

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT INVERNESS

[2026] SC INV 55

INV-A47-26

EX TEMPORE JUDGMENT OF SHERIFF SARA L MATHESON

in the cause

DP

Pursuer

against

BR

Defender

Act: Morgan, Counsel instructed by Munro and Noble Solicitors, Inverness

Alt: Colquhoun, Counsel instructed by Thorntons Law LLP, Inverness

Inverness, 1 April 2026

Background

[1] The late [MR] (hereinafter “the deceased”), died on 10 March 2026. He has not yet been buried. There is a dispute between the parties to this action over who is the nearest relative of the deceased and therefore who has the right to make arrangements for his burial. The pursuer claims to have been living with the deceased as if they were married to each other for a period of at least 6 months. The defender is the deceased’s brother. The defender disputes the pursuer’s claim to have been living with the deceased as if they were married, but does not dispute that if that were determined to be the case the pursuer would have the right to make the arrangements for burial in terms of section 65 of the Burial and Cremation

(S) Act 2016 (hereinafter “the Act”) (as she would effectively be his nearest relative and rank before him in terms of the provisions of section 65(3)).

Procedure

[2] An initial writ was lodged on 23 March 2026 and orders were sought prior to service. Sheriff MacDonald granted interdict *ad interim* in terms of crave 2 and granted warrant to serve. I presided over a hearing after service on 27 March 2026 at which time I continued the order previously made. It was apparent to all that there was considerable urgency surrounding this matter. As a result I dispensed with the fixing of an Options Hearing, made various other procedural orders and fixed a proof for 31 March (also reserving 1 April) 2026.

[3] The proof hearing proceeded as assigned on 31 March and 1 April. Parties lodged various affidavits and led parole evidence from each witness. The proof was conducted in person, with legal submissions following the conclusion of evidence on 1 April 2026. I have considered matters and now pronounce this *ex tempore* judgment in accordance with Rule 12.2(4)(a) of the Ordinary Cause Rules. This oral judgment is not intended to be a Note, as referred to in Rule 12.3(3) of the Rules, which Note I shall produce if required to do so in terms of Rule 12.3(4). This judgment is produced against a background of urgency and is thus necessarily short and is not intended to be a full treatise on the current law.

Discussion

[4] The key question in this case is whether the pursuer “was living with the adult [the deceased] as if they were married to each other and had been so living for a period of at least 6 months immediately before death”. If I determine that she was then she is entitled by law

to make the deceased's burial arrangements; if she was not, then the defender is so entitled.

Such is the application of section 65(3) of the Act.

[5] There is an associated question, raised by the defender's counterclaim. That counterclaim craves the court "to find and declare that [the deceased] expressed a wish to be buried with his mother and siblings in a family lair at Kilvean Cemetery" and effectively seeks that the court give effect to the alleged wishes of the deceased in terms of section 67 of the Act.

[6] At first blush this may seem like a simple determination; but it is not.

[7] The first thing to observe is that the words of this 2016 statute do not appear to mirror previous statutory language used in relation to the same issue of whether persons have been living together as if they were married to each other.

[8] The Matrimonial Homes (Family Protection)(S) Act 1981, section 18, uses this language: "if a man and a woman are living with each other as if they were man and wife...". Section 18(2) provides that the court

"shall have regard to all the circumstances of the case including (put short) the time for which it appears they have been living together and whether they have children, in determining whether the section applies."

[9] The Family Law (S) Act 2006 uses the term "cohabitant". At section 25 this is defined as: "either member of a couple consisting of...a man and a woman who are (or were) living together as if they were husband and wife...." The same section provides various criteria (section 25(2)(a) to (c)) that the court shall have regard to in determining whether a person is a cohabitant. Put shortly, these are the length of period that they lived together, the nature of their relationship during that period and their financial arrangements.

[10] I therefore note that the wording of the 2016 Act is distinct from anything that has gone before. The significance of this is difficult to determine; clearly there are some parallels

between the terminology of the various statutes, but they are not identical. The statute does not provide any suggested factors to consider when the court is required to determine a couple's status, such as those in section 18(2) of the 1981 Act or in section 25(2) of the 2006 Act.

