FEATURES OF DANISH LAW CONCERNING PROPERTY RIGHTS AND OBLIGATIONS OF UNMARRIED COHABITANTS

BY

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I. UNMARRIED COHABITATION IN DENMARK

I.1. *Introduction*

Cohabitation without marriage has probably always existed in Denmark. As long ago as 1241 A.D. the peninsula of Jutland had a statute addressing the problem:

> If a man has a cohabitee in his house and it is evident that he sleeps with her and she has keys to the cupboards and the drawers and if she evidently eats and drinks with him during three winters, then she is his wife.[1]

Later the introduction of the Protestant religion into Denmark in the 16th century changed the Danish attitude towards cohabitation without marriage. More recently, sweeping changes in social attitudes towards family life and legal regulation of the family have taken place in Denmark. The development of marriage as a legal institution is, therefore, of comparatively little interest to those dealing with family law in the 1980s. This paper, therefore, deals only with the present state of the law as it affects unmarried couples.

The property problems of unmarried couples in Denmark must be viewed against the background of the marital property system. The Danish matrimonial property regime is based upon a concept of deferred community property ownership. In effect, each spouse has management and control of his or her own property during the marriage with some limited restrictions upon individual ownership and management based upon an underlying concept of spousal partnership. Partnership principles within the marital relation do not have full force or effect until the dissolution of the marriage by either the death of one of the parties or by divorce. Upon the dissolution of the marriage the community marital property is, in principle, divided equally between the spouses (or their estates).[2]

Spouses may choose a separate property regime for the ownership of property during the marriage, but this choice is made only by a minority of couples. Since neither community property ownership principles nor

[1] Translation by Jan Trost, quotation from *Unmarried Cohabitation*, Västerås 1979, p. 42.

[2] I. M. Pedersen, "Matrimonial Property Law in Denmark", 30 *Modern Law Review*, pp. 140 ff. (1965).

separate property ownership principles from Danish marriage law apply in the case of an unmarried couple, the growing number of unmarried cohabitants has, therefore, made legal regulation of the property rights and obligations of unmarried cohabiting partners increasingly important. It should also be noted at this point that Danish courts have been extremely reluctant to use analogies from rules concerning marital property in solving problems faced by unmarried cohabitating partners.

I.2. *Sociological information*

There are two major sources of statistical information about the extent of unmarried cohabitation in Denmark: (1) information gathered by the Mothers' Aid Institutions and (2) studies made by the Central Statistical Office of Denmark in cooperation with the Institute of Social Research.

The Mothers' Aid Institutions were until the mid 1970s public agencies set up to offer assistance to parents with children below the age of two. These institutions had contact with the great majority of unmarried mothers in Denmark and also with a considerable number of married mothers. In 1958 and 1959, when the institutions began to include statistics as to the number of cohabitants out of wedlock in their studies, it was learned that 13 % of the mothers receiving advice and assistance were unmarried and had not formerly been married. There was no significant change in this statistic until about 1965. In the late 1960s and early 1970s there was a sharp rise in the percentage of unmarried clients seeking assistance from the Mothers' Aid Institutions. The last available statistics before these institutions were closed down in the course of a general reform of the social service system showed that about 60 % of the clients of the Mothers' Aid Institutions were and had been unmarried. Additionally, the Mothers' Aid Institutions registered the number of separated, divorced and widowed mothers who were cohabitating without marriage from 1965 until 1975. During this latter period the percentage of unmarried cohabitants in this last category rose from 36 % in 1965 to 47 % in 1975.

The second source of information regarding the nature and extent of unmarried cohabitation in Denmark are the regularly recurring studies made by the Central Statistical Office of Denmark in cooperation with the Institute of Social Research. These studies cover not only families with small children but also persons whose backgrounds more accurately represent the wider spectrum of Danish social groups as a whole, including childless couples. These studies therefore have a broader base than those of the Mothers' Aid Institutions.

The Central Statistical Office studies show that in 1974 about 8 % of all Danish couples (married as well as unmarried) cohabitated without a marriage licence. By 1977 this percentage had shown a significant increase to about 13 %. Figures from 1979 show a slight increase, but the percentage of unmarried cohabitating couples is still about 13 %. These studies also indicate—in contrast to the studies of the Mothers' Aid Institutions—that there is a higher percentage of unmarried cohabitating couples in urban districts than in rural districts.

