

Briefing Note

Cohabitation

Introduction

In response to the increasing popularity of cohabitation throughout Scotland, in 2006 legislation was enacted to provide limited rights to cohabiting couples on the breakdown of their relationship. It is important for individuals to be aware of the concept of cohabitation and the potential claims which may be made. Cohabitation Agreements are becoming an increasingly popular tool for parties wishing to protect assets and regulate their financial affairs.

Who is a Cohabitant?

A cohabitant is defined as either member of a couple who live or have lived together as if they were husband and wife or civil partners. This definition is accompanied by a list of factors to be taken into account in determining whether or not a person is a cohabitant, namely:-

- The length of time the couple have or had been living together (there is no minimum time limit);
- The nature of their relationship during that period; and
- The extent and nature of any financial arrangements between them during that period.

Whilst commentary has indicated the Scottish Executive intended the legislation apply to long-term and enduring relationships, it is important to note that claims have been made by cohabitants who have lived separately but still claimed they were cohabiting because they stayed overnight with each other.

Rights of Cohabitants

It is important to note that cohabitating couples do not have the same rights as married couples. A husband or wife has the right on divorce to a share of the matrimonial property that has been built up during the marriage. In contrast, cohabitants do not have the same automatic right, instead they are entitled only to make a claim.

Under the 2006 legislation, firstly it is presumed that household goods acquired during the cohabitation will be shared equally between cohabitants. Secondly, if one cohabitant provides an allowance to the other for joint household expenses, this allowance will be treated as belonging to both cohabitants equally. Thirdly and most controversially, on separation cohabitants can make a claim to seek a capital sum from their cohabitant for any contributions they've made during the relationship to the other, whether financial or otherwise. In order to succeed in such a claim one party has to be able to demonstrate that he or she has suffered economic disadvantage in the interests of the other party or of any child of the relationship and/or the other party has derived economic advantage from contributions made by the person applying for the order. The courts are entitled to take into account offsetting of contributions made by the other party in that situation. There is no automatic entitlement to share in the value of capital assets built up during the course of cohabitation and there is no opportunity to seek either an award of maintenance or an order that

property should be transferred between individuals. The only order which can be made is for a capital sum and such awards are compensatory in nature.

Crucially, in order to make the claim for a capital sum on separation, a court action must be raised within one year from the date of separation. If the claim is not raised within a year then the cohabitant will lose the right to make a claim.

Finally, the 2006 legislation also introduced claims for cohabitants where one cohabitant dies while still living together with the other cohabitant. Providing that the deceased has died intestate (i.e. without making a Will) the survivor may make a claim for an award from the deceased's estate. Any such claim must be raised at court within six months of the deceased's death.

Cohabitants in the headlines

In 2012, the rights which had been given to cohabitants in the 2006 legislation hit the headlines in response to the controversial UK Supreme Court case of *Gow v Grant*. The Supreme Court took a much broader approach than had been adopted by the lower courts in earlier decisions, founding the judgment on an "overriding principle... of fairness".

Given the potentially far reaching consequences of the law, it is crucial parties are aware of their position and decide whether they wish to come to their own agreements on how their financial affairs will be regulated.

Cohabitation Agreements

A Cohabitation Agreement is like any other contract and parties can choose the provisions of their Agreement and how they wish to regulate their assets relative to their own circumstances. A Cohabitation Agreement is a legally binding document that can stipulate financial arrangements during a couple's cohabitation, clarify property ownership between the parties and set out what should happen in the event of separation including mechanisms for the division of assets.

A Cohabitation Agreement can be as simple as providing they neither party will make a financial claim if the parties separate.

A Cohabitation Agreement is a simple and advisable option where parties wish to protect assets and avoid future dispute.