

Dealing with property issues on cohabitation breakdown

An increasing number of couples are cohabiting rather than marrying, and the length and nature of their relationships are becoming more similar to those of married couples. When cohabitation relationships break down, the couple may face the same range of problems as on a divorce – including working out what to do with their property and having to cope with reduced financial resources – but there is currently no law equivalent to that on divorce to help couples resolve these. Instead, they must usually rely on the rules of property law. In a study funded by the ESRC, Gillian Douglas, Julia Pearce and Hilary Woodward, from the Universities of Cardiff and Bristol, tracked a group of separating cohabitants who sought help from solicitors and mediators in reaching settlements regarding their property, to find out how they experienced the current legal process and how practitioners cope with this complex area of the law.

Research Findings

- ❖ Whilst women were more likely to be at an economic disadvantage at the end of a cohabiting partnership, men suffered injustice from the existing property rules as well
- ❖ Cohabitants had little interest in or awareness of their legal position either at the time they formed their partnership or afterwards. While only a few in this sample believed that they were in a ‘common law marriage’ many thought they would have accrued some form of financial entitlement as a result of their cohabitation
- ❖ Where cohabitants had acquired a home to be held on a ‘joint tenancy’, most had not fully appreciated that this meant each would have an equal share should the relationship break down, regardless of their contributions
- ❖ Practitioners generally found this area of law complex to deal with and difficult to explain to their clients. They had relatively few cases of this type in their caseloads.
- ❖ Case-law in this area is fast evolving, making it difficult for solicitors to predict the outcomes of cases. They were more reliant upon counsel’s opinion than on divorce
- ❖ It was often difficult for clients to produce appropriate evidence to establish their claims, especially where they were reliant upon oral promises. Practitioners regarded the court procedure under which these cases were dealt with as less user-friendly than in divorce. The requirement for evidence of financial transactions during the relationship made cases complicated and costly to pursue.
- ❖ Unpredictability of outcome and the risk of a costs order led to some cohabitants being advised against pursuing what might have been a valid claim and to others making ‘nuisance claims’ intended to pressure a partner into settling quickly to avoid more protracted, expensive proceedings

Background

There has been a huge growth in the number of people cohabiting outside marriage in the past thirty years in Great Britain, and they are also cohabiting for longer, suggesting that cohabitation is assuming a greater significance in people's life cycles.

The legal position of cohabiting couples is significantly inferior to that of spouses. Cohabitants who separate must use the general rules of property and trust law to determine their entitlement to property acquired during the relationship. The Law Commission (Consultation Paper No 179: 2006) have summarised these rules as 'illogical, uncertain and unfair. ...highly complicated and uncertain in operation and outcome.' They have therefore recently suggested that where there has been a significant economic advantage to one partner, or disadvantage suffered by the other, caused by their cohabiting relationship, then (subject to a qualifying test) cohabitants should be able to seek court orders akin to those granted on divorce.

Little research has been carried out into the experience of cohabitants having to cope with this area of the law, or on how practitioners handle such cases. This small qualitative study therefore followed separating cohabitants in dispute with their ex-partners over what should happen to the former home, from their first involvement with a professional practitioner through to the end of their case. It also included interviews with professional practitioners (family and conveyancing solicitors and mediators).

The cohabitants

The nature and style of the cohabiting relationships of those in the study were very diverse. Some couples had positively rejected marriage, whilst others had actively planned for it. In almost half the couples, one partner had wished to marry but the other had not.

'I honestly did think we'd get married. We drifted along. In the end, I realized it wasn't going to happen. Looking back, I think, "Why didn't I do something before that?" but at each stage there with things happening.'

The duration of cohabitation ranged from nine months to 24 years, with the average being nine years.

Sixty per cent of the sample operated sole bank accounts only. However, the mode of banking did not appear to reflect the practical organisation of their finances, and was determined often by default, by practical considerations, or by force of personality.

Knowledge of the law

Very few participants had investigated or knew anything about their legal position as cohabitants. Over half assumed they would have some rights stemming from the cohabitation, but in contrast to other studies, relatively few believed their cohabitation gave rise to the same rights and obligations as if they were married (and those who did had little idea of what a married person's rights might be). Their lack of interest in the law stemmed from a reluctance to contemplate the relationship ending just when it was starting, or a view that it would be unromantic or embarrassing to seek to protect their position against the other partner.

The property in dispute

For half the sample, the home had been owned in joint names (all but one as 'joint tenants'), and for half in the name of one partner. Cohabitants holding as joint tenants did not appear to have appreciated that if the relationship broke down, they would be treated as having half shares, regardless of their actual financial contribution.

Conveyancers reported that cohabitant purchasers show little interest in the significance of joint ownership, being pre-occupied with completing the purchase and the practical details.

They also expressed reservations about the professional ethics of advising a client's partner of their individual legal rights.

'Normally, they just want the keys and to know when they're moving in. The legal aspects of it, they don't really think about.'

