Cohabitation
Law, Practice and Precedents

Seventh Edition

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ACKNOWLEDGMENTS

The authors wish to thank David Burrows for his contribution to the child support and enforcement section of Chapter 5, and to acknowledge his help and advice along with Nick Wikeley, Desmond Rutledge, Andy King, Jane Gordois and Carole Broadwith.

They are also indebted to Professor Rebecca Probert for providing the much needed Introduction, and to Professor Chris Barton whose idea this was.
FOREWORD

The ease with which a couple can opt for cohabitation, consciously or by default, belies the complexity that often attends the termination of their relationship.

In many respects legislation has provided safeguards and remedies that place cohabitants in a similar if not identical position to those who are married or in a civil partnership. In other important respects, notably property and financial provision, there has been a reluctance to do so. There are public policy arguments about the importance of marriage and the family for society, and counter arguments that point out that nearly half of all children are born outside marriage and the law should reflect the realities of family life in the 21st century.

Further attempts to legislate for inclusivity for cohabitants have been abandoned. As far as rights over property are concerned, these remain rooted in land law, equity and trusts. There is little or no discretion and the end result can often appear unfair.

The outcome of litigation can never be certain, and in disputes between cohabitants this is especially so. Many expensive arguments could be avoided if only cohabitants could be persuaded to take appropriate advice at the outset, whether as to beneficial interests on the purchase of the shared home or by the formalisation of agreed terms in a properly drafted cohabitation agreement.

The advice that cohabitants need reaches into all aspects of legal practice. This book provides a clear and authoritative exposition of the law, both contentious and non-contentious, with guidance on practice and procedure, precedents and checklists. It will be an invaluable reference for all those advising at every stage of a cohabitation relationship.

Lady Justice Eleanor King
PREFACE

The aim of this book is to assist practitioners when dealing with the particular requirements of those who are neither married nor in a civil partnership.

A lawyer will usually only be consulted when a relationship is either in difficulties or at an end. It is at this stage that myths as to entitlement to property and financial provision may have to be exploded. This is so especially in relation to property where there remains very little statutory protection for cohabitants and uncertainty abounds.

The approach of this book is that ‘prevention is better than cure’. It is divided into ten sections. Each sets out the substantive law and, where appropriate, precedents and procedural guides. As such it is multi-disciplinary, enabling practitioners to advise clients fully at all stages of a cohabitation relationship, and on every aspect.

The law is as stated at 1 February 2017.

Helen Wood

February 2017
INTRODUCTION

The need for a work that deals with the legal position of unmarried couples is greater today than ever before: the latest figures show that the number of cohabiting couples across the UK as a whole has reached 3.3 million, making it the fastest growing family form.\(^1\) Cohabitation has become the norm for first partnerships,\(^2\) and while many will go on to marry their partner, many others will not.\(^3\) The context of cohabitation is also increasingly diverse, with socio-economic factors, religion and ethnic background all playing an important role in the decision whether or not to marry.\(^4\) Some cohabitants idealise marriage and intend to marry when they can have the perfect wedding, or when the relationship itself has reached a particular state; others reject the institution of marriage altogether. Some may be cohabiting for pragmatic reasons, or because they see no particular advantage in formalising their relationship.\(^5\) Some may wish to enter into a civil partnership as an alternative to marriage, but at present this is an option available only to same-sex couples.\(^6\) Others may believe that they are in fact married, having gone through

\(^1\) ONS, *Families and Households in the UK*, 2016 (2016). By contrast, 12.7 million couples are married or in a civil partnership. Further data shows that married or civilly partnered couples account for 50.8% of all of those aged over 16: ONS, *Population estimates by marital status and living arrangements, England and Wales: 2002 to 2015* (2016).


\(^3\) B Wilson and R Stuchbury, ‘Do partnerships last? Comparing marriage and cohabitation using longitudinal census data’ (2010) 139 *Population Trends* 37 found that two-fifths of their 1991 sample of cohabiting adults had married their partner by 2001, while two-fifths had split up and the remaining one-fifth were still living together.