The reason for this difference may well be that the Central Statistical Office studies examine childless couples as well as couples with children. Cities with institutions of higher learning have many unmarried student couples, and this fact may well explain the different trends in the two studies. This theory is supported by a closer examination of the 1974 Central Statistical Office figures.[3]

The 1977 and 1979 figures show that 55–60 % of the unmarried cohabitating couples are in the age group 20–29, and that about 25 % of these couples are 35 years of age or over.

The percentage of people living in what might be described as trial marriages is quite high. According to the Central Statistical Office studies, about 40 % of the unmarried cohabitating couples expect to marry sometime, and about 20 % have answered "perhaps" as to the possibility of future marriage. However, a considerable number of the persons interviewed (about 30 %) answered quite definitely in the negative.

The data of these studies are supported by a decline in the marriage rate and an increase in the number of children born out of wedlock. The majority of these children are probably born as children of unmarried cohabitating couples.

The actual percentages discussed above may be slightly low, however, if one considers two additional facts. First, the statistics do not cover homosexual couples. Secondly, the figures do not include persons actually married or judicially separated cohabitating with a new partner despite the fact of marriage to another person. It is quite probable that quite a number of persons fall within these latter two groups.

II. PRESENT STATE OF THE LAW

II.1. *Introduction*

The significant increase in the number of unmarried couples living together in Denmark has created a plethora of legal problems which the

[3] Dines Andersen, *Samlivsformer i Denmark med særligt henblik på papirløse ægteskaber*, Copenhagen 1975.

Danish legal community can no longer ignore. A Matrimonial Law Reform Commission was set up in 1969 to discuss reforms in the marriage law of Denmark, and although unmarried cohabitating couples were mentioned in the terms of reference empowering the Commission, these terms of reference were rather vague on the subject of unmarried cohabitation. There is no doubt, however, that the Commission was expected to consider problems of homosexual and heterosexual unmarried couples. The Commission has published a report describing the existing state of the law in Denmark on these questions[4] and is currently working on proposals concerning, among other things, legal solutions to the property problems of unmarried cohabitants.[5] Although the Commission har not yet published its final recommendations there have been significant developments in the law affecting the financial problems of unmarried cohabitating couples. In fact, since the beginning of the 1970s (and especially since 1975) litigation in this area has increased, and attorneys are frequently consulted by unmarried partners to solve legal problems arising during the period of cohabitation and upon the dissolution of the cohabitation relationship.

The developments in this field of Danish law illustrate the maxim that the law often follows social change. This feature of the legal process often has the beneficial effect of adjusting legislative initiative properly to the social environment. In the case of unmarried cohabitating couples in Denmark any final law reform will necessarily depend upon future developments in the extent and nature of unmarried cohabitation. If a steadily increasing number of Danish couples choose cohabitation without marriage as a substitute for the traditional form of marriage, fundamental amendments in the present type of Danish family law will become necessary. However, if developments point to an end in the increase of unmarried cohabitating couples and unmarried cohabitating partners live together for the main purpose of a "trial marriage", a substitute for the old-fashioned type of engagement, then a different type of law reform will be needed.

In the meantime the legal problems of unmarried cohabitants must be solved by the Danish legal community. Thus far the main rule applied by the Danish courts in these types of situations has been to refuse to use rules of Danish marriage law to solve the financial problems of unmarried cohabitants.[6] This refusal of the courts to use Danish marriage law for unmarried cohabitants has meant that the parties have had to rely on

[4] I. M. Pedersen, *Samliv og ægteskab,* Report no. 5 from the Matrimonial Law Reform Commission (1974).

[5] Published in January 1981 as Report no. 8.

[6] I. M. Pedersen, *Papirløse samlivsforhold,* Copenhagen 1976, p. 63.

commercial law and property law governing the relationships between private individuals with no especially intimate social relationship.

In view of this refusal of the Danish courts to apply marriage law in this field, and because of the fact that unmarried cohabitation on a broad scale is still a relatively new social phenomenon in Denmark, this area of the law is still in its infancy. It must be stressed that most of the central problems of unmarried cohabitating couples have not yet been clarified in Danish law. It is especially important to note that no final answer has been given to the central question which is frequently brought up in the courts, viz.: What happens to the assets and debts of an unmarried cohabitating couple at the dissolution of the cohabitation relationship if there is no express contract governing the problem? It should be noted that there is no strong tendency among unmarried cohabitants to enter into express contracts. This fact is substantiated by the studies of the Central Statistical Office mentioned above. Surprisingly, those who do not intend to marry are less inclined to enter into agreements concerning their property and financial interests.

