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SAMPLE TEXT

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# Cohabitation

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## LEARNING OBJECTIVES

By the end of this chapter, students will be equipped to:

- Compare the financial vulnerability of cohabiting couples to that of married couples.
- Outline the operation and limits of the financial redress scheme available to cohabiting couples under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
- Analyse the extent to which cohabitants can make their own agreements to regulate their finances and property.

## CRITICAL THINKING POINTS

- Is legal protection of cohabitants compatible with the Irish State's duty to protect marriage?
- How should law measure adult commitment?
- Should there be an entirely unregulated space for intimate relationships?

## 1. INTRODUCTION

Cohabitation can mean different things to different people. Students living in a shared house might be described as cohabiting. Older siblings living together on a family farm might also consider themselves to be cohabiting because they live under the same roof. The housing crisis in Ireland means that different types of households are formed out of financial necessity with adult friends sharing flats for long periods or even buying property together. However, for family law purposes, cohabitation means more than just the fact of living together. It refers to a type of inter-dependent relationship between adults where two people in an intimate relationship live together without making a formal legal commitment like civil partnership or marriage. Due to the informality of cohabiting relationships, it can be difficult to tell when they start, or the level of commitment involved. For example, a couple might start out living in separate houses but spend most nights together. Their decision

to move in together might not be a clear deliberate one. It might be a gradual transition or result from one of the partners having to leave rental accommodation. The uncertainty of cohabitation and the variety of cohabiting couples makes it a tricky area of family life to regulate. 'One size' does not fit all.

Cohabitation is the fastest growing form of family life in Ireland. Home sharing by cohabiting couples increased by 125% between 1996–2002 giving rise to calls for legal change to protect this type of family. Since that time, the number of cohabiting couples in Ireland has again doubled. According to the 2016 census there are 152,302 cohabiting couples living in Ireland. 5,196 of these couples are same sex couples. 75,587 cohabiting couples are living with children (409 of these are cohabiting same sex couples). Families based on marriage still outnumber families based on cohabitation by more than 5:1.<sup>1</sup>

Irish law does not treat cohabiting couples as a family. As discussed in Chapter 1, constitutional case law defines the family as based on marriage.<sup>2</sup> The protections of Article 41 of the Constitution simply do not extend to non-marital families.

Article 8 of the European Convention on Human Rights (ECHR) protects families from unlawful state interference and illegal discrimination by granting everyone the right to respect for their private and family life. In contrast to the Irish constitutional approach, where family life is based on the formal status of marriage, proving family life for the purposes of art 8 does not require marriage or formal commitment but is a question of fact, based on the practice of close family ties.<sup>3</sup> The European Court of Human Rights (ECtHR) will look at factors such as whether applicants live together,<sup>4</sup> the length of the relationship and the presence of children.<sup>5</sup> Irish statute law that interferes with art 8 rights to family life can be challenged as being incompatible with Ireland's obligations under the ECHR.<sup>6</sup> But the existence of family rights under art 8 does not give rise to formal legal status as a family in Irish law.<sup>7</sup> Even within the jurisprudence of the ECtHR, mere cohabitation does not result in recognition of family life, the quality of the relationship will be subject to scrutiny.<sup>8</sup>

<sup>1</sup> Based on the 2016 Census, there are 847,251 married couples living in Ireland.

<sup>2</sup> See eg, *Murray v Ireland* [1985] IR 532, 536; *O'B v S* [1984] IR 316, 536.

<sup>3</sup> *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR Grand Chamber, 24 January 2017) [140].

<sup>4</sup> *Johnston and Others v Ireland* App no 9697/82 (ECtHR, 18 December 1986) [56].

<sup>5</sup> *X, Y and Z v. the United Kingdom* App no 21830/93 (ECtHR, 22 April 1997) [36].

<sup>6</sup> Human Rights Act 2003, s 5.

<sup>7</sup> *J McD v PL* [2009] IESC 81.

<sup>8</sup> *Evers v Germany* App no 17895/14 (ECtHR, 28/05/2020) [52].

