NON-MARITAL COHABITATION IN NORWAY

BY

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1. INTRODUCTION

This paper will provide an account of current legal provisions applying, in Norway, to a man and a woman living in non-marital cohabitation. There may also be cohabitation between two men or between two women, and the rules applying to such cases will most probably be the same as those governing cohabition between a man and a woman. However, there are differences, and this presentation will concentrate on cohabitation between a man and a woman.

The general rule in Norwegian law is that two people living together without being married are considered single persons. In some respects legislative efforts have attempted to equalize non-marital cohabition with formal marriage, but the results so far are negligible. Therefore, this will be a presentation of the various legal aspects of non-marital cohabitation as compared to marriage.

The legal provisions applicable to marriage function at different levels: There are rules governing the relationship *between* spouses and rules concerning the relationship between the spouses and the outside world, such as social security and tax law. This distinction between provisions also applies to non-marital cohabitation.

In 1971 the Norwegian Government appointed a Commission to revise the marriage law, the Marriage Law Commission. Part of the Commission's assigned task was to assess whether legislation should be introduced to address the legal status of long-term unmarried cohabitants. The Commission submitted its report in 1980[1] proposing very limited legal regulation. So far most of the proposals have not come into effect but are under discussion at the Ministry of Justice. The proposals will be presented in what follows.

2. THE RELATIONSHIP BETWEEN THE PARTIES

The legal provisions on entry into marriage, separation and divorce do not of course apply to non-marital cohabitation. Nor do the specific rules regarding the *property relationship* between spouses. A person cannot, for instance, sell or mortgage the family home without the written consent of his spouse (Act on Property Relationship between Spouses of May 20, 1927, No. 1 (hereinafter

[1] *NOU* 1980: 50.

referred to as Spouses' Property Act), sec. 14). This is to prevent the owner of the family home from taking steps that may suddenly leave the family without a place to live. Such restrictions on the right of disposal do not apply to non-marital cohabitation.

If two spouses are separating or getting divorced, the property is to be shared equally where there is so-called community property, cf. Spouses Property Act, sec. 12. There is no such equal sharing when a non-marital relationship breaks up; in such cases each of the parties take what they own. This is similar to the situation where two spouses having separate property leave each other. In such case there is no equal sharing. There is, however, one significant difference between marriage and non-marital cohabitation: Where two people enter into marriage and want to keep their properties separate, an explicit agreement is needed. If there is no such agreement, the property will be community property and subject to equal sharing. In the non-marital cohabitation situation, where there is no agreement, the property will be dealt with as if it were "separate property". The parties have a right to agree that their property shall be, wholly or partly, "community property" according to the rules applying to spouses. There are no formal requirements for such an agreement, but it ought to be in writing.

Where both spouses earn an income, and the husband's income is invested in valuable property, such as a house, a car etc., and the wife's income goes to cover daily expenses, it is natural to consider the parties as co-owners of the assets acquired during the cohabitation. Very often, it has been possible for the husband to make such investments only because his wife's earnings go to cover daily expenses. The case law provides examples of women being considered co-owners even though they did not have an income of their own, but because they, by working in the home, made it possible for the husband to take on work and thus earn enough to provide a home for the family. The women became co-owners even though the men otherwise were the legal owners. Several of the Norwegian court decisions concerning ownership of property, whether it is the husband's property alone or a case of co-ownership, involved marital relationships, but the views expressed are also relevant in non-marital cohabitation cases.[2] When determining whether property is separate or co-owned, the decisive factor must be the cooperation and the financial community between the parties, not the form of cohabitation they have chosen.

Where the parties are considered co-owners, the starting point, according to the Act on Co-ownership of June 18, 1965, No. 6, is that they own one half of the property each, unless it can be substantiated that one has contributed more than the other to the acquisition of the property.

[2] 1975 NRt 220, 1976 NRt 694 and 1980 NRt 1403.

During the marriage the spouses have a mutual *duty of maintenance*, cf. Spouses' Property Act, sec. 1. Such a duty may also be imposed after a separation or divorce, see Act on Contracting and Dissolution of Marriage of May 31, 1918, No. 2, secs. 56 and 57. After a separation or divorce the husband may be obliged to maintain his wife if she, due to child care, is unable to maintain herself through gainful employment. Even if she does not have to care for children, she may not be able to maintain herself. If this is because of the marriage—for instance if she has been working in the home for a substantial period of the marriage—the husband may be ordered to pay maintenance.

Non-marital cohabitants have no duty of maintenance either during the cohabitation or after.

