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**INTERNATIONAL FAMILY LAW REPORT:  
THE COHABITATION CONUNDRUM**



**COHABITATION IS THE FASTEST GROWING FAMILY TYPE IN THE UK. IN 2021, THERE WERE 3.6 MILLION OPPOSITE SEX COHABITING COUPLES IN ENGLAND AND WALES, UP 144% FROM 1.5 MILLION IN 1996**

**(OFFICE FOR NATIONAL STATISTICS 2022).**

## INTRODUCTION

**For literally decades there have been calls for reform of the way the law in England and Wales treats unmarried cohabitants when their relationship breaks down. They have none of the rights which married people have on divorce. This lack of rights disproportionately affects the weaker party in the relationship, particularly if a couple has children. The so-called “parental penalty” is much more severe for a woman with children whose cohabiting relationship breaks down than it would be for a married woman with children getting divorced.**

Our previous International Family Law Reports examined approaches to spousal maintenance, international relocation of children and ‘no fault’ divorce internationally. This report provides analysis of the position on cohabitation in England and Wales and the current state of play around the world.

Cohabitation is the fastest growing family type in the UK. In 2021, there were 3.6 million opposite sex cohabiting couples in England and Wales, up 144% from 1.5 million in 1996 (Office for National Statistics 2022). In the same year, more than half the children born in England and Wales were born to mothers who were not married or in a civil partnership with their fathers. In 2022 families in which the mother and father lived together but were not married made up 18% of all families and accounted for three-quarters of the total growth in the number of families in the UK in the last 10 years.

Some politicians have suggested that giving rights to unmarried couples would undermine marriage, but this argument is unconvincing. Even in the absence of rights for cohabitants the number of people choosing to marry is declining, and the number of people choosing to cohabit is increasing.

In the most recent British Social Attitudes Survey, published in September 2023, 81% of respondents said it was acceptable for a couple to live together without being married, and only 24% thought a couple wanting children should get married. In its previous survey, published in 2019, it was reported that nearly half the population in England and Wales (46%) believe that unmarried cohabitants have something called a “common law marriage” which gives them the same rights as married couples. They don’t – there is no such thing as a “common law marriage”. Clearly, however, there is an expectation that living together in a committed relationship gives rise to legal consequences if the relationship breaks down. This level of mass misunderstanding means that those who experience relationship breakdown are unprepared for the significant life-long disadvantages that can follow.

The two other common law jurisdictions in Europe, Scotland and Ireland, have introduced legislation to provide financial provision remedies when a cohabiting relationship breaks down, but the law in England and Wales lags behind. We have legislated to allow same sex partners to marry and be treated equally to married opposite sex couples, but the law ignores the ever-growing number of opposite and same sex people who choose to cohabit rather than marry.

Back in 2007 the Law Commission of England and Wales recommended legislation to give rights to separating unmarried cohabitants, more limited than the rights of separating married people, focusing on remedying relationship generated disadvantage. Family lawyers, charities working with families and academics supported the recommendations, but political support was limited. The government of the time decided to await research into the outcome of implementation of law reform for cohabitants in Scotland. That research was duly produced. However, no further action was taken.

Much more recently, the issue again came to prominence on the political agenda. In August 2022, a cross party group of MPs, the House of Commons Women and Equalities Committee, published its report on the rights of cohabiting partners. The report was firm in its recommendation of the urgent need for both reform of the law (it recommended following the Law Commission’s recommendations referred to above) and more education for the public about the true legal position of cohabitants. The Conservative chair of the committee, Caroline Nokes MP, said “The reality of modern relationships is that many of us choose.....not to get married even when in a committed long-term relationship. This number is ever growing and it is high time the government recognised the shift in social norms.....The law has been left decades behind so far as cohabitation is concerned.....Deciding not to marry is a valid choice and not one which should be penalised in law.....” The government did not accept the committee’s recommendation, but the campaign for law reform continues.

In October 2023, the Labour Party’s Shadow Attorney General made a speech at the party conference stating that cohabitation law reform would form an important part of a Labour government programme for law reform. Only time will tell if something concrete will come from this. In the meantime, separating cohabitants, who have not had the advice and foresight to protect their financial position before or during their relationship, will continue to experience the often bleak financial landscape that awaits them when it breaks down.

## ENGLAND & WALES: WHERE ARE WE NOW?

As it stands, the law in England and Wales does not make any specific provision for those leaving unmarried cohabiting relationships. Instead, people find themselves reliant on a piecemeal selection of legislation covering property ownership and financial provision for children.

