Reforming the law to protect cohabiting couples upon separation

Every year, thousands of unmarried couples separate following a period of cohabitation. When they do, they have little or no legal protection. This is the case regardless of whether the couple had been living together for 24 months or 24 years, or even whether they had children or property together. This is because there is no legal framework to govern their rights and responsibilities.

Unfortunately, many couples mistakenly believe that they are protected, with almost half of UK citizens believing in the myth of the “common law” marriage.\(^1\)

More than 5.9 million people in the UK currently cohabit.

Every year in the UK more than 115,000 married couples get divorced. For all the stresses they go through, they can take some comfort in the fact that the settlement of their divorce will be made within an established framework of rights and responsibilities.

The lack of a legal framework relating to cohabiting couples upon separation often results in hardship. This increases the cost of welfare as more people are forced to seek benefits to help them, and their children, deal with the fallout of a separation.

In a recent poll,\(^2\) more than 75% of MPs agreed that legislation should be introduced to afford similar financial rights to long-term cohabiting couples upon separation as are afforded married couples. Two-thirds agreed that ensuring separating couples had rights to a fair settlement at separation would reduce the welfare burden. 7 in 10 also agreed that their constituents hold a mistaken belief in “common law marriage”, believing that they have rights that they do not.

Living together: the current law

- The current law treats cohabiting couples at the end of their relationship as two unrelated individuals.
- There is no structure in place to determine a fair outcome for former partners taking account of the financial or other contributions they may have made to their shared lives.
- Former cohabitants may claim orders for financial provision on behalf of their children under the Children Act 1989. But most primary carer parents cannot obtain support for childcare costs to enable them to work.
- A former cohabitant may make a claim in respect of property under an “implied trust”. However, in order to succeed, they must be able to prove an agreement to share that property or a financial contribution to the value of the property.

The scale of the injustice and uncertainty

“By the time I realised I had no rights, I was in too deep”, said Jane who had two children with her ex-partner.

“I had sold my house and given up my job to support my ex by taking care of our children and helping out with his business. When I found out we were not common law husband and wife as I had assumed, I pressed for us to marry - to no avail. Since our split I have had to rely on government handouts and support from family whilst I try and rebuild my career and my new life as a single parent. I suppose the error I made was in trusting someone I loved.”

- Jane’s story
Supporting marriage and civil partnership but protecting the vulnerable

The special place of marriage and civil partnership in our society is acknowledged. However, evidence from other jurisdictions, such as Australia and Scotland, indicates that legislation to protect cohabiting couples upon separation has not had a negative impact on marriage.

The law should not seek to encourage marriage or civil partnership by maintaining insecurity for cohabiting couples.

Support for reform

In 2007 the Law Commission recommended legislative reform to entitle cohabiting couples to apply for financial relief on separation in certain circumstances together with reform of certain existing legislation applying on death.  

MPs support reform, with more than 57% believing the law needs to be reformed to afford protection to unmarried couples upon separation.  There is also broad support for reform among NGOs, academics and family law practitioners as well as strong public support for change: almost 90% think that a cohabiting partner should have a right to financial provision on separation if the relationship has been either long-term, involved children, or has involved prioritising one partner’s career over the other’s.

A changing social context

- Cohabitation is the fastest growing family type in England and Wales, according to the Office for National Statistics: the proportion of cohabiting couple families increased from 6.5 to 11.7 per cent between 1996 and 2012.
- Government actuaries have calculated that by 2031 there will be 3.8 million cohabiting couples – representing a 90 per cent increase over 25 years - and just 10 million married couples.
- The number of unmarried heterosexual cohabiting couple families has almost doubled since 1996, from 1.5 million to almost 3 million in 2012.
- Similarly, the number of dependent children living in heterosexual cohabiting couple families doubled from 0.9 million to 1.8 million from 1996 to 2012.
- More than a third of people (36 per cent) have cohabited in the past and one in nine (11 per cent) do so currently.

The persistent myth of the “common law” marriage

- A 2008 British Social Attitudes Report revealed that more than 50 per cent believe that unmarried couples who live together have the same protection as married couples on separation.
- Government departments often refer to people as being married or “living together as husband and wife”, adding to the misperception which, despite Government-funded educational campaigns, remains largely unchanged since 2000.

References

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