Protection of Partners in Informal Long-Term Relationships

JENS M. SCHERPE*

I. The need for protection

Informal cohabitation outside of marriage is a fact of life in western countries. Its incidence and significance varies in different countries, but in all states it is increasingly common. The reasons for this are manifold, ranging from informed decisions to indifference to legal consequences. Many children live in these relationships, often from previous relationships with other partners.

Historically, the law’s basic attitude towards cohabitation relationships is summarized by the famous quote by Napoléon: “Les concubins ignorent la loi, la loi ignore donc les concubins”. However, this is no longer true. Many countries have legislated extensively on cohabitation, acknowledging at least its existence and relevance for society. Even in countries where there is no such extensive legislation, such as Germany and England, it cannot be said that the law is silent with regard to cohabitants. Not only do many statutes refer, or apply, to cohabitants, but in many court decisions the law had to take a stance towards cohabitation, often resorting to curious constructs in order to arrive at just and fair results. Sometimes the results have been far from satisfying¹ and arguably they lack an underlying coherent structure. Some have argued that this merely reflects the normal chaos of life and indeed family law.² But can the state and society as a whole really afford to stand aside and watch the chaos and its consequences unfold?

Let me give some examples of those consequences. In the case of children, there is universal agreement that it is not their fault that their parents were not

¹ See e.g. Burns v. Burns [1984] Ch 317.

* Research Fellow, Max Planck Institute for Foreign Private and Private International Law, Hamburg, Germany. For all references in the text referring to national legislation see the national reports in Jens M. Scherpe and Nadja Yassari, eds., Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants, (Tübingen, Mohr Siebeck, 2005). For a historical overview, see S. Wagner, ‘Das nichteheliche Zusammenleben aus rechtshistorischer Sicht – eine Tour d’Horizon durch die Geschichte des Konkubinats’ (pp. 15-43), and for demographical data see M. Kreyenfeld, D. Konietzka, ‘Nichteheliche Lebensgemeinschaften – Demographische Trends und gesellschaftliche Strukturen’ (pp. 45-75) in the same volume.

married and that they should not be discriminated against.\(^3\) But are children whose unmarried parents separate really in the same position as children whose parents are divorcing? In most countries the possibility of a former cohabitant to make a personal claim of maintenance is limited, even when the cohabitant is currently or was formerly taking care of the partners’ children. Although children have their own maintenance claim, their overall standard of living is affected by the carer’s earning potential, which in turn is affected by cohabitation and consequential child care. So children of unmarried and married couples are in different positions when their parents separate.

Also, even when there are no children, the partner can be in a weak position, particularly if the partner gave up a job in order to aid the other in his or her career or to do the housekeeping. Does not this partner to some extent deserve protection, particularly if he or she fulfils a function that is valued by society?

Finally, it has been held by the European Court of Human Rights (ECtHR) that it is within the discretion of a contracting state not to award parental responsibility automatically to an unmarried father because of the wide range of attitudes of unmarried fathers towards their children.\(^4\) This seems questionable and certainly unfair towards many caring fathers, and many countries, including Spain, France, Croatia and Canada follow a different approach. In addition, the cases so far have been argued on the right to family life of the father under art. 8 of the European Convention on Human Rights (ECHR); but what about the child’s right to family life with the father? Is the child not treated differently from children of married couples with regard to its father’s position in its life?

The focus on marriage in the laws of most countries, as shown in the examples, can be explained by historical development: family life and marriage used to be inseparably intertwined; family life basically only happened within marriage. This is no longer true. Marriage may still be the most important unit in family life, but it is by no means the only one. Cohabitation has taken over many of the family functions that marriage used to have. It has been argued that the law’s focus on form (i.e. the legal status of marriage) has led to a neglect of those family relationships that fulfil the same function.\(^5\) It has therefore been proposed that the focus on form


\(^{4}\) *B v. UK* [2000] 1 FLR 1.