### PROPERTY

Unlike the situation for married couples, interest in property between unmarried couples is governed by general property law. A cohabitant may have an interest in a property by way of being a joint legal owner of it or, if it is owned in the sole name of their partner, under a trust. If the property is jointly owned the extent of each partner's interest is likely to be in accordance with the legal title, i.e. equal if they own as joint tenants or tenants in common with specified equal shares, or unequally.

If a cohabitant believes that the legal title does not accurately reflect their beneficial interest a claim can be made under the Trusts of Land and Appointment of Trustees Act 1996. There may be an express declaration of a trust in favour of the non-legal owner of the property, or a cohabitant may have the more difficult task of establishing a trust which has not been expressly declared, by showing:

1. they made a contribution to the purchase and both parties agreed that they would have a beneficial interest, or
2. they both agreed that the non-owner would have a beneficial interest and they acted on that agreement and suffered a loss as a result or
3. the legal owner led them to believe that they would have a beneficial interest and they relied on that belief and suffered some loss.

In any case, establishing an interest in a solely owned property is a difficult and uncertain process.

### CHILDREN

Although separating unmarried parents cannot, in England and Wales, make claims for financial support for themselves they can bring claims on behalf of dependent children. In most cases child maintenance is dealt with by the Child Maintenance Service (CMS) and is calculated according to a fixed formula. If the CMS does not have jurisdiction (for example because the child and/or non-resident parent lives abroad), or the paying party's income exceeds the CMS maximum (and for some other special categories of expenses) the court can order ongoing child maintenance.

In addition to child maintenance the courts are able to order lump sum payments specifically for child related expenses and make property available to house a child and the resident parent under Schedule 1 of the Children Act 1989. Such provision can be extremely helpful in the short term but it will end, and any property will revert to the non-resident parent, when the children grow up.

## OUR RESEARCH

**Our team examined a large number of jurisdictions spanning the globe to create a picture of specific legal provision for cohabiting couples on relationship breakdown. We were looking for distinct cohabitation laws that should, in theory, make it more straightforward for cohabiting couples to deal with finances, property and other assets, and agree on arrangements for children, when they separate.**

In particular, the analysis was focused on finding out which jurisdictions provide for this without the couple having to take any proactive steps when they are still together, such as formally registering the relationship or signing a cohabitation agreement. The benchmark being only a need to provide evidence of a genuine domestic relationship with shared finances and responsibilities – in other words, the much misunderstood concept of common law marriage.

We selected a number of representative jurisdictions to appear in our maps on pages 8 to 11.

In broad terms, our research shows that while there is general consensus on financial provision to protect children when a cohabiting couple separates, very few jurisdictions have unambiguous provision for the separating parties themselves. The information we have highlighted for each jurisdiction clearly demonstrates the piecemeal approach most cohabiting couples must resort to if they separate.

There are a small number of exceptions. Australia stands out as a clear pioneer: thanks to a law enacted in 1975, same-sex and opposite-sex cohabiting couples in de facto relationships have had, largely, the same rights as married couples for nearly 50 years. Its neighbour New Zealand followed with a similar Act in 1976.

10,000 miles away, in Brazil, the law provides for unmarried couples who are in a 'stable union'. Some couples choose to expressly declare their relationship, but it is not necessary to do so to make a financial claim on separation.

In Israel, as marriage is not possible for many couples (only opposite sex couples, who are citizens and residents and share the same religion can have a religious marriage), those who live together and share financial responsibilities as a family unit can constitute a common law marriage. These couples have mutual rights and obligations to each other that are very similar to those of a married couple.

Much closer to home, The Family Law (Scotland) Act 2006 provides a mechanism for cohabitees to apply for financial provision if they separate or if one half of the couple dies intestate. To qualify, applications must be made within one year of separation or of the death of one party. Rights are less generous than for divorcees, but some capital provision is available to compensate for economic disadvantage in certain circumstances.

Similarly, in the Republic of Ireland, the law provides for unmarried couples who are 'qualified cohabitants'. Couples can apply to court for financial relief through a number of orders, but they are not as extensive as those available to married couples or civil partners.

Outside of this modest group, couples face a patchwork of different approaches, mostly calling on other areas of law to find solutions following separation. Even in jurisdictions where social norms and attitudes are generally perceived as progressive, the law lags behind.

This is certainly the case in England & Wales, where, as set out in the box on page 4, anyone attempting to pursue a claim faces many challenges in comparison to their married counterparts. As explained earlier, this has long spurred different groups to campaign for change so that protection for the financially weaker party is the default provision.

