

The Law Commission
Consultation Paper No 179

**COHABITATION: THE FINANCIAL
CONSEQUENCES OF RELATIONSHIP
BREAKDOWN**

A Consultation Paper

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultation paper, completed on 4 May 2006, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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THE LAW COMMISSION
COHABITATION: THE FINANCIAL CONSEQUENCES OF
RELATIONSHIP BREAKDOWN

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PART 1

INTRODUCTION

THIS CONSULTATION PAPER AND THE LAW COMMISSION

- 1.1 This is a consultation paper. It does not contain any final recommendations for reform of the law.
- 1.2 The paper is the work of the Law Commission. The Commission is an independent statutory body which has the duties of keeping the law of England and Wales under review and making proposals for its reform. It does not have power to make changes to the law. That is a matter for Parliament.
- 1.3 This consultation paper asks what people think about the way the law currently treats cohabitants' property and finance when their relationships end, whether by separation or by death. The Government has asked us to consider how any reform of this area of law could be carried out. This paper therefore puts forward a possible new scheme and seeks consultees' views. In this paper we do not reach any final decision on the questions of whether there should be reform or to whom any reform should apply.
- 1.4 We are producing two versions of the consultation paper. This paper is the full consultation paper which examines the issues more comprehensively and sets out in considerable detail a proposed scheme for cohabitants. We are also publishing a much shorter "overview" which summarises the issues under consideration. Both papers contain consultation questions and provisional proposals, but a larger number of consultation issues are discussed in this paper than in the overview. The overview consultation paper is available on our website.
- 1.5 The consultation process is open to all who wish to participate. It lasts from the date of publication of this paper until 30 September 2006. We invite readers to write to us with their views.
- 1.6 Following consultation, we shall analyse the responses we receive and consider what specific recommendations we should make. We shall then publish a final Report containing an account of the consultation process, explaining the policy we are proposing, and setting out any recommendations for reform.
- 1.7 We intend to publish our final Report by August 2007.

THE BACKGROUND TO THIS PROJECT

- 1.8 In July 2002, the Law Commission published a Discussion Paper on *Sharing Homes*.¹ This was the culmination of a lengthy review of the law relating to the property rights of those who share a home, covering a broad range of people, including friends and relatives as well as both married and unmarried couples. The Discussion Paper focused on the complex principles contained in the law of

¹ *Sharing Homes: A Discussion Paper (2002) Law Com No 278.*

trusts and proprietary estoppel which determine when, and to what extent, a person who is not on the legal title may claim an interest in the shared home.

- 1.9 The *Sharing Homes* project sought to formulate a scheme for ascertaining and quantifying property rights in the shared home which would be easier to operate and more certain in its outcomes than the principles which are currently applied. Ultimately, this objective proved impossible to realise. The Commission concluded that it was not feasible to devise a scheme, based upon an objective valuation of the contributions made, which could operate “fairly and evenly across the diversity of domestic circumstances which are now to be encountered”.²
- 1.10 The Commission recommended that those who are living together should be positively encouraged to investigate the legal consequences of doing so and to make express written arrangements setting out their intentions.³ A major problem in encouraging cohabiting couples to make agreements is the degree of public misunderstanding about the consequences of cohabitation. Many cohabiting couples apparently believe that they acquire the same rights as married couples once they have been together for a certain length of time.
- 1.11 In *Sharing Homes*, the Law Commission identified and publicised
- a wider need for the law to recognise and to respond to the increasing diversity of living arrangements in this country. We believe that further consideration should be given to the adoption, necessarily by legislation, of new legal approaches to personal relationships outside marriage, following the lead given by other jurisdictions (such as France, Australia and New Zealand).
- These approaches may include such mechanisms as the formal registration of civil partnerships, or, less formally, a power for the court to adjust the legal rights and obligations of individuals who are or have been living together for a defined period or in defined circumstances.⁴
- 1.12 Registration of partnerships involves the parties “opting in”. Since the publication of *Sharing Homes*, this model has been adopted by Parliament in offering to same-sex couples the opportunity to register their relationships as “civil partnerships” and thereby to obtain broadly equivalent rights and obligations to those applying to opposite-sex couples who marry. The Civil Partnership Act 2004 came into force on 5 December 2005, and the first civil partnerships were entered into shortly afterwards.
- 1.13 During the passage of the Civil Partnership Act through Parliament, debate highlighted the case for fundamental legal reform for those who lived together but who neither married nor (in the case of same-sex couples) registered a civil partnership. Concern was centred on the potential financial hardship suffered by cohabitants on the termination of their relationship and on the current lack of any

² *Sharing Homes: A Discussion Paper* (2002) Law Com No 278, para 1.31(1).

³ *Sharing Homes: A Discussion Paper* (2002) Law Com No 278, para 1.31(2).

⁴ *Sharing Homes: A Discussion Paper* (2002) Law Com No 278, Part VI, paras (7) and (8).

coherent legal remedies to mitigate their position. In a letter of 12 May 2004, Lord Filkin, then Parliamentary Secretary at the Department for Constitutional Affairs, indicated to Peers that he had asked the Law Commission to consider a request to include a review of cohabitation law in its Ninth Programme of Law Reform.

TERMS OF REFERENCE

- 1.14 The terms of reference are set out in our Ninth Programme of Law Reform:⁵

The project will focus on the financial hardship suffered by cohabitants or their children on the termination of the relationship by breakdown or death. It will only consider opposite-sex or same-sex couples in clearly defined relationships. Particular attention will be given to:

- (1) Capital provision where there is a dependent child or children;
- (2) Capital and income provision on relationship breakdown;
- (3) Intestate succession and family provision on death; and
- (4) The Inheritance (Provision for Family and Dependants) Act 1975.

The project will also consider the place of cohabitation contracts and the extent to which cohabitants should be free to make and to enforce agreements concerning their respective liabilities to provide and to maintain following separation.

- 1.15 The current project is not intended to be a comprehensive review of all the law as it applies to cohabiting couples. It is specifically confined to the financial consequences of the termination of cohabiting relationships, whether by separation or by death. It may be helpful to indicate at the outset that, while the terms of reference cover both remedies on separation and on death, the principal focus of this consultation paper is on the position at separation. Cohabitants do not fall within the scope of the intestacy rules. However, the Inheritance (Provision for Family and Dependants) Act 1975 provides a specific set of remedies for certain cohabitants whose relationships end by the death of the other party. Although the current law does not entirely ignore the position of cohabitants who separate, there is no equivalent scheme specifically designed to provide financial relief between cohabitants in such cases. The main focus of this paper (in particular Parts 4 to 7) is therefore on whether a new scheme providing remedies on separation should be introduced and, if so, what form it should take and to whom it should be available. However, in Part 8 we also address the position on death, and consider what reform might be warranted in relation to such cases.
- 1.16 A number of issues are specifically excluded from consideration. As the Law Commission's Ninth Programme of Law Reform makes clear, the project does not concern:

⁵ The Law Commission: Ninth Programme of Law Reform (2005) Law Com No 293, para 3.6, available at [http://www.lawcom.gov.uk/docs/9th_Prog_Final\(2\).pdf](http://www.lawcom.gov.uk/docs/9th_Prog_Final(2).pdf).

- (1) parental responsibility for children;
- (2) next of kin rights; or
- (3) insolvency, tax and social security.

The operation of the child support legislation and the role of the Child Support Agency are also outside the scope of this project.

- 1.17 It is particularly important to emphasise that the Law Commission has not been asked to consider the way that the State generally deals with or recognises cohabitants. As will become clear, we are not proposing the creation of a new “status” of cohabitant conferring a broad range of rights and privileges. We are concentrating on the extent to which cohabiting couples should be able to claim financial remedies from each other following the termination of their relationship.
- 1.18 We will not be able to deal with consultation responses on any issues that fall outside the scope of the project.

GROUPS NOT COVERED BY THE PROJECT

- 1.19 “Cohabitant” is a wide term. The Ninth Programme makes clear that the project should not consider all those who live in the same home. It excludes:
- (1) relationships between blood relatives or "caring" relationships; and
 - (2) "commercial" relationships (such as landlord and tenant or lodger).
- 1.20 We are aware that some would argue strongly that the law relating to these other categories of home-sharers may also be in need of reform. We express no view on the merits of such arguments. As these groups are outside our terms of reference we will not be able to deal with them during the course of this project. Arguments for wider changes to the law should not prevent us from considering reform for those within our current remit.

WHO WILL WE BE CONSIDERING?

- 1.21 This project concerns what are commonly referred to as “couples”, either opposite-sex or same-sex, who live together in intimate relationships.
- 1.22 Although, as discussed, this group does not include all those who may share a home, it still comprises a highly diverse range of couples. At one extreme there are young couples who move in together to save rent, but who keep their finances entirely separate and have no longer term joint plans. At the other, there are established partners who have lived together for decades, bringing up children and intending to stay together forever. There are many different sorts of relationship in between.
- 1.23 We recognise that many consultees’ views on reform will depend on what type of couple we are talking about. We will listen to the views of consultees about which relationships should fall within any new scheme.

THE PROBLEM ON SEPARATION

- 1.24 The law governing the division of income and capital when a cohabiting couple separates has been said, in particular, to be unfair and uncertain.
- 1.25 Although there are some statutory remedies that may be claimed on separation, they are of limited scope and utility. There is relatively short-term protection from domestic violence, and residential tenancies may be transferred from one cohabitant to another by order of the court. While the court does have extensive powers to make orders for capital provision for the benefit of children, they are surprisingly rarely used. But there is nothing else.
- 1.26 Most significantly, the court has no general power to make orders for financial relief on the termination of a relationship outside marriage⁶ by separation. This contrasts starkly with the remedies available on divorce where the court may order ancillary relief so as to ensure that a just and fair solution is obtained.
- 1.27 It follows that if a cohabiting couple separate, they are usually restricted to making claims under the general law based on their entitlements to particular items of property, usually the shared home. Unless a trust has been expressly declared by the parties, the success of any claim will depend upon the application of doctrines such as implied (that is resulting or constructive) trust or proprietary estoppel.
- 1.28 As we explained in *Sharing Homes*, following a detailed analysis of these doctrines, the rules contained in the general law have proved to be relatively rigid and extremely difficult to apply, and their application can lead to what many would regard as unfairness between the parties. The formulation of a claim based on these rules is time-consuming and expensive, and the nature of the inquiry before the court into the history of the relationship results in a protracted hearing for those disputes that are not compromised. The inherent uncertainty of the underlying principles makes effective bargaining difficult to achieve as parties will find it hard to predict the outcome of contested litigation.
- 1.29 The best advice for cohabiting couples remains that they should, if at all possible, agree the terms on which they are living together before they begin to do so. As far as their shared home is concerned, that will involve a declaration of trust. It is, however, often the case that cohabitants do not address their minds to this issue at all, or before it is too late. As far as other financial arrangements are concerned, while it is now highly probable that a court would enforce a contract regulating the financial affairs of a cohabiting couple, the position is not entirely clear-cut.

DEVISING A SCHEME FOR FINANCIAL RELIEF ON SEPARATION

- 1.30 It would be possible to reform the law by allowing cohabiting couples to “opt in” to a scheme imposing enforceable financial obligations on the parties in the event of their separation. An “opt-in” scheme does have the advantage that it applies only

⁶ Throughout this Paper, wherever reference is made to “marriage”, “spouse” and related matters, it should be taken to include reference to civil partnership, civil partner and so on, save where it is expressly stated otherwise.

where the parties have consented to its application to their relationship and that it therefore respects the parties' autonomy.

- 1.31 In a sense, both marriage and civil partnership may be said to comprise opt-in schemes, although the range of the rights and obligations conferred covers a much wider area than the property and financial relations of the parties. We have noted that civil partnership confers rights and obligations broadly equivalent to those of married couples. Some have argued that opposite-sex couples who do not wish to marry should be entitled to register civil partnerships. We consider that advocating such reform misses the point. Opposite-sex couples can marry, whereas same-sex couples cannot. There is no pressing social need for opposite-sex couples to have a "marriage-alternative" which confers broadly equivalent rights and obligations to marriage.
- 1.32 In this paper, we consider the case for an opt-in scheme which is specifically restricted in its application to the property and financial relations of the parties. As will become clear, we have serious reservations about the utility of introducing such a reform. An opt-in scheme would apply only where the parties had complied with the relevant formal process of registration. It would therefore do nothing for those who, for whatever reason, failed to opt in. The objective of the current project is to provide effective remedies to alleviate the financial hardship of those who have not married (or, being same-sex, have not registered a civil partnership). It is difficult to see how that objective can be achieved by means of an opt-in system.
- 1.33 The emphasis of this paper is therefore on the formulation of a scheme of financial relief which would apply to cohabitants by default on their separation. In order to protect the autonomy of cohabitants, we provisionally propose that couples should be entitled to "opt out" of the operation of any such remedial scheme, provided that certain conditions were satisfied.
- 1.34 We realise that there may be concerns about the scale of any new jurisdiction which we may propose. It is important to be clear from the outset that we do not consider that all cohabiting couples falling within our terms of reference should have access to remedies merely because their relationship comes to an end. Simply having been in a cohabiting relationship should not be sufficient to give rise to a claim.
- 1.35 We also realise that there may be concerns that cohabiting couples should not be treated as if they were married. As we explain at paragraph 6.15 below we consider that there is a difference between relationships in which the partners have publicly made a legally binding commitment to each other and relationships in which they have not. In the course of this paper, we provisionally reject the suggestion made by some commentators that cohabitants should be treated identically to married couples and civil partners in terms of financial relief on termination of the relationship.
- 1.36 We have instead sought to devise a remedial scheme which is specifically designed for cohabitants on separation and based on principles different from those currently applicable between spouses on divorce.
- 1.37 Our provisionally proposed scheme of "financial relief on separation" is set out in Part 6. The scheme would confer jurisdiction on the court to make orders for

financial relief in the exercise of its discretion, taking account of the contributions and economic sacrifices made by each party during the course of the relationship. The aim would be to share the economic advantages and economic disadvantages created by the relationship and experienced on separation more fairly between the couple than the current law is able to do.

1.38 We believe that the availability of remedies under such a scheme would need to be controlled in two ways:

(1) *Eligibility to apply.* We believe that many consultees will take the view that only some cohabitants should be able to apply for financial relief on separation. This could be achieved by limiting the availability of any new remedies to cohabiting couples who satisfy certain qualifying conditions. The scheme would set out which sorts of couple were eligible and those that fell outside the defined category would be excluded from the scheme. For example, it would be possible to restrict eligibility to those couples who have a child, or to those couples who have lived together for a certain length of time.

(2) *The basis on which awards would be made.* However, just being eligible to apply should not automatically mean that the applicant is given anything. As we explain in Part 6, we do not consider that cohabiting couples should be entitled to a share of each other's assets at the end of their relationship irrespective of the extent to which they shared their lives during the relationship. Rather, we think that a new scheme should only provide applicants with a remedy on separation if they can show that the effects of the contributions and associated economic sacrifices they made during the relationship would otherwise be unfairly shared following separation. In many cases, neither party would be able to establish this and no claim would therefore be tenable.

1.39 These two filters would work in tandem. In order to produce a remedy, both (1) and (2) would have to be satisfied. This would mean that only parties who were eligible to apply and who proved the necessary contributions or sacrifices could obtain anything by way of financial relief.

1.40 The remedial scheme we set out would, we believe, be capable of being adapted to whichever category of cohabiting relationships Parliament may consider appropriate. We therefore test the scheme against the whole range of cohabitants falling within our terms of reference, present the results that would be produced and invite consultees to give their views.

1.41 A number of other jurisdictions have already introduced statutory schemes providing for the adjustment of property rights or financial provision between cohabiting couples on separation and on death. All Australian states, and most Canadian provinces, have such legislation. New Zealand in 2001 extended its system of deferred community of property and associated remedies applicable to spouses to cohabitants of three years' standing and those with a child. Since the commencement of this project, the Scottish Parliament has enacted legislation which confers power on the court to make orders for financial provision following the ending of a cohabitation otherwise than by death, and which entitles a

cohabitant to apply to the court for financial provision if their partner dies intestate. That legislation came into force on 4 May 2006.⁷

- 1.42 In the course of this paper we make reference to the statutory schemes in these and other jurisdictions. We have not yet had the opportunity fully to review the operation of those schemes and to consider the practical and theoretical problems that have been encountered. We intend to carry out further research into the law and experience of other jurisdictions following publication of this Paper, and to report on our findings in the final Report. We would be very interested to hear the views of those with experience of other jurisdictions in the course of the consultation process.

CONCLUSION

- 1.43 As will emerge in this paper, the legal treatment of cohabitants is an extremely difficult area. It involves significant questions of social policy and engenders strong responses. It is complex in terms of law and social impact. Broad questions of social policy remain a matter for Parliament. As a law reform body, the Law Commission is best qualified to address any technical deficiencies of the law and to recommend ways in which reform could be effected. We hope that this paper will inform the debate on the public policy questions relating to cohabiting couples and that our consultation will put Parliament in a position to make the necessary decisions about whether (and if so what) reform should take place.
- 1.44 We have had productive meetings with and received valuable assistance from a large number of people in the course of preparing this paper. We gratefully acknowledge those individuals and organisations in the final appendix to this paper.

STRUCTURE OF THIS CONSULTATION PAPER

- 1.45 **Part 2** of this paper describes the social context of cohabitation. It records the demographic data showing the decline in the rate of marriage and the growth in numbers of cohabitants and their children. It considers who is most likely to cohabit and the increasing duration of cohabiting relationships. It also reviews the reasons why couples cohabit, comparing those who cohabit before marriage, those who cohabit after one or both parties have been divorced and those who cohabit instead of marrying. It reports actuarial estimates for the future increase in numbers of cohabitants.
- 1.46 **Part 3** of this paper provides a summary of the current law relating to the financial and property consequences of cohabitation.
- 1.47 **Part 4** sets out the key criticisms that have been made of the law described in Part 3. It also examines what implications relevant human rights law might have for reform.
- 1.48 **Part 5** evaluates the case for statutory reform, in light of the perceived shortcomings of the current law and research concerning cohabitation and marriage. It considers whether it would be a sufficient response to those

⁷ See Appendix B.

criticisms to encourage parties to remove themselves from the scope of the law described in Part 3 by marrying or registering a civil partnership, or by making their own financial and property arrangements by means of cohabitation contracts and express trusts. It then examines the options for reform, if reform were thought desirable. It explains why we would prefer that any reform involved the enactment of a new scheme of remedies that would apply by default to couples falling within statutory eligibility criteria, but with the right for couples wishing to do so to opt out, rather than the creation of a new opt-in scheme for cohabitants. It considers what justifications, if any, there might be for applying a new opt-out scheme to various categories of cohabitant. It examines the likely impact of any reform on different situations involving cohabitants. It considers the potential costs of any reform to the public purse.

- 1.49 **Part 6** explores the options for a new scheme of financial relief on separation. It argues for a scheme based on the exercise of judicial discretion rather than the application of fixed rules. That discretion should, however, be structured so that the principles on which relief is to be granted are clear. The paper analyses the underlying principles on which other jurisdictions have based their schemes. It rejects the adoption of a needs-based or partnership-based scheme of the sort reflected in many decisions on ancillary relief on divorce. It considers the case for basing relief on an evaluation of the parties' respective contributions to the relationship and the associated economic sacrifices made, and provisionally proposes the adoption of principles of "economic advantage" and "economic disadvantage", akin to those recently enacted in Scotland.
- 1.50 **Part 7** seeks to demonstrate through a series of factual examples how it is envisaged that the principles underpinning the proposed scheme described in Part 6 would apply.
- 1.51 **Part 8** reviews the financial remedies available to cohabitants on the death of their partner. It considers the case for reforming the law of intestacy so that a cohabitant is entitled as of right to a share of the deceased's estate. It focuses on applications for financial provision under the Inheritance (Provision for Family and Dependents) Act 1975 and argues that there should be compatibility between any new scheme applicable on the separation of cohabitants and the family provision legislation currently applicable on death.
- 1.52 **Part 9** considers who should be eligible to apply for financial relief on separation. In our view, eligibility criteria should reflect the nature of the remedy on offer, and so we tie our discussion closely to the scheme set out in Part 6.
- 1.53 **Part 10** analyses the circumstances in which cohabitants should be entitled to "opt out" of any new statutory scheme, and the extent to which opt-out agreements should be susceptible to review by the courts. It also suggests that, in order to dispel any lingering doubt, statute should provide that the courts may enforce cohabitation contracts dealing with property and finance.
- 1.54 **Part 11** assesses the procedural consequences of our reform proposals. This Part also addresses issues relating to limitation periods, jurisdiction and anti-avoidance, and considers the retrospective effect of any new scheme and the need for transitional provisions.