The rule governing agreements between unmarried cohabitating partners are next described. An analysis and discussion of case law in this developing field then follows.

II.2. *Express contracts*

II.2.1. *General problems*

II.2.1.1. DO CONTRACTS BETWEEN COHABITANTS VIOLATE PUBLIC POLICY?

In many countries there has been a very heated discussion, in some cases involving extensive litigation, concerning the problem of whether property contracts between unmarried cohabitating partners are void on public policy grounds or whether they are valid and legally enforceable. The famous Marvin Case in California is perhaps the best known case in this field.[7]

This problem was solved in Danish law more than 20 years ago, and without much controversy.[8] This leading case involved the daughters and heirs of a well-to-do Copenhagen builder who had been cohabitating with an unmarried partner for some years before his death. The daughters and heirs argued that a property contract the builder had entered into with the woman was invalid as against public policy. The Eastern High Court of

[7] *Marvin* v. *Marvin*, 134 *Cal. Rptr.* 185 (1976) and *The Family Law Reporter*, vol. 5, no. 24 (1979).

[8] 1959 UfR 427.

Denmark disagreed with this contention and upheld the contract, even though it contained an obligation for the man to pay an annual allowance to the woman, a homemaker with no earned income of her own. The decision of the High Court on this point was accepted by the heirs; however, they lodged an appeal to the Supreme Court of Denmark concerning the interpretation by the High Court of a number of other detailed provisions in the contract. On most of these points both courts favoured the heirs, although it was obvious that the attorney who had drafted the contract for the builder had been aware of the legal pitfalls involved and had tried carefully to avoid them.

Danish public international law also affects the legal definition of public policy as it concerns property contracts between unmarried cohabitating partners. Denmark has ratified the European Convention on Human Rights. According to Art. 8 of this Convention, every person has the right to respect for his private life and his family life. Prominent Scandinavian legal scholars have interpreted Art. 8 of the Convention on Human Rights to apply to the case of unmarried cohabitants.

For example, the Norwegian scholar F. Castberg feels that lasting cohabitation between an unmarried man and an unmarried woman should have the same legal protection as family life based on marriage. Much along the same lines, the Danish Judge and Professor Max Sørensen presented a report to the Fourth International Colloquium on the Convention containing the following statement:

> There is no doubt that the human values at stake in such cases may be just as worthy of protection under the Convention as in the case of marriages sanctioned by an official certificate.[9]

Castberg limits his dictum to the case of two unmarried cohabitants, but Danish courts are most likely to apply the same reasoning even if one or both of the cohabitating partners are still married to another person. A typical case in point, for example, would be an unmarried couple living together although one of the partners was only judicially separated and waiting for a divorce from the actual spouse.

Upon much the same reasoning, a contract between homosexual partners would probably also be held valid. Indeed, there is even more reason to uphold such contracts since the partners are unable to marry, whereas other cohabitating couples may marry.

[9] I. M. Pedersen, *Papirløse samlivsforhold,* Copenhagen 1976, pp. 40 f.

II.2.1.2. CLARITY

Even when a property contract has been drafted with the greatest care it may still be difficult to predict with certainty that it will be enforceable *in toto*. The 1959 decision of the well-to-do Copenhagen builder mentioned above is a case in point.

A certain minimum of clarity accompanied by a description of the legal effects the parties to the contract are trying to achieve are undoubtedly important factors in the contruction of any contract, a point brought out by Jørgen Graversen in his recently published textbook.[10] It is not only essential, but furthermore sound legal technique that the terms of an agreement enable the parties to foresee the legal and practical consequences of a contract at the time it is entered into. This latter consideration, i.e., foreseeability, may well influence a court faced with resolution of a conflict concerning construction of the meaning of a contract.

A 1979 case[11] involving a contract in which two unmarried cohabitants attempted to settle their property relationship by reference to the law of marriage in Denmark illustrates that clarity is advisable. The contract in question briefly stated that the parties considered their financial relationship to be the same as if they were married. The agreement was stated to cover income, expenses and all property of the cohabitating partnership. The man owned the family home, but this fact was not stated in the contract. Some time after the formation of the relationship the couple attempted to enter the property contract between them into the local Land Register. The Land Registrar refused to register the contract, but did not declare it invalid.

