

Cohabitation Law Reform – Long Overdue?

Elissa da Costa examines the recent consultation paper on financial disputes in cases of unmarried couples

The Case for Change

Carnwath LJ made the following point in his judgment in **Stack -v- Dowden [2006] 1 FLR 254** -

‘To the detached observer, the result may seem like a witch’s brew, into which various esoteric ingredients have been stirred over the years, and in which different ideas bubble to the surface at different times. They include implied trust, constructive trust, resulting trust, presumption of advancement, proprietary estoppel, unjust enrichment, and so on. These ideas are likely to mean nothing to laymen, and often little more to the lawyers who use them.’

Indeed, it is not the first time over the last decade or so that the case for change has been put with criticisms having been made of the fact that cohabitants are subject to 19th Century trust and property law when their relationships break down unlike spouses for whom section 25 of the Matrimonial Causes Act 1973 together with 21st Century case law operates to determine how their property and finances are apportioned upon the dissolution of the marriage. Now that Civil Partners enjoy a similar regime to spouses on relationship breakdown it has become even more apparent how unfair the lack of legislative provision is for those same sex couples who choose not to enter into a Civil Partnership and equally for heterosexual couples who choose not to marry. It is as a result of the absence of a set of coherent remedies for the non-married or non-civilly partnered cohabitants that prompted Lord Filkin to ask the Law Commission to review the law and to suggest possible reforms, which are now the subject of a consultation paper, ‘Cohabitation: The Financial Consequences of Relationship Breakdown’¹. The urgency of the project and its social impact is apparent from the increasing numbers of those cohabiting, which as at the 2001 Census had reached over 2 million and with 42% of all children born out of wedlock being born to cohabiting couples. Such trends are likely to continue.

Many couples who live together do not understand that the law that provides for spouses on the breakdown of their relationship does not apply to them and many still believe that there is a legal status of ‘common law wife’ which confers rights on a cohabitating woman. There is a very rude awakening when it is discovered that this is not the case.

Many cohabitants are entirely unaware of how little legal protection they have when their relationship comes to an end, and depending on how long ago their cohabitational home was purchased, they have little if any recourse to the conveyancing solicitor who, in many cases, did not advise properly about the ways in which an interest in property could be achieved or protected. What of the cohabitant who makes no contribution at all to the financial side of the relationship but whose contribution to the welfare of the family would have earned her a half share had she been a legal wife? The Law Commission’s paper makes it clear that although it is twenty-two years since ‘Mrs Burns’ went to court, ‘the law has not changed significantly in the interim and it is likely that if Mrs Burns’ case were heard today, the result would be exactly the same as it was in 1984.’

The Main Focus of the Project

Although the project will examine the financial hardship suffered by cohabitants² or their children on the termination of the relationship by breakdown or death, the main focus will be on the financial impact of relationships that terminate via breakdown. It is clear that it is intended the remedies will be available to those in clearly defined relationships although there need not be a sexual element to the relationship. However, the relationship should involve cohabitation and bear all the hallmarks of intimacy and exclusivity, giving rise to mutual trust and confidence between partners. Attention will be given to-

- Capital Provision where there is a dependent child or children;
- Capital and income provision on relationship breakdown;
- Intestate succession and family provision on death; and
- The Inheritance (Provision for Family and Dependents) Act 1975.

Consideration will also be given to cohabitation contracts and the extent to which cohabitants should be free to make and enforce agreements concerning their respective liabilities to provide and maintain following separation. At the moment the ‘pre-nuptial’ agreement is not enforceable as a contract but counts as conduct in divorce cases, whereas the cohabitation agreement is enforceable.

The project is not intended to deal with-

- Parental responsibility for children;
- Next of kin rights (The Department of Health has now amended its policy guidance to NHS staff to extend consultation with next of kin to unmarried partners); or
- Insolvency, tax and social security.

Suggested Structures for Change

The variety of structures and suggestions upon which comments were sought are as follows:-

- Rejection of the extension of the regime governing financial relief between spouses on divorce;
- The Basic eligibility to the proposed legislation would be ‘cohabitants’ defined as a ‘shared joint household’;
- There would be an automatic entitlement to apply for relief for those cohabitants who have had children together, including if at the time of the separation the child had not yet been born³ or where the child has reached adulthood or left home. This latter provision would take account and perhaps compensate a female cohabitant who had given up work to care for the home and children sacrificing her own career and earning capacity. Views are sought in respect of other ‘children of the family’.
- It is also suggested that there might be a time period that applicants must satisfy in respect of their cohabitation before they are entitled to apply for a remedy;
- Having passed the time provision, applicants would then have to demonstrate either:
 - Economic disadvantage suffered by the applicant (as in the example above of giving up a career to care for children); or
 - That s/he has conferred an economic advantage on the other cohabitant (e.g. by doing a substantial amount of physical labour to improve a house belonging to the other party). Clearly what this provision is designed to do is to analyse the balance sheet of positive and negative positions of each party at the point of separation compared to their respective positions at the beginning of the relationship and for adjustments to be made where the current position is unfair.
- The Law Commission also seeks views on a possible third requirement which is that an

applicant would have to show ‘substantial or manifest unfairness’ before an award could be made.

