

立法會

Legislative Council

LC Paper No. LS112/08-09

Bills Committee on Domestic Violence (Amendment) Bill 2009

Paper on the relevant factors in determining whether two persons are in a cohabitation relationship

Purpose

At the meeting of the Bills Committee on Domestic Violence (Amendment) Bill 2009 (the Bill) held on 29 June 2009, when members were discussing the proposed new section 3B(2) of the Domestic Violence Ordinance (Cap. 189) (DVO), the Chairman of the Bills Committee requested the legal adviser to the Bills Committee to provide information on the relevant factors which had been adopted or used by law courts of other common law jurisdictions in determining whether two persons are in a cohabitation relationship. This paper provides information on the characteristics of a cohabitation relationship based on decided cases in other common law jurisdictions to assist members of the Bills Committee in their consideration of the Bill.

Proposed section 3B(2) of DVO

2. The new section 3B(2) of DVO, as proposed in the Bill, provides that -

"(2) In determining whether 2 persons (the parties) are in a cohabitation relationship, the court shall have regard to all the circumstances of the relationship including but not limited to any of the following factors that may be relevant in the particular case-

- (a) whether the parties are living together in the same household;*
- (b) whether the parties share the tasks and duties of their daily lives;*
- (c) whether there is stability and permanence in the relationship;*
- (d) the arrangement of sharing of expenses or financial support, and the degree of financial dependence or interdependence, between the parties;*
- (e) whether there is sexual relationship between the parties;*
- (f) whether the parties have any children and how they act towards each other's children;*

- (g) *the motives of the parties in living together;*
- (h) *whether such a relationship exists between the parties in the opinion of a reasonable person with normal perceptions".*

3. The phrase "cohabitation relationship" referred to in the proposed new section 3B(2) is defined in clause 5(2) of the Bill to mean a relationship between 2 persons who live together as a couple in an intimate relationship and includes such a relationship that has come to an end. As drafted, the provision is not intended to provide an exhaustive list of factors for determining the existence of a cohabitation relationship in a particular case. While the court is required to have regard to **all** the circumstances of the relationship including the specified factors, it is entitled to take into consideration any other factors that may be relevant in the particular case.

4. It is noted that the drafting approach of setting out the relevant factors to be taken into account by the courts as proposed in the proposed new section 3B(2) of DVO has been adopted in existing legislation, for instance, section 6 of the Unconscionable Contracts Ordinance (Cap. 458) (in determining whether a contract or part of a contract is unconscionable), section 3 and Schedule 2 of the Control of Exemption Clauses Ordinance (Cap. 71) (guidelines for application of the reasonableness test for exemption clauses) and section 7 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) (matters to which the court is to have regard in deciding what orders to make in matrimonial proceedings). In considering the legal effect of statutory provisions where the above drafting approach is adopted, the courts have decided that such statutory provision does not prohibit the courts from taking into account matters otherwise than stipulated in the provision¹.

5. To decide whether the approach adopted in the Bill in determining the existence of a cohabitation relationship is appropriate, it may be useful to look at the approach adopted in other common law jurisdictions. According to our research, we are not aware of any case authority in Hong Kong or other common law jurisdictions on the characteristics or deciding factors of a cohabitation relationship (or a relationship of similar nature) in the context of domestic violence legislation. However, there are cases where the existence of a cohabitation relationship (or relationship in the nature of marriage) was considered by courts of other common law jurisdictions in the context of legislation relating to spousal financial support, property rights of cohabiting parties and social benefits/welfare, but these cases primarily relate to cohabitation relationships between men and women.

¹ For example, in *Shum Kit Ching v Caesar Beauty Centre Ltd.* [2003]3 HKC 235, when deciding whether a contract concerned was unconscionable under the Unconscionable Contract Ordinance (Cap. 458), the court held that "*it is plain that s 6(1) does not enjoin the court only to take into account matters set out in s 6(1) (a) to (e) only. Hence, in deciding whether a contract or part of a contract is unconscionable or not for the purpose of s. 5, the court must have regard to all circumstances relevant to that issue but on top of that, the court must also take into account the factors set out in s. 6(1) (a) to (e) as appropriate.*"

The United Kingdom (UK)

