

Written evidence from STEP [HAB0381]

About Us

STEP is the worldwide professional association for those advising families across generations. We help people understand the issues families face in this area and promote best practice, professional integrity and education to our members.

Today we have over 22,000 members in over 100 countries and over 8,000 members in the UK. Our membership comprises a range of professions, including lawyers, accountants and other specialists. Our members help families plan for their futures: from drafting a will or advising family businesses, guiding international families with cross border interests, and protecting vulnerable family members.

We take a leading role in explaining our members' views and expertise to governments, tax authorities, regulators and the public. We work with governments and regulatory authorities to examine the likely impact of any proposed policy changes, provide technical advice and support, and respond to consultations.

STEP welcomes the opportunity to submit comments on this call for evidence as part of your inquiry on the rights of Cohabiting Partners and thanks you for the opportunity to have been able to discuss these issues directly with you.

Response

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

1. A legal definition of cohabitation will be essential if any legal rights are going to be given to co-habitants, but the main issue is how to frame it, so that it clearly encompasses those who should be covered. Co-habitation is currently quite difficult to define. We do not anticipate that there is any desire to provide rights to individuals who are simply living together, perhaps as boyfriend and girlfriend (or any other variation) but without the same depth of a relationship that others might have established. We would propose that a definition should consist of two parts:
 - 1.1. That the cohabitants have been living together in a relationship that has similar qualities to a marriage or civil partnership, and
 - 1.2. Have been living together as such for at least [two] years.
2. If co-habitants are going to be awarded certain rights then there needs to be an element of longevity to the relationship if they are not to marry or enter into a civil partnership, hence the time limit, although there is potential scope for unfairness by excluding a couple just shy of [two] years. It is difficult to say how long or short such a time limit should be, and it will doubtless be impacted by the stage at which any individual is at (a time limit may look very different to a couple in their 20s compared to one in their 50s).

However, STEP considers that it is important to have some objective criteria included in the test to enable there to be a degree of certainty as to whether there is a co-habiting relationship or not. On balance it is probably better to have some legislation in place rather than abandoning the whole definition as being too difficult.

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

3. STEP believes it is important to see co-habitants given rights under the intestacy rules under which they are currently excluded. It is questionable whether they should have the same rights as a spouse, but given that they currently have nothing save the ability to bring a 1975 Act claim, it would be beneficial to the public and advisors if their position was clearer.
4. It would also be very progressive if the same spouse exemption from inheritance tax were to apply to co-habitants. We suspect that a broad proportion of the public would expect that a co-habitant (effectively a "common law spouse") should have the same rights as a spouse. It would then be open to individuals to opt out of or amend such provisions by making a will if they so wished, whereas currently the default position is the other way round and this clearly can lead to co-habiting individuals being prejudiced by a lack of action in making a will.
5. Currently in the event of relationship breakdown there are certain specific exemptions and time periods in the context of divorce/civil partnerships that allow for arrangements to be made to disentangle and rearrange assets and affairs without tax liabilities arising. We would suggest that this is also something that should be thought about for cohabitation.
6. We would also recommend consideration of the rights of co-habiting partners in relation to Family Businesses. Particularly in a situation where a death occurs when the business is well established, but with no succession plan in place, and it is desired to preserve the value of the business for the surviving family. In that case, a transfer of the benefit of part or all of the business to the cohabitee will, under current rules, not arise under the intestacy rules and not attract relief from death (Inheritance) tax unless Business Property Relief (BPR) applies to exempt it from charge.
7. In respect of intestacy, as referred to above, this could be a serious problem in that the business may be what the deceased intends should provide for the surviving "family". Even though, under those rules, the spouse (as opposed to the common law spouse) does not get everything, he/she receives a significant benefit. That benefit should accrue to a common law spouse once they are recognised as such.
8. In respect of Inheritance Tax, if BPR applies then if the business is Willed to the Common Law spouse, this issue should not arise. However, in situations where that relief does not apply, or it is withdrawn, then the spouse exemption will not apply unless it is extended to common law spouses. It may be impossible for the business to be sold to raise the tax payable, (even if the instalment relief option was extended to businesses

which did not attract BPR). Thus the extension of the spouse exemption may be crucial in these situations.

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

9. We cannot refer to any specific inequalities however now that mixed sex and same sex couples can enter into marriage and civil partnerships in the UK, it seems odd that those who do not believe in marriage should be obstructed from entering into a serious relationship that is recognised by law.
10. In addition, the myth of the common law spouse/marriage is engrained within public perception and is so pernicious that some legislative change recognising cohabitants would be beneficial to society's understanding of the legal situation as a whole.

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

11. As long as both parents have parental responsibility for the child (which does not require them to be married or indeed cohabiting), then the child should be sufficiently protected in this context.

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

12. STEP believes broadly, yes, particularly in relation to tax and inheritance. However, much will depend on the definition of cohabitation. Society is becoming less marriage-centric therefore legal structures should be put in place providing some default protection for families whilst also allowing them to opt out and make their own arrangements.

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?

13. In New Zealand the law around cohabiting partners (referred to there as “de facto relationships”) is fairly well established. If you are married, in a civil union partnership or in a de facto relationship, even if you are a same-sex couple, and your relationship ends by separation or because one of you dies, you will be affected by the Property (Relationships) Act (the PRA)¹. This act came into force on 1 February 2002, replacing the Matrimonial Property Act 1976, which applied only to married couples.
14. The PRA presumes that each partner contributes equally to their relationship, even though that may be in different ways, and it aims to provide a just division (almost always

¹ <https://www.lawsociety.org.nz/for-the-public/common-legal-issues/dividing-up-relationship-property/>

equal) of the relationship property when the relationship ends, taking into account the interests of any children involved.

15. The PRA applies automatically to all married and civil union couples and those who have been living together in a de facto situation for a minimum of three years, whether they are of the same or opposite sex. However, sometimes shorter relationships (where there are children or a partner has made a substantial contribution) will also qualify if that would be just. It applies whether a relationship ends through separation or death – and it can override the provisions of a deceased partner’s will.
16. For the purposes of the PRA, a de facto relationship exists only when both parties are aged at least 18 and they are living together as a couple but are not married to each other or in a civil union. These are the essential (but not the only) factors that go to determining whether a relationship is or has been de facto. The issue of whether there is a de facto relationship in terms of the PRA and the date that it began will be questions of fact for a court to decide if necessary. In its decision the court will consider factors such as the length of the relationship, the extent to which you shared a home and the degree to which your finances were merged.
17. All relationship property will be divided equally following the end of a relationship that has lasted more than three years, unless extraordinary circumstances make equal sharing repugnant to justice. In that case, property would be divided according to the contribution each partner had made to the relationship. One partner may be awarded a greater share if the ending of the relationship would leave them at a serious economic disadvantage because of the division of roles during the relationship. An adjustment in equal sharing might also be made where a partner’s gross misconduct has affected the amount or value of relationship property. Usually each partner retains their separate property.
18. STEP is not recommending that this specific legislation be adopted and is aware of the enormity of this task which would require primary legislation. However certain aspects of the legislation may be appropriate and could be considered by the Government to be included within existing legislation such as the definition of a de facto relationship.

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