## IMPLICATIONS FOR COHABITING COUPLES IN ENGLAND AND WALES: FAMILY LAW AND BEYOND

**Some of the wider implications for cohabiting couples are illustrated in the case study of [Lara and Joe](#).**

### LACK OF LEGAL RECOGNITION

Cohabitation is not formally recognised as a legal status. A couple can formalise their cohabiting status between themselves by entering into a binding cohabitation agreement and make a declaration of trust which sets out how they share their property, but there is no formal way to declare that they are an established cohabiting family unit. This contrasts with other jurisdictions where registration provides legal recognition, such as in Greece and Spain.

### IMMIGRATION

Cohabitees in England and Wales may be eligible to apply for an Unmarried Partner Visa but will have to meet certain requirements and in most circumstances will have to evidence to the Home Office that they have been living together at the same address for at least two years.

A spouse/civil partner has an automatic right to apply as a dependent on their husband or wife's or civil partner's visa. In contrast, in Australia, a Partner Visa is available to both married and de facto partners, with de facto partners required to demonstrate 12 months' cohabitation immediately prior to lodging the application.

### NEXT OF KIN AND DECISION-MAKING

There is no legally defined term for next of kin in England and Wales but the term is frequently used in hospitals and seen as an entitlement to receive information in relation to someone's care.

A cohabitee is not treated as a next of kin irrespective of how long they have lived together. Cohabitees need to enter into an express agreement to be treated as a next of kin such as by making a Lasting Power of Attorney (LPA). An LPA will

give the cohabitee the power to make decisions relating to health, welfare and property and financial affairs if their partner has an accident or an illness which means they cannot make decisions themselves.

A spouse is automatically considered to be the next of kin in the absence of a contrary statement. However, it is still recommended that married couples make Lasting Powers of Attorney to ensure that their wishes are adhered to in the event that they are incapacitated.

### DEATH










If no provision has been made for a cohabitant in a will, they have no automatic entitlement to receive anything from their deceased partner's estate. If they have lived together for two years prior to the spouse's death, they are entitled to make a claim under the Inheritance (Provision for Family and Dependents) Act 1975. for limited financial provision. Claims can only be made if the deceased was domiciled in England & Wales and must be made within six months of the grant of probate.

In contrast, if a spouse dies without a will (intestate) the surviving spouse has an automatic entitlement to receive the first £322,000 from the deceased spouse's estate and half of the remainder of the estate. The rest of the estate will pass to any children, grandchildren or great grandchildren. If insufficient provision is made for a spouse in the will that spouse can apply under the Inheritance (Provision for Family and Dependents) Act 1975 for additional financial support on a wider basis than that available for non-spouses.

International cohabiting couples will have to take local advice on this issue as the legal position varies. For example, Israel's Succession Law 1965 gives a surviving common law spouse the same rights to inherit from their partner as a legally married spouse.

# LIFETIME COMPARATOR CASE STUDY

Ben and Hannah are an opposite sex couple born and living in England and Wales. They meet at university where both are studying with the intention of pursuing professional careers and begin a relationship. The following timeline demonstrates the impact of marrying or not throughout their lives.

