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Family law: cohabitation, weddings and marriage

Introduction

Text books often start with overviews which may be better read at the end of the course, when you are more capable of understanding them. They usually contain a smattering of history, an assurance of the radical changes which have taken place since the last edition, and some attempt to explain the rationale of the subject. Yet family law books have only recently begun to discuss this ‘family’ that their ‘law’ is about. In 1957, in the first edition of *Bromley’s Family Law* an opening passage entitled ‘The Scope of Family Law’ barely manages to make the second side of the first page. Although the coverage is doubled in the ninth edition (1998), a GCSE sociology student would be expected to have a better extra-legal knowledge of the family unit.

Yet family law LLB students are increasingly expected to know about these matters. Social policy drives legal reform in this area harder than ever before. Parts of the course may well be taught by people from other disciplines. The need to make coursework assignments more challenging than examination questions has also necessitated a broader-based approach, requiring knowledge not available in the standard set books (except, perhaps, such as Hale, Pearl, Cooke and Bates, *The Family, Law and Society*, 5th edn (London: Butterworths, 2002)). Less loftily, examiners are often keen to find a general, all-embracing essay when they run short of substantive topics on which to base their final question. What better than something along the lines of ‘Does family law do more for lawyers than it does for families?’ or, ‘The law is primarily interested in the nuclear marital family only. Discuss.’ The first question (below) falls into this category.

Some old-fashioned practitioners would scoff at such ‘academic’ stuff. They might have a similar reaction to any study of the marriage ceremony and its preliminaries. Even today, despite the interest in pre-marital contracts and the like, there is not much client interest in the opening ceremony, which is why it is unlikely to be covered in a legal practice course. But weddings are fun—and fashionable—and so is their legal content, at least for those prepared to consider how it reflects implicit policy considerations, etc.

It has the benefit, highly prized by examiners, of recommendations for reform which currently remain on the table. It is the *sine qua non* of the law's preferred form of domestic partnership. The second question in this chapter, or at least its suggested answer, demonstrates how the prepared student can capitalize on that.

Both these questions are in the form of essays, as is the final one, which concerns extra-marital cohabitation. No family law paper set in the last thirty years or more, will have failed to acknowledge the rise in this social phenomenon—if that is what it still is—and many of them are now shot through with this issue ('How, if at all, would your answer differ if H and W were not married to one another?'). You will see many examples of this in our chapters on domestic violence and property and, of course, in those chapters which deal with child law. There is always room, however, for what might be termed the new chestnuts, i.e. the questions which invite an overall consideration of the legal policies with regard to informal domestic partnership, including same-sex coupledness (even since the Civil Partnership Act 2004, and its conferral of quasi-marital status upon such latter pairs who choose to register under it).

Question 1

In which members of the family is family law interested?



Commentary

At the beginning of this chapter we said that 'overviews' might be better dealt with at the end; perhaps the same applies to this question. Wherever dealt with, it should only be asked if the course has been suitably imaginative and enquiring, as many are these days. Even without that, a cool candidate should be able to make something of it from scratch. Mentally survey the chapters and you quickly see that they involve rather more than the husband, wife and children of the nuclear marital family. For example: restrictions on choice of partner (the prohibited degrees of marriage/registration and prohibitions on sex with an adult relative); rights of intestate (and tenancy) succession; surrogacy; right to apply for residence orders 'over' children; 'relative' adoption; 'children of the family'; stepchildren; non-marital children, etc. We're into brothers, sisters, aunts, in-laws, step-parents and grandparents straight away. You should also be able to make use of the perennial debate about family form, i.e. single parent, non-marital, etc.

Although this question is apparently descriptive in scope, it provides room for debate as to what constitutes 'family' and as to the meaning of 'interest' in this context. Elementary contextual knowledge, such as the meaning of 'nuclear' and 'extended' can be pressed into service, as can anthropological definitions of the family unit—does it include non-marital and 'childfree' partnerships?—and sociology's categories of primary, secondary and tertiary

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relatives. Do not forget Art. 8 of the European Convention on Human Rights 1957, ‘the right to respect for . . . family life’.

In this answer, we aim to show how the student with a good overall knowledge of the subject can scan that knowledge to good effect.



