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Scots Rules of Private International Law Concerning Homosexual Couples
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I. Same Sex Marriage

In order to create a valid marriage under Scots domestic law, it is necessary that the participating parties are of opposite sex.¹ However, since the laws of certain EU Member States, and other non-EU states, permit same sex marriage, questions can be expected on a number of conflict of laws issues, eg the capacity of Scottish parties to enter such marriages abroad, the laws to regulate formal and essential validity of such marriages in the view of Scots law, and the recognition of such marriages and any incidents thereof by Scots law. Discussion of these matters is speculative, given the absence of case law, but principle would direct that in accordance with the choice of law rule governing capacity to enter into a (heterosexual) marriage,² any same sex ‘marriage’, purported to be entered into anywhere in the world, where one at least of the parties is of Scots domicile, will *not* be regarded as valid in a Scots court, by reason of lack of capacity.

Where, however, same sex marriage is valid by the *lex loci celebrationis*, and where, by his/her personal law (being, in Scots law, the law of the domicile), each contracting party has legal capacity to enter into such a union, recognition potentially could be afforded in Scotland to the status, or at least to certain of the incidents thereof. This speculative view is reinforced by the existence and terms of the Civil Partnership Act 2004 (*qv*), which introduces into Scots law the option of same sex civil partnership. The 2004 Act does not introduce into Scots domestic law same sex marriage,³ but it is

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¹ Marriage (Scotland) Act 1977, s 5(4)(e). See also Scottish Executive White Paper, *Parents and Children* (2001) paragraph 6.4.2.

² Family Law (Scotland) Act 2006, s 38(2).

³ In terms of s 215 of the Civil Partnership Act 2004, the effect of recognition in the UK of a specified overseas relationship (including ‘marriage’ in Belgium, the Netherlands and, under SI 2005/3135, Canada) qualifying under Sch 20 of the Act will be to treat such a union as equivalent to a UK civil partnership: see further *Wilkinson v Kitzinger & Ors* [2006] EWHC 2022 (Fam), below.

impossible to overlook the fact that the structure of rules and the provenance of many of the terms of the 2004 Act derive from domestic and conflict statutes concerning marriage and divorce.

If the issue of recognition of a same sex marriage were to be raised in a Scots forum, the forum will choose, define and identify the applicable law to govern legal capacity to enter into such a marriage. The fact that, by the *locus celebrationis*, the individuals concerned possessed legal capacity so to marry is likely to be irrelevant if the law of either party's domicile provides to the contrary.

Important matters of policy are present, and there may be difficulties of ranking of interests. For example, in a question of succession to land in Scotland belonging to an intestate, same sex 'spouse' domiciled (and, by definition, married) abroad, there may be a competition between the surviving same sex 'spouse', and other relations of the deceased having a ranking in terms of Scots rules of succession *per* the Succession (Scotland) Act 1964. The position would be more complicated if, by his date of death, the deceased 'spouse' had acquired/resumed his Scottish domicile and died possessed of moveable property in Scotland requiring to be distributed.⁴

It has been stated, for England and Wales, that 'Where persons of the same sex marry in certain foreign countries which allow same-sex marriages, the marriage may be recognised in England as a civil partnership under the Civil Partnership Act 2004.'⁵ The position would be the same under Scots law: as stated above, in terms of section 215 of the Civil Partnership Act 2004, the effect of recognition in the UK of a specified overseas relationship (including 'marriage' in Belgium, the Netherlands and Canada⁶) qualifying under Schedule 20 of the Act will be to treat such a union as equivalent to a UK civil partnership.

The question of recognition has been addressed recently by the English High Court. In the case of *Wilkinson v Kitzinger & Ors*,⁷ the petitioner (W), an English domiciliary, sought a declaration as to her marital status in terms of the Family Law Act 1986, section 55. She wished to have declared that a same sex marriage with the first respondent (K, also domiciled in England) celebrated in 2003 in British Columbia, Canada was a valid *marriage* worthy of recognition in the UK. In this respect, she asked the court 'to ignore or modify the requirement of private international law, administered as part of the common law, that legal capacity to marry be judged according to the law of the parties' domicile' on the grounds that application of the ordinary rules would lead to non-recognition of her same-sex partnership as a valid marriage.⁸ In the alternative, if the court were to find that the Canadian relationship were not worthy of such recognition, the petitioner sought a declaration of incompatibility, under section 4 of the Human Rights Act 1998, in relation to section

⁴ The 2004 Act, in s 131, makes certain provision for competing rights of succession arising by virtue of civil partnership.

⁵ Dicey, Morris & Collins, *The Conflict of Laws*, (14th edn, 2006), para 17-088. Further, 'The provision to this effect in the Act implies that as a matter of public policy a foreign same-sex marriage will not be recognised in England as a marriage, *even if by the law of their domicile the parties have capacity to enter into such a marriage.*' (emphasis added).

⁶ By virtue of The Civil Partnership Act 2004 (Overseas Relationships) Order 2005 (SI 2005/3135).