1.55 Part 12 brings together the provisional proposals made and consultation questions asked in the course of the paper.

PART 2

THE SOCIAL CONTEXT

INTRODUCTION

- 2.1 Cohabitation outside marriage has become increasingly common over recent decades in England and Wales, and is expected to become more prevalent in the future.¹
- 2.2 Since cohabiting relationships are not formalised, and since “cohabitation” can be described and defined in different ways, it is difficult to collect entirely accurate data about it.² However, demographers and other researchers have devised various mechanisms for measuring the prevalence and characteristics of cohabiting relationships and there is now a vast research literature on this subject.
- 2.3 We focus in this Part on the key demographic data and broad categories of cohabiting relationship that have been identified by that work. In later Parts of this paper, we shall draw on some other elements of the research literature, looking more closely at aspects of cohabiting relationships which are particularly pertinent to the issue of financial relief on separation.
- 2.4 The evidence on which this Part is based derives from numerous sources, the most important of which include:
 - (1) British Household Panel Survey: a longitudinal study of a single set of participants (originally 5,000) who have been repeatedly interviewed across a number of years since 1991;
 - (2) British Social Attitudes Survey: now in its 19th cycle, this is a large-scale quantitative survey, accompanied by in-depth qualitative follow-up surveys;
 - (3) Census: the Office for National Statistics conducts a census of the population every ten years, most recently in 2001;
 - (4) General Household Survey: the main annual Office for National Statistics survey, providing a “snapshot” of the sample of the population participating in that particular year; and
 - (5) Millennium Cohort Study: a large-scale panel study of babies born in the UK. The first sweep, conducted in 2001-2, contains information on 18,819 babies in 18,553 families, collected when the children were aged 9-11 months.

¹ This trend has been observed in many other European countries. See K Kiernan, “The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe” (2001) 15 *International Journal of Law, Policy and the Family* 1.

CHANGING SOCIAL TRENDS

The rise in cohabitation and parenthood by cohabitants: key figures

- 2.5 The 2001 Census records just over two million cohabiting couples in England and Wales,³ an increase of 67% on the figures from the 1991 Census.
- 2.6 The number of people who live with a partner outside marriage has been increasing significantly since the 1970s. In 1986, 11% of non-married⁴ men and 13% of non-married women aged 16-59 in Great Britain were cohabiting. By 2004, the equivalent figures had grown to 24% and 25% respectively.⁵ In terms of the overall population (aged 16-59) in Great Britain in 2004, 13% of men and 12% of women were cohabiting.⁶
- 2.7 The 2001 Census for England and Wales further records that:
- (1) 1,278,455 children were dependent on a cohabiting couple;⁷
 - (2) of those, 558,426 children were in cohabiting step-families;⁸ and
 - (3) 741,880 cohabiting couples had a dependent child or children;⁹
- 2.8 The number of children dependent upon a cohabiting couple is reflected in the increasing rate of births outside marriage. In 1970, fewer than 10% of births occurred outside marriage.¹⁰ By 2004, 42% of births were outside marriage.¹¹ The increase in such births has been accompanied by a similar rise in the

² For discussion of the problems of measuring “cohabitation”, see M Murphy, “The evolution of cohabitation in Britain, 1960-1995” (2000) 54 *Population Studies* 43; J Knab, “Cohabitation: Sharpening a Fuzzy Concept” (2005) Working Paper No 04-05-FF, Center for Research on Child Wellbeing, Princeton University.

³ Office for National Statistics, *Census 2001*, Table S006; these figures include same-sex couples.

⁴ This includes cohabitants who are separated from a spouse but still legally married.

⁵ Office for National Statistics, *Social Trends 36* (2006) p 27; *Social Trends 35* (2005) figure 2.10; based on data from the General Household Survey.

⁶ Office for National Statistics, *General Household Survey 2004* (2005) table 5.3. This figure includes separated (but not yet divorced) individuals cohabiting with another partner, and same-sex couples.

⁷ Office for National Statistics, *Census 2001*, table T01; 27% of these children were aged 0-2. The number of cohabiting couple households with dependent children more than doubled between 1991 and 2001. There were over 2.6 million children in lone parent families in 2001.

⁸ Office for National Statistics, *Census 2001*, table T01; *Social Trends 36* (2006) records that 38% of cohabiting families with dependent children are step-families, compared to just 8% of marital families with dependent children: p 28 and table 2.14.

⁹ See Office for National Statistics, *Census 2001*, table S006.

¹⁰ K Kiernan, “Unmarried Cohabitation and Parenthood in Britain and Europe” (2004) 26 *Law and Policy* 33, at 40, figure 2.

¹¹ Office for National Statistics, *Social Trends 36* (2006) p 30 and table 2.19, which provides comparisons with other EU countries; *Social Trends 35* (2005) pp 26-27 and figure 2.17, which shows the changes in jointly and solely registered non-marital births over time.

proportion of such births in England and Wales that are jointly registered by both parents. In 2004, 76.4% of those registrations were to parents recorded as living at the same address, who may reasonably be assumed to be cohabitants.¹² The proportion of births throughout the United Kingdom that are registered by one parent only has stayed fairly constant, at under 10%.¹³

- 2.9 Amongst the Millennium Cohort, 25% of children were born to cohabiting couples. 15% of births were to parents not in any co-residential relationship with each other at that time.¹⁴

Changes in marriage and divorce rates

- 2.10 Marriage remains the most popular form of partnership. The 2001 Census records over 10 million married couples in England and Wales.¹⁵ There were nearly 7.6 million dependent children in married couple families. It follows that currently approximately five in six opposite-sex couples¹⁶ are married, and one in six are cohabiting. Similarly, five in six dependent children live in a married couple family, and one in six in a cohabiting couple family.
- 2.11 There has, however, been a decline in the number of marriages per year over the last thirty years. In the United Kingdom as a whole, the number of marriages each year has dropped from around 480,000 in 1970 to around 300,000 by the end of the twentieth century.¹⁷ Recent years have seen a small rise: around 311,000 marriages were solemnised in 2004,¹⁸ of which around 270,000 took place in England and Wales.¹⁹
- 2.12 The divorce rate in the United Kingdom rose markedly during the 1970s and 1980s, rising more slowly in recent years.²⁰ An increasing proportion of marriages (two-fifths in 2003) are re-marriages for one or both parties.²¹
- 2.13 Marriage is being deferred: the average age at first marriage in England and Wales has risen from 25 for men and 23 for women in 1971 to 31 and 29 respectively in 2003.²² One cause of delay in marriage is people's tendency to

¹² Office for National Statistics, *Birth Statistics* Series FM1 no 33 (2005) table 3.10.

¹³ Office for National Statistics, *Social Trends 35* (2005) pp 26-27 and figure 2.17.

¹⁴ K Kiernan and K Smith, "Unmarried parenthood: new insights from the Millennium Cohort Study" (2003) 114 *Population Trends* 26, figure 1. The 15% includes a variety of parental relationships: separated/divorced at time of birth (1%), "closely involved" (7%), "friends" (2%), no relationship (4%).

¹⁵ Office for National Statistics, *Census 2001*, Table S004; figures for cohabitants are given below.

¹⁶ "Couples" here denotes spouses and cohabitants.

¹⁷ Office for National Statistics, *Social Trends 35* (2005) pp 23-24 and figure 2.8.

¹⁸ Office for National Statistics website (20 February 2006).

¹⁹ "Report: Marriages in England and Wales, 2004" (2006) 123 *Population Trends* 71.

²⁰ For detailed figures from 1961, see (2005) 121 *Population Trends* 75, table 9.3.

²¹ Office for National Statistics, *Social Trends 35* (2005) pp 23-24 and figure 2.8

²² Office for National Statistics, *Social Trends 35* (2005) p 24.

cohabit in their first partnership,²³ combined with older age when entering into first partnerships.²⁴

Same-sex couples

- 2.14 Since December 2005, same-sex couples throughout the United Kingdom have been able to register a civil partnership.²⁵ This confers on the partners similar rights and obligations to those applicable to married couples. It is too early to say how many partnerships will be registered.²⁶ The 2001 Census recorded 78,522 individuals in England and Wales living together in the same household in a same-sex couple.²⁷

“Living apart together”

- 2.15 To complete the picture of couple relationships in England and Wales today, reference should also be made to what demographers call “living apart together”: that is, individuals who do not live in a co-residential relationship but who have a partner. Depending on the criteria used to define the category, there may be anything between one and two million such couples.²⁸ Relatively little is known about this group but work has begun on identifying and describing them.²⁹

WHO COHABITS?

- 2.16 The headline figures regarding cohabitation in the population as a whole can be broken down by reference to various characteristics of the individuals involved. This may provide more insight into the social practice of cohabitation and an answer to the question “who cohabits?”

Age

- 2.17 Age considerably affects the likelihood of cohabitation. There has been a consistent increase in cohabitation amongst all age groups since the 1970s, but it is in the younger age groups that cohabitation has been most prevalent and the rate of increase greatest.³⁰ Women in their twenties are more likely than any

²³ See paras 2.17 and 2.31 below.

²⁴ J Ermisch and M Francesconi, “Patterns of household and family formation”, in R Berthoud and J Gershuny, *Seven Years in the Lives of British Families* (2000) pp 30-32.

²⁵ Civil Partnership Act 2004.

²⁶ For projections of take-up rates, see Department of Trade and Industry, *Final Regulatory Impact Assessment: Civil Partnership Act 2004*.

²⁷ Office for National Statistics, *Census 2001*, Table UV93.

²⁸ J Haskey, “Living arrangements in contemporary Britain: Having a partner who usually lives elsewhere and Living Apart Together” (2005) 122 *Population Trends* 35: if individuals living with their parents are excluded, 0.9 million men and 1.2 million women may be living in such relationships.

²⁹ J Haskey, “Living arrangements in contemporary Britain: Having a partner who usually lives elsewhere and Living Apart Together” (2005) 122 *Population Trends* 35; J Haskey and J Lewis, “Living-Apart-Together in Britain: Context and Meaning” (2006) 2 *International Journal of Law in Context* 37.

³⁰ Office for National Statistics, *Social Trends* 36 (2006) figure 2.12; J Haskey, “Cohabitation in Great Britain: past, present and future trends – and attitudes” (2001) 103 *Population Trends* 4, at 10, and figures 5a and 5b.

other age group in Great Britain to be cohabiting: 24-25% of women aged 20-29, compared with 4-16% in other age groups between 16-59. Similarly, 31% of men aged 25-29 were cohabiting compared with 2-20% in other age groups.³¹

- 2.18 Combined with the data about age at first marriage,³² it is clear that cohabitation has overtaken marriage as the preferred form of first partnership. Cohabiting couples without children tend to be younger than married couples, in line with the tendency of couples to cohabit rather than marry initially.³³ It also appears that the age at which people decide to cohabit is rising: there is evidence that not only marriage is being postponed, but that people are generally establishing co-residential relationships (whether marriage or cohabitation) later in life.³⁴

Cohabitation by marital status

- 2.19 The General Household Survey in 2002 found that about three-quarters of cohabitants in Great Britain aged 16-59 have never been married and about one-fifth of cohabitants have been divorced.³⁵
- 2.20 The age of cohabitants is generally congruent with a particular marital status. The vast majority of younger cohabitants (16-34) have never married. Most older cohabitants (35-59), by contrast, are divorced or separated.³⁶ Divorced men are more likely to be cohabiting than those men who have never married: in Great Britain in 2004-05, 36% of divorced men aged 16-59 were cohabiting, whereas only 23% of single men were. The distinction is less marked for women: in the same period, 29% of divorcées and 27% of single women cohabited.³⁷

Cohabitation and parenthood

- 2.21 Increasing numbers of children are born to cohabiting parents, and an increasing proportion of cohabiting couples produce children, largely as a result of women cohabiting rather than marrying in their first partnership.³⁸ The increase in the proportion of births to cohabiting parents, and lone parents, has been accompanied by a corresponding drop in the proportion of married parents of

³¹ Office for National Statistics, *General Household Survey 2004* (2005) table 5.3.

³² See para 2.13.

³³ Office for National Statistics, *Social Trends 36* (2006) p 27.

³⁴ J Ermisch and M Francesconi, "Patterns of household and family formation", in R Berthoud and J Gershuny, *Seven Years in the Lives of British Families* (2000) p 26.

³⁵ Office for National Statistics, *Living in Britain: General Household Survey 2002* (2004) p 57, derived from table 5.5; see *General Household Survey 2004* (2005) for latest data.

³⁶ Office for National Statistics, *General Household Survey 2004* (2005) table 5.5.

³⁷ Office for National Statistics, *Social Trends 36* (2005) table 2.11.

³⁸ See J Ermisch and M Francesconi, "Patterns of household and family formation" in R Berthoud and J Gershuny (eds), *Seven Years in the Lives of British Families* (2000) pp 33-4, using data from the British Household Panel Survey.

dependent children.³⁹ It seems that births to cohabiting parents are more often a “surprise” than births to spouses.⁴⁰

- 2.22 The General Household Survey 2004 indicates that 52% of married women aged 16-59 have dependent children and 35% have no children. By contrast, 39% of cohabiting women of that age have dependent children, and 58% have no children.⁴¹ The larger proportion of cohabitants without children reflects the generally younger profile of that group, and the likelihood that cohabitants of any age will marry or separate before having children.⁴²
- 2.23 Conception outside marriage now rarely results in the parents’ marriage prior to the birth.⁴³ It has been suggested that the so-called “shotgun weddings” may have now largely been replaced by cohabitation.⁴⁴
- 2.24 Although divorce may remain the primary cause of single parenthood, an increasing number of lone parent households (mostly headed by mothers) are created by the separation of cohabiting parents.⁴⁵ It is well-established that lone parent households are, on average, the poorest of families.⁴⁶

Socio-economic status

- 2.25 Evidence on the socio-economic status of cohabitants is available from various studies. The British Household Panel Survey suggests that while cohabitation began as the preserve of the upper-middle class, it has latterly become a

³⁹ J Haskey, “Cohabitation in Great Britain: past, present and future trends – and attitudes (2001) 103 *Population Trends* 4, at 13.

⁴⁰ K Kiernan, “Non-residential fatherhood and child involvement: evidence from the Millennium Cohort Study” (2006) *Journal of Social Policy* (forthcoming), table 2: 26% of spouses’ babies were a “surprise”, compared with 53% of cohabitants’ babies.

⁴¹ Office for National Statistics, *General Household Survey 2004* (2005) table 5.9. Contrast Labour Force Survey 2004 findings that suggest equal proportions of married and cohabiting couples (38%) have dependent children and 49% and 58% respectively had no children: Office for National Statistics, *Focus on Families* (2005) p 1.

⁴² J Haskey, “Cohabitation in Great Britain: past, present and future trends – and attitudes” (2001) 103 *Population Trends* 4, at 13.

⁴³ See J Ermisch, “The Puzzling Rise in Childbearing Outside Marriage” in A Heath, J Ermisch and D Gallie (eds), *Understanding Social Change* (2005) pp 28-30, figures 4-5. Compare the analysis of an older age cohort by A Berrington, “Entry into Parenthood and the Outcome of Cohabiting Partnerships in Britain” (2001) 63 *Journal of Marriage and Family* 80.

⁴⁴ A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) p 59; C Smart and P Stevens, *Cohabitation Breakdown* (2000) p 17.

⁴⁵ J Ermisch, “The Rise in Childbearing Outside Marriage”, in A Heath, J Ermisch and D Gallie (eds) *Understanding Social Change* (2005) p 46. Omnibus Survey findings from the mid-1990s suggest that a little under 20% of lone mothers had been in a cohabiting relationship; around 60% of lone mothers had been married: J Haskey, “One-Parent Families and their Dependent Children in Great Britain” (1998) 91 *Population Trends* 5, table 4. General Household Survey 2000 data also suggest that “single” (ie never married, but may have formerly cohabited) lone-mothers constituted 41% of all lone-parents, 64% of whom reported at least one past cohabitation: J Haskey, “One-parent families – and the dependent children living with them – in Great Britain” (2002) 109 *Population Trends* 46.

classless phenomenon, at least in so far as its prevalence at the outset of a relationship is concerned.⁴⁷ This “classless” view of cohabitation is also supported by the British Social Attitudes Survey of 2000. Nine per cent of the sample were currently cohabiting and a further 25% had done so in the past. Amongst those current and former cohabitants, cohabitation was more common amongst individuals living in households whose main source of income was earnings rather than a pension⁴⁸ or benefits. Those in receipt of benefits were found to be less likely to cohabit, contradicting the view that cohabitation is concentrated amongst those who are less educated, less skilled and unemployed. Once the variables of age, religion and income source were controlled for, the relationship between cohabitation and social class, education and employment status was not found to be statistically significant.⁴⁹

- 2.26 However, the destination of cohabiting relationships (into marriage, separation, or continued cohabitation, and whether couples become parents while cohabiting) seems to be differentiated in part by economic circumstances. In particular, as we shall see below, cohabiting parents are generally less affluent than married parents. Both lower household income and child-bearing in cohabitation have been found to decrease the chances of the couple marrying and to increase the length of cohabitation (through not converting to marriage).⁵⁰
- 2.27 Cohabitants are more likely to rent their homes from the social or the private rented sector than married couples.⁵¹ This may reflect the generally lower earnings of cohabitants,⁵² which may in turn reflect their generally younger age, and also a desire to have more flexible living arrangements, to allow for easy exit should the relationship come to an end.⁵³ But most cohabitants are owner-occupiers.⁵⁴

⁴⁶ See the Millennium Cohort Study, K Kiernan, “Unmarried parenthood: insights from the Millennium Cohort Study” (2003) 114 *Population Trends* 26; R Ford and J Millar (eds), *Private Lives and Public Responses: lone parenthood and future policy in the UK* (1998).

⁴⁷ J Ermisch and M Francesconi, “Patterns of household and family formation” in R Berthoud and J Gershuny (eds), *Seven Years in the Lives of British Families* (2000) pp 35-6.

⁴⁸ As the researchers acknowledge, in view of the current rarity of cohabitation amongst those of pensionable age, that is to be expected.

⁴⁹ A Barlow, S Duncan, G James and A Park, “Just a piece of paper? Marriage and cohabitation”, in A Park, J Curtice, K Thompson, L Jarvis and C Bromley (eds), *British Social Attitudes: Public policy, social ties. The 18th Report* (2001) p 44.

⁵⁰ See n 68 below.

⁵¹ Office for National Statistics, *General Household Survey 2004* (2005) table 4.11; Office of the Deputy Prime Minister, *Housing in England 2003-4* (2005) table 7.

⁵² J Haskey, “Cohabiting couples in Great Britain: accommodation sharing, tenure and property ownership” (2001) 103 *Population Trends* 26, at 33, discussing related findings from the 1998 Survey.

⁵³ R Probert, “Trusts and the modern woman: establishing an interest in the family home” (2001) 16 *Child and Family Law Quarterly* 275, citing Department of the Environment, Transport and the Regions, *Housing in England 1996-7* (1998) p 97.

⁵⁴ Office for National Statistics, *General Household Survey 2004* (2005) table 4.11; Office of the Deputy Prime Minister, *Housing in England 2003-4* (2005) table 7.

