

# Intestate Inheritance Rights for Unmarried Committed Partners: Lessons for U.S. Law Reform from the Scottish Experience

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*ABSTRACT: No U.S. state affords intestate inheritance rights to the unmarried and unregistered committed partner of a decedent. This omission has become more and more problematic in recent years as cohabitation rates in the United States have risen and marriage rates have declined. Indeed, the phenomenon of increasing cohabitation rates and declining marriage rates is observed across the developed world. Unlike in the United States, however, a significant number of foreign jurisdictions have reformed their law to afford intestate inheritance rights to a decedent's surviving unmarried committed partner.*

*This Article looks to Scottish law to inform consideration of how U.S. states might best reform their intestacy statutes so as to provide intestate inheritance rights to a surviving unmarried committed partner. Examination of Scottish law should prove especially fruitful for U.S. law reformers. The relevant Scottish statutory provisions have been in effect since 2006 and have been extensively critiqued by Scottish courts, academics, and practitioners. Indeed, the Scottish Law Commission ("SLC"), whose recommendations led to adoption of the current scheme, has called for repeal of these intestacy provisions, and has offered a replacement scheme. Moreover, Scottish succession law and U.S. succession law share significant norms valuing certainty and preferring fixed entitlements and limited judicial discretion.*

*The Article evaluates the Scottish statute with respect to three major issues of principle that should be at the center of U.S. reform discussions: fulfillment of purpose, implications for certainty and administrative convenience, and implications for marriage. The Article similarly evaluates the SLC's proposal*

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to replace the current statute. Finally, the Article reflects upon the Scottish statute and SLC proposal in considering which elements of Scottish law a U.S. state might profitably borrow or should reject in an effort to craft a more inclusive approach to the intestate inheritance rights of U.S. unmarried committed partners consistent with the principles of U.S. succession law. The jumping off point for this discussion is this author's previously published proposal for a model statute that implements an accrual/multi-factor approach to intestate inheritance rights for unmarried committed partners. After describing the significant features of this proposal, the Article considers how one might evolve the proposed accrual/multi-factor approach to incorporate the lessons learned from the Scottish experience.

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## I. BACKGROUND AND OVERVIEW

No U.S. state affords intestate inheritance rights to the unmarried and unregistered committed partner of a decedent.<sup>1</sup> In recent years, this omission has become increasingly problematic as cohabitation rates in the United States have risen and marriage rates have declined.<sup>2</sup> Indeed, the phenomenon of increasing cohabitation rates and declining marriage rates is observed across the developed world.<sup>3</sup> Unlike in the United States, however, a significant number of foreign jurisdictions have reformed their law to afford intestate inheritance rights to a decedent's surviving unmarried committed partner.<sup>4</sup>

This Article looks to Scottish law to inform how U.S. states might best provide intestate inheritance rights to surviving unmarried committed partners. Examination of Scottish law should prove especially fruitful for U.S. law reformers. The relevant Scottish statutory provisions have been in effect since 2006 and have been extensively critiqued by Scottish courts, academics, and practitioners. Indeed, the Scottish Law Commission ("SLC"),<sup>5</sup> whose recommendations led to adoption of the current scheme, has called for a repeal of these intestacy provisions and has offered a replacement scheme.<sup>6</sup> Also, Scottish succession law and U.S. succession law share significant norms,

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1. New Hampshire comes close in providing intestacy rights for unmarried "[p]ersons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them." N.H. REV. STAT. ANN. § 457:39 (2016). See generally *In re Estate of Bourassa*, 949 A.2d 704 (N.H. 2008) (holding that a couple was not common law married and therefore the surviving partner was not entitled to intestacy inheritance rights).

2. See Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215, 216–22 (2016) (documenting declining marriage rates and rising cohabitation rates in the United States, especially between 2000 and 2010).

3. See Family Law (Scotland) Bill 2005, SP Bill [36], Policy Memorandum ¶ 57, [http://www.scottish.parliament.uk/S2\\_Bills/Family%20Law%20\(Scotland\)%20Bill/b36s2-intro-dp.pdf](http://www.scottish.parliament.uk/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-intro-dp.pdf) [hereinafter Policy Memorandum] ("The available evidence suggests that cohabitation has moved from a minority to a dominant family type in the UK."); Elaine E. Sutherland, *From 'Bidie-in' to 'Cohabitant' in Scotland: The Perils of Legislative Compromise*, 27 INT'L J.L. POL'Y & FAM. 143, 146 (2013) (referencing the "dramatic increase in the incidence of cohabitation in western countries" and citing to multiple studies); Waggoner, *supra* note 2, at 231.

4. See generally 2 COMPARATIVE SUCCESSION LAW: INTESTATE SUCCESSION (Kenneth G.C. Reid et al. eds., 2015) (discussing intestate succession in Europe, the United States, Quebec, Australia, New Zealand, South Africa, and Latin America).

5. The Law Commissions Act 1965 established the SLC as an independent body charged with advising the Government on ways "to simplify, modernise and improve Scots law." *Welcome to the Scottish Law Commission*, SCOTTISH L. COMMISSION, <https://www.scotlawcom.gov.uk> (last visited Apr. 2, 2018).

6. See *infra* Part II.C.

both valuing certainty and preferring fixed entitlements and limited judicial discretion.<sup>7</sup>

Specifically, this Article focuses on the law of Scotland to gain insight into several issues of principle and related issues of execution that should be at the center of U.S. reform discussions. The first issue of principle relates to purpose—determining why an intestacy statute should provide rights for an unmarried committed partner. The Scottish statute is vague as to its purposes. This Article discusses the implications of this lack of expressed clarity and demonstrates how U.S. law reform efforts can avoid similar problems.<sup>8</sup> The second issue of principle regards certainty and administrative convenience. The desire for certainty and ease of administration with respect to decedents' estates is a fundamental principle of American succession law, perhaps second only to the desire to promote donative freedom.<sup>9</sup> Yet, at the same time, extension of intestate inheritance rights to unmarried committed partners will inevitably undermine certainty and administrative convenience to some degree.<sup>10</sup> This objection to U.S. intestacy law reform should be at the forefront of any reform proposal discussion. Lastly, the third issue of principle concerns the institution of marriage and the extent to which provision in the intestacy statute for unmarried committed partners may negatively affect the institution of marriage and the rights of a decedent's spouse.<sup>11</sup> This is another area of great concern for U.S. intestacy law reform<sup>12</sup> and, thus, also should be at the center of any reform discussion.

This Article also focuses on two issues of execution that have been at the center of my prior scholarship addressing intestacy reform aimed at better serving the needs of functional families.<sup>13</sup> First, how should the duration of

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7. See *infra* notes 9, 106–09 (discussing, respectively the preference in U.S. and Scottish inheritance law for certainty and fixed rights).

8. See *infra* Parts II.B, III.B.

9. E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1068, 1076–77 (1999).

10. *Id.* at 1088.

11. To be clear, the concern is not with the rights of a decedent's ex-spouse. Rather, a decedent might die with both a current spouse and an unmarried committed partner where the decedent failed to obtain a dissolution of her marriage despite having entered into a cohabitation with one other than her spouse.

12. See Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 L. & INEQ. 1, 14 (1998) (reporting the view that provision of intestate inheritance rights to unmarried committed partners is inconsistent with the view of intestacy law as functioning to support traditional marriage); Sutherland, *supra* note 3, at 147–49 (discussing arguments against providing legal rights for cohabitants grounded in a desire to privilege marriage and referencing several U.S. scholars who have advanced such arguments).

13. See, e.g., E. Gary Spitko, *Open Adoption, Inheritance, and the "Uncleing" Principle*, 48 SANTA CLARA L. REV. 765, 767 (2008) (“[T]he article proposes reforming intestacy statutes to allow an adopted child and her birth parent who have maintained a ‘qualifying functional relationship’ following an open adoption to inherit from and through each other as would an aunt or uncle and a niece or nephew.”); Spitko, *supra* note 9, at 1068, 1076–77 (arguing that the Uniform

the cohabitation impact the intestacy calculus?<sup>14</sup> Second, to what extent should the intestacy provisions be concerned with the relationship between probate and non-probate means of passing property? More specifically, how should the will substitutes of the decedent or of the unmarried committed partner impact the intestacy calculus?<sup>15</sup>

Part II.A of the Article begins with a detailed analysis of the Scottish statute providing for intestate inheritance rights for an unmarried committed partner, and pays particular attention to issues of execution.<sup>16</sup> Next, Part II.B evaluates the Scottish statute with respect to each of the three major issues of principle: (1) fulfillment of purpose; (2) impact on certainty and administrative convenience; and (3) implications for marriage.<sup>17</sup> Finally, this Part describes and briefly evaluates the SLC's proposal to replace the current statute.<sup>18</sup>

Then, Part III considers which elements of the Scottish statute and SLC proposal a U.S. state might use to craft a more inclusive approach to intestacy while remaining true to the norms of its succession law.<sup>19</sup> This discussion is framed by my previously published proposal for a model statute that implements an accrual/multi-factor approach to intestate inheritance rights for unmarried committed partners.<sup>20</sup> Therefore, Part III provides a detailed description of the significant features of my proposal<sup>21</sup> and, most importantly, considers how my proposal for an accrual/multi-factor approach should be updated to reflect and incorporate the lessons learned from the Scottish experience.<sup>22</sup>

## II. INTESTATE INHERITANCE RIGHTS FOR UNMARRIED COMMITTED PARTNERS IN SCOTLAND

### A. STRUCTURE

Although part of the United Kingdom, Scotland has a different intestacy statute than is found in England and Wales.<sup>23</sup> In 2006, Scotland extended

Probate Code's denial of intestate inheritance rights to surviving same-sex partners is inconsistent with the hierarchy of values on which the code is based).

14. See generally E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255 (2002) (articulating the rationale and mechanics of the accrual/multi-factor approach).