⁷ [2006] EWHC 2022 (Fam). See also Matrimonial Causes Act 1973, s 11.

⁸ Sir Mark Potter, at para 129.

11(c) of the Matrimonial Causes Act 1973, which specifies that a marriage shall be void on the ground that parties are not respectively male and female.

The petitioner argued that recognition of her Canadian marriage under the Civil Partnership Act 2004 would have resulted in the ‘downgrading’ of that relationship to the status of civil partnership. Sir Mark Potter, President of the Family Division of the High Court, adhered to the common law definition of marriage as stated by Lord Penzance in *Hyde v Hyde*,⁹ namely, that marriage is, ‘[t]he voluntary union for life of one man and one woman, to the exclusion of all others. The judge explained that:

In 2004, in the course of the passage of the Civil Partnership Act, Parliament closely re-examined the complex problems involved if recognition were to be given to same-sex marriages. The solution which it reached was that there should be statutory recognition of a status and relationship closely modelled upon that of marriage which made available to civil partners essentially every material right and responsibility presently arising from marriage, with the exception of the form of ceremony and the actual name and status of marriage. Parliament ostensibly passed the Act, not because it felt obliged to in order to comply with the norms of European law or the rulings of the European Court or the ECtHR, but because it elected to do so as a policy choice.¹⁰

In so far as legislative intention is relevant to this issue ... the intention of the Government in introducing the legislation was not to create a ‘second class’ institution, but a parallel and equalising institution designed to redress a perceived inequality of treatment of long term monogamous same-sex relationships, while at the same time, demonstrating support for the long established institution of marriage.¹¹

Dismissing the petitioner’s petition, the court concluded that it would be ‘inappropriate and ineffective’¹² to ignore or modify the existing private international law requirement concerning capacity to marry. Further, it concluded that neither Article 8 (Right to respect for private and family life), nor Article 12 (Right to marry) of the European Convention on Human Rights guaranteed the petitioner the right to have her foreign same sex marriage recognised as having the status of a marriage in English law.¹³ Accordingly, it was held that the provisions of English law are not incompatible with the Convention.

As a matter of policy, therefore, the position under English law (and, it is presumed, under Scots law) is that a foreign same sex marriage should be treated as a civil partnership, recognition of which should be regulated by the Civil Partnership Act 2004.

It is often said, with regard to the recognition of same sex marriage, that there are parallels with the history of recognition in Scots conflict rules of polygamous marriages, and the incidents thereof. While the pattern of growing recognition may be

⁹ (1866) LR 1 P&D 130, at 133.

¹⁰ Sir Mark Potter, at para 49.

¹¹ Sir Mark Potter, at para 50.

¹² Sir Mark Potter, at para 129.

¹³ Sir Mark Potter, at para 54.

repeated, nevertheless it should be borne in mind that, by Scots law, legal capacity to enter into polygamous marriages remains confined to those individuals whose personal law permits this.

II. Civil Partnership

With effect from December 2005, Scots law provides for a new institution of civil partnership, by virtue of the Civil Partnership Act 2004, which contains not only domestic, but also conflict of laws rules.

As stated above, while the statutory institution of civil partnership does not equate to the Scots conception of marriage, the new legislative provisions clearly are modelled upon existing legislative provision concerning marriage.

A civil partnership is defined as a legal relationship between two people of the same sex which is formed when they register as civil partners of each other, all in accordance with the relevant provisions of the 2004 Act, and which ends only upon death, dissolution or annulment.

Civil Partnership Act 2004

The Act is in 8 parts and has 30 schedules.¹⁴

Part 1 establishes the requirements for the creation of a valid civil partnership.

Separate provision is laid down for the different jurisdictions of the UK: Part 2 (England and Wales), Part 3 (Scotland), and Part 4 (Northern Ireland).¹⁵

Within each Part are special rules concerning formation and eligibility, registration, occupancy rights and tenancies, dissolution and financial arrangements.

Part 5, containing the conflict of laws provisions, is concerned with civil partnerships formed or dissolved abroad, and is of particular relevance to this Report.

Constitution of civil partnership

Legal capacity to enter into a civil partnership

The choice of law rule concerning capacity to enter into a civil partnership differs according to the place of registration (*'locus registrationis'* for short reference).

¹⁴ It is accompanied by relevant secondary legislation making necessary consequential changes to primary law, eg, The Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005 (SSI 2205/623); and The Civil Partnership Act 2004 (Overseas Relationships) Order 2005 (SI 2005/3135).

¹⁵ It seems that the registration *locus* determines which Part of the Act shall apply.

There are three potential scenarios, *viz.*:

- (a) where it is sought to register a civil partnership in any territorial unit of the UK (by parties domiciled in a UK jurisdiction, or otherwise);
- (b) where parties, one or both of whom is domiciled in a UK jurisdiction, seek(s) to register a civil partnership abroad (and thereafter to have it recognised in Scotland);
- (c) where parties, neither of whom is domiciled in a UK jurisdiction, having registered a civil partnership abroad, seek to have it recognised as such in Scotland.