- 2.28 The Millennium Cohort Study examined level of household income, receipt of benefits and housing tenure. In 2001/2, it found that children born to “non-partnered” parents were the most disadvantaged; that children of cohabiting couples were substantially better off than them; but that children of married couples were the most advantaged. Cohabiting parents, compared with married parents, were three times more likely to have a very low household income (21%, as contrasted with 7.8%); four times more likely to be in receipt of income support (12.7%, rather than 3.2%); and three times more likely to be in social housing (30.3%, rather than 10%). By contrast, 76.4% of non-partnered parents were on very low incomes; 69.8% were receiving income support; and 58.4% were in social housing.⁵⁵
- 2.29 Work has recently been undertaken on the Office for National Statistics Longitudinal Study data, derived from the Census.⁵⁶ This study, which compares data from 1991 and 2001, examines various characteristics of cohabitants, including age, social class, economic position, and housing tenure, by reference to the number of dependent children, if any, and the age of the youngest child. We anticipate that the results of this work will be published during the course of this project.⁵⁷

THE DURATION AND DESTINATION OF COHABITING RELATIONSHIPS

- 2.30 Measuring the duration of cohabiting relationships is difficult, and couples may “cease to cohabit” in various ways. They may separate. One of the parties may die. Or the couple may marry or form a civil partnership.

Pre-marital cohabitation

- 2.31 It is increasingly common for a couple to cohabit prior to marrying.⁵⁸ Figures from the General Household Survey suggest that whilst only around 10% of women in Great Britain cohabited prior to their first marriage in 1970, by 1996, 77% did so. Official marriage data show that in 2003, 78.7% of spouses gave identical

⁵⁵ K Kiernan and K Smith, “Unmarried parenthood: new insights from the Millennium Cohort Study (2003) 114 *Population Trends* 26, at 30 and table 10. See also S McRae (ed), *Changing Britain: Families and Households in the 1990s* (1999) p 17, for summary of similar earlier research findings; and K Kiernan and V Estaugh, *Cohabitation: extra-marital childbearing and social policy* (1993). Note also British Household Panel Survey findings that childbirth during cohabitation is more likely amongst less affluent couples: J Ermisch and M Francesconi, *Cohabitation in Great Britain: Not for Long, but Here to Stay* (1998) Working papers of the Economic and Social Research Council Research Centre on Micro-Social Change: paper 98-1, University of Essex, and J Ermisch, *Trying again: Repartnering after Dissolution of a Union* (2002) Working Papers of the Institute for Social and Economic Research: paper 2002-19, University of Essex, pp 2-3, observing a selection effect into marriage where the male partner is more prosperous.

⁵⁶ The Longitudinal Study constitutes a representative 1% sample of the population of England and Wales, and so contains over 500,000 members at any given time.

⁵⁷ Longitudinal Study Project Number 30049: *Cohabitation: deaths, same gender couples and transitions in relationship status and economic well-being*. The project is lead by L Clarke, Centre for Population Studies, London School of Hygiene and Tropical Medicine. The study also includes a comparison of cohabitants and spouses, examination of same-sex cohabitants in the 2001 sample, and an examination of relative mortality rates.

⁵⁸ Many of the new civil partners will have been cohabiting for a long time.

addresses before marriage.⁵⁹ The figures are higher for second marriages: in 1992, 86% of British women cohabited prior to their second marriage.⁶⁰

- 2.32 Cohabitation in these cases may be consciously viewed by one or both parties from the outset as a trial which may lead to marriage, or the parties may drift into cohabitation and from there to marriage. Pre-marital cohabitation may tend to be shorter than cohabitation that does not result in marriage. The General Household Survey in the late 1990s found that the median duration of pre-marital cohabitation was 27 months.⁶¹
- 2.33 The British Household Survey suggests that eventually 60% of cohabiting relationships convert into marriage.⁶² However, as might be expected given the declining marriage rate, it seems that the trend is for fewer cohabiting couples to marry.⁶³ Some commentators have suggested that it is implausible to think that all those who do not marry in their twenties (the decade in which people once commonly married) are simply delaying marriage and so will marry later. They expect that far higher proportions of the generation who were in their twenties and thirties at the end of the last century will never marry than was previously the case for people at that age.⁶⁴ This view is supported by official projections for marital status.⁶⁵
- 2.34 However, cohabiting couples who formalise their relationships are not the concern of this project. By formalising their relationship in this way, the parties acquire a legal status which thereafter dictates the legal consequences of their relationship. In particular, whether the formalised relationship ends through death or dissolution, existing family law provides comprehensive financial relief. We are concerned only with those cohabiting couples who do not marry or form a civil partnership and whose relationship ends by death or separation.

⁵⁹ Office for National Statistics, *Marriage, divorce and adoption statistics*, Series FM2 No 31 (2006) table 3.38.

⁶⁰ J Haskey, "Cohabitation in Great Britain: past, present and future trends – and attitudes" (2001) 103 *Population Trends* 4, at 11-12.

⁶¹ J Haskey, "Cohabitation in Great Britain: past, present and future trends – and attitudes" (2001) 103 *Population Trends* 4, at 10-11 and figure 7. See also J Haskey, "Trends in marriage and cohabitation: the decline in marriage and the changing pattern of living in partnerships" (1995) 80 *Population Trends* 5; J Ermisch and M Francesconi, *Cohabitation in Great Britain: not for long but here to stay* (1998) Working papers of the Economic and Social Research Council Research Centre on Micro-social Change: Paper 98-1, University of Essex.

⁶² J Ermisch and M Francesconi, "Patterns of household and family formation", in R Berthoud and J Gershuny, *Seven Years in the Lives of British Families* (2000) p 27.

⁶³ J Haskey, "Cohabitation and marital status histories of adults in Great Britain" (1999) 96 *Population Trends* 14, at 17. See also J Ermisch, *Personal Relationships and Marriage Expectations* (2000) Working Papers of the Institute for Social and Economic Research: Paper 2000-27, University of Essex.

⁶⁴ M Murphy and D Wang, "Forecasting British Families", in S McRae (ed), *Changing Britain: Families and Households in the 1990s* (1999) p 102. See also the assumptions made by the Government Actuary's Department in projecting future cohabitation in the never-married population:
http://www.gad.gov.uk/marital_status_projections/2003/cohabitation_assumptions.htm (last visited 4 May 2006).

⁶⁵ See para 2.45 below.

Duration of cohabitation ended by separation or death

- 2.35 The registration requirements of marriage and civil partnership, and the formalities associated with death and dissolution, enable us to ascertain precisely both the duration of these relationships and the reason for their ending. In view of the inherent informality of cohabiting relationships, there is no such official data relating to cohabitation, so we have no systematic means of knowing when all such relationships begin and end, or how long they lasted. However, survey data gives us an idea of the duration of cohabiting relationships.
- 2.36 Cohabiting relationships tend to be shorter than marriages ended by divorce,⁶⁶ and British Household Panel Survey data suggest that, overall, cohabiting relationships are nearly five times more likely to end by separation than marriages.⁶⁷ However, the likelihood that a cohabiting relationship will end by separation depends on various factors.⁶⁸ For example, partnerships between young couples are likely to break down more quickly than those involving older

⁶⁶ The median duration of marriage at point of divorce in 2004 was 11.5 years: (2005) 121 *Population Trends* 85, table 3. It may be supposed that many spouses will have been living apart towards the end of that period, reducing the duration of the factual, as opposed to legal, relationship, not least because the ground for divorce will be proved in some cases by reference to at least two years' separation.

⁶⁷ Controlling for socio-economic and other variables, cohabitants are only two to three times more likely than spouses to separate: R Böheim and J Ermisch, *Breaking up – Financial Surprises and Partnership Dissolution* (1999) Working Papers of the Institute for Social and Economic Research: Paper 1999-09, University of Essex, pp 7, 12-13. Compare figures calculated by J Haskey from an Office for National Statistics Omnibus Survey, "Cohabitation and marital histories of adults in Great Britain" (1999) 96 *Population Trends* 14, table 6: the factor ranges from 1.6 to 9.4.

⁶⁸ It is particularly difficult to disentangle the respective impact on individuals' socio-economic status of pre-existing factors, relationship status and relationship breakdown: K Kiernan, *Cohabitation and divorce across nations and generations* (2003) Centre for Analysis of Social Exclusion: Paper 65, p 17, available at <http://sticerd.lse.ac.uk/dps/case/cp/CASEpaper65.pdf> (last visited 4 May 2006). However, it seems clear that (whether married or cohabiting) those in economically disadvantaged circumstances are more likely to separate than others. On the impact of socio-economic circumstances on likelihood of cohabitation, marriage, separation, divorce and parenthood, see S McRae (ed), *Changing Britain: Families and Households in the 1990s* (1999) p 17; C Smart and P Stevens, *Cohabitation Breakdown* (2000) ch 4; and various papers based on British Household Panel Survey data, available at <http://www.iser.essex.ac.uk/pubs/workpaps/> (last visited 4 May 2006) including, J Ermisch and M Francesconi, *Cohabitation in Great Britain: Not for Long, but Here to Stay* (1998) Working Papers of the Economic and Social Research Council Research Centre on Micro-Social Change: Paper 98-1, University of Essex; R Böheim and J Ermisch, *Breaking up – Financial Surprises and Partnership Dissolution* (1999) Working Papers of the Institute for Social and Economic Research: Paper 1999-09, University of Essex; J Ermisch and M Francesconi, "Patterns of household and family formation", in R Berthoud and J Gershuny, *Seven Years in the Lives of British Families* (2000); J Ermisch, *Personal Relationships and Marriage Expectations* (2000) Working Papers of the Institute for Social and Economic Research: Paper 2000-27, University of Essex; J Ermisch, *Trying again: Repartnering after Dissolution of a Union* (2002) Working Papers of the Institute for Social and Economic Research: Paper 2002-19, University of Essex.

couples, whether they marry or cohabit.⁶⁹ It has been suggested that some cohabiting relationships have taken over ground formerly occupied by unstable marriages. That is to say, those who would formerly have observed (or come under pressure to observe) dominant social practice by marrying, but would then have been more likely than others to divorce, are now likely to cohabit and to terminate that relationship early.⁷⁰

- 2.37 There has nevertheless been a steady increase in the median duration of cohabitation. Surveys have sought to measure the length of cohabiting relationships by asking about current relationships and about past ones.
- 2.38 The General Household Survey has asked current cohabitants about the length of their relationships at time of interview. Self-evidently, since these relationships were still continuing and had not terminated, their total duration will have been somewhat longer;⁷¹ and some will have resulted in marriage. Between the mid-1980s and late-1990s, the median duration of on-going cohabiting relationships where one partner was a woman who had never previously married doubled from about 1.5 years to nearly three years.⁷² The duration of cohabiting unions between women who have divorced has (on average) consistently been longer; by the late 1990s, the median duration of their cohabiting relationships was around 4.5 years. The current cohabiting relationships of respondents to the British Social Attitude Survey 2000 had a median duration of four years and a mean duration of 6.5 years.⁷³ Only a fifth of cohabitants had been in their relationships for less than a year.⁷⁴
- 2.39 More recently, the General Household Survey has asked about the length of past (and so completed) cohabiting relationships that did not end in marriage. The 2004 Survey found that amongst those aged 16-59 who had cohabited, the mean duration for a first (past) cohabiting union that did not result in marriage was 42

⁶⁹ Office for National Statistics, *Living in Britain: the General Household Survey 2002* (2004) p 59; J Haskey, "Cohabitation and marital histories of adults in Great Britain" (1999) 96 *Population Trends* 13, at 17-9 and table 6; R Böheim and J Ermisch, *Breaking up – Financial Surprises and Partnership Dissolution* (1999) Working Papers of the Institute for Social and Economic Research: Paper 1999-09, p 9 (though note the finding regarding high risk of separation for women beginning partnerships in their 40s). For recent data on divorce rates according to age, see "Report: Divorces in England and Wales 2004" (2005) 121 *Population Trends* 85: the highest divorce rate was for those in their mid- to late-twenties.

⁷⁰ See for example M Maclean and J Eekelaar, "Marriage and the Moral Bases of Personal Relationships" (2004) 31 *Journal of Law and Society* 510, at 537. Compare the view of A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) pp 59-60.

⁷¹ J Haskey, "Cohabitation in Great Britain: past, present and future trends – and attitudes" (2001) 103 *Population Trends* 4.

⁷² J Haskey, "Cohabitation in Great Britain: past, present and future trends – and attitudes" (2001) 103 *Population Trends* 4, at 10 and figure 6.

⁷³ The higher mean duration indicates that there were a number of relationships substantially longer than the median duration which consequently raised the average.

⁷⁴ A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) p 17.

months. The mean length of a first and only such cohabitation was 44 months; of a first of two or more such relationships, 35 months.⁷⁵

- 2.40 As some of the figures cited above indicate, examining the average duration and other characteristics of “cohabitation” in general may be misleading. “Cohabitation” covers a wide range of relationships, each exhibiting different levels of commitment⁷⁶ and typically varying in their duration. It may therefore be useful to differentiate broadly between the various types of cohabitation,⁷⁷ not necessarily mutually exclusive.

Cohabitation as a first relationship

- 2.41 Cohabitation is more commonly adopted for one or both parties’ first relationship than marriage. The British Household Panel Survey suggests that 75% of women and 82% of men cohabit rather than marry in their first relationship.⁷⁸ These so-called “nubile” or “youthful” cases may or may not develop into a long-term relationship or marriage, and many may be quite short-lived and childless.⁷⁹

Cohabitation after marital breakdown

- 2.42 Those who have divorced are more likely (at least initially) to cohabit with, rather than marry, a subsequent partner. The British Household Panel Survey found that 70% of partnerships following divorce were not marital.⁸⁰ The decision to cohabit rather than marry following divorce may be made for various reasons, ranging from the emotional (the experience of a “bad divorce” apparently discourages many from re-marrying),⁸¹ to the pragmatic (such as the desire to protect the fruits of a divorce settlement).⁸²
- 2.43 As we saw at paragraph 2.38 above, the median duration of cohabiting relationships involving a divorced person is higher than that of other cohabiting relationships. Divorcés are usually older than other cohabitants, and this characteristic generally tends toward longer relationship duration, whatever the form of the relationship.

⁷⁵ Office for National Statistics, *General Household Survey 2004* (2005) table 5.15.

⁷⁶ See Part 5 for discussion.

⁷⁷ We have already discussed the cases of what turn out to be pre-marital cohabitation, from paragraph 2.31 above.

⁷⁸ J Ermisch and M Francesconi, “Patterns of household and family formation”, in R Berthoud and J Gershuny, *Seven Years in the Lives of British Families* (2000) p 26.

⁷⁹ K Kiernan and V Estaugh, *Cohabitation: extra-marital childbearing and social policy* (1993).

⁸⁰ J Ermisch and M Francesconi, “Patterns of household and family formation”, in R Berthoud and J Gershuny, *Seven Years in the Lives of British Families* (2000) p 28.

⁸¹ J Haskey, “Cohabitation in Great Britain: past, present and future trends – and attitudes” (2001) 103 *Population Trends* 4, at 12, citing conclusions from the British Social Attitudes Survey Report for 1987.

⁸² J Haskey has observed that divorced women may have particular financial and personal incentives to cohabit rather than remarry: “Cohabitation in Great Britain: past, present and future trends – and attitudes” (2001) 103 *Population Trends* 4, at 8.

Long-term cohabitation instead of marriage

- 2.44 Some couples, whether or not following experience of divorce, cohabit for many years without marrying. Many of these couples have children.⁸³ Although they may constitute less than 10% of all cohabiting relationships⁸⁴ there are examples both in the research literature⁸⁵ and case law⁸⁶ of relationships of over ten years. The longer a relationship endures, the less likely it is to dissolve.⁸⁷
- 2.45 Research indicates that there are various reasons why such couples cohabit instead of marrying, from those who consciously reject marriage as a legal institution, to those who (perhaps unaware of the legal significance of marriage) regard themselves as being “as good as married” anyway. In Part 5, we look more closely at that research and its implications for reform of the law in this area.

PUBLIC ATTITUDES TOWARDS COHABITATION

- 2.46 Just as the practice of cohabitation has been increasing, so too has its public acceptance. The British Social Attitudes Survey 2000 assessed public attitudes towards various aspects of cohabitation and marriage. 67% of respondents agreed that it was “all right for a couple to live together without intending to get married”.⁸⁸ Responses varied markedly by age group: 84% of those aged 18-24 agreed with the proposition, compared with just 35% of those aged over 65. However, rates of agreement amongst different age groups are changing over time - the agreement rate amongst all of the over-45 age groups had increased by more than 10% from the 1994 survey.⁸⁹ Similar patterns were evident in

⁸³ British Household Panel Survey data indicate that child-bearing leads to longer cohabitation, though they are still subject to the high risk of union dissolution associated with cohabitation: J Ermisch and M Francesconi, “Patterns of household and family formation”, in R Berthoud and J Gershuny, *Seven Years in the Lives of British Families* (2000) pp 38-9.

⁸⁴ J Ermisch and M Francesconi, “Patterns of household and family formation”, in R Berthoud and J Gershuny, *Seven Years in the Lives of British Families* (2000) p 27.

⁸⁵ For example, J Lewis’ study focused entirely on relationships of ten years’ standing: *Individualism and commitment in marriage and cohabitation* (1999) Lord Chancellor’s Department Research Series No 8/99.

⁸⁶ Classically, *Burns v Burns* [1984] Ch 317: the parties cohabited for 19 years and had two children; more recently *Stack v Dowden* [2005] EWCA Civ 857, [2006] 1 FLR 254, another 19 year relationship producing four children.

⁸⁷ R Böheim and J Ermisch, *Breaking up – Financial Surprises and Partnership Dissolution* (1999) Working Papers of the Institute for Social and Economic Research: Paper 1999-09, University of Essex, pp 12-13.

⁸⁸ A Barlow, S Duncan, G James and A Park, “Just a Piece of Paper? Marriage and Cohabitation”, in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds), *British Social Attitudes: Public policy, social ties. The 18th Report* (2001) table 2.2. A survey conducted for the BBC Panorama programme in 2003 reported that 84% of respondents agreed that it was “ok for people to live together rather than get married” (<http://news.bbc.co.uk/1/hi/programmes/panorama/2504815.stm> (last visited 4 May 2006)).

⁸⁹ A Barlow, S Duncan, G James and A Park, “Just a Piece of Paper? Marriage and Cohabitation”, in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds), *British Social Attitudes: Public policy, social ties. The 18th Report* (2001) table 2.5.

responses to questions relating to the desirability of marriage before having children and attitudes towards marriage.⁹⁰

- 2.47 This suggests that attitudes towards cohabitation are not a factor of age, but of cohorts or generations. As today's older cohorts are over time replaced by the today's younger generations, the overall acceptance of cohabitation as a social practice seems likely to increase, along with the prevalence of cohabitation. Whether the increasing approval rates amongst older generations reflect an acceptance of cohabitation or a more muted tolerance of cohabitation is disputed.⁹¹ But what is clear is that cohabitation has become an established part of British society.

PROJECTIONS FOR THE FUTURE

- 2.48 The Government Actuary's Department has recently predicted that by 2031 the number of cohabiting couples will have increased to 3.8 million and that the number of married couples is expected to fall below 10 million.⁹² On this projection, over one in four couples would be cohabiting by 2031. In terms of the overall adult population,⁹³ 16% of adults would be in cohabiting relationships and 41% would be married.⁹⁴
- 2.49 The average age of those cohabiting is expected to increase. In 2003, 21% of male and 18% of female cohabitants were over the age of 45. By 2031, the equivalent figures are predicted to be 41% and 36% (around 1.5 million and 1.35 million individuals respectively). Of those, 305,000 men and 234,000 women will be over the age of 65, a substantial increase on the current position.⁹⁵ The elderly cohabiting population is therefore expected to expand at a far greater rate than that of the cohabiting population as a whole. This has obvious implications for the numbers of cohabiting relationships that are likely to be terminated by death.

⁹⁰ A Barlow, S Duncan, G James and A Park, "Just a Piece of Paper? Marriage and Cohabitation", in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds), *British Social Attitudes: Public policy, social ties. The 18th Report* (2001) table 2.3.

⁹¹ See A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) pp 25-26.

⁹² These are the principal projections from Government Actuary's Department, *Marital Status Projections for England and Wales* (2005), available at http://www.gad.gov.uk/marital_status_projections/background.htm (last visited 4 May 2006). See also "Report: 2003-based marital status and cohabitation projections for England and Wales" (2005) 121 *Population Trends* 77. Note that, since the total population is projected to rise by a larger number than the total number of couples, the proportion of people in couples (of any sort) is projected to fall.

