Introduction

The advent of a range of partnering and parenting styles alongside more complex household arrangements raises a number of issues for all those concerned with the regulation of family life. Key questions facing policy makers and legislators include:

♦ How adequate is the law for increasing numbers of cohabiting couples on breakdown or death of a partner?
♦ Does the law do sufficient to protect the interests of children in unmarried families?
♦ Should the law recognise other co-dependants, who share a home, such as siblings?
♦ Where does the public interest lie?

In some instances, family law has responded to the needs of non-traditional families. The legislature took the lead, for example, with the Civil Partnership Act 2004 which recognised same-sex civil partnership on virtually equal terms with marriage. Yet in other cases, such as cohabiting couples who are not married or civil partners, the law in England and Wales (in contrast to Scotland and growing numbers of other jurisdictions) remains inconsistent, complex and confusing, despite recommendations for reform by the Law Commission (2007).

Whilst the government awaits research on the outcomes from the Scottish legislation before deciding whether to accept the Law Commission’s recommendations (Prentice, 2008), this briefing paper draws together what we now know from research about the implications of the changing ways families are formed and to consider the need for better family regulation, particularly where there is a shared household.

Key findings from research on cohabitation and marriage

♦ Cohabitation is rising across the Western world. It is not unique to Britain and is here to stay (Kiernan, 2004; Social Justice Policy Group, 2008).

♦ Most cohabiting couples intend to marry but get deflected from this course for a number of reasons (e.g. financial, practical, emotional) which largely exclude the legal context (Barlow et al, 2005).

♦ Whilst marriage is still the most common family form, the number of couples cohabiting is increasing whilst the number marrying is in decline (National Statistics, 2008).

♦ 25 per cent of all children are born to cohabiting couples (National Statistics, 2006).

♦ The majority of cohabiting couples (and of the public in general) believe that they have the same legal rights as if they were married (Barlow et al, 2008).

♦ Significant financial injustice often occurs under the current law when cohabiting relationships break down and this adversely affects children (Arthur et al, 2002, Douglas et al, 2007).

♦ Very few cohabiting couples make or feel able to make legal agreements to arrange their financial affairs, often exhibiting an ‘optimism bias’ (Barlow et al, 2008).

♦ Where age and length of relationship are taken into account, cohabiting and married couples organise their household finances in similar ways (Vogler, 2008, Ashby and Burgoyne, 2008).

♦ Most people think that the law should treat cohabiting couples and particularly those with children in broadly the same way as married couples both when relationships break down and even more emphatically when one partner dies without making a will (Barlow et al, 2008).

♦ Research indicates that increased legal rights for cohabiting couples has no impact on marriage rates in jurisdictions adopting this approach (Kiernan et al, 2007).
The international context: cohabitation, marriage domestic relationships

Whilst unmarried families present concerns for policymakers in England and Wales, unmarried heterosexual cohabitation is increasing in most parts of the Western world, regardless of the legal status ascribed to cohabiting families. For instance, in Ireland, where cohabitation is ignored by the law, the numbers cohabiting (including those with children) have soared since 2000 (Kiernan, 2004, Central Statistics Office, Ireland, 2007).

Conversely, those jurisdictions that have extended marriage law or similar protection to cohabiting couples (whether by giving presumptive rights or facilitating opt-in provisions) have seen no greater decrease in the marriage rate (Kiernan et al, 2007).

It is clear, therefore, that the move away from marriage and into heterosexual cohabitation is part of a social trend across the western world and many other jurisdictions have made cohesive legal provision for cohabitants, to address their needs.

Fears that extending marriage-like remedies to cohabiting couples amount to a “marriage-lite” option (Morgan, 2000) undermining marriage, seem unfounded given that research demonstrates that marriage rates have not been adversely affected by this in other jurisdictions (Kiernan et al, 2007).

Other forms of shared household, such as adult siblings or other non-intimate domestic or caring relationships may need future consideration. In some jurisdictions such as Australia, legal recognition is already given to this style of relationship (Bottomley and Wong, 2006). In England and Wales, calls to include this within the Civil Partnership Act 2004 were rejected by Parliament but may need to be considered in future.

The social context: who cohabits and why do they not marry?

“I want him to think that if we ever got married, it’s because I’m in love with him, not because of my rights”
(Tricia, divorced, cohabiting with another divorcee)

It is well known that people are marrying later and cohabitation is a stage through which many couples pass on the way to marriage. 78% of couples currently live together before marrying (National Statistics, 2006). Many are considering getting married while cohabiting—trial marriage; but are doing this for increasingly lengthy periods.

