Cohabitation law reform essay sample

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In recent decades, the traditional idea of the family has changed significantly, evidenced by the steep decrease in the marriage rate in England and Wales. 1 Different social circumstances and attitudes have contrived to make cohabitation a much more acceptable and prevalent way of life for thousands of people. The 2001 consensus revealed there were 2 million cohabiting couples in England and Wales, an increase of 67 per cent from the 1991 figure.

The fact that cohabitation is becoming increasingly more popular necessitates an appropriate and timely response from the law to regulate this new tradition. The government has recognised that the current law is insufficient to embrace the new trend of cohabitation, leading the Law Commission to conduct research over a two year period that culminated in an extensive report published in 2007. The report sets out the myriad of issues facing the legislators with regard to cohabitation and suggests options for reform.

The need for reform There are a multitude of reasons why the law on cohabitation needs to be reformed. Although the fact that the numbers of cohabitants is increasing, as the Law Commission acknowledges, this is not a sufficient reason in itself to justify a change in the law. Currently, childless cohabitants must have recourse to the general law of property and trusts, whilst cohabitants with children can utilise Schedule 1 of the Children Act 1989 in order to make a financial claim for the material products of the relationship.

Academic commentators have noted that “ the range of property law principles and approaches available produce an unnecessarily expensive and cumbersome process for the often distressed law client”. 3 The current law has been described as complex, uncertain and likely to give rise to unfair outcomes. 4 It does not take adequate account of the economic consequences of contributions made by the parties, particularly non-financial contributions such as one partner giving up work to raise a child. 5 Further, the Law Commission expressed dissatisfaction with the role of constructive trusts as a remedy for cohabiting couples who wish to separate.

The two main criticisms in the 2007 report were that constructive trusts cannot accommodate contingent intentions and that, due to the restrictive nature of constructive trusts, the court is unable to substitute its views of what is fair, but must adhere to the intentions of the parties. 6 On a more general note, one of the overarching aims of legislation to regulate financial provision for cohabitants on separation is to protect the vulnerable who are often unaware of the lack of protection and operate under a misguided notion that the law will look upon their relationship as a common law marriage. Possible options for reform

The Law Commission The Law Commission7 has emphasised that the scheme it proposes would afford less discretion to the courts than the ancillary relief provisions on divorce, in order to ensure an acceptable level of predictability and certainty. The Law Commission proposed two grounds for eligibility for cohabiting couples: the fact that they have children together or that they meet a minimum duration requirement. 8 An eligible applicant would have to prove that, as a result of a qualifying contribution made by the

applicant, at the point of separation either the respondent had a retained benefit or the applicant had an economic disadvantage.

The fact that the law has traditionally, but unacceptably, refused to take into account non-financial contributions is addressed here as contributions such as caring for the parties' children or other family members can be included under the ' qualifying contribution' category. Similarly, an ' economic disadvantage' can encompass lost future earnings and the future cost of paid childcare. The scheme would also require the court to have regard to discretionary factors including the welfare of any child of both parties; the financial needs and obligations of the parties and the conduct of each party.

The range of orders available to the court would include lump sum payments, property transfer orders, property settlements and orders for sale and pension sharing orders. However, it would not be able to make periodical payment orders9 and in this way, the Law Commission achieves its aim of ensuring that there is as clean a break as possible between the parties. Options rejected by the Law Commission The Law Commission considered, and rejected three main options for reform, which will be looked at in turn.

Firstly, the Law Commission decided against applying the Matrimonial Causes Act 1973 (the MCA 1973) to cohabitants for two reasons: reluctance to treat parties who had never married as if they had and because the MCA 1973 is itself under judicial attack. 10 Secondly, the Law Commission rejected amending Schedule 1 of the Children Act 1989 this would be outside of its remit and would not help childless cohabitants. The Law Commission

preferred taking steps to introduce remedies that would complement the relief currently available under the Children Act 1989.

Thirdly, the Law Commission considered whether reform should be left to the judges to develop the general law of trusts and estoppel. This approach was rejected as it is Parliament's role to make judgments of social policy and not for the judges. Lord Lester of Herne Hill's Private Members' Bill Lord Lester, in partnership with Resolution, introduced the Cohabitation Bill for its first reading in the House of Lords in December 2008; the Bill had its second reading in March 2009. A consultation paper – Reforming the law for people who live together: A consultation paper (2008) – was issued and included two main options for reform.