15. See generally Mary Louise Fellows, E. Gary Spitko, & Charles Q. Strohm, *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 IND. L.J. 409 (2010) (exploring the relationship between intestacy law and will substitutes regarding decedent donative intent).

16. See *infra* Part II.A.

17. See *infra* Part II.B.

18. See *infra* Part II.C.

19. See *infra* Part III.

20. See Spitko, *supra* note 14, at 345-49.

21. See *infra* Part III.A.

22. See *infra* Part III.B.

23. See Succession (Scotland) Act 1964, c.41, <https://www.legislation.gov.uk/ukpga/1964/41/contents>.

intestate inheritance rights to unmarried partners<sup>24</sup> by enacting the Family Law (Scotland) 2006 (“Act”), which provides various property and succession rights to “cohabitant[s].”<sup>25</sup> The statute’s cohabitation provisions are modeled on recommendations made by the SLC in its 1992 Report on Family Law.<sup>26</sup>

### 1. Definition of Cohabitant

Section 25(1) of the Act defines a “cohabitant” as “a man and a woman who are (or were) living together as if they were husband and wife; or . . . two persons of the same sex who are (or were) living together as if they were civil partners.”<sup>27</sup> The Act provides relatively minimal guidance to a court considering whether an applicant qualifies as a cohabitant.<sup>28</sup> Section 25(2) of the Act provides that a court considering whether an applicant is a cohabitant of another “shall” consider three factors: “(a) the length of the period during which [the applicant and the other person] have been living together (or lived together); (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.”<sup>29</sup>

Arguably, the last of these factors is broad enough to authorize a court, in making a section 25 cohabitant determination, to consider either party’s will-substitute beneficiary designations.<sup>30</sup> Thus, a partner’s designation of the other partner as a will-substitute beneficiary should weigh in favor of finding cohabitant status. In contrast, a partner’s beneficiary designation in favor of someone other than the other partner should weigh against finding cohabitant status.<sup>31</sup>

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24. *Kerr v. Mangan* [2014] CSIH 69 [6]–[8], (2015) SC 17, 19–20 (Scot.).

25. *See* Family Law (Scotland) Act 2006, (ASP 2) §§ 25–29.

26. *See* SCOTTISH LAW COMM’N, REPORT ON FAMILY LAW, 1992, SLC 135, at 115–27, <https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf> [hereinafter REPORT ON FAMILY LAW]; SCOTTISH LAW COMM’N, REPORT ON SUCCESSION, 2009, SLC 215, at 66, <https://www.scotlawcom.gov.uk/files/7112/7989/7451/rep215.pdf> [hereinafter REPORT ON SUCCESSION].

27. Family Law (Scotland) Act 2006, (ASP 2) § 25(1).

28. *See id.* § 25(2).

29. *Id.*

30. The issue seems not to have been discussed in the debate leading up to enactment of the Act. *See generally* Family Law (Scotland) Bill, SCOTTISH PARLIAMENT, <http://www.parliament.scot/parliamentarybusiness/Bills/25041.aspx> (last visited Apr. 2, 2018) (chronicling the legislative history of the bill).

31. *See* Fellows, Spitko, & Strohm, *supra* note 15, at 441 (The co-authors’ factorial research design study found: “With respect to 57% of the vignettes in which the life partner was the will-substitute beneficiary, the respondent would make the life partner a new heir” and “with respect to 51% of the vignettes in which the life partner was the will-substitute beneficiary, the respondent would give the life partner half or more of the probate estate.”).

## 2. Rights of Cohabitants

Sections 26 through 29 of the Act provide certain rights to one who has qualified as a “cohabitant” under section 25. Sections 26 and 27 are relatively minor provisions that establish presumptions of equal ownership concerning, respectively, certain household goods and certain money provided by a partner as an allowance for joint household expenses or property purchased with that money.<sup>32</sup> Of greater significance, section 28 authorizes a court to make a financial provision for a cohabitant when the cohabitation ends for a reason other than the death of a cohabitant.<sup>33</sup>

Most importantly for purposes of this Article, section 29 of the Act provides for a surviving cohabitant’s intestate inheritance rights.<sup>34</sup> This section applies only when, immediately prior to the intestate decedent’s death, the decedent was domiciled in Scotland and was cohabiting with the survivor.<sup>35</sup> Section 29(2) authorizes the court to order payment of a capital sum or transfer of real or personal property to the survivor from the decedent’s “net intestate estate.”<sup>36</sup> The net intestate estate is defined as what remains of the intestate estate after payment of or satisfaction of inheritance taxes, certain other liabilities of the estate, and the surviving spouse’s or surviving civil partner’s “legal rights” and “prior rights.”<sup>37</sup>

However, section 29 does not provide a fixed intestate share to the surviving cohabitant.<sup>38</sup> Rather, section 29 gives the court almost unlimited

32. Family Law (Scotland) Act 2006, (ASP 2) §§ 26–27.

33. *Id.* § 28; see also *Lindsay v. Murphy* (2010) Fam. L.R. 156, 159 [58] (Scot.) (noting the flexibility that section 28 gives courts to fashion an appropriate award where cohabitation ends for reasons other than by death and opining that this flexibility “reflect[s] the reality that cohabitation is a less formal, less structured and more flexible form of relationship than either marriage or civil partnership”).

34. Family Law (Scotland) Act 2006, (ASP 2) § 29. Notably, the Act does not provide for a surviving cohabitant’s rights when the decedent died testate. See *id.* §§ 25–29. The Scottish Executive chose not to include rights against the testate estate because the issue was under review at the time by the SLC. See REPORT ON SUCCESSION, *supra* note 26, at 68–69.

35. Family Law (Scotland) Act 2006, (ASP 2) § 29(1)(b)(i)–(ii).

36. *Id.* § 29(2)(a)(i)–(ii).

37. *Id.* § 29(10). The legal rights and prior rights that Scottish succession law affords to a surviving spouse or civil partner often entitle the spouse or civil partner to a significant portion—frequently all—of the intestate estate. Under Scottish law, however, a surviving spouse or civil partner is an heir of the “free estate” remaining after legal rights and prior rights only if the intestate decedent left no issue, parents, siblings, or issue of siblings. Succession (Scotland) Act 1964, c.41, § 2(1)(c), <https://www.legislation.gov.uk/ukpga/1964/41/section/2>. For a discussion of the legal rights of a surviving spouse and child and the prior rights of a surviving spouse, see *infra* notes 108–09 and accompanying text.

38. In its 1992 proposal, the SLC recommended a discretionary provision system for surviving cohabitants, asserting: “The main advantage of a discretionary system for cohabitants is that it can take account of the widely differing circumstances of different cases . . .” REPORT ON FAMILY LAW, *supra* note 26, at 122.

discretion to determine the size of the survivor's intestate share, if any.<sup>39</sup> The statute directs the court, in exercising its discretion, to have regard to certain matters, specifically, "the size and nature of the deceased's net intestate estate;" any property passing to the survivor as a "consequence of[] the decedent's death; . . . the nature and extent of any other . . . claims on[] the . . . net intestate estate; and . . . any other matter the court considers appropriate."<sup>40</sup> The statute does impose one significant limitation on the court's discretion: The intestate share awarded to the survivor may not "exceed the amount to which the survivor would have been entitled had the survivor been the spouse or civil partner of the deceased."<sup>41</sup>

As noted, section 29 expressly directs the court to consider, as a factor influencing the size of the surviving cohabitant's intestate share, property passing to the surviving cohabitant as a consequence of the decedent's death. This would include property passing to the survivor by a will substitute of the decedent. The statutory language does not expressly make clear, however, whether the court ought to consider will-substitute property passing to the survivor as a type of advancement that should tend to reduce the size of the intestate share or, instead, as an indicator that the decedent would want the survivor to be a favored heir, and, thus, to take a relatively larger intestate share.<sup>42</sup> The only court to have expressly considered the issue has interpreted the language such that a non-probate transfer to the surviving cohabitant militates against an award from the net intestate estate.<sup>43</sup>

The Act has now been in effect for a dozen years. The case law as well as commentaries from practitioners, academics, and law reformers evidence how the Act has worked in practice. The next Part evaluates the Act's cohabitation provisions in light of that information.

### B. EVALUATION

An evaluation of how the Act's cohabitation provisions have worked since their 2006 enactment is hampered by the fact that there have been relatively few published judicial opinions applying the provisions.<sup>44</sup> In March 2016, the Justice Committee of the Scottish Parliament published a report titled "Post-

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39. See Family Law (Scotland) Act 2006, (ASP 2) § 29(3)(d) (authorizing the court to consider "any . . . matter the court considers appropriate").

40. *Id.* § 29(3)(a)-(d).

41. *Id.* § 29(4).

42. See *id.* § 29(3)-(4).

43. See *Savage v. Purches* (2009) S.L.T. (Sh. Ct.) 36, 41-42 [9]-[11] (Scot.) (noting that a large pension benefit passing to the surviving cohabitant on the decedent's death militates against any award to the survivor under section 29).

44. See JUSTICE COMM., POST-LEGISLATIVE SCRUTINY OF THE FAMILY LAW (SCOTLAND) ACT 2006, 2016, SP 963, at 10, [http://www.parliament.scot/S4\\_JusticeCommittee/Reports/JS042016R06.pdf](http://www.parliament.scot/S4_JusticeCommittee/Reports/JS042016R06.pdf) (noting "[t]he apparent paucity of published judicial determinations on section 28 cases").

Legislative Scrutiny of the Family Law (Scotland) Act 2006,”<sup>45</sup> which speculated on the reasons for this dearth of published opinions.<sup>46</sup> The report noted evidence that family law cases generally are under-reported in Scotland and cited testimony that, “[s]ome sheriffs are possibly reticent to publish judgments because they are not terribly certain about the approaches that they have taken to section 28.”<sup>47</sup>

Moreover, it is particularly challenging to evaluate the Act’s cohabitation provisions respecting intestacy because most of the published opinions arose under section 28, which deals with cohabitations that have terminated due to breakdown rather than the death of a partner. With this caveat concerning the limited case law in mind, the Article turns next to evaluate the Act’s cohabitation provisions respecting intestate inheritance rights.