\(^5\) See eg A Barlow and J Smithson, ‘Legal Assumptions, Cohabitants’ Talk and the Rocky Road to Reform’ [2010] CFLQ 328, who classify cohabitants into ‘ideologues’ who reject marriage, ‘pragmatists’ who would marry if they thought there were legal advantages to doing so, ‘romantics’ who plan and ‘uneven’ couples where one wants to marry and the other does not.

\(^6\) Civil Partnership Act 2004, ss 1(1), 3(1)(a); Steinfeld & Keidan v Secretary of State for Education [2017] EWCA Civ 81. It is estimated that there are approximately 47,000 civil partners, as compared to 29,000 same-sex couples who are married and 87,000 who are cohabiting: ONS, *Families and Households in the UK*, 2016 (2016).
Cohabitation: Law, Practice and Precedents

a ceremony that is binding in the eyes of their religious community, only to find at a later date that the law regards their union as no more than a ‘non-marriage’ and treats them as if they are merely cohabiting. There are thus significant issues facing the law.

Yet the law has not as yet developed a comprehensive approach to cohabiting couples: in some contexts cohabitants are treated as if they were married, in others they are accorded lesser rights, and in yet others they have no rights at all, or at least none that are specific to their status as cohabitants. It is clear that many cohabitants, particularly women, experience disadvantage upon relationship breakdown. Proposals for reform have proliferated in recent years, but as yet no action has been taken. Nor has there been any review of the totality of laws applicable to cohabiting couples in order to evaluate the coherence of the current approach. Some signs of a more sympathetic approach to cohabiting couples are evident in the Supreme Court decision of Re Brewster, in which a difference in treatment as between married and unmarried couples was subjected to close scrutiny and held not to be justifiable in that particular context, but the implications of this decision remain to be seen.

In order to understand the current position – and in particular to understand how we got to where we are and why more progress has not been made – it is essential to understand something of the background. This introductory chapter sets out a brief history of the extent and legal treatment of cohabitation, and then considers the challenges facing those responsible for advising modern cohabitants.

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11 The issue in Brewster was whether the denial of a pension to a surviving cohabitant on the basis that no written nomination had been made constituted unlawful discrimination under art 14 of the European Convention on Human Rights when read in conjunction with art 1 of the First Protocol. The justification offered by the authorities in Northern Ireland that this requirement was necessary to ensure parity with the schemes in England and Wales had been undermined by the removal of that requirement by the time the case came before the Supreme Court.
A BRIEF HISTORY OF COHABITATION

There is a widespread but erroneous belief that cohabitation was popular in earlier centuries, in particular the late-eighteenth and early-nineteenth centuries,\(^\text{12}\) and that we are today seeing the revival of ‘social marriage’.\(^\text{13}\) In fact, rates of cohabitation were very low in this earlier period: the proportion of children born outside marriage barely edged above 5 per cent until the mid-nineteenth century,\(^\text{14}\) and only a very small proportion of such children were born within cohabiting relationships.\(^\text{15}\) Marriage in church was almost universal even before Lord Hardwicke’s Clandestine Marriages Act of 1753 put the rules governing the formation of marriage on a statutory basis for the first time.\(^\text{16}\)

Nor did the supposed strictness of the 1753 Act encourage couples to eschew legally-binding rites. The Act merely put the long-established canonical requirements for the formation of marriage on a statutory footing and gave them teeth by stipulating that a failure to comply with certain formalities would render the marriage void. Although observance of Anglican rites was therefore mandatory for all (save Jews and Quakers, who were exempted from the Act), there is little evidence that other Protestant dissenting sects had married according to their own rites before 1754, and ample evidence that they complied with the law after that date.\(^\text{17}\) Similarly, although Catholics had shown a greater tendency to marry according to their own rites before the 1753 Act, in its wake the vast majority accepted the need to supplement the Catholic ceremony with a legally-binding Anglican marriage.\(^\text{18}\) For the vast majority, religious nonconformity was not seen as a reason for refusing to formalise a relationship.

