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#### D. CONCLUSION

This is a rather odd paper because one might have expected a fuller and better informed discussion of the issues. While I appreciate the need to make such consultations accessible to the public, there is surely a duty to present some kind of reasoned analysis of the issues and the evidence.

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### Rights in Succession for Cohabitants: *Savage v Purches*

In the eighteen months since they came into force, the provisions of the Family Law (Scotland) Act 2006 introducing financial rights for unmarried cohabitants<sup>1</sup> have seen little in the way of judicial illumination. The first reported case was disposed of on a point of jurisdiction.<sup>2</sup> Two subsequent cases on financial provision following breakdown of cohabitation suggested a disinclination on the part of the courts towards a munificent application of the legislation.<sup>3</sup>

The decision in *Savage v Purches*<sup>4</sup> appears to apply a similarly parsimonious approach in the area of cohabitants' rights in succession. Here, the pursuer, James Savage, had cohabitated with Graham Voysey for around two years and eight months prior to Voysey's unexpected death in April 2007. The deceased left no will. Under the general law of intestate succession, the entire estate would have fallen to the deceased's closest living relative, his half-sister Sandra Purches.<sup>5</sup> However, the pursuer sought to assert his rights as a cohabitant, seeking payment of a capital sum in terms of section 29 of the 2006 Act.

#### A. LEGAL ARGUMENTS

For section 29 of the 2006 Act to operate, an applicant must first establish title to make a claim, following which the court exercises its discretion in determining the

1 Family Law (Scotland) Act 2006 ss 25-29. Section 28 of the Act makes provision for cohabitants to apply to the court for financial provision where cohabitation ends otherwise than by death, while section 29 provides for a surviving cohabitant to apply to the court for financial provision on intestacy.

2 *Chebotareva v Khandro* 2008 Fam LR 66, on which see C Roodt, "Cohabitation: *Chebotareva v Khandro*" (2009) 13 EdinLR 147.

3 *M v S* [2008] CSOH 125, 2008 SLT 871; *Jamieson v Rodhouse* 2009 GWD 3-54.

4 Falkirk Sheriff Court, 19 Dec 2008. The sheriff's judgment is available at <http://www.scotcourts.gov.uk/opinions/savage.html>.

5 Succession (Scotland) Act 1964 s 2(1)(c).

level of any award. The requirements of title are that the applicant and the deceased were cohabitants as defined in section 25 of the Act, that the deceased was domiciled in Scotland and that the cohabitation was brought to an end by death.<sup>6</sup> None of these issues was in dispute in *Savage*, although the factors specified in section 25(2) as being relevant in establishing cohabitation – the duration and nature of the relationship, and the extent of any financial arrangements between the parties – proved to be the subject of some discussion later in the judgment.

With title established, the court is directed to consider four factors in determining whether a payment should be made, namely:<sup>7</sup>

- (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.

Each of these factors was treated to detailed discussion from both sides of the bar.

### **(1) The size and nature of the deceased's intestate estate**

The net total of the intestate estate was agreed to be £186,113.<sup>8</sup> It was noted that, had the pursuer been the civil partner of the deceased, the entire sum would have been paid over to him in terms of his prior rights claim under sections 8 and 9 of the Succession (Scotland) Act 1964.<sup>9</sup>

### **(2) Any benefit received in consequence of the deceased's death**

The deceased had been a member of an occupational pension scheme which provided for a discretionary lump sum payment on death, in addition to a discretionary pension for dependents. The trustees of the scheme split the lump sum equally between the pursuer and the defender, resulting in payment of £124,840 each. The pursuer, as an adult dependent of the deceased, was also awarded payment of an annual pension of £9,530 gross, subject to inflationary increases. The defender's argument, accepted by the sheriff, was that this benefit should be valued on the basis of "replacement cost" – in other words, the price of purchasing an annuity from an insurance company that would provide the same annual income. The replacement cost was assessed at £298,900.<sup>10</sup> In total, therefore, the pursuer was considered to have received an aggregate of £420,000 in consequence of the pursuer's death before payment of any

6 Family Law (Scotland) Act 2006 ss 25 and 29(1).

7 Family Law (Scotland) Act 2006 s 29(3).

8 Para 8. For the purposes of this note, figures are given in pounds only, disregarding pence. Precise figures are given in the sheriff's judgment.

