



# What is the alternative to marriage for opposite-sex couples?

According to recent Office for National Statistics figures, the number of unmarried couples living together has more than doubled in the space of 20 years. It is the fastest-growing family type in the United Kingdom, accounting for 17 per cent of all families. These changing societal attitudes lead us to question whether the level of protection that the law currently provides for this growing family type is sufficient or whether reforms are needed.

There is currently a misconception by a worrying proportion of the population that ‘common law marriages’ exist in the UK. In reality, no legal right, at present in the UK, is given to an unmarried couple simply by virtue of the fact they are living together. The only claims they can make against each other are based on land law and equity provisions and are for financial support strictly on behalf of children and ownership of properties. There is no consideration for concepts such as need, which plays such a pivotal role when dividing assets ancillary to divorce (if applicable).

This article will therefore discuss what legal instruments can be used by cohabiting couples to provide them with minimal protection as well as legal recognition of their status.

It will also draw a comparison with France, where the *Convention de Concubinage* has encountered the same problems as its English equivalent. The cohabitation agreement – and civil solidarity pact, known as PACS – was originally created to bring some legal protection to same-sex couples before they could get married in 2013, but appears to be mostly used by heterosexual couples as an alternative to marriage. The numbers of opposite sex couples getting ‘PACSeD’ has increased significantly since its creation in 1999, reaching 188,947 couples in 2015, while the number of opposite sex couples getting married has fallen from 283,036 in 2005 to 228,565 in 2015.<sup>1</sup> It could be argued then that, by providing a real alternative to marriage, it has met the needs of a changing society.

## The civil partnership: not yet an option

In the appeal in *Steinfeld & Keidan v Secretary of State for Education (opposite sex partnerships) 2017*,<sup>2</sup> a human rights challenge was made against the Civil Partnership Act 2005 for restricting access to civil partnerships to opposite sex couples. The appellants in this case, an opposite-sex couple, argued that preventing them access to this type of union was a violation of their rights under Article 14 (prohibition against discrimination) and Article 8 (right to family life) of the European Convention on Human Rights. The rationale for this was that same-sex couples have the option to either opt for a marriage or a civil partnership while opposite-sex couples only have the option to marry if they want to give a legal frame to their relationship.

This appeal was rejected, but following this, a bill proposing to open civil partnership to opposite-sex couples was presented by Tim Loughton. It will have its second reading in the House of Commons on 2 February 2018.

Civil partnership may finally become an alternative in the future. Nevertheless, a civil partnership offers in substance the same protection as marriage. It could become an option for opposite-sex couples whose objections to marriage are more ideological, such as in *Steinfeld & Keidan*. The question is: what if a couple is looking for a different level of protection?

## Is a cohabitation agreement a viable option?

Unlike nuptial agreements, which focus on planning for future consequences ancillary to divorce, cohabitation agreements, in the same way as French marriage contracts, have the legal frame for the organisation of life as a cohabiting couple. This is because, in the same way as the French marriage contract, a cohabitation agreement is based on contract law. As a result, it can cover anything desired by the parties, but would usually cover things like an inventory of who owns what and in what proportions, who

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pays what proportion of rent, mortgage and bills during cohabitation and details about financial provision for children and how property will be divided on the breakdown of the relationship.

This is a good starting point, but cohabitation agreements still need to have sufficient enforceability and consideration for concepts such as fairness and needs for them to be a viable alternative to marriage.

The uncertainty over the enforceability of certain clauses such as those in relation to financial provision for a child might be part of the problem in giving this option credibility, as there are very few cases on this issue and none of them are recent. One of the most recent, *Darke v Strout*,<sup>3</sup> nevertheless points towards an increase in the level of enforceability as the agreement made between separating parties with regards to maintenance payments for their child was enforced by the court.

For the rest, as a cohabitation agreement is based on contract law, if those principles are applied, there is no reason why it shouldn't be enforced by a non-family judge applying the principles of contract law.