Of course, there were always some couples who flouted the conventions of the time and who lived together unmarried. And the number of such couples undoubtedly increased during the nineteenth century, as more of the population moved to or grew up in an urban setting and as traditional controls and structures weakened. The very fact that such controls were weakening led some


\(^{13}\) See eg S McRae, Cohabiting Mothers (1993); A Barlow, S Duncan, G James and A Park, Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century (2005), p 53.

\(^{14}\) P Laslett, ‘Introduction: comparing illegitimacy over time and between cultures’, ch 1 in P Laslett, K Oosterveen and R Smith, Bastardy and its Comparative History (1980).

\(^{15}\) R Probert, Marriage Law and Practice in the Long Eighteenth Century: A Reassessment (2009), ch 3.


\(^{17}\) See generally R Probert, Marriage Law and Practice in the Long Eighteenth Century: A Reassessment (2009).

contemporary commentators to fulminate against the perceived immorality of the times; cohabitation was seen as characteristic of ‘outcast London’. The journalist Henry Mayhew, writing in the 1850s, certainly discovered a number of unmarried couples during his investigation of the lives of the London poor, although some street sellers were so incensed by his claim that only one-tenth of them were formally married that they held a public meeting to protest.

Even when marriage and the family came under increasing criticism towards the end of the nineteenth century, with radical intellectuals proposing new alternatives to formal, permanent marriage, few actually put such ideas into practice. The nascent feminist movement did not champion ‘free unions’: most believed that the preferable way forward was to reform the law of marriage and that cohabitation offered too little protection to women.

Given the stigma that continued to attach to cohabiting relationships well into the 1950s, it is unsurprising that cohabitation remained rare during this period. Indeed, it was not until the 1970s that cohabitation emerged as a statistically significant family form; prior to this, as Mike Murphy has noted, ‘under 1 per cent of women aged 18–49 were cohabiting’. As the statistics set out in the introduction demonstrate, cohabitation has now ‘become a normal part of the life course’.

What this tells us is that the current popularity of cohabitation is unprecedented, and that the English legal system has never had to deal with unformalised relationships on such a scale before. But how has English law reacted to the existence of such relationships?

A BRIEF HISTORY OF COHABITATION LAW

Just as there are misunderstandings about the prevalence of cohabitation in times past, so too there is an equally widespread – and equally erroneous – belief that cohabiting couples would have enjoyed legal protection by means of a ‘common-law marriage’ prior to 1754. This rests on the double assumption that it was possible to marry by a simple exchange of consent before the Clandestine Marriages Act and that a cohabiting couple would be presumed to

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have exchanged such consent. However, given that a bare exchange of consent carried no legal rights – other than that of insisting that the marriage be solemnised in church – such a presumption would have conferred no legal protection on cohabitants.27 There was a presumption that couples who had cohabited and were reputed to have married had in fact gone through a legally binding ceremony of marriage, but several points need to be noted. First, it should be borne in mind that the presumption operated against a background in which cohabitation was punishable as fornication: cohabitation gave rise to a presumption that the parties were married precisely because it was assumed that no one would cohabit unless they were married. Similarly, couples would not enjoy the reputation of married couples within the community unless there was reason to believe that they had married. At a time when the community was responsible, through the poor law, for the support of those settled in the parish, and when children born outside marriage obtained a legal settlement in the parish of their birth, neighbours had good reason to check the marital status of any newcomers. Secondly, and vitally, the presumption only operated in certain contexts, where a child or remoter issue of the supposed marriage was claiming an interest and was unable to provide precise details. Given the unsatisfactory state of registration and record-keeping at the time, there would have been many formally-celebrated marriages of which no documentary evidence existed. The presumption was therefore an evidentiary tool to allow other means of proving a legal marriage rather than a mechanism for equating the married and the unmarried. Finally, it should be noted that the presumption does, in theory, still exist – although given the very different conditions of modern society it will rarely be appropriate for the courts to presume that a marriage has taken place where there is no formal evidence.28

So, how did the law treat cohabiting couples? The practice of presenting and punishing cohabiting couples for fornication had died out almost everywhere by the late eighteenth century, and over the course of the following century the law rarely engaged with cohabitants save when they obtruded themselves on its notice.29 There were of course a few cases in which cohabitants were involved in disputes over contracts, trusts, and wills (with varying degrees of success), but the family law of the time – known then as the law of domestic relations – was exclusively concerned with marriage.

