

## **Cohabitees - The New Rights**

The Family Law (Scotland) Act which came into force on 4<sup>th</sup> May 2006 gives certain financial rights and imposes obligations on non married couples. These new rights are not yet widely known.

Most people will at some time be involved in a relationship which is now governed by statute namely marriage, civil partnership or a non formalised relationship either heterosexual or same sex. Each of these people can potentially make claims against the other, if the relationship ends. This article deals only with cohabiting couples who have not formalised their relationship by marriage or civil partnership. It covers both heterosexuals and same sex couples.

The 2006 Act sets out certain new financial provision for cohabitees on the termination of the relationship. These rights are only available for couples who split up after 4<sup>th</sup> May 2006.

The definition of cohabitant in the Act is that the person is (or was) living with another person as if they were husband and wife or in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex. It is for the court to determine whether a person qualifies as a cohabitant, and thus has access to the claims mentioned. In order to do so, the court has to have regard to the length of time the parties lived together, the nature of the relationship and the nature and extent of any financial arrangements subsisting during the period the parties lived together.

On death and intestacy (i.e. where there is no Will), the cohabitant can apply to the court for a payment out of the deceased's net intestate estate for either a capital sum or transfer of property as the court considers is appropriate having regard to matters such as (1) the size and nature of the deceased's intestate estate; (2) the prospects of the survivor obtaining any benefit (compensation) as a consequence of the deceased's death and (3) the extent of other claims on the deceased's estate. Regard has to be had to for example, children or spouses. It should be noted that the Court order will not provide the survivor with a sum which would have exceeded the legal and prior rights which would have been awarded had the survivor been the spouse of the deceased. An application must be made within six months of the date of death. For those who do not wish to have their partners make a claim or who want to make proper provision for a partner, the making of a will is an important consideration. This is particularly so where there might be an older Will still in existence which predates the relationship.

Where the cohabitation ends other than by death (i.e. separation) then, within one year of the end of the cohabitation, one cohabitee may make a claim against the other for a capital sum. The making of a claim is by way of a court action. The basis of the claim is based on the following: that "the Defender has derived an economic advantage from the contribution made by the Applicant and that the Applicant has suffered economic disadvantage in the interests of either the Defender or any child of the cohabitants." This is in essence an unjustified enrichment argument. (Similar provision exists for spouses). In addition, a cohabitee is entitled to seek an order so that the Defender meets or shares the economic burden of caring for a child of the parties. Until the Act came into force, on termination of cohabitation, where there has been a child the only obligation has been for child support to be paid. This new section permits the (usually) mother to seek from the father a capital sum (or instalments) to assist with the burden of caring for the child.

This could include a capital sum to enable the child to be accommodated in suitable property which the mother might not otherwise be able to afford. This gives rise to potentially enormous implications for a large proportion of the population.

There are additionally some minor provisions relating to the presumption of ownership in household goods, the presumption being that these are held in equal shares. The presumption is rebuttable and can be overturned by evidence.

The implications of the new rights for cohabittees are quite significant. Legal obligations can arise in circumstances where little or no thought (or indeed intention) to enter into a legal relationship has occurred. Most people know marriage can have financial implications, not so with cohabitation. Marriage has a definite start date. It is not always clear cut with cohabitation. As there is no time frame set out in the legislation and each claimant will need to be "assessed" by the Court before attaining cohabitee status there will undoubtedly be a rise in claims and Court actions.

It is difficult to criticise the right of a woman to claim in circumstances where she has given up career and had a family with her cohabitee only to be left years later with no home and several children to support. The Act does not however only apply in such cases and can extend to for example the DIY enthusiast or builder who undertakes major improvement at his girlfriend's home or to the woman who gives up work just because her partner is financially secure and there is no need for her to work. High earners perhaps now need to become a little more cautious about relationships.

Where advice is sought, breadwinners will be unlikely to be advised to agree to a partner stopping work because of the potential for a claim (although these are not routinely the sort of things that advisers are asked about). The requirement of the Court to have regard to the nature and extent of any financial arrangements means many will be advised to keep a careful note of what they pay for. It is going to be especially difficult for a couple where their earning capacities are very different. As soon as the more well off person in the relationship starts paying for things because the other cannot afford to, the chances are claims will arise. Buying a house together gives rise to the possibility of a claim at the end of the relationship.

We now have a set of rules governing the position with the Court having the final decision on whether a person qualifies as a cohabitee and what financial provision they should receive. That of course will increase the need for litigation in family cases. All family type relationships are governed by statute to a greater or lesser extent. As those who are not married come to realise that their relationship has legal consequences and potentially financial implications, it is likely that people will be more ready and be advised to govern their relationship by contract and it is likely to become the norm that co-habitation agreements and pre-nuptial agreements will become commonplace. The prospect of litigation at the end of a relationship might very well mean that the, perhaps less romantic, idea of a contract at the outset becomes distinctly more attractive.

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