

# Does England and Wales need a cohabitation law?

**Yes**

The modern reality of two people living together does not fit with the inflexible and outdated principles of the law that governs it

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**T**he Office for National Statistics has published some interesting figures. They show that on the tenth anniversary of moving in with each other, half of cohabiting couples have got married, four in ten have separated, and only one in ten are still living together. Cohabitation therefore remains either a short-term relationship or flows into marriage.

But in the event of a breakdown, how well does the law protect or provide for cohabiting couples who have disputes which they need to resolve?

## Going backwards

A couple who have a civil partnership or are married benefit from flexibility of the law. For example, a court ignores in whose name a property is held and who paid for what in relation to that property. This is forward looking in scope. The court does what it thinks is fair and has a huge degree of flexibility to produce a fair settlement.

By contrast, the law relating to couples who are not married is inflexible and does not keep up with our ever-changing society. It is a very complex area of the law in which judges are trying to fit the modern principles of two people living together into inflexible outdated legal concepts surrounding property and trusts. This is backwards looking in scope.

The law for cohabiting couples as it stands at the moment ignores some key issues. There is no provision of

maintenance, which can be fundamental when the woman in a relationship has given up work to have a child. It also often ignores the financial circumstances of a couple as it works in accordance with a rigid legal framework. In short, it entirely ignores the day-to-day running of their actual relationship.

The case of Mrs Burns [1984] FLR 216 CA is a perfect example. Mrs Burns lived with Mr Burns for 19 years and had two children. They lived as a family but, when the relationship broke down, Mrs Burns was entitled to nothing as she could not show any financial contribution to the purchase of their home and the court was not able to consider the principles of need or fairness.

Many couples are blissfully unaware that this could happen to them. The myth of a 'common-law marriage' leads them to believe, falsely, that they will be treated as if they were married. It can come as a great shock to find out that this is not the case.

## Step by step

To advise cohabiting couples properly, lawyers are forced to consider case law, which can change as a case progresses through the judicial system. Family practitioners yearn for guidance and sometimes we get it, but normally on a specific point of law – we never get a full comprehensive overview of the law. The judgment of the Supreme Court in *Kernott v Jones* [2010] EWCA Civ 578 is

eagerly awaited. For some couples their cases are on hold until this decision has been handed down and for some this may be reaching the year mark. Does this provide a couple with the ability to move on and start a new life quickly?

The Law Commission and Resolution have both produced recommendations for reform, which include an eligibility requirement, an opt-out scheme and the idea of assessing qualifying contributions by a party to the relationship that gives rise to consequences.

We already have a law for married couples and some say this should be accessed by cohabiting couples. However, the broad range of relationships that would need to be considered and the mere fact that a couple have specifically not married counters this argument.

For the family practitioner it is clear that the law needs to change. However, the Ministry of Justice issued a statement on 6 September 2011 confirming that it does not intend to take forward the Law Commission's recommendations for reform in this parliamentary term.

This is hugely disappointing. It means that the road for separating couples is still long, complex and costly with little prospect of change in the foreseeable future. However, it is hoped that all interested bodies continue to champion a change in the legislation so that, one day, cohabiting couples can separate for a lesser cost, both emotionally and financially. ■