

Inquiry into the rights of cohabiting partners

Submission of written evidence

Summary

- The differing approaches adopted towards the assets of married and cohabiting couples where their relationships end¹ is based on an assumption that people understand the legal difference between these relationship forms, and act on the basis of that understanding.² As part of this, partners are taken to opt for greater financial ‘jointness’ where having chosen to marry than where cohabiting alone.
- However, the author’s empirical research suggests that, rather than being driven by whether or not their relationship has been formalised, couples’ financial arrangements are more likely to be influenced by practical factors.³ Changes to the partners’ financial behaviour and attitudes can be brought about by having moved in, or having purchased a house, with each other, or having had a child together.
- The research also identifies that the partners’ financial arrangements can be more heavily impacted by observations of their parents’ behaviour during childhood than they are by relationship form.⁴
- If there are factors that influence people’s behaviour to a greater extent than the law, questions are raised as to why a relationship’s legal recognition (or not) should carry so much weight in terms of what happens at the end of that relationship.
- This evidence concentrates on the key question as to **whether cohabiting partners should have the same rights as those who are married or in a civil partnership**, answering it in the affirmative. It is too simplistic to treat cohabiting couples

¹ See below at paras 2-4.

² A Barlow, ‘Modern marriage myths: The dichotomy between expectations of legal rationality and lived law’, in R Akhtar, P Nash and R Probert (eds), *Cohabitation and Religious Marriage: Status, Similarities and Solutions* (Bristol: Bristol University Press, 2020), 39.

³ C Bendall, ‘A family affair: The role of intergenerational transfer in shaping dyadic couple finances’, submitted for the consideration of *Child and Family Law Quarterly*, copy available on request.

⁴ *Ibid.*

differently to those who are married solely on the basis of superficial assumptions that centre around dissimilarity in legal status.

Author of the submission

1. The author is a Lecturer in Law at Birmingham Law School and is the author of several publications concerning relationship breakdown and financial relief.⁵ This submission is based on evidence obtained through a qualitative interviewing project, funded by a grant from the Socio-legal Studies Association, entitled ‘Reconsidering family law’s understandings of money in modern day couples’.

The basis of the existing law

2. In England and Wales, where a couple who have entered into a marriage (or civil partnership) subsequently separates, the family courts have extensive powers to redistribute the income and property to attain a position of ‘fairness’.⁶ They can make a range of orders, including: for one party to pay the other a ‘lump sum’; for the payment of ‘maintenance’; for the sharing of pensions; and for the transfer of property, or its sale.⁷
3. There is no such framework for reallocating the property of cohabitants, who must instead turn to the law of property and trusts.
4. Cohabitants are similarly disadvantaged on the death of a partner. Unlike those in a formalised relationship, they do not have an automatic right to inherit any of the deceased’s estate on intestacy, and neither can they benefit from the exemption from inheritance tax that is available to spouses.
5. The legal frameworks, through adopting differing approaches to cohabiting and married couples, operate on the basis that people make ‘informed choice[s]’⁸ within

⁵ See, for example, C Bendall and R Harding, ‘Heteronormativity in dissolution proceedings: Exploring the impact of recourse to legal advice in same sex relationship breakdown’, in E Brake and L Ferguson (eds) *Philosophical Foundations of Children’s and Family Law* (Oxford: Oxford University Press, 2018), 134; C Bendall, ‘A “divorce blueprint”? The use of heteronormative strategies in addressing financial remedies on same sex partnership dissolution’, (2016) 31(2) *Canadian Journal of Law and Society* 267; C Bendall, ‘Some are more ‘equal’ than others: Heteronormativity in the post-*White* era of financial remedies’, (2014) 36(3) *Journal of Social Welfare and Family Law* 260.

⁶ *White v White* [2000] UKHL 54.

⁷ Matrimonial Causes Act 1973.

their relationships. More specifically, an assumption is being made, through the application of these distinct approaches, that people understand the legal difference that being married makes when a relationship comes to an end, and that they will act accordingly. They will consequently make decisions, both about their financial arrangements and, indeed, about whether or not to marry, based on an appreciation of the law- i.e. in a 'legally rational' way.

6. Were it the case that people were behaving in a 'legally rational' manner in this context, they would be choosing to formalise their relationship where seeking the legal protection that marriage provides. Conversely, they would be electing not to formalise their relationship where not seeking this protection. It would be arguable that the law need do no more that it does currently to help cohabitants when their relationships end; they would have opted against this assistance.
7. To act in a 'legally rational' way would also entail the partners pursuing a more 'joint' approach towards the finances where marriage has been entered into (or a more separate approach where it has not). Financial 'jointness' can manifest in a greater merging of the partners' assets, as well as in a change in people's sense of ownership, towards the direction of equal sharing.
8. The notion is that to merge finances may appear risky, to somebody who is legally literate, in the absence of legal regulation, given the lack of assistance offered by the law where a cohabiting relationship ends. In contrast, should it be that people grasp the legal difference that formalising their relationship can make, they may feel more at ease about financially 'joining' with a partner having entered into a marriage.