9 Finding in fact 9.

10 Findings in fact 6 and 7.

award under section 29:<sup>11</sup> a substantial sum, particularly relative to the net value of the estate as a whole.

### **(3) The nature and extent of other rights against the deceased's estate**

The only other claim on the estate came from the deceased's half-sister, the defender. The nature of the relationship between the deceased and Mrs Purches was the subject of some debate at proof, with the pursuer arguing the two had been "distant" or even "estranged",<sup>12</sup> while the defender gave evidence of a close and loving relationship, beginning with a shared difficult childhood and continuing with regular contact until the defender scattered the deceased's ashes on the beach.<sup>13</sup> The sheriff found the pursuer's evidence on the point to be of "limited credibility and reliability", having formed the view that Mr Savage deliberately downplayed the deceased's relationship with the defender in order to further his own claim. Sheriff Arthurson detected "a distinct whiff of avarice about the whole action raised by the pursuer".<sup>14</sup>

It may be worth noting that under section 2 of the Succession (Scotland) Act 1964, a half-blood collateral (sibling) would inherit in preference to a surviving spouse or civil partner. This provision would only come into play, however, after payment of prior rights to the surviving spouse or partner had already been made.

### **(4) Any other matter the court considers appropriate**

It was this factor which caused the greatest debate in the case. What exactly would it be appropriate for the court to consider under this head?

The pursuer contended, in the first place, that the factors determinative under section 25 of the existence of cohabitation – length and nature of the relationship, together with the nature of financial arrangements between the parties – could not be relevant. Once the section 25 test had been passed, as it had in this case, these factors had served their purpose and could play no further part.<sup>15</sup> The pursuer also contended that factors such as any economic disadvantage suffered by one party to the relationship or the position of any children – essentially the principles by which the court is guided in making an award of financial provision on divorce<sup>16</sup> – should not be relevant here. There was no scope in the legislation for what pursuer's counsel referred to as the "worthy" beneficiary.<sup>17</sup> Instead, it was argued, the court would be entitled to consider only matters which affected the estate or the survivor after the death, for example, if the survivor would be left destitute without payment under section 29.<sup>18</sup>

11 Para 14.

12 Para 4.

13 Finding in fact 14.

14 Para 5.

15 Para 11.

16 Family Law (Scotland) Act 1985 s 9. These provisions have been extended to cover dissolution of civil partnership by the Civil Partnership Act 2004 Sch 28. References to divorce in this note should be taken to encompass dissolution.

17 Para 7.

18 Para 11.

There is something attractive about the pursuer's argument when one considers the general law of intestate succession. Unlike the rules for financial provision on divorce, the Succession (Scotland) Act 1964 does not allow for consideration of what might be termed the equity of the situation when providing for payment of prior rights.<sup>19</sup> A surviving spouse is entitled to a set amount, provided the estate contains sufficient funds to pay it. This is true regardless of whether the parties were estranged, or if they had married only two days previously, or if the deceased left behind numerous impecunious student children.

However, the point strongly taken by the defender was that the regime of the 2006 Act was not designed to provide cohabitants with automatic rights equivalent to those of a surviving spouse.<sup>20</sup> Prior rights are an entitlement; a payment under section 29 is at the discretion of the court. Section 29(4) establishes an upper limit, by providing that a surviving cohabitant is not to receive more than a surviving spouse would be entitled to in prior rights, but sets no lower limit on an award. On what basis is the court expected to exercise its discretion, if not by taking into account factors such as the duration and nature of the cohabitation, or the other resources available to the survivor?