> As stated above, a person may, after a separation or divorce, be awarded maintenance from the former spouse. This entitlement ceases if the recipient remarries. If the recipient enters into a non-marital relationship, the entitlement to maintenance does not always cease, but the payer of the contributions may demand a review of the question. The fact that the other spouse has entered into a non-marital relationship may indicate that the maintenance should cease. In *NOU* 1980: 50, the Marriage Law Commission has proposed that the right to maintenance by the former spouse shall cease if the recipient has been living with a person of the opposite sex for more than one year.

Where a person has made a substantial effort for the benefit of his cohabitant, he may be awarded *compensation* if this is deemed equitable, considering the economy of the parties and their situation in general. For instance, the man may have made improvements to the dwelling of his cohabitant, or the woman may have assisted her cohabitant in his business for several years without being paid. A claim for remuneration will in these cases be based on the general principles of enrichment and restitution, cf. the Supreme Court statement in 1984 NRt 497.

3. THE RIGHT TO THE FAMILY HOME

In the case of separation or divorce, the spouse who needs the home most may be awarded the *right of occupation*. If, for instance, the wife gets custody of the children and she is unable to provide a satisfactory home for herself and the children, she may be given the right of occupation of the home even if it belongs to the husband. If the couple have been living in a house that has been rented in the husband's name, the wife may, if she is the one who needs the house most, be allowed to take over the lease. The landlord must also accept such takeover, see the Rent Act of June 16, 1939, No. 6, sec. 32.

With regard to non-marital cohabitation, the owner or tenant will always

have a right to keep the home after a termination of the cohabitation. Where the house is owned jointly, the parties have equal rights to the house. If they fail to agree, the home must be sold or the lease terminated.

If it is an owner-occupied house, the parties may decide who shall keep it. In case of an ordinary lease or a council house, it is up to the owner or the housing corporation to decide whether one or both cohabitants shall be considered as tenants. Where both are registered as tenants, the owner or the housing corporation may object to only one of the parties remaining as the tenant after the termination of the cohabitation. Where only one of them has been registered as the tenant, he or she may similarly object to the house being taken over by the other party.

In *NOU* 1980: 50 the Marriage Law Commission proposed amendments to these provisions. Provided the cohabitation has lasted for more than three years—or less than three years where there are children of the cohabitaiton or a child is expected—a lease may be taken over by one of the cohabitants notwithstanding objections by the owner or the housing corporation.

Where the parties fail to agree as to who shall have the house after the break-up, it has been suggested that the party who needs the home most shall have a right of occupation, where this is indicated by strong reasons. This shall also be the case where the house is owned by the other party.

As for other corporation dwellings, the party who needs the home most shall be allowed to take over. This shall also be so where the other party is sole or part owner of the house. If it is a question of an owner-occupied house, the party who is not the sole owner has no right to take over the house. However, he or she may be awarded a right of occupation.

These proposals are still being discussed by the Ministry of Justice, and we do not know at present whether they will be put into effect. There is an indisputable demand for such provisions, however.

4. THE COHABITANT'S INHERITANCE STATUS

A surviving spouse has a right of inheritance (see the Inheritance Act of March 3, 1972, No. 55, sec. 6). The surviving spouse inherits one fourth of the estate where there are children of the deceased or grandchildren, and one half where the deceased leaves parents or children or grandchildren of the parents. Where the deceased leaves no such close relatives, without making a will for the benefit of other persons, the surviving spouse inherits everything.

A surviving cohabitant has no right of inheritance under the Act, but such right may be secured by testament. But the testamentary rights are restricted where the deceased leaves children or grandchildren; the testator can only dispose of one third of his property by will, sec. 29 of the Inheritance Act. It is true that this restriction also applies to spouses, but a surviving spouse has

other advantages not available to a cohabitant. Thus, a surviving spouse may keep the estate undivided without having to give the other heirs what is due to them until he or she dies or remarries, see ch. III of the Inheritance Act. A surviving spouse also has special advantages in case of division of the estate. A surviving cohabitant cannot keep the estate undivided nor does he or she have any special advantages in connection with division of the estate.

Even if the decedent has no children or grandchildren and thus is able to leave the entire estate to his cohabitant, there is nevertheless a marked difference between the position of a cohabitant and that of a spouse—a surviving spouse pays no inheritance tax. A surviving cohabitant must pay inheritance tax, and at the highest rate.

A surviving cohabitant does of course have the right to keep the property he or she owns. This property cannot be claimed by the decedent's heirs. Even if the decedent was the owner of property, a surviving cohabitant may still be considered as co-owner based on the cooperation and economic community that may have existed between the parties (for more details, see above under 2).

Even where the survivor is the sole heir under a will, it is necessary to establish what property belongs to the survivor—or what property is partly owned—so that inheritance tax can be calculated.