The couple sought redress in the High Court. Their contention was that their purpose in registering the property contract was to give the woman the same protection a wife would have in relation to her right to be heard under Danish law before the sale of a family home. The High Court did not declare the contract invalid, but upheld the decision of the Land Registrar.

It should be noted at this point, however, that under Danish law the validity *vel non* of a property contract is not usually decided as a part of the registration procedure for the Land Register. The Land Register is administered by a county court judge, and in some exceptional cases contracts that are clearly invalid will not be registered. For exemple, a 1974 case[12] involving a contract between unmarried cohabitants who attempted to prevent creditors with claims against one party only from attaching that

[10] Jørgen Graversen *et al.*, *Ægteskabsret*, Århus 1980, p. 601.
[11] 1979 UfR 808.
[12] 1974 UfR 1056.

party's share of the "family" home provides an illustration of when a Danish court will consider a contract so blatantly invalid as to refuse it registration in the Land Register.

In light of the foregoing case law, therefore, it is no doubt advisable that the draftsman make a contract between unmarried cohabitating partners as detailed and clear as possible and indicate as well the reasons for provisions of any unusual character.

Whether a lack of clarity will always deprive a contract between unmarried partners of all legal effect is a different question. Some aspects of this question are discussed below.

II.2.1.3. CAN A CONTRACT VOIDABLE BY HEIRS OR CREDITORS BE VALID *INTER PARTES*?

It has frequently been discussed whether an agreement between unmarried cohabitants may be held valid *inter partes* even in cases where it may be attacked with success by creditors of one or both parties or by heirs of a deceased party. This is a matter which draftsmen must take into account. Since there is as yet no case law in Denmark on this particular question, the opinions of prominent legal scholars are of interest in resolving conflicts of this nature.

The Swedish Supreme Court Justice Bertil Bengtsson has on several occasions analysed with great insight the legal problems of unmarried cohabitating couples. In his latest article,[13] Mr Justice Bengtsson expresses the point of view that a contract between unmarried cohabitants may be valid *inter partes* even in cases where third parties claiming against one or both of the unmarried partners have a better right. He even, although tentatively, extends this view to contracts between unmarried cohabitants which attempt to incorporate by reference the Swedish Marriage Act. The fundamental principles of the Swedish marriage law are similar to the Danish marriage law in this respect. Bengtsson then asks, with considerable justification, why a contract between unmarried cohabitants should not be held valid *inter partes* even if subject to attack by third parties, since the cohabitants may validly make complicated contracts similar to those known in Scandinavian corporation law.

In the present writer's opinion, Bengtsson's arguments should carry much weight when a case in point appears before the Danish courts. Bengtsson's arguments are strengthened by the fact that a solution of this

[13] Bertil Bengtsson, *SvJT* 1978, p. 195. Bertil Bengtsson was Professor of Private Law in the University of Stockholm Law School until 1977, when he was appointed a Supreme Court Justice.

recurring problem is becoming increasingly urgent. Over the last ten years Danish courts have more and more frequently been faced with problems of unmarried cohabitants who have not written express contracts. If no third party interest is violated, it may well be argued that it is better to decide property matters of unmarried cohabitants on the basis of a contract—whether express or implied—between the unmarried partners. In many cases there are no conflicts with the interests of third parties. Why, therefore, should courts in these circumstances be forced to consider the hypothetical interests of non-existing heirs or creditors? In cases where there is a conflict involving the rights of third parties, the courts need not be prejudiced by judicial construction of the contract *inter partes*.

II.2.1.4. Changed circumstances

Draftsmen are well advised to take into account not only the possibility of conflicts with heirs or creditors when drafting contracts between unmarried cohabitants, but also to consider whether changing circumstances affect the validity of the contract. Changed circumstances may, in effect, make the terms of a property contract between unmarried cohabitants unreasonable and this in turn may affect the validity of the contract as a whole or in part.