Lack of automatic legal recognition can leave cohabitants in a vulnerable financial position where their relationship breaks down or where one of them dies. Today, Pt 15 the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ('the 2010 Act') allows certain cohabitants to apply to court for financial redress if their relationship has broken down or when one of the cohabitants has died without making financial provision for the other. While the 2010 Act can be viewed as progressive in giving some statutory recognition to cohabiting families, the redress scheme provides only a limited safety-net and can be difficult to access. Cohabitants still have no automatic legal rights or status under Irish law.

### 1.1 'Cohabitant' as a legal term across Irish family law

The term 'cohabitant' as defined in s 172(1) of the 2010 Act is used across Irish law to refer to adults who are both living together *and* in an intimate relationship.

#### Key definition – Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s 172(1)

A cohabitant is one of two adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.

This definition applies in adoption law<sup>9</sup> where cohabiting couples are eligible to adopt jointly,<sup>10</sup> and is used in the statutory rules<sup>11</sup> determining parentage following donor assisted human reproduction.<sup>12</sup> The same definition of cohabitant is also used in the Guardianship of Infants Act 1964,<sup>13</sup> and across the Social Welfare Code.<sup>14</sup> The definition is extended for the purposes of child maintenance to include former cohabitants as well as current cohabitants.<sup>15</sup> Domestic violence legislation does not

<sup>9</sup> Adoption Act 2010, s 3.

<sup>10</sup> Adoption Act 2010, s 33(1)(a)(ib) as amended by the Adoption (Amendment) Act 2017.

<sup>11</sup> Guardianship of Infants Act 1964, s 2(4A); see discussion in Chapter 6.

<sup>12</sup> See eg, s 5(1) of the Children and Family Relationships Act 2015 where the cohabitant of a mother undergoing donor assisted human reproduction can be considered to be the second legal parent of a donor-conceived child.

<sup>13</sup> Guardianship of Infants Act 1964, s 2.

<sup>14</sup> Social Welfare Consolidation Act 2005, s 2 as inserted by the Social Welfare and Pensions Act 2010, s 15. See Social Welfare Consolidation Act 2005 (running consolidation) which is maintained by the Department of Social Protection available at <https://www.gov.ie/en/policy-information/81fdaa-social-welfare-consolidation-act-2005/> [last accessed 2 August 2023].

<sup>15</sup> Family Law (Maintenance of Spouses and Children) Act 1976, s 3.

use the term cohabitant but instead separates the issue of whether an intimate relationship exists between applicant and respondent<sup>16</sup> from the question of their living situation and property rights.<sup>17</sup>

Even when the status of cohabitant is relevant in an area of family law it does not necessarily create automatic rights. For example, the right to apply for financial redress under the 2010 Act is limited to **qualified cohabitants** who satisfy a strict list of conditions (see discussion below). Single fathers who cohabit with the mother of their children are not entitled to automatic guardianship. Instead, they must have lived with the mother for a period of not less than one year including at least three months of living together after the birth of the child.<sup>18</sup> Cohabitants can be obliged to pay child maintenance for their partner's dependent child, where they are not that child's parent, but only where they have been appointed legal guardian of that child.<sup>19</sup>

In most legislative situations, the court will decide whether or not a person is a cohabitant based on the ordinary and natural meaning of s 172(1) of the 2010 Act. However, where a cohabitant is seeking financial redress under the 2010 Act or establishing an entitlement under the social welfare code, their status as cohabitant will be scrutinised. The Department of Social Protection have published the criteria they use to determine whether cohabitation exists.<sup>20</sup> The approach taken by the court to determining eligibility under the 2010 Act is examined below.

## 1.2 The financial vulnerability of cohabitants as compared to spouses

Unlike married couples, cohabitants have no automatic legal rights or duties to financial support from their partner. Cohabitants can therefore be left in a vulnerable financial position where their relationship breaks down or where one of the cohabitants dies.

As examined in Chapter 3, where married couples want to legally end their marriage, they must go to court for a decree of divorce. A divorce may only be granted if the court considers that 'proper provision' for spouses and children has been made. The court has powers to redistribute property on divorce, taking it from one spouse and giving it to the other spouse where appropriate.

In contrast, when cohabitants break up, there is no requirement to go

<sup>16</sup> See eg, Domestic Violence Act 2018, s 6.

<sup>17</sup> For discussion see Chapter 7.

<sup>18</sup> Guardianship of Infants Act 1964, s 6B(2).

<sup>19</sup> Family Law (Maintenance of Spouses and Children) Act 1976, ss 5B and 5C.

