first phase of their review of aspects of family law<sup>3</sup>. The project has taken into account the proposals made in these papers.

## Context

There has been a significant growth in the number of cohabitating couples and families in the UK in recent years. The cohabiting couple family was the fastest growing family type in the UK over the 20-year period

<sup>1</sup> <https://www2.gov.scot/Resource/0047/00478965.pdf>

<sup>2</sup> <https://consult.gov.scot/justice/law-of-succession-2019/>

<sup>3</sup> <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/aspects-of-family-law/>

to 2017<sup>4</sup>. The number of such families more than doubled -from 1.474 million cohabiting families in 1996 to 3.291 million in 2017<sup>5</sup>, a growth of 123%. Cohabiting couple families now account for 17% of all families in the UK<sup>6</sup>. These statistics are reflected in Scotland where, in 2011, 16% of families were cohabiting couples<sup>7</sup>.

Within the period from 2005 to 2015 alone, the number of cohabiting couple families grew by almost 30%<sup>8</sup>. This demonstrates the significant growth in this family type since around the time of the introduction of the Family Law (Scotland) Act 2006 (the Act).

The Act contains a series of provisions concerning cohabitants – found principally in sections 25 - 29. The definition of cohabitant is set out in section 25:

- “(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.”<sup>9</sup>

The Policy Memorandum to the Family Law (Scotland) Act states: “The intention is to create legal safeguards for the protection of cohabitants in longstanding and enduring relationships...”<sup>10</sup>. The Act deals with rights in certain household goods (section 26), rights in certain money and property (section 27), financial provision where cohabitation ends otherwise than by death (section 28), and provides for an application to a court by a survivor on intestacy (section 29). This paper focuses on certain aspects of sections 28 and 29 only, although we recognise that the definition of cohabitant as set out in section 25 is relevant to our remarks and conclusions.

Research conducted by the Scottish Consumer Council in 2006 found that 37% of respondents had a will<sup>11</sup>. They found that this proportion “varied considerably according to age, socioeconomic category and relationship status.” It is therefore clear that there is a significant proportion of the public dying without a will – a matter which is relevant for the purposes of applications under section 29 as the section applies only where a cohabitant dies intestate.

The significant growth in cohabitation in recent years supports the relevance and importance of the law in this area to our society.

<sup>4</sup> ONS 2017 Statistical Bulletin.

<sup>5</sup> ONS 2015 and 2017 Statistical Bulletins.

<sup>6</sup> ONS 2017 Statistical Bulletin.

<sup>7</sup> 2011 Census, Table DC1102SC and Table DC1108SC, [www.scotlandcensus.gov.uk](http://www.scotlandcensus.gov.uk)

<sup>8</sup> ONS 2015 Statistical Bulletin.

<sup>9</sup> See section 4 of the Marriage and Civil Partnership (Scotland) Act 2014 with regards to interpretation of this.

<sup>10</sup> Paragraph 67.

<sup>11</sup> Scottish Consumer Council, *Wills and Awareness of Inheritance Rights in Scotland*, 2006, page 6, accessed online on 9 January 2019, <http://webarchive.nationalarchives.gov.uk/20090724135800/http://scotcons.demonweb.co.uk/publications/reports/archive.htm>

## Issues arising

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Practitioners have identified a number of issues with the operation of the relevant provisions of the Family Law (Scotland) Act 2006<sup>12</sup>. We consider that a full review of the provisions of sections 25 – 29A would be merited. We note the post-legislative scrutiny of the Act undertaken by the Scottish Parliament’s Justice Committee in 2016<sup>13</sup> and the recommendations made by the Committee in relation to the Act’s provisions concerning cohabitants.

As referred to above, our consideration has been limited to sections 28 and 29 only, in particular to the matters addressed below.

### Section 28

With regards to section 28, an “application under this section shall be made not later than one year after the day on which the cohabitants cease to cohabit”. Section 29A provides for an extension of time in certain cross-border cases where there has been a cross-border mediation attempt. There is no discretion for the court to accept a late application and other than in cases where section 29A applies, there are no other means by which to extend the time for application. Case law has demonstrated the strict interpretation taken by the court towards the time period for applications<sup>14</sup>. We refer in this paper to the time period for applications but note the comments by the court in *Simpson v Downie*<sup>15</sup>, being that a timeously lodged application is a prerequisite to the court having jurisdiction to consider an application, rather than a time limit.

Practitioners report concerns regarding the time period. In research among solicitors in 2010, 76% identified time limits as a problematic area of the Act<sup>16</sup>.

