Written evidence from Juliet Brook, Portsmouth University [HAB0295]

Property Issues Arising on Death of a Cohabiting Partner

I have no doubt that you will be presented with a large amount of evidence of the issues arising for cohabitees on separation. As a lecturer in Succession Law, I would like to submit evidence that focuses on the issues arising for cohabitees on the death of their partner. The particular purpose of this submission is to highlight the inequality of cohabitees in relation to the family home, due to both the intestacy provisions and the Inheritance Tax regime.

Since the two landmark cases of *Stack v Dowden*[1] and *Jones v Kernott*[2], there has been greater awareness amongst legal advisers of the need to discuss forms of co ownership with cohabitants when they purchase a property. Indeed, following those cases, many cohabitees will have been advised that ownership of the family home as tenants in common is more appropriate than owning as joint tenants. A tenancy in common enables each cohabitant to protect their financial contribution to the purchase price, and leave their share of the property by will to whomever they choose. Unfortunately, one consequence of this is that, on death, the surviving cohabitee has an increased risk of losing their home.

If cohabitees own their home as tenants in common, then on the death of one, their share will pass according to their will or intestacy. Cohabitees have no entitlement their partner's property under the intestacy rules so, unless the deceased made a valid will, their share of the property would pass automatically to the deceased's children, parents, siblings or remoter relations. The result will be that the surviving cohabitee will be the legal owner of the home, but may hold it on trust for themselves and other beneficiaries. This would leave the deceased at risk of being subject to an order to sell the property (under s 14 Trusts of Land and Appointments of Trustees Act 1996), so that these other beneficiaries can receive their inheritance.

The arguments for, and against, extending the intestacy provisions to include cohabitants (and proposed definitions of 'cohabitant') were set out in detail by the Law Commission in Chapter 8 of their 2011 Report 'Intestacy and Family Provision Claims on Death' (Law Com. No. 331), and their subsequent recommendation was to extend the intestacy rights to cohabitees. Unfortunately, successive Governments have refused to implement the Law Commission's recommendations in this regard, leaving many cohabitees with no option by to bring a claim against the estate of their deceased partner under the Inheritance (Provision for Family and Dependants) Act 1975.

However, even if the deceased has made a will that leaves their share in the family home to the surviving cohabitee, the Inheritance Tax burden that accompanies this could make retention of the home unaffordable. Although there is a right to pay Inheritance Tax due on property in instalments over a ten-year period, this attracts interest, and requires the surviving cohabitee to have sufficient spare income to cover the Inheritance Tax. As the surviving cohabitee does not have the same rights to their deceased partner's pension, their financial situation may be very precarious.

Contrast this with the situation faced by spouses or civil partners. The intestacy entitlements for spouses and civil partners differ depending on whether or not the deceased had children, but for the majority of estates, the spouse will be the sole beneficiary.[3] If the deceased was survived by their

[1] *Stack v Dowden* [2007] UKHL 17

[2] *Jones v Kernott* [2011] UKSC 53

[3] The Law Commission's 2011 Report suggested that the surviving spouse / civil partner will inherit the whole estate in at least 90% of cases - 'Intestacy and Family Provision Claims on Death' (Law Com. No. 331), para [2.6].

spouse / civil partner and issue, and their estate exceeds £270,000, then, by s 46 Administration of Estates Act 1925, their spouse / civil partner will be entitled to:

- The deceased's Personal Chattels
- A statutory legacy of £270,000
- Half of the residue

The remaining half of the residue would pass to the issue.

Although, for these larger value estates, the surviving spouse / civil partner would not receive the whole estate, the effect of various other provisions provides a degree of protection for the surviving spouse / civil partner's home. First of all, the spouse / civil partner has the right to appropriate this under Schedule 2 of the Intestates Estates Act 1952, either in full or partial satisfaction of their intestacy entitlement. Secondly, even if the value of the home exceeds the spouse / civil partner's entitlement on intestacy, their rights in respect of the deceased's pension, together with the fact that their inheritance under the intestacy provisions is not liable to Inheritance Tax, will ensure that the spouse / civil partner has a reasonable chance of being able to afford to pay any necessary 'equality money' to complete the purchase of the share of the property owned by the deceased.

Four examples that highlight the inequality are shown below.

