Key differences between English and Scottish cohabitation law

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Family analysis: Nicola Kerr, senior associate at Brodies LLP, discusses the key differences between English and Scottish cohabitation law. In particular, Kerr discusses how the Scottish cohabitation regime has generally been received and the impact of the Supreme Court’s decision in Gow v Grant.

Analysis

What is the background to the introduction of the Family Law (Scotland) Act 2006 and why was it necessary to be introduced in Scotland?

In the 20 years prior to the Family Law (Scotland) Act 2006 (FL(S)A 2006) coming into force, there were an increasing number of couples cohabiting in Scotland. During that time, many people held misconceptions regarding the existence of ‘common law marriage’ for cohabitants, and erroneously believed that they had the same rights as married couples.

The introduction of FL(S)A 2006 was a result of the Scottish Parliament deciding that the law needed to create certain legal safeguards in certain situations for the protection of cohabitants. The provisions in FL(S)A 2006 provide cohabitants with certain limited rights, which are by no means the same as married couples.

In the event of separation (otherwise than by death, which is a topic in itself and won’t be covered within these answers), FL(S)A 2006 makes provisions for rights in certain household goods (FL(S)A 2006, s 26), rights in certain money and property (FL(S)A 2006, s 27), and provision to seek an order for payment of a capital sum in certain situations (FL(S)A 2006, s 28).

How has the Scottish cohabitation regime generally been received?

FL(S)A 2006, s 28 in particular has received much criticism from practitioners and academics over the years. The criticism centres around poor drafting and the lack of guidance on how to interpret the wording of the provision.

Generally, having regard to the unfettered discretion afforded to courts, practitioners have found it difficult to quantify claims and advise clients as to the likely outcome of a section 28 claim. It was hoped that, over time, guidance would be provided from reported decisions. However, there has not been the level of reported decisions that was hoped for. Consequently, there remains a degree of uncertainty and risk involved for the client with any section 28 claim, which is contrary to the policy objective at the time the Bill was introduced to the Scottish Parliament in 2005, which was ‘to introduce greater certainty, fairness and clarity into the law by establishing a firm statutory foundation for disentangling the shared life of cohabitants when their relationship ends’.

In contrast to the legislative framework application to cohabitants upon separation, the legislative framework applicable to separated spouses is very clear in Scotland and, consequently, produces fairly predictable outcomes in the majority of cases.

What are the key differences between Scottish and English and Wales cohabitation laws?

While in Scotland, cohabitants have certain limited rights in the event of cessation of cohabitation, their counterparts south of the border have even fewer rights.

In Scotland, in terms of FL(S)A 2006, s 28, a person can make a claim against their former cohabitant for payment of a capital sum if:
• the former cohabitant has derived economic advantage from contributions made by the applicant, and/or

• if the applicant has suffered economic disadvantage in the interests of their former cohabitant or a relevant child, and/or

• if the applicant has the economic burden of caring after the end of the cohabitation for a child of whom the cohabitants are the parents

In contrast, in England and Wales, there is no provision in legislation for the court to award payment of a capital sum to a former cohabitant, except for the benefit of a child (under section 1 of the Children Act 1989).

In Scotland, FL(S)A 2006, s 26 provides that there is a presumption that each cohabitant has a right to an equal share in household goods acquired during the period of cohabitation. There is no similar provision in England and Wales.

What was the impact of the Supreme Court’s ruling in Gow v Grant?

The decision in Gow v Grant [2012] UKSC 29, [2012] All ER (D) 32 (Jul) has cured some of the deficiencies in the drafting of FL(S)A 2006, but not all. The Supreme Court clarified that fairness is the guiding principle of section 28, and that the purpose is to achieve fairness between both parties in the assessment of compensation for contributions made or economic disadvantages suffered in the interests of the relationship. Fairness does not mean equal sharing when considering a section 28 claim. The decision made clear that regard should be had to where the parties were at the start of the cohabitation and at the end, and a broadbrush approach to quantification should be adopted.

Has there been any other important case law on the matter?

There is not an abundance of case law in this area regarding how the legislative principles are to be applied. Some case law has however helped to clarify certain matters. One such case is Simpson v Downie [2012] CSIH 74. In that case, it was underlined by the Inner House of the Court of Session that the time limit provided in FL(S)A 2006, s 28(8) for making a claim under FL(S)A 2006, s 28 is a strict time limit. Accordingly, any claim under FL(S)A 2006, s 28 must be made no later than one year after the day on which cohabitants cease to cohabit. After that period has expired, no claim can be made in any circumstances.

The case of Harley v Thompson [2015] Fam LR 45 demonstrated that there is no minimum period of cohabitation required for an award in terms of section 28.

In the case of M v S [2017] CSOH 151, the judge observed that the purpose of section 28 is to redress any economic disadvantage, not the relief of one of the parties from poverty. Furthermore, prior to the case of M v S, the general held view among practitioners was that awards under section 28 were for smaller amounts. However, that view was quashed by the decision in M v S as the award was just over £900k.

Are any further amendments to the law necessary and can we expect any reform in the future?

In March 2019, the Law Society of Scotland published a paper titled ‘Rights of Cohabitants’, which was prepared following a period of consultation. Having regard to the issues identified in the paper in relation to certain provisions of FL(S)A 2006, the Law Society of Scotland consider that a full review of FL(S)A 2006, ss25–29A would be merited.
One of the suggestions within the Law Society’s paper is that legislation is introduced providing the court with discretion to accept an application under FL(S)A 2006, s 28 later than one year following cessation of cohabitation in particular circumstances on cause shown.

Following Lord Becket’s comments in the case of Courtney’s Executors v Campbell [2016] CSOH 136 it appears that a cohabitant may not be entitled to make a claim under the common law remedy of unjustified enrichment. The Law Society have suggested that this position be reconsidered, and that legislative provision is made to clarify that the right for an individual to make an application under FL(S)A 2006, s 28 does not prevent a common law claim being raised.

The Scottish Law Commission is currently undertaking a review of aspects of family law. The first phase of the project is focussing on review and reform of the law relating to cohabitants’ rights on cessation of cohabitation otherwise than by death. They are consulting with stakeholders including legal professionals, academics and other individuals as well as establishing an advisory group.

Having regard to the above, I consider it highly likely that there will be reform in this area in the future.

**What should practitioners be wary of when advising their non-married clients?**

If a practitioner is consulted by a client following separation from their former cohabitant, one of the main things to be aware of is the one year time bar for making a claim under FL(S)A 2006, s 28. Accordingly, if a practitioner is consulted by a client regarding a section 28 claim, it is advisable to make a diary entry for the one year anniversary of the separation and another entry for six weeks prior to the one year anniversary, because if a financial settlement has not been reached by then it would be advisable for the client to raise court proceedings in order to preserve any section 28 claim.

*Interviewed by Varsha Patel.***

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*