Most couples are unaware of, and/or do not consider the legal consequences a factor in deciding whether or not to marry (Hibbs et al, 2001; Barlow et al, 2005). Rather, people view this as a personal lifestyle choice, within the context of other factors in their lives. Some reject marriage due to its perceived patriarchal nature and the gender stereotypes available, these cohabitants often view themselves as even more committed than married people, but having a more egalitarian partnership (Barlow et al, 2007).

This and other research also shows some people do not marry as they fear divorce and its financial consequences, having seen their parents or friends experience this; others wish to wait until they can afford a ‘proper wedding’. Shotgun cohabitations nowadays replace shotgun weddings, which were always most likely to end in divorce (Brown and Booth, 1996).

Perhaps of most concern to policymakers are the “uneven” couples in which one partner would like to get married and the other is not keen—often this leaves one partner (and any children) vulnerable, should the relationship break down or one partner die.

♦ People who cohabit often take on the same type of responsibilities towards their wider family as married couples and feel subject to the same moral obligations. (Maclean and Eekelaar, 2004).

♦ The average length of cohabiting relationships is increasing and is now 7 years. Where cohabitants have children this increases to 8.5 years (Barlow et al, 2008).

♦ Cohabitation is socially accepted as equivalent to marriage and whilst marriage is seen as ideal, social attitudes show great tolerance to different styles of partnering and parenting relationships (Barlow et al, 2008).
The legal context

Unlike married couples and civil partners, cohabitants (whether same or different-sex) are not automatically treated as a family in law. It is undoubtedly true that the 21st century family may now come in a variety of forms. Socially, it is no longer confined to relationships linked by blood and marriage, nor, since the Civil Partnership Act 2004, is it limited to the heterosexual context. Given this, what styles of family should the law be regulating and what is the current position?

In England and Wales, confusion surrounds the legal position of heterosexual cohabitants and this confusion may spread to the same-sex community. Many cohabitants still believe (as does the majority of the wider population) that cohabitation gives the same rights as marriage – the “common law marriage myth”. Despite a government-funded information campaign and much media publicity, the 2008 British Social Attitudes Survey found that 51% of people generally and 53% of cohabitants still believe in common law marriage (Barlow et al, 2007). Yet whilst in some situations (such as claiming means tested benefits and tax credits) the law treats cohabitants as if they were married, in others (such as inheritance tax or on relationship breakdown) it treats them as two separate individuals.

In yet other situations, it provides remedies which are similar but inferior to those available to married people. Even the more legally aware cohabitants rarely make sufficient legal arrangements – for example, only 12% of cohabiting couples have made wills and only 19% had sought advice about their legal status (Barlow et al, 2008). This means that on relationship breakdown, the weaker economic partner has little or no redress even where disadvantage has been suffered due to, for example, childcare.

The law can sometimes have a direct effect on behaviour in this area. Where the land registry rules required couples purchasing a home together to declare their respective interests in it, the numbers agreeing arrangements of this nature rose from 8% in 2000 to 15% in 2006 (Barlow et al, 2008). Similarly, it has been found that welfare benefits law has a direct effect on people’s partnering choices, whereas tax credits do not exhibit such a clear outcome (Anderberg, 2008). Nor does the law on relationship breakdown operate in this way, with people finding it inappropriate to marry for legal rights and remedies (Barlow et al 2007).

“Until you’re actually in a situation, you don’t really start thinking...you know.” (Adam, cohabitant, divorced with children)

♦ Cohabitation relationships are diverse and range from the contingently committed to the mutually committed (Smart and Stevens, 2000, Lewis, 2001).
♦ Some cohabiting couples reject marriage, yet are committed to stable family life; they feel that not marrying permits a more equal relationship (Barlow et al, 2007).
♦ Around 40 per cent of cohabiting couples have children of the relationship, with such relationships being increasingly durable (Barlow et al, 2008).
♦ For some, cohabitation has replaced the ‘shotgun’ wedding with people doing their best to provide a stable family after unplanned pregnancy (Barlow et al, 2005).
The financial context

A recent House of Lords decision (Stack v. Dowden [2007] UKHL 17) has thrown the issue of financial practices into sharp relief. For the way a couple deals with money and property during the relationship may affect property rights in the family home. Given the far-reaching implications of such a judgement, it is important to draw together the research findings on how couples deal with money and to try and discern what their intentions might be.

At the moment, property law applies to cohabiting couples whose relationships break down, whereas family law governs marriage breakdown. However, research suggests that cohabiting couples organise their financial affairs in broadly the same way as married couples during the relationship (Burgoyne et al, 2007). Much of the previous research on intra-household finances has focused on married couples (Pahl, 1989; Vogler and Pahl, 1994; Burgoyne, 1990) and it is only relatively recently that the financial practices of cohabiting couples have come under scrutiny (Vogler et al, 2008; Barlow et al. 2008; Burgoyne et al, 2006).

