Written evidence from Howard Kennedy LLP [HAB0299]

This response focuses on cohabitation in the context of family law

Howard Kennedy is a leading law firm based in London. This response has been submitted by the Family department of the firm. Cohabitation, and the rights of cohabitees, is of great concern to our clients and the work that we do.

1. **Should there be a legal definition of cohabitation and, if so, what should it be?**

It is submitted that there ought to be a legal system of cohabitation- one which strikes a balance between certainty for the parties but retains the element of discretion which is foundational to family law in England and Wales.

We note that working definitions of cohabitation feature in several aspects of the law: in surrogacy law, in applications for non-molestation, and in applications of divorce (where case law draws a clear distinction between parties living separate lives under one roof and parties actually cohabiting).

It also strikes us that there must be a balance between protecting those who are vulnerable and fall afoul of the current lacunas in family law, and not imposing the rights and responsibilities of marriage on families who have chosen not to enter that institution.

A two-fold approach therefore seems appropriate.

We would first recommend a system of cohabitation registration based on the Australian model. Australian couples who live together and wish to have rights akin to marriage may register their relationship and enjoy those rights and responsibilities. They may remove themselves from the register at any time. The absence of couple from the register is not determinative of there being no cohabiting relationship, but conversely it would require strong evidence to rebut the presumption of cohabitation for the time that a couple is on the register.

The key issue is that a register which requires mutual consent of the parties does not protect those who are the most vulnerable when a relationship breakdown, i.e. those who are dependent financially on their partner but may not be in a position to ensure registration. We would suggest that on breakdown of the relationship, where there is a dispute as to whether cohabitation took place, the court should take into account the totality of statutory factors indicating cohabitation, much like the mechanism under s25 of the Matrimonial Causes Act. We would suggest the following factors be considered:

1. Whether, and for how long, the parties registered their cohabitation;

2. The length of time the parties lived under one roof;

3. The extent to which the parties considered, or represented to others, their residence with the other party as 'home';

4. Whether the parties had any children together;

5. The extent to which the parties treated each other's children as a 'child of the family' (e.g. providing that child with emotional or financial support, taking family holidays together, taking on responsibility for childcare etc.);

6. The extent to which the parties presented themselves as being in a romantic relationship or domestic partnership in public;

7. The age of the parties relative to the length of time they lived together (note: it strikes us that younger couples who live together for a short period and have few, if any, financial assets to mingle, will still have been as much genuine cohabitants as an older couple who have lived together for an extended period, and the factors must allow the court to consider this);

8. The extent to which the parties mixed their financial affairs (e.g. joint bank accounts);

9. The extent to which each party contributed to the household's financial outgoings;

10. The extent to which parties shared their income with each other;

11. The extent to which the parties took steps to promote the other's future wellbeing and care (e.g. nominating each other as emergency contacts at work, caring for the other during periods of ill-health etc.);

12. The extent to which the parties made long-term plans and decisions which involved the other, and the effect this had (e.g. renting a house together, naming each other as beneficiaries of Wills or insurance policies, joint investments, provision for children of the family etc.)

13. The extent to which either party suffered a detriment as a consequence of the relationship (e.g. taking time out of work to care for the other or the parties' children, expenditure on repairs to a property owned by the other party etc.)

Case law in the family courts indicate that, when faced with a question of the fact of cohabitation, a judge will 'know it when they see it'. The element of discretion is a key component of UK family law, because it allows courts to make common-sense decisions which protect the vulnerable, and to consider all aspects of a family's circumstances in the round.

However, we submit that the certainty which comes with a statutory criteria would aid advice and reduce the need to litigate when disputes arise. It is important that this criteria allows for cohabitation to be recognised even where certain markers are out of the parties' power (e.g. a younger couple is less likely to have lived together for a long length of time, a couple from a lower social economic background is less likely to have a dual income to mix or to have made financial planning steps).

2. What legislative changes, if any, are needed to better protect the rights of cohabiting partners in the event of death or separation?

Once again, the foundational concern when considering this answer was protecting those who are vulnerable on the death of their partner, or on separation, without infringing too far on the rights of those who have made a conscious choice not to marry to avoid the obligations which marriage entails.

In cases where the fact of cohabitation is established by the courts, and where a financial claim is brought on relationship breakdown, there ought to be scope to bring a claim on the basis of needs and compensation, as there currently is on divorce. However, the sharing principle ought not to apply, as this is not something the couple has opted into. The level of need should be determined with reference to the parties' lifestyle during the relationship, but also taking into account the length of the relationship and the degree of entanglement and mutual dependence, with reference to the statutory criteria suggested above.

It is submitted that the length of the relationship ought to be cumulative, so periods of separation would not 'start the clock again', as it were. This protect parties other than cohabiting partners – it is noted that some financial orders contain a provision for maintenance to cease when the payee has cohabited for a

certain period of time. Considering cohabitation cumulatively would prevent ex-spouses from 'gaming the system' by ceasing and resuming cohabitation with new partners.

3. **What equalities issues are raised by the lack of legal protection for those in cohabiting relationships?**

Women are disproportionately affected by the lack of protection for cohabitants, as they are more likely to be financially dependent on their partners, and to have taken a step back from their careers to care for the couple's children. Although child maintenance supports primary carers on relationship breakdown, and Schedule 1 can afford more generous protection in bigger money cases, there is still a lacuna of protection where the parties have fewer resources or, indeed, where parties do not have children. Similarly, TOLATA provides some protection where cohabitants own property, but this does not protect women with a lower socio-economic status, who are less likely to have property in any case.

4. **Should legal changes be made to better provide for the children of cohabiting partners?**

In terms of child maintenance, the CMS regime and Schedule 1 suffice for child provision (it is noted that there are practical implementation issues). If anything, in big money cases, the element of 'carer's allowance' may be overly generous, as it effectively provides maintenance for mothers who may have had a very brief relationship with the other parent. This is not necessarily appropriate where ample provision has been made for the child, including childcare and nanny costs. We submit that this carer's allowance above and beyond a child's care needs should be replaced with a needs calculation for the mother on the basis of cohabitation between the parties.

5. **Should cohabiting partners have the same rights as those who are married or in a civil partnership?**

No, as stated above, the parties should be free to make the choice to avoid the rights and responsibilities of marriage if they choose to. If parties feel there is a social weight attached to marriage that they do not want, but they would still like to gain rights akin to marriage, they are free to enter into a civil partnership.

However, it is a commonplace belief that 'common law marriage' exists and confers rights after a period of cohabitation. People who rely on this, or do not realise they are not protected in the event of death or separation from their partner, should have a measure of protection which reflects the increasing prevalence and normalcy of a cohabiting family structure.

6. **Are there examples of good practice in relation to the rights of cohabiting partners in the UK or internationally that the Government should seek emulate in England and Wales?**

As stated above, we believe that the Australian system for a cohabitation register should be considered, and the Scottish system for regularising and recognising cohabitation should similarly be emulated.

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