It is common for there to be uncertainty as to when cohabitation has ended. The process of separation may be a gradual one and financial support may be ongoing. 60% of solicitors in the 2010 research noted ‘establishing the date of separation’ as a problematic area of the Act<sup>17</sup>. The need to raise and serve a court action within one year of the separation may impact upon the ability of parties to resolve matters by negotiation, mediation or collaboration. There are a number of other reasons why a court action may not be raised within the one year time limit – for example, parties may not be aware of their rights<sup>18</sup>; one or both parties may be attempting or hoping to rekindle the relationship; or one or both parties may be suffering the emotional effects of a relationship breakdown. There is the potential for vulnerable parties to be placed at a

<sup>12</sup> For further discussion around issues arising, see the Scottish Parliament’s Justice Committee Report: Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006, 6th Report, 2016 (Session 4); and Wasoff, F, Miles, J and Mordaunt, E (2010) *Legal Practitioners’ Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006*; Nuffield Foundation, Centre for Research on Families and Relationships, and Cambridge University; Edinburgh.

<sup>13</sup> *Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006*, SP Paper 963, 6th Report, 2016 (Session 4).

<sup>14</sup> See Lord Emslie’s comments in *Simpson v Downie*, [2012] CSIH 74, at paragraph 13.

<sup>15</sup> *Ibid.*

<sup>16</sup> Wasoff, F, Miles, J and Mordaunt, E (2010) *Legal Practitioners’ Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006*; Nuffield Foundation, Centre for Research on Families and Relationships, and Cambridge University; Edinburgh, table 5.4.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* See discussion at pages 74-76.

disadvantage as a result of the limited time frame for lodging an application. For example, an abused partner may be reluctant to pursue a claim shortly after the breakdown of the relationship for fear of repercussions.

It is interesting to note that in other areas of Scots law, parties are afforded longer periods time to raise an action. For example, for personal injury actions, three years, and negligence actions, five years.

This lack of discretion can also give rise to issues when procedural difficulties arise, for example where a writ is lodged with the court timeously but then difficulties arise in service of the action upon the defender<sup>19</sup>, or the writ is mislaid. The limited time frame, when taken with the lack of discretion of the court to accept a late application, has the potential to create harsh results.

Turning to another matter, recent case law suggests that an action raised on the common law basis of claim of unjustified enrichment is not competent in situations where section 28 would have applied. The case of *Courtney's Executors v Campbell*<sup>20</sup> was an action raised by the executors of a former cohabitant against his former partner at common law on the grounds that the defender had been unjustly enriched at the expense of the deceased, Mr Courtney. The pursuers sought to have the enrichment reversed. The enrichment was said to consist of two lump sum payments which had been made by the deceased to the defender, as well as a sum sought as recompense for benefits gained by the defender as a result of the deceased's contribution to renovations made to a property owned in the defender's sole name.

The parties' relationship had ended in May 2013. The deceased sought legal advice in August 2014 with regards to the parties' separation, some 15 months after they had ceased to cohabit. During this period, the defender's son had been unwell and subsequently died. It was suggested that this was perhaps the reason for the deceased delaying in seeking legal advice. In the case, Lord Beckett referred to the subsidiarity principle, which has previously been held to prevent the seeking of recompense on the basis of unjustified enrichment where another legal remedy is or has been available by statute or common law<sup>21</sup>. He held that the pursuers were not entitled to raise a claim based on the equitable remedy of unjustified enrichment. He stated, referring to the one year period for making an application, that "there would need to be special and strong circumstances before a claim could be brought for an equitable remedy after that time has passed."<sup>22</sup> Lord Beckett did not consider that the fact that Mr Courtney may have chosen not to pursue legal action timeously due to Miss Campbell's circumstances amounted to "special and strong circumstances".

While this case is not binding, it has arguably given rise to uncertainty as to the legal position and to unfairness. It is recognised that unjustified enrichment is a remedy of last resort. However, the exclusion of unjustified enrichment entirely as a basis of claim when section 28 provisions could have applied has created the potential for some parties to have rights under unjustified enrichment where others do not. For

<sup>19</sup> The unreported case of *Hendry v Bruce*, Hamilton Sheriff Court, 2014, demonstrates potential difficulties with service of a section 29 application. This case is subject to discussion in Hinchin M, *Section 29 claims, time bar and service* (2014) JLSS Online, accessed online on 11 January 2019, <http://www.journalonline.co.uk/Magazine/59-10/1014551.aspx#.XDin66pLGUk>

<sup>20</sup> *Jan Claire Igoe, Dominic Vincent Macari as executors nominate of the late Robert Nisbet Courtney v Yvonne Campbell* [2016] CSOH 136.

<sup>21</sup> See *Varney (Scotland) Ltd v Lanark Burgh Council* 1974 SC 245.

