

CIVIL PARTNERSHIP ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Civil Partnerships: Scotland

Introduction

Chapter 3 – Occupancy Rights and Tenancies

Section 101: Occupancy rights

196. This section sets out the rights that civil partners have to occupy the family home of the civil partnership. The section applies where one of the civil partners is either entitled to occupy the family home, or permitted to do so by a third party, and the other civil partner has no such entitlement or permission. An example of this would be where the family home is owned or leased in the name of one civil partner only. The civil partner who is entitled to occupancy or permitted occupancy by a third party is called the “entitled partner”. The civil partner who is not entitled to occupancy or permitted occupancy by a third party is called the “non-entitled partner”.
197. *Subsection (1)* sets out that non-entitled partners have the right to continue to occupy the family home (if they are already doing so), or have the right to enter and occupy the family home (if they are not already doing so). If the entitled partner has occupancy rights by virtue of permission of a third party, the non-entitled partner does not require the permission of the third party to exercise the rights conferred by *subsection (1)*.
198. *Subsection (2)* means that this right also extends to any child of the family.
199. *Subsection (3)* covers a situation whereby the entitled partner shares a right of occupancy with another person who is not the civil partner. In this situation, the rights explained in *subsection (1)* only apply if that other person waives their right to occupy the family home in favour of the entitled partner.
200. *Subsection (4)* provides recourse to the court, if the entitled partner refuses to let their civil partner enter the home. The latter can apply to the court for an order, as explained in section 103.
201. *Subsection (5)* allows the non-entitled partner to renounce their rights under this section in writing in certain circumstances. *Subsection (6)* provides that such a statement must be made before a notary public and made without coercion.
202. *Subsection (7)* provides definitions of “child of the family” and “family” and *Subsection (8)* defines what a notary public is.

Section 102: Occupancy: subsidiary and consequential rights

203. This section sets out the rights ancillary to the occupancy rights of a non-entitled partner in relation to the family home. *Subsection (1)(a) to (f)* list the duties that a non-entitled partner can undertake without the permission of the entitled partner. *Subsection (2)*

details the circumstances in which if an obligation has been performed or enforced by a non-entitled partner, it will be treated in the same way as if it had been made by the entitled partner.

- 204. *Subsection (3)* provides that, where there is an entitled and non-entitled partner, the court may make an order apportioning costs incurred or to be incurred by either civil partner if they carry out any of the duties in *subsection (1)(a) to (d)* without the consent of the other civil partner, or perform any other activity in respect of the family home with the consent of the other civil partner.
- 205. *Subsection (4)* sets out the situation as it applies to civil partners where both are entitled or permitted by a third party to occupy a family home. This subsection sets out what each civil partner can do and note matters to which the court may have regard in making an order.
- 206. *Subsection (5)* covers the situation where one civil partner owns or hires goods such as furniture in a family home. The subsection sets out what the other civil partner may do in connection with these goods. It also sets out how the court may treat such goods if making an order to apportion expenditure in respect of these goods.
- 207. *Subsections (6) to (9)* specify additional criteria relevant to previous *subsections* of this section.

Section 103: Regulation by court of rights of occupancy of family home

- 208. This section sets out the regulation by the court of rights of occupancy of the family home. *Subsections (1) and (2)* detail the type of order a civil partner may apply for from the court in connection with occupancy of the family home or possession or use of goods owned or hired by one of the civil partners.
- 209. *Subsection (3)* sets out the factors that the court will consider in determining an application for an order. *Subsection (4)* gives the court power to make an interim order under certain circumstances. *Subsection (5)* prevents the court from making an order, if the effect of that order would be to exclude the non-applicant civil partner from the family home.
- 210. *Subsection (6)* allows the court, on the granting of an order under *subsections (3) or (4)*, to grant a warrant allowing a messenger-at-arms or sheriff officer to enter the family home or other premises to search for and take possession of the item required to be delivered and to deliver the item in accordance with the order that is granted. *Subsection (7)* provides that such a warrant be executed only after the end of a period specified in the order for delivery.
- 211. *Subsection (8)* provides that the court can order one civil partner to pay compensation to the other if it appears to the court that the latter has suffered a loss of occupancy rights, impaired occupation of the family home, or impaired use of the items in the civil partner's possession as a consequence of any act or default on the part of the other civil partner.
- 212. *Subsection (9)* provides for a civil partner to renounce rights to apply under *subsection (2)* for the possession or use of any item as detailed in that *subsection*.