### 1. Fulfillment of Purpose

The Policy Memorandum that the Scottish Executive prepared to accompany the Family Law (Scotland) Bill (which later became the Act) provides insight into the objectives and values that underpin the Act.<sup>48</sup> In general, the Scottish Parliament intended for the Act to respond to the changing nature of family formation by offering new protections to persons with nontraditional family structures.<sup>49</sup> With respect to cohabitants specifically, the Policy Memorandum states that the statute seeks to provide a statutory basis for protecting qualifying cohabitants when their relationship ends because of a breakdown or the death of a partner.<sup>50</sup>

However, the Act does not seek to convey marriage-like rights on unmarried committed partners.<sup>51</sup> Indeed, the statute seeks to preserve the special status of marriage in Scottish society.<sup>52</sup> Thus, the rights of a surviving spouse and the rights of a surviving unmarried cohabitant remain differentiated under the Act.<sup>53</sup>

45. See generally *id.* (describing the response to the Act).

46. The report took stock of the Act’s effectiveness during the first decade following its enactment and focused especially on the provisions on cohabitation as well as on certain provisions on parental responsibilities and rights. *Id.* at 1–2.

47. *Id.* at 7 (quoting JUSTICE COMM., SCOTTISH PARLIAMENT, OFFICIAL REPORT OF 9TH MEETING, 2016-4, at 26, <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10418&mode=pdf>).

48. Policy Memorandum, *supra* note 3, ¶¶ 2–12.

49. *Id.* ¶¶ 2, 4–5; see also Family Law (Scotland) Act 2006, (ASP 2) ¶ 3 Explanatory Notes, <http://www.legislation.gov.uk/asp/2006/2/notes> (“The Act makes a range of provisions designed to address the legal vulnerabilities experienced by family members in Scotland today and to ensure that family law protects the best interests of children regardless of the type of family to which they belong.”).

50. Policy Memorandum, *supra* note 3, ¶¶ 64–65.

51. *Id.* ¶ 65.

52. See *id.* ¶ 70 (stating that the drafters “believe that to regard cohabitation as equivalent to marriage fails to acknowledge the special place of marriage in Scottish society”).

53. JUSTICE COMM., *supra* note 44, at 4.

Finally, as the structure of the statute suggests, the drafters sought to give courts “the necessary flexibility in interpreting the facts of each case and discretion in securing fair and just outcomes.”<sup>54</sup> The drafters understood that cohabiting relationships and the personal circumstances of the cohabitants vary greatly. Thus, they believed that courts should have broad discretion to fashion an appropriate outcome based on the facts of any given case.<sup>55</sup>

Beyond these general statements of intent, neither the text nor the legislative history of the Act gives any indication as to the statute’s objectives in qualifying an applicant under section 25 or providing for an award to the qualified cohabitant from the net intestate estate under section 29.<sup>56</sup> Thus, a court applying these sections is without guidance as to what ends it should seek to promote.<sup>57</sup> This lack of any clearly stated principle to ground these cohabitation provisions has given rise to great uncertainty in the statute’s application.<sup>58</sup>

Consider, for example, application of section 29’s language regarding will substitutes. If section 29’s dominant purpose is to implement a reciprocity or compensation principle or to protect the survivor’s reliance interests or provide for her needs, then a significant non-probate transfer to the surviving cohabitant should support courts awarding a reduced intestate share to the survivor. In contrast, if section 29’s dominant purpose is to promote the decedent’s unexpressed presumed donative intent, then a significant non-probate transfer to the surviving cohabitant might support courts awarding an increased intestate share to the survivor.<sup>59</sup>

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54. Policy Memorandum, *supra* note 3, ¶ 75.

55. JUSTICE COMM., *supra* note 44, at 4.

56. *Cf. id.* at 10–11 (The Justice Committee of the Scottish Parliament noted comments submitted to the committee for its ten-year review of the Act which expressed “views that, while the law on adult relationships—marriage, civil partnership, and cohabitation—in Scotland may be broadly fit for purpose, it has evolved in a piecemeal fashion over the last decade and a half, with limited consideration of what the underlying aims and principles of the law should be.”). The SLC’s 1992 Report on Family Law, which heavily influenced the Act, suggests that the provision for a surviving cohabitant “may be intended to provide recompense for past contributions or sacrifices . . . [or] to reflect the view that the deceased, if he had made a will, would in all probability have made provision for the cohabitant.” REPORT ON FAMILY LAW, *supra* note 26, at 122–23.

57. The 1951 report of the “Mackintosh Committee,” which heavily influenced the Succession (Scotland) Act 1964 and, thus, Scotland’s modern intestacy scheme, opined that the intestacy statute should provide for distribution of the intestate estate as the decedent most likely would have wanted the estate to be distributed had she made a will. *See* SCOTTISH HOME DEP’T, LAW OF SUCCESSION IN SCOTLAND: REPORT ON THE COMMITTEE OF INQUIRY, 1951, Cmd. 8144, at 8.

58. *See infra* notes 75–79, 95–102 and accompanying text.

59. *See* Fellows, Spitko, & Strohm, *supra* note 15, at 441 (The results of a factorial research design study seeking to assess public attitudes about the relationship between will substitutes and intestacy statutes found that, “[w]ith respect to 57% of the vignettes in which the life partner was the will-substitute beneficiary, the respondent would make the life partner a new heir.”); Fellows et al., *supra* note 12, at 63 (concluding that the naming of a putative committed partner as

The Act does not expressly instruct courts to focus on the surviving cohabitant's needs, reliance interests, and contributions to the decedent's economic, physical, or emotional well-being in applying the intestacy provisions with respect to cohabitants.<sup>60</sup> The structure of the statute, however, gives courts the discretion to do so.<sup>61</sup> Specifically, section 29(3) expressly authorizes a court to rely upon "any . . . matter the court considers appropriate."<sup>62</sup> Indeed, in the two published opinions in which a court has discussed at length the reasoning grounding its application of section 29(3)'s factors influencing the award of an intestate share to a surviving cohabitant,<sup>63</sup> both courts focused their analysis principally on reciprocity/contribution and reliance/need.

In *Windram, Applicant*,<sup>64</sup> the court awarded the surviving cohabitant of a twenty-five-year cohabitation a large share of the intestate estate—an amount almost equal to what the survivor would have taken of right had she been married to the decedent.<sup>65</sup> In determining the award, the court focused on the survivor's contributions to the decedent's well-being: For many years she had been a full-time homemaker and mother to the couple's children (which allowed the decedent to focus on his business and financial matters) and she had taken care of the decedent during his final illness.<sup>66</sup> The court also focused on the extent to which the survivor had "placed herself in a position of dependency on the deceased."<sup>67</sup> In this case, she had merged her finances with those of the deceased, had left the workforce to care for their children full-time for eleven years and, even after returning to the workforce, had worked only part-time in a position that allowed her to care for the children during school holidays.<sup>68</sup> Finally, the court noted that the survivor had a continuing obligation to provide care and support for the couple's children and would be left financially insecure without a sizeable award from the net intestate estate.<sup>69</sup>

In contrast, in *Savage v. Purches*, the surviving cohabitant had lived with the decedent for only two years and six months, ending with the decedent's

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beneficiary of a non-probate means of passing property at death is an "[o]bservable factor[] closely correspond[ing] to self-definitions of a committed relationship and can be associated with a preference for having a committed partner inherit").

60. See Family Law (Scotland) Act 2006, (ASP 2) § 29(2)–(4).

61. *Id.*

62. *Id.* § 29(3)(d).

63. See *Windram, Applicant* (2009) Fam. L.R. 157, 161–62 [14]–[18] (Scot.); *Savage v. Purches* (2009) S.L.T. (Sh. Ct.) 36, 39–41 [4]–[8] (Scot.).

64. *Windram*, at 157.

65. *Id.* at 162 [18].

66. *Id.* at 161 [14].

67. *Id.*

68. *Id.*

69. *Id.* at 162 [15]–[18].

death.<sup>70</sup> The court noted that the survivor had not contributed to the mortgage on the decedent's home and had paid no rent; had changed careers during the relationship and had been supported financially by the decedent during the transition; and had made only minor contributions to the household, such as carrying out limited shopping and paying for dog grooming and ironing services.<sup>71</sup> After commenting "that there was a distinct whiff of avarice about the whole action raised by the pursuer," the court ruled that the survivor should take nothing from the intestate estate.<sup>72</sup> In doing so, the court emphasized that the decedent had "considerably enhanced" the survivor's standard of living during their cohabitation and that significant pension benefits had passed to the survivor by discretion of the pension trustees as a result of the decedent's death.<sup>73</sup> The short duration of the cohabitation (less than three years) was also a critical factor for the court in denying any award under section 29.<sup>74</sup>

The lack of clarity with respect to the purpose of the cohabitation provisions, especially section 29, has been the subject of significant criticisms and calls for legislative clarification.<sup>75</sup> Indeed, Lady Smith, sitting on the Court of Session (Scotland's supreme civil court) has noted that section 29's provisions "provide little, if any, indication of underlying principle."<sup>76</sup> Further, she has opined, "[i]f clarity is to be achieved [in the application of section 29], the current section 29 needs to be replaced with a provision that gives a clear indication not only of the mischief which it seeks to address but also of the policy underlying whatever solution is adopted."<sup>77</sup> Similarly, the SLC, in calling for section 29's repeal and replacement, has argued that the "potentially infinite" number of relevant factors for a court to consider in conjunction with a lack of clarity as to purpose yields too great a degree of uncertainty<sup>78</sup> and that "[t]he court is being asked to do the impossible: to balance conflicting family interests without any guidance on the relative weight to be given to the needs and interests of each party."<sup>79</sup>

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70. *Savage v. Purches* (2009) S.L.T. (Sh. Ct.) 36, 37 [2], [14] (Scot.).