Research findings: less 'legal rationality', more practicality

9. It is with the law's assumptions in mind that the author conducted 20 in-depth interviews in England between August and December 2017, exploring the reasons why couples come to the financial arrangements within their dyadic relationships.
10. This project, 'Reconsidering family law's understandings of money in modern day couples', examined the extent to which formalising a relationship brings about a shift

⁸ Barlow, n 2 above.

towards financial ‘jointness’. The participants were equally split between married partners and cohabitants.⁹

11. Just one of the study’s participants described having been driven both to enter into a marriage, and into subsequently ‘joining’ finances with a partner, by her understanding of the law, stating that:

I wasn’t comfortable sharing our financial assets until we were married [...] I really wanted there to be a commitment that we were going to be together for the rest of our lives before I was willing to make a financial commitment [...] I know that, if you’re married, then it’s, like, easier to get assets and things when you divorce [...] I just wanted to make it all above board (Participant 3).

There was some contradiction as to whether Participant 3 was seeking to protect her own assets, or to be able to claim a share of her (larger earning) partner’s, in the event of the two breaking up. Even so, her cognisance that marriage makes a legal difference on relationship breakdown fed into her financial behaviour, as well as seemingly her decision to get married itself.

The difference made by housing

12. More often, however, the study’s married participants felt that having entered into a marriage had made little difference to the financial arrangements within their relationship. Contrary to what the law presumes, participants were more likely to identify having started to cohabit with a partner, or having purchased a house together, as having impacted their finances than having got married.¹⁰ This was evident from, for instance, Participants 1, 2 and 11:

We actually set up the joint bank account before we were married, so that happened as soon as we moved in together, [because] I think that we had already decided that we thought this was a long-term thing (Participant 1).

⁹ Demographic information can be supplied on request.

¹⁰ This sits well with previous findings that buying or renting a property can prompt partners to open a joint account (see, for example, K Ashby and C Burgoyne, ‘Separate financial entities? Beyond categories of money management’, (2008) 37(2) *Journal of Socio-economics* 458).

It's not really the marriage [that makes the difference to the finances], it's the housing situation (Participant 2).

We set up [the financial arrangements] when we moved in together. We lived together for about five years, so [...] that was, sort of, what just continued (Participant 11).

Participant 1 had pooled almost all of her finances with her partner on having moved in together, whilst Participant 11 reported the opening of an account for joint expenditure and bills at a similar point within her own relationship. Entirely separate finances had been retained during Participant 2's 10 year relationship, although she perceived that this would change once she and her partner had purchased a house together.

13. Notably, as is common nowadays,¹¹ cohabitation had been a stage that these participants had passed through on their way to marriage. As against this, the existing legal frameworks appear to be based on more traditional notions around people beginning to live together at around the same time as entering into a marriage.
14. Having merged their finances prior to marriage, the indication is that the participants were not driven by, or were perhaps even unaware of, the legal protection that marriage brings with it.
15. The participants' financial arrangements, rather than having been reached in a 'legally rational' way, appeared to have been influenced by practicalities to a greater extent than they were by their relationship form. The responses, in this sense, were more compatible with the approach taken in the area of means-tested benefits than with the law's approach where a relationship ends. As to these benefits, all couples who are living together, irrespective of whether or not their relationship has been formalised, are jointly assessed. The fact that they are treated as a single financial unit in that regard may, in fact, bolster misunderstandings around the way in which the law will treat cohabitants on the ending of their relationships.¹²

¹¹ A Barlow and J Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform?', (2010) 22(3) *Child and Family Law Quarterly* 328.

16. Similarly to their married counterparts, several of the cohabiting participants likewise reported greater financial merging on having moved in with, or purchased a property with, their partner:

[A joint account was opened] as soon as we got our first place, because we were trying to think of logistics of trying to split the bills, and, yeah, it would have been too difficult to try and work out which bills to put in what account (Participant 4).

[Setting up the joint account] was [partner's] idea because, when we just started living together, we were transferring money from my account to his, and from his account to mine [...] Then he said "okay, we can [open the account], and it will be much easier for us to manage how we spend money" (Participant 7).

I'm just trying to remember [...] at what point we got the joint account. I think it was when we got the mortgage for the house (Participant 12).

Participant 12, for example, described how she and her partner had opened a joint account to cover the payments for the mortgage that they had taken out together.¹³

17. These cohabiting participants had chosen to merge finances with their partner (at least to some degree), despite the lack of legal protection conferred on them. Again, it was the practicalities that appeared determinative, and the participants showed little appreciation of the potential risks of joining finances outside of a formalised relationship.

The difference made by having children

18. A further practical issue that was viewed, by nine of the study's participants, to have influenced their relationship finances was having had children.¹⁴

¹² Barlow, n 2 above.

¹³ This supports earlier findings that a joint mortgage can bring about that the mixing of partners' finances in C Burgoyne and E Kirchler, 'Financial decisions in the household', in A Lewis (ed), *The Cambridge Handbook of Psychology and Economic Behaviour* (Cambridge: Cambridge University Press, 2008), 132.

