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Proposals to give inheritance rights to cohabiting couples

The Law Commission has recommended changes to the law affecting unmarried cohabiting couples when one of them dies. These proposals have been a long time in the making but the Government has not yet indicated when it will respond to the recommendations. It should be noted that last autumn the Government rejected the Law Commission's previous proposals giving unmarried couples property rights when they separate.

There are currently more than two million unmarried couples in the UK. This figure is likely to almost double in twenty years. It is difficult to know how many of them die intestate (without a will) but figures suggest that it could be around one third.

Many cohabiting couples assume that their partner will automatically inherit the other's estate on death. This is not the case. Cohabiting couples are able to make a claim on their deceased partner's estate under the Inheritance (Provision for Families and Dependants) Act 1975 (the 1975 Act) but such claims are often difficult, time consuming and expensive.

The Law Commission has recommended that qualifying cohabitants should be given the same rights as married couples when one of them dies without a will. To qualify, the couple must have been living together in the same household (and not be married to someone else) as if they were spouses or civil partners for five years before the death of the first partner, or two years if they had a child together.

These timescales are not new; they are the same as the provisions which enable cohabitants to make a claim in their own right under the 1975 Act. It has also been proposed that the 1975 Act should be amended so that cohabitants who have a child should be able to make a claim irrespective of the duration of the cohabitation.

The Law Commission says that the draft Bill “reflects the growing prevalence and public acceptance of cohabitation”. Others will view this proposed changes as a further attack on the institution of marriage.

Although the proposal would pass the estate of an unmarried partner in the same way as though they are married there is one very important difference. There is no proposal that there should be any change to the exemption from Inheritance Tax which is afforded to married couples and civil partners. Therefore assets passing under the intestacy rules which exceed the Inheritance Tax allowance (currently £325,000) will be liable to that tax at 40%.

However, the average value of an intestate estate is around £56,000 so the need for certainty and avoiding costly litigation is clear.

The timescales also mean that unmarried couples are treated differently. The intestacy rules and Inheritance Tax exemption between spouses apply irrespective of the length of the marriage. This could be perceived to cause unfairness if an unmarried couple had cohabited for just short of the relevant period.

It should also be noted that if one of a cohabiting couple remains to someone else then the proposals would not apply.

It is possible that the changes could actually lead to more claims being made by children under the 1975 Act. Under the current intestacy rules, children would inherit their unmarried parent’s estate whereas the proposals would mean that in most cases, the assets will pass to the surviving cohabitant.

There are also some proposals to change the intestacy rules insofar as they relate to married couples or civil partners and which would therefore apply to unmarried couples if the proposals are accepted. The first applies where there is a spouse and no dependants (ie children, grandchildren) then the surviving spouse should receive the entire estate. Currently, the estate would be shared with parents or siblings if the estate exceeds £450,000. The second change would apply where there is a spouse and children. In that case, the surviving spouse would still

receive the statutory legacy of £450,000 but they would also receive half of the remainder outright rather than held in a trust for their lifetime. The other half would pass to the children in trust until they reach 18. The second change will affect more intestacies and will simplify the administration in some cases.

These proposals should not however be seen as a solution to married or unmarried couples or indeed anyone else. More and more people have complex personal circumstances which the intestacy rules cannot provide adequately for. We retain testamentary freedom and therefore the best way for all individuals to make provision on death is to make a will. These proposals do not change that.

If you would like to talk to us about the issues raised by this note, please contact:

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