Answer plan

- The most important members are the nuclear family—on division
- The most important of those are partners, parents and children
- Some differences between marriage and registration but not between ‘different’ and ‘same’ sex cohabitations
- Grandparents, step-parents and in-laws
- Net most widespread on death!

Suggested answer

Had the question asked about the family members with which the law is most *frequently* concerned, it would not be necessary to venture far beyond the nuclear family, marital or otherwise. Domestic partners (married, unmarried, and now registered) and children (marital and non-marital) take up most, if not all, of the time of the family lawyer. Of those, the extra-marital group had little legal significance, particularly so far as the adult partners were concerned, until the early 1970s (e.g. the fate of the family home in *Cooke v Head* [1972] 1 WLR 518). Had the question been about *when* the law is most interested, it would have been necessary to limit the enquiry to the division, or at least the straining, of relationships. We should note at the outset that the very word “‘family” . . . must be given its popular meaning at the time relevant to the decision in the particular case’ (*Dyson Holdings v Fox* [1975] 2 All ER 1030, 1035–6 *per* James LJ). At the end of the millennium the House of Lords held that a homosexual couple could constitute a ‘family’ for the purposes of tenancy succession under the Rent Act 1977 (*Fitzpatrick v Sterling Housing Association* [2000] 1 FCR 21). Section 62(3) of the Family Law Act 1996 had already included within its definition of ‘associated persons’ those who ‘live or have lived in the same household’, thus permitting a same-sex partner to obtain a ‘non-molestation’ order. Now, all three of the Gender Recognition Act 2004, the Civil Partnership Act 2004 and the Domestic Violence, Crime and Victims Act 2004 extend the domain of ‘family’ law. The first introduces ‘gender recognition certificates’ which grant the bearer ‘acquired’ gender status, the second affords quasi-marital status to registered same-sex couples,—and the third extends the definition of ‘associated persons’ (FLA 1996, above) to ‘intimate personal relationships’, i.e. those which have never involved marriage, cohabitation, or even engagement. The incorporation into English law of the European Convention of Human Rights by the Human Rights Act 1998—Art. 8 requires respect for family life—has considerable potential here: *Re R*

(*a child*) [2003] EWCA Civ 182 has already held that whilst genetic fatherhood does not always produce family life, social parenthood may.

We may at least start with the law's acknowledgement of the seven 'primary' relatives (mother, father, sister and brother from the 'family of orientation', and partner, son and daughter from the 'family of procreation'). It seems that the latter group of three attract the most, and the most-invoked, law. So far as financial support for the children is concerned, it now makes very little difference whether the parents are married or not. With regard to child support legislation, the Child Support Act 1991 (under review again in 2006) requires a 'non-resident parent' (s. 1(2)) to meet her or his 'responsibility to maintain' if she/he is '...in law the mother or father of the child' (s. 54). The non-marital father is, however, not equated with his married brother in so far as the *prima facie* vesting of parental responsibility is concerned. Section 2(1) of the Children Act (CA) 1989 treats the married father in the same way as his wife, i.e. automatic parental responsibility, but the unmarried father needs a court order or the mother's agreement (s. 4)—plus, also under s. 4 but as amended by the Adoption and Children Act 2002, joint registration of the birth. Most importantly, it should not be forgotten that, should the child's upbringing become a matter for the court, then 'its' welfare becomes 'the paramount consideration' under s. 1(1) of the CA 1989, a criterion which may bring into play adults from outside the family.

So far as the unmarried partners themselves are concerned, we may identify three different attitudes. At one extreme, there is no duty to maintain, no divorce, and no financial relief, whatever popular misunderstandings may still obtain about the wrongly named 'common law marriage'. At the other extreme, the position of cohabitants approaches assimilation with that of marrieds. An example is to be found in s. 2(2) of the Law Reform (Succession) Act 1995. It amended the Inheritance (Provision for Family and Dependents) Act 1975 to permit claims by a surviving cohabitant where the deceased died after 1995, provided the cohabitation lasted for a continuous period of at least two years immediately before the deceased's death (s. 1(1A) of the 1975 Act). (Even then, a surviving cohabitant is less well placed than a spouse in that the former's financial provision is limited to an amount sufficient for his or her 'maintenance' (s. 1(2)(b)).) In the middle, there are many circumstances where the cohabitational relationship is recognized but not afforded the same weight, such as in the legal response to family violence. An example is Part IV of the Family Law Act 1996. Section 36 permits applications for occupation orders where only one of the cohabitants has occupation rights: under s. 36(6)(e) the court must consider 'the nature of the parties' relationship *and in particular the level of commitment involved in it*'. The words in italics, added by the Domestic Violence, Crime and Victims Act 2004, may or may not reduce the adverse significance of the parties' non-marital relationship.