One of the advantages a surviving spouse has upon division of the estate is the right to keep the family home with furnishings, cf. the Probate Act of February 21, 1930, sec. 63, para. 2. Surviving cohabitants have no such rights under the law, but in 1978 NRt 1352 the Court stated that if two cohabitants are co-owners of the home, the survivor ought to be allowed to keep it if this is necessary in order to avoid an inequitable result. The statement refers only to situations where the cohabitants are co-owners of the home. A surviving spouse has a right to keep the family home even if the deceased spouse was sole owner.

Where there is a lease of some kind, transfer of the home to the surviving cohabitant needs approval by the owner or the board of the housing corporation. A surviving spouse will always have the right to remain a tenant according to the Rent Act, sec. 31. The Supreme Court has refused to apply this rule by analogy applicable for the benefit of the surviving partner of a non-marital cohabitation, 1978 NRt. 1558.

In *NOU* 1980:50 the Marriage Law Commission has proposed that where the cohabitation has lasted for three years, or less where there are children of the union or a child is expected—the surviving cohabitant shall, where indicated by special reasons, have the right to take over the family home, whether a council or corporation dwelling, even if the decedent was sole owner. The owner of the house must also accept such transfer. If the family home is an owner-occupied dwelling

owned jointly by the partners, the surviving cohabitant shall have a corresponding right, but not if the deceased was sole owner.

The same report contains a proposal to the effect that the right of a surviving spouse to retain the estate undivided shall cease where the survivor has been living with a person of the opposite sex for more than one year. At present the right ceases where the survivor remarries, and the goal is to achieve balance between the two kinds of cohabitation on this point.

The above proposals are still awaiting treatment by the Ministry and today (October 1985) it is uncertain whether they will ever emerge in statute form.

5. THE RELATIONSHIP TO THE CHILDREN

If children result from a non-marital cohabitation, paternity has to be established. Thus, the child does not automatically have a father, such as is the case where the mother is married and the husband is presumed to be the father of the child. Paternity can be established by a so-called recognition submitted to the National Population Register. Recognition may take place before the child is born or in connection with the birth report, but it may also take place later (see the Children Act of April 8, 1981, No. 9, sec. 4).

Even if paternity has been established, the unmarried mother has sole parental responsibility. However, the parents may make an agreement on joint parental responsibility. Such agreement must be reported to the National Population Register (cf. the Children Act, sec. 35).

If, in case of break-up of the cohabitation, there is dispute as to parental responsibility and the custody of the child, the question shall be settled by the courts or the County Governor, and the chief concern shall be what is best for the child. (See the Children Act, sec. 35, cf. sec. 34.) This shall also apply where the parents have not made any agreement on parental responsibility while living together. In case of a break-up the mother has no preferential claim to custody even if she has the sole responsibility.

The provisions regulating the right of access are the same whether the parents have been married or not, and so are the provisions regarding child maintenance.

Unmarried cohabitants cannot adopt children together, nor are they allowed to adopt children from a partner's previous relationships.

6. NON-MARITAL COHABITATION AND ENTITLEMENT TO SOCIAL SECURITY BENEFITS

Norway has a comprehensive public social security system providing benefits for sickness, disablement, old age, surviving family, single parents, etc., under

the National Insurance Act of June 17, 1966, No. 12. The criterion married/unmarried runs like a thread through all social security provisions. This presentation will concentrate on the most important rules.

An old-age pensioner or disablement pensioner gets a maintenance supplement if he or she maintains a spouse who does not receive a pension, cf. the National Insurance Act, sec. 7-7. Unmarried cohabitants are not entitled to a maintenance supplement. Where both parties are old-age or disablement pensioners, however, it is more favourable to live in non-marital cohabitation than to be married. The aggregate basic pension of two spouses will be less than that of two non-marital cohabitants, cf. the National Insurance Act, sec. 7-2.

Where a marriage is dissolved due to the death of one partner, the surviving spouse is entitled to a widow's or widower's pension and other benefits, cf. the National Insurance Act, ch. 10. Only a person married to the deceased is entitled to a survivor's pension. Not even long-term non-marital cohabitation entitles the parties to survivor's benefits. A case from the Social Security Tribunal shows an example of a woman who was not awarded a widow's pension despite the fact that she had lived with the decedent for 25 years and had five children by him.

Benefits to a surviving spouse cease in the event of remarriage, cf. the National Insurance Act, sec. 10-8. If a surviving spouse enters into non-marital cohabitation, the benefits awarded to a surviving spouse will continue.

An unmarried, separated or divorced parent who has sole responsibility for children under the age of 18, is entitled to single parent benefits, see the National Insurance Act, ch. 12. Entitlement to benefits as a single provider ceases after remarriage. This also applies where the new spouse has no duty to maintain the other party's children from previous relationships. A single parent's entitlement to benefits does not cease due to non-marital cohabitation, unless the parties have children together, the National Insurance Act, sec. 12-4. It may happen that paternity has not been established, and in that case entitlement to benefits ceases, provided the paternity of the cohabitant cannot be excluded. The idea is that nobody shall be tempted to keep the paternity a secret in order to obtain single provider benefits.