What needed to be resolved

Cohabitants' disputes concerned:
Acceptance that the property must be divided but disagreement as to respective shares;
Seeking to preserve a home for themselves and/or their children;
Finding a practical means of separating into two households;
Defending a claim on property held in their sole name;
Seeking financial compensation for having made a contribution to the partner's property.

The practitioners' handling of the case

Most cases involving cohabitants' property were handled by family rather than civil/property solicitors, but even amongst family lawyers, few dealt with more than a handful of such cases each year. CABx reported seeing even fewer cases.

The relative rarity of such cases meant that practitioners' work could not become routinised. Many reported that they had to remind themselves of the legal principles and procedural rules each time.

'I find it a very difficult area of the law to deal with, because it's an area that I don't think many of us are comfortable with... You do look at the case-law – it's so complex, it's so academic and not very practical. It is very difficult to apply, sometimes, the principles to your situation. ... I think it's an area you probably can't dabble in – you need to specialize.'

Solicitors were generally less comfortable in handling these cases than divorce work and found it harder to explain the legal

position to clients. They had to wrestle with a trio of difficulties –

The substantive rules concerning trusts are complex and subject to considerable legal interpretation;

The procedural rules (the Civil Procedure Rules 1998) are seen as less 'user-friendly' than those which apply to divorce cases (the Family Proceedings Rules 1991);

There is usually a lack of documentary evidence to support claims of promises to share property, making them hard to substantiate.

Solicitors reported that many clients see them only for a one-off consultation, and then go away and resolve matters for themselves. Given the difficulties and perceived unfairness of the current law, practitioners encouraged clients to do this and to negotiate their own settlements regardless of the strict legal position. Some mediators felt that mediation provides an opportunity in which a 'fair' outcome rather than adherence to the 'rules' could prevail.

Practitioners were more cautious in predicting outcomes for clients and more likely to seek counsel's opinion than they would be in a divorce case. This added to the costs and length of the case.

'The litigation is riskier because there's a big difference again in contrast to ancillary relief where you can with an element of certainty predict a band of outcome and say to people it's going to be between this and that amount or your maintenance is going to be between this and that figure and between this and that number of years. ... very very often you have no evidence, just oral – they don't write these things down and therefore you're going to trial on the basis of oral evidence which makes it very difficult to predict because you don't know how the other party is going to come across in their evidence. You can have a vague idea of how your client will come across but you don't know how the other party will.'

Uncertainty as to the outcome also meant that 'risk averse' clients – and their lawyers – might either give up on a potentially good claim or concede a

settlement in order to try to minimize potential costs. A more confident lawyer or a more robust client might call the other's bluff or chance a 'nuisance claim'.

The outcome of cases

Although the majority of the cohabitants achieved their primary objective, over half felt the outcome was unfair in some way. In particular, many said they had compromised on the outcome in order to avoid further cost or the stress of court proceedings.

Type of outcome		Number (24)
Settled	Between themselves	5
	With solicitor or mediator's help	5
Court proceedings issued	Settled before final hearing	3
	Fully adjudicated	3
Abandoned		2
Not resolved		6

Unjust outcomes

The study identified five basic scenarios where the current law served to produce significantly unjust results:

The woman, after a long cohabitation in which she had cared for the children, had no right to a share in the home because she had made no financial contribution to its acquisition

A home owned by one partner before the cohabitation was then re-mortgaged and put into joint names as a joint tenancy. This meant that its value was shared equally, with no recognition of the partner's prior ownership

One partner had contributed all or most of the finance to purchase a property put in joint names but had failed to protect his or her contribution

One party was the sole owner, with no intention of sharing the value of the home with

the partner. The partner then left and made an unmeritorious claim on the property, which proved costly to defend

One partner had made significant financial contributions to the relationship and to the home owned in the other's sole name, but could not obtain any recognition of this due to lack of adequate evidence

Suggestions for reform

The study concludes that reform of the law is needed. It suggests that the Law Commission's proposed scheme would be a significant improvement on the current position, but would not address all of the problems identified. In particular, applicants for redress would still have difficulties in assembling the evidence necessary to establish what might have happened in the past. The study also suggests that reforms are necessary to: *Conveyancing practice and procedures*, to give more proactive advice to cohabitants at the time they purchase their property about protecting their interests, and to amend the property transfer form to make its meaning clear to a lay person

Trusts law, to limit the potential for unmeritorious claims and to enable non-financial contributions to be taken into account

Land law, to separate out the right of survivorship on a joint tenancy and the question of what shares the parties hold in the equity.

About the study

The study took place between 2004 and 2006. The fieldwork was carried out in South West England, South Wales and outer London. Solicitors, mediators and CABx were asked to forward information to clients inviting them to participate in the study. 29 separating cohabitants (including five couples) took part. 61 practitioners were also interviewed. Further details about the study may be obtained from Gillian Douglas at douglasg@cf.ac.uk or Julia Pearce at Julia.Pearce@bristol.ac.uk