Surveys of married couples indicate that most have joint financial systems, very few (around 2%) retain separate finances. Separate financial management has been considered more typical of cohabiting couples (Blumstein and Schwartz, 1983; Elizabeth, 2000) and keeping money more or less separately has also been seen as an indication of their (presumed) lower level of commitment to the relationship when compared with married couples. However, such a conclusion may be too simplistic. There is a trend towards more separate systems of management in newly married couples, probably reflecting more modern practices at a time when young adults expect more financial independence and gender equity, and when labour market rates of men and women have been equalising and many more women are returning to work after maternity leave.

Recent research on marital and cohabiting couples (Pahl, 2005; Burgoyne et al, 2006) demonstrates that newly married, younger couples behave very similarly to cohabiting couples, in terms of pooling money and keeping independent finances (in contrast to older married couples). It appears, when examining a couple's financial practices, it is more useful to consider their life-stage rather than their marital status. Thus, Vogler et al, (2008) found that couples with children had a similar approach to money management regardless of marital status, i.e. cohabiting parents were as likely to pool their income as married parents.

Given this convergence of financial practices in married and cohabiting relationships and the lack of distinction in the way financial and non-financial contributions (such as childcare or housework) to the household are divided in these two groups (Crompton and Lyonette, 2008), the very different treatment in the law to married and cohabiting parents on relationship breakdown seems anomalous to many people (Barlow et al, 2005).

Support among cohabitants for registered cohabitation contracts as exists in France has been found in some studies (Barlow et al, 2005, 2007).

"When Millie and I bought in Amsterdam, we signed what’s called a Living Together agreement under Dutch law which essentially is formalising your relationship without it being marriage. And we did that expressly because we wanted the relationship to be clear cut so that if anything happened with our relationship and we had this house, then we’d know what we could do with it." (Thomas, former cohabitant)

"In a partnership people make compromises and quite often it’s the woman that makes compromises and that’s part of the deal. If it then turns sour, the relationship, they shouldn’t be penalised because they’ve made sacrifices.” (Ruth, cohabitant)
Effects on children

There is widespread concern for the wellbeing of UK children, in the context of recent research showing that one third of UK children live in poverty, and that UK children came at the bottom of a study of European children’s happiness (UNICEF, 2007).

The negative impact of parental separation on children’s financial and emotional wellbeing is of concern to policymakers (Home Office, 1998; Social Justice Policy Group, 2008). On divorce, children and their primary carer are afforded financial protection. Yet mothers and dependent children are still much more likely to be living in poverty after divorce. Recent research show that fathers’ income rises after divorce, while mothers and children’s goes down (Ermisch, 2003, Jenkins, 2009). This risk of poverty is exacerbated for separating cohabitants (Tenant et al., 2006).

When cohabiting parents split up, there is far less financial protection for dependent partners and children, with a correspondingly worse impact on children (Arthur et al., 2002, Douglas et al., 2007). Whereas on divorce, assets are redistributed to meet, as a minimum, the caring parent’s needs in addition to those of the children, for cohabiting parents there is no such family law redistribution of assets from one partner to another. On death of a cohabiting partner, the Widowed Parent’s Allowance is dependent on parents’ marital status and not available even where there are young children, again causing financial hardship for such families.

Attitudes to reform of cohabitation law

The nationally representative British Social Attitudes (BSA) Survey published in 2008 aimed to gauge how people thought the law should treat cohabitants and married couples on relationship breakdown and death of a partner. The BSA 2001 had shown 93 per cent in favour of marriage-like inheritance rights for a 10 year childless cohabitant in respect of the family home (Barlow et al., 2005). Two thirds of the BSA 2008 sample thought a childless cohabitant of just two years standing should inherit the home bought by their deceased partner prior to their relationship as if they were married. Various scenarios were also presented to judge which categories of couples were thought to merit legal remedies for financial provision on relationship breakdown. It aimed to see how views changed according to variables such as:

♦ the presence or absence of children,
♦ whether the parties were married,
♦ the length of the relationship and
♦ financial and domestic contributions to the relationship
♦ the circumstances leading to the claim for financial provision

The Table below sets out the main responses regarding separation (where current law only provides for married partners). These support reform, particularly where there are children (see Barlow et al., 2008).