19. Although it is recognised that those who have formalised their relationship are more likely to have children, in 2016, 32% of children were registered to cohabitants.¹⁵

20. Participant 9 (a cohabitant), for instance, set out how:

Since we had [child], I set up a joint account, because things became so unequal [...] [Now] we've got a joint account that I put [money] into, that pays for all of our food, [...] and also, anything the kid needs can come out of that [...] I wanted to be in the position that, if we wanted to buy [child] a birthday present or a Christmas present, or if he needed a bike, or some new clothes, that there was always just a lump of shared money there that both of us felt able to access.

Participant 9 (a female) had returned to work full-time after having had their child, whilst her (male) partner had conducted most of the childcare. Her description of her partner's disadvantaged financial position as a carer (which had led to the opening of the joint account) echoed concerns expressed, generally around 'homemaking' wives, in a number of the higher profile financial relief cases.¹⁶

21. Attempts to address such financial imbalance in the context of financial relief would, of course, be inapplicable to Participant 9's partner, given that the two remained unmarried. Should it be the case that the introduction of children to a relationship are commonly causing greater financial 'jointness', cohabitants should surely be offered more legal protection where they are present.

22. The findings around children once more suggest that pragmatic factors may be of greater impact on people's financial arrangements than the law.

¹⁴ This finding is compatible with previous suggestions that starting a family can bring about financial merging by, for instance, Burgoyne and Kirchler, *ibid*.

¹⁵ Office for National Statistics, *Births by Parents' Characteristics in England and Wales: 2016* (2017) available at:

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/livebirths/datalist?size=50>, last accessed 13 June 2021.

¹⁶ See, for example, *White v White*, above, n 6.

The influence of parents on their children's financial behaviour

23. Finally, whereas the current legal approach, in making such a distinction between cohabiting and married partners, focuses closely on the point at which the couple chose to marry (or not), financial attitudes can instead be formed at a much earlier stage in life.

24. Families have been identified as important for learning around finances.¹⁷ This learning can be carried through into adulthood, with Santander, for instance, finding that over two fifths of the adults that they surveyed felt that their parents had had the largest influence on their financial behaviour.¹⁸

25. 14 of my study's participants reported parents (and, occasionally, wider family members) as having impacted the finances within their own adult dyadic relationships.

26. Participants described having observed, during childhood, those family members' financial behaviour, attitudes and experiences. In some cases, they had proceeded to mimic what they had observed whereas, in others, they had sought to avoid their parents' financial mistakes and misfortunes.

27. Whilst previous research has found that having experienced divorce personally can result in a desire to retain separate finances in subsequent relationships,¹⁹ further exploration is needed into the impact of having witnessed parental divorce. Nevertheless, the indications within my data were that the partners' willingness to engage in financial 'jointness' can be influenced by whether or not their parents had a happy marriage. Vicarious observation of parental separation may feed into a resistance, in later life, against mixing finances with a partner, and in a drive towards financial independence.

¹⁷ See, for example, J Kim and S Chatterjee, 'Childhood financial socialization and young adults' financial management', (2013) 24(1) *Journal of Financial Counselling and Planning* 61.

¹⁸ Santander UK, *Two Fifths of Brits Take After their Parents' Money Habits* (2017) available at: www.santander.co.uk/about-santander/media-centre/press-releases/two-fifths-of-brits-take-after-their-parents-money-0, last accessed 6 August 2021.

¹⁹ C Burgoyne and V Morison, 'Money in remarriage: Keeping things simple- and separate', (1997) 45(3) *Sociological Review* 363.

28. This aspect of the findings suggests that, rather than being determined by an understanding of the law, people's financial behaviour can be shaped to a greater extent by what is transmitted within their families, and what they learnt during childhood.

Concluding remarks

29. The legal status of a relationship makes a considerable difference to what happens to the assets if that relationship ends. Yet, there is little to suggest that people are acting on the basis of a knowledge of the law, or even that they are aware of what the law is.

30. Were couples established to be making legally informed decisions around their relationship form, and arranging their finances accordingly, it would seem less problematic to offer so little protection to cohabitants at the end of their relationships. However, where people are not making conscious decisions around their relationship finances with a cognisance of their legal position, the law is operating under a 'rationality mistake'.²⁰

31. If, as has been suggested, couples are instead making financial decisions based around practicalities, and around learnt behaviour and attitudes from childhood, then there is a disconnect between the assumptions underlying the relevant legal frameworks and people's lived experiences (and thinking). Relationship finances are complex, and an awareness of the various factors that can impact people's financial arrangements is essential.

32. Moreover, should it be that the assumptions underpinning the differential treatment of married and cohabiting partners are, indeed, false, that differential treatment becomes difficult to justify. Cohabitants should, in this case, be provided with the same rights as their married counterparts.

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²⁰ A Barlow and S Duncan, 'Supporting families? New Labour's communitarianism and the 'rationality mistake': Part I', (2000) 22(1) *Journal of Social Welfare and Family Law* 23.