

The slow road to cohabitation reform



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Can the Irish perspective help us find a safety net?

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The absence of a statutory financial remedy for cohabitants in England & Wales has created a lacuna in family law that has been under scrutiny by policymakers and reformers since 2002, when the Law Commission produced its discussion paper on Sharing Homes. The experience of cohabitation legislation recently introduced in the Republic of Ireland further informs the debate about cohabitation reform in England & Wales. This article is limited to an overview of lifetime cohabitation claims.

UK demographics

The demographics of the modern family explain why the reform of cohabitation law remains at the forefront of Resolution's manifesto for change. Figures released by the Office for National Statistics last November show that cohabiting couples continue to be the fastest growing family type in the UK.

Between 2005 and 2015 the number of cohabiting couples rose by 29.7%. This exacerbates the increasingly common experience of Resolution members (when advising the more vulnerable unmarried client at the point of separation), that it is possible to live with someone for decades, to have children together, but then for the wealthier partner to simply walk away without taking any financial responsibility for a former partner when the relationship breaks down. This can have a huge impact on women and children, particularly in cases where a mother has given up or reduced her work to raise a family.

RoI demographics

The Republic of Ireland's demographics, based on figures available from its last census in 2011, record an almost four-fold increase in the number of cohabiting couples in the

10 years from 1996 to 2006 – from 31,300 to 121,800. A more modest increase in the number of cohabiting couples resulted in an increase in the most recently published census – 2011 – to 143,561 couples. The 2011 census records 820,334 family units consisting of married couples. As the figures illustrate, there has been a move away from the traditional Roman Catholic family unit towards the “living in sin” cohabitation model as Irish society has undergone considerable social change, particularly in the years from 1996–2006.

Cohabitation law in Ireland before statutory reform

Prior to the introduction of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 on 1 January 2011, cohabiting couples were treated as strangers in law except in particular instances, such as for the purposes of bringing an application for some remedies under the Domestic Violence Act 1996 or when seeking damages for wrongful death pursuant to the Civil Liability (Amendment) Act 1996. Unmarried couples could seek maintenance from the other in respect of any dependent children of their relationship, but could not seek maintenance for themselves. Disputes in relation to the ownership of property were settled until recently by reference to the Partition Acts of 1868 and 1876 and the equitable jurisdiction of the court, which has been developed over the centuries to permit co-owners to determine their respective shares in a property by reference to the court.

The Partition Acts were repealed by ss30–31 of the Land and Conveyancing Law Reform Act 2009, which conferred a statutory jurisdiction on the courts to deal with issues relating to co-ownership of land on application to it by any person having an estate or interest in co-owned land. If cohabitants were engaged they could invoke the jurisdiction of the Family Law Act 1981 to determine ownership issues relating to the property of parties to a broken engagement.

Cohabitation law in England & Wales – the current position

In England & Wales there is a focus on the strict law of real property and trusts, mitigated to some extent by the principles underlying the common law constructive trust, those of proprietary estoppel, and by Schedule 1 to the Children Act 1989.

Common intention constructive trusts are only engaged where there is a common intention to share the beneficial ownership of the property. In practice, this is particularly difficult to prove in sole ownership cases.

The common intention is then determined as to the extent of the parties' respective beneficial interests in the property. By looking at the whole course of the dealings between the parties in relation to the property, each party would then be entitled to that share which the court considers fair. (See Chadwick LJ in *Oxley v Hiscock* [2004] 2 FLR 669, as qualified by Baroness Hale in *Stack v Dowden* [2007] 1 FLR 1858.) The House of Lords in *Stack v Dowden* indicated that, in joint names cases, there will be a presumption of joint ownership, so it will only be in exceptional cases that the beneficial title will not follow the legal title. But the House of Lords listed factors in *Stack* which could make any case exceptional. The Supreme Court in *Jones v Kernott* [2012] 1 FLR 45 subsequently confirmed the ability to infer or impute a common intention as to the extent of the parties' respective beneficial interests. Distilling these concepts in practice is extremely difficult, and often steeped in uncertainty, particularly as each case is fact specific, and therefore the case law is not easy to apply.

Proprietary estoppel can be established in cases where the common intention does not exist between the couple, but the court is constrained to do the minimum in that situation to satisfy the resulting equity.

Schedule 1 to the Children Act 1989 entitles unmarried parents to make financial claims on behalf of children. This includes a menu of orders, including top-up periodical payments, lump sum orders, and for settlement of property. The relevant factors and principles are heavily child focused, taking into account each parent's income and earning capacity, financial

needs and obligations. Reported decisions show that relatively generous provision is available in high-value cases, applicable in relation to a child living outside the jurisdiction, and can include legal costs funding. There are many cases, however, where Schedule 1 awards are not made because the providing parent (normally the father) does not have sufficient surplus capital or income to meet a claim.