<sup>20</sup> Department of Social Protection, *Cohabitation* (2019) available at <https://www.gov.ie/en/publication/d258d8-cohabitation/> [last accessed 2 August 2023].

to court and the courts have no general powers to redistribute property outside of the narrow confines of the redress scheme set out in the 2010 Act. Each cohabitant keeps what they own, however unfair this may be. Sometimes cohabitants will go to court to determine who owns what, particularly when it comes to their shared home.<sup>21</sup> Cohabitants do not have any rights in their shared home under the Family Home Protection Act 1976. This means that if they do not own a share in the home, they are vulnerable to eviction by the home-owning cohabitant.

Married couples are also in a more protected position where one spouse dies. Under Irish law a spouse is entitled to a legal share in their deceased spouse's estate even where a will has been made leaving them nothing. The spouse's statutory share under s 111 of the Succession Act 1965 ensures that one spouse cannot write the other spouse out of their will entirely. Where no provision is made in a will, the surviving spouse is entitled to one half of the deceased's estate where there are no children and one third of the estate where there are children.<sup>22</sup> Where the deceased has not made a will, a surviving spouse is entitled to everything if there are no children and two thirds of the deceased's estate where there are children.<sup>23</sup> Spouses pay no inheritance tax on inheritances from each other.

Cohabitants are in a much weaker situation than spouses on death. They may be entitled to nothing unless they can make an application under the 2010 Act for provision from their deceased cohabitant's estate. They have no intestacy rights. They can be written out of their partner's will entirely, and if they do inherit are liable for inheritance tax at the rate of 33% on amounts over the relevant tax-free threshold.<sup>24</sup>

The relative financial vulnerability of cohabitants can be justified on the basis that they have made an informed choice not to marry. However, anecdotal evidence from Irish solicitors suggests that many cohabitants are unaware that they do not enjoy the same rights as married couples. They only realise their mistake when the relationship comes to an end. Research carried out in England suggests that many cohabitants believe in the myth of common law marriage; a fiction that after living together for a long time, a couple enjoy the same rights as a married couple.<sup>25</sup> This sort of marriage has never been part of the law in Ireland or England.

<sup>21</sup> See eg, *C(M) v S(B)* [2010] 1 IR 107; *McGrane v O'Foghlu* [2020] IECC 1.

<sup>22</sup> Succession Act 1965, s 111.

<sup>23</sup> Succession Act 1965, s 67.

<sup>24</sup> For further details see Revenue, Gift and Inheritance Tax (Capital Acquisitions Tax – Cat) available at <https://www.revenue.ie/en/gains-gifts-and-inheritance/gift-and-inheritance-tax-cat/index.aspx> [last accessed 2 August 2023].

<sup>25</sup> Rebecca Probert, 'The evolution of the common-law marriage myth' (2011) Family Law 283.

Whatever the reason for this misunderstanding as to legal rights by Irish cohabitants, it leaves financially dependent cohabitants in a vulnerable position when the relationship ends.

This financial vulnerability was a key driver of Irish law reform efforts to provide a legal safety net for cohabiting couples.<sup>26</sup>

### 1.3 The background to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010

Several very different pressures came together to drive a programme of law reform to recognise and safeguard cohabiting couples in Ireland. In the early 2000s, cohabitation was a rapidly growing family form and for many couples, a prelude to marriage. Legal protection was required for couples who seemed to have opted out of marriage. For same sex couples, who were legally precluded from marrying until 2015, there was simply no legal option for legal recognition of their commitment or to protect them from financial vulnerability resulting from cohabitation.

In 2006, the Department of Justice and Law Reform presented an *Options Paper*<sup>27</sup> outlining different ways in which the State might regulate to safeguard cohabitants. At the same time, the Law Reform Commission issued its final report on the *Rights and Duties of Cohabitants* recommending a safety-net system to protect the most vulnerable cohabitants from the economic vulnerability of their family relationship alongside measures encouraging cohabitants to come to their own financial arrangements.<sup>28</sup>

### 1.4 Critical thinking point: Is legal protection of cohabitants compatible with the Irish state's duty to protect marriage?