As mentioned already, a surviving spouse's entitlement to benefits does not cease due to non-marital cohabitation, and this is true even if there are children of the union. This difference compared to the entitlement of unmarried, separated and divorced parents can probably only be explained by the fact that widows and widowers are considered more "deserving poor" than other single providers.

Everyone caring for children under 16 is entitled to child benefits (Act on Child Benefit of October 24, 1946, No. 2). The amount of the child benefits

varies according to the number of children, and is not the same for each child. A single parent is entitled to increased child benefits. The level of increase is fixed in that the single parent receives benefits for one additional child. In other words, a single parent with one child gets child benefits for two children, one with two children gets child benefits for three, etc.

The entitlement to increased child benefits ceases if the single parent marries, but not where the single parent enters into non-marital cohabitation. An unmarried mother loses entitlement to increased child benefits if she marries. She does not lose the benefits if she moves in with a man, and her entitlement to child benefits for her child or children by the previous partner is retained even if she has children by her cohabitant. On this point the rules on child benefits are different from those applying to other benefits to unmarried, divorced or separated parents.

7. TAX LAW AND NON-MARITAL COHABITATION

7.1. *Taxation of the Parties*

The Tax Code contains a number of provisions where a significant factor is whether a person is married or not. The details are beyond the scope of this paper, but some of the principal rules will be discussed.

Spouses shall be assessed jointly for their aggregate income and property. This requirement applies regardless of whether the spouses have separate property or community property. Where both have an income from work or business, separate assessment may be claimed for the lowest income of this kind (Taxation Act of August 18, 1911, No. 8, sec. 16). Unmarried cohabitants are *assessed separately* with regard to both assets and income. This is advantageous to persons with assets and capital income. Assessment in tax class 2 gives a right to an extra deduction from the income. Where only one spouse has income and assets of a certain magnitude, joint assessment will be most advantageous, because they will then be assessed in tax class 2 (Taxation Act, sec. 75). Among other things, tax class 2 allows a person an extra tax deduction. Where only one partner in non-marital cohabitation has an income or assets, assessment shall be separate, and thus the parties do not benefit from tax class 2.

Where both spouses work in an enterprise, owned either by one of them or jointly, such as for instance a farm, one of them shall be assessed for the aggregate earnings. However, the spouse who is not considered to be performing the main part of the activities can claim separate assessment for part of the profits, limited to 30 000 NOK. The limit may be raised if 30 000 is obviously unreasonable (Taxation Act, sec. 16). In the case of non-marital cohabitation

one partner may be assessed separately for work in the other's business irrespective of the above limits. From a taxation point of view, distributing the profits as evenly as possible to both parties is obviously the best approach.

7.2. *Taxation of Parents and Children*

A single parent caring for children under 18 has a right to be assessed in tax class 2, and therefore benefits from an extra tax deduction, see the Taxation Act, sec. 75. Where the parents of the child live together, they have no right to be assessed in tax class 2 as single providers. A person also loses the right to be assessed as a single provider after remarriage, even if the spouse is not the father or mother of the child. If, however, somebody lives in non-marital cohabitation with a person who is not the parent of the child, entitlement to assessment in tax class 2 is not lost, unless additional children result from the cohabitation. This interpretation of the concept single provider does not appear from the wording of the Act, but follows from administrative practice and the *travaux préparatoires*.

Parents are entitled to a *maintenance tax allowance* for children until they reach the age of 20 (Act on Maintenance Tax Allowance for Children and Young People of December 10, 1976, No. 90). Until the child reaches the age of 16, it makes no difference whether the parents are married or not. For children over 16 the allowance is granted only if the child is still being maintained. A single provider also gets a tax allowance for one child more than the actual number of children, provided the children are all in the 16–20 age bracket. With respect to the maintenance allowance a person shall be considered as a single provider to the same extent as in relation to tax class 2, see section 7.1 above.

8. AGREEMENTS BETWEEN UNMARRIED COHABITANTS

8.1. *Introduction*

One would think that two people living in non-marital cohabitation would feel a need to regulate certain aspects of their life by agreements. But a study carried out by the Ministry of Justice in 1976 shows that no more than 5 per cent of non-marital couples had made written agreements. There is no reason to believe that the percentage is higher today. Danish studies from 1983–84 show that only 6 per cent had made agreements in Denmark.

There is no need to speculate at length about the low incidence of cohabitation agreements, but it may be that these couples do not have the decisive attitude towards the cohabitation form that was previously suspected. Perhaps

they do not know much about what such an agreement should contain. A more fundamental matter is their possible ignorance of the legal status of such an agreement. These questions will be discussed below with emphasis on agreements concerned with the financial aspects of the relationship.

