

**Women and Equalities Committee** Rights of Cohabiting Partners 2021

Written evidence submitted by Dr Ruth Lamont, University of Manchester, UK

*Summary*

- An **opt-out system** will provide some protection for parties who enter a cohabitation relationship and buy property in the expectation that the law will govern the division of assets on separation. It will allow informed parties to reach their own, legally binding arrangements, preserving the distinction with marriage/civil partnership, and some element of autonomy.
- The current arrangements for conveyancing property to joint owners who are cohabiting does not facilitate the parties creating a formalised division of ownership under a trust arrangement at the point of purchase. It requires expensive and specialist legal advice and knowledge.
- The law relating to cohabitation and property ownership does not relate well to the law following marriage, despite the fact that cohabitation may be a prelude to marriage.

*Author of the Evidence and Reasons for Submitting Evidence*

Dr Ruth Lamont is a Senior Lecturer in Family and Child Law at the University of Manchester. She is a specialist in the regulation of the family and the impact of the law upon children. She is an editor of the *Child and Family Law Quarterly*, and edits the textbook *Family Law* for OUP. This evidence is submitted to highlight some of the broader practical issues affecting ownership of the family home and the share of ownership between cohabitants.

**Cohabitation, Ownership of the Family Home and Opt-Out**

The patchwork of rights associated with cohabitation relationships means that there is no coherent approach to any aspect of the relationship which is left largely to private arrangement between the parties. There is no clear basis within the current law to attribute rights solely on the existence of cohabitation relationship.

This has been highlighted as a problem in relation to ownership of the family home, where people in cohabitation relationships have not sought to formalise or negotiate any division of ownership when they have bought property together. On relationship breakdown, there is no statutory framework regulating ownership of the property by the cohabitants who own the property to which they have title, as if there were no relationship at all. No statutory regime has been developed for three broad inter-linked reasons:

1. The desire to distinguish informal cohabitation relationships from marriage or civil partnership and encourage entry into these formalised relationships.
2. The difficulty of determining when a cohabitation relationship exists and at what point the parties should be regarded as having legal obligations to one another.

3. To provide an alternative, outside formalised legal relationships, through which individuals may choose their own arrangements for property and other entitlements,<sup>1</sup> untouched by state intervention if the relationship breaks down.

Cohabitation, as currently regulated, allows the parties in the relationship significant autonomy to determine their rights and obligations towards one another without intervention by the state. Whilst some individuals undoubtedly enter into this situation with knowledge, many people do *not* fully understand the legal consequences of their actions in cohabiting. There remains a perception that a long (but undefined) period of cohabitation creates rights and obligations akin to marriage. There is a strong argument that the law should fulfil this expectation, by creating some form of protective framework, but also allow individuals the opportunity to form relationships with maximum autonomy outside of the formalised framework of marriage or civil partnership.

An **opt-out system** creating obligations after a certain period of cohabitation or birth of children of the relationship would protect those without knowledge of the law, but permit the decision by informed parties to create alternative arrangements.

### **Difficulties in Formalising Arrangements on Conveyancing**

The lack of statutory regulation has meant that, in relation to the family home, the courts have resorted to the common intention constructive trust<sup>2</sup> or proprietary estoppel<sup>3</sup> to intervene in cases of evident unfairness. The use of trusts law in this way was initially often to the benefit of women who were not on the legal title and had no property rights over the family home when the cohabitation relationship broke down. Increasingly however, both parties are on the legal title creating a joint owner dispute over the extent of each parties' share, and women have much greater economic independence, potentially earning more than their partner (male or female).<sup>4</sup>

The complexity of the law in relation to trusts and the lack of clarity over the basis upon which a share of the ownership should be divided has not helped cohabitants' understanding of the legal consequences of their relationship. Good legal advice at the point of purchase of the family home is essential to making an informed choice, defining whether the title is shared and exactly the division between the parties. Changes to the TR1 form for the transfer of property are intended to require the parties to define the division and how the property is held.<sup>5</sup> There will be several factors underpinning an informed decision:

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<sup>1</sup> Deech, R. 'Cohabitation' [2010] *Family Law* 39.

<sup>2</sup> *Lloyds Bank v Rosset* [1991] 1 AC 107.

<sup>3</sup> *Thorner v Major and others* [2009] 2 All ER 945.

<sup>4</sup> *Stack v Dowden* [2007] UKHL 17. See Probert, R. 'Trusts and the Modern Woman – Establishing an interest in the family home' (2001) 13 *Child and Family Law Quarterly* 275.

<sup>5</sup> As joint tenants or tenants in common. Panel 10. See

<https://www.gov.uk/government/publications/registered-titles-whole-transfer-tr1/guidance-completing-form-tr1-for-the-transfer-of-registered-property>

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1. Conveyancing is normally carried out by one solicitor on behalf of both parties. Independent legal advice for each party will cost more. Many solicitors and conveyancers will try to discuss the implications of joint purchase with each party to make their independent interests clear to them.
2. Drawing up a specific trust document, expressing the division of ownership between the parties (if it is not to be shared equally) to be reflected in the TR1 form is expensive. It often requires specialist drafting and advice outside the normal conveyancing process. Despite being a desirable outcome, it adds significant cost.
3. The complexities behind the cohabitation relationship may add difficulty in determining the share of each party at the point they purchase together and declare a trust. This requires significant input from the parties and discussion about a suitable division of the ownership. It is possible that there are children from previous relationship, and money arising from external sources, such as inheritance or previous relationship, that may need protection through declaration of a trust. This initial division may then change if the parties' circumstances change, e.g. the birth of children from the relationship affecting economic input, and changing obligations towards dependents.

There are many reasons why the division of ownership will not be fully discussed and formalised, leaving the parties to rely on the background law of common intention constructive trusts, or on agreement between themselves at the point of separation. The lack of formal arrangement will make it more likely that one party will be financially disadvantaged by separation and eventual sale of the family home to realise the asset.

### **Interconnection of Cohabitation and Marriage with Consequences for Property**

Cohabitation, though the fastest growing family form, is often also a prelude to eventual marriage (before or after having children). Formalised trust arrangements, which are so desirable to define the ownership of property whilst cohabiting, are difficult to maintain into the eventual marital relationship.

- The division of assets on divorce will then be governed by the Matrimonial Causes Act 1973. Legal arrangements made for the ownership of the family home during the cohabitation relationship, prior to the marriage, can then be adjusted.
- If the parties wish to maintain their legal arrangements for the ownership of the family home post-marriage, they may seek a pre-nuptial agreement. A pre-nuptial agreement will require further legal advice and drafting at extra expense. The pre-nuptial agreement will not necessarily be binding on the spouses (by contrast to a trust set up to manage the consequences of cohabitation), though it may bear weight in a dispute over the division of assets on divorce.<sup>6</sup>

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<sup>6</sup> *Radmacher v Granatino* [2010] UKSC 42.