



**LSA** Legal Services Agency

Scotland's National Law Centre

# Co-Habitation: The New Law

**An advice leaflet on a comprehensive code which provides for financial support to former co-habitees on separation or death.**

By Jennifer Nobbs, Solicitor, Lindsays WS Edinburgh  
Published by Legal Services Agency Ltd "sponsored by North Glasgow Advice Centre a LSA and Glasgow Central CAB. Project funded by Glasgow City Council, Glasgow Housing Association and Communities Scotland".

# Introduction

---

## Unmarried couples: the law has now changed a lot!

Previously, cohabitants had limited rights or obligations towards each other. However, unmarried couples who decide to set up home together now have extensive legal rights and obligations towards each other, whether they like it or not. The new law is particularly important when there are children.

The changes are as a result of the **Family Law (Scotland) Act 2006** which came into force on 4 May 2006.

An important warning: there are some strict time-limits!

# What is exactly is a cohabitant?

---

Under the new Act, a cohabitant is a person who is (or was) living with another person as if they were husband and wife, or two persons of the same sex who are (or were) living together as if they were civil partners i.e. the law makes no distinction between "gay" and "straight" relationships.

If the matter ever came to court, the court could also look at the length of the period during which the couple lived together, the nature of their relationship during that period, and the nature and extent of any financial arrangements, which existed during that period.

Due to the definition of cohabitant, those who are simply sharing a flat, for example flat-mates, will not be effected. Essentially, you must be living together as if you are husband and wife or civil partners. This definition may be problematic for those who perhaps work abroad or do not live together on a full time basis, for whatever reason.

# What are the new rights?

---

## Separation

A cohabitant now has the right to apply for what is known as “financial provision” when they separate from their former cohabitant. The applicant can apply to the court for an order for a payment of a capital sum for their own benefit and/or a further sum to reflect the additional burden of having to care for a child who is either a child of both of the parties or a child who has been accepted as a child of the family.

The court also has the power to make an interim order and can order payment to the applicant by way of a lump sum or by instalments.

The court, in deciding whether or not to make such an order, has to take account of the extent to which:

- The defender has derived an economic advantage from the contributions of the applicant and also
- If the applicant has suffered an economic disadvantage in the interest of the defender and/or any child of the family.

The court then must balance any economic advantage or disadvantage gained or suffered by either party. “Economic advantage” includes gains and capital, income and earning capacity and economic disadvantage is to be construed accordingly.

This allows the court to exercise discretion, in dealing with couples where one party sacrificed a career for example in the interest of caring for the parties’ children. The court has a wide discretion. As the law is very new it is difficult to predict exactly how this will be exercised, given the lack of cases which have come to court so far.

**It is very important to note that the application must be brought within a year from when the couple separated.** There is no discretion for this period to be extended. This may cause real problems as the date of separation may be unclear.

Therefore if you think that you would wish to make such a claim, you should **consult a solicitor as soon as possible** about this as one year does not allow a lengthy period of time to deliberate about this.

## Death

If a cohabitant dies and does not leave a Will, which is known as dying "intestate", the surviving cohabitant may apply to the court for financial provision out of the deceased's estate.

However, if the deceased cohabitant has made a Will, then the law remains unchanged and the division of the estate will be in accordance to what the Will says. However there still remains the possibility of a claim for unjustified enrichment, where applicable.

Financial provision can take the form of a capital sum or a property transfer out of the deceased's net intestate estate. A lump sum or instalments are both competent.

The court will look at:

- The size and nature of the estate
- Any benefit received or to be received by the survivor – for example the deceased's pension scheme or joint life policies
- Any other claims on the estate such as those of the deceased's children and
- Any other matters which the court considers to be appropriate

It is important to note that the court cannot make an order awarding the survivor a higher amount than they would have had the right to had the parties been married (or in a civil partnership).

Another important thing to note is that any order for a payment of a capital sum/transfer of property must be made from the deceased's net estate after payment of inheritance tax, debts and satisfaction of any prior legal rights claims of a surviving spouse or civil partner.

Therefore if you are married but separated and 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. The importance of consulting a solicitor to have a Will drawn up should not be under-estimated as it can avoid complicated situations such as these happening.

**It is also important to note that the timescales for this type of application must be brought within six months of the death and there is no discretion allowed to extend this time limit.** Therefore again if you feel you have a claim, you must contact your solicitor immediately about this.

If the parties separate before the death, then the survivor has no right to claim.

## Other rights

Co-habitees have other rights particularly if there are children: for instance financial support and rights to see the children on separation. In addition, under landlord and tenant law, there may be rights to tenancy transfer or defend recovery of possession/eviction actions. Seek advice on these complex areas.

There are also two other rights which provide that where any question arises as to the rights of a cohabitant to

- (a) any money derived from any allowance made by either cohabitant for their joint household expenses or for similar purposes, or
- (b) any property acquired out of such money, that (subject to any agreement to the contrary),

the money/property shall be treated as belonging to each cohabitant in equal shares.

However, the term "property" does not include a house used by the cohabitants as the sole or main residence in which they live (or lived) together.

LSA is one of Scotland's leading law centres. We undertake a wide range of casework in all courts and tribunals, organise seminars and publish leaflets on many topics. See also [www.lsa.org.uk](http://www.lsa.org.uk) for full details of our work and how we can help you.

We specialise in social welfare law including asylum, landlord and tenant disputes, homelessness, criminal injuries compensation, children's rights, mental health, community care, disability discrimination and dementia.

### **Legal Services Agency Glasgow**

3rd Floor, Fleming House, 134 Renfrew Street, Glasgow, G3 6ST

Tel: 0141 353 3354

Fax: 0141 353 0354

Email: [lsa@btconnect.com](mailto:lsa@btconnect.com)

### **Legal Services Agency Edinburgh**

3rd Floor, Princes House, 5 Shandwick Place, Edinburgh, EH2 4RG

Tel: 0131 228 9993

Fax: 0131 228 9994

Email: [Isaedin@btconnect.com](mailto:Isaedin@btconnect.com)

### **Legal Services Agency Greenock**

Inverclyde Housing Rights Project, 9 Sir Michael Street, Greenock, PA15 1PQ

Tel: 01475 553309

Email: [elaine.blue@btconnect.com](mailto:elaine.blue@btconnect.com)

### **North Glasgow Advice Centre**

1169 Royston Road, Glasgow, G33 1TE

Tel: 0141 770 7869

Fax: 0141 770 7979

Email: [ngac@btconnect.com](mailto:ngac@btconnect.com)

### **A joint LSA and Glasgow Central CAB Project**

LSA is a charity, Registered office: 134 Renfrew Street, Glasgow, G3 6ST

**For further information please visit [www.lsa.org.uk](http://www.lsa.org.uk)**

© Legal Services Agency 2007

S/Drive PDB

Edited 5/7/07