⁹³ "Adult" here refers to those over the age of 16.

⁹⁴ The current proportions are 10% and 53% respectively.

⁹⁵ 54,000 men and 34,000 women: see Government Actuary's Department, *Marital Status Projections for England and Wales* (2005).

- 2.50 The number of children dependent upon a cohabiting couple is also expected to increase as more couples have children outside marriage and fewer parents subsequently marry.⁹⁶
- 2.51 It seems reasonable to suppose that, as more people cohabit and do so for longer, the average length and stability of cohabitation will continue to increase, in line with current trends.⁹⁷

CONCLUSION

- 2.52 Cohabitation is already a significant social practice, it is growing, and continued growth is forecast. While most people in cohabiting relationships still aspire to marriage,⁹⁸ to some extent cohabitation is being adopted instead of marriage as a family form. Parenting outside marriage and within cohabitation is also increasingly prevalent.⁹⁹
- 2.53 Increasing numbers of couples and families therefore fall outside the scope of matrimonial law dealing with the financial and property consequences of dissolution and the termination of those relationships by death, and within the scope of this paper.
- 2.54 Having set the social context, we describe in the next Part those key areas of the current law relating to property and finances which apply to opposite-sex and same-sex cohabiting couples whose relationships end by separation or death.

⁹⁶ J Haskey, "Cohabitation in Great Britain: past, present and future trends – and attitudes" (2001) 103 *Population Trends* 4, at 18.

⁹⁷ K Kiernan, *Cohabitation and divorce across nations and generations* (2003) Centre for Analysis of Social Exclusion: Paper 65, pp 29-30. J Ermisch, *Personal Relationships and Marriage Expectations* (2000) Working Papers of the Institute for Social and Economic Research: paper 2000-27, University of Essex, found evidence of this trend during the 1990s in British Household Panel Survey data, and notes that the longer a relationship lasts, the lower the chances of separation.

⁹⁸ The British Household Panel Survey data for 1998 found that 75% of current cohabitants expected to marry, though only a third had firm plans, and that seven out of eight people in cohabiting relationships expect to marry at some point in their life: J Ermisch, *Personal Relationships and Marriage Expectations* (2000) Working Papers of the Institute of Social and Economic Research: Paper 2000-27, University of Essex. In the case of same-sex couples, it remains to be seen how many civil partnerships will be registered, and so how many same-sex couples will remain as unregistered cohabitants.

⁹⁹ And the expectation of marriage amongst such parents is less common than amongst cohabitants generally: J Ermisch, *Personal Relationships and Marriage Expectations* (2000) Working Papers of the Institute of Social and Economic Research: paper 2000-27, University of Essex.

PART 3

THE CURRENT LAW

INTRODUCTION

- 3.1 It is worth beginning with a clear statement of what the current law does not provide. There is a widespread belief that English law recognises cohabitants as “common law spouses” once they have lived together for some period of time¹ and that they are thereafter treated for legal purposes as if they were married.² Fifty-six per cent of British Social Attitudes Survey respondents in 2000 believed in the “common law marriage myth”, and the prevalence of this misconception was slightly higher (at 59%) amongst cohabitants as a group.³ More than six in ten respondents from the general population recently surveyed for the Living Together Campaign, which is seeking to dispel the myth, subscribed to this error.⁴ Sixty-nine per cent of a survey of engaged couples – who were therefore on the way to acquire the legal rights and duties unique to marriage⁵ – were similarly mistaken, some 41% further believing that marriage would have no effect at all on their legal status.⁶
- 3.2 In some legal contexts, it is true that a period of cohabitation can give rise to treatment analogous to that of married couples.⁷ But for many purposes – not least financial relief on separation and death – cohabitants and spouses are treated quite differently.
- 3.3 On the dissolution of marriage and civil partnership, the courts have a wide-ranging discretion to adjust the couple’s property and finances in accordance with what they judge to be a fair outcome in all the circumstances.⁸ By contrast, when cohabitants separate, the courts use a patchwork of statutory and non-statutory

¹ Views regarding the duration of this mythical period vary: the deceased in *Churchill v Roach* [2002] EWHC 3230 (Ch), [2004] 2 FLR 989 apparently believed that after six months’ cohabitation, seven days a week, his partner would become his common law wife and acquire an interest in the property: [2004] 2 FLR 989, 991.

² It would seem that failure to appreciate the legal distinctions between marriage and cohabitation is not unique to this jurisdiction. Evidence from Germany and the Netherlands suggests that there is a similar problem there: W Schrama, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht* (2004) pp 375 and 378.

³ A Barlow, S Duncan, G James and A Park, “Just a piece of paper? Marriage and cohabitation”, in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds), *British Social Attitudes: the 18th Report* (2001) pp 45-6. Questions in the follow-up qualitative interviews about particular areas of the law found that respondents were less wrong in their perceptions about cohabitants’ (lack of) rights to maintenance on separation and to provision on death, though there was still a substantial minority that were mistaken: A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) pp 39-41.

⁴ http://www.advicenow.org.uk/go/livingtogether/feature_236.html (last visited 4 May 2006).

⁵ And now, in almost all respects, civil partnership.

⁶ M Hibbs, C Barton and J Beswick, “Why marry? – Perceptions of the Affianced” (2001) 31 *Family Law* 197.

⁷ For example, in relation to means-testing for welfare benefits, tax credits and access to non-molestation orders.

rules to determine what should happen to the couple's property. The courts have few adjustive powers in these cases, so, for the most part, the focus is on determining who owns what as a strict matter of property law, rather than to whom it should in fairness be given.⁹ In the case of household contents and other items of personal property, the basic position is that whoever happened to pay for the property owns it.¹⁰ However, the home in which the parties live will often be the most valuable asset falling within the joint property pool of a cohabiting couple. Ascertaining whether one or both parties own it and in what shares, and then deciding whether it should be sold immediately or made available for occupation by one of them for a period, are often the key issues arising on separation, and the law on this issue is complicated.

- 3.4 In cases where one partner dies, the question of who owns what remains important, as it is necessary to identify what property falls within the deceased's estate: the general law discussed below for ascertaining ownership is therefore as relevant in death cases as it is on separation. However, there is also an adjustive statutory remedy available to the surviving cohabitant which is far more substantial than any of the remedies currently available between cohabitants on separation. The survivor will often be eligible to make an application to court to seek reasonable financial provision where the deceased's will or the intestacy rules do not adequately cater for the survivor's maintenance.
- 3.5 In this Part, we set out the current law governing the distribution of cohabitants' property and finances on separation and death, focusing particularly on ownership of the home. First, we explain how the parties may seek to regulate their property relationship by means of express trust or contract. We then consider how the question of beneficial entitlement to property is determined where no express declaration of trust has been made. We go on to explain the current statutory remedies that may be applicable on relationship breakdown. Finally, we consider the distribution of property on the death of a cohabitant.

EXPRESS REGULATION BY THE PARTIES

- 3.6 Cohabiting couples can seek to regulate the property and financial aspects of their relationship in several ways. The legal consequences of their arrangements may differ according to the method chosen.
- 3.7 Cohabitants can make outright gifts to each other.¹¹ They may confer beneficial interests in property on each other by way of express trusts; depending on the nature of the property involved, certain formalities may have to be completed before such a trust will be binding. Where the home is owned by one cohabitant, the owner may confer a right to occupy on a cohabiting partner by way of

⁸ Matrimonial Causes Act 1973, Part II; Civil Partnership Act 2004, sch 5.

⁹ *Pettitt v Pettitt* [1970] AC 777, 798, per Lord Morris.

¹⁰ For a discussion of the law in this area in the matrimonial context (where the general law is the same as it is for cohabitants), see *Matrimonial Property* (1988) Law Com No 175, paras 2.1 to 2.5.

¹¹ A promise to make a gift is unenforceable for want of consideration unless it is made by deed, but this does not apply to a completed gift: *Ayerst v Jenkins* (1873) LR 16 Eq 275.

contractual licence.¹² However, lingering questions remain in relation to contracts between cohabitants which are designed generally to govern their property and financial relations during their relationship and/or in the event of separation.

- 3.8 We shall discuss private regulation involving wills, pensions and life assurance later in this Part when we examine the current law applying specifically on death.

Express declarations of trust in respect of land

- 3.9 A couple may come to an agreement as to their respective shares (in legal terms, their respective beneficial entitlements) in the house they occupy, or indeed in any property the title to which vests in one or both of them.
- 3.10 Where a couple purchase a house together, they will usually instruct a solicitor. If it is intended that each should obtain a share in the house, the solicitor should draw up a declaration of trust indicating their respective shares. This must be evidenced in writing and signed by the legal owner or owners of the property who, in the majority of cases, will be the cohabitants themselves.¹³
- 3.11 The courts have in recent years emphasised the importance of express declarations of beneficial entitlement.¹⁴ Such a declaration is conclusive of the entitlements of those who are party to the transaction, subject only to challenge on grounds such as fraud,¹⁵ mistake¹⁶ and undue influence.¹⁷ It avoids any need to rely on the difficult law relating to implied trusts, which we discuss below. In fact, where land is to vest in persons as joint proprietors,¹⁸ the Land Registry now requires that a declaration of trust be executed.¹⁹ The statutorily prescribed form

¹² *Chandler v Kerley* [1978] 1 WLR 693.

¹³ Law of Property Act 1925, s 53(1)(b).

¹⁴ Judges have been beseeching solicitors to take the instructions of transferees as to beneficial interests in property for many years – see *Cowcher v Cowcher* [1972] 1 WLR 425, 442, per Bagnall J. The most famous of these remarks is that of Ward LJ in *Carlton v Goodman* [2002] EWCA Civ 545, [2002] 2 FLR 259, at [44]. “I ask in despair how often this court has to remind conveyancers that they would save their clients a great deal of later difficulty if only they would sit the purchasers down, explain the difference between a joint tenancy and tenancy in common, ascertain what they want and then expressly declare in the conveyance or transfer how the beneficial interest is to be held because that will be conclusive and save all argument. When are conveyancers going to do this as a matter of invariable standard practice? This court has urged that time after time. Perhaps conveyancers do not read the law reports. I will try one more time: ALWAYS TRY TO AGREE ON AND THEN RECORD HOW THE BENEFICIAL INTEREST IS TO BE HELD. It is not very difficult to do.” (The use of the upper case for emphasis is that of the judge.) Sir Peter Gibson recently made a similar comment in *Crossley v Crossley* [2005] EWCA Civ 1581, [2006] 1 FCR 655, at [5].

¹⁵ *Pettitt v Pettitt* [1970] AC 777, 813, per Lord Upjohn; see also *Goodman v Gallant* [1986] Fam 106.

¹⁶ *Pettitt v Pettitt* [1970] AC 777, 813, per Lord Upjohn; see also *Goodman v Gallant* [1986] Fam 106.

¹⁷ *Bullock v Lloyds Bank Ltd* [1955] Ch 317.

¹⁸ Whether on an application for first registration, on a transfer of land with registered title, or on an assent to the vesting of land in persons entitled under a deceased’s estate.

¹⁹ The information is required under the provisions of the Land Registration Act 2002, s 44(1), and the Land Registration Rules 2003, r 95(2)(a). It must be given on Form FR1 in the case of first registration, and on Form TR1 in the case of a transfer of registered land.

requires the intending proprietors to state whether they hold on trust for themselves beneficially (a) as joint tenants, (b) as tenants in common in equal shares, or (c) as tenants in common in unequal shares or as regulated by a separate trust deed.²⁰ The provision of this information enables the Registrar to enter a Form A Restriction in the Land Register, which alerts subsequent purchasers to the existence of the trust.

- 3.12 The probable involvement of a solicitor and the requirements of the Land Registry make it likely that now whenever a couple decide to purchase a property together, they will execute a declaration of trust concluding the matter of beneficial entitlement in that property. In the event of their relationship breaking down, the proceeds of sale of the property should be divided in accordance with the parties' beneficial shares.²¹
- 3.13 However, it is unlikely that a declaration of trust will have been made if the property was not jointly purchased. There is no obvious reason why legal advice would be sought where one person owns a house into which another comes to live. Even if a house is purchased at a time when the couple are living together, the Land Registry does not require the respective shares of the parties to be declared if the legal title is transferred into the name of one party only. In either circumstances, the non-owning party who wishes to claim a share in the property must resort to the doctrines of implied trust and proprietary estoppel, discussed below.

Express trusts of personal property

- 3.14 Express trusts in relation to personal property, including funds in bank accounts in the sole name of one party, do not depend on the execution of any formalities, and so may be declared orally.²² The use of oral declarations in this context is significant and should be compared with the relevance of oral statements made in relation to land, discussed below from paragraph 3.26. There is no need in the context of personal property for the beneficiary of the trust to have relied to his or her detriment on the oral declaration of trust before it will be enforceable.

“Cohabitation contracts”

- 3.15 Private regulation by cohabitants has been problematic owing to the historical illegality of contracts which could be said to promote extra-marital sexual relations. Contemporary case law for the most part clearly distinguishes “meretricious” contracts (where sexual relations form part of the consideration and so the contract may be regarded as contrary to public policy) from those regulating the financial and property relationships of cohabitants.²³

²⁰ Under option (c), the parties may specify their unequal shares, or they may state that the land is held on trust for the members of an unincorporated association or in accordance with a separate trust deed.

²¹ Disputes about whether the property should be sold so as to realise the parties' shares may be determined by application under the Trusts of Land and Appointment of Trustees Act 1996 (“TOLATA”), s 14.

²² *Rowe v Prance* [1999] 2 FLR 787; *Paul v Constance* [1977] 1 WLR 527.

²³ See G Treitel, *The Law of Contract* (11th ed 2003) p 443-444.

- 3.16 Cohabitation contracts may cover various issues and be concluded at various times. They may regulate the financial affairs of the parties during the currency of the relationship, or make provision for the parties' financial affairs (including the division of their assets) on separation. They may be concluded before the parties' cohabitation, during the parties' cohabitation or following the parties' separation.
- 3.17 The validity of such contracts depends on the impact, if any, of the illegality rule. It seems that contracts made following separation have never been void for illegality, and so will be binding, provided that they are executed in a deed or otherwise supported by lawful consideration.²⁴ Difficulties arguably remain in relation to contracts made before or during the relationship, owing to the lack of clear case law upholding such contracts. Judicial comments in some of the older case law indicate that contracts between cohabitants may be unlawful or unenforceable on the ground of public policy.²⁵ However, the better view is that such contracts are only liable to be struck down if they comprise contracts for prostitution.²⁶ The modern law was recently stated by Hart J to the effect that:

There is nothing contrary to public policy in a cohabitation agreement governing the property relationship between adults who intend to cohabit or who are cohabiting for the purposes of enjoying a sexual relationship.²⁷

- 3.18 On this basis, there seems no distinction as far as public policy is concerned as between the types of cohabitation contract described above. The leading textbooks are confident that contracts regulating the financial affairs of cohabitants would be enforced,²⁸ and books of legal precedents exist to aid cohabitants and legal advisers in drafting cohabitation contracts.²⁹ The current law therefore appears to allow parties to enter into all such kinds of contract and to permit enforcement by the courts in the event of breach. However, it could be

²⁴ See G Treitel, *The Law of Contract* (11th ed 2003) p 443, n 56.

²⁵ *Uptill v Wright* [1911] 1 KB 506.

²⁶ Treitel, *The Law of Contract* (11th ed 2003) p 443; R Probert, "Sutton v Mishcon de Reya and Gawor & Co – Cohabitation contracts and Swedish sex slaves" (2004) 16 *Child and Family Law Quarterly* 453. In *Tanner v Tanner (No 1)* [1975] 1 WLR 1346, the court implied a contractual licence between an unmarried couple, so it seems unlikely that the courts would hold an express contract to be void for illegality.

²⁷ *Sutton v Mishcon de Reya and Gawor & Co* [2003] EWHC 3166 (Ch), [2004] 1 FLR 837, at [22].

²⁸ See, for example, S Cretney, J Masson and R Bailey-Harris, *Principles of Family Law* (7th ed 2003) pp 135-136; G Treitel, *The Law of Contract* (11th ed 2003) p 444; *Chitty on Contracts* (29th ed 2004) paras 16-067 and 16-068; and C Barton, *Cohabitation Contracts: Extra-Marital Partnerships and Law Reform* (1985) p 48-49. Note also that the Committee of Ministers of the Council of Europe has recommended that cohabitation contracts should be enforceable: Committee of Ministers of the Council of Europe, *The validity of contracts between persons living together as an unmarried couple and their testamentary dispositions* Recommendation No R (88) 3 of 7 March 1988: "contracts relating to property between persons living together as an unmarried couple, or which regulated matters concerning their property either during their relationship or when their relationship has ceased, should not be considered invalid solely because they have been concluded under these conditions".

²⁹ For example, H Wood, D Lush and D Bishop, *Cohabitation: Law, Practice and Precedents* (3rd ed 2005).

argued that the statement of Hart J above was not strictly necessary for the decision in the case. While we would expect it to be followed in subsequent cases, it cannot be conclusively said that it represents the current state of English law.

- 3.19 In so far as they are lawful, cohabitation contracts are governed by the ordinary rules of contract law. So, for example, there must be an intention to create legal relations and lawful consideration (or use of a deed), and a contract between cohabitants may be susceptible to challenge on grounds such as fraud, duress, undue influence, misrepresentation, mistake, duress or illegality on some other ground.

IMPLIED TRUSTS AND PROPRIETARY ESTOPPEL

- 3.20 Where no express declaration of trust has been made on or after the acquisition of property, the laws of implied trusts and proprietary estoppel may be called upon in order to determine the respective entitlements of cohabitants to any property which they own or occupy.³⁰ They apply both in cases where the legal title is in the name of one party and where it is in the name of both.³¹ The significance of these principles is that they allow beneficial interests to be created despite failure to comply with the formalities that are required to create express trusts. They are particularly important in relation to the shared home, but can also apply to all other kinds of property. The ownership of funds in a joint bank account and property purchased from that source are discussed separately below.³²

Resulting trusts

- 3.21 Where the legal title to property vests in one party, but another party has paid some (or all) of the purchase price, the presumption of resulting trust holds that beneficial ownership “results” to the parties in proportion to the share of the purchase price that each provided. So if one party contributes £10,000 towards the purchase of property worth £100,000, that party will acquire a 10% share in the value of the property. The presumption of resulting trust may, however, be rebutted by evidence that the contributor did not intend to acquire a beneficial

³⁰ Cases regarding beneficial ownership, most between cohabitants, constitute around 50% of the caseload of the Adjudicator to HM Land Registry. In a study of legally-aided cases, 61% of land-related cases involved current or former cohabitants or spouses: T Goriely and P Das Gupta, *Breaking the Code: The impact of legal aid reforms on general civil litigation* (2001) ch 11. This study pre-dated major legal aid reforms in April 2000. Data received from the Legal Services Commission for 2004-05 and 2005-06 show that around 80% of cases receiving General Family Help or Legal Representation in relation to trusts of land involved ex-cohabitants.

³¹ Though the new Land Registry rules requiring express declarations of the beneficial shares should mean that, in cases of joint title, the law of implied trusts need no longer be relied on: see para 3.11.

³² See paras 3.38 to 3.40; and S Cretney, J Masson and R Bailey-Harris, *Principles of Family Law* (7th ed 2003) pp 159-160.

interest in the property purchased. For example, the money may have been provided by way of gift or loan.³³

- 3.22 Most importantly, a resulting trust will only be presumed at all on the making of particular types of contribution. Direct financial contributions to the purchase price, payment of the deposit and contribution of a “right to buy” discount³⁴ all count as contributions. Where parties become joint mortgagors of property that they are buying to live in together, each will be treated as contributing half of the value of the mortgage loan, unless there is a clear agreement between them that payment of the instalments will not be equally shared.³⁵
- 3.23 Not all financial contributions are sufficient to give rise to a resulting trust. Whether making mortgage payments will give rise to a beneficial interest under a resulting trust depends on the nature of the mortgage and the intention of the payer in making the payments.³⁶ Crucially, “indirect” financial contributions will not give rise to a resulting trust: for example, where one party pays the household bills,³⁷ while the other pays the mortgage. Even payments into a common pool from which the mortgage is paid may not suffice.³⁸ Domestic contributions count for nothing.³⁹
- 3.24 However, the significance of these limitations on the applicability of the resulting trust presumption is diminished as a result of the developing law of constructive trusts. The forms of contribution from which a resulting trust would be presumed may also generate a constructive trust, which potentially offers contributors a more substantial share than the *pro rata* value of their contributions. The constructive trust is therefore likely to be preferred by applicants.⁴⁰

Constructive trusts

- 3.25 A constructive trust will arise where there is a common intention between the parties that the beneficial ownership of property should be shared, and the party seeking a share has relied on that intention to his or her detriment or otherwise made a change of position in reliance on it.

