

Co-habiting couples urged to find a will to avoid future woes

Cohabiting couples need to make a Will to avoid sleepwalking into a legal mess that could leave one partner facing financial misery, a family law expert has warned.

Sally Nash, Senior Associate with Gilson Gray, said that there needs to be better information overall made available to the public on the potential pitfalls to spouses, civil partners and cohabitants in the event of a death.

Her comments came in reaction to the Scottish Government's published response to the Consultation on the Law of Succession.

She said that while there are elements of the response to be welcomed, there are still unsatisfactory areas of uncertainty particularly in respect of cohabitants' rights on death.

Sally said: "As matters stand, if a couple are not married or in a civil partnership and one of the cohabitants dies with a Will in place which makes no provision for their partner, the surviving partner has no right to make any claims against the deceased's estate.

"Since 4th May 2006, if the deceased dies intestate (in other words without a will) the surviving cohabitant has a right, under section 29 of the Family Law (Scotland) Act 2006 ("the 2006 Act") to make a claim on their deceased partner's estate. A claim can be made provided that before the death the deceased was domiciled in Scotland and cohabiting with their partner.

"Critically, any claim must be made within six months of the

deceased's death, failing which the claim will be time-barred, and the survivor will have lost the ability to claim.

"I am pleased the Scottish Government have concluded that there is sufficient support to extend the period during which a claim can be made to twelve months from the date of death. As a practitioner operating in this field on a day to day basis, that is certainly a development I know will be welcomed by family lawyers.

"However, the Scottish Government has concluded that for the time being, no changes to the substantive laws in respect of cohabitants' rights on death should be made. They have instead indicated that they 'considered the time was right to consult on a fresh approach to cohabitants' rights'.

"That means that cohabitants will continue to be left in an uncertain and unsatisfactory situation following the death of their partner without a Will, although if the Scottish Government follows through on its promise, they will likely have more time to make a claim.

"The reality is that although there is no such thing as "common law marriage", when the Scottish Government brought the 2006 Act into force, not enough was done to make clear that apart from the rights afforded by that incoming legislation, those who are not married or in civil partnerships have no rights on separation or on death.

"I think there are a lot of the general public who will not understand the intricacies of succession rights for cohabitants.

"That all points to need for better dissemination of knowledge as to where spouses, civil partners and cohabitants stand in the event of death, whether with or without a Will in place.

“For cohabitants, the reality is all too clear; it totally underlines the importance of making a Will and seeking legal advice when doing so.”

Following the Scottish Government’s response to the Consultation on Succession, the Law Society of Scotland launched its own consultation on 5 November on the rights of cohabitants (albeit looking at the wider issues of cohabitants’ rights on separation as well as on death).