THE RIGHTS OF COHABITING PARTNERS

Thank you for the opportunity to make submissions to this Inquiry. For what is worth, I am Emeritus Professor of Family Law (Staffordshire University), Emeritus Member of the Society of Legal Scholars, a Vice-president of the Family Mediators Association and an Academic Door Tenant at Regent Chambers, Stoke-on-Trent. That's a lot of capitals! Currently, I publish in legal journals and help with the updating of family lawyers and mediators.

I am responding in my personal capacity, and doing so out of general sympathy with the project. Whilst I have not published *en bloc* what follows, some of the points have appeared under my name in various articles and books. I have not addressed all of the 'key questions', though they have influenced my responses, some of which are abstract and without reference to legal sources. With the exception of my 'overall theme' (below) my responses only cover a number of specific, selected, points and are thus certainly not comprehensive.

As you will know, it is now some 13 years since the Government decided not to implement the carefully-crafted proposals in Law Com 307, *Cohabitation; the Financial Consequences of Financial Breakdown* regarding reform of the law on death and separation. One hopes that any further ideas will not be stymied for fear of the reaction from members of the Marriage Fundamentalist Brigade who labour under the delusion that bringing justice to cohabitants will damage their favoured institution; perhaps they will be mollified by the savings to the public purse resulting, in some cases, from making cohabitants as responsible for their partners as are the formally-paired.

1. AN OVERALL THEME

I believe that some gaps should continue to exist between formal and informal domestic partnerships sufficient to reflect legitimate societal expectation and shared private intentions. Those gaps, some of which currently require narrowing, should not be fixed in perpetuity but depend upon prevailing *mores*. So, sadly, there is no once-and-for-all answer. For the time being marriage - which has the advantage of being a matter of record - is still seen as being a signal of greater commitment, not least, perhaps, by that huge majority of wedders who were previously

cohabiting (or at least not those suckered into it by the wedding 'industry'). So I believe there is a limit to how far the informally partnered should expect to be treated as if they are, or were, married. Where the interests of the children can be disentangled from those of the cohabiting parents, the former should not be prejudiced by the nature of the latter's present or former relationship. Steps should be taken to ensure that would-be couples understand the default position and how far they may choose to vary it.

2. PRE-PARTNERSHIP

There should be well-publicised access to the same sort of legal and other information information traditionally available to the affianced (incidentally, the legal preliminaries to marriage provide an opportunity, necessarily unavailable to would-be cohabitants, for such supply.) The data, on both formal and informal relationships, is already available via such as official websites and what is needed is encouragement to access it. Perhaps the private sector, eg building societies, should be given an incentive to publicise it and the public sector, eg electoral registrars, required to. The most recent, 2019, survey demonstrated that about half of those asked still believe in the common law marriage myth –and do those that know it's a myth believe that cohabitation is a legal vacuum and therefore fail to take advice?

N.B. Prospective and actual couples who wish to customise their legal relationships during and/or after their partnership should know that, eg, cohabitation contracts, unlike 'pre-nups', are capable of being drafted guaranteed to stick. All prospective couples need to know what they're letting themselves in for and the rich, particularly old money, have always tended to toddle along to lawyers first. If formal and informal pairers think they'd be happy with the default law - despite not having the faintest idea what it is and that it may change beyond their control – fine.

3. PARENTHOOD

i. Children born to the formally-paired are rebuttably presumed to have been fathered by the man, with significance for, eg, the right to apply for child arrangement orders and liability for child support. Perhaps the same should apply to cohabitants (although his paternity will already be rebuttably presumed if, as in the vast majority of cases now, he is so named on the birth certificate).

ii***. By disorganised accretion, the position of a parent's cohabitant has become untenably privileged. Whilst attracting no***

default financial support obligations then or later to either 'mother' or child, 'he' may apply without leave for a CAO after 3 years en famille and may reduce 'his'own child support obligations by reference to those in 'his' new informal family. This combination of rights without duties needs to be addressed.

iii The non-applicability of financial remedies for under Part 11 MCA 1973 (below) and the differences with those of the Children Act 19889. Unmarried parents on separation are not entitled to support from their partner in their own right but only in their capacity as carer for a minor child. When the child reaches 18 or completes their full time education that support comes to an end and any housing provided for the benefit of the child will revert back to the providing parent. The amount of income provided is designed only to meet the income needs of the parent and child and is not designed to enable the parent to build up any savings or provision for the future; no pension. The package should ensure that the child enjoyed a standard of living which reflected the father's own lifestyle and the manner in which she has chosen to live with his other children. Were the changes I suggest under 'Separation' (below) to be applied to applications for children as well as to the adults, this CA 1989 route could be closed.

4 UNDER THE SAME ROOF

i.Not being entitled to property adjustment under Part 11 MCA 1973 (below), cohabitants are reliant on declaratory principles. This may impact not merely on 'her' ownership rights in the family home on separation but on intestacy and insolvency. In the common situation whereby 'she' moves into 'his' house the present law gives her no entitlement to any part of the equity in it - irrespective of her contributions or how long she has lived there – unless there has been appropriate paperwork or 'she' can rely upon 'proprietary estoppel' ie that 'he' has promised her a share on which she has relied and that it would be unfair were 'he' to renege. The law should be changed to give her that proportion of the equity that she merits by virtue of, eg, her contributions and how long they were together there.

ii. A cohabitant without ownership rights is a'non-entitled' applicant for an order regulating occupation of the family home under the FLA 1996 and is therefore less well-placed than a formal partner in that the order can only last 6

months with only one extension This discriminations should be lifted, as per the Act's title, perhaps after a minimum period of living together.

5. DEATH

Under the intestacy rules cohabitants have no rights and will see everything go their partners' children (of whom the cohabitant might be the other parent!) or, failing that, firstly to their partners' parents, with the crown at the end of the queue. This is too stark a difference and, again, a cohabitant should get at least something perhaps after a minimum qualifying period, eg two years, to bring it into line with a cohabitant's existing entitlement (where the will or the intestacy rules have unreasonably failed to make reasonable provision for the applicant) under the Inheritance (Provision for Family and Dependants Act) 1975.

6. SEPARATION

This is, perhaps, the most important issue as it involves the biggest – most unjust? - gap with marriage (or rather divorce); cohabitants are barred from adjustive financial relief - maintenance or capital – similar to that under Part II MCA 1973 Given that s 25(2), the criteria for awards, has 10 references to 'marriage' and 3 to 'family', it is well capable of making an appropriate distinction, capable of changing with changing times, between formal and informal partnerships. Some addition, such as the court having to have regard to whether the particular cohabitants had intended a lesser commitment, might mollify objectors. (The 2006 *Cohabitation; the Financial Consequences of Financial Breakdown* Consultation Paper noted that New Zealand, some Australian states, and some Canadian Provinces,had chosen to apply some or all of existing financial relief law.)

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