A case in point arose several years ago in which, shortly after the beginning of unmarried cohabitation, a woman had signed an instrument of debt stating that she owed her partner 40 000 Danish Kroner. They cohabitated for several years. He assisted her in her business and shared the income thereof. Upon the dissolution of the cohabitation relationship several years later, he demanded the money mentioned in the instrument of debt. The woman had at that time lost all her property and refused to pay. The High Court held that the instrument was binding and ordered her to pay, thus deciding the case as if it had been a conflict arising in an ordinary business relationship. The Supreme Court reversed, stating that a change in circumstances (the fact that her business had been their principal source of income for several years) had rendered the instrument of debt invalid.[14] The opinion of the Court makes it clear that the parties had a marriage-like relationship and that this relationship influenced the assessment of the legal effect of the changed circumstances upon the validity of the instrument of debt. This point was also later stressed in an article written by one of the Justices who had decided the case.[15] The

[14] 1972 UfR 751.
[15] See *UfR* 1972 B, p. 251.

Justice also pointed out that it was an important factor that the woman owned nothing when the relationship was dissolved.

A number of other cases before the High Courts have addressed the problem of changed circumstances in slightly different fashion. Unmarried cohabitants have set up house together since both partners expected the relationship to be a lasting one. With this expectation, one of the parties pays considerably more toward the expenses of maintenance of the household than the other. Contrary to expectation, the relationship breaks down after a comparatively short period. This may lead to unreasonable consequences in terms of an equitable adjustment of the property relation between the parties, especially if one party has paid for valuable assets belonging to the other party (e.g. house, car, etc.).

In some of these cases the courts have ordered one party to pay a lump sum to the other, stressing as justification the change in circumstances, namely the unexpected break-up of the relationship. In 1975 the Contracts Act was amended thus making it possible for the courts to set aside a contract wholly or in part if it is unreasonable. In determining what is unreasonable in this context the court is therefore entitled to take into consideration, not only the conditions obtaining when the contract was entred into, but also a change in circumstances.

Although the 1975 Contracts Act amendment was aimed at the business community, the courts have not, however, limited its application to cases involving only business contracts. The Eastern High Court, for example, has found that it may be applied to agreements between spouses, and there seems to be little doubt that it may also be applied to other intimate contracts. In view of the fact that circumstances change frequently in intimate personal relationships, it may well be that the 1975 amendment will prove of great use in disputes involving the settlement of property matters between unmarried cohabitants. It should once again be noted here that a court acting under this amendment has the power to set aside a contract in whole or in part.

II.2.2. *Specific types of contractual arrangements*

II.2.2.1. JOINT OWNERSHIP OF THE FAMILY HOME

An agreement between unmarried cohabitants to acquire a family home as joint owners is undoubtedly valid. In fact, this type of contract is the one most commonly found in cases of unmarried cohabitating couples, a fact borne out by the Central Statistical Office surveys mentioned earlier and by entries in the Land Registers. The most common provision in these

contracts is for each of the parties to own half a share of the home.[16] It should be noted that the same trend is observable among married couples buying a family home, even in the community property context.

In the present writer's opinion this trend toward half/half ownership is a sign that the idea of partnership is deeply rooted in the minds of modern Danish couples. This theory is supported by a study made by the Institute of Social Research for the Matrimonial Law Reform Commission during the early 1970s.[17] It is no longer widely believed that a legal regime of separate property is the answer to all the ills of property disputes between married and unmarried couples.

Although a contract for joint ownership of the family home is without doubt valid, even when a prior marriage of one (or marriages of both) of the unmarried cohabitating partners has not been dissolved, there is some doubt as to the validity of certain provisions in such contracts. In particular, doubts often arise in relation to the rights of the parties to control and management of their shares of the family home during cohabitation and, further, in problems that arise at the dissolution of the partnership either by death or by "divorce".

These doubts about the validity of control and management provisions regarding ownership of the family home are often created in cases involving failure of the Land Registrar to enter such contracts on the public record. The explanation offered is that the purpose of the registers is only to show rights and duties affecting real property, and that often the provisions in the title deeds and other documents relating to the control and management of a family home by an unmarried couple mix purely personal rights and obligations with rights and obligations concerning real property. Recent case law in this area has, however, shown a more lenient attitude towards the cohabitants.[18]

It must be stressed that the Land Register does not make a final and binding decision as to whether the provisions of a contract brought to it are valid and enforceable. Since there may be doubt in this area as to provisions for joint control and management of the family home, the parties ought to consider drafting a will or wills to determine rights to the property upon the death of one or both of the partners. Although there is no case law concerning this problem, an early case dealing with the problems of two friends and business partners who were joint owners of a block of flats seems to indicate that, if the provisions dealing with the dissol-

[16] I. M. Pedersen, *Papirløse samlivsforhold,* Copenhagen 1976, p. 115.