Section 104: Exclusion orders

- 213. This section provides that either civil partner in the family home can apply to the court for an order which suspends the occupancy rights of the other civil partner in a family home. *Subsection (2)* sets out that the court is to make an exclusion order if it appears necessary to protect the applicant or any child of the family from the conduct of the other civil partner. This is subject to *subsection (3)* which sets out where it would appear unjustified or unreasonable to make an exclusion order.

214. *Subsection (4)* sets out the types of exclusion order that the court can grant, where this is necessary. *Subsection (5)* sets out further directions that the court may attach when making an exclusion order. *Subsection (6)* gives the court power to make an interim order and sets out that *subsections (4)* and *(5)* will apply in the same way to an interim order as to an exclusion order. *Subsection (7)* sets out that an interim order can only be made if the non-applicant partner has been given an opportunity to be heard or represented before the court.
215. If both civil partners are entitled or permitted by a third party to occupy the family home, *subsection (8)* makes it incompetent for one civil partner to bring an action to eject the other from the family home. This is without prejudice to *subsections (1)* and *(6)*.

Section 105: Duration of orders under sections 103 and 104

216. This section sets out the duration of orders made under sections 103 and 104. *Subsection (1)* gives the court the power to vary or cancel an order made under these sections, at the request of one of the civil partners. *Subsection (2)* sets out the circumstances where such an order (unless varied or cancelled) will cease to have effect. In addition, *subsection (3)* provides that where an order has been granted under section 103(3) or (4), which grants possession or use of items, this will cease if a third party revokes permission for these possessions to be retained in the family home.

Section 106: Continued exercise of occupancy rights after dealing

217. This section sets out the occupancy rights in relation to dealings with third parties. *Subsection (1)* provides protection for the non-entitled partner with occupancy rights in relation to the entitled partner's dealings with third parties. *Subsection (2)* provides a definition of dealing for the purposes of *subsection (1)*. *Subsection (2)* also provides that a civil partner is not an entitled partner where they are only entitled to occupy the family home by virtue of permission from a third party, or they share entitlement to occupy along with a person who is not the other civil partner, irrespective of whether that person has waived their rights. *Subsections (3)* and *(4)* deal with the circumstances in which this section does not apply.

Section 107: Dispensation with civil partner's consent to dealing

218. This section allows the court to dispense with the non-entitled partner's consent to a dealing which has taken place or is proposed in certain circumstances. *Subsection (1)* sets out the circumstances under which this can occur. *Subsection (2)* defines when a non-entitled partner is to be regarded as having unreasonably withheld consent. *Subsection (3)* places an onus on the court to consider all the circumstances of the case in considering whether to make an order. *Subsection (4)* provides that where the entitled partner makes an application to the court for an order under this section and the non-entitled partner has brought proceedings in court for enforcement of occupancy rights, the non-entitled partner's proceedings will not be decided until the conclusion of the application by the entitled partner.

Section 108: Interests of heritable creditors

219. This section explains the rights that a heritable creditor has where there is an interest in the family home. *Subsection (1)* provides the grounds under which a creditor, who has an interest in the family home, can seek an order from the court for the non-entitled partner to make a payment, where such a payment is due. *Subsections (2)* to *(4)* attach conditions and exceptions to this situation.

Section 109: Provisions where both civil partners have title

220. This section covers the situation where both civil partners have title of the property and are entitled to occupy the family home.

Section 110: Rights of occupancy in relation to division and sale

221. This section explains the circumstances that the court must take into account where a civil partner brings an action for the division and sale of a family home owned jointly with the other civil partner. The section allows the court to refuse to grant a decree, to postpone granting a decree or granting a decree with certain conditions applied.

Section 111: Adjudication

222. This section protects the interests and rights of a civil partner where a decree of adjudication has been pronounced by the court on property or furnishing belonging to the other civil partner, which the former uses.

Section 112: Transfer of tenancy

223. This section allows the court to make an order to transfer the tenancy of a family home to the non-entitled partner and provides for the non-entitled partner to make an appropriate payment to the entitled partner in compensation. The section sets out the circumstances under which this can apply and the consideration that the court should give.