6. It is noted that in the Administration's response to members' comments made on 29 June 2009 (LC Paper No. CB(2)2414/08-09(01)), the Administration made reference to an UK case, namely, *Kimber v Kimber*². In *Kimber v Kimber*, the Family Division of the High Court of England and Wales held that while it was impossible to draw up an exhaustive list of factors for determining the existence of cohabitation, the following factors, derived from the previous authorities and the Social Security Contributions and Benefit Act 1992, were relevant:

- (a) living together in the same household;
- (b) sharing of daily tasks and duties;
- (c) stability and a degree of permanence in the relationship;
- (d) whether the way in which financial matters are being handled could be an indication of the cohabitation relationship;
- (e) whether there is a sexual relationship;
- (f) having and caring children together;
- (g) having the relevant intention and motivation in living together; and
- (h) whether cohabitation of the parties exists in the opinion of a reasonable person with normal perceptions.

Canada

7. In Canada, the generally accepted characteristics of a cohabitation or conjugal relationship decided by the courts³ include:

- (a) Shelter: whether the parties live under the same roof;
- (b) Sexual and personal behaviour: whether the parties have sexual relations;
- (c) Services: the conduct and habit of the parties in relation to preparation of meals, washing and mending clothes, shopping, household maintenance; and any other domestic services;
- (d) Social: whether they participate together or separately in neighbourhood and community activities and the relationship and conduct of each of them towards members of their respective families and how such families behave towards the parties;
- (e) Societal: the attitude and conduct of the community towards each of them and as a couple;
- (f) Economic support: the financial arrangements between the parties regarding the provision of or contribution towards the necessities of life (food, clothing, shelter, recreation, etc. and the arrangements concerning the acquisition and ownership of property, etc.); and
- (g) Children: the attitude and conduct of the parties concerning the children.

² *Kimber v Kimber* [2000] 1 FLR 383.

³ *Molodowich v Penttinen* (1980) 17 R.F.L. (2d) 376 (Ont. Dist. Ct.).

8. It has however been recognised by the courts that the above factors or characteristics of a cohabitation or conjugal relationship may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal⁴. In other words there is no single factor or element which is decisive in considering whether there exists a cohabitation or a conjugal relationship.

Australia

9. In New South Wales of Australia, it has been decided in *Roy v Sturgeon*⁵ that a variety of factors should be taken into account when deciding the existence of a "de facto relationship" of a heterosexual couple. These factors have been adopted as the factors for determining whether two persons are in a de facto relationship in the Property (Relationships) Act 1984 of New South Wales of Australia (the NSW Act). Section 4 of the NSW Act provides that:

- "(1) For the purposes of this Act, a de facto relationship is a relationship between two adult persons:*
- (a) who live together as a couple; and*
 - (b) who are not married to one another or related by family.*
- (2) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:*
- (a) the duration of the relationship;*
 - (b) the nature and extent of common residence;*
 - (c) whether or not a sexual relationship exists;*
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;*
 - (e) the ownership, use and acquisition of property;*
 - (f) the degree of mutual commitment to a shared life;*
 - (g) the care and support of children;*
 - (h) the performance of household duties; and*
 - (i) the reputation and public aspects of the relationship.*
- (3) No finding in respect of any of the matters mentioned in subsection (2)(a)-(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a*

⁴ *M. v. H.* [1999] 2 S.C.R. 3 and *Mihalik v Mihalik* [2007] O.J. No. 3180, Ontario Superior Court of Justice, Milton, Ontario.

⁵ (1986) 11 NSWLR 454.

relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case."

10. Members may note that the concept of "de facto relationship" in section 4 of the NSW Act is quite similar to the concept of "cohabitation relationship" proposed in the Bill in that both concepts are gender neutral and the parties under both concepts are not married to one another. However, while the NSW Act defines a de facto relationship as a relationship between two adult persons and an "adult person" is defined in the Act to mean a person of or above the age of 18 years, there is no similar provision applicable to "cohabitation relationship" under the Bill.