[17] *Ægteskabet i statistisk og sociologisk belysning* (by Inger Koch-Nielsen), Report no. 6 from the Matrimonial Law Reform Commission (1974).

[18] 1979 UfR 813.

ution of the joint ownership are the same in case of dissolution during the owners' lifetime as upon death, they will be valid, even if contested by the heirs.[19] Further, in accordance with this case, if upon the death of one partner the surviving partner is allowed to take over the partnership property at a value considerably lower than fair market value, the courts *may* invalidate the contract. The state of the law is, however, not clarified on this important point.

II.2.2.2. INSURANCE CONTRACTS

Inheritance taxes are very heavy if the surviving heir is not the widow, widower or child of the deceased. This tax problem is considerable when a cohabitating unmarried partner dies. Even in such a case when the family home is jointly owned, the duty to pay inheritance tax may force the survivor out of the family home.

In order to avoid being taxed out of house and home, unmarried cohabitants have, in recent years, learned from the practice of business partnerships to insure each others' lives. Insurance proceeds from such life insurance devolve to the surviving unmarried partner and no inheritance tax is imposed on these proceeds. However, provisions concerning dependents in ordinary life insurance policies do not usually include surviving unmarried cohabitant parners unless this identification of beneficiary is expressly stated. Even in cases where this precaution has been taken, conflicts may arise with the basic right of heirs or spouses.

II.2.2.3. ALIMONY CONTRACTS

Contracts concerning alimony to be paid by one unmarried cohabitating partner to the other *during* cohabitation have not yet given rise to any case law. Danish tax authorities have, however, disapproved of such contracts when the party who has undertaken the duty to pay alimony attempts to deduct the alimony sum from his taxable income. In fact, the taxation authorities have been quite adamant in these circumstances and have refused unmarried cohabitating couples any deduction under these contracts.

In view of the above dichotomy, it is possible to conclude that an agreement concerning alimony to be paid *after* the dissolution of an unmarried partnership will be valid, if it is made at the time of the "divorce". There will usually be a right to deduct any such sums of alimony from the

[19] 1962 UfR 576.

income of the party paying alimony for the purposes of lowering his or her final tax but not if cohabitation is resumed. Furthermore, although there is no case law as yet concerning the validity of alimony contracts written during a period of unmarried cohabitation and extending into a period after a break-up of the unmarried relationship, it will, again, undoubtedly be possible to draw up a contract that will be considered valid if it is not too vague or unreasonable.

II.2.2.4. CONTRACTS OF EMPLOYMENT

Spouses often work together in a family business. This is a well-known pattern of life in agriculture and in many areas of trade and smaller industrial undertakings. Under Danish private law, spouses are entitled to enter into employment contracts with each other. These contracts are, however, ignored for all practical purposes by the income tax authorities and social security authorities, to the financial disadvantage of the spouses.

Unmarried cohabitating partners are better off in this respect. Danish private law here requires that normal employment contracts between unmarried cohabitating partners be respected by taxation and social security authorities and be treated completely as if they were contracts between persons with no intimate relationship.

II.3. *Wills*

It is very important to note that one unmarried cohabitant will not inherit from the other unless there is an express testamentary provision to this effect. Unmarried cohabitants, therefore, often draw up mutual wills. If the cohabitants own assets jointly, the survivor takes his or her own share even if there is no will. The share of the deceased partner, however, belongs to his or her estate. A will is therefore necessary if the survivor is to acquire the deceased's share of the joint property. If the deceased has left children, other descendants or a spouse, a will cannot deprive these heirs completely of their rights to inherit from the deceased.

II.4. *Resolution of property disputes without express contracts*

II.4.1. *"Separate property" and the Actress Case*

Cohabitants who have made no express contract concerning their financial rights and obligations must face the fact that there is no separate legal regime to solve their problems. In principle each party owns his or her own

property and when cohabitation ceases either because of death or disagreement, each of the parties is entitled to keep the assets to which he or she has formal title. Of course, each of them has to pay his or her own debts. In many ways this legal position is similar to that of spouses who have chosen a separate property regime.

When one party holds title to most of the cohabitation assets, the other party (usually the woman) is in a difficult position. There has been very little case law in this area until recent years, possibly because attorneys have been advising unmarried cohabitants who consulted them that there was very little that could be done under the present state of the law unless the former cohabitation partner consented to a property settlement.