Debates over how best to legislate to protect the rights of cohabitants have been complicated by a legal argument that legal protection for cohabiting couples could constitute an unconstitutional 'attack on marriage'. This argument is rooted in a statement by Henchy J in the 1966 case of *State Nicolau v An Bórd Uchtála*<sup>29</sup> that awarding equal constitutional protection to a family founded on an 'extra marital' union would disregard the state's pledge in Article 41.3.1<sup>o</sup> to guard with special care the institution of marriage. *Nicolau* was a case in which an unmarried father's attempts to prevent the adoption of his child were unsuccessful as he was not recognised as being part of the constitutional family under

<sup>26</sup> Law Reform Commission, *Consultation Series: Rights and Duties of Cohabitees* (LRC 32-2004), 24-27.

<sup>27</sup> Working Group on Domestic Partnership, *Options Paper* (Department of Justice 2006).

<sup>28</sup> Law Reform Commission, *Report: Rights and Duties of Cohabitants* (LRC 82-2006).

<sup>29</sup> [1966] IR 567.

Article 41 and so had no constitutional rights of parental authority or any equivalent legal rights. Adoption law has subsequently been reformed (see Chapter 11).

Henchy J's statement supported arguments that giving legal recognition to cohabiting couples would undermine marriage either by favouring unmarried couples or by discouraging people from getting married. The issue arose again in *Ennis v Butterly*<sup>30</sup> (discussed below).

The 1996 Constitution Review Group recommended revisions to Article 41 itself to retain the pledge to protect marriage, but to make it clear that the Oireachtas could provide protection for families based on a relationship other than marriage.<sup>31</sup> However, in 2004, the Law Reform Commission took the more pragmatic view that legislating to protect cohabitants would not violate the obligations of Article 41 unless it granted cohabitants greater rights than those enjoyed by married couples.<sup>32</sup> They recommended that any redress scheme must also protect the rights of spouses and cannot apply to a cohabitant who is married to a third party.

The redress scheme in the 2010 Act protects spouses and recognises cohabitation as a lower level of adult commitment than marriage. The redress scheme does not automatically recognise cohabitation as an alternative form of family life. It merely provides a mechanism for avoiding the worst effects of financial vulnerability arising as a result of cohabitation. The financial rights of any spouses or former spouses of the cohabitant are protected throughout the scheme and are preferred to the claims of cohabitants.

## **2. CIVIL PARTNERSHIP AND CERTAIN RIGHTS AND OBLIGATIONS OF COHABITANTS ACT 2010**

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 came into force on 1 January 2011. The 2010 Act introduced civil partnership as an alternative to marriage for same sex couples (see Chapter 1). It also creates a redress scheme for qualifying cohabiting couples. This redress scheme provides a limited safety net for financially dependent cohabitants if a long-term cohabiting relationship ends through death or separation. In successful applications, the court has a broad discretion to make financial orders requiring one cohabitant to

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<sup>30</sup> [1996] 1 IR 426.

<sup>31</sup> Constitution Review Group, *Report of the Constitution Review Group* (Stationery Office 1996), 332.

<sup>32</sup> Law Reform Commission, *Consultation Series: Rights and Duties of Cohabitees* (LRC 32-2004), 7-11.

provide the other with financial support,<sup>33</sup> or the court may order the adjustment of property ownership in a shared home,<sup>34</sup> or make a pension adjustment order.<sup>35</sup> Where one cohabitant has died, the court may make an order for financial provision out of the deceased's estate.<sup>36</sup>

The redress scheme is not automatic, cohabitants must litigate by bringing their claims to court. This can be a protracted and upsetting process, particularly where one cohabitant has died and the application is challenged by the deceased cohabitant's extended family. The legislation creates several barriers for cohabitants applying to court. Even where an application is successful, the discretionary nature of the scheme means that the **quantum of relief** (i.e. the amount that a successful cohabitant can expect to receive) is uncertain.

The 2010 Act originally made no provision for children of cohabitants and was focussed solely on adult commitment. Today,<sup>37</sup> the court may make a child maintenance order under ss 5A or 5B of the Family Law (Maintenance of Spouses and Children) Act 1976. Such orders are used to require a cohabitant to pay maintenance to their ex-cohabiting partner to support their own biological children, their children conceived through donor-assisted human reproduction (DAHR), or any non-biological children to whom they are recognised as legal guardian (see Chapter 9).

