

Rights of Cohabitees

This consultation centres around the different rights and obligations (property and financial) of cohabitees as opposed to those who are married or civil partners.

It is worth observing that where cohabitees have an objection to marriage that marriage is no longer as rigorous a status as it was when it was correctly defined as “The voluntary union, for life, of one man with one woman, to the exclusion of all others”. The result of the existing legislative construct of “same-sex marriage” and the proposal for unilateral divorce renders it “The voluntary union of one person with another person, until either decides to terminate it”.

Note however that even this emaciated definition still includes “voluntary”. A proposal to give cohabitees equal property and financial rights to those married or in civil partnerships removes the voluntary element since the State presumes to force a legal status on those who do not intend or want it, otherwise they could have opted for the choices available to them – merely because as free individuals they have embarked on some kind of relationship which the State deems necessary to control. I suggest that this has no place in a liberal democracy which believes in the freedom of the individual, as opposed to a totalitarian regime.

This leads to the (almost insoluble) question of how to define cohabitation. It is of the essence an inchoate state – not a quantifiable status – which has no identifiable beginning and might include a brief affair, or an on-and-off affair, or a relationship which has lasted for a long time. Would it include two people who had shared a flat together – or an owner and a lodger? It is entirely possible that one partner is married already – does the proposal entail enforced “bigamy”? Would the widow whose husband had been cohabiting with another woman have her claim on his estate trumped or reduced by the proposed rights awarded to the other party?

How would it impact upon inheritance rights, including the current legislation for provision for family and dependants under the Inheritance Act? Would it automatically revoke an existing will, as in the case of marriage or civil partnership? How would it affect the law of intestate succession? How would it affect pension rights?

The whole concept is undermined by the impossibility of devising a framework which can definitively show that Case A constitutes cohabitation whilst Case B falls outside of it. With marriage or civil partnership there is a certificate which is evidence of the status of the parties from the start. With a supposed cohabitation one party can deny that it amounted to such – since it “just grew” (like Topsy) there is no point where one could put a finger on it and decide that it undoubtedly existed and arguments could continue until it was settled by a court.

This in turn leads to the question of who decides, and when, that a statutory cohabitation exists or had existed? In drafting any document in future which used to provide for an event or entitlement affected by marriage or civil partnership, how is it possible to anticipate that a statutory cohabitation has or had come into force unless a court so decides? Litigation lawyers will have a field day, and courts will struggle to reach conclusions and hold the balance between competing claimants. It reminds me of the late R.E. Megarry’s dedication of his massive work on the Rent Acts: “To the

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draftsmen of the Acts with awe and affection, and to the County Court Bench with an admiration which is as profound as it is respectful”.

So far I have concentrated upon the legal minefield which this unwelcome proposal would entail, apart from pointing out the unethical desire to interfere with decisions made by individuals in their private lives. If it is deemed unwise – as it almost certainly is – to have a society in which a large proportion of couples are cohabiting outside marriage, surely it is better to encourage them to enter into marriage which underpins the stability and well-being of the family and raising of children, rather than attempt the impossible task of imposing rights and obligations on a formless and unquantifiable state of affairs referred to as “cohabitation” which cannot be defined.

I humbly suggest that Humpty Dumpty should have the last word: “When I use a word it means what I want it to mean – neither more nor less”. You have been warned.

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