³³ *Fowkes v Pascoe* (1875) 10 Ch App 343; *Walker v Walker*, judgment of 12 April 1984, CA (unreported); *Re Sharpe (A Bankrupt)* [1980] 1 WLR 219.

³⁴ *Springette v Defoe* [1992] 2 FLR 388.

³⁵ *Huntingford v Hobbs* [1993] 1 FLR 736; *Carlton v Goodman* [2002] EWCA Civ 545, [2002] 2 FLR 259.

³⁶ See for example *Curley v Parkes* [2004] EWCA Civ 1515, [2005] 1 P & CR DG15 (payer not party to mortgage); *McKenzie v McKenzie* [2003] 2 P & CR DG6, at [77] of the full judgment (payer party to mortgage); for comment, M Dixon, “Resulting and Constructive Trusts of Land: the Mist Descends and Rises” (2005) *Conveyancer and Property Lawyer* 79.

³⁷ *Gissing v Gissing* [1971] AC 886.

³⁸ *Buggs v Buggs* [2003] EWHC 1538 (Ch), [2004] WTLR 799.

³⁹ *Burns v Burns* [1984] Ch 317.

⁴⁰ Though that fact sometimes appears to be curiously overlooked: for example, no constructive trust argument was considered in *Curley v Parkes* [2004] EWCA Civ 1515, [2005] 1 P & CR DG15.

Common intention

- 3.26 Cases of constructive trust fall into two categories:
- (1) express common intention cases, arising from an express (though informal) agreement, arrangement or understanding between the parties; and
 - (2) inferred common intention cases, which will arise where one party has engaged in relevant conduct referable to the acquisition of an interest in the property.⁴¹

EXPRESS COMMON INTENTION CONSTRUCTIVE TRUSTS

- 3.27 The courts have been generous in their interpretation of the common intention requirement. They have been prepared to treat excuses for not putting one party on the title documents as evidence of an express common intention to share, even though it is clear that the private intention of the legal owner is that no such share should arise.⁴²

INFERRED COMMON INTENTION CONSTRUCTIVE TRUSTS

- 3.28 In *Lloyds Bank Plc v Rosset*, Lord Bridge stated that a common intention would be inferred from financial contributions to the initial purchase price of a house or from mortgage payments, but “it is at least extremely doubtful whether anything less will do”.⁴³
- 3.29 The case law remains crucially ambiguous on the issue of whether a court may infer a common intention from financial contributions if the parties confess to having never considered the matter of ownership. The clear lack of any actual intention might be expected to rebut an inference of common intention to share beneficial ownership. Some judicial remarks suggest that this is not necessarily the case, though those remarks themselves are ambiguous.⁴⁴ If, and in so far as,

⁴¹ *Lloyds Bank Plc v Rosset* [1991] 1 AC 107.

⁴² *Grant v Edwards* [1986] Ch 638; *Eves v Eves* [1975] 1 WLR 1338.

⁴³ *Lloyds Bank Plc v Rosset* [1991] 1 AC 107, 133.

⁴⁴ *Midland Bank Plc v Cooke* [1995] 4 All ER 563, 575D, per Waite LJ: “It would be anomalous...to create a range of home-buyers who were beyond the pale of equity’s assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it”. However, Waite LJ may have intended to confine his remarks to the quantum of a constructive trust, rather than its existence: “I would therefore hold that positive evidence that the parties neither discussed nor intended any agreement as to the proportions of their beneficial interest does not preclude the court, on general equitable principles, from inferring one” (at 575H, emphasis added). Having said this, the facts of the case suggest that the parties had not reached a common intention to share ownership, let alone a common intention as to what their shares should be, but Mrs Cooke obtained an interest nevertheless. Therefore, Waite LJ’s comments must apply to cases where there is evidence that the parties did not form an intention to share ownership, as well as cases where the parties did not form an intention as to the quantum of their shares. In *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211, at [68], Chadwick LJ said that “where the evidence is that the matter was not discussed at all” a common intention “will readily be inferred from the fact that each has made a financial contribution”. However, he went on to discuss quantum at [71], and said that “if it were their common intention that each should have some beneficial interest in the property – which is the hypothesis upon

actual intention need not exist, it may be more accurate to say that the intention is “imputed” to the parties than its existence inferred. But it does seem to be necessary at least that the other party was aware of the conduct from which the common intention arises.⁴⁵

- 3.30 However, whether or not actual intention is required, the inference (or imputation) of common intention will only arise from certain sorts of conduct. It is clear that direct financial contributions to the purchase of the property, including the making of mortgage payments, will suffice.⁴⁶ More difficult is the question of indirect financial contributions. Some decisions and judicial comments appear to accept that, at least in circumstances where the owner paying the mortgage could not have afforded to do so had the applicant not been paying other bills, payment of those bills will count for these purposes.⁴⁷ But other cases and judicial comments do not support the inference of common intention on this basis.⁴⁸ It is clear that domestic contributions will not give rise to an inferred common intention to share.⁴⁹

Detrimental reliance or change of position

- 3.31 It is the applicant’s detrimental reliance on the common intention which makes it unconscionable for the legal owner to deny the applicant’s beneficial interest. In cases of express common intention, the range of conduct and contributions that will count as detrimental reliance is wider than that which will give rise to an inferred common intention. In cases of inferred common intention, the conduct from which the common intention is inferred will also constitute detrimental reliance.
- 3.32 However, there remain limitations on which types of conduct the courts will classify as detrimental reliance. In the case of inferred common intention, those limitations derive from the narrow view of what conduct will generate the intention in the first place. In the case of express common intention, although in theory a wider range of conduct is relevant, it seems necessary to demonstrate that the

which it becomes necessary to answer the second question [how to quantify the beneficial interest] – then, in the absence of evidence that they gave any thought to the amount of their respective shares, the necessary inference is that they must have intended that question would be answered later on the basis of what was then seen to be fair”. This appears to require the actual existence of a common intention in order for the trust to arise (though not as regards quantum), and prevents the finding of an inferred common intention when there is positive evidence that the parties did not form such a common intention.

⁴⁵ *Lightfoot v Lightfoot-Brown* [2005] EWCA Civ 201, [2005] 2 P & CR 22.

⁴⁶ Though, as in the case of resulting trusts, the evidence might sometimes indicate that those payments were intended for some purpose other than the creation of a beneficial share: *McKenzie v McKenzie* [2003] 2 P & CR DG6.

⁴⁷ *Gissing v Gissing* [1971] AC 886; *Le Foe v Le Foe and Woolwich Building Society plc* [2001] 2 FLR 970.

⁴⁸ *Lloyds Bank v Rosset* [1991] 1 AC 107, 132H-133B, per Lord Bridge; *Buggs v Buggs* [2003] EWHC 1538 (Ch), [2004] WTLR 799; *Mollo v Mollo* [2000] WTLR 227; *Mehra v Shah* [2004] EWCA Civ 632, judgment of 20 May 2004, CA (unreported); *Stack v Dowden* [2005] EWCA Civ 857, [2006] 1 FLR 254; the point was not even considered in *Curley v Parkes* [2004] EWCA Civ 1515, [2005] 1 P & CR DG 15.

⁴⁹ *Burns v Burns* [1984] Ch 317; *Lloyds Bank v Rosset* [1991] 1 AC 107.

conduct in question is “referable to” the common intention, and not conduct in which the applicant would have engaged anyway had there been no such intention. The case law is particularly ambiguous about conduct which might equally be attributable to the relationship between the parties: setting up home together, raising a family, sharing household bills and so on may not be regarded as detrimental reliance. If the applicant oversteps the boundary of what might be “expected” of a partner, particularly perhaps in light of the applicant’s gender,⁵⁰ a finding of detrimental reliance is more likely.⁵¹

Quantifying the interest

- 3.33 Once the relevant intention and detrimental reliance have been found, it is then necessary to quantify the parties’ respective shares.⁵² Where the couple had an express common intention not only as to shared ownership but also as to the size of their shares, that intention will usually be upheld.⁵³ Where the parties have not reached agreement as to the shares, it is now clear that the court’s function is to determine, in light of the parties’ whole course of dealing in relation to the property, what would be a fair share.⁵⁴ In theory, the court’s inquiry is not confined to examining the parties’ financial contributions (to the acquisition of the property or more generally to the household), but may range more widely, taking into account domestic contributions.⁵⁵ This makes the process of quantifying a constructive trust distinctive from that used to quantify a resulting trust. However, despite this latitude, recent cases seem to follow the parties’ financial contributions to the acquisition of property quite closely in ascertaining what fairness requires.⁵⁶ Analysis of how the size of the applicant’s share is arrived at by the judge is sometimes rather brief.⁵⁷

⁵⁰ See K Gray & S F Gray, *Elements of Land Law* (4th ed 2005) para 10.123.

⁵¹ Contrast *Grant v Edwards* [1986] Ch 638, 657A-B, per Browne-Wilkinson V-C and 648G-H, per Nourse LJ; *Hammond v Mitchell* [1991] 1 WLR 1127; *Eves v Eves* [1975] 1 WLR 1338; *Cox v Jones* [2004] EWHC 1486 (Ch), [2004] 2 FLR 1010.

⁵² In *Hurst v Supperstone* [2005] EWHC 1309 (Ch), [2005] 1 FCR 352, at [11], Mr Michael Briggs QC, sitting as a deputy High Court judge, pointed out that once the court has found a common intention to share beneficial ownership, it should ask whether the parties intended to share as beneficial joint tenants or tenants in common. As joint tenants are equally entitled to the property, the parties can only hold the property in unequal shares if they intended (or the court imputes an intention) to hold the property as tenants in common. Only at this point does the question of quantifying the parties’ interests arise.

⁵³ *Mortgage Corporation v Shaire* [2001] Ch 743, 750B, per Neuberger J; *Crossley v Crossley* [2005] EWCA Civ 1581, [2006] 1 FCR 655.

⁵⁴ *Midland Bank Plc v Cooke* [1995] 4 All ER 562, 574C-E; *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211, at [69].

⁵⁵ *Midland Bank Plc v Cooke* [1995] 4 All ER 562; *Hurst v Supperstone* [2005] EWHC 1309 (Ch), [2005] 1 FCR 352.

⁵⁶ *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211; *Stack v Dowden* [2005] EWCA Civ 857, [2006] 1 FLR 254. In *Midland Bank v Cooke* [1995] 4 All ER 562, the wife contributed less than 7% of the purchase price, yet was awarded a 50% beneficial interest. In *Oxley*, Chadwick LJ stated, at [69] and [73], that he was undertaking the same broad analysis of the parties’ whole course of dealing in relation to the property. However, the quantification of the constructive trust in *Oxley* reflected the parties’ financial contributions, and it seems likely that the outcome would have been the same had the case been decided on a resulting trust basis. The parties’ marital status may be significant; in *Mortgage Corporation v Shaire* [2001] Ch 743, 750, Neuberger J suggested that “the

Proprietary estoppel

3.34 Proprietary estoppel and constructive trusts share common ground.⁵⁸ For an applicant to establish an interest in the owner's property under the law of proprietary estoppel, it is necessary to show that:

- (1) a representation or assurance that the applicant has or will have an interest in property has been made or given;
- (2) the applicant relies upon that representation or assurance; and
- (3) the owner then seeks to deny the applicant an interest in a way that would result in unconscionable detriment to the applicant.

Recent decisions emphasise the need to take a broad approach, looking at the matter "in the round", in deciding whether the necessary unconscionability is present.⁵⁹

The representation or assurance

3.35 In order to give rise to an estoppel, there must be a sufficiently specific representation made, or assurance given, by the owner⁶⁰ that the applicant is to have some interest or entitlement in property. The practice of inferring or imputing a common intention in order to found a constructive trust is therefore not mirrored in a proprietary estoppel claim. For the purposes of estoppel, the representation or assurance must actually exist; it cannot be inferred or imputed. It is not necessary that any specific asset or interest in it should be identified, but it must be possible ultimately to interpret the representation as applying to a particular asset or pool of assets.⁶¹ What will not suffice is a general promise that the respondent will support the applicant or that the applicant will be "financially secure" in the future.⁶²

extent of the financial contribution is perhaps not as important an aspect as it was once thought to be. It may well carry more weight in a case where the parties are unmarried than where they were married". In *Cooke* (at 576C-D), Waite LJ appears to attach weight to the Cookes having been married, but in *Oxley* (at [74]), Chadwick LJ does not refer to the parties' status as cohabitants when deciding on the quantification of their respective shares. See E Cooke, "Cohabitants, Common Intention and Contributions (again)" [2005] *Conveyancer and Property Lawyer* 555, at 561-562.

⁵⁷ See, for example, *Cox v Jones* [2004] EWHC 1486 (Ch), [2004] 2 FLR 1010 and *Stack v Dowden* [2005] EWCA Civ 857, [2006] 1 FLR 254.

⁵⁸ The precise relationship between the two doctrines has long been a matter of judicial and academic debate: see *Sharing Homes: A Discussion Paper* (2002) Law Com No 278, paras 2.101 to 2.104.

⁵⁹ *Gillett v Holt* [2001] Ch 210; *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501.

⁶⁰ This may involve the owner standing by while the applicant makes a unilateral mistake about his or her entitlement in relation to the property: *Ward v Kirkland* [1967] Ch 194, 239A-B, per Ungood Thomas J; *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, 148E-F, per Oliver J.

⁶¹ *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501.

⁶² *Lissimore v Downing* [2003] 2 FLR 308; *Layton v Martin* [1986] 2 FLR 227.

Detrimental reliance

- 3.36 Detrimental reliance in the estoppel context poses demands on applicants that are similar to the law of constructive trust. Applicants must show that the conduct engaged in was to some extent caused by the representation. While it need not have been the sole cause of the applicant's behaviour, it must have been a factor influencing it.⁶³ It is clear that non-financial contributions, including "domestic" activities and associated sacrifices of paid employment, may constitute detrimental reliance for the purposes of proprietary estoppel.⁶⁴ However, as in constructive trust cases, some applicants may find it difficult to satisfy the court that such activities were made in reliance on the representation, rather than pursuant to the parties' relationship.⁶⁵

The remedy: "satisfying the equity"

- 3.37 Where these requirements are satisfied, the applicant has an "equity" which can be enforced against the owner, and the court may be called on to decide what remedy is necessary to satisfy it. The courts adopt a broad approach in deciding how to satisfy the applicant's equity. Recent case law emphasises the need for the remedy to be proportionate in light of the detriment sustained and the expectation held.⁶⁶ In some cases, they will give effect to the applicant's expectation. In others, they will simply compensate the applicant for the loss suffered in relying on the assurance, rather than giving the applicant what was been promised. The remedy will frequently involve conferring on the applicant some sort of proprietary interest, although not necessarily a beneficial share,⁶⁷ or it may entail monetary compensation.⁶⁸ In some cases, the court may conclude that no remedy is necessary at all in view of benefits enjoyed by the applicant which cancel out the disadvantage he or she sustained.⁶⁹

Ownership of funds in bank accounts

- 3.38 The ownership of funds in bank accounts merits brief separate discussion. As we have seen, where an account is held in the sole name of one party, an express

⁶³ *Wayling v Jones* [1995] 2 FLR 1029.

⁶⁴ *Greasley v Cooke* [1980] 1 WLR 1306; *Campbell v Griffin* [2001] EWCA Civ 990, [2001] WTLR 981.

⁶⁵ *Coombes v Smith* [1986] 1 WLR 808; *Lissimore v Downing* [2003] 2 FLR 308; cf *Grant v Edwards* [1986] Ch 638, 656, per Browne-Wilkinson V-C.

⁶⁶ *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501; *Gillett v Holt* [2001] Ch 210.

⁶⁷ For example, a freehold in *Pascoe v Turner* [1979] 1 WLR 431; a life interest in *Greasley v Cooke* [1980] 1 WLR 1306; leases in *Griffiths v Williams* [1977] 248 EG 947 and *J T Developments Ltd v Quinn* (1991) 62 P & CR 33; and an easement in *Crabb v Arun DC* [1976] Ch 179.

⁶⁸ *Dodsworth v Dodsworth* (1973) 228 EG 1115; *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501.

⁶⁹ *Sledmore v Dalby* (1996) 72 P & CR 196. Roch LJ, with whom Butler-Sloss LJ agreed, said (at 205) that an equity had arisen by virtue of proprietary estoppel, but that the minimum necessary to satisfy that equity had already been received by the claimant. However, Hobhouse LJ considered (at 209) that the claimant had not even established an equity in her favour by virtue of proprietary estoppel; the issue of the minimum necessary remedy therefore did not arise.

trust may arise by oral declaration.⁷⁰ The mere fact that a bank account is in joint names does not mean that the account holders have a joint beneficial interest in the funds in that account. Whether they do or do not depends on their intentions. If the account is fed from the resources of one party, A, but is held in joint names with B merely for convenience – for example, to give B access to funds – B has no beneficial interest in the money in the accounts until he or she actually exercises the right to draw funds from it. While it remains in the account, the money will belong, under resulting trust principles, to A as the party who fed the account. If B has made no contribution to the account, A will be entitled to terminate B's access to the funds at any time.⁷¹

- 3.39 Where both parties contribute to the account, pooling their resources, they will at least be found to own the funds on a resulting trust basis in accordance with their contributions. However, both in pooling cases and in cases where A has provided all the funds, the presumption of resulting trust might be displaced, for example, where there is an express declaration of trust⁷² or common intention to the effect that the parties should share the account in some other proportions. Indeed, the court might find that the parties intended to be joint tenants of the beneficial interest, each equally entitled to the whole of the fund.⁷³
- 3.40 Property purchased with funds from a joint account will ordinarily belong to whoever acquires title to that property, even if that person had no or only a part-share in the funds when they were in the account.⁷⁴ If, unusually, there is evidence that the assets acquired were intended to be held in the same way as the funds in the account, then that property will be held accordingly.⁷⁵

RESOLVING DISPUTES OVER THE HOME CO-OWNED BY COHABITANTS

- 3.41 Under the general law, if one party has no beneficial interest in the property, he or she is vulnerable to being excluded by the legal owner as a trespasser.⁷⁶ Where both parties are found to have a beneficial share in the property and they are separating, dispute may arise about whether the property should be sold and the proceeds divided (in accordance with their shares) or retained for the occupation of one party and sold at a later date. Either party may apply to the court under the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA") for orders resolving the questions of sale and occupation. In considering such an application, the court is required to have regard to:

- (1) the intentions of the person(s) creating the trust;

⁷⁰ *Paul v Constance* [1977] 1 WLR 527.

⁷¹ *Stoeckert v Geddes (No 2)* [2004] UKPC 54, (2004-05) 7 ITEL 506, from the Court of Appeal of Jamaica.

⁷² Cf *Paul v Constance* [1977] 1 WLR 527 in relation to an account in the name of one party.

⁷³ For a discussion of joint tenancy and tenancy in common, see *Sharing Homes: A Discussion Paper* (2002) Law Com No 278, paras 2.10 to 2.22.

⁷⁴ *Stoeckert v Geddes (No 2)* [2004] UKPC 54, (2004-05) 7 ITEL 506.

⁷⁵ *Jones v Maynard* [1951] Ch 572.

⁷⁶ Subject to the finding of a contractual licence for a determinate period or that might require reasonable notice be given: *Chandler v Kerley* [1978] 1 WLR 693.

