DIFFICULTIES IN PRACTICAL APPLICATION OF THE LAW TO COHABITATION OUTSIDE MARRIAGE

Rebecca J. Probert, University of Warwick

The current law

- A patchwork of legal rights – cohabitants are treated in the same way as spouses/civil partners for some purposes, given lesser rights in other contexts, and ignored altogether in many cases.

- The current law suffers from a lack of coherence:

    - Different definitions
    - Different criteria
    - No general consensus that rights should be extended to cohabitants

Difficulties in applying the law on relationship breakdown

Particular difficulties arise where the relationship breaks down. The applicable rules vary according to whether the couple were living in rented or owner-occupied accommodation, and whether they have children.

Under Sch. 7 of the Family Law Act 1996, the court may reallocate a tenancy in the name of one party to the other at the end of their relationship. The transferee may be ordered to pay compensation for the tenant's loss of the right to buy. There is, however, very limited information about the working of this provision.

If the parties have had a child together, the court may order the settlement of property for the benefit of the child under s.15 of the Children Act 1989. The problem with this is that any property thus settled will revert to the settlor when the child reaches the age of 18 or completes tertiary education: at this point the resident parent is in a very vulnerable position.

The other option for those living in owner-occupied accommodation is to seek to establish an interest in the property. While there is no special regime applicable to the family home, the House of Lords has recently held that a different set of considerations apply when ascertaining the parties' respective rights in the family home to those than pertain in the commercial context (*Stack v Dowden* [2007] UKHL 17).

English law is complicated by the fact that the ownership of property is split between *legal* and *equitable* (or beneficial) ownership. Since it is possible to establish an interest in the property informally, the legal title may not match the beneficial interests.

Problematic cases

- The couple buy the property in joint names and make ***no*** declaration as to the beneficial ownership
- The couple buy the property together but the title is conveyed into the name of just one of them
- One person buys a property; some time later the other moves in

Couple buy the property in joint names and make ***no*** declaration as to the beneficial ownership

- "the starting point where there is joint legal ownership is joint beneficial ownership." (*Stack v Dowden* [2007] UKHL 17 para. 56, Baroness Hale).
- To depart from this, the claimant will need to establish that it was not the intention of the parties to own the property jointly

Difficulties in application:

- Uncertain as to when the court will depart from equality: contrast *Stack v Dowden* [2007] UKHL 17 with *Fowler v Barron* [2008] EWCA Civ 377.
- Property rights may change over time: *Jones v Kernott* [2009] EWHC 1713 (Ch).

If one partner is the legal owner...

- First question: has the legal owner made an express declaration of trust?
  - if so, this is conclusive
  - although declaration must be evidenced in writing: Law of Property Act s. 53(1)(b)

- Second question: has the other party acquired an interest under a resulting or constructive trust or via proprietary estoppel?
  - Resulting and constructive trusts are exempted from requirement of writing: Law of Property Act s. 53(2)

Situation (1): the promise or assurance

- The legal owner leads the other to believe that he or she has/will have an interest in the property

When will the law recognise such promises/ agreements?

Lloyds Bank v Rosset [1991] 1 AC 107

- 'The first question is whether... there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially.... Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her legal position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel.'

Difficulties in application:

- The 'agreement, arrangement or understanding' must be based on express discussions – but cohabiting couples may be unlikely/unwilling to enter into such discussions
- The promise must relate to the sharing of the beneficial interest, not merely the sharing of the home
- Establishing that the claimant has relied on this understanding to his/her detriment requires them to show that they have done something that they would not have done but for the expectation of an interest in the property: some contributions may be regarded as being made as part of the relationship

Situation (2): the contribution

- One party makes a contribution to the purchase/running of the property, but there have been no discussions as to their respective shares

When will the law recognise such contribution as giving rise to an interest in the property?

- Where it takes the form of a direct financial contribution to the purchase price
  - *Lloyd's Bank v Rosset* [1991] 1 AC 107: 'direct contributions to the purchase price … whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust.'
- Where the parties are engaged to be married and one makes significant improvements to the property

Difficulties in application:

- Divergent authorities on what contributions will give rise to an interest in the property. In particular, there is uncertainty as to the status of indirect financial contributions and physical improvements to the home.

- Certain contributions are not recognised for this purpose – e.g. ongoing maintenance of the home, domestic work, child-care
- The decision of the House of Lords in *Stack v Dowden* [2007] UKHL 17, while making it easier to establish an interest in cases of joint legal ownership, seem to have made it more difficult to establish an interest in cases of sole legal ownership (see e.g. *James v Thomas* [2007] EWCA Civ 1212; *Thomson v Humphrey* [2009] (unreported).

A final difficulty in application:

- In all these cases the final shares of the parties will be assessed on the basis of what the parties must be inferred to have intended. This test leads to considerable uncertainty, since many factors are relevant to the court's assessment of what the parties must have intended.