While in scenarios (a) and (c) legal capacity is determined according to the *lex loci registrationis*, scenario (b) is subject to the connecting factor of domicile. Where a party is domiciled in a UK jurisdiction, the provisions of the Act have the effect of ensuring that his personal law applies extra-territorially, meaning that the requirements as to eligibility contained in the 2004 Act will follow him wherever he may purport to register his partnership.¹⁶ This means that a Scottish domiciliary cannot evade, for example, Scottish rules of consanguinity or non-age by going abroad to register the partnership.

Part 3 (Scotland): Eligibility (section 86¹⁷)

Legal capacity to enter a civil partnership is placed under the heading of 'eligibility'. Two parties are not eligible to register in Scotland as civil partners of each other if:

- they are not of the same sex;
- they are related in a forbidden degree;¹⁸
- either has not attained the age of 16 years;
- either is married or already in civil partnership; or
- either is incapable of understanding the nature of civil partnership, or validly consenting to its formation.¹⁹

The connecting factor by which to judge the presence of eligibility is nowhere expressed.²⁰ Section 86 sets down these requirements with the qualification that they apply to registrations 'in Scotland', which tends to suggest that the law of the place of registration determines formal validity and essential validity (capacity).

¹⁶ s 217 (*qv*).

¹⁷ As amended by Family Law (Scotland) Act 2006, s 33.

¹⁸ The forbidden degrees are set out in s 86 and Sch 10 to the Act in a manner similar to that found in the Marriage (Scotland) Act 1977, as amended (*mutatis mutandis*).

¹⁹ s 123 provides that absence of consent is a ground rendering the civil partnership void.

²⁰ Except as regards final determination of gender: see s 216(1).

Dissolution of civil partnership

Jurisdiction of the Scots courts under the Civil Partnership Act 2004

Part 3 of the Act (sections 85 – 136) applies to partnerships registered in Scotland.²¹

Part 5 (sections 210 – 245) applies to civil partnerships formed and dissolved abroad.

Part 3 – Dissolution in Scotland of a civil partnership: jurisdiction

In terms of section 117(1), an action for the dissolution of a civil partnership may be brought in the Court of Session or in the Sheriff Court. Though section 117 in its terms does not restrict the jurisdiction which it confers to proceedings concerning civil partnerships registered in Scotland, Part 5 of the Act (sections 225 – 227) lays down particular rules of jurisdiction of the Scottish courts in respect of civil partnerships formed abroad, and so, by inference, it would seem that Part 3 jurisdiction must be restricted to those civil partnerships registered in Scotland (or possibly in the UK).²² The jurisdictional link, therefore, is based on the place of occurrence of an event (registration), rather than upon a personal connection between one or both parties and the forum.²³

Under section 117(2), the Scottish court may grant decree if, but only if, it is established that the civil partnership has broken down irretrievably. Irretrievable breakdown is taken to be established by proof of certain factors such as unreasonable behaviour, desertion, or non-cohabitation, all on the model of Scots domestic divorce law as contained in the Divorce (Scotland) Act 1976, as amended.

Part 5 – Civil partnerships formed or dissolved abroad

This Part makes provision for ‘overseas relationships’, which are defined as specified relationships,²⁴ or as relationships which meet the ‘general conditions’,²⁵ AND which are registered in a country outside the UK by two people who under the ‘relevant law’ (qv) are of the same sex at the time when they do so, and neither of whom is already a civil partner or lawfully married.

The Act describes in these provisions a set of factual/legal circumstances which is a sufficient approximation to the institution of civil partnership in UK law as to justify the attachment to those circumstances of (a) recognition of the relationship in the UK; and (b) availability of domestic remedy.

²¹ Though s 124 concerns the validity of civil partnerships registered *outside* Scotland.

²² For ‘abroad’ is not defined. s 225(1)(c) confers residual jurisdiction on the Scottish courts.

²³ As noted above, where the *locus registrationis* is Scots, the *lex loci registrationis* will regulate capacity and form, but where the *locus registrationis* is overseas, domicile safeguards are inserted for parties domiciled in a legal system of the UK.

²⁴ Defined in s 213, and by reference to Sch 20, as augmented by The Civil Partnership Act 2004 (Overseas Relationships) Order 2005 (SI 2005/3135).

²⁵ Defined in s 214, thus: the general conditions are that under the relevant law (being the law of the place of registration, including its conflict rules – s 212(2)) (a) neither of the parties is already a party to such a relationship, or lawfully married; (b) the relationship is of indeterminate duration; and (c) the effect of entering into the relationship is that the parties are either treated as married, or treated as a couple either generally or for specified purposes.

Overseas relationships treated as civil partnerships (Part 5, Chapter 2)

The general rule (section 215)

In order to have an overseas relationship treated as a civil partnership, the parties must have had legal capacity to enter into the relationship under the *lex loci registrationis*,²⁶ and have met all the requirements of that law necessary to ensure the formal validity of the relationship. Additionally, by section 216(1) the parties are not to be treated as having formed a civil partnership as a result of having registered an overseas relationship if, at the time of registration, they were not of the same sex in terms of UK law.