Cohabitation law in Ireland after statutory reform

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 introduced entirely new rights for cohabitants when it came into force on 1 January 2011. Couples who met the criteria were automatically cohabitants but in order to seek relief arising from these rights the cohabitant must apply to the courts and prove:

- that they were in an intimate and committed relationship (s172(1));
- that they were qualified cohabitants (s172(4));
- financial dependency on the other cohabitant and that financial dependence arises from the relationship or the ending of the relationship (s173(2)) – except in cases involving provision after death; and
- that it would be just and equitable for the court to make an order for redress in all circumstances (s173(3)).

The relevant time limits within which to apply for relief are two years from the end of the relationship where cohabitants are both alive (s195). (The time limit where one party is deceased and provision sought is six months from date of grant of representation in the estate, unlike Scotland which is six months from date of death.)

A cohabitant is defined as:

"... one of two adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other" (s172(1)).



In deciding whether the couple were cohabitants, the court must take into account all the circumstances of the relationship and must have regard to the following:

- the duration of the relationship;
- the basis on which the couple lived together;
- the degree of financial dependence of either adult on the other and any agreements in respect of their finances;
- the degree and nature of any financial arrangements between the adults, including any joint purchase of an estate or interest in land or joint acquisition of personal property;
- whether there are one or more dependent children;
- whether one of the adults cares for and supports the children of the other; and
- the degree to which the adults present themselves to others as a couple (s172(2)(a)–(g)).

A qualified cohabitant is an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for two years or more where they are the parents of at least one dependent child, or five years or more in any other case (s172(5)).

The reliefs available for “qualified cohabitants” are maintenance (both periodic and lump sum), property adjustment orders (but not an order for sale), pension adjustment orders and provision from the estate of a deceased cohabitant. (Any person having an estate or an interest in land which is co-owned, whether at law or in equity, may apply, inter alia, for an order for sale of the land and distribution of the proceeds of sale as the court directs pursuant to s31(2)(c) of the Land and Conveyancing Law Reform Act 2009. The method of calculation is entirely different to that contained in the 2010 Act.)

Where financial dependency is a prerequisite for relief then if the applicant has an income and is able to support themselves independently they will not be considered dependent, according to Fergus Ryan in *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010: An Annotation*. Ryan highlights the Irish Law Reform Commission’s view that the purpose of the redress model is to “operate as a safety net to address the needs of vulnerable qualified cohabitants on the breakdown of the relationship”.

The Commission took the view that not all cohabitants should be entitled to redress and that casual or short-term relationships without interdependency do not require ancillary relief.

The main criticism of the new regime is the absence of any new rights for cohabitants in relation to children of the relationship. It was only earlier this year, with the introduction of the Child and Family Law Relationships Act 2015, that cohabitant fathers could be automatically

appointed guardians by the court (provided they satisfied certain residency requirements).

Low take up of new redress by Irish cohabitants

There has been a very low level of litigation since the Act was commenced over five years ago, with a total of 80 cases being initiated in the Circuit Family Court in the Dublin region in the period 2011–2015 (comparable figures for the same period for applications for divorce are 6,823). There is only one reported decision of the Superior Courts in relation to the new rights granted to cohabitants under the 2010 Act – *DC v DR* [2015] IEHC 309 – and it relates to provision from the estate of a deceased cohabitant.

Lessons to be learned?

In contrast with Irish cohabitation law, which is needs-focused, attempts to reform cohabitation law in England & Wales have centred on establishing rights, albeit with a view to addressing hardship, such as Lord Marks’ Cohabitation Rights Bill, most recently debated by the House of Lords in December 2014.

Resolution’s proposals are for cohabitants meeting eligibility criteria indicating a committed relationship to have a right to apply for certain financial orders if they separate, which is automatic unless the couple chooses to opt out. Opponents of reform have argued that providing rights to cohabitants would open the floodgates to high numbers of contested cases, saturating our already overwhelmed Family Court, and lead to overly generous awards that unfairly penalise those who have made a conscious decision not to marry.

Resolution continues its call for the urgent introduction of safety-net legislation providing legal protection and fair outcomes at the time of a couple’s separation, particularly for children and mothers left vulnerable under the existing law. Although this would only be a small stepping-stone along a gradual statutory road to achieving fairness for unmarried couples on separation, could the introduction of needs-based legislation, following the Irish example, provide such a safety net?

This article is based on materials prepared for the cohabitation workshop delivered at Resolution’s National Conference 2016, where the authors were speakers, and included presentations by John Wilson QC and Michael Gouriet on the legal principles in England & Wales, and Janys Scott QC on the position in Scotland.

Resolution will be hosting a National Cohabitation debate on 10 November 2016.

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