

Rights of cohabitants – Family Law (Scotland) Act 2006, sections 28 and 29

The Law Society of Scotland is the professional body for almost 12,000 Scottish solicitors. We seek to influence the creation of a fairer and more just society and are strongly committed to our statutory duty to work in the public interest and to both protect and promote the rule of law.

The starting point

There has been a significant growth in the number of cohabitating couples and families in the UK in recent years. Within the period of 10 years to 2015, the number of cohabiting couple families in the UK grew by almost 30%.

The Family Law (Scotland) Act 2006 (the Act) contains a series of provisions concerning cohabitants – found principally in sections 25 - 29. Section 28 concerns financial provision where cohabitation ends otherwise than by death and section 29 provides for a surviving cohabitant to make an application to a court following the death of their cohabitant, in intestate cases only.

Solicitors and members of the public have identified a number of issues with the current law, and we have called for a full review of the law on cohabitants in Scotland.

Claims on separation

Following separation, cohabitants have a period of one year to make an application to the court for financial provision.

There are a number of reasons why a court action may not be raised within a year – parties may not be aware of their rights; there may be uncertainty as to when cohabitation has ended; or parties may be suffering the emotional effects of the relationship breakdown. Vulnerable parties may be reluctant to pursue a claim shortly after the breakdown of a relationship for fear of repercussions. The limited time frame along with a lack of discretion for the court to accept a late application has the potential to create harsh results.

Recent case law suggests that parties should not be entitled to raise a common law action based on unjustified enrichment in situations where

the Act would have applied unless there are “special and strong circumstances”. This has arguably given rise to uncertainty and unfairness.



237,000

cohabiting couples in Scotland in 2011



In 2006

37%

of people in Scotland had a will



76%

of solicitors think time limits are a problematic area of the Act

Claims on death

Under section 29, an application must be made to the court within six months of the date of the death of the cohabitant. This is a limited period of time when a cohabitant is likely to be grieving and may be dealing with a number of practical matters related to, or following upon, the death of their cohabitant. There is no discretion within section 29 for the court to accept an application after the six month period has expired.

There may be complications in making an application timeously to the court where executors have not been appointed to deceased person's estate, for example, where there are a large number of persons with an interest in the estate and/or beneficiaries require to be traced. There may also be difficulties in meeting the time limit if certain legal situations arise – for example, when a will is challenged by a child who is not provided for in the will or where all or part of a deceased's estate becomes intestate sometime after death.

Our proposals

We propose that section 28 be amended to allow a court to accept an application made after the one year time limit 'on cause shown'. This would give the court powers in limited circumstances and subject to the judge's discretion to accept a late application where it appears to be in the interests of justice to do so. There appears to be support for a review of the time limit for applications to be received by the court. Our work did not set out to cover this matter and so we do not make any recommendation beyond stressing that this, along with the law relating to cohabitation as a whole, would merit further consideration.

Following the court's comments in a recent case, it appears that the common law basis of claim of unjustified enrichment may no longer be considered by the court to be open to parties who could make a claim under section 28, whether or not the time limit has been missed. We suggest that this be reconsidered, and parties be able to make a claim on unjustified enrichment in appropriate circumstances.

In relation to applications following the death of a cohabitant, we suggest that the time period for a cohabitant to make an application under section 29 should be extended. We welcome the Scottish Government's recent proposal to extend the period to one year from the date of death. However, we also consider there is scope to link the time period to a grant of confirmation. We think this would be the most appropriate way to reduce potential practical difficulties which may be faced by a cohabitant making an application. We suggest that the permitted period should be either up to 12 months from the date of death or, in a case where confirmation is obtained in respect of the deceased's estate after the expiry of 12 months from death, up to six months from the date of confirmation.

We suggest that neither the Scottish Government's proposal alone, or our proposed suggestion to provide an alternative of linking the time limit to the grant of confirmation, goes far enough to resolve the potential difficulties with applications. In line with our proposals in relation to applications on separation, we suggest that the court be afforded discretion to accept a late application 'on cause shown'.

The Scottish Government has also stated it will not change the law to allow a claim by a cohabitant on a testate estate. We have considered the issue and agree with the Scottish Government's position to restrict section 29 claims to intestate cases.