[11] All of this is important as there is a body of case law on the interpretation of section 25 of the 2006 Act, which may or may not be apposite in this case.

[12] The noteworthy point from precedent for the purposes of this determination is that the concept of "living together" is a wider one than merely staying together in the same residential accommodation. As Sheriff Principal Stephen put it in *B v B* 2014 WL4636823 (2014):

"The appellant seeks to interpret the term 'living together as if man and wife' literally. Physical separation is not conclusive of or determinative of the end of cohabitation. The sheriff requires to consider the whole of the evidence as to the nature of the relationship. In a relationship of considerable length allowance has to be made for difficulties and the working through of these difficulties. The importance of the emotional and supportive qualities that characterise partnership or being husband and wife should not be underestimated."

[13] However, I also consider that many of the decided cases on the question of cohabitation have different considerations to the present case. As the quote above demonstrates they are most frequently dealing with the disputed determination of when cohabitation has ceased, rather than the situation that presents here; namely "were the parties cohabitants at all?" There is a risk that too much reliance on that body of case law would result in approaching things from an incorrect perspective, a perspective that is "looking up the opposite end of the telescope".

[14] There is also a risk that the law begins to define persons as "living together as if they were married to each other" when that was not what one, or both, of the couple wanted.

Persons must surely be entitled to be in a close relationship which won't give them (or the other party) cohabitants' rights in terms of the pieces of legislation already quoted.

[15] The case law clearly assists us in understanding when a cohabiting relationship has ended, even if parties continue to live in the same home. What is not so clear is at what point of a relationship is "living with someone as if married to each other" deemed to commence, if at all; particularly, as here, where both parties in the relationship retain their own heritable property.

[16] On the evidence led, I consider that I do not require to determine whether the Act can apply to a couple who retain separate dwellings and don't live full-time together, as I am satisfied that in this case the pursuer, on the facts, has proved the necessary 6 months of living together as if she were married to the deceased prior to the deceased's death, as required by statute. In other words I do not require to focus on whether the Act can apply to those not living together but in an enduring relationship, as I am satisfied that they were factually living together in the more than 6 months prior to the deceased's death, as the statute requires when ranking is being considered in section 65(3).

Reasons

[17] I have reached this decision above for the following reasons:

a/ The pursuer's evidence:

[18] I accept the evidence given by the pursuer that she and the deceased lived together at Laggan Road from on or about 16 June 2025 (the deceased died more than 6 months later on 10 March 2026). This evidence was, to a large extent, uncontroverted. The reason the date is so definitive is that the deceased presented at A and E, Raigmore Hospital on 16 June. He

was told his cancer had returned. Treatment commenced and he wished to have the privacy of Laggan Road while he had chemotherapy treatment. The pursuer thus moved to Laggan Road with him at that time.

[19] There was no disagreement that the pursuer was the one providing day to day care to the deceased. The deceased's sister, [LP], acknowledged in her evidence that the pursuer was the one providing overnight care to the deceased. This is eloquent of a couple living together.

[20] In my judgement the defender sought to downplay the pursuer's involvement in the deceased's life. I was not persuaded by his evidence of when the relationship commenced. I did not find him reliable on this point. I also noted him to agree with the proposition that the deceased and pursuer lived together at Laggan Road, in his evidence from about July 2025 onwards.

[21] I accepted the evidence of [DM], long-time friend of the pursuer and deceased. His account was of visiting the deceased at Laggan Road from June 2025, where the deceased was living with the pursuer. He delivered a Christmas card to them there in December 2025.

b/ The entire nature of the relationship

[22] I was satisfied, on the evidence, that the deceased and pursuer were "living together as if married to each other", rather than, for example, as flatmates or friends. I reached that conclusion having regard to the following factors:

- That their relationship was a romantic one, rather than a friendship. This was not disputed.
- Relatives of both the pursuer and the deceased considered them to be an enduring couple. The deceased's mother and sister sent cards that referred to

the pursuer as “daughter in law” and “sister in law- well nearly!”. The deceased’s late mother spoke to the deceased about using a family ring to propose to the pursuer.