## B. DECISION AND ANALYSIS

Although satisfied that the pursuer had established title to make a claim under section 29, the court assessed the value of the claim at nil.<sup>21</sup> The decision turned primarily on the factors covered by sections 29(3)(b) and (d). The sheriff pointed out that the benefits the pursuer had already received as a result of the death, which were undoubtedly relevant for consideration under section 29(3)(b), were sufficient in themselves to militate against payment of anything more. This conclusion is difficult to argue with given the sums of money involved.

Usefully, however, the sheriff made further observations in respect of the matters which could appropriately be taken into account under section 29(3)(d). With regard to the duration and nature of the cohabitation, Sheriff Arthurson noted that the court "cannot close its eyes to such factors within the contextual hinterland in which the claim . . . presents itself".<sup>22</sup> This assertion is somewhat Delphic, but in essence it appears that the court accepted the defender's position. The court was clearly concerned by the fact the deceased had previously been in a cohabiting relationship of 15 years duration with a different partner. During that period the deceased had made a will with his then partner named as sole beneficiary, and that will had been destroyed without replacement. Taken together with the fact the pursuer and the deceased did not share a bank account, a picture was painted of the nature

19 For proposals for reform of the law of intestate succession, see Scottish Law Commission, Discussion Paper on *Succession* (Scot Law Com DP No 136, 2007), discussed by K McK Norrie, "Reforming succession law: intestate succession" (2008) 12 EdinLR 77, and D Reid, "From the cradle to the grave: politics, families and inheritance law" (2008) 12 EdinLR 391.

20 Para 12.

21 Para 14.

22 Para 15.

of the cohabitation from which the sheriff found an inference could be drawn about the deceased's testamentary intentions towards the pursuer.

The sheriff specifically stated that he was not seeking to categorise the pursuer as "unworthy",<sup>23</sup> which appears to suggest that factors used in determining financial provision on divorce should not form part of the court's considerations under section 29(3)(d). This interpretation is backed up by the notable absence of any reference in the sheriff's note to the financial situation between the pursuer and the deceased. This is, however set out in the sheriff's findings in fact, from which it appears that the pursuer's standard of living improved considerably after commencing cohabitation with the deceased, who provided free accommodation and several foreign holidays a year in addition to a car, two dogs and the ultimate romantic gesture of having the ironing "sent out". The pursuer, it was conceded, sometimes paid for the dogs to be groomed.

The sheriff did go on to say, however, that his view of the pursuer (as, it would appear, an unworthy beneficiary) bore directly on his assessment of the pursuer's credibility.<sup>24</sup> In other words, the economic advantages the pursuer enjoyed in cohabiting with the deceased may have led to the "avarice" the sheriff detected in assessing the pursuer as an unreliable witness. Although there is some scope for confusion in the wording of the sheriff's note here, it is not thought that the sheriff intended to assert that the pursuer's personal characteristics should be taken into account under section 29(3)(d). There would not appear to be any precedent for "good character" considerations in the law either of succession or of financial provision between cohabitants, and a move in that direction would seem to go directly against, for example, the trend in divorce law by which the concept of "blame" in the breakdown of a relationship is largely discounted.<sup>25</sup>

Overall, the decision continues the cautious approach adopted so far by the courts to interpretation of the provisions on financial rights for cohabitants. The guidance given on matters relevant to the exercise of the court's discretion suggests that claims by cohabitants in succession may straddle something of a middle ground between the traditional law of intestate succession and financial provision on divorce. The quality of the relationship will have some bearing on the value of any award ultimately made. Whether an unmarried cohabitant will ever receive an award equivalent to the claim of a surviving spouse or civil partner on intestacy is as yet unknown. In the interests of clarity, it is hoped that the provisions of the 2006 Act see another day in the judicial sun sooner rather than later.

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<sup>23</sup> Para 16.

<sup>24</sup> Para 16.

<sup>25</sup> Section 11(7)(d) of the Family Law (Scotland) Act 1985 provides that conduct of the parties will only be relevant to financial provision on divorce where their actions have directly impacted on the financial resources of the household, or where it would be manifestly inequitable to leave it out of account.