71. *Id.* at 38 [11].

72. *Id.* at 40 [5], 42 [14].

73. *Id.*

74. *Id.* at 41 [11].

75. See, e.g., Fran Wasoff et al., *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* 31, 136 (Univ. of Cambridge Faculty of Law Legal Studies Research Paper Series, Working Paper No. 11/03, 2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1736612](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736612) (noting critically that section 29 "provides no guidance about the objective which the court should be seeking to achieve in making any order").

76. *Kerr v. Mangan* [2014] CSIH 69 [17], (2015) SC 17, 23 (Scot.).

77. *Id.* at 24 [19].

78. REPORT ON SUCCESSION, *supra* note 26, at 6, 67–68.

79. *Id.* at 68.

## 2. Implications for Certainty and Administrative Convenience

### i. Section 25

Courts and practitioners alike seemingly have not had much difficulty interpreting or applying section 25.<sup>80</sup> Most of the case law applying section 25's definition of cohabitant arose in the context of an application under section 28. Nonetheless, that case law should be informative with respect to qualifying a cohabitant under section 25 in connection with a claim for an intestate share under section 29.

In fact, however, very few published opinions discuss cohabitant qualification at length.<sup>81</sup> In a significant number of cases, the parties stipulated that the applicant was a cohabitant within the meaning of section 25.<sup>82</sup> In a number of other cases, the court did not discuss the issue at all, but rather proceeded directly to a section 28 or 29 analysis,<sup>83</sup> or announced a conclusion regarding cohabitant status after a short presentation of facts and with little or no section 25 analysis.<sup>84</sup> This limited body of case law may evidence a general willingness of Scottish courts and the parties themselves to find or concede cohabitation status under section 25 given that such a finding

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80. JUSTICE COMM., *supra* note 44, at 5 (The Justice Committee noted in its study ten years after the enactment of the Act: "Overall, we were left with the impression that the definition [of cohabitant in section 25] is not perfect but appears not to have created significant problems in practice."); Wasoff et al., *supra* note 75, at 124 (discussing their survey of practitioners and concluding "our research did not find any substantial problems with identifying cohabitation in practice").

81. *But see, e.g.*, *Harley v. Thompson* (2015) Fam. L.R. 45, 50 [42] (Scot.) (considering the cohabitant issue "by looking at the circumstances of the relationship as a whole"); *Gutcher v. Butcher*, 2014 WL 4954935 [13]–[17] (Scot.) (official transcript).

82. *See, e.g.*, *Gow v. Grant* [2012] UKSC 29 [9], [13], (2012) SC 1, 5–6 (Scot.); *Lindsay v. Murphy* (2010) Fam. L.R. 156, 158 [1] (Scot.); *Savage v. Purches* (2009) S.L.T. (Sh. Ct.) 36, 40 [7] (Scot.); *see also* *Courtney's Executors v. Campbell* (2016) CSOH 136, 2016 WL 05930096 [70] (Scot.) (dismissing estate's claim for unjust enrichment where the parties did not dispute that the deceased and the defendant had been cohabitants within the meaning of section 25 yet the deceased had failed to pursue a remedy under section 28 after breakup).

83. *See generally* *Kerr v. Mangan* [2014] CSIH 69, (2015) SC 17 (Scot.) (proceeding directly to section 29 analysis in a case in which the applicant had lived with the decedent for 22 years); *Whigham v. Owen* [2013] CSOH 29, (2013) S.L.T. 483 (Scot.) (proceeding directly to section 28 analysis in a case in which the parties had lived together for more than 26 years); *Mitchell v. Gibson* (2011) Fam. L.R. 53 (Scot.) (proceeding directly to section 28 analysis in a case in which the parties had lived together for two years).

84. *See, e.g.*, *Windram, Applicant* (2009) Fam. L.R. 157, 160 [3] (Scot.) (explaining that the court "had no difficulty in reaching the conclusion that the deceased and the pursuer [in a section 29 case] were cohabitants within the meaning of s[ection] 25" where the couple had lived together for 25 years, had raised two children together, and the pursuer had cared for the decedent during his last illness); *Chebotareva v. Khandro* (2008) Fam. L.R. 66, 70 [19] (Scot.) (concluding, in a section 29 case, that the deceased and the pursuer had been section 25 cohabitants given that they had been in a "long relationship" of which certain family members had knowledge; had cohabited for a little over one year; the deceased had "claimed that he loved the pursuer very much"; and the deceased had been prepared to attend the pursuer's immigration hearing and had stated that he would accompany her to her home country if she had to return there).

does not of itself entitle the qualified cohabitant to any financial provision under section 28 or any share of the decedent's intestate estate under section 29.<sup>85</sup>

Section 25 instructs the court, in making a determination as to whether an applicant qualifies as a cohabitant, to consider the length of the cohabitation period, but does not impose a minimum duration of the cohabitation for an applicant to qualify.<sup>86</sup> The statute is not intended to extend protections to cohabitants of a short-term cohabitation.<sup>87</sup> Rather, “[t]he intention is to create legal safeguards for the protection of cohabitants in long-standing and enduring relationships.”<sup>88</sup> Nevertheless, the drafters purposefully declined to establish a minimum cohabitation period concluding, “[i]t would be arbitrary, rigid and unresponsive to individual cases; would create problems of proof; could distort behavior; and could lead to especially harsh outcomes in relation to discretionary awards on death.”<sup>89</sup> The drafters predicted that, over time, case law would clarify which types of cohabiting relationships and surrounding circumstances would likely give rise to a successful claim under the Act.<sup>90</sup> However, more than a decade after the statute's enactment, no such sufficient body of case law has arisen.

Still, section 25's failure to provide for a minimum cohabitation period for an applicant to qualify has not created significant difficulties.<sup>91</sup> Professor Fran Wasoff and her colleagues surveyed practitioners who had handled section 25 cases. They found that very few cases involved a cohabitation of less than two years and relatively few cases involved a cohabitation of less than five years.<sup>92</sup> The researchers concluded that “cohabitations of short duration could very well rule themselves out.”<sup>93</sup> Moreover, concern that section 25 may

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85. See, e.g., *Chebotareva* at 70 [19]–[20] (finding section 25 cohabitation status where the parties “had lived together for a year and a few months” but holding that the pursuer's section 29 claim failed because the decedent had not been domiciled in Scotland at his death).

86. Family Law (Scotland) Act 2006, (ASP 2) § 25(2)(a).

87. Policy Memorandum, *supra* note 3, ¶ 67.

88. *Id.*; see also JUSTICE 1 COMM., STAGE 1 REPORT ON FAMILY LAW (SCOTLAND) BILL, 2005-2, SP 401, ¶ 179 (citing oral testimony indicating that the bill is intended to apply to long-lasting cohabitations and not to short-term relationships).

89. Policy Memorandum, *supra* note 3, ¶ 67; see also Sutherland, *supra* note 3, at 151 (“The lack of a fixed minimum cohabitation period avoids arbitrary injustice to a pursuer . . . who misses the qualifying time by a small margin.”).

90. Policy Memorandum, *supra* note 3, ¶ 68.

91. Wasoff et al., *supra* note 75, at 125 (concluding from their survey of practitioners that the lack of a minimum duration requirement in section 25 “does not appear to have created problems”); see also Sutherland, *supra* note 3, at 151 (reaching the same conclusion in the context of court workload).

92. Wasoff et al., *supra* note 75, at 125; see also *Gow v. Grant* [2012] UKSC 29 [52], (2012) SC 1, 17–18 (Scot.) (citing research by Wasoff and her colleagues, and concluding that the lack of a qualifying duration for the cohabitation “has not proved a problem”).

93. Wasoff et al., *supra* note 75, at 89; cf. REPORT ON FAMILY LAW, *supra* note 26, at 116 (positing that its recommendations would “be self-limiting (in the sense that a short cohabitation

allow the survivor of a transient relationship to qualify as a cohabitant entitled to assert a section 29 claim might be lessened by the fact that the court may again consider the short duration of the cohabitation in its section 29 analysis, under “any other matter the court considers appropriate.”<sup>94</sup>

ii. *Section 29*

Section 29 has generated significant criticism from Scottish judges, law reformers, academics, and practitioners relating to the uncertainty that arises from the section’s grant of nearly unfettered discretion to the courts.<sup>95</sup> Lady Smith has opined that, “[t]he factors specified in subsec[ti]on (3) are obvious but limited and the ability to have regard to ‘any other matter the court considers appropriate’ gives no useful guidance at all.”<sup>96</sup> She has concluded, “[i]n the end of the day, the court’s discretion is so unfettered as to make it extraordinarily difficult, if not impossible, to predict accurately what may be the outcome, at first instance, of an application under sec[ti]on 29.”<sup>97</sup> Lord Drummond Young, also sitting on the Court of Session, similarly has commented, “[t]he lack of statutory criteria for an award [under section 29] makes the task of the court extremely difficult . . . . In my view reform of the law in this area is clearly desirable.”<sup>98</sup> The SLC likewise has noted the difficulty of predicting how a court may rule upon a section 29 application and, thus, has called for replacement of section 29 “with a simpler provision [that] will greatly reduce the extent of the court’s discretion” and that “will make the outcome of litigation easier to predict and therefore encourage parties to negotiate a settlement without resort to court.”<sup>99</sup>

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or one involving little mutual commitment would be likely to give rise to minimal legal consequences”).

94. *See* *Savage v. Purches* (2009) S.L.T. (Sh. Ct.) 36, 36 [11] (Scot.) (considering the short duration of the cohabiting relationship a relevant factor under section 29(3)(d), which covers “any other matter the Court considers appropriate”); *see also* *Windram, Applicant* (2009) Fam. L.R. 157, 161 [14] (Scot.) (listing the long duration of the cohabitation as a factor justifying a large award from the intestate estate).