- That their relationship was an enduring one. I note photographs from family weddings which they attended as a couple which date back to May 2010; and go on to cover the period up to an 80th birthday party in June 2016. I am satisfied on the evidence that the couple lived together as if they were married at Heatherley Crescent. I formed this view from parole evidence of different people attending there to dine and socialise with them, from the deceased using that address as his for NHS purposes and for payslip purposes. All of that evidence suggests it as a place he viewed as his home, rather than somewhere he spent the occasional night.
- They saw themselves as a couple, for example the deceased signed cards to the pursuer’s blood niece as being from “Auntie [D] and Uncle [M]”.
- The deceased appointed the pursuer as his Power of Attorney on 19 December 2022. This suggests the deceased had considerable trust in the pursuer and expected her to be a constant in his life.
- The deceased made provision for the pursuer in various wills that he executed, from 19 December 2022 onwards. In each of the three wills produced to the court the pursuer was the residual beneficiary. Again, this suggests his view of their relationship as being of paramount importance to him.

[23] I accept that there are features in this case that one might not see in a traditional marriage; the retention of separate homes, the lack of any combining of finances, a retention of independent holidays and friendships. However, I view these as being a reflection of the

parties' age and maturity when their relationship commenced and of their financial security; rather than indicative of a casual or non-committed relationship.

[24] Counsel for the defender made much of the fact that, as he put it, "the parties retained separate bases". That was not my interpretation of the evidence. I viewed the evidence as suggesting that the deceased quite often used his Laggan Road address and went there on occasion in much the way that a married woman might keep her maiden name for work purposes: it does not make the marriage any less of a committed one, but it is expedient not to have to change everything with official channels, it is useful on occasion to have the option of which name to use and it is a retention of a small amount of independent identity.

[25] I also disagree with the submission that a person who is "anti-marriage" cannot be said to be "living with someone as if married". On the contrary, in my judgement they are exactly the type of person such statutory language was created for. The partners in such a relationship can acquire certain rights and protections under the law, but retain their objection to marriage and to being married.

[26] In all the circumstances I consider it is proved that the deceased and the pursuer lived together at Laggan Road from June 2025 to March 2026 as if they were married to each other.

The deceased's wishes

[27] Some time has been taken up in the proof considering the deceased's burial wishes, no doubt with reference to the craves of the counterclaim.

[28] Section 67(3) of the 2016 Act says:

- “(3) In making a decision for the purposes of subsection (2), the person must, so far as known to the person, have regard to—
- (a) any wishes that the adult or child expressed as to the burial, cremation or hydrolysis of the remains, and
 - (b) whether the adult or child is of a particular religion or belief.”

Gloag and Henderson 15th Edition, paragraph 37.05 says:

“The [2016 Act] now regulates those methods of disposal. A deceased adult may set out their wishes for the funeral arrangements or appoint someone (in writing or orally) to make the arrangements. These will be followed unless it is impracticable to do so. Failing such arrangements, the nearest relative is entitled, but not obliged, to make arrangements for the funeral.”

Sutherland on Child and Family Law 3rd edition, paragraph 7-016 says:

“While the main purpose of the Act is to modernise the law on burial, cremation and related matters, it also contains provisions on the making of funeral arrangements. The starting point is that the wishes of the deceased should be respected and the Act introduces the concept of an ‘arrangements on death declaration’, being ‘a declaration by an adult specifying the person by whom the adult wishes the arrangements to be made for the burial or cremation of the adult’s remains on the adult’s death.’

7-017 In the absence of such a declaration or where it would not be reasonably practicable to give effect to it, the ‘nearest relative’ of the deceased is empowered, but not obliged, to arrange for burial or cremation of the remains. In carrying out this function, the relative must have regard to ‘any wishes’ expressed by the deceased (i.e. not only those in an arrangements on death declaration) and whether the deceased was of a particular religion or belief. Very helpfully, the Act provides a hierarchical list of the relatives who qualify as the nearest relative.”