A Scots court in seeking to establish whether parties neither of whom, at the point of registration, was domiciled in a part of the UK, have validly created a civil partnership abroad, must apply the *lex loci registrationis*, including its rules of private international law.

Special rule for persons domiciled in the UK (section 217)

While the *lex loci registrationis* is a sufficient test to deal with partnerships registered in the UK, it has been thought appropriate to use the traditional connecting factor of domicile where parties, one of whom is domiciled in the UK, have purported to enter into a civil partnership abroad.

By section 217(4) persons domiciled in Scotland will not be treated as having formed a civil partnership if, at the time of registration, they were not eligible in terms of section 86 to register such a relationship in Scotland.²⁷

Section 217 ensures that, where an overseas relationship is registered by a person who is domiciled in Scotland, the relationship cannot be treated as a civil partnership unless the parties would have been eligible to register as civil partners of each other in Scotland. Thus, the overseas relationship will not be treated as a civil partnership if either party was under 16 at the time of registration, or if the parties are within the prohibited degrees of relationship applicable in Scotland, or if either party was incapable of understanding the nature of civil partnership or validly consenting to its formation, or if either party was at the time of the purported registration lawfully married, or a party to an existing civil partnership.

Section 217 reinstates for parties domiciled in a part of the UK the traditional rule that the law of the domicile regulates legal capacity to enter into domestic relationships. In this way, registration of an overseas relationship receives a different treatment from the registration of a civil partnership within the UK, in the latter of which essential validity (including capacity) and formal validity both are governed by the *lex loci registrationis*.

²⁶ Being the law of the place of registration, including its rules of private international law (ss 215(1) and 212(2)).

²⁷ See above. The same principle applies, *mutatis mutandis*, to English domiciliaries (s 217(2)) and Northern Irish domiciliaries (s 217(5)).

Public policy (section 218)

The provisions of the Act concerning overseas relationships are subject to the usual public policy discretion of the forum, whereby two parties are not to be treated as having formed a civil partnership as a result of having entered into an overseas relationship if it would be manifestly contrary to public policy to recognise the capacity under the *lex loci registrationis* of either/both parties to enter into the relationship.

Dissolution of civil partnerships formed abroad: jurisdiction of the Scottish courts (Part 5, Chapter 3)

Section 225(1) provides that the Court of Session has jurisdiction to entertain an action for the dissolution of a civil partnership formed abroad, or for separation of such partners,²⁸ if (and only if) –

- (a) the court has jurisdiction under regulations made under section 219 of the Act (that is, to correspond to Article 3 of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility²⁹); or
- (b) if no court has jurisdiction under (a) above, and either civil partner is domiciled in Scotland on the date when the proceedings are begun; or
- (c) the following conditions are met -
 - (i) the two people concerned registered their partnership in Scotland,³⁰
 - (ii) no court has jurisdiction under (a) above; and
 - (iii) it appears to the court to be in the interests of justice to assume jurisdiction in the case.³¹

Conflicting jurisdictions

Provision is made in section 226 for the resolution of cases of conflicting jurisdiction, corresponding to the system of mandatory and discretionary sists contained in Schedule 3 to the Domicile and Matrimonial Proceedings Act 1973.³² However, it

²⁸ As to the jurisdiction of the Sheriff Court (lower court), see s 225(2). For declarators of nullity, jurisdiction is restricted to the Court of Session (s 225(3)).

²⁹ Detailed rules, laid under s 219 of the 2004 Act, are provided in The Civil Partnership (Jurisdiction and Recognition of Judgments) (Scotland) Regulations 2005 (SSI 2005/629), reg 4. These rules, which attempt to align the rules on jurisdiction in respect of dissolution and annulment of civil partnerships, and separation of partners, with the corresponding rules for marriage contained in Council Regulation 2201/2003, came into force on 5 December 2005. Equivalent rules applying in England and Wales, and Northern Ireland, implemented on 5 December 2005, are contained in The Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005 (SI 2005/3334).

³⁰ There is a precedent for this in that at common law in Scotland *locus celebrationis* was regarded as a good ground of jurisdiction in annulment of marriage if it was averred that the marriage was void: *Prawdzielazarska* 1954 S.C. 98.

³¹ ie the residual rules of national jurisdiction. cf Regulation 2201/2003, Art 7.

³² For England & Wales, see The Family Proceedings (Civil Partnership: Staying of Proceedings) Rules 2005 (SI 2005/2921). Equivalent rules for Scotland have not yet been made. cf 1973 Act, by virtue of s 7(8) and Sch 3.8 of which, no action for divorce shall be entertained in the Court of Session while proceedings for divorce or nullity of the same marriage are pending in another part of the UK (termed a related jurisdiction) ('mandatory sists'); and by Sch 3.9, where, before proof has begun in any

may be expected that any regulations introduced in terms of section 219 will adopt the system of *lis pendens* which is characteristic of the Brussels regime. A potential categorisation difficulty is capable of arising in civil partnership cases as well as in divorce, separation and nullity cases regarding delimiting the sphere of operation of different regulatory regimes, that is to say, to identify which partnership dissolution cases are governed by section 219 regulations, and which are governed by the rules of court to be introduced under section 226.