The real problem with cohabitation agreements, which flows from their basis in contract law, is the lack of protection for the weaker economic party. As explained above, no regard will be given to notions such as fairness or needs. As a result, situations can arise where the primary carer of a child is forced out of their home and ends up in a place that is not appropriate for a child while the other party keeps the home for themselves. Cohabitation agreements do not give any real legal recognition to the parties' relationship because they do not have a status. Technically, the law regards parties in the same way whether they have just moved in together, have been living together for two years, or more or have children together.

### More statutory rights for cohabiting couples? An ongoing pressure for reform

Lord Marks of Henley-on-Thames introduced the latest bill on cohabitation rights to implement the Law Commission's 2007 proposal on separation. The first thing to note about this bill is that the pool concerned has been carefully selected. Only couples that have cohabited for at least two years or have had children together are to be covered by the bill. Couples entering that category but who do not wish to be covered by the legislation can opt out.

It is also important to state that the aim of the bill, as stated by its author, is not to give cohabiting couples the same right as married couples, but to provide them with a basic level of protection on separation or death. For example, there is no provision in the bill for a cohabiting version of spousal maintenance as in the Matrimonial Causes Act (MCA) 1973.

Unlike the MCA, the bill aims to keep a contractual approach, having as its goal putting the parties in the same position as had the cohabitation not happened and limiting the orders available to the judges to 'clean break' orders unless there is an economic disadvantage that cannot be balanced out by the payment of a lump sum or the transfer of a property.

You can clearly see its contractual roots when looking at what a party must show to obtain a financial settlement order:

- s/he is now at an economic disadvantage as a result of the relationship; and
- the other party has gained a benefit as a result of a qualifying contribution made by the applicant. The qualifying contribution does not have to be a financial one, but still has to be relevant enough having taken into account a certain number of factors in the relationship to be able to have a fair picture of it.

Several bills were put forward before this latest version as the issue has been ongoing for a while. Moreover, this bill still has a long way to go before it becomes law. It had its first reading in the House of Lords on 5 July 2017 and the second reading of that bill is yet to be scheduled. It is, therefore, in no way close to be an alternative option to marriage.

### A search for inspiration into the French system

#### *The French cohabitation agreement*

The *concubinage* is defined by French statutes as a de facto union between two persons of the same or different sex who are living together in a stable and continued way.<sup>4</sup> French legal practitioners created a *Convention de Concubinage*, taking inspiration from the English cohabitation agreement, but this convention did not have the expected success in France. Interestingly, the reasons for its failure are the same as for its English counterpart: it is ruled by general contract law principles, which make it possible for a party to request its enforcement by a non-family law judge and/or to obtain damages



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when one of the *concubins* does not respect its provisions.<sup>5</sup> It is enforceable, but can be easily challenged.

It is also worth noting that, despite its contractual freedom, the interest of the *Convention de Concubinage* is limited by the principle of individual freedom. No terms relating to personal status (ie, change of surname), assistance or being faithful can be agreed in it. It could, therefore, be argued that the convention is only an accumulation of multiple contracts.<sup>6</sup>

As opposed to the convention, the PACS has had great success since its creation. An analogy between this legal protection and the English cohabitation agreement is therefore more helpful.

### The French PACS

The PACS (*pacte civil de solidarité*) was established by statute in 1999. It takes the form of a statutory contract between two members of a couple (the partners) in order to organise their life together. Unlike the English civil partnership, it is open to both same- and opposite-sex couples.

As for marriage, the couple has to elect a regime and they have two options:

1. *a séparation de biens*, where each partner keeps their own assets. If a partner buys a house, it will only belong to them and will not be shared;
2. *l'indivision*, where if the couple or one partner buy a property, it will be shared 50/50.<sup>7</sup>

The regime is elected when the partners sign the PACS. From that point, they also commit themselves to live together and financially support each other. Unless they decide otherwise in the PACS, the contribution is proportional to their incomes.