<table>
<thead>
<tr>
<th>Beliefs regarding rights to financial provision on separation for married and unmarried couples</th>
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<tbody>
<tr>
<td>% agree partner should have right to financial provision on separation if …</td>
</tr>
<tr>
<td>… couple living together for 20 years, 3 children, woman reduced work to part-time and then gave up work to look after family and home, man supported family financially and owns home, woman has no income and poor job prospects</td>
</tr>
<tr>
<td>… couple for ten years, no children, one partner worked unpaid to build up other partner’s business, partner who runs business also owns family home, other partner has no property or income of own.</td>
</tr>
<tr>
<td>… couple for two years, one has a much higher income than the other and owns the family home.</td>
</tr>
<tr>
<td>… couple living together for two years with young child and now separating. She will be child’s main carer and he will pay child support.</td>
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</tbody>
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Total number of respondents: 3197
Reasons for and against cohabitation law reform

For

♦ Current law is complex and confusing, and affecting increasing numbers of people in longer lasting relationships, often involving children.
♦ Financial injustice often occurs under the current law for cohabitants whose relationships break down.
♦ Reform would remove the current perverse incentive to cohabit to avoid the financial implications of divorce.
♦ Other jurisdictions have provided cohabiting couples with legal remedies on separation without this causing a further decline in the marriage rate.
♦ Many people affected by the current law are financially vulnerable people, including children, who would benefit from reform.
♦ There is clear public support for reform.
♦ Permitting cohabitants to register cohabitation contracts and gain legal status without marrying would encourage people to discuss their arrangements. This model could extend to other home sharers, such as siblings, thereby avoiding injustice in other styles of households.

Against

♦ Although marriage is already in decline, reform might be considered acceptance of marriage-lite.
♦ Fewer people might cohabit to avoid the financial implications of reform, resulting in people having less legal protection than in the current context.
♦ Where an opt-in reform was chosen, many cohabitants would not get round to opting in or registering, so the most vulnerable may still not gain legal protection.
♦ Cohabitation may be difficult to legally define, (although definitions already exist).
♦ Where cohabitants are deliberately avoiding legal recognition, reform would infringe their autonomy unless it included the right to opt-out.
♦ Some argue that the status quo is satisfactory – there is enough legal protection available.
♦ Some argue that many cohabitations do not last long enough to warrant regulation.

“I really would like to see a change in the procedure that says I have to stay in residence to claim any legal rights that I may have. The strain of having to remain in residence, every day seeing and talking with a partner against whom I will be conducting a court case through the conclusion of the court case and until the sale of the house, is in my opinion a situation which no culture that calls itself civilised should see fit to impose on its members.” (Diane, long term cohabitant)

Options for reform

A recent working group (the Centre for Social Justice) report on the needs for change in Family Law states that “Increasing stability and encouraging commitment are key aims” (Social Justice Policy Group, 2008: p6). All the main political parties are agreed on this (see also Home Office, 1998). However, given denial of legal rights and remedies to informal cohabitants has not persuaded people to marry, and given the increasing length of cohabiting relationships, especially those with children, research tends to suggest that cohabitation has become accepted and there is a need recognised by wider society to extend family law remedies to cohabitants. How might such increased legal protection be achieved?

Main options suggested include:

♦ Presumptive legal rights and remedies for separating cohabitants similar to those available to married couples, either immediately if they have a child together or after a set time period (typically 2 years to 5 years), subject to the right to jointly opt out and/or
♦ Opt-in Registered Partnerships (similar to the French PaCS-style agreements) where cohabitants can formally register their cohabitation agreement.

The Law Commission (2007) concluded that a presumptive set of rights from which couples could opt out should provide remedies for economic disadvantage suffered following cohabitation.
Conclusions

- The growing number of cohabitants and inconsistent approach in law, means that current law is not fit for purpose.
- Just because cohabiting relationships break down more regularly than married relationships (Kiernan, 2006) does not mean that family law protections for cohabitants on separation or death of a partner are inappropriate. It could be argued that the converse is true.
- Under the current system, children of cohabiting couples are in practice indirectly penalised on death of a parent or separation of parents.
- Focusing law and policy on married couples does not prevent non-traditional families.
- There is an increasing diversity of relationships, which needs a pluralistic legal response. The aim should be to balance a duty of family responsibility against rights to personal autonomy for cohabiting couples.
- Social and legal norms need to converge not diverge to retain public respect and utility.
- A majority of people, whether or not they themselves are currently cohabiting, support more rights for cohabiting couples, especially in cases where a couple has a child together.
- Given one of the principal aims of family law is to protect the most vulnerable family members when relationships end, family law is currently missing its target by not extending its remedies to cohabiting couples.

References


References (ctd)


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