



Presentation to University of Southampton ESRC

6th February 2015

Centre for Population Change

Cohabitation trends, policies and practices:

Situating the United Kingdom in International Perspective

Who We Are:

We are a national network member organisation, with affiliated family mediation services working in over 500 locations across England and Wales; the largest provider of family mediation.

There will be people here who know about family mediation. And others who won't.

Let me explain briefly: family mediation does not try to keep separating couples together. It is not relationship counselling, but an entirely separate profession in its own right.

It enables separating couples to make agreements and settlements primarily about child arrangements, money and property issues away from the stressful heat of the court room.

Over eight out of 10 couples who use National Family Mediation's services manage to achieve full agreement on all these issues. It is a process that is quicker, cheaper and less stressful than taking the traditional separation route of 'high street solicitor... high fees ... courtroom drama'.

Mediation works particularly well for family breakdown where the couple has been cohabiting, rather than being married, and I'd like to explain how and why, as well as outlining barriers we still face.

What happens to the home when cohabitants separate.

let me start by highlighting one of the fundamental difficulties people face in at this point of transition.

If a cohabiting couple's relationship ends one of the parties might find themselves in a vulnerable position.

They may have purchased a property together in their joint names and without realising it find that they hold the property as joint tenants.

One of the parties might have contributed substantially more towards the purchase but find that the other person has an equal interest in the equity.

Or If a property is held in the name of one party only, then the person claiming an interest has an uphill struggle under trust law to show an intention that they should have a share.

If children are involved then a parent can make an application under the 1989 Children Act but this does not mean that they themselves receive a greater share of the equity (but it may be possible to preserve a home for the children). Whereas Divorcing couples can ask the Family Court "to whom should this asset be given" as opposed "to whom does this asset belong"...additional deficits for cohabitants are; there is no maintenance paid between the parties and no pension sharing at the end of a cohabiting relationship.

and the debate about whether the law should be changed to address these inequalities has been around for many years.

Research and Recommendations

As long ago as 2007 The Law Commission published a report following a two-year research project. It concluded the law relating to cohabitants to be "unsatisfactory". It described the law as "complex, uncertain, expensive to rely on and, as it was not designed for family circumstances, it often gives rise to outcomes that are unjust".

Rejecting a change in the law that would see cohabitants have access to exactly the same remedies as married couples and civil partners, The Law Commission proposed a scheme that would apply specifically to eligible cohabiting couples who separate. It was thoughtfully constructed, but came to nothing. In Scotland however they implemented some of the law commissions recommendations in section 28 of the Family Law (Scotland) Act 2006. The English government said they wanted to learn from what was happening in Scotland. In 2012 the legislation was put to the test and the case of Gow and Grant was heard on appeal at the Supreme Court. This was a Scottish cohabitation case where a financial award was made following the breakdown of the Gow and Grant relationship. In

her speech Lady Hale said that lessons can be learned in England and Wales from the practicability and fairness provided by the Scottish legislation. In this case the outcome demonstrated that the idea of showing an economic disadvantage or economic advantage does work and whilst not giving cohabitantes access to the full flexibility of the divorce laws goes some way to addressing the current unfairness in the law.

But in England and Wales eight years on, have we moved on? No.

NFM believes the answer is for the Government to recognise cohabitation as equal to marriage.

Yet any change in the law requires legislation. And successive governments always step back at the last minute for fear of undermining “the institution of marriage.” That’s despite knowing that nearly half of all children born in this country are born outside of marriage. With an election three months away, and the inevitable settling-down period in the months (and years) beyond, there’s no sign this is going to change any time soon.

Raising awareness and providing education

The Law Commission report also spoke at length about helping educate people about the legal differences between marriage and cohabitation. Years later there remains an acute need to address the massive nationwide lack of awareness about the legal differences between marriage and cohabiting.

Most cohabitants still believe in the “common law marriage myth”: believing unmarried couples who are living together are, after a certain length of time, treated for all purposes by the law as if they were married. They are not.