Under the Civil Partnership Act 2004, there is no legal distinction to be made between unmarried different-sex cohabitants and their unregistered same-sex equivalents. (On the other hand there are a number of differences between marriage and registration, e.g. the opening ceremonies, and the grounds for nullity and divorce.) So far as cohabitation

is concerned, the Law Commission has provisionally recommended that there be an opt-out scheme involving discretionary remedies for ‘eligible’ unwed/unregistered couples, i.e. those with children, and based on each other’s contributions to the family (‘Cohabitation: The Financial Consequences of Relationship Breakdown’, Law Com Consultation Paper No. 179 (2006)).

In that ‘family of orientation’, does the law retain any interest after the child comes of age at 18 (s. 1, Family Law Reform Act 1969)? Precious little continuing duty is owed by the parents; indeed on divorce, the court’s duty under s. 41 of the Matrimonial Causes Act 1973 to consider whether its Children Act 1989 powers should be exercised is limited to children of the family under 16, unless the court directs otherwise (s. 41(3)(b)). The corollary is that until such time as the state off-loads responsibility for the elderly, adult children owe little if any legal duty to their parents. It is in the area of succession, particularly the intestate variety, that the law is most concerned with adult parent–child relationships. Siblings and the extended family are also involved, as seen below.

This leads us to the 33 ‘secondary’ relatives as the sociologists call them (we will not be considering the 151 ‘tertiaries’!). We might start with grandparents, who might well be given leave to apply for a s. 8 CA 1989 order under s. 10(1)(a)(ii) of the latter Act—as in *Re W (Contact Application by Grandparent)* [1997] 1 FLR 793.

We encounter even more branches of the family tree by way of the incest taboo, and even more through the prohibited degrees of consanguinity and affinity. Under Sch. 1 of the Marriage Act 1949, the prohibited degrees of consanguinity cover parents, grandparents, children, grandchildren, brothers, sisters, half-brothers, half-sisters, uncles, aunts, nephews and nieces—a list which ss. 64 and 65 of the Sexual Offences Act 2003 now duplicate in its entirety for the purposes of criminalizing adult familial carnal knowledge. Apart from these consanguinity bars there still remains, even today, the possibility that a marriage contracted between certain affines would be invalid. Although the Marriage (Prohibited Degrees of Relationship) Act 1986 now permits marriage between in-laws, and between step-relatives, there are two cases where certain conditions apply.

First, marriage to a stepchild will only be valid if: (a) both parties are 21 or over; and (b) the stepchild had never been a child of the step-parent’s family at any time whilst the stepchild was under 18. The policy is that marriage should not be permitted where one of the parties has effectively acted as the other’s mother or father during the stepchild’s childhood, yet sexual intercourse and cohabitation remain available, of course. Secondly, marriage to a son- or daughter-in-law. A woman, for example, may only marry her son-in-law if both parties are 21 or over, and the son-in-law’s spouse (the woman’s daughter) and her father (the woman’s former husband) are both dead. Yet the latter, at least, of these bars is now being examined by the UK Government—see the draft Marriage Act 1949 (Remedial) Order 2006—in the light of the European Court of Human Rights case of *B and L v United Kingdom* [2006] 1 FLR 35, which held that it violated Art. 12 (the right to marry) of the 1950 European Convention for the

Protection of Human Rights and Fundamental Freedoms. The Court's reasoning was that the bar did not prevent such couples from either having sex, or cohabiting with, one another, and that it can in any case be circumvented by a private Act of Parliament.

Incidentally, under the Adoption and Children Act 2002 (inserting s. 4A into the CA 1989) a *married* (only) step-parent is able to obtain parental responsibility. The parent-spouse will need to have 'parental responsibility' (PR), and to consent, as will the other parent with PR. Failing that the step-parent may apply for a court order.