Example 1

A and B are cohabitants, who own their house (valued at £300,000) as tenants in common. The equity is divided as to 60% to A and 40% to B, to reflect their unequal contributions to the initial deposit and subsequent mortgage payments. Although A and B were both advised to make a will when they purchased the property, they never got around to doing it. A and B have no children. On A's death, A's share in the property passes to A's parents under the intestacy rules. B now holds the property on trust for B and for A's parents. A's parents would be entitled to apply to court under s 14 Trusts of Land and Appointment of Trustees Act 1996 for an order for sale. By s 15 of the same Act, the Court should must consider the wishes of the majority beneficiaries by value, so the wishes of A's parents may be given greater weight than the wishes of B. If there are no minors in occupation of the land, an order for sale seems likely.

In contrast, had A and B been married or in a civil partnership, under the intestacy rules A's entire estate would pass to B. (It is also worth noting that, if they had been married or in a civil partnership, there would be far less incentive for A and B to purchase the property as tenants in common in the first place; if they had purchased as joint tenants then B would be entitled to the property automatically through survivorship.)

Example 2

A and B are cohabitants, who own their house (valued at £750,000) as tenants in common in equal shares. A has two adult children, C and D, from a previous relationship. Again, A and B were advised to each make a will when they bought the property, but had forgotten to do so. On A's death, A's share of the house passes to A's children under the intestacy rules. B now holds the property on trust for B, C and D. As in example 1, C and D could apply to court under s 14 Trusts of Land and Appointments of Trustees Act 1996 for an order for sale.

As there is no clear majority in favour of sale it is less likely that sale would be ordered. However, as A's share in the property amounts to £375,000, there will be Inheritance Tax to pay on both this share and the rest of A's property. C and D (who would be the administrators of A's estate) may not

have sufficient liquid assets in the estate in order to meet the Inheritance Tax liability, so the sale of the property might be the most practical way to ensure that the administration of the estate is completed promptly.

Even if there were no pressing financial need to sell the property, C and D may try to exercise their right to live in the property under s 12 Trusts of Land and Appointment of Trustees Act 1996. The harmony of the former family home will depend on the relationship between B, C and D; a sale might be the only way to avoid protracted disputes.

In contrast, had A and B been married or in a civil partnership, under the intestacy rules B would be entitled to:

- A's Personal Chattels
- A statutory legacy of £270,000
- Half of the residue

The remaining half of the residue would pass to C and D in equal shares.

B would have the right to appropriate A's share of the property under the Intestates Estates Act 1952. Although B's entitlement on intestacy may not cover the full value of A's share of the house (this would depend on the value of other assets), there would be no Inheritance Tax liability on B's entitlement, and B's pension rights as a spouse or civil partner would ensure that B would be in a much stronger financial position to be able to provide any necessary equality money. (Again, note that, if they had been married or in a civil partnership, there would be far fewer reasons for A and B to purchase the property as tenants in common in the first place. If the property had been owned as joint tenants then B would have been entitled to it by survivorship.)

In both of the above examples, it can be seen that the cohabitant is at much greater risk of losing the family home than a spouse or civil partner. The surviving cohabitant would be entitled to bring a claim for reasonable financial provision under the Inheritance (Provision for Family and Dependents) Act 1975 but this would involve litigating against the family of A. Few people would relish the prospect of starting such litigation in order to remain in the family home following the death of their partner. Furthermore, the outcome of such a claim is always uncertain, as the cohabitant is only entitled to 'such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance'.[4]

This inequality could be resolved if the Law Commission's proposals from their 2011 Report (see Chapter 9) were adopted. Whilst it could require the cohabitant to prove their cohabitation status, this is already required in order to bring a claim under the Inheritance (Provision for Family and Dependants) Act 1975. Of course, the inequalities above could have been resolved if A had made a will, but there are further inequalities for cohabitants due to the Inheritance Tax regime and these apply regardless of whether or not the deceased made a will.