Dissolution of civil partnerships: choice of law

Civil partnerships registered in Scotland

There is no direct reference in the Civil Partnership Act 2004 to choice of law. Currently in divorce actions in Scotland the choice of law made by the forum is always the *lex fori*.³³ In the case of civil partnerships registered in Scotland, the civil partnership is void if, and only if, the parties were not eligible to register (see section 86), or, being eligible, either of them did not validly consent to its formation.³⁴

Civil partnerships registered in England and Wales, or Northern Ireland

The minor differences between the body of provisions governing civil partnerships registered in England and Wales, and Northern Ireland, from those which are to obtain with regard to civil partnerships registered in Scotland, have resulted in a covert choice of law direction in section 124, *viz.*: where two people have registered as civil partners of each other in England and Wales, or Northern Ireland, and wish to have that relationship declared null in Scotland, it is enacted that their civil partnership is to be regarded as void (or voidable) if it would be void (or voidable) in England and Wales, or Northern Ireland, respectively.³⁵ This must mean that a Scottish dissolution forum must apply to a civil partnership registered in England and Wales, or Northern Ireland, those provisions in the Act which have been particularly crafted for those jurisdictions.

Civil partnerships registered outside the UK

By the same token where (by implication of the Act) two people seek a dissolution of their partnership in a Scots court (*per* sections 225 – 227), said partnership being ‘an apparent or alleged overseas relationship’, section 124(7) directs that the civil

consistorial action, it appears that there are proceedings relating to the marriage in another jurisdiction outside the UK and the balance of fairness including convenience between the parties is such that it is appropriate for those other proceedings to be disposed of before further steps are taken in the Scottish action, the court may, if it thinks fit, sist the action (‘discretionary sists’). Eg *Shemshadford v. Shemshadford* [1981] 1 All E.R. 726; *De Dampierre v. De Dampierre* [1987] 2 All E.R. 1; *Mitchell v. Mitchell* 1993 S.L.T. 12; and *Breuning v Breuning* [2002] 1 FLR 888.

³³ Though see EU Commission Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (17 July 2006) (COM (2006) 399 final), which proposes to introduce a harmonised choice of law rule in matters of divorce and legal separation, based in the first place upon the (restricted) choice of the spouses (Art 20a), and, in the absence of choice, upon a ‘scale of connecting factors’, which would refer, in turn, to the law of the spouses’ common habitual residence; failing which, their last common habitual residence insofar as one of them still resides there; failing which, their common nationality or, in the case of the UK and Ireland, common domicile; failing which, where the application is lodged (ie the *lex fori*) (Art 20b).

³⁴ s 123.

³⁵ For grounds of voidability, see ss 50 – 51 (England and Wales); and ss 174 – 175 (Northern Ireland).

partnership is void if (a) the relationship is not an overseas relationship;³⁶ or (b) being an overseas relationship, the parties are not to be regarded under Chapter 2 of Part 5 (overseas relationships treated as civil partnerships) as having formed a civil partnership. Further, section 124(8) in regard to overseas relationships provides that the civil partnership is voidable if it is voidable under the relevant law,³⁷ or, either of the parties being domiciled in England and Wales or Northern Ireland, if the circumstances fall within section 50 or 174 (grounds on which a civil partnership is voidable, in England and Wales, and Northern Ireland, respectively).

Recognition of foreign decrees of civil partnership dissolution, annulment and legal separation

Decrees obtained in the UK

By section 233,³⁸ no dissolution or annulment of a civil partnership obtained in one part of the UK is effective in any part of the UK unless obtained from a court of civil jurisdiction.

If a judicial dissolution, annulment or legal separation is obtained from a court in one part of the UK, it shall be recognised throughout the UK, subject to the principles of *res judicata* and avoidance of irreconcilable judgments.³⁹

Decrees obtained overseas

A distinction is likely to be made between recognition of decrees obtained from courts of EU Member States (except Denmark), and those from non-EU states.

In the case of the former, section 234(2) permits rules of recognition of EU decrees to be introduced, mirroring those which obtain currently in relation to matrimonial decrees under Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.⁴⁰

The rules of recognition of non-EU decrees⁴¹ follow closely the provisions for recognition (and refusal thereof) of overseas consistorial decrees which are contained in the Family Law Act 1986, sections 46 and 51. The mirroring continues in sections 237 and 238,⁴² but one notable novelty is contained in section 237(2)(b)(ii), which addresses the interesting issue of the proper resolution of the following situation: what is to happen where (i) a party has purported to enter into a civil partnership in a

³⁶ *per* ss 212 – 218.

³⁷ s 124(10) defines relevant law as the law of the country or territory where the overseas relationship was registered, including its rules of private international law. This, therefore, amounts to reference to the use of that law, including its conflict rules.