- (2) the purposes for which the property is held on trust;
 - (3) the welfare of any minor who occupies or might reasonably be expected to occupy the property as his home; and
 - (4) the interests of any secured creditors of any beneficial owner.⁷⁷
- 3.42 Where one purpose of the trust is to provide a home for the parties' children, the court may be inclined to postpone sale until the home is no longer required for the children (and their primary carer).
- 3.43 If the court orders that sale should be postponed and one partner granted occupation in the meantime, the occupier may be required to pay the excluded party occupation rent during that period.⁷⁸ This remedy is similar to equitable accounting. Equitable accounting provides compensation between co-owners where, for example, one party has enjoyed the trust property to the exclusion of the other, or one party has paid more in relation to the property than the other (that payment not being reflected in that party's beneficial share), contrary to the parties' prior agreement.⁷⁹ Where the couple have separated, but the property was intended to provide a family home and is still required for that purpose for the couple's children and whichever party the children are to live with, the court might decide against an order for occupation rent.⁸⁰
- 3.44 In the exercise of its TOLATA jurisdiction, the court has no power to adjust the parties' beneficial shares in the property. On any sale, the proceeds will therefore be split according to the parties' beneficial entitlements, whether express or implied by the court under a resulting or constructive trust.
- 3.45 We consider below the statutory remedies available to non-owning cohabitants which might result in a limited right of occupation being granted in relation to the property under Part IV of the Family Law Act 1996 or, where the couple have children, under Schedule 1 to the Children Act 1989. The latter might also be invoked between co-owning cohabitants,⁸¹ in which case any applications under the Children Act 1989 and the TOLATA should be joined. In such cases, the Children Act application would probably be considered before the TOLATA application, owing to the wider powers enjoyed by the court under the former Act.⁸²

⁷⁷ TOLATA, s 15. For the application of this provision, see *Mortgage Corporation v Shaire* [2001] Ch 743; *Bank of Ireland Home Mortgages v Bell* [2001] 2 All ER (Comm) 920; *First National Bank plc v Achampong* [2003] EWCA Civ 487, [2004] 1 FCR 18; and *Chan Pui Chun v Leung Kam Ho* [2002] EWCA Civ 1075, [2003] 1 FLR 23.

⁷⁸ TOLATA, ss 13-14.

⁷⁹ See *Stack v Dowden* [2005] EWCA Civ 857, [2006] 1 FLR 254; *Clarke v Harlowe* [2005] EWHC 3062 (Ch), [2005] WTLR 1473; E Cooke, "Cohabitants, common intentions and contributions (again)" [2005] *Conveyancer and Property Lawyer* 555.

⁸⁰ *Stack v Dowden* [2005] EWCA Civ 857, [2006] 1 FLR 254.

⁸¹ Especially if it is unclear whether or not the parties share the beneficial interest.

⁸² *White v White* [2003] EWCA Civ 924, [2004] 2 FLR 321.

FAMILY LAW REMEDIES ON RELATIONSHIP BREAKDOWN

- 3.46 The court has very wide powers to deal with the property of married couples on their divorce in order to ensure a broadly fair outcome between the parties. These powers are contained in Part II of the Matrimonial Causes Act 1973.⁸³ The court may make orders for periodical payments secured or unsecured, lump sum orders, orders for settlement of property or for variation of existing settlements, pension sharing orders, orders transferring property and orders for sale.
- 3.47 There is no analogous, wide-ranging jurisdiction applicable when cohabiting couples separate. Most cohabitants therefore have to rely heavily on the general law of trusts and estoppel. There are, however, three statutory regimes which they may invoke.

Protection of occupation

- 3.48 Part IV of the Family Law Act 1996 (titled “Family Homes and Domestic Violence”) allows the court to make occupation orders in relation to a dwelling-house in which cohabitants live, lived, or intended to live together. The concept of “cohabitant” is not defined in the Act, save by analogy with marriage (and now civil partnership),⁸⁴ and there is no requirement that the parties’ relationship should have lasted any minimum duration to qualify for protection under the Act.⁸⁵
- 3.49 While this jurisdiction is principally used in cases of domestic violence, it is not so restricted and it may in theory be employed to facilitate the separation of cohabitants by making orders for the short-term exclusion of one party from the property. However, the courts regard occupation orders as “draconian”, and so without evidence of abuse that would render continued cohabitation potentially harmful, they are reluctant to make orders excluding cohabitants who are otherwise entitled to occupy the property.⁸⁶ Occupation orders may nevertheless provide a very effective short-term remedy. In practice, the long-term resolution of their occupation dispute will be resolved under TOLATA⁸⁷ (where both parties are co-owners) or Schedule 1 to the Children Act 1989 (where they have children).

Applicants who are entitled to occupy

- 3.50 The best protection is offered by the Family Law Act to applicants who are “entitled to occupy” the property under the general law of property, trusts or contract, or by statute. Spouses and civil partners are included in this category of

⁸³ Equivalent provision is made for civil partners under the Civil Partnership Act 2004, sch 5. An extract from the Matrimonial Causes Act 1973, setting out the statutory checklist and other factors to which the court is required to have regard when exercising its discretion to grant ancillary relief, may be found in Appendix A.

⁸⁴ Family Law Act 1996, s 62(1); for judicial application of the concept, see *G v F* [2000] Fam 186.

⁸⁵ See generally Part 9.

⁸⁶ *Chalmers v Johns* [1999] 1 FLR 392, a case arising at the end of a twenty-year long cohabiting relationship, where an interim occupation order was withheld despite a history of assaults by each party against the other, in preference for use of non-molestation orders.

⁸⁷ TOLATA, ss 12-15.

applicants by virtue of their statutory “home rights”.⁸⁸ Where a cohabitant is “entitled to occupy” the property, the court may make an order allowing him or her to occupy the property to the exclusion of the other party for an unlimited period.⁸⁹ The court is required to make an order in certain cases where the “balance of harm” demands it.⁹⁰ Otherwise, in deciding whether to make an order and (if making an order) in what terms, the court is required to have regard to all the circumstances, including:⁹¹

- (1) the housing needs and housing resources of each of the parties and of any relevant child;⁹²
- (2) the financial resources of each of the parties;
- (3) the likely effect of any order, or any decision not to make an order, on the health, safety or well-being of the parties and of any relevant child; and
- (4) the conduct of the parties in relation to each other and otherwise.

Applicants who are not entitled to occupy

3.51 Applications by cohabitants who are not entitled to occupy property which the other is entitled to occupy are more complicated.⁹³ The court must first decide whether to give that cohabitant the right to occupy against the wishes of the other (entitled) partner. In making that decision, the court is required to have regard to all the circumstances, including those listed in paragraph 3.50 above, and also:⁹⁴

- (1) the nature of the parties’ relationship and in particular the level of commitment involved in it;
- (2) the length of time during which they have cohabited;
- (3) whether there are or have been any children who are the children of both parties or for whom both parties have or have had parental responsibility;
- (4) (where relevant) the length of time that has elapsed since the parties ceased to live together; and

⁸⁸ Family Law Act 1996, s 30.

⁸⁹ Family Law Act 1996, s 33.

⁹⁰ See Family Law Act 1996, s 33(7): this complicated test in broad terms entails weighing (i) the harm that might be suffered by the applicant or any relevant child attributable to the conduct of the respondent if an order were not made against (ii) the harm that might be suffered by the respondent or any relevant child if an order were made. If the harm under (i) is greater than that under (ii), an order must be made. If not, the court has a discretion to make an order.

⁹¹ Family Law Act 1996, s 33(6).

⁹² Defined broadly by s 62(2) to include any children who lives with or who might reasonably be expected to live with either party and whose interests the court considers relevant.

⁹³ Family Law Act 1996, s 36; cf s 38, which applies where neither party is entitled to occupy.

⁹⁴ Family Law Act 1996, s 36(6).

- (5) the existence of any pending proceedings between the parties under Schedule 1 to the Children Act 1989 for a property settlement or transfer for the benefit of a child, or relating to the legal or beneficial ownership of the dwelling.
- 3.52 If the court decides to allow the non-entitled party to occupy, it then considers whether to restrict the entitled partner's occupation of the property. In making that decision, it is directed to have regard in particular to the factors listed in paragraph 3.50 above, and the "balance of harm" arising to the parties from making or not making an order.⁹⁵
- 3.53 Where the party seeking the order is not entitled to occupy the property under the general law, the duration of the order is strictly limited in the first instance to a maximum of six months. It may be extended for only one further six-month period, offering at most twelve months' protection.⁹⁶ We shall see below that considerably longer occupation protection can be obtained indirectly by a non-owning cohabitant, with whom the parties' children live, by virtue of Schedule 1 to the Children Act 1989.
- 3.54 The court has the power to attach various supplementary provisions to an order made under the Family Law Act.⁹⁷ These may deal with repair and maintenance obligations, possession and the use of furniture and other contents. They may require the party in occupation to pay occupation rent to the excluded, entitled party. Finally, and most importantly, they may impose obligations on one party to fund the rent, mortgage payments or other outgoings affecting the property. However, owing to apparent legislative oversight, orders requiring payment of rent, mortgage instalments or outgoings are effectively unenforceable.⁹⁸ This is a serious problem, which may effectively deprive this otherwise useful order of much of its utility (not only in non-entitled cohabitants' cases, but more widely).⁹⁹

Transfer of tenancies

- 3.55 Under Schedule 7 to the Family Law Act 1996, the court may order the transfer of certain types of residential tenancy when cohabitants have "ceased to cohabit".¹⁰⁰

⁹⁵ Family Law Act 1996, s 36(7)(8): see n 90 above, but note that in cases brought by non-entitled cohabitants, the balance of harm test never requires the court to make an order; it retains complete discretion.

⁹⁶ Family Law Act 1996, s 36(10) and s 38(6).

⁹⁷ Family Law Act 1996, s 40(1).

⁹⁸ See *Nwogbe v Nwogbe* [2000] 2 FLR 744.

⁹⁹ TOLATA contains no provisions that could be used to plug the gap. There might be indirect means of enforcing an obligation to pay in matrimonial cases: for example, spouse A undertakes to pay the mortgage and the court encourages A to meet that (unenforceable) undertaking by making a nominal periodical payment order in favour of spouse B, who is in possession of the property. B in turn undertakes not to seek a variation of the periodical payments order unless A fails to pay the mortgage, in which case the order will be increased so that B can pay the mortgage directly. This mechanism involves certain complexities and potential economic disadvantage to B.

¹⁰⁰ This provision originates in Domestic Violence and Occupation of the Family Home (1992) Law Com No 207, Part VI.

In order to qualify for this remedy, the parties' relationship need not have lasted any minimum duration.

- 3.56 The legislation directs the courts to have regard to all the circumstances when considering the exercise of this power, including:
- (1) the circumstances in which the tenancy was granted to either or both of the cohabitants, or in which either or both became the tenant;
 - (2) the suitability of the parties as tenants;
 - (3) factors (1)-(3) from the list of considerations relevant to the making of occupation orders for applicants who are entitled to occupy the property (see paragraph 3.50); and
 - (4) where only one of the cohabitants is entitled to occupy the dwelling under the tenancy, factors (1)-(4) from the list of additional considerations relevant to the making of occupation orders for applicants who are not entitled to occupy the property (see paragraph 3.51).
- 3.57 The party to whom the transfer is made may be required to pay compensation to the other.¹⁰¹
- 3.58 There is little reported case law to show how the courts are exercising this power¹⁰² and no centrally collected court statistics record the number of Schedule 7 applications or orders made.¹⁰³ It may be the case that local authorities are often co-operative and prepared to transfer the tenancy without the need for a court application, assuming that both parties agree to the transfer. The case law does indicate that the courts may be reluctant to make transfer orders in respect of social housing, save in cases of domestic violence or impending homelessness, where to do so may hamper housing authorities' policies.¹⁰⁴
- 3.59 Conversely, in making these orders, care also needs to be taken to ensure that the party against whom it is sought is not therefore liable to be treated as "intentionally homeless" and so prejudiced in his or her attempts to find new social housing.¹⁰⁵ It seems that this may effectively require respondents to oppose the application for a tenancy transfer, expending time and resources in the process.

¹⁰¹ Family Law Act 1996, sch 7, para 10.

¹⁰² The tenancy in *Gay v Sheeran* [2000] 1 WLR 673 was not of a relevant type.

¹⁰³ Figures obtained from the Legal Services Commission for the year from April 2005 up to March 2006 (financial year ongoing) reveal only a very small number of cases involving tenancy transfer between cohabitants receiving General Family Help and Legal Representation; Legal Help, Family Mediation or Help with Mediation cases are not included, as the codes for these are not specific enough to identify cases involving cohabitants.

¹⁰⁴ *Vuong v Huang*, judgment of 11 January 1999, Family Division (unreported), [1999] CLY 3734; cf *Jones v Jones* [1997] Fam 59; *Akintola v Akintola* [2001] EWCA Civ 1989, [2002] 1 FLR 701.

¹⁰⁵ See Housing Act 1996, s 191.

- 3.60 In some circumstances, notably where the tenant has the right to buy, an application for tenancy transfer might be bitterly contested. However, in other cases the power to obtain a tenancy transfer may be of only limited value. Much depends on the security represented by the tenancy. In the private sector, the tenant is likely to hold an assured shorthold tenancy which is easily terminable by the landlord serving notice.¹⁰⁶
- 3.61 Where the tenancy is held jointly, it may be vulnerable to one party serving notice to quit on the landlord before an application can be made.¹⁰⁷ Questions have been raised about the compatibility of the rule permitting unilateral notice to quit with the other party's rights under Article 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").¹⁰⁸ The courts currently have no statutory anti-avoidance or other powers to rectify this problem once the tenancy has been terminated,¹⁰⁹ although it has been suggested that, in cases involving children, an injunction to prevent notice being given could be sought under Schedule 1 to the Children Act 1989 or the inherent jurisdiction.¹¹⁰ We have already recommended in the course of our project on Renting Homes that all tenants should agree to the service of a notice to quit in order for it to be effective.¹¹¹

Provision for children

Maintenance and the Child Support Act 1991

- 3.62 Where the Child Support Agency has jurisdiction over a case under the Child Support Act 1991,¹¹² income payments for the child's maintenance will usually be

¹⁰⁶ Housing Act 1988, s 21(1): the landlord can serve a notice under s 21(1)(b) at any point which must give the tenants a minimum of two months' notice. However, the court may not make an order for possession during the first six months of the tenancy.

¹⁰⁷ *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478; *Newlon Housing Trust v Al-Sulaimen* [1999] 1 AC 313.

¹⁰⁸ *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, held that the consequent possession proceedings brought by the public sector landlord were compatible with the Convention (this finding seems to survive *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 WLR 570); the case did not consider the compatibility of the underlying notice to quit rule as it operates between the tenants. In relation to the latter, see S Bright, "Ending tenancies by notice to quit: the human rights challenge" (2004) 120 *Law Quarterly Review* 398; and I Loveland, "After *Qazi*: Part 1: Sole tenant termination of joint tenancies and Article 8 ECHR" (2005) *Conveyancer and Property Lawyer* 123.

¹⁰⁹ In the case of spouses, see H Conway, "Protecting Tenancies on Marriage Breakdown" (2001) 31 *Family Law* 208; for arguments based on the European Convention for the Protection of Human Rights and Fundamental Freedoms, see I Loveland, "After *Qazi*: Part 1: Sole tenant termination of joint tenancies and Article 8 ECHR" (2005) *Conveyancer and Property Lawyer* 123.

¹¹⁰ *Bater v Greenwich LBC* [1999] 4 All ER 944, per Thorpe LJ. The court may also have inherent powers to bar the frustration of an application under Schedule 7 before notice to quit has been given: S Bridge, "Transferring Tenancies of the Family Home" (1998) 28 *Family Law* 26, at 29.

¹¹¹ Renting Homes: The Final Report, Volume 1: Report (2006) Law Com No 297, paras 4.9 to 4.12.

¹¹² Generally, where the child is a "qualifying child" (Child Support Act 1991, ss 3(1) and 55), maintenance is sought by a "person with care" (s 3(3)) from a "non-resident parent" (s 3(2)), and all parties are habitually resident in the United Kingdom (s 44); see also restrictions in s 4(10).

exclusively a matter for the Agency. In such cases the courts are ordinarily unable to award periodical payments.¹¹³

Capital provision under Schedule 1 to the Children Act 1989

3.63 However, in all cases, the court has exclusive jurisdiction to make orders against the child's parent for lump sums,¹¹⁴ property transfers and settlements for the benefit of the child, regardless of the nature of the relationship between the parents.¹¹⁵ The relevant provisions are contained in Schedule 1 to the Children Act 1989. These powers, focused entirely on the child's needs, are potentially of very great importance to all parents, even if they never cohabited.

3.64 The legislation sets out a checklist of factors to be considered by a court exercising its jurisdiction under Schedule 1. These factors are very similar to those contained in matrimonial legislation for the benefit of children of spouses.¹¹⁶ The welfare principle contained in section 1 of the Children Act does not apply to this jurisdiction,¹¹⁷ but the welfare of the child is nevertheless an important factor.¹¹⁸ In addition, the court must consider, amongst all the circumstances of the case:

- (1) the income, earning capacity, property and other financial resources which each parent¹¹⁹ has or is likely to have in the foreseeable future;
- (2) the financial needs, obligations and responsibilities which each parent has or is likely to have in the foreseeable future;
- (3) the financial needs of the child;

¹¹³ The cases where the court will have the power to order periodical payments alongside the Agency's maintenance calculation are listed in Child Support Act 1991, s 8: orders made by consent (which only preclude an application to the Agency for one year (s 4(10)(aa)) or until the parent with care claims relevant means-tested benefits, whichever is sooner); orders in respect of education expenses (such as school fees) or expenses attributable to the child's disability; and orders dealing with any net income of the non-resident parent which exceeds the jurisdictional limit of the Agency (£2,000 per week).

¹¹⁴ Lump sum orders must not be used as a vehicle for evading the limits on the court's jurisdiction to make maintenance provision. Capitalised maintenance in the form of a lump sum therefore cannot be ordered where the Agency has exclusive jurisdiction over maintenance: *Phillips v Peace* [1996] 2 FLR 230.

¹¹⁵ Regardless of whether the parents ever cohabited. The Act can only be used to make orders against an individual who is not the child's parent where that individual is married (or in a civil partnership) and both parties to the marriage (or civil partnership) treat the child as a child of the family. This is the case regardless of whether the child is related to either party. Cohabitant "step-parents" and other non-parents are therefore not liable for their partners' children: Children Act 1989, s 105 and sch 1, para 16.

¹¹⁶ See, for example, Matrimonial Causes Act 1973, s 25(3)-(4); and, for civil partners, Civil Partnership Act 2004, sch 5, para 22. Where the parents have been married and divorce proceedings are pending, the court will almost always make orders under its Matrimonial Causes Act jurisdiction rather than under the Children Act 1989, sch 1.

¹¹⁷ Children Act 1989, s 1 and s 105, definition of "upbringing".

¹¹⁸ *Re P (A Child) (Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865.

¹¹⁹ The legislation also allows applications to be made by various non-parents: Children Act 1989, sch 1, para 1(1) and in limited cases by the child, para 2(1), in which cases see para 4(4).

- (4) the income, earning capacity (if any), property and other financial resources of the child;
- (5) any physical or mental disability of the child; and
- (6) the manner in which the child was being, or was expected to be, educated or trained.

Where the parties have been cohabiting, the standard of living enjoyed by the family is also a relevant consideration.¹²⁰

- 3.65 Orders made under this legislation can, in theory, provide children with very substantial protection, for example, the provision of accommodation in the family home with the primary carer.
- 3.66 There are, however, important limitations to orders under the Children Act. They may ordinarily be directed only to meeting the children's needs during minority, or until the completion of their education.¹²¹ They cannot be used to require the paying parent to support or house children into adulthood when the children are capable of supporting themselves.¹²² The courts are therefore reluctant to order transfers of capital where that capital will not be exhausted in meeting the child's needs during minority. So, for example, the court will not transfer a house outright.¹²³ Once the child reaches majority or completes education, the home will revert to the parent (or parents), in accordance with their property law entitlements, as is appropriate for a remedy designed to protect the children.
- 3.67 The parent caring for the children is likely to benefit indirectly from orders made for the children, not least by being permitted to occupy the property reserved for them. However, any benefit enjoyed will be in that individual's capacity as the children's primary carer, and only to the extent necessary to enable him or her to perform that role.¹²⁴ The Act confers no power to adjust the adult parties' property rights in order to achieve a fair outcome between them, as opposed to providing for the children. The courts cannot, therefore, give parents with care any beneficial share in the house or an interest in the other party's pension fund or other property. Again, this is appropriate in the context of a remedy designed to protect the children.