<sup>22</sup> *Jan Claire Igoe, Dominic Vincent Macari as executors nominate of the late Robert Nisbet Courtney v Yvonne Campbell* [2016] CSOH 136, at paragraph 67.

example, people living together as a couple who do not meet the definition of cohabitants under the Act may be entitled to raise an action based on unjustified enrichment while those who meet the definition but fail to lodge an application timeously, perhaps for good reason, are not. It appears unlikely that it was Parliament's intention to remove this basis of claim when the Act was enacted.

## Section 29

Turning to section 29, an application must be made to the court within six months of the date of the death of the cohabitant. This is a limited period of time particularly when a cohabitant is likely to be grieving and may be dealing with a number of practical matters related to, or following upon, the death of their cohabitant. Section 29A also applies in its limited terms to section 29 applications. As referred to above, practitioners have reported concerns regarding the time period involved in these provisions<sup>23</sup>. There is no discretion within section 29 for the court to accept an application after the six month period has expired. Such a provision was included in the Family Law (Scotland) Bill at the time of its introduction – “the court may, on cause shown, permit an application to be made after the expiry of the period....”<sup>24</sup>.

The current provisions can be contrasted with those of section 4 of the Succession (Scotland) Act 2016 which concerns rectification of a will and provides:

“(1) Subject to subsection (2), an application under section 3(1)(c) must be made within the period of 6 months commencing—

- (a) in a case where confirmation is obtained in respect of the testator's estate, on the date of its being obtained, or
- (b) in any other case, on the date of the testator's death.

(2) The court may, on cause shown, consider an application which is made outwith that period of 6 months.”

The case of *X v A, B, C, and D*<sup>25</sup> highlights difficulties around the raising of an action under section 29. In this case, a cohabitant (X) made an application under section 29 for provision on intestacy. The parents of the deceased (A and B) along with the deceased's siblings (C and D) were called as defenders to the action, all in their capacity as next of kin and representatives of the estate. The application was made to the court timeously. The pursuer's solicitors had knowledge that the first and second defenders had been appointed as executors dative but the individual who drafted the application was not aware of this fact. The action was raised *cognitionis causa tantum*. This refers to an action raised by creditor of a deceased debtor in order to constitute a debt against the estate. The first and second defenders objected to this, claiming

<sup>23</sup> Wasoff, F, Miles, J and Mordaunt, E (2010) Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006; Nuffield Foundation, Centre for Research on Families and Relationships, and Cambridge University; Edinburgh, table 5.4 and pages 71 to 73 for discussion.

<sup>24</sup> Family Law (Scotland) Bill [AS INTRODUCED], Section 22(7).

<sup>25</sup> [2016] SC EDIN 54.

that the action was not properly raised and was incompetent. The pursuer sought to amend to remove reference to decree *cognitionis causa tantum* and to substitute craves related to the first and second defenders' position as executors dative. The presiding Sheriff allowed the pursuer to tender a minute of amendment to rectify the problem.

The Sheriff considered the terms of Rule 33.6A of the Ordinary Cause Rules<sup>26</sup> which provides the procedure for an application under section 29 of the Act. The Rule states:

“(1) In an action for an order under section 29(2) of the Act of 2006 (application by survivor for provision on intestacy), the pursuer shall call the deceased's executor as a defender.”

The rule does not make provision for the procedure in cases in which there is no executor.

Rule 33.7, which concerns warrants and forms for intimation in family actions, states:

“(1) [Subject to paragraphs (5) and (7), in the initial writ] in a family action, the pursuer shall include a crave for a warrant for intimation–

....(p) in an action where a pursuer makes an application for an order under section 29(2) of the Act of 2006 (application by survivor for provision on intestacy) to any person having an interest in the deceased's net estate, and a notice of intimation in Form F12E shall be attached to the initial writ intimated to any such person...”

The Sheriff stated he did not “regard the appointment of an executor as being a fundamental prerequisite to the making of a claim.”<sup>27</sup> He said:

“Section 29 claims relate to the law of succession. It is a claim against an estate rather than a person. I can see that applications ought to convene executors as defenders. A failure to do so constitutes a failure to follow proper practice and should be remedied where that is possible. Nonetheless, in my opinion if the absence of an executor is not an absolute bar to the making of a claim pursuant to section 29, and I hold that it is not, it ought to follow that an action raised against someone other than the executor (which includes all interested parties) does not, of itself, render the action liable to dismissal as fundamentally incompetent.”<sup>28</sup>

The Sheriff did not hear arguments in relation to *cognitionis causa tantum* in and of itself. It would appear surprising, however, if a claim could not be progressed on this basis in circumstances where there is no appointment of an executor dative. Raising an action on this basis may, however, be complex – for example, where there are a large number of persons with an interest in the estate and/or beneficiaries require to be traced. It may not be feasible to do this within six months of the death, especially when a genealogist may require to be instructed. In addition, there is the potential for members of a cohabitant's

<sup>26</sup> Sheriff Courts (Scotland) Act 1907, Schedule 1, as amended.