³⁸ cf Family Law Act 1986, s 44(1).

³⁹ cf Family Law Act 1986, s 44(2).

⁴⁰ Detailed rules, laid under s 219 of the 2004 Act, are provided in The Civil Partnership (Jurisdiction and Recognition of Judgments) (Scotland) Regulations 2005 (SSI 2005/629), Pt 2, regs 5 – 11. These rules, which attempt to align the rules on judgment recognition in respect of dissolution and annulment of civil partnerships, and separation of partners, with the corresponding rules for marriage contained in Council Regulation 2201/2003, came into force on 5 December 2005. Equivalent rules applying in England and Wales, and Northern Ireland, implemented on 5 December 2005, are contained in The Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005 (SI 2005/3334).

⁴¹ s 235 (grounds for recognition); s 236 (refusal of recognition).

⁴² cf Family Law Act 1986, ss 46(5) and 50, respectively.

jurisdiction in which he is not domiciled; and (ii) one or both parties to the purported partnership are domiciled in a country which does not recognise such relationships between two persons of the same sex; (iii) this relationship, presumably legally constituted according to the *lex loci registrationis*, has broken down; (iv) the parties have obtained a dissolution order from a court in the *locus registrationis*, and now seek to have that order recognised in the UK? Section 237(2) permits the Lord Chancellor or the Scottish Ministers to make provision for such cases, but it is uncertain whether provision is necessary, and it is difficult to predict the nature of the modifications to be made. If the difficulty in the case described is one of capacity to enter into a new partnership, section 238 already provides a solution. If it is rather a matter of the wisdom of according recognition to such a dissolution, section 236(3)(c) permits withholding recognition on the grounds of public policy. However, if the effect of withholding recognition of a dissolution would be to recognise the continuing existence (according to Scots conflict rules) of a legal relationship which is forbidden by the domicile of one of the parties, such an outcome seems counter-productive.

Since there is to be a dual system, with provision of one set of rules for recognition of EU decrees, and another set for non-EU decrees, it will be important to delimit the scope of operation of each set of rules. Moreover, it will require to be clarified, as regards, eg, the recognition of EU decrees, when Regulation 2201/2003 applies, and when section 234 of Part 5 of the 2004 Act applies. By which law is the relationship to be characterised as ‘marriage’ or ‘partnership’? Upon that categorisation rests the decision as to which set of jurisdiction and recognition rules apply. Thus, for example, if a Scottish court is called upon to recognise a Dutch dissolution of a Dutch same sex relationship, the relationship in the eyes of Dutch law amounting to ‘marriage’ (and therefore attracting in the Netherlands application of Regulation 2201/2003), but conversely the same relationship in the eyes of Scots law amounting rather to ‘civil partnership’ (attracting application of Part 5 of the 2004 Act); is the Scots forum to prefer its own approach to characterisation and consequences? A further dilemma of delimitation might arise in relation to conflicting proceedings concerning the same relationship, in order to decide which set of conflicting jurisdiction rules should apply (ie those in Regulation 2201/2003, or those in the 2004 Act).

Moreover, to what extent does the restrictive attitude to public policy-founded refusal of recognition contained in Regulation 2201/2003 apply in the context of the decision to recognise, or not, the foreign termination of a registered partnership?⁴³

The body of UK rules, existing and proposed, is less than comprehensive, even though embodied in complex, lengthy legislation.

Property rights arising from civil partnership

In the case of civil partnerships registered in Scotland, Part 3, Chapter 3, of the 2004 Act makes provision with regard to occupancy rights in the family home of the civil partnership, and the transfer of tenancies in the family home to the ‘non-entitled partner’. Further, section 261 and Schedule 28 make provision in relation to civil

⁴³ 2004 Act, s 236(3)(c).

partners' rights (and duties) of aliment (*per* the Family Law (Scotland) Act 1985); the financial consequences of dissolution of a civil partnership registered in Scotland (also *per* the Family Law (Scotland) Act 1985); and rights of succession upon the death of a civil partner domiciled at death in Scotland (or owning property in Scotland at the date of death) (*per* the Succession (Scotland) Act 1964).

In the case of civil partnerships registered in England and Wales, the property and financial consequences are detailed in Civil Partnership Act 2004, Part 2, Chapter 3.

Financial provision upon termination of civil partnership by foreign dissolution or annulment

In relation to financial provision available upon the foreign dissolution or annulment of a civil partnership, the Civil Partnership Act 2004 provides, in section 125 and Schedule 11, that where a civil partnership has been dissolved or annulled abroad, and the dissolution or annulment is entitled to be recognised as valid in Scotland, the Scots court may entertain an application by one of the former civil partners, or former ostensible civil partner, for an order for financial provision.

The jurisdictional requirements and conditions clearly are modelled upon the corresponding provisions for financial provision upon overseas termination of marriage contained in the Matrimonial and Family Proceedings Act 1984, sections 28 and 29.