¹²⁰ *F v G (A Child: Financial Provision)* [2004] EWHC 1848 (Fam), [2005] 1 FLR 261.

¹²¹ In *A v A (A Minor: Financial Provision)* [1994] 1 FLR 657, the house was settled on trust for the child until six months after she reached the age of 18, or six months after she finished her full-time education (which included her tertiary education), whichever was latest. See also *Re P (A Child)(Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865.

¹²² *A v A (A Minor: Financial Provision)* [1994] 1 FLR 657; cf where the child is disabled and so "special circumstances" apply – Children Act 1989, sch 1, para 3(2)(b); *C v F (Disabled Child: Maintenance Orders)* [1998] 2 FLR 1.

¹²³ The property will instead be held on trust by the parents (or other individuals) as trustees for the child for the duration of the order: *K v K (Minors: Property Transfer)* [1992] 1 WLR 530.

¹²⁴ *Re P (A Child)(Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865.

3.68 In the unusual cases where the court has jurisdiction to make periodical payments for the child,¹²⁵ that order can include a carer's allowance. But such an allowance is designed to provide the child with a carer and to meet that person's consequent needs in that capacity. The parent with care cannot be awarded periodical payments for his or her own personal benefit, even while the children are pre-school and may be inhibiting that parent from re-training or returning to full-time work. The adult parties have no independent personal claims against each other, so, for example, the amount awarded by way of carer's allowance will not permit the parent with care to make savings or invest in a pension.¹²⁶ However, in one recent case a carer's allowance was awarded on the basis that the mother should have a choice between using it: (i) to buy in child-care, enabling her to retain full-time employment and to accrue earnings of her own from which investments could be made; or (ii) to reduce her working hours so that she could spend more time with the child, but thus forgo her chance to earn and so to save.¹²⁷

PROPERTY ENTITLEMENT ON THE DEATH OF A COHABITANT

3.69 In general terms, English law confers full powers of testamentary disposition on competent individuals, whether married or unmarried. Individuals with capacity to do so may therefore dispose of their estate as they wish by making a will, provided that the disposition complies with the relevant statutory formalities and is otherwise valid. Where a person dies having failed to dispose of the whole, or some part, of his or her estate, the intestacy rules will govern its destination.

3.70 However, the court has an important statutory discretion to make awards for reasonable financial provision to defined classes of applicant under the Inheritance (Provision for Family and Dependents) Act 1975 ("the 1975 Act"). The effect of a court order made under this legislation will be to vary or even to overturn the testator's dispositions by will (or the devolution of such of the estate that is not disposed of by will pursuant to the intestacy rules).

3.71 It is also important to remember that whenever someone dies, the first task must be to ascertain what property falls within the deceased's estate. For these purposes, the general law of property and trusts, outlined above from paragraphs 3.6 to 3.14 and from 3.20 to 3.40, will apply.

Property passing otherwise than by probate

3.72 The property of a deceased person may pass by other means than by will or by operation of the intestacy rules. Certain items of property (typically a house, or a bank account) may be held by cohabitants beneficially as joint tenants at the time of the death, in which case the doctrine of survivorship will apply.¹²⁸ On death the property in question vests automatically in the survivor without any need for further legal formality. This can be an effective and efficient means of transmitting important items of property, and in some cases (where the cohabitants have only

¹²⁵ See n 113.

¹²⁶ See *Re P (A Child)(Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865.

¹²⁷ *F v G (Child: Financial Provision)* [2004] EWHC 1848 (Fam), [2005] 1 FLR 261.

¹²⁸ K Gray & S F Gray, *Elements of Land Law* (4th ed 2005) paras 11.8-11.21.

one major asset, such as their home) may mean that it is unnecessary to make a will.

- 3.73 Provision may also be made for a cohabitant by exercising a power of nomination in relation to small investments held by industrial and provident societies.¹²⁹ Or a cohabitant may receive a death-in-service payment in relation to a partner who has nominated him or her to receive it.¹³⁰
- 3.74 Certain residential tenancies (that is, of houses or flats) are transmitted on death by the operation of the Housing Act 1985, the Housing Act 1988, the Housing Act 1996 and (now relatively rarely) the Rent Act 1977.¹³¹
- 3.75 The Life Assurance Act 1774 renders void and illegal any policy of insurance where the applicant for the policy did not have an “insurable interest” in the life to be insured. A person has an insurable interest in the life of his or her spouse or civil partner, regardless of whether the death would cause any financial loss. However, there is no such automatic interest in the case of cohabitants. The subject of life assurance falls outside the scope of this project, but in a separate project on insurance contract law we are considering whether these rules should be reviewed to establish whether reform is desirable.¹³²

Intestacy

Entitlement on intestacy

- 3.76 Under current law, a cohabitant has no entitlement on the intestacy of his or her partner. Entitlement under the intestacy rules is strictly confined to those who are related by blood or by marriage to the deceased.

Bona vacantia

- 3.77 There is, however, one instance where the operation of the intestacy rules themselves may, albeit indirectly, result in benefit to a cohabitant. Where an intestate dies without leaving any relatives qualifying under the intestacy rules, his or her estate will devolve upon the Crown (or, if the intestate dies resident there, upon the Royal Duchies of Cornwall or Lancaster) as *bona vacantia*.¹³³

¹²⁹ Miller, *The Machinery of Succession* (2nd ed 1996) p 111.

¹³⁰ Such nominations are usually not binding on pension trustees but are rarely departed from in practice.

¹³¹ We have proposed changes to cohabitants’ succession rights in *Renting Homes: The Final Report, Volume 1: Report* (2006) Law Com No 297, Part 7. Under our proposals, the criteria for succession would be essentially the same, but survivorship would not constitute a succession, and a second succession would be possible in some circumstances.

¹³² *Insurance Contract Law: A Joint Scoping Paper* (2006) Law Commission and Scottish Law Commission, para 2.2.

¹³³ If the estate is small (consisting of a net cash residue not exceeding £500) the case need not be referred to the Treasury Solicitor. There is a special procedure for estates over £500 but under £2,000. See The Treasury Solicitor Bona Vacantia Division, *Guidelines for referring estates to the Treasury Solicitor* (2005), available at <http://www.bonavacantia.gov.uk/default.asp?Pageld=1345> (last visited 4 May 2006).

3.78 The Crown has power (historically derived from the Royal prerogative) to make discretionary provision for “dependants” of the intestate and for other persons for whom the intestate might reasonably have been expected to make provision.¹³⁴ The policy and the criteria applied by the Treasury Solicitor in making discretionary grants have been published since December 2002. In exercise of this power, it is relatively common for grants to be made to cohabitants, as indicated in the published guidelines:¹³⁵

If the deceased was married at the time of his or her death then, in general, the estate will not pass to the Crown. However, discretionary grants have often been made in cases where the applicant and the deceased, although unmarried, lived together in an established relationship. For example, the deceased may have lived with his or her partner as man and wife. Alternatively, the deceased may have lived with his or her partner in an established same-sex relationship.

3.79 When deciding whether to make a discretionary grant, and deciding upon its value, the factors which the Treasury Solicitor considers are:

- (1) the size and nature of the estate;
- (2) the length and nature of the relationship between the deceased and the applicant;
- (3) any legal or moral obligations the deceased had towards the applicant;
- (4) the way in which the applicant behaved towards the deceased (including the contribution, if any, made by the applicant to the deceased’s welfare); and
- (5) any other matter which in the particular circumstances the Treasury Solicitor considers relevant.¹³⁶

These factors are similar to, but not the same as, the considerations to which the court must have regard in exercising its jurisdiction under the 1975 Act.¹³⁷

3.80 There is substantial overlap between the making of discretionary grants and the law of family provision. Where the applicant for a grant is entitled to make a claim under the 1975 Act, it is the Treasury Solicitor’s policy to require the applicant to bring proceedings under the Act.¹³⁸ This enables the Crown to ensure that all those entitled to claim are party to any compromise that is reached and thereby to minimise the risk of a late and unanticipated claim being made once the estate

¹³⁴ Administration of Estates Act 1925, s 46(1)(vi).

¹³⁵ The Treasury Solicitor Bona Vacantia Division, *Guide to discretionary grants in estates cases* (2005) para 31(a). Available at <http://www.bonavacantia.gov.uk/default.asp?PageId=1347> (last visited 4 May 2006).

¹³⁶ The Treasury Solicitor Bona Vacantia Division, *Guide to discretionary grants in estates cases* (2005) para 10.

¹³⁷ See para 3.92 to 3.93.

¹³⁸ The Treasury Solicitor Bona Vacantia Division, *Guide to discretionary grants in estates cases* (2005) para 21. See, for example, *Re Watson* [1999] 1 FLR 878.

has been administered. The requirement may, however, be waived. If the estate is modest in size (below £20,000), or if it would not be reasonable to expect the applicant to pursue an application under the 1975 Act (typically on grounds of frailty due to old age or ill health), the Crown may make grants without requiring prior commencement of action.¹³⁹ It may also be the case that the applicant is not entitled to claim under the 1975 Act.¹⁴⁰ This will not, of course, preclude an application for a discretionary grant.

- 3.81 In theory, at least, there may be advantages to claiming under *bona vacantia* rather than under the 1975 Act, although, in practice, much will depend on the size of the estate. If a cohabitant claims reasonable financial provision under the 1975 Act, the claim is confined to that which is reasonable for his or her maintenance.¹⁴¹ If a cohabitant claims a discretionary grant under the *bona vacantia* jurisdiction, there is no such ceiling to the claim.

Family provision

- 3.82 The Inheritance (Provision for Family and Dependants) Act 1975 (as amended) provides a scheme for those who claim that the disposition of an estate (whether effected by will or the intestacy rules or the combination of the two) has failed to make them reasonable financial provision.
- 3.83 The scope and extent of family provision legislation has expanded since its introduction in 1938. Initially, the only persons who could apply were the deceased's spouse, infant son, unmarried daughter, and adult sons and married daughters who by reason of some mental or physical disability were incapable of maintaining themselves.¹⁴² Consistent with its objective to deal with "unjust wills", claims could only be brought if the deceased died testate, and the only order available to the court was one for periodical payments, save where the estate was below £2,000.
- 3.84 The current statute was enacted following a review of the family provision laws by the Law Commission.¹⁴³ The 1975 Act originally set out five qualifying classes of applicant;¹⁴⁴ a sixth was added in 1995.¹⁴⁵ A surviving cohabitant may now have a claim under one or both of two classes: as a dependant or as a cohabitant of the deceased.

¹³⁹ The Treasury Solicitor Bona Vacantia Division, *Guide to discretionary grants in estates cases* (2002) para 22.

¹⁴⁰ In particular, if the cohabitant lived with the deceased for less than two years, and is unable to establish dependency immediately before the death.

¹⁴¹ See paras 3.90 to 3.95.

¹⁴² Inheritance (Family Provision) Act 1938, s 1(1).

¹⁴³ Second Report on Family Property: Family Provision on Death (1974) Law Com No 61.

¹⁴⁴ Spouses, former spouses, children, children of the family and dependants of the deceased.

¹⁴⁵ Cohabitants: Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(ba), inserted by the Law Reform (Succession) Act 1995, s 2.

Claim as a dependant

3.85 A dependant is defined as “any person [not otherwise qualifying as an applicant] who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased”.¹⁴⁶ The applicant must be able to establish an assumption of responsibility by the deceased for the applicant during their lifetimes.¹⁴⁷ This can, however, be implied from the fact of maintenance.¹⁴⁸

3.86 Further clarification is provided by section 1(3) of the 1975 Act:

...a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money’s worth towards the reasonable needs of that person.

3.87 In order to determine whether the applicant is eligible to apply as a dependant, the court must therefore value the contributions made by the deceased, and any valuable consideration given by the applicant, and conduct a balancing exercise to determine whether the former exceeds the latter.¹⁴⁹ If it does, then a claim can be made. If it does not, then the applicant will not be eligible to apply under this category. The courts are expected to approach this balancing exercise with common sense: it “cannot be an exact exercise of evaluating services in pounds and pence”.¹⁵⁰ Accordingly, the financial relationship between the deceased and the applicant must be looked at “in the round”, avoiding “fine balancing computations involving the value of normal exchanges of support in the domestic sense”.¹⁵¹

3.88 The effect of these limitations is that it is not always the most deserving of applicants who qualifies and that those who have given more than they have taken (for example by devoting many years of care and possibly financial support to an ailing partner) may not be able to claim.

Claim as a cohabitant

3.89 It was partly as a consequence of the limitations of the class of dependants that the Law Commission recommended the addition of cohabitants in their own right as a sixth class of applicant to the 1975 Act.¹⁵² This recommendation was implemented by the Law Reform (Succession) Act 1995, which amended the 1975 Act in its application to deaths on or after 1 January 1996. The legislation does not use the word “cohabitant”, but instead describes the class of applicant in

¹⁴⁶ Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(e).

¹⁴⁷ *Re Beaumont* [1980] Ch 444.

¹⁴⁸ *Jelley v Iliffe* [1981] Fam 128.

¹⁴⁹ *Re Wilkinson* [1978] Fam 22, *Jelley v Iliffe* [1981] Fam 128; *Tyler’s Family Provision* (3rd ed 1997) p 88.

¹⁵⁰ *Jelley v Iliffe* [1981] Fam 128, 141, per Griffiths LJ.

¹⁵¹ *Bishop v Plumley* [1991] 1 WLR 582, 587, per Butler-Sloss LJ.

¹⁵² Distribution on Intestacy (1989) Law Com No 187.

the language used by the Fatal Accidents Act 1976. To be eligible to apply under this category, the applicant must have been living:

during the whole of the period of two years ending immediately before the date when the deceased died...

(a) in the same household as the deceased; and

(b) as the husband, wife or civil partner, of the deceased (although not in fact married to or a civil partner of him or her).¹⁵³

Reasonable financial provision

3.90 Whether the claim is made as dependant or as cohabitant, the applicant has to establish that the disposition of the deceased's estate effected by his or her will or by the law relating to intestacy (or by the combination of the two) is not such as to make the applicant "reasonable financial provision". If the claimant crosses that hurdle, the court then has to consider what, if any, order is required so as to make such "reasonable financial provision".

3.91 Reasonable financial provision in both cases is statutorily defined as "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance".¹⁵⁴ This has been judicially explained as meaning "such financial provision as could be reasonable in all the circumstances of the case to enable the applicant to maintain himself in a manner suitable to those circumstances".¹⁵⁵

3.92 Whether the claim is made as cohabitant or dependant, in considering whether the disposition of the deceased's estate makes reasonable financial provision for the applicant, and in determining whether and in what manner to exercise its powers to make such provision, the court must have regard to:

- (1) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
- (2) the financial resources and financial needs which any other applicant for an order has or is likely to have in the foreseeable future;
- (3) the financial resources and financial needs which any beneficiary of the deceased's estate has or is likely to have in the foreseeable future;
- (4) any obligations and responsibilities which the deceased had towards any applicant for an order or any beneficiary of the deceased's estate;
- (5) the size and nature of the net estate of the deceased;

¹⁵³ Inheritance (Provision for Family and Dependants) Act 1975, ss 1(1)(ba), (1A) and (1B); *Re Watson* [1999] 1 FLR 878, *Gully v Dix* [2004] 1 WLR 1399, *Churchill v Roach* [2002] EWHC 3230 (Ch), [2004] 2 FLR 989. On the requirement of a joint household, see *Kotke v Saffarini* [2005] EWCA Civ 221, [2005] 2 FLR 517 (considering the equivalent provision in the Fatal Accidents Act 1976).

¹⁵⁴ Inheritance (Provision for Family and Dependants) Act 1975, s 1(2)(b).

¹⁵⁵ *Re Coventry* [1980] Ch 461, 494, per Buckley LJ.

- (6) any physical or mental disability of any applicant for an order or of any beneficiary of the deceased's estate; and
 - (7) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.
- 3.93 If the claim is made as a dependant, the court must have regard to "the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant and to the length of time for which the deceased discharged that responsibility".¹⁵⁶
- 3.94 If the claim is made as a cohabitant, the court must also have regard to:
- (1) the age of the applicant and the duration of the cohabitation; and
 - (2) the contribution made by the applicant to the welfare of the deceased's family, including any contribution made by looking after the home or caring for the family.¹⁵⁷
- 3.95 If the court finds that the applicant has not received "reasonable financial provision", as defined, from the deceased's estate, and concludes that some provision should be made, it has a wide range of orders at its disposal. Those orders, similar to those available under the Matrimonial Causes Act 1973 on divorce and Schedule 1 to the Children Act 1989, include periodical payments, lump sum, property transfer, and property settlement orders.¹⁵⁸

CONCLUSION

- 3.96 It will be clear from the foregoing survey that cohabitants and their children are not ignored by the law. Both statute law and the general law may be used to resolve some of the disputes that arise on separation or on death of one party. Cohabitants can regulate their affairs through express trusts or contracts. If they have not taken these steps, they may seek to claim a beneficial interest in a specific asset using the law of implied trusts or proprietary estoppel. Certain statutory remedies are available; cohabitants may claim orders for the occupation of the home, tenancy transfer and financial provision for their children. Cohabitants may be entitled to claim financial provision from the estate of their deceased partner.
- 3.97 However, the resolution of cohabitants' financial and property affairs on the termination of their relationships is largely driven by strict property law

¹⁵⁶ Inheritance (Provision for Family and Dependants) Act 1975, s 3(4).

¹⁵⁷ Inheritance (Provision for Family and Dependants) Act 1975, s 3(2A).

¹⁵⁸ Inheritance (Provision for Family and Dependants) Act 1975, s 2.

entitlements. The current law has been subjected to heavy criticism. In Part 4, we explore the problems that it has left unremedied and created.

PART 4

CRITICISMS OF THE CURRENT LAW ON SEPARATION OF COHABITANTS

INTRODUCTION

- 4.1 In this Part, we set out the key criticisms that have been made of the current law as it applies between cohabitants on separation where the parties have not regulated their affairs by way of express trust or contract. The law has been subjected to three principal accusations: that it is unfair, that it is uncertain, and that it is illogical. It has also been criticised as substantively and, in some cases, procedurally complex. Many of these criticisms equally affect cohabitants with children¹ and those without. But there are inevitably some problems that are either uniquely or more acutely a feature of cases involving children. Our focus shall therefore be principally on those cases. We shall consider criticisms of the current law as it applies on the death of one cohabitant in Part 8.
- 4.2 At this stage, we simply set out the criticisms of the current law without seeking to draw any particular conclusions about whether the law is sufficiently problematic to warrant reform or, if it is, what form any new scheme should take and to whom it should apply. Whether or not the criticisms levied at the current law are strong enough to merit reform of the law in some, all or indeed any cases of cohabitation, is a complex issue. Evaluating these criticisms and the case for reform inevitably raises substantial questions of social policy, and we turn our attention to those difficult questions in the Part 5.
- 4.3 At the start of various sections in this Part, we refer consultees to Part 7, in which we have set out a number of hypothetical cases. The examples in Part 7 are used principally in order to demonstrate the effects that the scheme provisionally proposed in Part 6 would have, but the discussion that follows each example also outlines the outcomes produced by the current law.

UNFAIRNESS ON SEPARATION

- 4.4 As we saw in Part 3, in the absence of express trust or contract, the principal court-based remedies available to a cohabiting couple on the breakdown of their relationship are provided by the law of implied trusts and proprietary estoppel, and by Schedule 1 to the Children Act 1989. Child support will also be payable under the Child Support Act 1991.
- 4.5 The court-based remedies have been criticised for failing to provide fair outcomes in such circumstances, in particular by failing to recognise the value of certain types of contribution made by one party to the acquisition of assets owned by the other, and by failing to recognise the economic sacrifices made by those who give up paid employment, for example, in order to care for the couple's children.