- There would be no automatic entitlement to an award based merely on the fact of the cohabitation, regardless of the length of the relationship.
- There would be no award either simply because a party has needs although the needs of parties and of children are to be taken into account in deciding what assets to transfer if an award is made. For example it is likely to be the case that the party with care of the children will have the family home transferred to them, although it remains to be seen the basis upon which that is done, whether for example, as in the case of spouses, there will be charge back provisions where both parties would be entitled to a share in the equity but that there is insufficient to provide homes for both parties.
- The Law Commission paper also states that it is likely that the form of any award will be modelled on the regime under the Matrimonial Causes Act 1973 in that it is envisaged there will be awards of periodical payments, lump sums,

‘The appeal in this case is due to be heard by the House of Lords on the 5th February 2007

‘The Law Commission Consultation Paper No 179.

‘Burns -v- Burns [1984] FLR 216 in which the Court of Appeal held that ‘Where an unmarried couple, who had lived together as husband and wife, separated and there was a dispute over the former matrimonial home the courts were not empowered (as in the case of married couples) to make such property adjustment order as they thought fair and reasonable. The respective interests of the parties were to be ascertained by the application of the law of trusts and the principles to be applied were those stated by the House of Lords in *Pettitt v Pettitt [1970] AC 777* and *Gissing v Gissing [1971] AC 886*. A trust for sale could arise (a) by the express declaration or agreement; (b) by way of a resulting trust where the claimant had directly provided part of the purchase price; or (c) from the common intention of the parties. In this case there was no express agreement that the plaintiff had an interest in the house nor did she make any direct contribution to the purchase price. Therefore, she had to show a common intention that she had a beneficial interest in the property giving rise to resulting trust. The court was not confined to looking at the factual situation at the date of acquisition but would have regard to all the subsequent circumstances including the contribution of the parties. In this case there was nothing at the time of the acquisition of the house which indicated a common intention that the plaintiff should have an interest: she provided no money for the purchase and assumed no liability for the mortgage, and the defendant did nothing to lead her to change her position in the belief that she would have an interest in the house. The plaintiff’s contributions to the household expenses did not, and were not intended to, relieve the defendant of his liabilities, and she did not make a substantial contribution to the family expenses so as to enable the mortgage instalments to be paid. It was not enough for the plaintiff to show that she had worked just as hard as the defendant in maintaining the family in the sense of keeping the house, giving birth to and bringing up the children of the union; she

property adjustment and pension orders and it is further envisaged that the clean break principle will also apply.

Opting Out

It is envisaged that couples would have the right to opt out of the proposed legislative scheme provided this is done in writing, signed by both parties and witnessed. At the moment it is not clear whether or not parties should also be required to give full financial disclosure and/or whether they should also be required to have received independent legal advice before an opt-out agreement will be binding, providing yet further points upon which feedback is sought. Should the courts likewise be able to disregard the terms of an otherwise valid agreement, because it did not provide for an unforeseen change in circumstances from the time of signing the agreement, such as the birth of a child. In the field of matrimonial financial law, such questions are being asked in respect of pre-nuptial agreements where it is clear that agreements that do not contain any ‘Edgar’ factors are upheld and pre-nuptial agreements are upheld under ‘conduct’ but ‘added to’ where their provisions do not necessarily cover the

new and unforeseen circumstances’.

The proposed new scheme rejects the notion of cohabitants having automatic rights under intestacy in favour of adapting the relief available under the Inheritance (Provision for Family and Dependents) Act 1975.

Timing

The Consultation Paper is just that – a document for consultation rather than firm and comprehensive recommendations. The consultation phase closed on the 30th September 2006 and it is planned that the final recommendations for reform will be published in the summer of 2007. The press has reported that legislative reforms of cohabitational law will be introduced in 2008 although this is difficult to envisage given that the Commission’s document states that the final report will not include a draft bill!

Given the ‘witches brew’ which characterises the current state of the law relating to the property and financial affairs of cohabitants, especially on relationship breakdown, reform is to be welcomed. Lawyers and cohabitants alike can only continue to speculate on the exact form that such reform will take.

had to show that she had, directly or indirectly, made substantial financial contribution to the acquisition of the house.

‘It is clear that the project excludes relationships between blood relatives or caring relationships; and commercial relationships (such as landlord and tenant or lodgers).

‘This would no doubt lead to DNA testing in some cases.

‘Edgar -v- Edgar [1981] 2 FLR 19

It seems clear, looking at the decisions so far, that the courts will consider the *Edgar* factors when considering the weight, if any, to attach to the existence and terms of a pre-nuptial agreement. The *Edgar* Test as set out by Ormrod LJ is as follows-

‘to decide what weight should be given in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement and to their subsequent conduct in consequence of it.

It is not necessary in this connection to think in formal terms, such as misrepresentation or estoppel, all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant.’

- Those circumstances will include-
- Undue pressure by one party
 - Exploitation of a dominant position
 - Inadequate knowledge
 - Bad legal advice
 - Material Change of Circumstances

Also important is the general principle that formal agreements, properly and fairly arrived at with competent legal advice should not be displaced unless there are good and substantial grounds for concluding that an injustice will occur by holding the parties to the terms of their agreement.

K -v- K (Ancillary Relief: Pre-Nuptial Agreement) [2003] 1 FLR 120