In cases of foreign dissolution or annulment of a civil partnership, the Scots court may make financial/proprietary orders in terms of the provisions of the Civil Partnership Act 2004. As with divorce,⁴⁴ the court will apply its own domestic law, *mutatis mutandis*, after taking jurisdiction in terms of section 125 of the Civil Partnership Act 2004 (financial provision after overseas proceedings).⁴⁵ Essentially, the Scots court will endeavour to place the parties in the position they would have been in had the application for financial provision been disposed of by a Scottish forum as part of a Scottish action for dissolution or annulment of the civil partnership on the date when the overseas dissolution or annulment became effective. Regard will be had to the parties' resources, and to any foreign order for financial provision made pursuant to the overseas dissolution/annulment proceedings. Where the jurisdiction of the Scots court is based solely on the presence of the former family home of the civil partnership, any order must be restricted to that home and its furniture/plenishings (or financial equivalent).

⁴⁴ The EU Commission Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (17 July 2006) (COM (2006) 399 final) does not extend to proposed harmonisation of the financial consequences of divorce. See, however, EU Commission Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition COM (2006) 400 final (17 July 2006).

⁴⁵ Sch 11, Part 3 (Disposal of Applications).

III. De Facto Cohabitation

Until the 2006 Act, there was no single body of rules in Scots domestic law governing the definition, constitution, and proprietary and other consequences, of cohabitation, although particular claims by one partner of a cohabiting couple were, on occasion, recognised.⁴⁶ Provision was haphazard. As stated above, with effect from December 2005 in Scotland, homosexual partners may register their relationship as a civil partnership, in terms of the Civil Partnership Act 2004. The effect of registering will be that parties become subject to the specific rules newly provided for the institution of civil partnership, which, in the particular case, will trump application of rules, current and proposed, regulating '*de facto*' cohabitation.

De facto cohabitation is intended to mean relationships not formalised by legal ceremony or registration process, but nevertheless attracting, to a greater or lesser extent as the case may be, financial/proprietary/succession consequences which arise by operation of law where the relationship in question satisfies the definition of cohabitation laid down by the legal system purporting to regulate that relationship. Of such a type is the cohabitation relationship to which are attached property and other consequences by the Family Law (Scotland) Act 2006, sections 25 – 30.

For *de facto* cohabitation, the 2006 Act introduces in sections 25 – 30 a set of rules which, after defining 'cohabitant' (section 25) provides rights for such persons in certain household goods (section 26); in certain money and property (section 27); upon termination of the cohabitation otherwise than by death (section 28); and upon termination of the relationship upon death intestate of one cohabitant (section 29).

The meaning of 'cohabitant' is contained in section 25(1), as follows: 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.

The 2006 Act takes the approach of providing in section 25(1) an abstract definition of those who are eligible to be regarded as 'cohabitant, and of listing in section 25(2) factors which may be taken as sufficient to establish cohabitation so as to 'trigger' sections 26 to 30. Section 25(2) states that in determining whether, for the purposes of sections 26 – 29 parties are cohabitants, the court 'shall have regard to – (a) the length of the period during which A and B have been living together (or lived together);⁴⁷ (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.' It is not possible, therefore, to advise with absolute certainty whether the law would regard a particular couple as being cohabitants for the purposes of the 2006 Act. Conversely, it may be difficult for a couple to evade the status of cohabitant under the Act, even if that should be their desire.

⁴⁶ eg Mortgage Rights (Scotland) Act 2001; the claim of a partner under the Damages (Scotland) Act 1976, as amended by the Administration of Justice Act 1982, s 14(4); and the Housing (Scotland) Act 1988, s 31(4).

⁴⁷ It is unclear whether a Scottish forum will be prepared to take into account any period of cohabitation spent abroad (cf and contrast *Walker v Roberts* 1998 S.L.T 1133).

Conflict problems arising from the incidence of de facto cohabitation

These notable changes in Scots domestic Family Law are capable of generating conflict of laws problems, but, in general, sections 25 – 30 make no reference to the conflict of laws, except that for application to be made under section 29 the deceased cohabitant must have been domiciled at death in Scotland. It is implicit that application may be made for the rights provided for in the Act whenever Scots law is the *lex causae*.

It is not clear in what circumstances the Scots courts have jurisdiction to rule on such matters provided for by the 2006 Act; or, regarding choice of law, what arguments a party might deploy to persuade a Scots court that a law other than the *lex fori* should apply? The law of the domicile during cohabitation might suggest itself, both as to jurisdiction and choice of law,⁴⁸ but there is a strong argument for application, by the court of the country in which the parties cohabit, of the law of that country, to determine the consequences of cessation of *de facto* cohabitation (and presumably that law also would determine when, and in circumstances, such cohabitation is deemed to have ceased).⁴⁹

Cessation of de facto cohabitation

De facto relationships, by definition, do not require formalities at the point of commencement, or conclusion, but a Scots court may be asked to make proprietary and/or financial provision for a ‘cohabitant’, during or at the cessation of the *de facto* relationship, and therefore must ascertain by the relevant applicable law whether the claimant qualifies as a cohabitant. For this purpose, the length of the period of alleged cohabitation, nature of the relationship during that period, and the nature and extent of any financial arrangements subsisting, or which subsisted during the relevant period, will be relevant.⁵⁰