The first almost identically mirrored the Law Commission's proposals and foresaw a scheme based on addressing any economic imbalance resulting from the cohabiting relationship, whilst the second has been described as, " a more discretionary scheme, similar in form – if not identical in substance – to the Matrimonial Causes Act 1973". 12 It is somewhat surprising that Lord Lester chose the second option, in spite of the extensive research carried out, and the comprehensive report produced, by the Law Commission.

The Bill defines cohabitants as " any two people (whether of the same sex or the opposite sex) who live together as a couple". With regard to eligibility, the parties must either be the legal parents of a minor child (or have a joint residence order in respect of a child) or have lived together for a continuous period of at least 2 years. The Bill also envisages an opt-out scheme,

therefore in this regard – and with respect to the eligibility requirements – the Bill generally reflects the Law Commission's proposals.

However, the Bill proposes that the court can make a financial settlement order if it is just and equitable to do so, having regard to all the circumstances; this differs greatly from the Law Commission's suggestion of ' structured discretion'. The Bill also proposes that the degree of a commitment within a cohabiting relationship should be tested rather than simply assumed, as is the case with the Law Commission's proposals. The Bill is unsatisfactory and pays too little attention to the suggestions of the Law Commission.

Instead of fulfilling its purpose by mitigating potential financial hardship for cohabitants, the Bill may perpetuate such hardship. This unwelcome consequence is evidenced by the fact that, under the Bill, any financial contributions made to the purchase price of a property that is registered in the sole name of one of the parties would be just one of the factors to take into account. This is in contrast to the Law Commission's proposals, which would allow financial contributions to the purchase price to constitute a retained benefit that the court would be directed to reverse. 3 Indeed, a cohabitant in this situation may be in a better position under the general law of property as he would be entitled to a share of a property on a resulting trust.

The Bill affords an untenable degree of discretion to the court, therefore certainty and a body of coherent principles that the law currently lacks would be perpetuated, in the unhappy event that the provisions of the Bill were

translated into statute For these reasons, it is submitted that the Bill does not represent an adequate or desirable solution to the problems that the current law faces with regard to financial provision for cohabitants on separation.

The approach of other jurisdictions The approach of other European and Commonwealth countries to financial provision for cohabitants on separation is considerably more progressive and far-reaching than the proposals made by the Law Commission. Moreover, a significant number of countries have had some form of legislation in place for several years. 14 The approach of some countries has been to develop the idea of a civil union whereby the law recognises defacto partnerships between unmarried persons of the same or different sex and accords such civil unions protection from a financial perspective upon separation.

In New Zealand, the Civil Union Act has been in place since 2004 and extends certain rights and obligations to cohabitants. The Netherlands introduced registered partnerships in 1998 and, despite the fact that the driving force behind this was to benefit same sex couples, statistics show that between 1998 and 2001, one third of registered partnerships were entered into by heterosexual couples. 15 Arguably, the greatest development of the civil union concept has occurred in France. 6 In 1999, the French government introduced the pacte civil de solidarite (PACS) which has proved to be a popular alternative to marriage amongst cohabitating couples. It confers fewer rights and imposes fewer responsibilities than marriage and has become socially acceptable in France.

Hughes, David and Jacklin have expressed strong support for the use of PACS in the UK and praise the fact that “ France has opted for a tiered system of unions which formally reflect the different levels of commitment of the parties and which result in different packages of rights and obligations”. 8 However, the Law Commission made no reference to PACS in its report, not even to discount the role that PACS or the concept of civil union could play as a means to regulate cohabiting relationships. Scotland has recently enacted legislation19 that enables the court, on the breakdown of a cohabiting relationship, to require payment of a capital sum to the applicant where the respondent has derived an economic advantage from the applicant’s contributions.

The new Scottish regime is very similar in substance to the proposals made by the Law Commission and it is likely that the English government will carefully monitor the emerging jurisprudence in Scotland as part of its investigation into the most appropriate regime for England and Wales. It is worth noting that the Scottish system is less restrictive than the Law Commission’s approach in one respect, namely the absence of a minimum duration requirement for as a ground for eligibility.