Perhaps the legal net is at its most widespread on death. Should the deceased leave no surviving spouse or issue then, under the Administration of Estates Act 1925, all goes to the parent (in equal shares if they both survive), then brothers and sisters of the whole blood (the issue of any predeceased siblings taking their share), then brothers and sisters of the half blood, then grandparents equally, then (finally) uncles and aunts, with their issue taking their predeceased parents' share(s) on the statutory trusts. In 2006 the Law Commission (above) provisionally recommended that there be a correlation between the remedies available to 'eligible' cohabitants on, respectively, separation and death.

Question 2

'The law is not understood by members of the public or even by all those who have to administer it' (Law Commission No. 53, Annex, para. 6, Report on Solemnisation of Marriage (1973)).

In the light of this remark, consider how far wedding law provides a suitable start to marriage.



Commentary

This is the sort of question which should leave the examinee in no doubt as to whether it is 'on' or not. The subject matter is immediately clear, even in the heat of an exam; similarly, the (sometimes not so clear) matter of how the material is to be deployed. It is about the idea that wedding law is unduly complicated, which does not make for a good send off for the ship of marriage, and that it may not match up in other ways, either. You would have realized that even before you started the course, even before you had the knowledge to address it. Do note that you can make a good fist of it even though you have not read the Law Commission Report, which few students will have done.

One note of caution. It concerns the danger, almost always present in essay questions, of adopting an over-descriptive approach. It should be easy to show why so few of those involved in weddings can have much idea of the legal content, but a good answer will also need to address the harder issue of whether the ceremony and its preliminaries (do not forget those) are capable of influencing the success of the marriage.

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Two mistakes to avoid. It is the register, not the registry, office, and the major division (as regards the preliminaries, at least) lies between Anglican weddings and the rest, not between Church and civil. Finally, try to be lively. Weddings are fun.



Answer plan

- Weddings on the wane
- Anglicans v the rest
- Preliminaries
- Place and nature of ceremony—increased choice
- 2002 White Paper
- Limited potential for helping marriage succeed

Suggested answer

The 270, 700 weddings in England and Wales in 2004 involved the third increase in as many years but there has been a long-term decline over the last 30 years (*Social Trends* 36, 2006). (We might also mention that, following the implementation of the Civil Partnership Act 2004 on 5 December 2005, 3,648 couples registered by the end of January 2006—69 per cent male.) Furthermore, only those who comply with the Marriage Acts 1949–1996 may normally achieve a legally valid union, a fact probably known only to a much smaller number of the population. Such compliance ensures the formal validity of the marriage by satisfying the *lex loci celebrationis*. In further reliance on the analogy with contract, the parties must also have had capacity to marry by their respective *lex domicilii*. Only if these requirements are satisfied will the relationship qualify as one of ‘marriage’, and the ‘spouses’ enjoy the law’s preferred form of partnership. In *Rignell v Andrews* [1991] 1 FLR 332, the couple had lived together for 11 years and she had used his surname, but he was not thereby permitted to claim the higher rate of personal allowance for income tax purposes available to a man whose ‘wife’ was living with him. There is, at least superficially, a right to wed. Article 12 of the European Convention on Human Rights so provides, but only ‘according to national laws governing [its] exercise’. So no further restrictions may be imposed, and in *Rota CPS v Registrar-General of Births, Deaths and Marriages* [2002] EWCA Civ 1661, the Crown Prosecution Service failed in its application to prevent a marriage which would have prevented the bride from giving evidence against the groom.

This popular misunderstanding, that cohabitation produces something called ‘common law marriage’, has no basis in reality (although it survived in Scotland until the Marriage Act of 1939). Until the Marriage Act 1753, consent (Roman law) and consummation (the early Church) were the only requirements. The disadvantages were those of ill-considered marriage and uncertainty; the adventurer could too easily lay claim to the heiress’s fortune. Our wedding law can only be properly understood in the

light of its history, i.e. the search for certainty and openness, and the supremacy of the Church of England.