<sup>27</sup> *X v A, B, C, and D* [2016] SC EDIN 54 at paragraph 18.

<sup>28</sup> *Ibid.* at paragraph 19.

family to seek to delay the administration of the deceased's estate until the six month period has expired with a view to attempting to prevent, or at least complicate, an application by the surviving cohabitant.

The limited time frame for applications and the lack of discretion for the court to accept a late application has the potential to give rise to fundamental problems in certain intestate situations. These difficulties can be demonstrated by two sets of circumstances, although we do not suggest that these examples are exhaustive of the situations in which difficulties may arise.

The first of these situations concerns the operation of the legal principle *conditio si testator sine liberis decesserit*<sup>29</sup> (the *conditio*). This principle provides for the reduction or deemed revocation of a will upon the subsequent birth of a child where that child is not provided for in the will. In the event that a child seeks reduction of a will in such circumstances, the deceased will be treated as having died intestate. Although as far as we are aware this is as yet untested in the Scottish courts, it would appear that in such circumstances a surviving cohabitant could pursue an application under section 29 as the deceased's estate would be intestate. A difficulty may arise where a child seeks to operate the *conditio* sometime after the six month period from the date of death. This would lead to reduction of the will and therefore cause the deceased's estate to fall into intestacy. The surviving cohabitant, however, would not be able to pursue an application under section 29 due to the length of time which had passed since the date of death. There is the potential for a child to deliberately delay in enacting the *conditio* in order to prevent a timeous application by a cohabitant.

The second situation of somewhat wider potential application concerns circumstances whereby the deceased died with an apparently valid will. At some time later, the will's validity is successfully challenged and reduced or for some reason, part of the estate falls into intestacy<sup>30</sup>. This again could have the result of preventing a cohabitant from making a claim on the now intestate estate where the reduction of a will or the estate otherwise becoming fully or partially intestate occurred after expiry of the period of six months from death.

These situations demonstrate potential difficulties which could arise as a result of the limited time frame for an application, coupled with the lack of discretion for a court to accept an application late. In addition, we note that the English case of *Land v Land*<sup>31</sup> highlights the potential for challenge under the European Convention on Human Rights of a limited time limit (in that case, three months) in discretionary claims in succession.

<sup>29</sup> See discussion on this in Paisley, R. R. M. (2016). *The Rationale and Fundamental Structure of the Conditio Si Testator Sine Liberis Decesserit in Scots Law*. In A. R. C. Simpson, S. C. Styles, E. West, & A. L. M. Wilson (Eds.), *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte*, University of Aberdeen, 2016.

<sup>30</sup> For discussion on this point, see *Munro's Trustees v Munro* 1971 SC 280.

<sup>31</sup> [2006] EWHC 2069.

Finally, the provisions of section 29 extend only to intestate estates. Section 29 provides a right for a cohabitant to apply to the court for an award out of the deceased's estate – it is not an automatic right in the estate. This was confirmed in the case of *Kerr v Mangan*<sup>32</sup>. In her Opinion, Lady Smith stated:

“It is, of course, true to say that section 29 does not, of itself, entitle the cohabitant to any part of the estate and it does not make a cohabitant a member of the class of persons upon whom intestate estate automatically devolves under Scots law. Rather, it gives power to the court to confer benefit on the cohabitant where no such right arose under the Scots law of succession before the 2006 Act.”<sup>33</sup>

The current law does not therefore fully protect a cohabitant against disinheritance. Previous research has shown support for protecting cohabitants against disinheritance. In 2005 research, 81% of respondents agreed that a surviving partner should be entitled to claim a share of the deceased's estate where they had not been provided for in the deceased's will<sup>34</sup>.

The lack of an 'automatic' provision for cohabitants can be contrasted with the protection for spouses and civil partners, and for children. Such individuals can claim 'legal rights', whether or not the deceased died testate or intestate. Legal rights are limited to a proportion of the deceased's net moveable estate. Although a person who has rights under a will requires to decide whether to accept those rights or claim legal rights, those who are not provided for in a will are provided with some protection from disinheritance by virtue of a legal rights claim. Spouses and civil partners have additional automatic rights, known as prior rights, where the deceased dies intestate. Although cohabitants are not generally entitled to prior rights, there is provision in respect of a prior right for a cohabitant to a croft tenancy<sup>35</sup>.

The Scottish Law Commission previously considered and recommended that their new proposed statutory regime for cohabitants should apply to testate as well as intestate estates<sup>36</sup>.

