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Separation, cohabitation and common law marriage

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It is no secret that the Matrimonial Causes Act 1973 (the **Law**) is in need of review and reform. Various attempts have been made to encourage reform by both practitioners and the Justice Minister, all attempts just falling slightly short of success and addressing the real problems.

Whilst there has been development of the Law in several key areas, including by *White v White*[1] which, as we all know, established that there should be no discrimination between breadwinner and home-maker when a court considers financial claims and remedies, and *Radmacher v Granatino*[2] which of course provided that, save for in a situation of unfairness, nuptial agreements may be upheld by the court, there are still several areas, including financial remedy for non-married couples, which are in serious need of reform.

The framework of the Law is well embedded into society, providing the ability to make financial provision upon divorce and developing key areas by way of case law as time goes on and matters of import change.

The Law, generally, does what it says on the tin. It works well most of the time and provides a good framework and base line, especially in relation to the s.25 criteria, for Judges to base decisions upon and for practitioners to be able to provide good and solid advice to clients. That being said, the Law is 50 years old, and in that time the world has changed and times have moved on: Massachusetts became the first state in America to legalize same sex marriage, with it becoming legalised nationwide in June 2015 following *Obergefell v Hodges*[3]; Barack Obama became the first black president of the United States; and the #MeToo movement has rocked the globe. The world is simply no longer the world it was in 1973.

In 2021 the Office for National Statistics published an article[4] providing an overview of people's living arrangements in the United Kingdom, including their legal partnership status. Its research showed that the *proportion of people who live in a couple that are cohabiting (not in a marriage of civil partnership) has increased from 20.6% in 2011 to 24.3% in 2021, an increase across all age groups aged under 85 years*. This statistic, in its most basic form, means that nearly one quarter of couples living together will, in all likelihood, have little to no financial claims or relief available to them were they to separate, save for in relation to children and child maintenance. Whilst some couples will choose to cohabit and not marry precisely for the lack of legal rights which cohabiting creates, a large proportion of those couples may also not be aware of the legal position.

In November 2022 the House of Commons Library published a research briefing[5] which included earlier studies by the British Social Attitudes Society from 2019, revealing that 46% of cohabiting couples are under the impression that cohabiting forms a "common law marriage". The number of couples who may be under this impression across the UK is, simply put, terrifying.

In a world where minorities are often already under represented, badly treated or simply dismissed, a person who has been in a long, loving and serious relationship for a number of years, who is then faced with the fact that they have no financial claim against their spouse upon separation, is simply incomprehensible in 2023.It represents an unrealistic view of the world and the current practices of, frankly, most couples.

The issue of financial provision for unmarried couples ought to be of much more importance than it currently appears to be. Reform should centre around the things that are changing with the world, to keep up with the times and the next generation of people.

Argument

There are always going to be two sides to every coin, and the same can be said for the call for matrimonial reform.

Those on the side of reform, as I am, would seek to argue that providing the ability for the court to make financial orders in relation to cohabitating couples upon separation would have wide ranging benefits including, but not limited to,:

1. Providing those in long term relationships with stability and assistance upon separation, especially where one person may have given up a career or job to become a home maker and look after the children. Upon divorce the court has the ability to make such orders and it should be no different for couples in long term relationships who have made the same decisions for the same reasons.
2. The reforms would move with the times of society. Cohabitation is not "taboo" as it once was, and often couples chose to cohabit and never marry. Financial orders being able to be made by the court upon the breakdown of a such a relationship would simply bring the rights of cohabiting couples into line with those of married couples.
3. Those couples who don't want to marry, who cannot marry or who simply cannot afford to marry, will be able to have the same rights and benefits from their relationship and cohabitation as they would had marriage been an option for them. Couples should not find themselves in the position of being effectively being forced to get married in order to protect themselves just in case they separate.

On the other side of the coin, there are of course arguments to be had in relation to where the court might draw the line (or indeed begin the line!) When the court currently considers financial remedies following the breakdown of a marriage, one of the s.25 factors dictates that the length of the marriage should be considered.

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As we all know from tried and tested case law, the length of the marriage applied by the court can have a significant effect on the orders subsequently made. A short term marriage may result is a smaller award, or in certain assets not being split or not forming part of the matrimonial pot. A long term marriage may well mean that anything and everything is on the table.