Nonetheless, the supremacy of the Church of England still underpins the present choice—at least so far as the preliminaries are concerned—which is not between civil and religious but between the Church of England and everything else. It has been so since the Marriage Act 1836 and, leaving aside the special arrangements available for Jews and Quakers, the law lumps together non-Anglican Christians not only with all other believers, but with non-believers as well. It is a mark of the comparative modesty of the 2002 proposals for reform (see below) that they barely touch the established Church. The scope for ignorance, to paraphrase the Law Commission's remark, is perhaps most marked in the preliminary formalities. This is ironic because their original purpose was to ensure openness. Anglicans and the others each have a number of (different) choices, some of which can be paired.

The famous banns, used for some 90 per cent of Anglican weddings, are probably the preliminary with which the public is most conversant. 'Three Sundays preceding the solemnization' (s. 7(1), Marriage Act 1949) rings a bell with most of us. Since the 1973 remark mentioned in the question, s. 160 of the Immigration and Asylum Act 1999 has gone some way towards simplifying the non-Anglican complexities by abolishing the old superintendent registrar's certificate (SRC) with licence (which permitted a wedding after one day's wait). Now, all non-Anglicans will usually obtain an SRC, and must (normally) wait for at least 15 days before the wedding. In addition, s. 161 makes it compulsory for both affianced to present themselves to the Registrar. Furthermore, in 2001, the Archbishop of Canterbury's Working Group floated the suggestion that the 'civil' preliminaries be used for all couples, which would do away with the 'common licence' which is the Anglican equivalent of the old SRC with licence—just as the Banns are twinned with the superintendent registrar's certificate *simpliciter*. So we may have some sympathy with The Law Commission's 1973 assertion!

At first sight, the final pairing, special licence and the Registrar General's licence, seems ill-matched: the one seems to be for the well-off and the other for the sick. The romantic-sounding special licence, which some of those using the Superintendent Registrar's certificate with licence thought they were employing, is obtained from the Master of Faculties, an officer of the Archbishop of Canterbury. It permits marriage at any hour in any place and demand is likely to be much reduced under the government's 2002 proposals (below). The civil equivalent is supplied by the Marriage (Registrar General's Licence) Act 1970 and permits non-Anglicans to avoid a register office, or registered place of worship. It is normally used for the so-called 'deathbed marriage'. Duplication, and possibly further complication, is provided by the Marriage Act 1983 which permits the use of Superintendent Registrar's certificates for the house-bound and the imprisoned.

The wedding ceremony is surely what matters most, both to the parties and to everyone else—we all go to them. Perhaps the most important factor is the location. Disregarding marriages of members of the armed forces under the Marriage Act 1949, the choices available until the Marriage Act 1994 were: a place of worship; a

government building; a prison; or a sickbed. What constitutes a place of worship can be controversial; in *R v Registrar General ex parte Segerdal* [1970] 2 QB 697, the Court of Appeal upheld the Registrar General's refusal to register a chapel of the Church of Scientology. The 'take-up rate' of mosques, Sikh and Hindu temples, and other places of ethnic worship, has been surprisingly low: so weddings in such non-registered places of worship are of 'merely' religious significance.

Since 1992, there have been more civil than religious wedding ceremonies in England and Wales (*Social Trends*, above) and the 1994 Marriage Act now frees the secularly-inclined from having to wed in the district of residence of one or both of them (s. 2) and, more importantly, from having to marry in a register office (s. 1). Under s. 1 there are regulations permitting local authorities to approve sites other than their own register offices. The regulations require the local authority to satisfy itself that the premises provide a 'seemly and dignified venue' with no connection with any religion. No food or drink may be served in the room during the ceremony nor for one hour beforehand. *Selfridges*, HMS *Warrior* and Lord's cricket ground have all been authorized under the Act. That the 1994 de-regulation appeals to the affianced may be seen in its growing share of the market. In 2004, 31 per cent of all weddings in England and Wales took place in 'approved premises' compared to 5 per cent in 1996 (*Social Trends*, above): civil partners—for whom signature in a 'civil' ceremony is all that is required—may also use such places. Since the Marriage Ceremony (Prescribed Words) Act 1996, the ceremony in a register office can be extremely simple. After the parties have declared that they are legally free to marry, the minimum form of words is: 'I, AB, take you [or thee], CD, to be my wedded wife [or husband]'. Encouraged by the 'reception', as it were, of the 1994 Act, the Government intends to take further de-regulatory measures. The 2002 White Paper, *Civil Registration: Vital change; Birth, Marriage and Death Registration in the 21st Century*, Cm. 5355, presages a system based on the appointment of celebrants who would be responsible for the solemnization of either religious or civil marriages as in, eg, Scotland or New Zealand (para. 3.16). The time and place of ceremonies will be a matter of negotiation between the celebrant and the parties, although national standards for civil ceremonies will ensure that 'the solemnity and dignity of the occasion are not compromised' (para. 3.17).