95. *See, e.g.*, JUSTICE 1 COMM., *supra* note 88, ¶ 208 (expressing “concern[] at the wide discretion that the current drafting leaves to the court in determining the appropriate amount that should be awarded” and expressing a preference that the legislation give further guidance to the courts); JUSTICE COMM., *supra* note 44, at 5 (noting that comments submitted to the Justice Committee of the Scottish Parliament raised the issue of the vague nature of section 29 and the consequent difficulty of advising clients of a likely outcome of a section 29 application); Wasoff et al., *supra* note 75, at 63–64, 70–71, 103–04, 107 (reporting various comments of practitioners criticizing section 29’s broad grant of discretion and seeking greater clarity).

96. *Kerr v. Mangan* [2014] CSIH 69 [17], (2015) SC 17, 23 (Scot.) (quoting Family Law (Scotland) Act 2006, (ASP 2) § 29(3)(d)).

97. *Id.* at 24 [18].

98. *Id.* at 30 [48] (Lord Drummond Young, concurring).

99. REPORT ON SUCCESSION, *supra* note 26, at 67–68. The SLC’s proposal more precisely specifies criteria to determine who should qualify as a cohabitant and to calculate the portion of the intestate estate that a qualified cohabitant should take. *See id.* at 70–71, 73.

The Wasoff survey of practitioners found significant dissatisfaction among practitioners with section 29's broad grant of discretion.<sup>100</sup> Professor Wasoff and her colleagues have concluded that section 29's broad discretion "undermines its wider objectives, as well as the broad policy objective of encouraging private ordering within a clear framework of principles that characterises so much else in Scottish family law."<sup>101</sup> Thus, they have called for reform that would give greater guidance to courts considering a surviving cohabitant's claim for an award from the decedent's intestate estate.<sup>102</sup>

Understanding that cohabitation relationships and the personal circumstances of the cohabitants vary tremendously, however, the Act's drafters took the position that courts should have broad discretion to fashion a just award depending on the facts of the case.<sup>103</sup> Professor Kenneth Norrie has criticized this thinking.<sup>104</sup> He points out that marital relationships and the personal circumstances of the spouses also vary greatly, yet, Scottish law gives more explicit guidance to courts with respect to the division of marital property and recent scholarship has shown that this approach works well in Scotland.<sup>105</sup>

Indeed, the nature and degree of discretion that section 29 grants to courts applying the provision is very much out of step with the preference for certainty and administrative convenience found in Scottish family law and succession law generally, which tend to rely upon fixed entitlements rather than judicial discretion.<sup>106</sup> Most notably, Scotland, unlike England and Wales,<sup>107</sup> does not provide for a discretionary family maintenance system to guard against disinheritance. Rather, Scottish law's protections against disinheritance provide to a surviving spouse or civil partner fixed "prior rights" in the decedent's intestate estate,<sup>108</sup> and to a surviving spouse or civil

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100. Wasoff et al., *supra* note 75, at 138.

101. *Id.* at 139.

102. *Id.*

103. Policy Memorandum, *supra* note 3, ¶ 75; JUSTICE COMM., *supra* note 44, at 4.

104. JUSTICE COMM., *supra* note 44, at 9.

105. *Id.*

106. Kenneth G.C. Reid, *Intestate Succession in Scotland*, in 2 COMPARATIVE SUCCESSION LAW: INTESTATE SUCCESSION, *supra* note 4, at 370, 396 (stating that discretion in section 29 is "unique[] in Scottish succession law"); Frankie McCarthy, *Rights in Succession for Cohabitants: Savage v Purches*, 13 EDINBURGH L. REV. 325, 328 (2009) (noting that the Scottish law of intestate succession does not allow for consideration of "the equity of the situation"); Wasoff et al., *supra* note 75, at 31–32, 138.

107. See Inheritance (Provision for Family and Dependents) Act 1975, c.63 (Eng. & Wales), <https://www.legislation.gov.uk/ukpga/1975/63/contents>.

108. Prior rights may be asserted only by a surviving spouse or civil partner and only if the decedent has died intestate. Succession (Scotland) Act 1964, c.41, § 8, <https://www.legislation.gov.uk/ukpga/1964/41/section/8>. The spouse or civil partner enjoys three types of prior rights. First, the spouse or civil partner is entitled to the marital dwelling house in which the spouse or civil partner lived with the decedent at the time of the decedent's death up to a value of 300,000 GBP in 2006 and 473,000 GBP as of February 1, 2012. *Id.* § 8(1); The Prior Rights of Surviving

partner and children fixed “legal rights” in the decedent’s testate or intestate estate.<sup>109</sup> Unlike with a family maintenance system, the Scottish scheme guarding against disinheritance of a spouse or child does not afford any discretion to the court in setting the amount of prior rights or legal rights.

### 3. Implications for Marriage

The principal objection to the Family Law (Scotland) Bill’s provisions granting legal protections to unmarried committed partners was “that this would undermine marriage and discourage people from marrying.”<sup>110</sup> The drafters themselves sought to avoid undermining marriage when they were drafting the Act’s cohabitation provisions. As the Policy Memorandum states,

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Spouse (Scotland) Order 2005, SI 2005/252; The Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011, SI 2011/436. Second, the spouse or civil partner is entitled to the furniture and furnishings of the marital dwelling house up to a value of 24,000 GBP in 2006 and 29,000 GBP as of February 1, 2012. Succession (Scotland) Act 1964, c.41, § 8(3), <https://www.legislation.gov.uk/ukpga/1964/41/section/8>; The Prior Rights of Surviving Spouse (Scotland) Order 2005, SI 2005/252; The Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011, SI 2011/436. Finally, the spouse or civil partner is entitled to a cash sum, the amount of which depends upon whether the decedent is survived by issue. Succession (Scotland) Act 1964, c.41, § 9, <https://www.legislation.gov.uk/ukpga/1964/41/section/9>. In 2006, the surviving spouse or civil partner was entitled to 42,000 GBP if the decedent was survived by issue, and up to 75,000 GBP if the decedent was not survived by issue. *See* The Prior Rights of Surviving Spouse (Scotland) Order 2005, SI 2005/252. As of February 1, 2012, those amounts increased to 50,000 GBP and 89,000 GBP respectively. *See* The Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011, SI 2011/436.

109. SCOTTISH EXEC., RIGHTS OF SUCCESSION: A BRIEF GUIDE TO THE SUCCESSION (SCOTLAND) ACT 1964, at 3 (2005), <http://www.gov.scot/Resource/Doc/47121/0020437.pdf>. Legal rights may be claimed by a surviving spouse or civil partner and also by a surviving child. Succession (Scotland) Act 1964, c.41, §§ 8, 9, & 11(1), <https://www.legislation.gov.uk/ukpga/1964/41/contents>; SCOTTISH EXEC., *supra*, at 2. Such rights of a child are called legitim. Succession (Scotland) Act 1964, c.41, § 11(1), <https://www.legislation.gov.uk/ukpga/1964/41/section/11>. The issue of a predeceasing child can assert the legal rights of the predeceasing child. *Id.* Legal rights may be claimed against the testate estate or the intestate estate. SCOTTISH EXEC., *supra*, at 2–4. When the decedent dies testate, the spouse or civil partner or child must elect either to take any testamentary provision in their favor or claim legal rights. *Id.* at 4. When the decedent dies intestate, the spouse or civil partner or child can claim legal rights out of the intestate estate, but only after satisfaction of the spouse or civil partner’s prior rights. *Id.* at 2. An interesting feature of Scottish legal rights is that they depend upon the form of the estate. Legal rights may be claimed only out of the decedent’s personal property, known as the “moveable estate.” Civil Partnership Act 2004, c.33, § 131 (Eng. & Wales), <https://www.legislation.gov.uk/ukpga/2004/33/section/131>; Succession (Scotland) Act 1964, c.41, § 10(2), <https://www.legislation.gov.uk/ukpga/1964/41/section/10>; SCOTTISH EXEC., *supra*, at 2. The decedent is free to devise her real property, known as the “heritable estate,” by will as she sees fit. *Id.* at 2. If the deceased is not survived by issue, a spouse or civil partner is entitled to claim a sum of money equal to half the value of the net moveable estate. Civil Partnership Act 2004, c.33, § 131(1) (Eng. & Wales), <https://www.legislation.gov.uk/ukpga/2004/33/section/131>. If the deceased is survived by issue, a spouse or civil partner is entitled to claim a sum of money equal to one-third the value of the net moveable estate. *Id.* § 131(2). If the deceased is not survived by a spouse or civil partner, the decedent’s children are entitled to a sum of money equal to half the moveable estate. SCOTTISH EXEC., *supra*, at 2. Finally, if the deceased is survived by a spouse or civil partner, the children are entitled to a sum of money equal to one-third of the remains of the net moveable estate. *Id.*

110. Policy Memorandum, *supra* note 3, ¶ 77.

“[t]he Scottish Ministers are clear that marriage has a special place in society and that its distinctive legal status should be preserved.”<sup>111</sup> Indeed, survey data suggest that there is strong support within the Scottish succession and family law bars for maintaining a clear distinction between the rights of married people and the rights of unmarried cohabitants.<sup>112</sup>

In several ways, the cohabitation provisions reflect the drafters’ desire to protect the institution of marriage. First, the Act differentiates the rights of a surviving unmarried cohabitant from the rights of a surviving spouse or civil partner.<sup>113</sup> Second, the award to the qualified cohabitant from the intestate estate may not exceed the value of the portion of the intestate estate to which the cohabitant “would have been entitled had [she] been the [decedent’s] spouse or civil partner” at the decedent’s death.<sup>114</sup> Finally, for situations in which the decedent is survived by both a spouse or civil partner and a cohabitant, the cohabitant’s rights are subordinate to the prior rights and legal rights of the spouse or civil partner.<sup>115</sup> These rights entitle the spouse or civil partner to claim up to 591,000 GBP plus one-half of the value of the moveable property in the intestate estate.<sup>116</sup> As a result, in many cases where the decedent is survived by a spouse and a cohabitant, after prior rights, legal rights, taxes, and expenses are paid, there will be nothing left of the intestate estate from which the cohabitant’s share might be awarded.