#### Key Legislation – Navigating the 2010 Act

- Introduced Civil Partnership as an alternative to marriage for same sex couples.
- Creates a redress scheme for qualifying cohabiting couples.
- All the provisions relating to cohabitants are found in Pt 15 of the 2010 Act.
- There are two statutory checklists that the court must consider when exercising its discretion:
  - o s 172(2) when considering if a cohabiting relationship exists.
  - o s 173(3) when deciding what is fair and equitable to award.

### 2.1 Eligibility to apply for financial redress

Cohabitants seeking financial redress from the courts must overcome several different barriers to their application.

<sup>33</sup> s 175.

<sup>34</sup> s 174.

<sup>35</sup> s 187.

<sup>36</sup> s 194.

<sup>37</sup> Following changes made by the Children and Family Relationships Act 2015.

1. They must prove that they are a **qualified cohabitant**.<sup>38</sup>
2. They must apply within two years of relationship breakdown,<sup>39</sup> or six months of a grant of probate where the other cohabitant has died.<sup>40</sup>
3. Cohabitants seeking redress from a cohabitant who is still alive must also prove financial dependency.<sup>41</sup>

### **2.1.1 Who counts as a qualified cohabitant under the 2010 Act?**

Not all cohabitants are permitted to apply for redress. In order to fall into the definition of cohabitant under the 2010 Act, the claimant must prove that the couple lived together in an intimate and committed relationship.<sup>42</sup>

To be considered a 'qualified' cohabitant, the couple must have lived together for a defined period of time immediately before the relationship ended. The period of time that must be proven differs depending on whether or not the couple have a child together. Where there are no dependent children, the couple must have lived together for at least five years before the relationship ended. Where both cohabitants are parents of one or more dependent children, a duration of two years must be proven.<sup>43</sup> The requirements relating to the quality of the relationship and the duration of the relationship have been considered by the High Court in recent case law which is examined below.

Section 172(6) of the 2010 Act<sup>44</sup> precludes someone from being considered a qualified cohabitant if the other cohabitant is married to someone else and at the time the cohabiting relationship ended, their spouse is not eligible to bring divorce proceedings because the 'living apart' requirement for divorce is not satisfied. This protects the rights of spouses by ensuring that cohabitants do not get a time advantage over a spouse in bringing their financial claim. When the 2010 Act came into force, divorce was only obtainable after living apart for four out of five years whereas it was possible for a cohabitant to bring a claim immediately after two years of living together if the couples had a dependent child. This section is less relevant now that the living apart requirement for divorce has been reduced to two out of the previous three years.<sup>45</sup>

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<sup>38</sup> s 172.

<sup>39</sup> s 195.

<sup>40</sup> s 194(1).

<sup>41</sup> s 173.

<sup>42</sup> s 172(1).

<sup>43</sup> s 172(2).

<sup>44</sup> As amended by Family Law Act 2019, s 4(2).

<sup>45</sup> See further Chapter 3.

In *Z v Y*,<sup>46</sup> the court considered the definition of living together where Mr X was married to Mrs Y but had an intimate relationship with Ms Z in the five years before he died. Ms Z sought a declaration that she was a qualified cohabitant within the meaning of the 2010 Act claiming that Mr X had lived with her in a shared rented house for the six years before he died. Mrs Y accepted that an intimate relationship with Ms Z had taken place but claimed that Mr X continued to live with her in the marital home during this time, although the couple kept separate bedrooms. Barrett J found that Mr X had spent many evenings with Ms Z during this time but that he had returned to sleep in his marital home every day between 1–2am, telling Ms Z that he was working night shifts as a private security guard. He concluded that Mr X and Ms Z were not ‘living together’ in the manner contemplated by s 172(1) but were spending time together and enjoying occasional intimate relations. He held that Ms Z was not a qualified cohabitant within the meaning of the 2010 Act.

**END OF SAMPLE**

**Remaining headings in chapter:**

- 2.2 Critical thinking point: How should the law measure adult commitment?
- 2.3 Determining how much to award in successful applications
- 2.4 Cohabitation agreements and opting out of the 2010 Act
- 2.5 Critical thinking point: Should there be an entirely unregulated space for adult relationships?

**3. Summary**

**4. Further Reading**

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<sup>46</sup> [2022] IEHC 583.