[29] I interpret these provisions as requiring the court to determine if the deceased made an “arrangements on death declaration”, as if he had, then in terms of section 65(1) the person named by the deceased in that declaration would be entitled to make the funeral arrangements, rather than the “nearest relative” as defined by section 65(3).

[30] An “arrangements on death declaration” is defined in section 65(8) as being:

“a declaration by an adult specifying the person by whom the adult wishes the arrangements to be made for the burial cremation, or hydrolysis of the adult's remains on the adult's death”.

[31] In other words, it is a nomination of a person, not a place or method of burial. I am satisfied, on the evidence, that the deceased made no such declaration.

[32] Thereafter, I do not consider that the statute requires the court to have regard to any funeral arrangements specified by the deceased. What I consider the statute to require is for the nearest relative (as determined by the court) to have regard to any wishes expressed by the deceased. There is nowhere imported into the Act a hint that the court should, for example, consider the question of who would be more likely to have regard to the deceased's wishes in determining who the nearest relative is; or any suggestion that the court can or should make an order detailing what it considers the deceased's wishes as regards funeral arrangements to have been. Accordingly, any burial wishes expressed by the deceased, short of an "arrangements on death declaration", are irrelevant to a determination with reference to section 65(2).

[33] However, counsel for the defender submits that in a situation where the deceased's wishes are clearly known, and are about to be disregarded, by the nearest relative, then the court should make an order that gives effect to the deceased's wishes in terms of section 68(2): "(2)An order under subsection (1) may include such other provision as the sheriff considers necessary or expedient."

[34] My view of the evidence was that the deceased did have a clear wish in December 2016 to be buried in the [R] family plot. He was party to a discussion with his siblings and the undertaker George Chisholm which related to the purchase of additional lairs for their own bodies to be interred in.

[35] The difficulty is that a person is able and entitled to change their mind about their wishes, particularly over a 10 year period. In my judgement, on the evidence, there was no

clear indication of the deceased's wishes at the time of his death. I do not consider that I would be able to make any finding in fact as to the deceased's wishes, other than that they were for burial (rather than cremation), but not at any clear location, at the time of his death. Against this background I do not view it as necessary or expedient to make an order of the type sought by the defender.

[36] Finally, counsel for the defender submitted that the burial arrangements referred to by section 65 of the Act have already been made in this case. They were made at the meeting between the parties and the undertaker on 12 March 2026. At that meeting the pursuer acquiesced to the arrangements being made in her presence by the defender. Counsel's submission was that section 65(2) did not give to the nearest relative a right to disturb arrangements already made.

[37] Counsel for the pursuer submitted that, if I found the "nearest relative" to be the pursuer then she had the right to make arrangements and would not be bound to carry out arrangements made by others. I prefer that submission.

[38] The whole purpose of this section of the Act was to resolve disputes between different classes of next of kin and to make it clear who has primacy to make decisions. The defender making a decision that the pursuer acquiesced to is different from the pursuer making a decision. I consider that it is appropriate that I make an order declaring that the pursuer is entitled to make the deceased's burial arrangements, even if it is correct to say that she previously went along with arrangements made by the defender.

[39] In all the circumstances then, I grant decree as craved in terms of crave 1 of the initial writ. I repel the counterclaim. I shall find the cause as suitable for sanction for counsel in terms of section 108 of the 2014 Act in respect of both parties.

[40] I wish to record my considerable thanks to all legal staff and to counsel involved in representing the parties to this case. The subject matter has meant very tight timescales for complex and novel matters to be dealt with and that is a task which they have all risen to admirably.

[41] Finally, I say to the parties my reading of Mr Alec Keith's file note of 6 March 2026 is that the deceased expected you to be able to get on and co-operate with each other in distributing his estate and in, (as the file note puts it) "sorting things out between you". There is much left to be done and relations at present do not appear to be good. I strongly suggest that you think very carefully about honouring the deceased's memory by doing what you can from today to get back into a civilised and co-operative relationship; you both require to make and positively receive efforts in that regard.