Property rights arising from de facto cohabitation

De facto cohabitants, cohabiting in Scotland

As above stated, sections 25 – 30 of the Family Law (Scotland) Act 2006, endow ‘cohabitants’⁵¹ with certain rights (eg *per* section 26, in household goods, and *per* section 27, in money derived from a household allowance or property acquired out of such money). Section 28 states that where cohabitation ends otherwise than by death, a Scottish court may award a capital sum to the applicant, and grant an order in respect of any economic burden of caring for a child of the cohabitants. Application is permitted, *per* section 29, to the court by the survivor for provision on the death intestate of his/her cohabitant, domiciled at death in Scotland.

It is implicit that application may be made for the rights provided for in the 2006 Act whenever Scots law is the *lex causae*. But the Act does not specify, from a conflict of laws perspective, when, or in what circumstances, the rights created therein should

⁴⁸ The courts will not entertain argument about the application of foreign rules concerning cohabitation unless one party were to aver that such foreign law is relevant and were to offer to prove its content.

⁴⁹ Family Law (Scotland) Act 2006, s 28 gives lengthy consideration to the types of order which may be made on cessation of cohabitation and the criteria for awarding them, but no guidance as to ascertaining that cessation has occurred.

⁵⁰ For Scots law, see Family Law (Scotland) Act 2006, s 25(2).

⁵¹ As defined, s 25 (above).

apply. By inference, and arguing by analogy from use of the matrimonial domicile in marriage cases, Scots law would be the *lex causae* in relation to rights arising during the cohabitation where the cohabitation occurs/occurred in Scotland. This immediately raises temporal issues which, given the mobility of persons, are more than academic. It is clear, however, that in respect of the rights of the survivor on the death intestate of the predeceaser, Scots law, if it is the *lex ultimi domicilii*, must be the *lex causae*.⁵²

If a case were to arise with an actual or potential conflict of laws dimension (eg as regards the property consequences of cohabitation in Scotland of one or more foreign domiciliaries), guidance in solving such problems will require to be drawn from general conflict principles governing capacity to enter into legal relationships, recognition of status and its incidents, and public policy.

The 2006 Act contains no jurisdiction or choice of law rules with regard to *de facto* cohabitation. Thus, it remains uncertain in Scots law which law, for example, governs an individual's legal capacity to attain the status of cohabitant (for the purposes of section 25); and in what factual circumstances a Scottish court would be entitled to apply the provisions in the Act covering the personal, financial and proprietary consequences of cohabitation. The essential antecedent question, not addressed in the Act, is in what circumstances the Scottish courts have jurisdiction to rule on the financial/proprietary rights of cohabitants (including the question as to the extent of the Scots court's competence to regulate the distribution of cohabitants' foreign assets upon termination of their relationship).⁵³

Thus, the 2006 Act introduces into Scots law significant new rules relating to cohabitation without enacting when those rules shall apply. The provisions, therefore, are incomplete.

De facto cohabitants, cohabiting outside Scotland

With regard to the proprietary consequences of a foreign *de facto* cohabitation, and in particular, the effect, if any, upon moveable and immoveable property situated in Scotland, it is likely that, in the first instance, the Scottish court would apply the 'proper law of the cohabitation' (law of closest connection) to determine whether the statutory regime imposed by that law purported to have extraterritorial effect upon property belonging to the cohabitants and situated abroad. If the statutory regime (say, of community of property between cohabitants), or a private contractual arrangement between the cohabitants⁵⁴ did purport to affect *all* property belonging to the couple, the Scottish *lex situs* nevertheless would retain absolute control over any property situated within Scotland, and would have an undeniable right to recognise, or not, the purported extraterritorial proprietary effects of the statutory regime, and the purported effect of the parties' contractual arrangements. It is probable that the Scottish *lex situs* would recognise the purported proprietary effects of a *de facto* cohabitation, *inter*

⁵² s 29(1)(b)(i).

⁵³ See J M Carruthers, *The Transfer of Property in the Conflict of Laws* (2005) (OUP), paras 2.51 – 2.62. Also *McKie v McKie* [1933] I.R. 464.

⁵⁴ cf statutory recognition of private contractual arrangements in a matrimonial context: Family Law (Scotland) Act 1985, ss 14(2)(h), 16 and 17, and Family Law (Scotland) Act 2006, s 39(6)(b).

partes, but possibly not in the event of a competing claim to property in Scotland by a third party such as a creditor.⁵⁵

The question whether a Scottish court would be entitled to apply the provisions of the Family Law (Scotland) Act 2006 to *de facto* cohabitants cohabiting (or formerly cohabiting) outside Scotland would seem to rest upon the Scottish court having jurisdiction (the basis of which, as stated above, is not clear), and upon the parties satisfying the section 25 meaning of cohabitants.

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⁵⁵ At least where the third party, say, the creditor, is relying on Scots law.