Even the best wedding formalities we could design would hardly produce so 'suitable a start' as to eliminate unhappy marriages altogether. Yet on the 'harder to marry, less likely to divorce' principle, some other possibilities do suggest themselves. Information, suitability testing, counselling (if only optional) might all prove inexpensive investments for society, for the couple, and for their children. (On a related issue, whilst suspected cases of sham marriages are to be reported to the immigration authorities under SI 2000/3164, it is believed that many such abuses are taking place.) Some of the member states of the United States, for example, require certification of freedom from venereal disease as a necessary preliminary to marriage. Here, following Governmental recommendations in the 1998 White Paper *Supporting Families*, registrars are making marriage preparation packs available, thus facilitating informed discussions between

the couple in advance of the ceremony. So, whilst there is a limit to what even the most accessible wedding law can do to ensure success in marriage, perhaps matters have improved since 1973.

Question 3

Do you approve of the legal differences between marriage and cohabitation?



Commentary

It is 30 years and more since the marriage/cohabitation essay-type question started to appear in family law exams. Today, any family law course is likely to keep a running total of the score between the two forms of marital partnership, and the examination candidate is likely to have to economise, rather than maximise, in order to do well. It has become a 'scan and summarise question'. Although now very dated in content, the structure of the comparison tables in chapter 2 of *Cohabitation Contracts* (C. Barton, 1985), might still prove a good starting point for a coursework answer. In an exam, it will not be possible to deal with every relevant incident, but your examples should be representative. Roam over the entire subject, e.g. violence, the home, property, money, succession and children. Perhaps this is best done chronologically, working through the history of the partnership from its inception onwards. Do use some statistics.

Leaving aside the subject matter, please note that this question is a very good example of the need for analysis. You are not asked just for a statement of the differences but for a value judgment about them. Most examiners will be reluctant to hand out as much as a lower second without it. An early, wrong, but still stimulating source of opinion, is Ruth Deech's 'The Case Against Legal Recognition of Cohabitation' in J. M. Eekelaar and S. M. Katz (eds), *Marriage and Cohabitation in Contemporary Societies* (1980)—and a more recent, more positive, source is 'Cohabitation: The Financial Consequences of Relationship Breakdown—A Consultation Paper' (Law Com C P No. 179 (2006)). But what do you think? You must have an opinion—everyone else does. Just base yours in the law.



Answer plan

- Increased cohabitation and changed social attitudes
- Incidents of partnership law
- Differentials
- Same-sex couples
- Proposals for reform: closing the gap

Suggested answer

There has been a long-term decline in weddings over the last 30 years. In contrast, by 2001/2, about a quarter of all unmarried adults in England and Wales aged between 16 and 59 were cohabiting. (Perhaps these developments are to do with the fact that, according to surveys, many people believe that informal pairing produces marriage-like status.)

As these trends have emerged, the legal recognition of extra-marital cohabitation has grown with its social acceptability. It may be helpful, in deciding whether to ‘approve’ of the ‘legal differences’, to consider the likely reasons for this lifestyle. ‘Our’ cohabitants might be categorized as: ‘informed’ (avoiding responsibility), ‘uninformed’ (living in ignorance); ‘reluctant’ (one wishes to marry but the other does not); and ‘forced’ (one or both married to someone else, or of the same sex)—see *Cohabitation—The Case for Clear Law* (2002), The Law Society. It should not be forgotten that living together can be achieved at will, and without expense, and that the declining social disapproval has been increasingly self-fulfilling. Times have changed. Cohabitation is a socially acceptable alternative to marriage, rather than a mere prelude to it (the latter is now the case with over 50 per cent of marriages).

The legal differentials can be considered under a number of heads, e.g. choice of partners, during the functioning relationship, after death, the failing relationship, ending it, and afterwards.