The unpropertied partners are, however, not left without remedy. The earliest leading case[20] concerned an unmarried couple, a theatrical manager and an actress, who lived together in a marriage-like relationship for more than twelve years until his death. The actress had earned her own income and had spent a considerable part of it on household expenses since the household was her responsibility. The decreased had paid a number of other expenses and had acquired valuable assets. The couple lived in a Copenhagen flat and had a separate weekend dwelling. The conflict in the court concerned the ownership of the furnishings of these two dwellings.

The Eastern High Court decided that the fact that the actress had paid household expenses and that the deceased had paid a number of other communal expenses did not, in itself, create any form of joint ownership as to assets which the deceased held in his own name. The High Court did decide, however, that the exact ownership of some of the assets was sufficiently unclear from the long period of cohabitation to require that the case be sent to the Distribution of Estates Court for further clarification as to title and distribution of jointly owned assets or assets to which title was not clear.[21]

While the courts rarely accept proof of joint ownership in marital conflicts without an express agreement to prove joint ownership, the reverse is usually true in conflicts involving former unmarried cohabitants. Proof of

[20] 1953 UfR 182.

[21] The Distribution of Estates Courts are sections of the County Courts entitled to make a distribution as described by the High Court under the authority of sec. 82 of the Distribution of Estates Act. The purpose of this statute is to make possible distribution of assets and debts when a business partnership has to be dissolved, although the statute has in many cases also proved useful to unmarried cohabitants by offering them a simple and fairly cheap way of resolving their property conflicts.

Some claimants have, however, chosen to convert their claims to demand for payment of a lump sum. In this event the case must be tried by the ordinary courts (the County Courts if the claim does exceed 100 000 Danish Kroner or, otherwise, one of the two High Courts).

an implied contract concerning joint ownership or joint financial contribution toward the acquisition of assets—which also under Danish law leads to joint ownership of the assets—has been accepted on a fairly lenient basis. None of the cases have as yet dealt with the value of indirect contributions made by a homemaking partner.

II.4.2. *Developments during the 1970s*

For a number of years the Danish law as to joint ownership of property was clear. Joint ownership arose only if (a) the parties had made an express agreement, (b) there was proof of an implied agreement or (c) both parties had made direct financial contributions towards the acquisition of the asset concerned.

In 1975 the Eastern High Court carried the law one step further and decided that indirect financial contribution of a partner paying household expenses, thereby enabling the other partner to acquire other assets, could in some instances be a sufficient basis for the creation of joint ownership of the assets thus acquired. In this case[22] the unmarried couple cohabitated for six years until the death of the man. During cohabitation the woman paid the household expenses, while the man acquired savings and other assets. The court held that the assets were jointly owned, 3/4 by the man and 1/4 by the woman. This distribution of ownership was based upon a formula considering the extent of asset ownership at the start of the cohabitation and the earnings of the parties during cohabitation.

Since this 1975 decision the Eastern High Court has decided a number of like cases in the same manner. Further, several recent decisions by the Western High Court are probably based upon the same point of view.

The fundamental principles of these recent decisions have been described by the Danish legal scholar Vibeke Vindeløv as follows:[23]

> Assets are held to be owned jointly:
> (1) if they have been acquired for the common use of the parties;
> (2) if the party who has no share in the formal title has contributed towards payment of the family expenses, thus making acquisition of the assets possible or easier; and,
> (3) if the parties have not made an express agreement prohibiting the establishment of joint ownership.

Recent case law has shown a growing tendency toward awarding the parties equal shares upon the dissolution of the cohabitation relationship even in cases where one of them (usually the woman) has earned a consid-

[22] 1977 UfR 814.
[23] See *UfR* 1979 B, pp. 204 f.

erably lower income than the other during the cohabitation. The decisive test employed by the courts has been a test of good faith contribution to the family finances according to the best ability of each of the parties.

The main asset in question in the majority of property disputes between unmarried couples has been the family home. An increasing number of Danish families own their own home instead of renting a flat, and inflationary pressures have made it increasingly important for both parties to establish joint ownership in order to share in the increased value of the home upon the dissolution of cohabitation.

II.4.3. *The 1980 Supreme Court decision*

It was not until 1980 that a dispute concerning the disposition of proceeds from the sale of a family home of an unmarried cohabitating couple reached the Supreme Court of Denmark.[24] The couple in this case cohabitated for four and a half years and then parted due to a disagreement. They had both been gainfully employed, although her earnings were considerably lower than his. The woman had a child of her former marriage living with her. After two years of cohabitation the man bought a house in which the family lived until the dissolution of the partnership. Some time after the dissolution of the unmarried partnership, he sold the house and she claimed a half share of the profit from the sale.