LIFESTAGE									
	Ben and Hannah leave university and begin graduate training schemes.	Ben and Hannah finish their graduate training schemes and begin permanent jobs in the City. Ben purchases a flat (2b Tower Mansions) in his sole name and they move into it.	Ben and Hannah welcome their first child, a son James. Following Hannah's maternity leave Ben and Hannah agree that she will reduce her working hours to 3 days per week. Doing so will reduce her income and could harm her prospects of promotion.	Ben and Hannah sell Tower Mansions and buy a bigger property, Hill House. The purchase is funded by the sale proceeds of Tower Mansions and a mortgage in Ben's sole name. It is held in Ben's sole name. He tells Hannah it is easier that way as he is the higher earner.	Hannah gives birth to the couple's second child, a daughter named Eve. Ben and Hannah decide that, due to the cost of child care for two children, it makes financial sense for Hannah to give up work.	Ben works increasingly long hours and Hannah starts an extra-marital relationship with a neighbour. The parties separate. Both children are under 18 years.	James, and later Eve, both go to university. Their parents are very supportive of their further education and wish to help them financially.	Ben and Hannah reach retirement age.	Ben dies.
MARRIED	Ben and Hannah have a joint tenancy on a rented accommodation for which they are jointly and severally liable.	Tower Mansions becomes Ben and Hannah's matrimonial home. Despite the fact that the purchase has been funded solely by Ben and is in his sole name it will be considered by the family courts as integral to the family unit. The court can adjust the legal ownership of the property between Ben and Hannah and the equity would likely be divided equally in the event of a divorce. This could be the case even if the property was purchased prior to their marriage.	As Ben and Hannah are married Ben automatically has parental responsibility for James, as does Hannah. In the event of a divorce Hannah can be compensated for any financial disadvantage she has suffered as a result of the relationship. She may have a claim for spousal maintenance to bridge the gap in her income and her loss of future earning potential can be taken into account in any financial settlement or court award.	As with Tower Mansions, Hill House is treated by the couple as their family home and would be considered to be a matrimonial asset to be divided fairly if they were to divorce.	As with James, Ben automatically has parental responsibility for Eve, as does Hannah. Hannah's relationship generated disadvantage is increased by the decision for her to give up work entirely. If the parties were to divorce that would be taken into account.	Either Ben or Hannah can apply for a divorce, or they can make a joint application. The application will be made on a "no fault" basis with no blame attributable to either party. The parties behaviour (Ben's long hours and Hannah's affair) will also have no impact on the division of finances between them.  Hannah will have financial claims for ongoing income support (maintenance) as well as capital and pension provision. The starting point will be that all matrimonial assets (including Hill House and any capital acquired during the marriage) should be divided equally. Although Hill House is legally owned by Ben, Hannah can register Matrimonial Home Rights against that property to formally register her interest in it and effectively prevent Ben from selling it. If the overall finances allowed she could seek to have that property transferred to her to provide a home for her and the children.  Hannah could expect to receive substantial maintenance both for herself to support her while she cares for the children and possibly retrain to return to work. She will also be entitled to a share of Ben's pension assets by way of a Pension Sharing Order, to provide her with income in retirement.	Provision can be made for James and Eve's university education within a financial settlement. The court can order educational expenses to be met by Ben and a "roofing allowance" can be paid to Hannah to cover the costs of accommodating the children during university holidays.  As Hannah will have received income and capital provision from Ben, and will have been supported in returning to work, she is likely to be in a position to provide financial support to James and Eve during this period.	The Pension Sharing Order Hannah received as part of the divorce settlement will provide her with an income in retirement. The spousal maintenance she received to enable her to retrain and return to work means she has also had a period of time back in the workplace to contribute to her own pension. In addition she may be in a position to downsize as she no longer has to house the children, thereby freeing up further capital.	If Ben were to die while Hannah was still receiving maintenance she could make a claim against his estate under the Inheritance (Provision for Families and Dependants) Act 1975. She may also still be eligible for death in service and pension benefits as a former spouse. If Ben were to die intestate before the divorce was finalised Hannah would automatically inherit part of his estate.
UNMARRIED	Ben and Hannah have a joint tenancy on a rented accommodation for which they are jointly and severally liable.	Tower Mansions legally belongs to Ben. Hannah will be reliant on trust principles if she wants to claim a beneficial interest in it.	If Ben is named as the father on James' birth certificate he will have parental responsibility for James. Otherwise he would need to enter into a parental responsibility agreement with Hannah, or apply for a court order.  If the cohabiting relationship breaks down it is likely that Hannah will be James' resident parent and as such will be able to claim child maintenance from Ben. She may also have claims under Schedule 1 of the Children Act 1989 depending on the level of assets Ben has available to him.	As with Tower Mansions, Hannah has no legal interest in Hill House and would be reliant on trust arguments to establish a beneficial interest.	Ben will have parental responsibility for Eve if he is named on her birth certificate. Otherwise, like with James, he will need an agreement or court order.  If the cohabiting relationship breaks down Hannah will be entitled to child maintenance at a higher rate as there are now two children but financial provision (whether maintenance or capital) will still be limited to that required for the children rather than for Hannah herself. No attempt can be made to compensate Hannah for her loss of career.	Hannah may want to try and make a claim for a beneficial interest in Hill House by way of a trust. As Ben has deliberately kept the properties in his sole name it is unlikely there is an express declaration of trust giving Hannah an interest in Hill House.  As Hannah did not contribute to the purchase she will not be able to show a resulting trust. She may succeed if she can show that she and Ben had a common intention, which was never formally documented, that she should have an interest in the property or that Ben led her to believe that she would have an interest, and in either case that she relied on that to her detriment (for example by using her money to pay for renovations to Hill House rather than purchasing a property of her own etc). This is likely to be an uphill struggle and she may find she has no claim against Hill House at all, despite living in it as her family home for years.  As well as child maintenance for James and Eve Hannah may be able to claim a lump sum for their expenses and/or settlement of property for their use. The success of those claims will really depend on the level of available resources James has. If he does not have sufficient capital to house himself and Hannah in separate properties he will not be ordered to do so. Even if he is able to provide Hannah and the children with housing that will revert to him when the children grow up, leaving Hannah homeless.	Any financial support Ben provides will be for the children, and not for Hannah. While Ben is likely to be in a position to continue to support his now adult children Hannah is unlikely to have the resources to do the same.  Any housing provided by James will be about to come to an end and Hannah's financial propriety will have to be providing for her own future.	Hannah will receive no provision from Ben's pension and child maintenance will have long since ceased. If Hannah was able to secure an interest in Hill House she may have some capital to house herself but if not she is likely to be renting whatever she can afford on her own (limited) pension and state pension provision.	Hannah has no automatic claim on Ben's estate. She may be able to make a claim under the Inheritance (Provision for Families and Dependants) Act 1975 if Ben died during their relationship or if he had continued to maintain her. Given his lack of obligation to do so this seems unlikely.