As the state began to intervene more directly in family life, however, there was some limited recognition of cohabiting relationships. Section 17 of the Prevention of Cruelty to Children (Amendment) Act 1894 provided that rules designed to protect children against their parents should apply to step-parents and ‘to any person cohabiting with the parent of the child’, while under the Workman’s Compensation Act of 1906 children born outside marriage could claim compensation on the same footing as legitimate children.

28 See eg Martin v Myers [2004] EWHC 1947 (Ch).
29 See eg G Frost, Living in Sin (2008), for examples of cases in which cohabiting couples were involved.
But it took a national emergency for rights to be extended to unmarried partners: the outbreak of the First World War saw separation allowances being extended to all dependants of soldiers – including the so-called ‘unmarried wives’ – and provision was also made for such women to receive a pension in the case of the soldier’s death or injury. Such provision was, however, less generous than that conferred on legal wives. Post-war unemployment was similarly seen as a national, short-term emergency, leading to the provision of dependants’ allowances for women living with unemployed workers. But there was concern about the explicit recognition of unmarried relationships, and in 1927 the law was changed to limit such allowances to women who had care of the unemployed worker’s children. Of course, such a woman might well be the mother of those children, but the change in terminology allowed a veneer of respectability to be preserved. Had the original wording remained on the statute book, it might have provided a precedent for further reform, but this was not to be.

In the meantime, a more durable principle had been introduced by the Widows’ Orphans’ and Old Age Contributory Pensions Act, which stipulated that widows who remarried or cohabited would not be entitled to receive a pension. The application of the ‘cohabitation rule’ was extended to new contexts in the wake of the Second World War, as the state assumed greater responsibility for the welfare of its citizens. But the growing financial burden of such provision – and increasing suspicion that women were obtaining benefits fraudulently by failing to disclose a cohabiting relationship – led to a renewed scrutiny of cohabiting relationships. After 1964, the undisclosed presence of a man in the household of a woman who was in receipt of national assistance was sufficient ground to prosecute her for fraud: it was no longer necessary to establish that he was actually supporting her.

And of course women had no legal means of securing support from cohabiting partners. It was not until the 1970s that the law began to make positive provision for cohabitants – but then, as we have seen, it was not until the 1970s that couples began to cohabit in significant numbers. The Inheritance (Provision for Family and Dependants) Act 1975 allowed a wider range of ‘dependants’ to claim provision from the estate of a deceased individual, the Domestic Violence and Matrimonial Proceedings Act 1976 enabled the courts to grant an injunction to protect cohabitants against domestic violence, and ‘reputed’ spouses were included as dependants under the Pneumoconiosis (Workers’ Compensation) Act 1979. Cohabitants also benefited from reforms to the general law: the rejection of the ‘family assets’ doctrine in Pettitt v Pettitt and Gissing v Gissing, and the reiteration that interests in the family home were to be determined by principles of trusts law, did have one benefit for cohabiting couples, in that judicial creativity was refocused on the

31 Unemployed Workers’ Dependents (Temporary Provision) Act 1921, s 1(2).
32 See eg National Insurance (Industrial Injuries) Act 1946, s 88(3).
boundaries of the constructive trust, which, unlike the earlier family assets doctrine, applied outside marital relationships. Such changes were both a product of, and encouraged, a greater social acceptance of cohabitation.

