

## **COHABITING AND THE LAW – WHAT YOU SHOULD KNOW**

More than ever before, couples are choosing to live together rather than, or prior to, marrying. Official figures suggest that in 1996 9% of all couples in the UK cohabited but by 2006 this had risen to 14%.<sup>1</sup> In response to this increase the Scottish Government took the decision to give some legal recognition and protection to cohabitants who separate. The new law is set out in the Family Law (Scotland) Act 2006 and came into force on 4 May 2006. Please read on if you think this may affect you.

- Are You a ‘Cohabitant’?

The legal definition of a ‘cohabitant’ is a person who is, or was, living with another person as if they were husband and wife (opposite sex) or civil partners (same sex). If the cohabiting couple separate and are not be able to agree on how their finances and property should be divided, one of them may decide to take the matter to court. In such circumstances the court is required to take certain factors into account when deciding whether or not to make any orders. They must consider the length of time the couple have lived together, the nature of their relationship and the nature and extent of any financial arrangements the couple had during that period.

If you think that you may be, or have been, a cohabitant then the new law could have a significant impact upon you.

- What is the law?

When a couple separate it is sometimes necessary and appropriate for the law to be applied in order to regulate the manner by which, amongst other things, financial matters are to be resolved. While the law does not provide cohabitants with the same level of rights and protection as married couples, what it does provide is, nonetheless, significant given that cohabitants received no legal recognition before 4 May 2006.

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<sup>1</sup> National Statistics Online: Overview of Families ([www.statistics.gov.uk](http://www.statistics.gov.uk))

### 'Household Goods'

The new law creates a presumption that each cohabitant has a right to an equal share in 'household goods' acquired during the time they lived together. 'Household goods' is defined as anything kept or used during the cohabitation for the couple's joint domestic purpose in any residence in which the cohabitants were living together. Money, securities and motor vehicles are specifically excluded from this definition.

### Money and Property

Cohabitants now have the right to claim an equal share of any money derived from any allowance made by either cohabitant for their joint household expenses or for similar purposes or any property acquired out of such money. It is important to note that the new law makes no provisions regarding the house in which the cohabitants lived together.

### Financial Provision

On separation a cohabitant can apply to the court for financial provision. A cohabitant may ask for an order against their former partner for a capital sum if certain matters apply to their situation such as having suffered some economic disadvantage during the relationship. A cohabitant may also seek a further sum to reflect the economic burden of caring for any child of the relationship. In deciding whether to make such an order the court must consider whether the other cohabitant has gained financially from the contributions of the applicant and whether the applicant has suffered any financial disadvantage in the interests of the other cohabitant or any child of the relationship. The court has a high level of discretion and must carry out a balancing exercise between any economic advantage gained by one cohabitant and any economic disadvantage suffered by the other. One of the most important points to note is that any application in relation to financial provision must be made within one year of the couple separating. Perhaps surprisingly, since the 2006 Act came into force, only one case relating to financial provision for cohabitants has been decided by

the Scottish courts.<sup>2</sup> The case involved a couple who had cohabited for eight years and had two children during that time. The female pursuer argued that she had suffered economic disadvantage in the interests of the male defender by giving up full-time employment and losing certain opportunities. She also claimed that the defender had gained economic advantage by, amongst other things, her having looked after the children. She sought a total payment from the defender of £70,000. In reaching his decision, Lord Matthews felt that he had a very wide level of discretion as to how the law should be applied. He drew comparisons between the new law relating to cohabitants and the legislation of 1985 which sets down the principles to be applied to separating married couples and civil partners. He also recognised that the contributions parties made to a relationship cannot always be measured in economic or financial terms and took this into account in reaching his decision. In carrying out the balancing exercise between economic disadvantages and economic advantages he ultimately decided to make an award in favour of the pursuer, but this was far less than what she had been seeking. He ordered the defender to pay to her a total of £14,460.31, being his half share of the total speculative future costs for their two children until they both reached the age of 16. This included sending them to breakfast clubs, after school activities and holiday clubs, all of which were considered necessary to allow the pursuer to continue working, albeit on a part-time basis.

### Death

Another significant change in the law relates to the rights of surviving cohabitants on the death of their partner. If the deceased cohabitant made a will, their estate will be divided in accordance with their wishes. However, if they did not make a will then the surviving cohabitant may apply to the court for payment of a capital sum and/or transfer of any property (a house or objects) from the deceased's estate. In deciding whether to make any such order the court will look at the size and nature of the estate; any benefit received or to be received by the surviving cohabitant; any other people who may have a claim on the estate such as the deceased's children; and, any other matters the court considers

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<sup>2</sup> CM v STS [2008] CSOH 125: Lord Matthews

appropriate. Two points are particularly noteworthy here; firstly, any order made in this regard must be from the deceased's estate after payment of the necessary taxes, any debts and any prior legal rights claims of a surviving spouse or civil partner. This is significant. If you are separated from your husband or wife but have not divorced and are living with a new partner, your spouse's rights on succession are not overridden and should you die, your new partner could be left with nothing. Secondly, applications for orders to be made on death must be made within six months of the cohabitant dying.

- What can you do?

Whilst cohabitants now have a level of legal protection in the event of their separation, it remains open to you to enter into a Cohabitation Agreement with your partner. Much like a Pre-Nuptial Agreement for people about to marry, a Cohabitation Agreement can set out what a couple's intentions are should they ever separate. In comparison to taking matters to court, such an Agreement can give a great deal of control to the couple should their relationship come to an end. In addition to dealing with financial and property matters a Cohabitation Agreement can also provide how any children are to be cared for and by whom. Depending on the circumstances it is thought that registered Pre-Nuptial Agreements would be valid and enforceable in Scotland. Although the matter has never been tested in a Scottish court, it is anticipated that registered Cohabitation Agreements will be treated in the same way. In any event, such an agreement has the potential to reduce the risk of dispute and provide a level of protection and certainty for both parties following separation.

If you have any questions about the points raised in this article, or any other questions about an aspect of family law, please do not hesitate to contact us on 0131 225 8371 and ask to speak with any member of the Bonar Mackenzie Family Law Team. We are always happy to help.

**Sarah A Lilley**

Solicitor – Bonar Mackenzie Family Law Team

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