

Cohabitants and intestacy – is change on the way?

The existing intestacy provisions date from 1925. Recognising the changing patterns of family life (the number of cohabiting couples increased by over 60% to 2.3 million between 1996 and 2006) the Law Commission undertook a review of the law in a Consultation published in October 2009.

As part of that review a Report by NatCen and Cardiff University was commissioned which has recently been published. The Report is important as it gives scientific backing to the proposals suggested in the Consultation.

In the Report, respondents were asked about their own situations and to comment on what they thought should happen on intestacy in different scenarios. Support for a surviving spouse was still strong with around four-fifths of respondents saying they would give the spouse all, or priority, over other beneficiaries, reflecting the present rules under intestacy. However, where the public deviated from the current law was in relation to the position of cohabitants. Over half of all respondents favoured the cohabitant receiving half or more of the estate in all the scenarios featuring cohabitants.

The Report also found that only 13% of cohabitant respondents had made a will - even though a surviving cohabitant is most likely to be disadvantaged by there being no Will.

Interestingly, those respondents who were *themselves* in cohabiting relationships showed less support for the rights of cohabitants than did married respondents. Unexplained in the Report, this anomaly arguably shows that cohabitants do not see their relationship (and therefore their entitlement) as on a par with spouses.

Currently, cohabitants do not inherit under the intestacy rules unless a family provision claim is made. Making a claim can be expensive and stressful, involves litigation against the deceased's relatives and possibly the surviving cohabitant's own children.

The Proposals

With the scientific data to back up the Consultation it is likely that the Law Commission will continue to propose the following amendments to the existing rules:

- In the case of a couple with no children together but who have cohabited for more than 5 years the cohabitant should receive the same entitlement as a spouse.
- If the cohabitation had lasted between two and five years the surviving cohabitant should be entitled to 50% of the amount to which a spouse would have been entitled.
- If the deceased and surviving cohabitant are by law the parents of a child there should be no minimum duration requirement and the cohabitant should have the same entitlement as a spouse.

Issues for the Probate Lawyer

Who is a cohabitant?

The proposals are a turnabout from a report by the Law Commission in 1989 which suggested that including cohabitants in the intestacy rules would increase costs and cause delays in estate administration because disputes could arise over a bereaved partner's eligibility. This qualm is not fully addressed in the latest Consultation with the reasoning that a cohabitant's situation already has the potential for dispute under the current law since entitlement depends on a claim under I(PFD) Act 1975.

Who decides when the cohabitation started?

Reliance on prescribed time periods will lead to manifest unfairness - consider the cohabitant who has been with the intestate for 4 years and 364 days. According to the proposals this could mean the difference between a 50% or 100% share of the estate.

It is proposed that any duration requirement should be fulfilled only by a continuous period of cohabitation. But it is unclear what happens if cohabiting couples live apart for say work reasons or separate for a short period – does time start running again?

Extra burden for Administrators

Currently Administrators can apply the existing intestacy rules with certainty using birth, death, marriage and civil partnership certificates. Unless the statutory order for the appointment of Administrators is changed, the Administrators would be family members and will have to decide whether a cohabitant is to be included (or not) at the expense of their own entitlement.

The Consultation acknowledges that including cohabitants might increase the burden on Administrators. For example, if Administrators were to distribute the estate without regard for an eligible cohabitant, they could be personally liable. Conversely they could be liable for distributing to a cohabitant when the test had not been met.

In response to these concerns the Consultation suggests that any fears about the position of Administrators should be met by devising further protection for Administrators. Although not mentioned how this would be achieved it is likely to be through insurance (costly) or some sort of notice period for claims (dilatatory). Ironically, one of the aims of the proposals is to reduce the cost and length of administering intestate estates where cohabitants are involved.

Conclusions

On the whole the Report concludes that the current intestacy laws are doing 'a rather good job'. The essential problem appears to be one of expectation: a gulf exists between the general public's understanding of the perceived rights of a cohabitant – the 'common law marriage' myth - and the statutory reality.

Although the wish to include cohabitants under the rules is commendable let us not forget that there is a ready mechanism for cohabitants to protect one another – by making a Will!

The Commission has also proposed amending the 1975 Act to ditch the maintenance requirement for cohabitants claiming under the Act. This means that in those situations where a cohabitant dies intestate the 1975 Act will be a way for claims by cohabitants to be assessed on the same terms as spouses.

The rejoinder to the above is that intestacy law should be in line with public attitudes and should take account of the different ways people are choosing to live and create their family structures.

In my heart I agree with this but my probate lawyer head likes the certainty of the current intestacy rules and is fearful of the uncertainty the proposed changes will undoubtedly bring. It is expected that a draft bill will be submitted later this year. Watch this space!

Well at least the contentious probate lawyers must be smacking their lips...

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