2020 in family law: Why cohabitants need legal reform

09 DECEMBER 2019

CATEGORY:
ARTICLE

As we approach election week, one manifesto that deserves support is Resolution's Fairness for Families. Its timing is designed to encourage Parliamentary candidates to consider areas of family law which are urgently in need of reform, setting out as it does a wish list for the future government to enact.

Over recent weeks we have been reminded of the pressing need for long overdue reform of the law as it relates to cohabiting couples – the fastest growing family type in the UK with close to 7 million in the UK living in a cohabiting relationship and almost half of whom (according to a British Social Attitudes survey published earlier this year) are unaware of their lack of legal status and rights and thus vulnerability on relationship breakdown.

Whilst news that with effect from 31 December 2019 heterosexual couples will be able to enter into civil partnerships is welcome, this will only effect the informed few who decide to formalise the legal status of their relationship and does nothing to solve the problem that so many cohabitants face, as it does not address the fact that the current law does not adequately reflect or protect relationship living arrangements in modern society.

Save for limited claims in respect of dependent children, there are no financial claims against a former cohabitant, regardless of the length or nature of the relationship. Despite this, 46% of the public still mistakenly believe that the myth of 'common law marriage' somehow exists to provide protection – which it does not.

A stark reminder of the direct implications of this lack of protection was provided in the recently reported decision of Sandford v Oliver. They had been together for 23 years and had 3 children. Mr Sandford was a builder who carried out various renovations on the property (including an extension and a swimming pool). However, as the property was registered in Ms Oliver's sole name, when it came to their separation, Mr Sandford failed to persuade the Judge that he had an interest in it as there was no common intention between them that he should do so. The Judge concluded that the substantial improvement works he carried out to the property was to make the living arrangements more comfortable rather than undertaken because he thought he had a beneficial share.

The dredging back over a lifetime together to try to establish motivation and intention behind behaviour would be extremely daunting for most people – was it driven by the relationship (being a supportive partner), wanting to improve quality of life, or a consensus that they intended to share the home they lived in. Trying to piece together evidence over long time periods is inevitably not only time consuming and extremely costly but also emotionally gruelling. In a society where people are increasingly choosing not to marry, and may well choose not to enter civil partnerships, it seems to me to be essential that their rights are protected.

The recent Court of Appeal decision of Kahrmann v Harrison-Morgan also provides a salutary reminder of the disadvantage that befalls a cohabitee as compared with a spouse or civil partner following their partner's death. In that case the former cohabitant was ordered to return to her late partner's estate the £2.2m she had received for agreeing to vacate her partner's property in order for it to be sold. The Court of Appeal held that there was no basis for the payment; she did not have the right to occupy the property. Her partner had died intestate, due to the invalidity of his wills (which would have provided for her on behalf of their children), and she was not even eligible to make a claim against his estate as dependent because he had died domiciled in Germany.

Regrettably, cohabitation law reform continues to take a back seat. Successive governments have kicked the can down the road for over a decade despite the Law Commission's clear recommendations for reform in 2007 and notwithstanding calls for change from leading members of the judiciary over many years. The welcome imminent extension of civil partnership legislation only came about due to the commendable perseverance of Ms Steinfeld and Mr Keidan in taking their case to the Supreme Court. Further positive reform was anticipated when Siobhan McLaughlin (mother of 4 who had lived with her partner for 23 years) successfully persuaded the Supreme Court that the law preventing her from claiming widowed parent's allowance was incompatible with the European Convention on Human Rights, but despite that decision last year,

the law remains unchanged.

Over the last 20 years we have seen enormous changes in family law. Although family judges are forward thinking, open-minded, and fairness-focussed they can only work within the parameters of the statutory law. Only Parliament can make legislative changes. As the time for change is now, we hope that the next government (of whatever complexion) takes active heed of Resolution's succinct manifesto.

Authors

Jemma Thomas

PROFESSIONAL SUPPORT LAWYER | LONDON

Divorce and family

+44 20 7597 6146

jemma.thomas@withersworldwide.com

Michael Gouriet

PARTNER | LONDON

Divorce and family

+44 20 7597 6125

michael.gouriet@withersworldwide.com