# COHABITATION: A GLOBAL SNAPSHOT

## Australia



A law from 1975 recognises same-sex and opposite-sex couples provides for cohabitating couples if they are in a *de facto* relationship. This is when: the couple is not married, the couple is not related by family, and they live together on a genuine domestic basis.

There is no minimum duration but cohabitation for at least two years is considered a strong indicator of a *de facto* relationship. Other factors include a sexual relationship, ownership, use and acquisition of property, care and support of children.

Financial claims are broadly equal to those of married couples for both partners and children.

## Brazil



The law provides for unmarried couples in a stable union. These couples share equally any property or assets acquired during their relationship (even if purchased by one person). Any assets owned prior to the relationship, or inherited by one person, are kept separate. The couple can agree alternatives to these arrangements and they can expressly declare that they are in a *stable union* by deed.

If there is no express declaration of a stable union, other evidence as to the quality of the relationship can be relied on. There is no minimum qualifying period for an unmarried relationship required.

## California



There is no legislative provision to provide for cohabittees financially following separation but legally binding cohabitation agreements can be created. Without an agreement, there is no right to a share in property or for income support (alimony). Instead, the courts have developed Marvin Actions to provide financially on separation. Possible causes of action include breach of an express contract (where the couple has entered into a cohabitation agreement) and breach of an implied contract (evidenced by the couple's conduct). If successful, the court can order ongoing income support (alimony) or the division of property between the couple.

## England



There is no legal or financial responsibility which arises from cohabitation. Despite public perception, the law does not recognise *common-law marriage* and does not provide an ex-cohabitee, whether opposite or same-sex, with a share in property or other assets once the relationship ends.

Claims can be made for interest in property and financial provision for children but this is for the benefit of the child and so is limited in scope and duration.

Cohabitees can enter into a cohabitation agreement to set out their intentions in relation to property and any other assets they own if they separate.

## Florida



There is no legislation governing the division of property for unmarried couples on the breakdown of their relationship. It is possible to use trust law principles to establish a claim over property, for example, where a share in that property was promised during the relationship.

Child support does not normally include capital claims or property transfers.

Couples can opt into cohabitation agreements which are legally binding and make provision for the sharing of property and assets.

## France



The civil code will recognise a cohabiting relationship as a *de facto* union but relationships are not regulated. In general, each cohabitant retains full ownership of their separate property. Assets acquired or inherited during the time that the couple are living together remain in the name of the cohabitant who acquired or inherited them.

No provision is made in case of separation or death and no income provision for an ex-cohabitee (alimony) can be sought. A claim for financial compensation may be possible if cohabitation occurred over a long period and one cohabitant benefitted financially.

## Greece



Informal (*de facto cohabitation*) as well as formal cohabitation (formalised by way of a civil union or cohabitation agreement) exist.

*De facto* cohabitation is not subject to any legal provision. No legal or financial responsibility will arise from *de facto* cohabitation.

Informal cohabitants do not enjoy automatic rights to property division or spousal type support. Assets acquired during the time that the couple live together can sometimes be divided between the parties after separation if one of them unfairly benefitted from assets using unjust enrichment arguments.

## Hong Kong



There is no legislation governing the division of property for unmarried couples on separation. Unlike ex-spouses, unmarried couples cannot bring claims for financial support for themselves so there is no opportunity to claim maintenance (alimony), lump sum payments or property transfers. They can only bring a claim under the general law of property or contract.

A variety of financial orders are available for the benefit of children including payment of lump sums, regular income support for the child(ren) and transfer or other settlement of property.

## Israel



Marriage is not possible for a large percentage of couples. Couples who live together and share financial responsibilities as a family unit can constitute a *common law marriage*. Such couples have mutual rights and obligations to each other that are very similar to those of a married couple. They include the right to maintenance (alimony), to pension funds of a deceased partner and to a division of assets accumulated during the relationship.