The status of domestic partnership contracts has become more clear recently. In so far as a ‘pre-marital contract’ might purport to deal with the post-marital financial arrangements, it could not be guaranteed as binding, because the parties may not contract out of the divorce court’s powers of financial relief under the MCA 1973 (although such agreement might be seen as one of ‘all the circumstances’ under s. 25: *M v M (Prenuptial Agreement)* [2002] FLR 655, and in *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120, the court held that an injustice would be done to the husband by ignoring the agreement insofar as capital was concerned). So far as cohabitation contracts are concerned, it is now clear from *Sutton v Mishcon de Reya and Gawor and Co* [2004] EWHC 3166, that they can ‘stick’ provided there is a manifested intent to create legal relations, there is no promise of payment for sexual services, and none of the vitiating factors apply. Perhaps couples—and others—who hanker for pre-emptive private ordering are better served by cohabitation, rather than pre-marital, contracts, given that the former involve a comparatively blank legal canvass. The Government Discussion Paper *Supporting Families* (1998) suggests a template for the marital variety which provides, e.g. that the court could ignore them if they would occasion ‘significant injustice’: but would not the affianced be put off by such a threat to their deal? To add to the confusion, the Law Society in its 2002 paper (above) recommends that the evidential value of cohabitation contracts should be the same as ‘pre-nups’ and that they should not be given legal force—although by 2006 the Law Commission was provisionally recommending legislation to provide, for the avoidance

of doubt, that cohabitation contracts for financial and property matters be not contrary to public policy (para. 10.9, above).

Where differences do still exist, the more stringent law, if any, is to be found in marriage. A refusal of sex, or infidelity, may give rise to matrimonial causes or domestic proceedings, whereas no such rights or duties arise from a 'mere' cohabitation, no matter how long-standing.

Generally, the question of who owns the home is a matter of standard principles of contract, conveyancing, equity and trusts: *Pettit v Pettit* [1970] AC 777; *Gissing v Gissing* [1971] AC 886. It follows that as the law was not prepared to give anything to a wife, there was nothing to take away from a cohabitant. Yet it must be remembered that a spouse has the safety net of the courts' discretionary powers of property adjustment in matrimonial causes (see the MCA 1973) and that recently (since the retirement of Lord Denning, some would say) the declaratory principles have been applied less liberally. There are hard cases like *Burns v Burns* [1984] FLR 216 (19-year cohabitation, the woman took the man's name and gave up her job to look after him), and *Lloyds Bank plc v Rosset* [1990] 2 FLR 155 (wife's supervision of renovation), in both of which cases the court has refused to draw the inference from her indirect contribution that the beneficial interest be shared. Despite their (normally) lesser need of them, wives are slightly better served by the declaratory principles than are cohabitants, e.g. the presumptions of advancement and resulting trust (now much weakened in this gender-conscious age); and s. 37 of the Matrimonial Proceedings and Property Act 1970 (a share of the beneficial interest by virtue of substantial contribution to an improvement in the home). Finally would-be reformers should remember that in its 2002 Discussion Paper 'Sharing Homes', the Law Commission concluded that it was not possible to devise a universally fair system for the determination of shares in a co-occupied home.

Death provides a variety of legal responses. No rights for a cohabitant on intestacy under the Administration of Estates Act 1925 as amended, and different rights from those of a spouse under the Inheritance (Provision for Family and Dependents) Act 1975 (a cohabitant can only qualify as of right if he or she had been living with the deceased at the time of the death and for at least two years beforehand).

During the failure of the relationship, rights of protection from violence and of occupation in the home are again available to both sorts of partner under Part IV of the Family Law Act 1996 (since when the Domestic Violence, Crime and Victims Act 2004 has repealed s. 41, which required the court, when considering an application for an occupation order by a non-entitled (i.e. non-owning) cohabitant, 'to have regard to the fact that the parties have not given each other the commitment involved in marriage'). Under the 2004 Act the definition of 'cohabitants' now includes same-sex pairs, thereby enabling the one to make an 'occupation' application under s. 36 of the 1996 Act (i.e. where only the other has an interest in the property).