The Scottish Government has considered the potential extension of provisions to testate cases. Of those responding to relevant the question in their 2015 consultation, forty-two per cent stated that they disagreed with a cohabitant being able to claim on a testate estate, twenty-four per cent agreed, and thirty-three per cent said that they didn't know<sup>37</sup>.

<sup>32</sup> 2014 CSIH 69.

<sup>33</sup> *Ibid.* at paragraph 36.

<sup>34</sup> Scottish Executive Social Research, *Attitudes Towards Succession Law: Findings of a Scottish Omnibus Survey*, 2005, at pages 16 and 17.

<sup>35</sup> Succession (Scotland) Act 1964, section 8(2A).

<sup>36</sup> Scottish Law Commission, *Report on Succession*, 2009 (SCOT LAW COM No 215), paragraphs 4.8 and 4.9.

<sup>37</sup> *Scottish Government Analysis of Responses to the Consultation of the Law of Succession*, 18 October 2018, paragraph 6.31.

## Additional research

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We issued a consultation in relation to these matters which ran from 5 November 2018 to 3 December 2018. 24 responses were received. Of those, 18 responses were from individuals (75%) and six from law firms or other representative bodies (25%).

Of the 18 responses received from individuals, nine identified themselves as members of the Law Society of Scotland and one as a Law Society of Scotland Accredited Paralegal. Four identified themselves or were confirmed to be non-members. The remaining four individual respondents did not answer the question.

Two of the 24 responses did not address the questions asked by the consultation. These responses were acknowledged but have not been included within the analysis of responses below. These responses included comment on the fairness of the application of the Act's provisions to all categories of cohabitants (for example, opposite- and same-sex cohabitants) and personal experience of the court procedure in respect of a case.

The consultation addressed the matters below in a free-text format. Where percentage figures are given, these have been rounded to the nearest whole percentage. The themes of the responses to each question have been assessed in this analysis:

### **1) Whether the common law claim of unjustified enrichment should remain available to parties in circumstances where the one-year period within which a claim under section 28 must be made has been missed:**

15 out of the 22 respondents (68%) agreed that the common law claim of unjustified enrichment should be available in such circumstances.

Of these respondents, four provided conditional responses –

- One respondent said this should be available as long as the period for making an application is restricted to one year;
- One respondent noted that whether this remedy should remain in the longer term should be considered as part of a wider review of the law on cohabitation; and
- Two respondents said that this should be available in limited or exceptional circumstances only.

Four respondents (18%) did not agree that the common law claim of unjustified enrichment should be available. Two of these respondents highlighted that the time bar for claims should be extended, with one specifying that this should be extended to five years in order to be similar to other claims.

Two respondents (9%) stated that they had no opinion and one respondent (5%) provided another answer.

Comments made by respondents highlighted the following matters:

- The approach by the court to close this route of claim has been damaging;
- Unjustified enrichment is complicated and hardly ever successful;
- Many people do not speak to a solicitor until after a year from separation;
- The more cohabitation laws can be brought into line with marriage and civil partnership, the better;
- The remedy should be available although in reality, it is not an attractive option; and
- The purpose of section 28 is not to exclude other available remedies.

## **2) Whether the time limit for applications under section 28 should be subject to judicial discretion in limited circumstances:**

15 respondents (68%) agreed that the time limit for applications should be subject to judicial discretion. Two of those respondents restricted their answer by stating that this judicial discretion should be for very limited circumstances only. One agreed that there should be judicial discretion but stated that this should be subject to a long stop date. Three of these respondents said that there should be judicial discretion as well as the period for claims being extended, one suggesting an extension to two years and one to five years.

It was suggested that it would be sensible to permit parties to agree that a claim could be presented to the court after the one year period, on the basis that this would allow parties to continue to negotiate matters without needing to raise a court action.

Five respondents (23%) did not think that the time limit should be subject to judicial discretion. One respondent (5%) did not answer the question, and one respondent (5%) provided another response.

Respondents also raised these matters:

- Not to afford discretion based on relationship status is unfairly prejudicial and discriminatory;
- It is common experience among practitioners that a significant number of claims, which would otherwise be stateable, fail because legal advice is not sought until after 12 months from the date of separation; and
- The exercise of discretion may need to be subject to guidance.

## **3) Whether the time period for application under section 29 should remain within six months of the date of death and whether the time period for claim should be linked to the grant of confirmation rather than date of death:**

These two matters were addressed together in the consultation.

Six respondents (27%) were in favour of the time period for application remaining within six months of the date of death. Three respondents (14%) were in favour of the time period being extended with it remaining

linked to the date of death. Each of these respondents suggested an appropriate time period – one suggesting nine months, one suggesting one year and one suggesting five years.