Couples can enter into cohabitation agreements, which will evidence that a common law marriage exists. However, claims can be made following separation even if no agreement exists.

# COHABITATION: A GLOBAL SNAPSHOT

## Japan



There is no specific legislation available for unmarried separating couples in relation to division of property. However, the law that applies to the division of property for married couples can, according to case law, be applied to *de facto* spouses (but this is defined as couples who live together with the intention of getting married but who have not, at the point of separation, formally registered a marriage).

## New Zealand



*De facto* relationships are recognised by law. They are defined as a relationship between two people (regardless of gender) who live together as a couple and are not married/in a civil union. They have almost identical rights to married and civil union couples.

According to the Property (Relationships) Act 1976, couples who are in a *de facto* relationship for three years or more are entitled to half of the family home and chattels acquired during the relationship.

Spousal maintenance is available under the Family Proceedings Act 1980 but the cohabitants need to have lived together in a *de facto* relationship for three years.

## Republic of Ireland



The law provides for unmarried couples who are *qualified cohabitants*. *Qualified cohabitants* means an unmarried couple who lives together in an intimate relationship for five years, or two years if they have a child together.

Couples who qualify can apply to court for orders which deal with their property, pensions as well as compensatory maintenance and claims relating to the estate of a deceased cohabitant. These orders are not as extensive as those available to married couples or civil partners.

Cohabitants can enter into a written agreement to opt out from the statutory regime.

## Ontario



There is no legislative provision for the division of property for ex-cohabitantes. However, couples can use trust and property law to establish a right over property.

According to Ontario's Family Law Act, ex-cohabitantes are entitled to spousal support if they have lived together as *common law spouses* which means living together continuously for at least three years or having a child together and living in a relationship of some permanence.

Couples can enter into legally binding cohabitation agreements which provide for the sharing of assets and/or support obligations but cannot include child custody or child maintenance.

## Scotland



The Family Law (Scotland) Act 2006 provides a mechanism for cohabitantes (same or opposite sex) to apply for financial provision if they separate. If the court has to decide if a couple have been living together, it will consider: how long they have been cohabiting, the nature of their relationship and extent of any financial arrangements between them.

These rights are less generous than those for divorcees, but some capital provision is available to compensate for any economic disadvantage in certain circumstances. Provision is limited to lump sum payments but reform is proposed to widen the range of available remedies.

## Singapore



There is no legislation that governs division of property for unmarried couples on the breakdown of their relationship and so property and assets of cohabitantes are dealt with under ordinary principles of property law.

Parents, married and unmarried, can apply for maintenance for children in the same way. The available maintenance awards include a monthly allowance or a lump sum although the courts do not generally grant lump sum maintenance for children.

## Spain



Each region has different regulations for cohabitantes. Generally, stable cohabiting relationships can be registered so they are recognised for entering into contracts (e.g. renting property) and financial affairs (opening bank accounts/obtaining loans) as well as claiming widow(er)'s pension rights. There is no minimum period to establish a cohabiting relationship. Cohabitants can create cohabitation agreements to provide some protection on separation/death.

However, there is no legislation to share property or assets following separation. Assets in one party's name will remain in their ownership, even if the other person contributed financially.

However, a family home purchased during cohabitation is considered joint property and each cohabitee owns 50% unless the purchase deed provides otherwise.

## South Africa



No law regulates the rights of cohabiting parties. However, the word spouse has been interpreted to include a cohabitee in relation to damages claims, domestic violence disputes, pension benefits, and medical aid entitlements. To qualify there must be a sexual relationship, a factual cohabiting relationship and a measure of durability and stability.

A cohabitee cannot secure maintenance upon death or separation unless an agreement that it should be paid can be proven.

## Sweden



Specific legislation provides limited protection for cohabiting couples on separation. There must be cohabitation on a permanent basis (the court will consider duration), they must live together as a couple (normally including sexual relations) and share a household including household expenses and chores.

Provision can be made for the division of the home and household goods acquired for joint use. Who paid for the property is not relevant unless the property was owned by one party prior to the cohabitation.

Claims must be made within a year of separation. Cohabitants can agree alternative provision in a cohabitation agreement.

## UAE



Until 2022 it was a criminal offence for men and women who were not married or related to live together (even platonically). However, due to the huge influx of expats in recent years, the civil law has been changed to decriminalise opposite sex cohabitation.

Unmarried couples do not have rights regarding the division of property/assets and are not entitled to financial support from each other for themselves. However, an unmarried mother can claim child maintenance from the father.

## SAME SEX AND OPPOSITE SEX COUPLES

A look across the international legal landscape also reveals a difference in the treatment of same sex and opposite sex unmarried couples in some jurisdictions and a refreshing lack of distinction in others.