Many people would say that legal differences require the greatest scrutiny where they concern a person's capacity as a parent; children have no say about the nature of their parents' relationship. Section 1(1) and (2) of the Children Act 1989 grants *prima facie*

‘parental responsibility’ (PR) for marital children to each parent, but to the mother only for non-maritals. (A putative father may obtain this ‘responsibility’ under s. 4 either by court order or agreement with the mother, the latter made in a prescribed form and filed in the Principal Registry of the Family Division.) In not granting prima facie ‘responsibility’ to the ‘unmarried’ father irrespective of whether he is a rapist (as a husband could equally well be), a one-night stander, or a better man/partner/father than the average husband, the law may well be depriving large numbers of children (by 2000, 80 per cent of births outside marriage were registered by both parents and in 75 per cent of those cases the parents were cohabiting) of a vital right. Consequently, the Adoption and Children Act 2002 amends s. 4 of the 1989 Act to give him PR on joint registration of birth.

In moving to the ending of the partnership, we may remain in the area of child law. The Child Support Act 1991, in requiring each parent of qualifying children to maintain them, is even-handed between marrieds and others; s. 15 of the Children Act 1989 provides almost the same opportunities of financial relief for non-marital children as does Part 2 of the MCA 1973 for spouses and children on divorce. Where divorcing parents have ‘children of the family’, then, under s. 41(2) of the MCA 1973 the court may, exceptionally, delay the decree absolute if Children Act 1989 orders are contemplated.

This survey demonstrates that the law oscillates between no recognition of cohabitation (e.g. no divorce), and (in other contexts) near equation with marriage. Some argue that this selective policy is probably appropriate in that the parties must be taken to have rejected the trappings of marriage in their decision not to wed—yet surveys suggest that people’s perceptions of the legal consequences, accurate or not, play little part in their decisions as to family form. This approach is surely inappropriate, however, so far as their children are concerned; many people are coming round to the view that it is family function not form that should be recognised, and that even as regards the adults, some monitoring is necessary in order to avoid injustice to, e.g. women who have mixed their labour in the family home. Proposals have included assimilation, opting in/out by registration and removing the same-sex complication—a large anomaly but which involves only a very few pairs—by offering them the knot, if not the sacrament. All these possibilities have been explored further in various other legal systems, e.g. France and Canada, and there appears to be a certain historic inevitability that we will join them. But for the moment parity is limited to giving same-sex couples registration rights under the Civil Partnership Act 2004. Whilst not allowing them to wed—or, e.g., to divorce for adultery—it gives such pairs quasi-marital status in both public and private law. The Government declined to extend this to different-sex couples (because they, unlike their ‘gay’ counterparts, may choose to marry) or indeed to other sorts of people who live together. Those homosexual couples who do not register may at least be assured that, since *Ghaidan v Godin-Mendoza* [2004] 2 FLR 600 they must not be treated differently to heterosexual cohabitants. Perhaps it would have been

easier (if displeasing to certain best-selling newspapers) had the former simply been permitted to wed. After all, since the Adoption and Children Act 2002 (s. 50) both they and different-sex unmarried couples are now eligible to adopt, although—unlike married couples—the statute requires them to be ‘in an enduring family relationship’ (s. 144(b)).

The 2004 Act did not satisfy the aspirations of all gay and lesbian couples, and in *Wilkinson v Kitzinger and HM Attorney-General*, *The Times* 21 August 2006, it was held that a same-sex Canadian wedding could only confer civil partnership here and not marital status: this was not a breach of human rights given that only three members of the Council of Europe currently recognized same-sex marriage. But now that same-sex pairs can at least obtain crypto-marital status, and both sorts of couples must be treated the same if merely cohabiting, what should be done about such informal partnerships? In 2006, the Law Commission (above) provisionally proposed that there be an opt-out scheme involving discretionary remedies for ‘eligible’ unwed/unregistered couples—i.e. those with children—based on each party’s contributions to each other and to the children. Given the prediction reported by the Commission that by 2031 cohabiting couples will rise to 3.8 million and that marriages will fall below 10 million, perhaps this is the time for the law to acknowledge Westermarck’s famous dictum (*A Short History of Marriage*, 1926) that ‘marriage is rooted in the family, not the family in marriage’—and to remember that the National Curriculum requires pupils to be made aware of ‘different types of relationships’, ‘including marriage’.

Further reading

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