New Zealand

11. In New Zealand, the approach adopted by the courts in deciding whether a "relationship in the nature of marriage" is to consider both the mental and physical aspects of the relationship⁶. In deciding whether such a relationship has been entered into, it is generally helpful to consider the physical aspect first, and the following questions or factors have been considered by the courts to be relevant to the physical aspect of the relationship:

- (a) whether and how frequently the parties live in the same house;
- (b) whether the parties have a sexual relationship;
- (c) whether the parties give each other emotional support and companionship;
- (d) whether the parties socialise together or attend activities together as a couple;
- (e) whether and to what extent the parties share the responsibility for bringing up and supporting any relevant children;
- (f) whether the parties share household and other domestic tasks;
- (g) whether the parties share costs and other financial responsibilities by the pooling of resources or otherwise;
- (h) whether the parties runs a common household, even if one or other partner is absent for periods of time;
- (i) whether the parties go on holiday together; and
- (j) whether the parties conduct themselves towards, and are treated by friends, relations and others as if they were a married couple.

After considering the physical aspects of the relationship, the mental aspect to be considered by the courts is whether the parties have a commitment to each other for the foreseeable future.

12. As regards the weight to be given to the above factors in determining whether a relationship in the nature of marriage exists, the courts have held that this would depend on the statutory context under which such relationship is considered and

⁶ *Thompson v Department of Social Welfare* [1994] 2 NZLR 369.

the purpose of the relevant statutes. In *Ruka v Department of Social Welfare*⁷, the Court of Appeal of New Zealand, in determining what is a "relationship in the nature of marriage" in the context of the Social Security Act, put more emphasis on the emotional commitment and financial interdependence of the parties having regard to the purpose of the Act. The Court, however, stated that absence of financial support would be of much less significant when a relationship was considered under the Domestic Violence Act 1995⁸.

13. Based on the above information, it seems that the following principles would be relevant in determining whether a cohabitation or de facto relationship exists:

- (a) In general, a cohabitation or de facto relationship would have one or more of the following characteristics:
 - (i) living in the same household;
 - (ii) sharing tasks and duties of daily lives or providing household services to each other;
 - (iii) having stability and permanence in the relationship;
 - (iv) providing economic support to other party or having financial interdependence;
 - (v) having sexual relationship;
 - (vi) joint acquisition of property;
 - (vii) having children together or caring children of other party ;
 - (viii) having the relevant motives to live together;
 - (ix) in the opinion of a reasonable person with normal perception, having such a relationship;
 - (x) joining social activities or holiday trips together;
 - (xi) with societal perception of the relationship as a couple;
 - (xii) having mutual commitment (for the foreseeable future) and mutual emotional support; and
 - (xiii) running the common household when other party is absent for periods of time.

- (b) However, it is impossible to provide a checklist, factors or criteria to cover every scenario. Therefore, those checklists and factors drawn by the courts cannot be exhaustive nor comprehensive; and in some cases, other factors not on the list may well be relevant and require assessment in the overall picture of a particular case;

- (c) The extent to which the different factors of the cohabitation or de facto relationship will be taken into account must vary with the

⁷ [1996] NZFLR 913; 1996 NZFLR LEXIS 136.

⁸ In *Ruka v Department of Social Welfare*, Blanchard J. said (at page 22 of 1996 NZFLR LEXIS 136) that "*the statutory context is of great importance in determining what is a 'relationship in the nature of marriage'. Other statutes use the same expression but for different legislative purposes. What is or is not such a relationship may be viewed differently for different purposes. For example, absence of financial support will be of much less significance when a relationship is considered under the Domestic Violence Act 1995.*"

circumstances of each case; certain factors or elements of the relationship may attract more weight and consideration than others when a particular case is considered in the context and purpose of the relevant legislation; and

- (d) Absence of one or more of the listed factors will not necessarily mean the absence of a cohabitation or de facto relationship, and there is no single factor which is indispensable and decisive for the existence of such a relationship.

14. It can be seen from the decided cases mentioned above that the approach adopted by the courts of other major common law jurisdictions in determining the existence of a cohabitation relationship is similar to that proposed in the Bill. It should however be noted that these cases primarily relate to cohabitation relationships between men and women whereas under the Bill, cohabitation relationships include relationships between two persons of the same sex. Where gender-neutral cohabitation relationships are involved, one of the approaches adopted in other jurisdictions, as in an Australian statute mentioned in paragraph 9 above, is to set out in the statute the factors to be taken into account by the courts in determining the existence of a cohabitation relationship. Members may note that this approach is basically in line with that proposed in the proposed new section 3B(2) of DVO.

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