### C. THE SCOTTISH LAW COMMISSION REFORM PROPOSAL

In its April 2009 Report on Succession, the SLC recommended radical reform of Scottish succession law including that Parliament repeal section 29 of the Act and replace it with a set of rights for surviving cohabitants that would apply to both testate and intestate estates.<sup>117</sup> The SLC’s Report is

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111. *Id.* ¶ 71; *see also* REPORT ON FAMILY LAW, *supra* note 26, at 115 (recommending reform to extend legal rights to heterosexual cohabitants and stating as a goal to not undermine marriage).

112. *See* Wasoff et al., *supra* note 75, at 93–96 (discussing survey responses as to the distinction between married people and cohabitants).

113. *See* JUSTICE COMM., *supra* note 44, at 4 (“[T]he legal consequences of marriage and cohabitation should remain clearly differentiated.”).

114. Family Law (Scotland) Act 2006, (ASP 2) § 29(4).

115. *Id.* § 29(2), (10); *see also* SCOTTISH LAW COMM’N, THE EFFECTS OF COHABITATION IN PRIVATE LAW, 1990, Discussion Paper No. 86, at 46 (acknowledging that the argument that granting intestate inheritance rights to cohabitants would devalue marriage “might have some plausibility if the rules on intestacy were to provide that a cohabitant were to be preferred to a legal spouse, where the deceased was survived by both”).

116. *See* The Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011, SI 2011/436.

117. REPORT ON SUCCESSION, *supra* note 26, at 69. The proposed draft Succession (Scotland) Bill is set forth at pages 135–83 of the Report on Succession, with the proposed provisions concerning cohabitants set forth at pages 155–60. *See* Succession (Scotland) Bill (Draft), *in* REPORT ON SUCCESSION, *supra* note 26, app. A, at 135–83. In April 2016, the Succession (Scotland) Act 2016 came into force. *See generally* Succession (Scotland) Act 2016, (ASP 7), <http://www.legislation.gov.uk/asp/2016/7/contents/enacted>. The Succession Act implemented

unclear as to the purposes or values that ground its reform proposal, offering only vague hints such as, “a cohabitant’s rights of succession should reflect the quality of the relationship which the couple had.”<sup>118</sup> A single passage in the report suggests obliquely that a dominant purpose is to reward contribution: In explaining why the proposed statute does not take account of will substitutes passing to the cohabitant upon the decedent’s death or the interests of the decedent’s other relatives, the Report directs, “[t]he court has to decide to what extent the surviving cohabitant *deserves* to be treated as the deceased’s spouse or civil partner for the purposes of the rules of succession. Other factors . . . are irrelevant.”<sup>119</sup> As discussed below, the proposed statute itself directs the court to focus on the surviving cohabitant’s contributions to the relationship as one of only three factors the court may consider in setting “the appropriate percentage” of the estate to which the surviving cohabitant would have been entitled had she been the decedent’s spouse or civil partner.<sup>120</sup>

The SLC proposal defines a cohabitant as one who, immediately before the decedent’s death, was not the decedent’s spouse or civil partner yet was “living with the deceased in a relationship which had the characteristics of the relationship between spouses or civil partners.”<sup>121</sup> The statute further provides that in determining whether the applicant was living in such a relationship, the court should focus on five factors:

- (a) whether they were members of the same household,
- (b) the stability of their relationship,
- (c) whether their relationship was sexual,
- (d) whether they had children together, or had accepted children as children of the family, and

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many of the reforms the SLC proposed in its 2009 Report on Succession, but did not address intestacy reform or the rights of cohabitants. *See generally id.* In June 2015, the Scottish Government issued a consultation paper concerning intestacy reform, protection from disinheritance under a will, and the rights of cohabitants. *See generally* THE SCOTTISH GOV’T, CONSULTATION ON THE LAW OF SUCCESSION, June 2015, Consultation Paper, <http://www.gov.scot/Resource/0048/00480484.pdf>. The proposed reforms, which would subject agricultural lands to the forced share of a surviving spouse, civil partner, and cohabitant, have met considerable opposition from agricultural interests. *See* Barney Thompson, *Scottish Landowners Resist Inheritance Reform*, FIN. TIMES (Dec. 8, 2014), <https://www.ft.com/content/cf3e3a38-7fo1-11e4-a828-00144feabdco> (discussing the concern of some Scottish landowners that proposed succession law reforms would result in the splitting of large estates of land to the extent that such estates would no longer be viable as businesses).

118. REPORT ON SUCCESSION, *supra* note 26, at 69.

119. *Id.* at 72.

120. Succession (Scotland) Bill (Draft), *in* REPORT ON SUCCESSION, *supra* note 26, app. A, at 155, 157.

121. *Id.* at 155.

(e) whether they appeared to family, friends and members of the public to be persons who were married to, in civil partnership with or cohabitants of each other.<sup>122</sup>

The drafters' note accompanying this section makes clear that the list is not exclusive. Rather, the court may consider any other factor that the court thinks relevant to the cohabitant determination and no factor should be considered more important than any other.<sup>123</sup>

The SLC proposal would provide a qualified surviving cohabitant an "appropriate percentage" of the testate or intestate estate to which the surviving cohabitant would have been entitled had she been the decedent's spouse or civil partner.<sup>124</sup> This percentage, which may not exceed 100%, "is designed to express the extent to which the cohabitant should be treated, for the purposes of succession, as if he or she had been married to, or in civil partnership with, the deceased."<sup>125</sup> The court is directed to determine the appropriate percentage based exclusively on three factors:

- (a) the length of the period of cohabitation,
- (b) the interdependence, financial or otherwise, [of the partners] during the period of their cohabitation, [and]
- (c) what [the survivor] contributed to their life together (whether such contributions were financial or otherwise) as for example—
  - (i) running the household,
  - (ii) caring for [the deceased], [or]
  - (iii) caring for any children that [the partners] had together or had accepted as children of the family.<sup>126</sup>

Accordingly, the court may not consider the size of the decedent's estate or the identity of other beneficiaries or heirs of the estate in setting the appropriate percentage.<sup>127</sup>

In greatly reducing the number of factors that a court may consider in setting the amount of the surviving cohabitant's award from the decedent's estate to only three, the SLC proposal would increase predictability and decrease litigation costs as compared to the Act's cohabitation provisions. Significantly, the court would no longer have discretion to consider the

122. *Id.*

123. *Id.* § 22(4), at 155-56.

124. *Id.* § 22(3), at 155; *see also* REPORT ON SUCCESSION, *supra* note 26, at 6 (discussing the rationale grounding the proposed "appropriate percentage" and the factors that a court should consider in setting the percentage).

125. REPORT ON SUCCESSION, *supra* note 26, at 6; *see also* Succession (Scotland) Bill (Draft) § 22(3), *in* REPORT ON SUCCESSION, *supra* note 26, app. A, at 155 (implementing these principles).

126. Succession (Scotland) Bill (Draft) § 23(2), *in* REPORT ON SUCCESSION, *supra* note 26, app. A, at 157.

127. *Id.* at 158.

competing needs and contributions of other claimants. Still, after considering the evidence relating to the three relevant factors, the court would retain tremendous discretion in awarding to the cohabitant the “appropriate percentage” of the decedent’s estate to which she would have been entitled had she been the decedent’s spouse or civil partner.<sup>128</sup>

Finally, as under the Act, the SLC proposal would allow a surviving cohabitant to assert a claim against the decedent’s estate even if a spouse or civil partner survived the decedent also. If the decedent died testate survived by a spouse or civil partner, the cohabitant’s legal claim against the testate estate would not impair the surviving spouse or civil partner’s legal claim: The testate estate may fully satisfy the legal rights of both the spouse and cohabitant.<sup>129</sup>

If, however, the decedent died intestate survived by a spouse or civil partner, the surviving cohabitant’s successful claim would necessarily impair the right of the spouse or civil partner to an intestate share. The SLC proposal provides that the intestate share to which the spouse or civil partner otherwise would be entitled is to be shared with the successful cohabitant. Specifically, the cohabitant is entitled to an “appropriate percentage” of one-half of the spouse or civil partner’s intestate share, to be deducted from the share of the surviving spouse or civil partner.<sup>130</sup> In this way, the SLC proposal is less solicitous of the special place that marriage holds in Scottish society and of the rights of a surviving spouse as compared to the Act’s cohabitation provisions.

### III. LESSONS LEARNED FROM THE SCOTTISH EXPERIENCE: SUGGESTIONS FOR U.S. INTESTACY LAW REFORM

Part II of this Article discussed and evaluated the Scottish provisions for an unmarried cohabitant’s intestate inheritance rights. This Part now ponders how the Scottish experience might profitably inform U.S. intestacy law reform efforts. U.S. law reformers should consider not only what might be borrowed from Scottish law but also how the Scottish provisions might be improved. The critical task is to situate the lessons learned from an examination of the Scottish experience within the context of U.S. succession law. Thus, especially where Scottish law reflects values that are inconsistent with the values that underpin U.S. succession law, U.S. law reformers should focus on how the relevant provisions must be altered if they are to function well in the U.S. context.

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128. See Sutherland, *supra* note 3, at 164 (noting that “[a]n element of discretion would remain” with respect to setting the “appropriate percentage”).

129. Succession (Scotland) Bill (Draft), in REPORT ON SUCCESSION, *supra* note 26, app. A, at 158.

130. *Id.*

## A. LESSONS LEARNED

The Scottish experience respecting intestate inheritance rights for unmarried cohabitants offers several important lessons for U.S. law reformers contemplating how best to structure an intestacy statute to provide for unmarried committed partners. With respect to fulfillment of purpose, it is critically important that the statute specify the purposes and values that ground the cohabitation provisions. A clear statement of purposes can guide and cabin a court's discretion in applying the statute. Indeed, any factors that the statute sets out to guide the court's discretion should themselves derive from the purposes and values that ground the cohabitation provisions.