8.2. *The Agreement's Effects on the Rights of the Parties*

Let us imagine that two cohabitants have entered into an agreement stating that their current and future property shall be considered as co-owned. In this way they have classified the character of their property at the date of the agreement, and at the same time they have determined the character of future property. The part of the agreement that deals with their current possessions does not give rise to special problems. They should be able to transfer property to each other as a gift or against remuneration without restrictions. It must be kept in mind, however, that transfer of certain property may be prevented by rules regarding permits or concessions (e.g. for the acquisition of agricultural land) or other provisions. Where this is the case, a cohabitant cannot become co-owner of the property. But the parties should have the right to make an agreement on financial co-ownership, thus making them co-owners of the economic value represented by the property.

The general rule is that an agreement to the effect that future property shall be subject to co-ownership, is valid. It is possible, however, that such an agreement may be regarded as self-incapacitation as regards control of one's own property, and if the agreement is unreasonable or has no sensible purpose, it will be invalid. As stated before (section 2) the parties will often be considered co-owners of property acquired during the cohabitation even where there is no agreement, and in that case an agreement will not be necessary. The advantage of an agreement, however, is that it prevents disputes about the right of ownership.

The substance of an agreement may be that only the acquired property of *one* of the partners shall be subject to co-ownership. Such an agreement does at first sight seem rather dubious. However, if it does have a sensible purpose —perhaps it is meant to correct a previous imbalance, or the one-sided transfer is intended as remuneration for work performed by the cohabitant, for instance taking care of the house and children—then the agreement is valid.

As said before under 2, the normal property arrangement between spouses is community property, unless they have agreed on separate property. Community property does not mean that they both own everything. Each party is the sole owner of what they acquire themselves. The co-ownership applies only to what they have acquired together. Community property does mean, however, that in case of separation or dissolution of the marriage, the property of the

spouses, or rather, the net value of the property, shall be shared equally. Before the sharing, each of the spouses may deduct an amount necessary to cover debts. Unmarried cohabitants should be able to make agreements on "community property" according to the pattern applicable to spouses.

A co-ownership or "community property" agreement may appear sensible and reasonable at the time of agreement, but the cohabitation may take an unexpected course. The mutuality hoped for may fail to materialize, and only one of the parties contributes assets to the co-ownership without getting anything in return. If the cohabitation terminates, such an agreement may be set aside based on implied conditions or in pursuance of the omnibus clause in the Contracts Act of May 31, 1918, No. 4, sec. 36.[3]

Basically, a prior agreement regarding maintenance or the occupation rights to the family dwelling in case of termination of the cohabitation, will also be valid. However, where implementation of the agreement will seem unreasonable in light of the rules on maintenance and the right of occupation applying to spouses, it must be possible to set the agreement aside.

Prior agreements on property division, maintenance and occupation rights will thus be subject to a certain degree of scrutiny if one of the parties contests the agreement.

An agreement entered into at the time the relationship ended will not be subject to the same level of scrutiny. The parties are supposed to know more about the consequences of the agreement when it is concluded simultaneously with the breakdown of the cohabitation than where agreements are concluded during the cohabitation when there is no consideration of a possible break-up.

There are some agreements that are prohibited, for instance an agreement not to pay maintenance contributions to children. Such agreements are void according to the Children Act of April 8, 1981, No. 7, sec. 52. Nor can maintenance contributions to children fixed by agreement be below the statutory minimum contributions which at present (October 1985) amount to 660 NOK per month for each child. Besides, modifications of an agreement may be claimed at any time later and the question of maintenance contributions may be reviewed by the County Governor or a court.

[3] The previous wording of sec. 36 of the Contracts Act was changed by amendment of March 4, 1983, No. 4, and it now reads: "An agreement may be wholly or partly set aside or changed inasmuch as it would seem unreasonable or in conflict with sound business practice to make it valid. This also applies to unilaterally binding dispositions.—When making the decision, consideration shall not only be given to the contents of the agreement, the situation of the parties and the circumstances at the conclusion of the agreement, but also to situations arising later and to circumstances otherwise.—The provisions of the first and second paragraphs shall apply correspondingly where it would be unreasonable to cite trade practice or other contractual custom."
There are corresponding provisions in Danish and Swedish contract law.

8.3. *External Effects of the Agreement*

Clearly, the parties cannot by an agreement on cohabitation bind a *public authority* to deal with them in a special manner. Nor can the parties decide that they shall be treated as spouses in relation to provisions on taxation or social security.

It is equally clear that the parties' agreement cannot bind *private persons* or *private institutions* to treat them as spouses. Their agreement cannot oblige a private airline to sell them tickets at reduced family rates. And where only one of the parties is registered as tenant to a lease, they cannot by agreement between themselves bind the owner to accept the cohabitant as tenant if the cohabitation ends.