Ten respondents (45%) were in favour of the period for application being linked to the grant of confirmation rather than the date of death. Nine respondents (41%) were in favour of requiring an application to be made within six months from the date of confirmation and one respondent (5%) favoured requiring an application to be made within one year from the date of confirmation.

Two respondents did not answer the question (9%) and one (5%) provided another answer.

These matters generated significant comment from respondents. Issues raised include:

- The six month time period is inadequate and causes unnecessary problems;
- Progress towards obtaining confirmation lies entirely with the executor;
- If the time period is linked to the grant of confirmation, consideration may have to be given as to whether or not some form of publicity of the grant is required;
- The six month time period from death creates certainty;
- Linking the time period to the grant of confirmation may avoid difficulties caused where no executor has been appointed;
- Executors can defeat a claim by failing to apply for confirmation until the six month period from death has passed;
- The current time period is short especially where a cohabitee may be suffering from grief and dealing with changes to their lifestyle;
- Six months is too short however it can sometimes take many months to obtain confirmation;
- A one year time period could create hardship for beneficiaries; and
- If judicial discretion is created to accept late applications, extending the period for claims would be unnecessary.

#### **4) Whether the time period for applications under section 29 should be subject to judicial discretion in limited circumstances:**

13 respondents (59%) agreed that the time period for applications under section 29 should be subject to judicial discretion. One of those respondents noted that this should be on “exceptional cause shown and subject to any necessary safeguards to ensure no prejudice to any third parties acting in good faith.”

Three respondents (14%) did not agree that there should be judicial discretion in respect of this matter. Five respondents (23%) did not answer the question.

The remaining respondent provided that in the event of a ‘late’ claim being permitted, it would be very difficult to ‘unpick’ a situation where the estate had been distributed. This respondent highlighted that a better option would be to extend the initial time period for an application.

Matters raised by respondents in relation to this question included:

- Judicial discretion should be permitted for where there is genuine reason for the cohabitee not claiming within the required time;
- Without discretion, a legal system becomes unwieldy and of limited purpose;
- Allowing judicial discretion has to be balanced with allowing executries to be wound up within a reasonable period of time; and
- Time limits should be removed altogether.

#### **5) Whether section 29 claim should be extended to testate cases:**

12 respondents (55%) did not agree that section 29 claims should be extended to testate cases.

Four respondents (18%) agreed that section 29 provisions should be extended to testate cases, one of whom noted that this extension should be for limited circumstances only.

Two respondents (9%) did not answer the question. Four (18%) other responses were provided.

This question also attracted significant comment. Matters raised include:

- Whether section 29 claims should be extended to testate cases is a broader social question;
- If there is a will, the testator's wishes are clear and that should be respected;
- A will may have been made by the deceased prior to the commencement of the relationship and not subsequently updated, perhaps without the deceased having the intention to deliberately exclude a cohabitant;
- It should not be for the law to protect adults against their own inaction;
- Couples who wish to protect against disinheritance should make a will and/or enter a registered form of relationship, i.e. marriage or civil partnership;
- Cohabitants should be afforded similar status and rights to married couples and civil partners;
- Any extension would need to be subject of a clear policy decision and careful drafting as to its scope;
- Extension of protection from disinheritance could be implemented with a more detailed statutory framework for judicial discretion;
- Whether or not section 29 is extended to testate cases is related to whether section 29 is considered to be an aspect of the law of succession or a debt on the estate, and it may be helpful to re-visit this question; and
- Extension to testate cases would cause uncertainty.

## Proposed solution

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### Summary

In reaching our recommendations in relation to sections 28 and 29, we have taken account of the results of our own consultation as well as other sources of research referred to throughout this paper and the knowledge and experiences of those involved in the working group.

We propose that section 28 be amended to allow a court to accept an application made after the one year time limit 'on cause shown'. Following Lord Becket's comments in the case of *Courtney's Executors v Campbell*, it appears that the common law basis of claim of unjustified enrichment may no longer be considered by the court to be open to parties who could make a claim under the provisions of section 28, whether or not the time limit has been missed. We suggest that this position be reconsidered, and parties be able to make a claim on such basis if the circumstances are appropriate.

In relation to section 29, we suggest that the time period for a cohabitant to make an application under section 29 should be extended. We suggest that the permitted period should be up to 12 months from the date of death, or in a case where confirmation is obtained in respect of the deceased's estate after the expiry of 12 months from death, up to six months from the date of confirmation. We propose that it should be open to the court to allow the late lodging of an application 'on cause shown'. We do not consider that the scope of section 29 should be extended to testate cases. This is in line with the Scottish Government's position as set out in their response to the consultation on reform of the law of succession, published in October 2018<sup>38</sup>.