### HOW COULD WE USE IT IN THE UK?

With the PACS, partners can make decisions about asset division as well as financial contribution while living together and these are enforceable. As the protection focuses on finance and property, partners have mostly used the PACS as a property division tool.

The *Conseil Constitutionnel* ruled that there is no statutory right to financial maintenance between ex-partners for loss of income. Nevertheless, it is admitted that partners can decide this issue by contractual stipulations as long as it does not affect the freedom to break up.<sup>8</sup> Therefore, it is unlikely that exact figures

would be written down for the equivalent of spousal (or even child) maintenance when signing the PACS. They will be calculated with regards to the incomes and expenses of the partners at the time of the break-up.

The law specifies that ex-partners must deal with maintenance on their own. If they did not include maintenance provisions in the PACS and cannot find a settlement after the separation, they can seize a civil court<sup>9</sup> to rule on it.

Nevertheless, as it is possible for parties to stipulate financial support in the PACS, a partner may be liable for failing to comply with what they agreed in it or in the convention dealing with the consequences of the break-up. In case of breach, the partner can be forced to enforce the contract and/or pay damages.<sup>10</sup>

Moreover, compensation may, in theory, be granted for extra-contractual fault.<sup>11</sup> Article 515-7 of the Civil Code provides for this possibility for ex-partners. Each clause that would prevent someone from exercising this right would be set aside by the judges. This right to obtain compensation is constitutional.<sup>12</sup> Nonetheless, in practice, compensation is hard to obtain because judges are reluctant to accept the idea of repairing moral harm after a break-up. Indeed, the ex-partner must prove that the break-up was unfair and particularly brutal.

One major rule in contract law states that provisions against the public policy doctrine are forbidden. As such, it is not possible to decide that one partner will use the other's last name or that they will not be faithful.

It is also not possible to decide in the initial PACS convention the consequences of a break-up for the children of the relationship, first, because the law was originally created to bring legal protection to same-sex partners and, at that time, children were not a possibility, and second, because the law regarding divorce ruled that any financial support must be decided with regards to the parent's financial situation at the relevant date. The same principle would be applied with regards to the child's custody as the situation could change between the day the partners sign the convention and the day they break up.

After they break up, ex-partners should agree the practical and financial consequences for the children. Their agreement on custody and financial support will be drawn up in a contract, which will then be presented to the judge to be sealed.<sup>13</sup> That seal will make the contract enforceable. If no

agreement can be found, parents will be able to seize a family court and the judge will give a judgment on the matter.

The PACS contract is a useful tool as it allows partners to gain more protection during their life together as well as after a break-up. However, in practice, and perhaps because of the mentality of French society, its role has been very limited to property division. Nevertheless, it is a good starting point when thinking of a way to improve the English alternative to marriage.

#### Notes

1 National Institute of Statistics and Economic Studies, available online at [www.insee.fr/fr/statistiques/1281436](http://www.insee.fr/fr/statistiques/1281436),

accessed 14 November 2017. In 2011, 32 million people declared themselves to be a part of a couple. Nearly 24 million were married, a little more than 1 million had PACS and 7 million were cohabiting.

- 2 *Steinfeld & Keidan v Secretary of State for Education (opposite sex partnerships)* [2017] EWCA Civ 81.
- 3 *Darke v Strout* [2003] EWCA Civ 176 ADR.L.R. 01/28.
- 4 Article 515-8 of the Civil Code.
- 5 Article 1231-1 of the Civil Code.
- 6 Yann Favier, *Rupture du Couple: Effets Patrimoniaux* (Ellipses 2015).
- 7 Articles 515-5 and 515-5-1 of the Civil Code (exceptions exist).
- 8 Jean Garrigues, *Droit de la famille* (Daloz 2015).
- 9 Article 515-7 of the Civil Code.
- 10 Article 1231-1 of the Civil Code.
- 11 Article 1240 of the Civil Code.
- 12 Constitutional Council Decision, 9 November 1999, Nos 99-419 and Article 4.
- 13 Article 373-2-2 of the Civil Code.