In relation to certainty and administrative convenience, perhaps the principal lesson to take away from the Scottish experience is that the tolerance for uncertainty in the intestacy statute's cohabitation provisions should reflect the tolerance for uncertainty found in the society's succession law generally. Moreover, where a great degree of certainty is desired, a statute that allows a court to base its award not only on specified factors but also on "any other matter the court considers appropriate" is likely to be problematic.<sup>131</sup> Finally, the Scottish experience somewhat undermines the argument that the failure of an intestacy statute providing for cohabitants to impose a minimum cohabitation period will tend to produce costly and protracted litigation of frivolous claims, at least where the scheme is structured so that qualification as a cohabitant does not automatically entitle the qualified cohabitant to a significant portion of the intestate estate.

With respect to the institution of marriage, a statute providing for intestate inheritance rights for unmarried cohabitants should be drafted with the interests of a surviving spouse and the special status of marriage within the society in mind. Many would argue this point as a normative matter.<sup>132</sup> As a practical matter, observing this principle should tend to lessen opposition to enactment of protections for unmarried committed partners from those concerned that protecting unmarried cohabitants will undermine marriage and discourage people from marrying.<sup>133</sup>

In applying these lessons to the context of U.S. succession law, this Part uses as its jumping-off point for discussion my 2002 proposal for an accrual/multi-factor approach to intestate inheritance rights for unmarried

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131. See *Kerr v. Mangan* [2014] CSIH 69 [17], (2015) SC 17, 23 (Scot.) ("[T]he ability to have regard to 'any other matter the court considers appropriate' gives no useful guidance at all." (quoting Family Law (Scotland) Act 2006, (ASP 2) § 29(3)(d))).

132. See Policy Memorandum, *supra* note 3, ¶ 77 (noting that fears of undermining marriage and discouraging people from marrying were "main reasons in opposition to the proposal" to extend intestate inheritance rights to unmarried committed partners).

133. *But see* Sutherland, *supra* note 3, at 166–67 (arguing that cohabitants should be provided with the same default legal consequences as married couples on breakdown of the relationship).

committed partners (“2002 proposal”).<sup>134</sup> First, this Part summarizes the most important features of the 2002 proposal. This Part then considers how the 2002 proposal might advantageously be modified in light of the lessons learned from the Scottish experience and consistent with the values that ground U.S. succession law.

### B. A REVISED ACCRUAL/MULTI-FACTOR APPROACH

The 2002 proposal defines a “committed partner” as one who lived “with the decedent as a couple in an emotionally and physically intimate partnership such that the intestacy scheme should protect the decedent’s interest in donative freedom, or the surviving committed partner’s reciprocity or reliance interests, by awarding to the survivor a portion of the decedent’s intestate estate.”<sup>135</sup> The proposal then identifies twenty-three non-exclusive factors that a court shall consider to qualify a committed partner for the purposes of the intestacy statute. These factors are grouped according to the element of the cohabitant definition that they tend to demonstrate: that the parties lived life together as “emotionally and physically intimate” partners; that the decedent would have wanted her intestate estate to provide for the survivor; that the survivor contributed to the decedent’s physical, mental, or economic well-being; or that the survivor relied upon her relationship with the decedent to her economic detriment.<sup>136</sup>

The 2002 proposal is structured so that one who qualifies as a surviving committed partner is entitled to a specified portion of the decedent’s intestate estate.<sup>137</sup> The qualified partner’s portion increases according to a fixed schedule as the duration of the cohabitation period increases. For example, “the unreduced intestate share percentage” for the qualified survivor of a cohabitation that lasted more than three years but less than four years is 18% of the intestate estate while that portion increases to 100% for a cohabitation that lasted fifteen years or more.<sup>138</sup> However, the relevant percentage is reduced by specified amounts if the decedent left issue who are not issue of the survivor, left a parent or parents but no issue, or if the relationship fractured within a specified period prior to the decedent’s death.<sup>139</sup>

#### 1. Fulfillment of Purpose

The 2002 proposal is expressly grounded in three specific purposes: (1) to promote the decedent’s unexpressed donative intent; (2) to recognize

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134. See generally Spitzko, *supra* note 14 (articulating the rationale and mechanics of the accrual/multi-factor approach).

135. *Id.* app. b, at 346.

136. *Id.* app. b, at 346–48.

137. The surviving committed partner must have cohabited with the decedent for at least three years to qualify for a portion of the decedent’s intestate estate. *Id.* app. b, at 345.

138. *Id.*

139. *Id.* app. b, at 345–46.

the surviving unmarried committed partner's contributions to the intestate decedent's economic, physical, or emotional well-being; and (3) to protect the survivor's reliance interests in the relationship.<sup>140</sup> These purposes are incorporated into the proposal's very definition of cohabitant.<sup>141</sup> Moreover, the factors that the court must consider in qualifying a surviving cohabitant are designed to operationalize the statute's objectives in that the factors derive from the proposal's purposes and the factors are categorized accordingly. Finally, the accrual schedule itself also is designed to operationalize the proposal's purposes: The likelihood that the decedent would want to provide for the survivor, that the survivor contributed to the decedent's well-being, and that the survivor came to rely upon the relationship for her own economic well-being all increase as the length of cohabitation increases.<sup>142</sup>

Nevertheless, the Scottish experience teaches that interpretive difficulties arise from an ambiguous purpose and, therefore, suggests that the 2002 proposal might beneficially be revised to clarify how courts should operationalize the proposal's purposes via the multi-factor test. The revised proposal should make clear that the definition of cohabitant is partially disjunctive: If the court finds that the couple lived life together as a couple in an emotionally and physically intimate partnership and also finds sufficient evidence of either (1) the decedent's intent to favor the survivor; (2) the survivor's contributions to the decedent's well-being; or (3) the survivor's reliance on the relationship, then the test is satisfied. Thus, an utter lack of evidence to support a finding in favor of cohabitation status with respect to one or even two of the factors does not cancel out evidence supporting a finding in favor of cohabitation status with respect to the remaining factors.<sup>143</sup>

## 2. Implications for Certainty and Administrative Convenience

The 2002 proposal includes a minimum three-year cohabitation period before a surviving partner may assert a claim for an intestate share.<sup>144</sup> In favor of this prerequisite, I have previously argued, “[t]his requirement greatly promotes certainty by narrowing the pool of potential claimants and eliminating those potential claimants most likely to have a weak or borderline claim.”<sup>145</sup> Indeed, foreign jurisdictions that grant intestate inheritance rights to a surviving cohabitant typically require that the couple had cohabited for a

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140. *Id.* at 262, 269–83.

141. *Id.* app. b, at 346 (defining a surviving committed partner as one who “lived her or his life together with the decedent as a couple in an emotionally and physically intimate partnership such that the intestacy scheme should protect the decedent’s interest in donative freedom, or the surviving committed partner’s reciprocity or reliance interests, by awarding to the survivor a portion of the decedent’s intestate estate”).

142. *Id.* at 295–300.

143. *See id.* at 325 n.240 (stating that the 2002 proposal was drafted with this intent).

144. *Id.* at 264, 345.

145. *Id.* at 264, 318–19.

minimum period, ranging from two to five years, or else had parented a child together.<sup>146</sup>

The cost of including a minimum cohabitation period is that the statute will not protect some “deserving” unmarried committed partners who were in a short-term cohabitation. The implicit conclusion grounding imposition of a minimum cohabitation period is that the increase in certainty and administrative convenience gained by including the prerequisite is worth this cost. The Scottish experience under the Act, however, suggests that the benefit will not outweigh the cost in an accrual/multi-factor system such as the 2002 proposal.

The Scottish experience under the Act undermines the argument in favor of a minimum cohabitation period, at least with respect to a system—such as that provided for by the Act—in which qualification as a cohabitant does not automatically entitle one to a significant portion of the intestate estate. The Act does not provide for a minimum cohabitation period; yet this omission has not led to a large number of applicants from short-term relationships and has not given courts difficulty in applying the statute.<sup>147</sup>

Moreover, empirical data from the United Kingdom generally and Scotland specifically suggest that many short-term cohabitants may be worthy intestate takers.<sup>148</sup> Although the data suggest that the vast majority of cohabitations are transient, lasting a median of two to three years before converting into marriage or breakup, marriage, rather than breakup, is the more common reason for cohabitation termination.<sup>149</sup> This is true also of cohabitation in the United States, suggesting that the cost of excluding short-term cohabitants would be significant.<sup>150</sup> Specifically, in the United States, more than half of first cohabitations can be expected to transition to marriage within three years, and nearly two-thirds of first cohabitations can be expected to transition to marriage within five years.<sup>151</sup>

This empirical data and the Scottish experience with the Act support the argument that the 2002 proposal should be amended to remove the

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146. Kenneth G.C. Reid et al., *Intestate Succession in Historical and Comparative Perspective*, in 2 COMPARATIVE SUCCESSION LAW: INTESTATE SUCCESSION, *supra* note 4, at 442, 506.

147. See *supra* notes 89–92 and accompanying text.

148. See Wasoff et al., *supra* note 75, at 14 (discussing data on cohabitation dissolutions and transitions into marriage in the United Kingdom and in Scotland).

149. Policy Memorandum, *supra* note 3, ¶¶ 57–58 (“About two-thirds of cohabitations result in marriage and the remaining third mostly dissolve within 10 years. . . . Given that cohabitation is more common among younger people, key commentators expect both the incidence and duration of cohabitation to increase over time.”).

150. See Waggoner, *supra* note 2, at 215 (noting that most cohabitants “either break up or get married fairly quickly”).