### Section 28

It is clear from the court's approach to cases under section 28 and 29 of the Act that a 'hard line' is taken to the one-year time limit for applications<sup>39</sup>. This, coupled with a lack of discretion for the court to accept late applications, can produce harsh results, for example where a party was not aware of their rights, where advice was deliberately not sought immediately after the parties ceased to cohabit, or where difficulties arise with service. Although there appears to be support for a wider review of the time limit for applications to be received by the court, our work did not set out to cover this matter. We therefore do not make any substantive recommendation beyond stressing that this, along with the provisions of the Act relating to cohabitation as a whole, would merit further consideration.

In the meantime, we suggest that legislation is introduced providing the court with discretion to accept an application under section 28 in particular circumstances after 12 months from the date on which the parties ceased to cohabit. We suggest that this could be 'on cause shown' or 'on special cause shown'. This would

<sup>38</sup> Scottish Government response to the Consultation on the Law of Succession, 18 October 2018.

<sup>39</sup> See for example *Simpson v Downie* [2012] CSIH 74 and *Kerr v Mangan* 2014 CSIH 69.

have the effect of affording the court powers in limited circumstances and subject to the Sheriff or Judge's discretion to accept a late application where it appears to be in the interests of justice to do so. The need for such discretion is supported by the responses to our own consultation as well as earlier research among solicitors in relation to the provisions of the Act<sup>40</sup>.

Turning to the availability of the common law basis of claim of unjustified enrichment, recent case law<sup>41</sup> supports the removal of this basis of claim from cases where section 29 could apply. We do not consider this to be equitable or in the interests of justice. Although recognising the principle of subsidiarity and therefore the limited scope for claims to be raised on the basis of unjustified enrichment, we do not consider this sufficient justification to remove access to such a basis of claim entirely. Arguably, if Parliament intended to prevent claims on this basis, this would have been specifically provided for when the Act was passed. This was not done so. We suggest, therefore, that legislative provision is made to clarify that the right for an individual to make an application under section 28 does not in and of itself prevent a common law claim being raised.

## Section 29

Reform of the time limit for an application under section 29 has previously been suggested. The Scottish Law Commission, in its 2009 report, recommended that the time limit for making an application under section 29 be extended to one year from the date of death<sup>42</sup>. The Scottish Government's consultation on reform of the law of succession has also shown support for such an extension. 64% of respondents who answered the relevant question agreed with an extension of the period for claim to one year from the date of death<sup>43</sup>.

We welcome the Scottish Government's proposal to extend the period to one year, however, we also consider there is scope to link the time period for an application to the grant of confirmation where this follows some time after the death. We consider this would be the most appropriate means by which to reduce potential practical difficulties which may be faced by a cohabitant attempting to make an application where no executors dative have been appointed, particularly where those with an interest in the estate require to be traced. This would also afford greater time for negotiation between parties and may reduce the need for applications to be made to the court.

We appreciate that confirmation may not be granted in every case and we do not therefore suggest a grant of confirmation as a prerequisite to the making of an application under section 29. We suggest that the permitted period should be up to 12 months from the date of death, or in a case where confirmation is

<sup>40</sup> Wasoff, F, Miles, J and Mordaunt, E (2010) *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006*; Nuffield Foundation, Centre for Research on Families and Relationships, and Cambridge University; Edinburgh, see page 72 for discussion.

<sup>41</sup> *Jan Claire Igoe, Dominic Vincent Macari as executors nominate of the late Robert Nisbet Courtney v Yvonne Campbell* [2016] CSOH 136, as discussed above.

<sup>42</sup> See Scottish Law Commission, *Report on Succession, 2009* (SCOT LAW COM No 215), at paragraphs 4.31 and 4.32.

<sup>43</sup> Scottish Government Analysis of Responses to the Consultation of the Law of Succession, 18 October 2018, paragraph 4.65.

obtained in respect of the deceased's estate after the expiry of 12 months from death, up to six months from the date of confirmation. We note some parity with the provisions of section 4 of the Succession (Scotland) Act 2016<sup>44</sup> in this regard.

It is interesting to note that the comparable provision in England and Wales states:

“An application .... shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out (but nothing prevents the making of an application before such representation is first taken out).”<sup>45</sup>.

A grant of representation is a grant of probate made to executors appointed under a will or a grant of letters of administration in other cases<sup>46</sup> and is considered similar to a grant of confirmation.

We appreciate the need to balance timeous winding up of an estate with the right of a cohabitant to make an application to the court. This can be particularly difficult when dealing with the emotional and practical fall-out of a cohabitant's death.

