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Cohabiting relationships, money and property: The legal backdrop

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Abstract

Unlike most European jurisdictions where the law imposes a system of 'community of property', in English law marrying or entering a civil partnership has no legal effect on a couple's property. Neither does cohabitation. However, on relationship breakdown family law provides for redistribution of income and assets between the parties for those divorcing or dissolving their civil partnership at the court's discretion. Yet for separating cohabiting couples, a more rigid property law determines the outcome irrespective of the couple's financial practices during the relationship. At a time when there is a call for greater harmonisation of Family Law within Europe, the English Law Commission are considering reform of the law relating to financial provision for cohabiting couples.

Drawing on empirical research into attitudes towards community of property, this article considers how far the current legal treatment of money and relationships remains appropriate to 21st century coupledom.

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1. Introduction

The legal regulation of property and money within intimate couple relationships is subject to the frequent challenges posed by changing social norms. Family law has long been charged with resolving the disputes which the mixing of sex and money tends to provoke especially when relationships break down. However, across the western world in recent times it has been trying to shake free from its patriarchal roots and react appropriately to the move away from

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marriage-centred and gender stereo-typed roles for men and women within families. A parallel development is its acceptance of same-sex relationships as a family form within our society. The conflicting themes within these debates are gender equality (e.g. Deech, 1996; Diduck and Orton, 1994), the protective function of family law (e.g. Maclean and Eekelaar, 1997; Fineman, 1995) and the right to make autonomous choices (e.g. Freeman, 1984). These are explored below in the context of family law's search for the best way to regulate couples, their money and their property in England and Wales and whether there are lessons to be learned from Europe.

Let us first outline the legal and demographic context to the regulation of couple finances in Europe. Broadly speaking, Western Europe is experiencing a decline in marriage and rises in divorce, heterosexual cohabitation and births outside marriage (see e.g. Kiernan, 2004) yet legal regulation remains marriage-centred. At the same time, most West European states now recognise same-sex couples who, depending on the jurisdiction, can either marry and/or enter into registered partnerships giving them the same or similar rights as married couples (see Boele-Woelki and Fuchs, 2003; Curry-Sumner, 2005). A minority of European states also allow heterosexual couples to register civil partnerships. Regulation of money and property within couple relationships tends to be concentrated on married and registered relationships in European jurisdictions. Informal cohabitation has nowhere in Europe achieved the presumptive marriage-equivalence found in Australia, Canada and New Zealand[1] although as explored below, English[2] law has adopted this presumptive and protective approach in some legal contexts but not, confusingly, in others.

In contrast to its European neighbours, in England and Wales marriage or registering a same-sex civil partnership has no direct effect on a couple's property which continues to be owned separately unless specifically purchased jointly. At the point of divorce (or civil partnership dissolution) though, the court has wide discretionary powers to redistribute income and capital assets to achieve a fair outcome between the parties. The rationale for this is to protect the weaker economic family members – typically women and children – and balance non-financial contributions to family life against financial contributions when things go wrong. In all European Union states other than the common law jurisdictions of the UK, Ireland and Malta, marriage and civil partnership registration do have an automatic effect on the property rights of the couple unless they opt out of the default community of property regime imposed by law. However, the wide variety of 'community of property' regimes within Europe together with the very different common law approach has led to consideration of harmonisation of family law including the possibility of a generic European community of property regime by the European Commission (see McGlynn, 2001; European Commission, 2006).

By way of contrast, the position of informal cohabiting couples has yet to be addressed at a European level despite the demographic drift away from marriage and into cohabitation. In Britain, though, this is a matter of live debate and one which is heightened by the fact that research has shown that many cohabiting couples falsely believe they have the same legal rights as married couples—the so-called 'common law marriage myth' (Barlow et al., 2001, 2005; Barlow, 2002). Legal reform has recently been enacted in Scotland (see Family Law (Scotland) Act, 2006) and is currently under consideration by the Law Commission for England and Wales (the Law Commission) (see Law Commission, 2006).

[1] See for example the New South Wales De Facto Relationships Act 1984 used as a model in many other Australian states; for Canada see constitutional challenges in Miron v Trudel (1995 marital status) and cf. Walsh v Bona (2000) 5 RFL (5th) 188 and in trust law, Peter v Beblow (1993) 1 SCR 980; in New Zealand see Property (Relationships) Act 1976.

[2] Note that within the UK there are three separate family law jurisdictions—Scotland, Northern Ireland and England and Wales.