Where two non-marital cohabitants agree that they shall be co-owners of everything they acquire, or that one shall have the right of use or other limited rights to the property of the other party, such rights ought to be legally protected in relation to *bona fide* contracting parties. If the day arrives when the cohabitation is no longer stable, there is no certainty that the other party will loyally observe prior agreements. The need for legal protection in relation to a *bona fide* third party arises both where the cohabitants transfer property to each other by agreement, but also where the cohabitants even without an agreement are considered as co-owners of the property acquired during the cohabitation.

In the event of transfer or establishment of rights in real property or movable property subject to a duty of registration, legal protection may be secured by such registration.

It may prove difficult to secure legal protection for movable property that is not subject to registration. Basically, this can only be achieved by physical transfer, and where furnishings in the family home are concerned, transfer may not be possible. However, if the previous owner unlawfully sells the property to someone else, this may be regarded as theft, thereby entitling the cohabitant to claim return of the property from the *bona fide* third party, cf. Act on Bona Fide Acquisition of Movable Property of June 2, 1978, No. 37, sec. 2. If a man gives his female cohabitant a painting that hangs on the wall of the family home, it is theft if he takes down the painting and sells it. It is also theft where the parties are co-owners of the painting.

A cohabitation agreement involving a transfer between the cohabitants must be legally protected in relation to the *creditors of the person disposing of the property*. In case of transfer of real and movable property subject to registration, the agreement must be registered in order to enjoy legal protection in relation to the creditors. In case of transfer of other assets between cohabitants, legal protection may be achieved by notification or reporting.

In case of transfer of movable property not subject to registration it is more difficult to provide proper notification. This can normally be done only by removing the property from the possession of the transferor. According to Norwegian law, such transfer will always be sufficient to create legal protection in relation to the creditors of the person disposing of the property.

In connection with the establishment of a right of use, or another limited right, there is wide agreement in Norwegian legal theory that such rights have no legal protection in relation to the owner's creditors unless the property is removed from his possession.

With regard to transfer of ownership, the rules are far more uncertain. From a creditor's point of view, the demand for notification ought to be complied with, and therefore transfer should be claimed. However, the transfer of movables between two cohabitants is complicated by the difficulty of removing property from the possession of the transferor. An example would be the transfer of furniture in the family home. A strict transfer requirement may completely defeat good faith transactions. As stated, the rules are uncertain, and, as a matter of legal policy, transfer should not be required where it proves impracticable.

Notification in relation to creditors is required only where there is a transfer or establishment of other rights. Otherwise, the creditors cannot invoke rights superior to the debtor. Even if the correct ownership may be well concealed, the creditors cannot base any rights on the apparent ownership of the debtor. As mentioned before, two unmarried cohabitants should often be regarded as co-owners of the assets acquired during the cohabitation, even if co-ownership has not been agreed. In such case, creditors cannot seize more than the debtor's share of the co-owned assets.[4] If, as a safeguard, the parties have also made a co-ownership agreement, this cannot change the position of the creditors.

9. ATTITUDES TOWARDS NON-MARITAL COHABITATION

9.1. *Statistics concerning Non-marital Cohabitation*

Unmarried cohabitation is not a new living-together arrangement. The first Norwegian sociologist, Eilert Sundt, wrote about non-marital cohabitation as early as 1855 in his theses "On Morality" and "On Marriage". General awareness of the phenomenon is also evidenced by the prohibition against concubinage in the Penal Code of 1902. However, the phenomenon did not

[4] According to Swedish law, the rules are more in favour of the creditor.

attract much attention until the late 1960s, a fact which is probably due to the occurrence of non-marital cohabitation also within the circles of prominent people. Since then non-marital cohabitation has become increasingly widespread. A study from 1972 showed that at that time non-marital cohabitation amounted to 2.5 per cent of all relationships (marriage and non-marital cohabitation viewed together). In 1977 the Norwegian Central Bureau of Statistics undertook a mapping of non-marital cohabitation, and this showed that of all cohabiting women between 18 and 44 years of age, about 6 per cent lived in non-marital cohabitation. 1984 studies show that the figure has risen to 15 per cent.

The 1977 study shows that there are considerable geographical variations. In Oslo, the capital, and the surrounding areas, the occurrence exceeds the national average. This is also true in Northern Norway, while in the Southern and Western parts of the country the occurrence is below the national average. Non-marital cohabitation is most widespread among people in their mid-twenties. As for older people, most unmarried cohabitants are divorced. As far as young people are concerned, non-marital cohabitation is probably first and foremost a preliminary step to eventual marriage, whereas for older people who have been married before, unmarried cohabitation is probably more of an alternative to marriage.[5]

Non-marital cohabitation is far more widespread in Sweden and Denmark. No current figures from Sweden are available today, however, calculations made in 1981 indicate that at that time non-marital cohabitation amounted to 20 per cent of all forms of cohabitation. Today the percentage is probably well over twenty. In Sweden too, most of these relationships are regarded as a preliminary to marriage. 90 per cent of all people entering into marriage have lived with their future spouse for a shorter or longer time. But also in Sweden non-marital cohabitation is probably an alternative to marriage.