While we welcome the Scottish Government's proposal to extend the period to 12 months from the date of death, we suggest that neither this proposal alone, or our proposed suggestion to provide an alternative of linking the time limit to the grant of confirmation, goes far enough to resolve the potential difficulties with section 29 applications.

We recognise the importance of the timeous winding-up of an estate. It is clear however that there is the potential for circumstances to arise in which an estate, or part thereof, may be found to be intestate only after expiry of the six month period (or 12 month period from death or six months from confirmation if the law was to be amended). It would appear to be wholly unfair to prevent a cohabitant from making an application to the court in such circumstances, particularly where they may otherwise have been provided for in a deceased's, albeit invalid, will. We note that the Scottish Law Commission<sup>47</sup> has previously recommended that the court have discretion to accept a late application. Such a provision is included in the English and Welsh legislation referred to above. In line with our proposals in relation to section 28, we therefore suggest that legislation be introduced to provide for application to be accepted 'late' by the court, subject to judicial discretion.

Finally, we have considered carefully the possibility of extending the scope of section 29 to cover testate estates. We do not recommend such an extension at this time. There was limited support among the respondents to our own consultation for such an extension. We consider that this would require a substantive change in policy and one which merits full consideration. We note that Scottish Government do not intend to introduce such an extension.

<sup>44</sup> Which concerns rectification of a will.

<sup>45</sup> Inheritance (Provision for Family and Dependents) Act 1975, section 4.

<sup>46</sup> See Explanatory Notes to the Inheritance and Trustees' Powers Act 2014 which amended section 4 of the Inheritance (Provision for Family and Dependents) Act 1975.

<sup>47</sup> See Scottish Law Commission, *Report on Succession*, 2009 (SCOT LAW COM No 215), at paragraph 4.31.

## Other remarks

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As referred to above, we consider that a full review of the provisions of sections 25 – 29A of the Act would be merited. Such a review is out with the scope of this project, however, a number of other matters relating to the law on cohabitation arose during work on the project. These include:

1. Definition of cohabitant – we note that there has previously been discussion around the requirement of a qualifying period for a cohabitant to be able to make an application under the Act<sup>48</sup>. We acknowledge that section 8(2A) of the Succession (Scotland) Act 1964 contains provision for a prior rights claim by a cohabitant in relation to a croft tenancy – section 8(6)(za) provides the definition of cohabitant and contains a two-year minimum qualifying period of cohabitation. While we consider it appropriate for a court to consider the length of the period during which parties lived together and the nature of their relationship in determining the extent of a claim, we do not consider it appropriate for a qualifying period to be imposed in relation to financial claims on separation or on death.
2. It is necessary for a surviving cohabitant to be able to determine the extent of the net intestate estate in order to appropriately frame an application under section 29. While we recognise the opportunity to lodge a specification of documents during the progress of a case and note that a court is likely to accept the need for appropriate documentation to be obtained, we consider it would be beneficial if section 29 specifically provided for a surviving cohabitant to have access to vouchers and estate accounts to enable them to determine the extent of their claim.
3. We note that the provisions of sections 28 and 29 are based on a discretionary system, rather than a fixed rule system. We acknowledge the existence of a fixed rule system for the prior right of cohabitants in the special situation of a croft tenancy under Succession (Scotland) Act 1964, s.8(2A). We consider there is benefit to a discretionary system continuing in relation to claims under sections 28 and 29. We note there is merit in the fixed rule system relating to a croft tenancy. Any claim under section 29 would be discounted by the inheritance of a croft tenancy under the 1964 Act.
4. We note that the Forfeiture Act 1982 currently allows a court to make an order modifying or excluding the effect of the forfeiture rule where a court determines that the rule has precluded a person who has unlawfully killed another from acquiring any interest in property (section 2). Section 3 of the Act states: “The forfeiture rule shall not be taken to preclude any person from making any application under a provision mentioned in subsection (2) below or the making of any order on the application”. Subsection 2 includes any provision of the Inheritance (Provision for Family and Dependants) Act 1975 and provisions around the variation of periodical allowances in respect of marriages and civil partnerships under section 13(4) of the Family Law (Scotland) Act 1985. This is no express provision to exclude from the scope of the forfeiture rule claims under sections 28 or 29

<sup>48</sup> Scottish Law Commission, *Report on Family Law*, 1992 (SCOT LAW COM No 135), paragraphs 16.20, 16.24 and 16.32.



of the 2006 Act. We make no comment as to whether the law on this matter should be amended but note the discrepancies.

5. We note that section 9(4) of the Requirements of Writing (Scotland) Act 1995, which concerns subscription of documents on behalf of a blind granter or a granter unable to write, currently extends only to spouses (and sons or daughters). We suggest consideration be given to whether this should be extended to deal with cohabitants (and also civil partners).

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