In Australia, Brazil, Israel and Sweden, the remedies available for unmarried separating couples apply equally to same sex and opposite sex couples. As there is no civil marriage (as opposed to religious marriage) available in Israel, common law marriage fills the gap. Only opposite sex couples, who are both citizens of and resident in Israel and who share the same religion, can have a religious marriage. Common law marriage is therefore used by same sex, inter-faith and multi-national couples.

In contrast the provisions for division of property between de facto spouses in Japan do not apply to same sex couples and the Japanese courts have been seen to deny the division of property on the breakdown of a same sex relationship.

In South Africa, due to laws that pre-date the introduction of same sex marriage, a cohabitee in a same sex relationship can inherit from a partner who dies intestate if the permanence of their relationship and reciprocal support obligations can be established. The same is not true of unmarried opposite sex couples although there is talk of reform.

## RELIGIOUS MARRIAGES

Nearly every country in Europe and beyond has experienced a decline in rates of marriage and increases in cohabitation and people having children outside of marriage. In religious communities, marriage remains important but not all religious marriages carry legal status meaning that some couples can become unintentional cohabitants with serious financial consequences.

For a marriage to carry legal status in England & Wales it is not sufficient for there to have simply been a religious ceremony if the civil formalities have not been complied with and non-legally binding religious marriages are fraught with legal difficulties. It is thought that almost two-thirds of Muslim couples, for example, do not legalise their marriage with a separate

legal ceremony. Sometimes this is intentional, and used as a way of achieving acceptance of a cohabiting relationship in the religious community but often is due to a misunderstanding of the formalities of a legally binding marriage. It is unclear how many women are aware that their religious marriage ceremony carries no legal status. It has been reported that some men use this knowledge to their advantage as a form of asset protection and avoid legalising their marriage intentionally to leave their partner without any claims for financial support. This has consequences beyond divorce, leaving religious couples who have not attended a civil ceremony unable to benefit from the rules of intestacy in the event of death.

Difficulties can also arise when a couple marry outside of this jurisdiction. In the case of *Tousi v Gayukova* [2023] EWHC 404 (Fam), in which a Ukrainian couple wrongly believed themselves to have been married for over 20 years, retiring High Court judge,

## UNMARRIED FATHERS

The ripple effects of remaining unmarried in a relationship go beyond the financial. In England and Wales (and in Scotland), a married father will automatically acquire parental responsibility for a child born to that marriage. An unmarried father however will only acquire parental responsibility if he is registered as the father on the birth certificate, has entered into an agreement with the mother, or following a court order. Unlike a married father, in England and Wales, his parental responsibility can also be revoked by the court if it is felt to be in the child's best interests.

Similarly in other jurisdictions (Hong Kong, Japan, and, perhaps surprisingly, Sweden) if the parents of a child are not married the mother will have automatic custody of the child and the unmarried father will need to take steps (through court, agreement or otherwise) to obtain rights and responsibilities for the child.

In Greece the parental care and custody of a minor child born to unmarried parents belongs to the child's mother but a father who has acknowledged paternity, either voluntarily or by court proceedings, will have equal parental rights conferred on them.

At the other end of the scale, in Australia, children born to de facto partners are recognised as children of both partners under legislation and treated no differently to those born to married partners.

Mr Justice Mostyn, arguably England and Wales' most outspoken judge expressed his concern for religious marriages, most frequently Islamic, not carrying any legal standing and described the situation as "a disreputable mess and urgently needs to be definitively clarified both substantively and procedurally".

Once again, the common theme emerges that women, particularly those from minority groups, are disadvantaged by an unwillingness in this jurisdiction to adopt a discretionary approach in an outdated legal structure. Contrast this to the position in California where a "putative spouse", i.e., a party who genuinely, but wrongly, believes they are married can establish property rights as if they were, in fact, married.

## DOWN UNDER: HENRY AND CLARE'S CASE STUDY

Henry and Claire are both British nationals. They met in London in 2012 when they were both in their twenties. Claire is a doctor and Henry has a successful and lucrative career in private equity.

In 2014, Claire and Henry took advantage of Australia's call for British doctors to come and work there. Henry was fortunate in being able to continue his private equity career in Sydney and Claire was promoted to consultant at St Vincent's Hospital. The couple soon felt that Sydney was their home and put down roots, buying their first home together, a luxurious \$4,000,000 house in the Sydney suburbs. Henry contributed the entire purchase price of the home and the home was therefore placed in his sole name. Two years later, Claire was diagnosed with a health condition and she and Henry decided that she should stop work and focus on her health as they also began to think about starting a family.