Example 3

A and B are cohabitants, who own their house (valued at £750,000) as tenants in common. The equity is divided as to 2/3 to A and 1/3 to B, to reflect their unequal contributions to the initial deposit and subsequent mortgage payments. A made a will, under which B was the residuary beneficiary. On A's death, B is therefore entitled to A's share of the property (worth £500,000). However, the value of A's estate exceeds the £325,000 Inheritance Tax threshold, so Inheritance Tax

[4] Inheritance (Provision for Family and Dependants) Act 1975, s 1(2)(b)

will be payable (at 40%) on the value of A's estate that exceeds this threshold. Even if A had very limited assets in addition to the house, this would result in an Inheritance Tax bill of around £70,000.[5] If the bulk of A's estate comprised his /her share in the property, then its sale might be the only way to discharge the Inheritance Tax liability. Alternatively, the tax due on the property could be paid in instalments over the next ten years, but even this would require payments of £7,000 plus interest each year. B's ability to retain the home could therefore depend on B's own income, which may have been substantially reduced on A's death. (Note that a similar scenario would apply even if A and B owned the property as joint tenants, although the Inheritance Tax liability would be reduced as A's share of the value of the home would only be £375,000.)

In contrast, if A and B had been married there would have been no Inheritance Tax liability, so taxation would not influence B's ability to retain the family home.

Example 4

A and B are cohabitants, who live in a house that is solely owned by A (valued at £400,000). A made a will, under which B was the residuary beneficiary. On A's death, B is therefore entitled the house. However, the value of A's estate exceeds the £325,000 Inheritance Tax threshold, so Inheritance Tax will be payable (at 40%) on the value of A's estate that exceeds this threshold. Even if A had very limited assets in addition to the house, this would result in an Inheritance Tax bill in excess of £30,000. Again, this could be paid in instalments over the course of a ten year period, subject to the caveats on B's income set out above.

In contrast, if A and B had been married there would have been no Inheritance Tax liability.

In both of these examples, it can be seen that the amount of Inheritance Tax payable on the death of a cohabitant could have a significant impact on the ability of the survivor to retain the family home. Although it is acknowledged that, in *Burden v UK,*[6] the Grand Chamber of the European Court of Human Rights held that a tax system that favoured those with the formalised relationship did not violate the European Convention on Human Rights art. 14, the indirect consequence of this is that cohabitees are more likely to be required to sell the family home to pay to meet the Inheritance Tax liability.

Summary

All four of these examples demonstrate how the family home is prioritised under the intestacy laws for spouses and civil partners, and the ability of the surviving spouse / civil partner to retain ownership of it is further aided by the Inheritance Tax regime. Cohabitees have none of these protections. Whilst cohabitation may be a deliberate choice for some, this cannot be assumed to be the case. Some couples do not formalise their relationship due to misunderstandings about their legal position, whilst others may have simply 'not got around to it yet' – many more couples will be in this position having had regular prohibitions on marriages and civil partnerships over the last 16 months. Regardless of the reason behind the cohabitation, for many long-term cohabitees a primary concern, following the death of their partner, is whether you can retain your home.

This evidence is not suggesting that the family home should be the focus of any changes to Inheritance Tax; if the tax liability of a cohabitee depended on whether or not their assets included

[5] When valuing the deceased's share of property that was held as tenants in common with his / her cohabiting partner, a valuation discount can be applied (usually 15%) but for simplicity this figure is simply 40% of £175,000.

[6] *Burden v UK* [2008] ECHR 13378/05 [65]

real property, that would cause a different kind of inequality. (Although it is noted that the Inheritance Tax system does recognise the importance of the family home through the enhanced Inheritance Tax nil rate band for those who leave their interest in the family home to descendants.[7]) The Law Commission's 2011 report rejected the option of focusing the intestacy laws on the family home on the basis of 'the complexity and potential for unfairness generated by any reform that treats the family home in a different way to other assets in the estate';[8] an opinion with which I agree.

It is, however, argued that the indirect effect of the different treatments of cohabitees through the intestacy rules and the Inheritance Tax legislation is to leave the surviving cohabitee with reduced residential security in a way that produces particular inequalities. If long-standing cohabitees (defined as per the Law Commission's 2011 report) were given the same entitlements on intestacy, and received the same Inheritance Tax relief, as spouses and civil partners, this would alleviate the problem.

July 2021

[7] Inheritance Act 1984, ss 8D-8M

[8] Law Commission, *Intestacy and Family Provision Claims on Death,* (Law Com No 331, 2011) para 2.50