Difficulties in applying the law if the relationship ends in death

A cohabitant is entitled to make a will leaving all his or her property to the survivor. However, few cohabitants have made a will, and a surviving cohabitant is not entitled to any provision under the intestacy rules. The surviving partner may, however, make a claim for reasonable financial provision under s. 1(3)(1A) of the Inheritance (Provision for Family and Dependants) Act 1975 if he or she had been living with the deceased in the same household immediately before the date of the death, and for at least two years before that date, as the husband or wife (or civil partner) of the deceased.

Difficulties in application

- The need to make an application to the court, potentially against one's own children.
- The difficulties of deciding whether the relationship fulfils the statutory criteria. No provision can be made where the relationship has come to an end before the death of the deceased, however long the relationship.

Proposals for reform

In 2005 the Law Commission began a project focusing 'on the financial hardship suffered by cohabitants or their children on the termination of the relationship by breakdown or death.'

The subsequent consultation paper (Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper* Law Com CP No 179 (HMSO, 2006)) and report (Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* Law Com No 307 (HMSO, 2007)) recommended that reforms be enacted to enable eligible cohabitants to apply for financial provision on separation/death.

Two key elements of the scheme are that:

- Rights are to be conferred on an opt-out rather than opt-in basis
- The rights conferred are to be different to those of married couples

Eligibility

- The parties must be cohabiting, which is defined as 'living together as a couple in a joint household' without being parties to a legally recognised marriage or civil partnership.
- Either may apply if they have had a child together
- Either may apply if they have been together for a specified period (suggested to be between 2 and 5 years)

Grounds for relief

Retained benefit

- It is a ground for relief that the respondent 'has a retained benefit… as a result of qualifying contributions the applicant has made.' (para. 4.33).

'Qualifying contributions'

- These comprise 'any contribution arising from the cohabiting relationship which is made to the parties' shared lives or to the welfare of members of their families.' (para. 4.34).

However, the limitations placed on this should be noted:

- domestic contributions are not included
- physical improvements to the property are included; routine maintenance is not
- paying bills/household expenses does not count unless the other party could not otherwise have afforded to pay the mortgage

Economic disadvantage

- the loss that the claimant *will* suffer as a result of contributions made during the relationship
- problems of evaluation/mitigation

Quantification

- The principle is that a retained benefit is to be reversed while economic disadvantage is to be shared.
- However, this applies only 'in so far as that is reasonable and practicable' having regard to a list of discretionary factors (see para 4.38). This includes:

    - the welfare while a minor of any child of both parties who has not attained the age of eighteen;
    - the financial needs and obligations of both parties;
    - the extent and nature of the financial resources which each party has or is likely to have in the foreseeable future;
    - the welfare of any children who live with, or might reasonably be expected to live with, either party; and
    - the conduct of each party, defined restrictively, but so as to include cases where a qualifying contribution can be shown to have been made despite the express disagreement of the other party.

- There is in addition an 'economic equality ceiling' in the case of claims based on economic disadvantage: i.e. the claim cannot be for more than half of the respondent's assets.

Opting out

- The Law Commission recommended that couples should be able to make a joint decision to opt out of the proposed scheme if they so wished. Such an agreement must be in writing and signed by both parties, and must make it clear that they are disapplying the statutory scheme. However, it may still be set aside 'if its enforcement would cause manifest unfairness having regard to (1) the circumstances at the time when the agreement was made; or (2) circumstances at the time the agreement comes to be enforced which were unforeseen when the agreement was made.' (para. 5.61). Other arrangements made by the parties would then take effect.

Likelihood of becoming law

In 2008 the Government announced that it intended to consider research findings on the Family Law (Scotland) Act 2006, which came into effect in 2007, before deciding whether to legislate for England and Wales.

Potential difficulties in application

- The concept of 'economic disadvantage', while attractive in principle, may be difficult to apply in practice.

An alternative proposal

A private member's bill – the Cohabitation Bill 2008 – was promoted by Lord Lester of Herne Hill. This adopted a more flexible approach to the division of assets, providing that a court might make a 'financial settlement order' if the parties have separated and 'having regard to all the circumstances, the court considers that it is just and equitable to make an order' (cl 8(1)(b)). It is more similar to the regime that currently applies to spouses and civil partners, in that no overall objective is specified, the court would be given a wide discretion, and the welfare of the children would be the first consideration for the court. However, there are also important differences: there is to be no principle of sharing, the responsibilities imposed are not to be long term, and there remains the possibility of opting out.

Potential difficulties in application

- The current regime applicable to spouses and civil partners has been criticised for its uncertainty and lack of any clear objective; the extension of a similarly discretionary regime to cohabiting couples may therefore pose problems.

Proposed rights on intestacy

The Law Commission has recently published a further consultation paper advocating that a surviving cohabitant should be automatically entitled to a share of the estate on the other's death (Law Commission, *Intestacy and Family Provision Claims on Death*, Consultation Paper No 191). Their provisional proposal is that a surviving cohabitant should be entitled to the same entitlement as a spouse under the intestacy rules if the couple had had a child together or had been living together for the previous five years. It was further proposed that a cohabitant of between two and five years' standing would be entitled to 50% of what a spouse would have received.

Potential difficulties in application

- There may be difficulties in applying the proposed regime in cases where the duration of the relationship is uncertain, given the element of subjectivity that exists in the concept of 'cohabitation'.