The High Court held on these facts that joint ownership had been established. The Supreme Court, however, reversed this decision. The majority of the Supreme Court awarded the woman a lump sum, somewhat lower than half of the profit, basing its decision upon the circumstances of the case. The opinion states that the lump sum amount was determined by taking into account the duration of the cohabitation, the fact that the house was used as a family home and the difference in amount of the incomes of the parties during the cohabitation.

A minority of the Supreme Court agreed that the women had not become a joint owner of the house, but found no grounds for awarding her a lump sum. The dissenting opinion stressed, among other factors, that her income was sufficient only to cover the living expenses of herself and her child, and that she had not (even indirectly) contributed to any part of the price paid for the house, nor toward repayment of the mortgages. The minority expressly rejected the woman's claim that a marriage-like community of property had been established between the parties. The majority opinion no doubt concurs on this point even though the majority does not expressly so state.

[24] 1980 UfR 480.

II.4.4. *The state of the law after the 1980 Supreme Court decision*

The scope of this 1980 Supreme Court decision is still unclear. Two points are, however, observable: (1) the Supreme Court held that High Court case law had gone too far towards recognizing claims of joint ownership, and (2) the Supreme Court accepted the fundamental principle that a partner who has indirectly made it possible for the other to obtain substantial savings ought not to be left "bare and naked" at the dissolution of the unmarried partnership. This second principle, it may incidentally be noted, was put forward in the 19th century as theoretical justification for the establishment of community property as a legal regime for married couples.

It has also become clear from the case law that lump sum awards may now be considered an appropriate solution in a considerable number of property conflicts between former cohabitants. In the present writer's opinion, this solution is advantageous. Although not without problems, a lump sum solution is less complicated that the distribution of property according to a judicially determined joint ownership formula. Indeed, joint property law is one of the most difficult areas of Danish law. It is therefore not desirable to bring these legal uncertainties into the resolution of family life property disputes. It should also be noted at this point that, although the practice of awarding a lump sum in the settlement of property disputes between unmarried cohabitants may lead to more clarity in the law, a number of recent High Court decisions have shown that the law is not entirely clear in this ever-evolving area.

In mid-1980 it is still too early to make any final analysis. As far as can be determined at this point, the fundamental principle of the Actress Case (that payment of communal expenses by each of the partners will not in itself create joint ownership as to assets owned by one of the partners in his or her own name) is still accepted as the minimum standard. In actual practice, it is much easier for an unmarried cohabitant to prove an implied agreement concerning joint ownership of property than it is for a married partner in similar circumstances. Also, the Matrimonial Law Reform Commission will soon publish a report dealing with the property problems of cohabitants. The recommendations of this report should be taken into account in any comprehensive analysis of the present state of the law and future directions for the law.[25]

However, even now it is still too early to make any final analysis for the

[25] The report has now been published (in January 1981) as Report no 8. The majority of the Commission members advocate a lump sum solution.

proper solution of these property conflicts. It must first be known whether the ever increasing number of unmarried couples who choose cohabitation do so as a substitute for marriage or as a substitute for the old-fashioned type of engagement relationship. If couples choose unmarried cohabitation as a new permanent way of life, that choice will carry with it the need for a sweeping reform in Danish law. The present state of uncertainty in the law could not under such circumstances be permissible in the future.

Although statistics in Denmark gathered on this subject furnish us with valuable information, it is at present almost impossible to predict future developments. The figures do indicate, however, that in the comparatively near future more clearly discernible trends may become evident.

Readers of the popular Pulitzer Prize-winning American comic strip series, Doonesbury, may recently have noticed that the prominent women's liberation personality, Joanie Caucus, who some years ago left home and children to obtain a law degree, and who is cohabitating without marriage, was earlier this year suddenly confronted by her daughter, Joanie Jr., who firmly stressed that she (Joanie Jr.) was going to marry her current boy friend. Evidently, cohabitation without marriage was outdated in Joanie Jr.'s adolescent eyes. Unfortunately, Joanie Jr.'s relationship broke down before the wedding took place.

The future of Joanie Jr. and the future of marriage as an institution appear at present somewhat uncertain. One hopes that the future will soon become more clear.