151. PAULA Y. GOODWIN ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 3, 13 (2010), [https://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_028.pdf](https://www.cdc.gov/nchs/data/series/sr_23/sr23_028.pdf).

minimum cohabitation prerequisite. Recall that the 2002 proposal provides for an unreduced intestate share percentage of 18% of the intestate estate for the qualified survivor of a cohabitation that lasted more than three years but less than four years. Accordingly, the revised accrual schedule should provide for an unreduced intestate share percentage that is less than 18% of the intestate estate for the qualified survivor of a cohabitation that lasted less than three years. Thus, as with the Act, qualification as a surviving cohabitant of a cohabitation that lasted less than three years will not automatically qualify the applicant for a significant portion of the intestate estate. The relatively small size of the portion of the intestate estate that might be awarded to the surviving cohabitant of such a short-term cohabitation should minimize litigation and the consequences of a court making an expensive “wrong” determination on the cohabitant qualification issue.<sup>152</sup>

The drafters of the Act acknowledged that a partner in a long-term cohabitation arguably should enjoy greater rights arising from the relationship than should a partner in a relatively brief cohabitation.<sup>153</sup> Nonetheless, the drafters expressly rejected “a system of accrued rights whereby entitlement would progressively enlarge with the duration of the relationship.”<sup>154</sup> The drafters felt that such an accrual approach would be too complex and questioned whether the “Scottish [populace] would welcome such a radical approach.”<sup>155</sup>

In fact, the Act itself was a far more radical break with Scottish succession law norms than an accrual approach would be. The drafters of the Act prized flexibility over certainty. They believed that, given the great variation in cohabiting relationships, a court should have broad discretion to craft an award tailored to the facts of any given case.<sup>156</sup> Yet, the principal criticism made of the Act’s intestacy provisions is that the exceptional discretion the court possesses to set the amount of an award to the surviving cohabitant results in an unacceptable amount of uncertainty.<sup>157</sup> As noted earlier, this level of discretion and uncertainty is inconsistent with the intolerance for discretion and uncertainty in Scottish succession law generally, which otherwise relies upon fixed entitlements rather than judicial discretion.<sup>158</sup>

Moreover, the SLC proposal would repeat this principal error in that the level of discretion and uncertainty in the proposal also conflicts with the Scottish succession law norms favoring certainty and fixed entitlements: After considering the three exclusive factors set out in the proposal—the duration of the cohabitation, the interdependence of the parties, and the survivor’s

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152. Spitzko, *supra* note 14, at 300.

153. Policy Memorandum, *supra* note 3, ¶ 71.

154. *Id.*

155. *Id.*

156. See *supra* notes 54–55 and accompanying text.

157. See *supra* notes 95–105 and accompanying text.

158. See *supra* notes 106–09 and accompanying text.

contributions to the relationship—the court would still retain tremendous discretion in setting the surviving cohabitant’s award. The court might award the qualified surviving cohabitant 100% of the portion the survivor would have taken had she been the decedent’s spouse or civil partner, or nothing at all.

Use of a “flexible” accrual approach would enable a court to take into account the factors that the SLC proposal focuses on in a manner that is far more consistent with Scottish succession law norms and U.S. succession law norms favoring certainty and fixed entitlements. As it stands, the 2002 proposal employs a “strict” accrual method that affords no discretion to the court: The portion of the intestate estate to which a qualified surviving cohabitant is entitled is determined solely by the accrual schedule and the identity of competing heirs. The Scottish experience, however, should prompt one to consider whether the 2002 proposal’s accrual approach might be redesigned with a degree of flexibility consistent with U.S. succession law norms.

One might introduce limited flexibility into the 2002 proposal’s accrual approach while retaining prized certainty by giving a court discretion to deviate within a specified range from the presumptive award set out in the accrual schedule. Thus, the qualified surviving cohabitant’s presumptive award would be determined solely by the duration of the cohabitation and the identity of competing heirs. The court, however, would have limited discretion to deviate up or down several values from that presumptive award based upon the court’s specific findings of extraordinary facts concerning the decedent’s intent, the surviving cohabitant’s contributions to the decedent’s well-being, or the surviving cohabitant’s reliance interests.

### 3. Implications for Marriage

The Act’s drafters expressly sought to respect the special status of marriage within Scottish society.<sup>159</sup> Accordingly, the statute’s cohabitation provisions provide that the value of an award to a surviving cohabitant may not exceed the value of what the survivor would have been entitled to had she been a surviving spouse.<sup>160</sup> Moreover, when both a cohabitant and a spouse survive the decedent, the spouse’s legal rights and prior rights in the intestate estate take priority over any claim by the cohabitant.<sup>161</sup> As a result, the cohabitant’s claim might impair the spouse’s interests only in the rare case where the spouse’s legal rights and prior rights do not exhaust the intestate

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159. See *supra* notes 51–53 and accompanying text.

160. Family Law (Scotland) Act 2006, (ASP 2) § 29(4).

161. *Id.* § 29(2), (10).

estate and the spouse is an intestate heir—that is, where decedent left no issue, no parents, no siblings, and no issue of siblings.<sup>162</sup>

The SLC proposal is less respectful of the special status of marriage in relation to cohabitant rights. The SLC has proposed revising the intestacy scheme so that the spouse becomes a favored heir: Under the SLC proposal, a surviving spouse would take the entire intestate estate or, in some cases, would share the estate with the decedent's issue.<sup>163</sup> Under the SLC proposal, however, when both a spouse and a cohabitant survive the decedent, any award to the cohabitant from the intestate estate would be taken from the spouse's share, although the cohabitant's award still may not exceed what the spouse will take in intestacy.<sup>164</sup>

Unlike the Act and the SLC proposal, the 2002 proposal does not contain a restriction that a surviving cohabitant may not receive more from the decedent's intestate estate than she would have received had she been the decedent's surviving spouse. Indeed, depending on the specifics of a state's intestacy scheme and the identity of the decedent's other heirs, a surviving cohabitant's share under the 2002 proposal might well exceed the share that a surviving spouse would have taken under the state's intestacy statute. This was an oversight. So as not to discourage marriage, the 2002 proposal should be revised to add the limitation that a surviving cohabitant may not receive more in intestacy than she would have received had she been a surviving spouse.

Political realities in the United States may dictate that a successful reform proposal be even more solicitous of the interests of the surviving spouse and the institution of marriage than are the Act and the SLC proposal. It may be argued that the Act has undermined the special status of marriage in Scottish society by allowing a surviving cohabitant to assert a claim against the intestate estate of a decedent who is survived by a spouse. The 2002 proposal defines a "surviving committed partner" as "an unmarried adult" but is poorly drafted so that a surviving unmarried cohabitant may assert a claim against the estate of a decedent who was married at her death.<sup>165</sup> The 2002 proposal should be amended to make clear that a cohabitant is foreclosed from making a claim on the intestate estate when a spouse survives the decedent.<sup>166</sup> Notably, unlike

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162. See Succession (Scotland) Act 1964, c.41, § 2(1)(e), <https://www.legislation.gov.uk/ukpga/1964/41/section/2>.

163. See REPORT ON SUCCESSION, *supra* note 26, at 12, 16.

164. *Id.* at 66–67.

165. Spitko, *supra* note 14, app. b, at 346.

166. See Waggoner, *supra* note 2, at 236 (proposing a draft Uniform De Facto Marriage Act, "[t]he starting point [of which] is that the couple must not be married to anyone else" (footnote omitted)). The Uniform Law Commission, on the joint recommendation of the Joint Editorial Board for Uniform Trust and Estate Acts and the Joint Editorial Board for Uniform Family Law, has appointed a Study Committee to consider "the need for and feasibility of drafting a uniform act or model law addressing the economic rights of unmarried cohabitants in the United States, both at divorce and upon death." See *Economic Rights of Unmarried Cohabitants*, UNIFORM LAW COMM'N,

Scotland, many of the other foreign jurisdictions that grant intestate inheritance rights to a surviving committed partner preclude qualification as a cohabitant if one or both of the partners was married to another.<sup>167</sup>

#### IV. CONCLUSION

The Family Law (Scotland) Act 2006's lack of clarity as to its underlying policies has given rise to significant interpretation difficulties. Moreover, the statute's grant to courts of exceptionally broad and unguided discretion in awarding a portion of the intestate estate to a surviving cohabitant has undermined predictability and private ordering. Most importantly, this broad discretion is at odds with Scottish succession law norms valuing certainty and preferring fixed entitlements and limited judicial discretion. Finally, although the Act maintains a clear distinction between the rights of married people and the rights of unmarried cohabitants, the statute has somewhat undermined the special status of marriage in Scottish society by allowing a cohabitant to assert a claim against the intestate estate of a decedent who is survived by a spouse. Moreover, the Scottish Law Commission's reform proposal is even less respectful of the institution of marriage and the interests of a surviving spouse.

The Scottish experience with respect to the provision of intestate inheritance rights for unmarried cohabitants should inform U.S. intestacy law reform efforts concerning unmarried committed partners. Any U.S. reform proposal should specify the purposes and values that ground its provision of intestate inheritance rights to a surviving cohabitant. Moreover, the discretion the proposal affords to courts should be reflective of the limited tolerance for uncertainty found in U.S. succession law. Finally, the proposal should be respectful of the interests of a surviving spouse and the special status of marriage in the United States.

In light of the lessons learned from the Scottish experience, this Article asserts that the author's 2002 proposal for an accrual/multi-factor approach to intestate inheritance rights for unmarried committed partners should be modified. To increase certainty, the revised proposal should clarify how courts are to operationalize the proposal's purposes. To add flexibility, the revised proposal should forego a minimum cohabitation prerequisite and should authorize courts in extraordinary cases to deviate within a specified range from the strict accrual schedule. And finally, to safeguard the special status of marriage and to protect the interests of a surviving spouse, the revised proposal should provide that a surviving cohabitant may not take more in intestacy than she would have taken had she been the decedent's surviving spouse and that no claim by a surviving cohabitant may be brought when the decedent is survived by a spouse.

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<http://www.uniformlaws.org/Committee.aspx?title=Economic%20Rights%20of%20Unmarried%20Cohabitants> (last visited Apr. 3, 2018). The Study Committee has yet to report. *See id.*

167. *See Reid et al., supra* note 146, at 507.