In Denmark, studies from 1983-84 show that of the total number of relationships, non-marital cohabitation accounted for 18 per cent. As many as 38 per cent of the relationships had lasted for more than five years, and 25 per cent of the non-marital relationships had resulted in children. This may indicate that in Denmark non-marital cohabitation serves as a significant alternative to marriage.

In Norway further studies are required to provide a picture of what kind of people live in non-marital cohabitation—the number of children in these relationships—whether children of the union or children from previous relationships—and the duration of the relationship.

[5] Helge Brunborg, *Cohabitation without Marriage in Norway* (Central Bureau of Statistics), Oslo 1979.

9.2. *Should there be Statutory Regulation of Unmarried Cohabitation?*

As stated above, the Penal Code of 1902 contained a prohibition against concubinage. During the preparation of the legislation there was considerable disagreement whether a prohibition should be included. Subsequently, there were several proposals to abolish the law, but the *Storting* did not vote for abolition until 1972. At that time, all the representatives of the Christian People's Party voted against abolition, because this might be interpreted as an acceptance of non-marital cohabitation.

The question of non-marital cohabitation has been widely debated during the last few years. As mentioned, part of the assignment of the Marriage Law Commission that was appointed in 1971 was to report on whether long-term non-marital relationships should be regulated by statute. The Marriage Law Commission proposed only limited legislation, primarily concerning rights to the family dwelling. An account of these proposals has been rendered above under sections 3 and 4, and they are still being discussed in the Ministry of Justice. The reason why no bill has been submitted based on the work of the Marriage Law Commission, is probably that the three Coalition Government parties, the Conservatives, the Centre Party and the Christian People's Party are unable to agree on even very limited regulation of non-marital cohabitation. The Christian People's Party does not want to accede to legislation that may be considered an acceptance of non-marital cohabitation thereby posing a threat to the institution of marriage.

The proposal of the Marriage Law Commission is concerned with "family law". Changes in taxation and social security law are not discussed. These areas, however, have been dealt with in the so-called Family Report, presented by the Government in the spring of 1985, see *Storting* Report No. 50 (1984-85). This report did not present any concrete proposals, but the *Storting* was invited to discuss issues connected with non-marital cohabitation. During the *Storting* debate there was agreement between most of the political parties that the Marriage Law Commission proposals regarding the family dwelling must be implemented. Nor did these parties take a clear stand as to changes of taxation and social security law. The Christian People's Party wanted a change in the provisions which give unmarried cohabitants advantages that married couples do not have.

The question of the statutory regulation of non-marital cohabitation cannot be resolved solely on the basis of prevailing attitudes toward lifestyles. One must also consider the social need for regulation. The legal provisions applicable to the relationship between spouses have been enacted with a view to protecting the weaker party in marriage. Therefore, when cohabitation is

established outside of marriage, there is reason to believe that there is a corresponding need to protect the weaker party. It may be that the absence of such provisions makes it more difficult for the weaker of the partners to break away from a non-marital cohabitation than from a formal marriage.

Two financially independent persons living in non-marital cohabitation can manage well without legal provisions. But studies have shown that not all unmarried cohabitants are financially independent. It is also maintained that those who have chosen non-marital cohabitation have done so as a protest against marriage, and therefore they should not have marriage law imposed on them. However, a study undertaken for the Marriage Law Commission in 1976 showed that very few couples had such a conscious attitude toward the choice of cohabitation form. When asked why they preferred non-marital cohabitation, 19 per cent replied that they wanted to find out whether they were suited for each other. Twelve per cent said that it had just happened this way and they could not bother to get married. Ten per cent did not want to get married because they had tried marriage before. Eleven per cent replied that not being married was quite all right. The others gave various reasons including difficulty in getting a place to live, education, insecure work situation, the wish to avoid all the paper work involved in getting married, or that they were not yet divorced. Very few of these replies indicate that non-marital cohabitation had been chosen as a protest against marriage.

One argument against the legal regulation of non-marital cohabitation has been that these relationships are less stable than marriages, and that legal regulation will entice more people into such relationships. It is far from certain that those who are in an unstable relationship would find it any more stable if they were married. And those who at present are in a stable marriage would probably also find their relationship stable if they were unmarried cohabitants. The fact that non-marital relationships are dissolved more often than marriages might also indicate the need for the legal regulation of non-marital cohabitation in order to protect the weaker party.

