The common law marriage myth

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Cohabiting couples are the fastest growing family model in the UK. According to the Census 2021, the proportion of people in a co-habiting relationship (not a marriage or civil partnership) has increased from a fifth in 2011 to nearly a quarter in 2021, an increase across all age groups aged under 85 years.

Whereas historically cohabitation was seen as a 'trial run' before marriage and children, the statistics support the reality that cohabitation is now an active choice by couples, many of whom go on to raise children together.

Changes in social attitude towards legitimacy may well account for this increase. Many couples actively shun marriage, but while cohabitation is now increasingly seen as a socially accepted trend, the law has not kept up. The lack of legal rights for long-term unmarried couples is a significant and long-standing issue, and reform is long overdue.

Many people still erroneously believe they have rights as 'common law spouses', but in fact there is no such status or concept in law. As a result, some cohabiting families find themselves in real financial difficulties should they separate, particularly where children are involved.

Whereas married couples can resort to the Court to impose a fair settlement on divorce, there is no such provision for cohabiting couples. The net result can be catastrophically unfair. The fact of marriage can leave two families in starkly different positions on the breakdown of the relationship.

Take a couple who have been in a relationship for 20 years, have three children, live in a property held in the sole name of the father (who works) and where it was agreed that the mother would give up work to care for the children. On separation, it is agreed that the children should reside with the mother. If they were married, the

Court retains a wide discretion upon an application made by either or both parents for an order for a lump sum, transfer of the matrimonial home, spousal maintenance for themselves or child maintenance for the children. Given that the mother has no independent income, the Court is likely to ensure that the mother has adequate financial provision so that her needs are met as well as those of the children. The Court may further direct that the former matrimonial home be sold in order to provide each party with funds to re-house themselves and the children. An order for child maintenance could also be made.

Conversely for the same couple who have cohabited as opposed to being married for 20 years, there is no recourse to the Court by either cohabitee for financial support for themselves (maintenance), even if the mother has been entirely dependent (by agreement) upon the father for the duration of the relationship. The legal ownership of the property assumes critical importance, unlike if the parties were married. Cohabiting couples are left to fall back on general property law principles, which are at odds with the generous provisions within divorce legislation. Whilst child maintenance is available and can be ordered, a mother in these circumstances is likely to be left in severe financial difficulties, especially when compared to a wife with the same background.

Many lawyers and commentors consider that this area of family law is in urgent need of an overhaul. For now though the position remains that cohabitees should think carefully and seek legal advice about how best they might protect themselves and their families in the event of a breakdown of the relationship.

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