Cohabitation contracts may be a way forward for some but many people do not have any awareness of what these are and what they can cover.

Speaking as the CEO of an organisation that has pushed long and hard, often at what sometimes feels like a locked-shut door of Government to properly publicise something specific – in our case the benefits of family mediation above court – I am not imminently expecting a mass government

publicity campaign highlighting legal differences between marriage and cohabiting, but there is no doubt it is desperately needed.

Cohabitation, mediation and fairness

So, if we are where we are, what can be done do to support cohabiting couples to ensure that where their relationship does break down, they can achieve the best possible outcomes?

Certainly if by 'best' we mean 'quickest', 'best value' and 'least stressful', then encouraging them to mediate settlements, rather than head off to lawyers and court, has to be the way forward.

Having decided to call time on their relationship, if they head off to a solicitor, then to court, the legal costs can be substantial. In an application under the Trusts of Land and Appointment of Trustees Act 1996 (TLATA) the Civil Procedure Rules apply and legal costs can get out of hand very quickly as documents going back over many years have to be disclosed. In mediation the couple can focus on what is important to them and the issues that need to be resolved today rather than dredging the emotional and practical archive.

And in all likelihood if an application is made to court they may not achieve what they feel is a "fair" result. Fairness in mediation is important. It is not for the mediator to say what is fair as mediators are impartial but it is the client's perception of fairness which is important. In mediation so long as the couple are aware of their legal rights they can settle matters in the way they feel is fair between them.

So family mediation works particularly well for cohabiting couples who have decided to separate.

There are other particular benefits for cohabitees' going through family breakdown of coming to mediation. The process gives more scope to appeal to the humanitarian aspect of relationship breakdown. For example, if the couple went to court the settlement handed down would be 50-50 on the house, but mediation enables it to be something different if it needs to be: something that's fairer, and that recognises the contribution both parties have made over time.

I want to show you a case study based on a mediation of a cohabiting couple.

SLIDE 1

The background to this scenario is that Emma was 18 and straight out of a care home at the time she met Joe. During the early years they were together she had the odd job but no career as such and when the children were born did not work. Joe was a couple of years older than Emma and worked as a heating engineer. They owned a house, Emma had never paid a mortgage instalment or made any major contribution to improvement works to the property.

SLIDE 2

Had they been married Joe and Emma could have expected to share the marital assets and discussed all of these issues they would have been able to look at immediate needs and future needs but they were cohabitants.

SLIDE 3

On separation Emma had issued an application under TLATA for a share of the property under constructive trust. Her barrister at the first hearing told her that she was unlikely to get anything from the house. It was following this stark realisation that they agreed to try mediation. At the first meeting Joe said he just wanted to be fair to Emma.

SLIDE 4

They went on to mediate and reach a full agreement that was then drawn up as a deed of separation and therefore legally binding.

Conclusion

So this I think was an outcome that benefitted the family and became legally binding that secured a separated family's future. Our challenge is to get the couple in the mediation room in the first place. This can be because the parties are aware of the strict legal position, which would be most unusual, but if that is the case they will not understand that there are alternative means of achieving a better outcome and also because they are not in an emotional place where they can negotiate something different. It is a complicated area of the law and it is important for mediators (and solicitors advising) to have a good understanding.

Mediation is not, and never has been, legally binding. Even after there's been a full mediated agreement between both people, the agreed outcomes still have to pass through a legal rubber-stamp process. This can be as simple as a solicitor preparing a Deed of Separation for the couple which does not need to be that expensive. If court proceedings are afoot then a consent order may be lodged with the court.

I could speak further about the benefits – and barriers - to mediation for cohabitee couples, but time is limited and I'd be pleased to pick up specific points in the Q and A or afterwards.

But please let me conclude by highlighting what you might call my 'key message' for today. The fact that the law governing cohabitation is an ass strengthens the value of family mediation to cohabiting couples whose relationship breaks down. We are working hard to get the message out there and will continue to do so... we'd be delighted to work with others in the room to help bring about the changes we need to see.

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