In Swedish legal writing, Anders Agell emphasizes family stability as an argument against the legal regulation of non-marital cohabitation.[6] He refers to the fact that the liberal Swedish divorce rules contain a provision, for the benefit of the children, that parents must have at least six months to think about a divorce before it can be granted if there are children under the age of 16. This rule also applies where *both* parents want the divorce. Agell believes that, if this provision is to be taken seriously, one should not provide an incentive by way of statutory regulation, for couples to choose a form of

[6] Anders Agell, "The Swedish Legislation on Marriage and Cohabitation. A Journey without a Destination", 24 *Sc.St.L.*, pp. 9 ff. (1980), see p. 43.

cohabitation where there is no contemplation period. In the view of the present author, Agell attaches too much significance to the contemplation period. There are most likely other more important reasons keeping married couples together and making divorce difficult than the contemplation period requirement.

Primarily, Agell opposes legal regulation for technical reasons.[7] He is of the opinion that complete equality between marriage and non-marital cohabitation is impracticable. There would be insurmountable technical problems involved in determining whether there is cohabitation or not. And since equality would lead to fewer people getting married, the difficulties would only increase.

Even limited regulation of non-marital cohabitation, like Sweden has, will in Agell's opinion bring undesirable results. The current legal situation is not very clear, with some similar and some different provisions applying to married couples, and to unmarried cohabitants depending on whether the cohabitants have children. The problems in defining whether there is cohabitation are going to increase along with the growing number of relationships.

Agell is of the opinion that the authorities ought to make it quite clear that marriage is the form of cohabitation to be recommended. Therefore, legislation should not be shaped to tempt people to choose non-marital cohabitation. The ideology of neutrality must be abandoned. Legislation on non-marital cohabitation must be limited to areas where statutory regulation is absolutely necessary for social reasons and to the areas where unmarried cohabitants otherwise would gain advantages which married couples do not enjoy, for instance within taxation and social security.

It is by no means certain that people will refrain from non-marital cohabitation if, as suggested by Agell, a restrictive approach is chosen to legislation. We do not know to what extent people are influenced by legislation when they choose their cohabitation form. Perhaps there have been too dramatic changes in our attitudes towards marriage and cohabitation to allow a turning of the trend toward non-marital cohabitation by means of a change in legislative policy. At any rate there is a likelihood that we will be left with a rather large group of people who will not marry in any circumstances, a group composed of exactly those people who are most in need of statutory regulation of their relationship. In my view, this raises a difficult question of legislative ethics: Do we have the right to "sacrifice" this group in order to "chase" all the others under the protective wing of marriage?

Among Norwegian legal writers, Helge Johan Thue has adopted the most unambiguous stand on the issue of the statutory regulation of non-marital

[7] Agell, *op.cit.*, pp. 37–43.

cohabitation. He argues, as does Agell, in favour of a restrictive legislative approach, but on a different basis. His view is that two non-marital cohabitants must be considered as two equal persons with no mutual legal relationship, and they must therefore be treated as single persons.[8]

However, far from all relationships are composed of two equal—at least financially equal—persons. Besides, a possible statutory regulation of the relationships is meant to protect the weaker of the two parties, and where the parties are independent and equal, they will know how to arrange things so that the rules will not apply to them. And, provided there is a social need for legislative regulation, the consideration of allowing the resourceful to feel independent cannot decide the question of legislative regulation.

As mentioned above, statutory legislation of non-marital cohabitation has been very limited; no substantial changes can be expected in the foreseeable future. However, non-marital cohabitation is increasing and so are the number of legal disputes arising from such relationships. A considerable number of such cases have been brought before the courts. The unsatisfactory legal status of these relationships has meant that the courts, especially the lower level courts, have interpreted the law rather freely in order to attain equitable results. Very few cases have gone to the Supreme Court. The Supreme Court has shown much more caution in these cases than have the lower courts, but the Court has indicated that in certain situations it may be acceptable to apply the rules relevant to marriage by analogy to non-marital cohabitation if this proves necessary to arrive at reasonable results, cf. above under 3. The Supreme Court has also allowed an unmarried cohabitant to claim remuneration on the grounds of unjust enrichment if the claimant has contributed to an increase of the property of the other party, cf. above under 2.

An increase in the number of legal disputes involving non-marital cohabitation in the future is certain, and some of these disputes will also reach the Supreme Court. The courts have to a greater extent than the legislature been prepared to find equitable solutions in these cases, and it will be very interesting to watch the court's lawmaking in this area.

[8] Helge J. Thue, "Order or Freedom. The Established View and an Existentialistic Family Law Theory", 29 *Sc.St.L.*, pp. 233 ff. (1985).