Unfortunately, Claire and Henry decided to separate ten years later, while still living in Sydney. Henry was of the view that as Claire was not a joint owner of the family home and did not make a financial contribution, she should not have any interest in the property. Claire did not consider this to be fair. They had jointly agreed that she should stop working to focus on her health. She had not worked in a healthcare setting for a decade and it would be extremely difficult for her to find work and rehouse herself.

In Australia, the Family Law Amendment (De Facto Financial Matters and Other Measures) Act (FLA) came into effect in 2009 and, as a result, Claire was able to make a financial application to the Court. Whilst Claire and Henry had not registered their relationship, the FLA applies automatically if any of the following circumstances are applicable:

- the duration of the relationship is at least two years
- there is a child of the relationship
- a failure to consider the applicant's contributions would result in injustice.

As a result of the FLA legislation, Claire was successful in an application for the family home to be sold and she received 50% of the proceeds of sale. She was able to apply that money to buy a two bedroom home for herself and used the remainder to meet her day to day needs while she transitioned back to work.

This outcome would have been radically different had Claire returned home to England when her father fell ill two years before her relationship with Henry broke down. At that time Claire and Henry's relationship was already struggling under the pressures of fertility problems and Henry's very intense job. Claire and Henry had considered selling up in Australia and returning home to England and for Henry to buy a property in Somerset, close to Claire's parents, so she could be near to her father who had been diagnosed with a terminal illness.

Had Claire and Henry taken that step, Claire would have had no family law protection in England. The rights that she had in Australia would not have travelled with her and she would not have been able to make any claims against Henry for financial support. As a cohabitant in England and Wales, Claire's only remedies would be using general property and trusts law and it is likely that Claire would have been left without a share of either Henry's capital accrued during the relationship or a share of his income.

# WHAT NEXT FOR ENGLAND & WALES?

**Our sample of jurisdictions suggests that there has been little real progress in cohabitation law for 50 years, despite a significant increase in cohabitation. Our previous International Family Law Report showed that divorce law in England & Wales was not fit for purpose compared to many jurisdictions globally. Last year, a new act reformed the process. In contrast, when it comes to unmarried couples, there is a clear opportunity for England & Wales to take the lead on legal reform to ensure we meet the needs of the fastest growing family type.**

For nearly a quarter of a century, divorce law has not differentiated between the 'breadwinner' and the 'homemaker' because that has been considered gender discriminatory, and therefore not a fair or equitable way to approach the division of finances following the breakdown of a long-term relationship. The same does not currently apply for millions of cohabitants; in fact, the gender discriminatory consequences of separation are often much magnified for the financially weaker cohabiting party - at the time of separation and beyond. Meanwhile, those living together in marriage-like family units rarely take legal advice to proactively safeguard their futures and the majority continue to believe in common-law marriage rights.

As active members of Resolution, the national community of family justice professionals committed to adopting a constructive approach to family law problems, the lawyers who have worked on this report are very pleased to support the launch of a *Vision for Family Justice*. Published in November 2023, this is a blueprint for a future family justice system, advocating positive change to protect unmarried couples.

A key component of any reform in this area must be to ensure that there is, by default, legal protection for cohabitants, subject to certain criteria in the relationship being met. We know from research undertaken by *The Fair Shares Project* that a minority of separating couples access legal advice, so to meet modern needs, any protection needs to be in place automatically. It must be consumer-friendly and cost-effective; a simple framework for those who need to engage with and rely on it. This would be a world away from the patchwork of disjointed laws and partial remedies many have to resort to currently.

However, one size does not fit all and the autonomy to 'opt out' and agree alternative financial arrangements must be available. This would align the choices available to unmarried couples in England & Wales with those open to spouses and civil partners entering into pre-marital and pre-partnership agreements and is the approach taken by many of the jurisdictions that already make provision for cohabiting couples. New laws will need to cater for international families with assets in more than one jurisdiction and the enforcements difficulties which can arise in such cases.

A potential change in government within the next 12 months may bring the renewed prospect of reform. We look forward to contributing to the ongoing conversation to ensure our legal system meets the needs and values of the society it serves.

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AS IT STANDS, THE LAW IN ENGLAND AND WALES DOES NOT MAKE ANY SPECIFIC PROVISION FOR THOSE LEAVING UNMARRIED COHABITING RELATIONSHIPS. INSTEAD, PEOPLE FIND THEMSELVES RELIANT ON A PIECEMEAL SELECTION OF LEGISLATION COVERING PROPERTY OWNERSHIP AND FINANCIAL PROVISION FOR CHILDREN.







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