If financial remedy were to be made available to cohabitating couples the court would be faced with a similar decision to make in relation to the length of a relationship and cohabitation. Of course, were this to be the case, as with length of marriage, a body of case law would slowly develop and provide much needed guidance in this area.

A second consideration is that if financial remedies to be available to cohabitating couples it is very likely, at least for the first few years, to open the flood gates to new applications and matters. Whilst this can be viewed as a positive thing from the perspective of those couples, it may well not be quite as positive for practitioners who are working in what is already an overworked and understaffed area of law, especially in smaller jurisdictions like Guernsey, where I practice.

Where practitioners are limited, time is limited so a raft of new matters relating to cohabitating couples and financial provision may not be as welcomed by conscientious practitioners as some may think.

Guernsey – Jurisdictional views

I practice in Guernsey, a small island situated 27 miles off of the coast of Normandy. It is a self-governing Crown Dependency and is, comparatively, a relatively small jurisdiction compared to the UK.

The island of Guernsey has some 64,000 residents[6] and a person needs to be a Guernsey Advocate[7] in order to appear before the Guernsey courts, albeit (save for appearing before the courts) they can practice as a Solicitor or Barrister in Guernsey, with the supervision of a Guernsey Advocate. Of the some 300 Advocates on the Role of Advocates in Guernsey, only a small handful of those are Matrimonial and/or Family Law practitioners. Even fewer still of those deal with finances and financial claims arising out of a marriage and subsequent separation.

Working in such a small jurisdiction can be and, often is, very rewarding, but it also comes with a counterbalance, that being the heavy caseload given the small number of practitioners and the relatively strenuous process of qualifying as a Guernsey Advocate.

Guernsey often looks to the UK for reform of its own laws, and tends to follow (loosely or otherwise) the framework of Scotland, England and Wales when drafting its own laws. The Matrimonial Causes Law, 1939[8] is heavily based on the English equivalent, and we would therefore hope that reform affected in England would soon follow into Guernsey.

Guernsey has announced its intention to put into effect a new matrimonial causes law, which will hopefully be effective from 2023. This introduces the no fault divorce to the jurisdiction. This has of course been in effect in England for some time and is the launch board for Guernsey's own changes and reform in this area.

Conclusion

It is my strong view that reform is clearly needed in relation to financial provision for cohabitating couples upon separation.

Providing the court with the ability to make orders in such circumstances will ensure that couples who, rightly or wrongly, believe they are in some form of "common law marriage" by way of their cohabitation, or who cannot or do not wish to get married, and who have lived in every other way effectively as a married couple, who may have children together, who may have intertwined their finances and mingled their financial affairs and assets, have some recourse should the relationship come to an end.

No one plans for their relationship to end, but everyone should be able to be secure in the knowledge that if the worst were to happen, they would be provided for in a world where the support they may have had throughout their relationship is no longer available to them.

It is clear that in today's society cohabitation is a growing feature and often the preferred method of a relationship/ As statistics illustrate, a large proportion of society do not see the benefit of marriage, especially where they, perhaps, already own property together and have children. Marriage is also often a luxury that few can afford. The injustice which risks being faced upon separation by those couples who do not marry is astronomical.

Reform is clearly required to many areas of the Law, and this area in particular. I think it is fair to say that a large number, if not most, of practitioners would agree and would be keen to see change being brought to the forefront of everyone's minds.

References

[1] [2000] 2 FLR 976

[2] [2010] UKSC 42

[3] 576 U.S. 644 (2015)

[4] People's Living Arrangements in England and Wales: Census 2021: https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/articles/livingarrangementsofpeopleinenglandandw

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[5] "Common Law Marriage" and Cohabitation, Catherine Fairbairn, 3 November 2022: https://researchbriefings.files.parliament.uk/documents/SN03372/SN03372.pdf

[6] https://www.gov.gg/population#:~:text=On%2030th%20June%202022%2C%20Guernsey's,%2C%200.0%20and%200.8%25%20respectively.

[7] https://www.guernseybar.com/practising-guernsey-law/advocates.aspx

[8] Correct as at the date of drafting. A new law is due to be brought in by the end of 2023

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