Yet there was clearly no coherent policy of extending rights to cohabiting couples, as is evident from the fact that they were excluded from other contemporary pieces of legislation dealing with family issues. The Law Commission did consider carrying out a review of the legal position of unmarried couples at this time, but decided against it on the grounds that the topic was one ‘largely governed by considerations of social and financial policy.’ And in the 1980s there was a shift in social policy that led to limits being placed on a number of the doctrines developed in the previous decade. The few reforms benefiting cohabiting couples to be passed by the Conservative administration of the time focused on the established categories of the bereaved cohabitant and the victim of domestic violence (and even this was controversial, as evidenced by the reaction to the Family Homes and Domestic Violence Bill in 1995). By contrast, those living with a bankrupt were – contrary to the recommendations of the Cork Report – not included within the scope of new rules protecting the family home. Moreover, same sex relationships were specifically stigmatised as ‘pretended family relationships’ by s 28 of the Local Government Act 1988.

The 1980s did, however, witness a number of developments affecting cohabitants in their role as parents. The Family Law Reform Act 1987 removed most of the negative legal consequences of being born outside marriage, while the Children Act 1989 marked a decisive shift away from marriage to parenthood as the basis for rights and responsibilities. The desirability of assisting cohabiting couples to have children was, however, a much more contested issue. The appropriate status of the male partner of a woman receiving fertility treatment was not even considered in the original draft of the Human Fertilisation and Embryology Bill, and when a clause dealing with the

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35 See eg Cooke v Head [1972] 2 All ER 38.
37 For example, the Fatal Accidents Act 1976 and the Domestic Proceedings and Magistrates’ Courts Act 1978.
40 See eg the Administration of Justice Act 1982, defining cohabitants as dependants for the purposes of the Fatal Accidents Act 1976; Law Reform (Succession) Act 1995, amending the Inheritance (Provision for Family and Dependants) Act and obviating the need for cohabitants to bring themselves within the concept of ‘dependant’.
41 S Doughty, ‘Anger at Bill to “sabotage” marriage’ (1995); W Oddie, ‘How could MPs fail to spot this blow to marriage?’ Daily Mail 23 October 1995.
issue was introduced it was with the grudging message that it ‘should not be seen as encouraging unmarried people to use infertility treatments’.

At the start of the twenty-first century the focus shifted to those who could not marry: same sex couples were accepted as members of each other’s family in Fitzpatrick v Sterling Housing Association, while in Ghaidan v Mendoza the House of Lords was willing to accept that such couples could be described as living together ‘as husband and wife’. The Civil Partnership Act 2004 provided same sex couples with a means of formalising their relationship and thereby acquiring virtually the same rights and responsibilities as married couples; and in 2014 same-sex couples were finally able to marry, following the passage of the Marriage (Same Sex Couples) Act 2013.

Yet although the Civil Partnership Act also removed differences in treatment between same-sex and opposite-sex cohabitants, the legal regime to which they were subject was far from comprehensive. The fact that no provision had been made for cohabitants provoked new calls for reform, and in 2005 the Law Commission began a project examining the legal consequences of relationship breakdown for cohabiting couples.

A substantial consultation paper was produced with impressive swiftness and thoroughness, and in 2007 the Law Commission set out its recommendations. The key features of the recommended scheme were that cohabiting couples who had satisfied certain eligibility criteria (basically, having had a child together or having lived together for a certain period) should be able to apply for financial relief on separation unless they had specifically opted out of the scheme. The applicant would also have to prove that he or she had experienced economic disadvantage and/or that the respondent had a retained benefit as a result of the applicant’s ‘qualifying’ contributions – these being defined as ‘any contribution arising from the cohabiting relationship which is made to the parties’ shared lives or to the welfare of members of their families’. The level of financial relief would then be determined by the court first reversing the retained benefit and then sharing any remaining economic disadvantage, but in both cases only in so far as it deemed this ‘reasonable and practicable’, having regard to a list of discretionary factors (including the welfare of any minor children, the financial needs, obligations and resources of both parties, and their conduct).

In March 2008, the then Government indicated that it would examine the operation of similar principles in Scotland before deciding whether the scheme should be introduced in England and Wales, and in 2011, the coalition Government that had been elected in 2011 announced that it did not intend to...
take forward the Law Commission’s recommendations for reform during its
existing term in office. Subsequent Conservative governments have not
indicated any intention to do so either.

Subsequently, in a review of the law relating to intestacy and family provision
claims, the Law Commission further recommended that a surviving cohabitant
should automatically be entitled to receive a share of the deceased’s estate
under the intestacy rules. It was proposed that a cohabitant of five years’
standing should receive the same as a spouse. Where the cohabiting
relationship had lasted between two and five years, the survivor would receive
50 per cent of what a spouse would have received. However, if the couple had
had a child together, the surviving cohabitant should automatically receive the
same as a spouse would have done, regardless of the duration of the
relationship. The Cohabitants (Inheritance) Bill 2012 sought to give effect to
these proposals, but failed to proceed beyond a second reading.

Since then there have been a number of bills introduced by private members
advocating the implementation of these proposals, but in the absence of
government support legislative reform seems unlikely at the present moment.

THE COHABITANT AS CLIENT

In the meantime, one challenge for the lawyer in this context may be the very
basic one of disabusing their clients of the belief that cohabitation already
entails certain legal rights and responsibilities. A survey carried out in 2000
found that 56 per cent of the general population, and 59 per cent of cohabiting
couples, believed that cohabiting couples had a ‘common-law marriage’, which
conferred the same rights as if they were married. The Living Together
Campaign (funded by the then Department of Constitutional Affairs) was
subsequently launched to inform cohabitants of their (lack of) rights. That it
enjoyed only modest success in dispelling the common law marriage myth is
clear from a subsequent study. This found that the numbers believing in the
existence of common law marriage fell slightly (to 51 per cent of the general
population and 53 per cent of cohabitants), but that belief was being replaced
by uncertainty rather than by knowledge of the correct legal position, the
percentage who were unsure of the legal position having risen from 6 per cent

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51 Law Commission, Intestacy and Family Provision Claims on Death, Consultation Paper
No 191.
52 See http://services.parliament.uk/bills/2012-13/inheritancecohabitants.html.
53 A Barlow, S Duncan, G James and A Park, ‘Just a piece of paper? Marriage and cohabitation
in Britain’ in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds), British social
in the earlier study to 10 per cent in the later one. Subsequent research has confirmed ‘substantial and ongoing public misunderstanding of cohabitation law’.

Such uncertainty – and the persisting belief in common law marriage – may in part be due to the way in which cohabitation is discussed in the media. It was during the late 1970s – when discussions of the new legal rights being conferred on cohabitants regularly overstated the extent of legal protection – that the common law marriage myth emerged. And today, for every article highlighting the fact that there is no such thing as common law marriage, there are many more using terms such as ‘common law wife’ or ‘common law husband’ to refer to cohabiting individuals. And the tendency to present proposals for reform as presaging imminent change may well lead couples to believe that, even if they do not yet enjoy legal rights, they soon will.

Couples who believe that they already enjoy legal rights are by definition unlikely to seek advice as to how to acquire them. But even those who do not believe that they are protected by a common law marriage do not always take steps to put matters on a legal footing by making contracts, declarations of trust, or wills. Many are put off by the perceived cost of legal advice; others fall prey to an ‘optimism bias’, believing that their relationship will endure. Even those who are involved in a legal transaction – for example the purchase of a home in joint names – often misunderstand the advice that they are given or are not made aware of its potential implications for their future relationship.

It should also be noted that the fact that an individual does not believe in common law marriage does not necessarily mean that they have a correct understanding of the law. Here, again, the presentation of the issue in the media may play a part. Articles debunking the common law marriage myth tend to emphasise cohabitants’ lack of legal rights and rarely draw attention to the rights that they do enjoy. This may go some way to explaining why cohabitants are far less likely than married couples to seek legal advice upon

54 A Barlow, C Burgoyne, E Clery and J Smithson, ‘Cohabitation and the law: myths, money and the media’ in A Park, J Curtice, K Thompson, M Phillips and E Clery (eds), British social attitudes – the 24th report (2008).
relationship breakdown: if they believe that they have no legal rights then there will be no reason for them to consult a solicitor.

For those that do make it through the doors of a solicitor’s office, it is clearly essential that they obtain accurate and comprehensive advice as to the legal options that are available to them. It is the aim of the chapters that follow to assist in the task of providing such advice.

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