¹ In this Part, we use that expression "cohabitants with children" to describe a variety of families; in Parts 6 and 9, we shall consider separately the cases of cohabitants who become parents together, cohabiting step-families and other families with children who are not the children of both cohabitants.

4.6 The claimed unfairness of the current law is the result of:

- (1) its dependence upon criteria and distinctions that appear arbitrary in the context of everyday domestic life, particularly in relation to domestic financial management;
- (2) its failure to respond meaningfully or adequately to parties' interdependence, particularly the impact of their contributions to the relationship, and associated sacrifices, on each party's economic position at the point of separation; and
- (3) its focus on the acquisition of individual assets, rather than a holistic review of the parties' economic positions; and its associated lack of remedial flexibility, which prevents it from responding constructively to cases involving modest assets.

We shall also see that cohabiting parents with dependent children face considerable procedural complexity when they invoke the law on separation.

Focus on intention to share ownership and direct financial contributions²

4.7 Where the parties have not bought their home together (or where they jointly purchased their home without making a declaration of trust³), the law of implied trusts and proprietary estoppel must be invoked in order to ascertain how the beneficial interest in the property is held. This law is concerned with establishing the ownership of individual assets.

4.8 As we have seen, establishing an interest in favour of a non-owner may depend either upon express evidence of a common intention to share ownership or, in the case of estoppel, some representation or assurance that the non-owner should have some proprietary interest. Many people do not articulate their intentions or assumptions regarding their home specifically in terms of ownership; they may be more likely to discuss their shared occupation of the home, particularly when the relationship is a happy one.⁴ Yet the law insists on discussion of or belief in ownership.⁵ In addition, as we have seen, the law does not attach significance to general promises of future financial support.

4.9 This puts the onus on the individual seeking to establish ownership of a beneficial share to persuade the judge that the right sort of conversation or understanding between the parties took place or existed, or that the right sort of belief was held by the non-owner and acquiesced in by the owner. Establishing whether the parties ever did turn their minds to the question of ownership may pose substantial evidential problems:

The primary emphasis accorded by the law in cases of this kind to express discussions between the parties ("however imperfectly

² See Part 7, Examples 1, 1A, and 8A.

³ See para 3.11 for a discussion of current land registration requirements.

⁴ As Lord Bridge acknowledged in *Lloyds Bank Plc v Rosset* [1991] 1 AC 107, 128.

⁵ *Lloyds Bank Plc v Rosset* [1991] 1 AC 107.

remembered and however imprecise their terms”) means that the tenderest exchanges of a common law courtship may assume an unforeseen significance many years later when they are brought under equity’s microscope and subjected to an analysis under which many thousands of pounds of value may be liable to turn on fine questions as to whether the relevant words were spoken in earnest or in dalliance and with or without representational intent.⁶

Success or failure in such cases may depend upon the judge’s decision about the parties’ credibility. Attempting to prove the existence of such intention in litigation may be costly.

- 4.10 In the absence of an express common intention to share ownership, the law of implied trusts will allow such intention to be inferred (if not imputed⁷), and the trust to arise, by the making of certain financial contributions to the acquisition of the property in question. However, the continuing uncertainty about whether and when indirect financial contributions may suffice leaves the party who happened to pay household bills (rather than the mortgage) potentially without recognition for expenditure incurred for the parties’ benefit, while the party who happened to pay the mortgage accrues a beneficial share.
- 4.11 The insistence that the parties turn their minds specifically to ownership or make particular contributions, and the continuing ambiguity about the relevance of financial contributions to general household running costs, could be said to leave cohabitants subject to a law ill-suited to the realities of family life.⁸ Whether an applicant succeeds in establishing an interest may be entirely fortuitous. In so far as the law requires that parties act specifically with a view to acquiring an interest, it could be said to favour calculating and self-interested individuals over the more altruistic (or less legally aware).⁹ Many people simply do not appreciate the significance that the law attaches to certain intentions and contributions, and the lack of significance it attaches to others. It has been said that the search for this particular intention “neglect[s] most of the ethical case to be made, in the family context, for having this jurisdiction at all”.¹⁰

Failure to recognise the value and impact of non-financial contributions and associated sacrifices¹¹

- 4.12 If the courts were to establish conclusively¹² that indirect financial contributions should be capable of establishing an interest in property, it would benefit many

⁶ *Hammond v Mitchell* [1991] 1 WLR 1127, 1139, per Waite J.

⁷ See para 3.29 and following paragraphs.

⁸ See S Gardner, “Quantum in *Gissing v Gissing* constructive trusts” (2004) 120 *Law Quarterly Review* 541; K Gray & S F Gray, *Elements of Land Law* (4th ed 2005) para 10.128.

⁹ K Gray & S F Gray, *Elements of Land Law* (4th ed 2005) para 10.136.

¹⁰ S Gardner, “Quantum in *Gissing v Gissing* constructive trusts” (2004) 120 *Law Quarterly Review* 541, at 546.

¹¹ See Part 7, Examples 1-1B, 3, 4, 6, 7, 7A and 10.

cohabitants, at least to some extent.¹³ Evidence suggests that there are few families now in which both parties will not have made some financial contribution during the relationship.¹⁴ However, even with the benefit of that clarification, some individuals would remain without any share in the property. Whatever the position may be as regards financial contributions, the law is quite clear about non-financial activities. Non-financial contributions alone – running the home, raising the children, undertaking repairs and so on – and the potentially substantial economic sacrifices that they entail (for example by way of impairment to future earning capacity) will not give rise to any beneficial share. One commentator has recently observed that the courts’ willingness to compensate individuals for foregoing specific investment opportunities is not matched by similar concern for the lost employment opportunities of many cohabitants who undertake home-making and child-rearing tasks.¹⁵

- 4.13 The law’s failure to recognise non-financial contributions for this purpose may be thought to give rise to potentially substantial unfairness. Such contributions have direct financial value – all such “services” can be bought on the market, so their provision by one party saves the couple money that they might otherwise have had to spend.¹⁶ Moreover, the performance of those activities may also have involved significant economic sacrifice by the party undertaking them. This is particularly true of child-care. Most primary carers are women,¹⁷ and much of the data on employment and parenting relate specifically to women. But the discussion which follows here would apply equally to fathers undertaking that role.

Evidence about the economic impact of parenting

- 4.14 Raising children can be one of the most rewarding and pleasurable experiences in life. However, parenthood does come at an economic cost. Having a family necessarily entails an increase in household expenditure, a cost that is usually

¹² Ideally, in view of the conflict between various judicial comments in *Gissing v Gissing* [1971] AC 886 and Lord Bridge’s remarks in *Lloyds Bank v Rosset* [1991] 1 AC 107, by decision of the House of Lords.

¹³ The extent to which the courts will quantify the beneficial share by reference to the parties’ non-financial contributions remains unclear, and so a party who had made only a small financial contribution is not assured of a substantial share in recognition of other contributions and sacrifices: see 4.28 below.

¹⁴ R Probert, “Trusts and the Modern Woman: Establishing an Interest in the Family Home” (2001) 13 *Child and Family Law Quarterly* 275.

¹⁵ R Probert, “Land, law and ex-lovers” [2005] *Conveyancer and Property Lawyer* 168, 172: the woman had ceased her attempts to purchase a flat when the man offered to do so, and a trust was found to have arisen on the basis of *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372. See generally A Lawson, “The things we do for love: detrimental reliance in the family home” (1996) 16 *Legal Studies* 218.

¹⁶ See R Probert, “Land, law and ex-lovers” [2005] *Conveyancer and Property Lawyer* 168, 171, contrasting the court’s willingness to acknowledge the value of the claimant’s “project management” activities. Note also the calculation that gross unpaid household production in the UK in 2000 was worth £877 billion: Office for National Statistics, *Social Trends* 36 (2006) p 86, table 5.27.

felt by all members of the household.¹⁸ Although payment of the expenses associated with the children may not currently be recognised by the current law as a way of acquiring a beneficial share of the home in which the parties live,¹⁹ it does not impair that parent's future economic standing: that party's earning capacity remains intact.

- 4.15 However, parenthood also often involves substantial economic sacrifices in the form of suppressed earnings, earning capacity, pension savings and so on. In view of the tendency for most parents to specialise to some extent in their breadwinning and child-caring functions (for example, one parent gives up work or reduces his or her hours, at least while the children are pre-school, while the other continues to work full-time) one party will often make greater sacrifices of that sort than the other.²⁰
- 4.16 There is considerable evidence about the effect of child-care responsibilities on the income and earning capacity of mothers. A study carried out for the Cabinet Office in 2000²¹ demonstrates the impact that child-care and other caring responsibilities may have on many women's earnings and pension incomes in later life. Fewer years in employment, shorter hours through part-time rather than full-time work, lost experience (in the form of lost promotion opportunities and skills depletion) and the pay "penalty" independently associated with part-time employment combine to leave many mothers with substantially reduced income

¹⁷ Fathers of dependent children are more likely to be working than mothers: 90% as compared with 67%: Office for National Statistics, *Social Trends 36* (2006) p 53.

¹⁸ Though some research suggests that where couples' money is managed separately, expenditure on the child is likely to come from the woman's income: J Pahl, "Individualisation in Couple Finances: Who Pays for the Children?" (2005) 4 *Social Policy and Society* 381.

¹⁹ They could only do so as a form of "indirect" financial contribution to the acquisition of the property.

²⁰ For relative employment rates of mothers and fathers, compared with men and women without dependent children, see Office for National Statistics, *Social Trends 36* (2006) pp 53-54, table 4.4: mothers with dependent children are less likely to be in employment than those without; fathers with dependent children are, by contrast, more likely to be working than those without. Women aged 25-49 who are economically inactive (that is to say "neither in employment nor unemployment") are most likely to cite "looking after family or home" as the reason for their employment status (44% of all such women); that is the least common reason cited for economic inactivity by men (6%): Office for National Statistics, *Social Trends 36* (2006) table 4.26. ("Unemployment" is defined as "those aged 16 and over who are without a job, are available to start work in the next two weeks, who have been seeking a job in the last four weeks or are out of work and waiting to start a job already obtained in the next two weeks": Office for National Statistics, *Social Trends 36* (2006) p 51 glossary).

²¹ K Rake (ed), *Women's Incomes over the Lifetime* (2000). Much of the following discussion in the text is taken from this source, in particular ch 5. See also data reported in HM Treasury et al, *Choice for parents, the best start for children: a ten year strategy for childcare* (2004) annex B.

over the course of their lifetime than they might have received had they not had children.²²

- 4.17 The study shows that the level of mothers' educational attainment and their age at the birth of their first child has a considerable effect on the extent to which motherhood impacts negatively on their employment patterns. The lifetime incomes of low- and mid-skilled women may be substantially reduced by motherhood. Even though they are less likely to have been engaged in employment with a clear career path and future prospects prior to motherhood, they may lose a considerable proportion of what they would otherwise have earned over the course of their working lives and so have much lower pension income later in life.²³ Conversely, in general, the income of many high-skilled women in professional occupations will not be substantially affected by motherhood, as they often have their children later in life and then return to the same job and career path following maternity leave. But even in these cases, parenthood brings a cost, as it will only be possible for both parents to stay in full-time work if money is spent on professional child-care.²⁴ The higher earnings of these couples make child-care costs more affordable and economically realistic than they are for couples with lower incomes, for whom paid child-care (at least pre-school) may consume a considerable portion of what the party who would otherwise undertake the primary care is able to earn.²⁵ However, clearly, if a high-skilled woman does give up or scale down her paid employment when the couple start a family, the extent of the economic sacrifice that she is making will be substantial.
- 4.18 Of course, times have changed since the leading authority on the law's refusal to base a beneficial share on non-financial contributions alone, *Burns v Burns*.²⁶ Recent legislative measures seek to assist parents with the costs of child-care and to support "family-friendly" employment. Tax credits, flexible working, improved maternity, paternity and parental leave, and improved child-care provision all have important roles to play in helping parents sustain a good work-life balance and to pursue paid employment whilst also fulfilling their role as

²² K Rake (ed), *Women's Incomes over the Lifetime* (2000) p 117. Although many mothers remain economically active, many work only part-time: 80% of the part-time labour force are women: Office for National Statistics, *Social Trends* 36 (2006) p 50. There is a lot of data about mothers' employment patterns. 47% of working mothers (aged between 25 and 54) with one child and 63% of those with two or more children work part-time: HM Treasury et al, *Choice for parents, the best start for children: a ten year strategy for childcare* (2004) chart B8; see also charts B9-B10; these charts do not distinguish between married/cohabiting mothers and lone mothers.

²³ Where the woman cohabited with her partner, she will not be entitled to a Category B retirement pension or bereavement benefits (bereavement payment, widowed parent's allowance and bereavement allowance): Social Security Contributions and Benefits Act 1992, ss 36, 39A, 39B, 48A and 48B. We discuss private pensions in para 3.73.

²⁴ These costs are not included in the modelling of women's income done by K Rake (ed), *Women's Incomes over the Lifetime* (2000) pp 106-107 and p 114.

²⁵ Although they may get some assistance from the child-care element of Working Tax Credit; see n 27 and 32.

²⁶ [1984] Ch 317.

parents.²⁷ The number of economically active women has increased by 4.3 million since 1971.²⁸ And an increasing number of parents share child-care responsibilities – and the effect of those responsibilities on their employment – equally.²⁹

- 4.19 However, many couples do not evenly distribute the impact of child-care, either during their relationship or following separation. Some couples still choose complete role-specialisation (at least during the early years of the child's life³⁰) whereby one parent goes out to work, the other cares for the child at home, either as a result of economic constraints or simply preferring to raise their children in that way.
- 4.20 While the relationship is continuing, the party making the greater sacrifices in relation to employment may be protected from the effects of doing so by the support that the relationship provides.³¹ On separation, however, that support is lost, and the primary carer is exposed to the economic consequences of the role-specialisation which the parties adopted during their relationship. In particular, that individual may have an impaired earning capacity and reduced pension-savings. Moreover, if the children are still dependent on separation, whichever parent is primarily responsible for them thereafter may be unable to engage in full-time employment for a time, either at all or without engaging professional child-care.³² The resulting economic disadvantage experienced by that parent

²⁷ Working tax credit includes an allowance for 70% of “relevant childcare” costs up to a prescribed ceiling, according to the number of children: Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002, SI 2002 No 2005, reg 20(3), as amended. 5% of couples with dependent children and 46% of lone parents received working tax credit in 2003/4: Office for National Statistics, *Social Trends 36* (2006) p 125, table 8.18. On flexible working: Employment Rights Act 1996, ss 80F-80I, Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, and Flexible Working (Procedural Requirements) Regulations 2002). On maternity and paternity leave: Employment Rights Act 1996, ss 71-80E, Maternity and Parental Leave Regulations 1999. See also HM Treasury et al, *Choice for parents, the best start for children: a ten year strategy for childcare* (2004); the Childcare Bill 2006 and the Work and Families Bill 2006. A higher proportion of female employees have requested and been granted flexible working than male employees: Office for National Statistics, *Social Trends 36* (2006) p 59 and table 4.17.

²⁸ Office for National Statistics, *Social Trends 36* (2006) p 50.

²⁹ See Part 7, Example 2 for an illustration.

³⁰ See HM Treasury et al, *Choice for parents, the best start for children: a ten year strategy for childcare* (2004) charts B7 and B10; B11 displays the data for mothers in couples and lone mothers separately (but without any distinction between full-time and part-time employment – see next note); lone mothers are less likely to be in paid employment, especially when the youngest child is under 5.

³¹ But note research which identifies financial inequality within some relationships, discussed by C Vogler, “Cohabiting couples: rethinking money in the household at the beginning of the twenty first century” (2005) 35 *Sociological Review* 1.

³² Though tax credits may assist with these costs, see n 27. Conveniently located and affordable child-care is not uniformly available: Office for National Statistics, *Social Trends 36* (2006) p 126: 31% of lone parents and 23% of couples described local child-care provision in 2003 as “not at all affordable”; 34% and 41% respectively considered it to be “fairly affordable”; see N Lyon, M Barnes and D Sweiry, *Families with children in Britain: Findings from the 2004 Families and Children Study* (2006) Department for Work and Pensions Research Report No 340, ch 16; and F Williams, *Rethinking Families* (2005) p 29, reporting evidence from the TUC that childcare costs can amount to 25% of the average household income.

may in some cases continue long after the relationship ends and beyond the children reaching independence.

- 4.21 Although the non-resident parent will be required to pay child support, those payments only help to meet the immediate needs of the child, and do not, therefore, provide a remedy for the wider economic impact of parenthood on the primary carer. In the absence of any remedy providing financial relief to help the primary carer with that consequence of separation, the full economic impact of parenthood will be borne unequally between the parties. Some primary carers may be left at least partly reliant on the state, when that reliance would not have been necessary (at least in part) had the economic impact of child-caring responsibilities been shared equally between the parents, during the relationship or on separation.

The current law's lack of response to this problem

- 4.22 It is here that the current law may be said to fail the primary-carer cohabitant. Where the individual who has made these sorts of economic sacrifices happens to be able to point to other evidence from which a trust or estoppel interest might arise – such as an express common intention to share ownership or a relevant financial contribution, however small,³³ from which the court was prepared to infer such an intention – then relief under the general law might be available.³⁴ Certainly where the claimant has made a financial contribution, detrimental reliance will readily be found; whether non-financial contributions may constitute detrimental reliance is uncertain.³⁵
- 4.23 However, in the absence of such evidence, the non-financial contributions made by such individuals, and the associated economic sacrifices, will not, of themselves, generate a share in the value of any of the property or give rise to any other claim under the general law. Individuals in this position may therefore be left entirely without remedy on separation, despite those economic sacrifices and their potentially long-term consequences for earning capacity.
- 4.24 Although we have focused on the case of parenting, the law's failure to acknowledge the value of non-financial contributions to the parties' relationship and the economic sacrifices associated with them may also affect some cohabitants without children. For example, one party might give up work in order to care for the other party (in case of illness or old age), or for an elderly relative.³⁶ Or a couple might relocate frequently over the course of a long relationship, possibly internationally, in order to pursue the career of one party at

³³ Mrs Cooke's financial contribution of less than 7% of the purchase price of the property sufficed to give her a 50% beneficial share: *Midland Bank v Cooke* [1995] 4 All ER 562.

³⁴ In a study of legally-aided cases, 70% of applicants in receipt of legal aid in land disputes were female; 19% were full time housewives or carers: T Goriely and P Das Gupta, *Breaking the Code: The impact of legal aid reforms on general civil litigation* (2001) ch 11. This study pre-dated major legal aid reforms in April 2000.

³⁵ See para 3.32 (trusts) and 3.36 (estoppel).

³⁶ See Example 6 in Part 7. It is harder to map the effects on men and women's incomes of caring for vulnerable adults (as compared with child-care) owing to the diversity of such cases and the possibility that employment status may affect the likelihood that someone performs a caring role: K Rake (ed) *Women's Incomes over the Lifetime* (2000) para 5.5.

the expense of the other's. The economic disadvantage sustained in such cases may typically be less profound than that experienced by many cohabiting parents, but, in both cases, they are sacrifices which will not of themselves give rise to any share in property or other remedy under the general law.

- 4.25 From the perspective of the claimant unable to point to the sort of evidence described in paragraph 4.22, but for whom the impact of the relationship and the separation is as profound as those who can, the law's insistence on this particular evidence may seem arbitrary.
- 4.26 Moreover, some commentators have suggested that the current law is discriminatory on grounds of gender (in a way that prejudices both male and female claimants) in so far as certain types of contribution made by women may not be regarded as "detrimental" reliance, but would if made by a man, and vice versa.³⁷
- 4.27 For those claimants who do manage to leap the general law's initial hurdles (by proving common intention, relevant contributions, and so on, as described in paragraph 4.22), the court then comes to quantifying the interest or, in estoppel, to determining what remedy, if any, is required to satisfy the equity. Non-financial contributions are given their greatest weight by the current law at this stage. They can result in as much as a 50% share in the property being attributed to the contributing party.³⁸
- 4.28 Yet, as we have seen, perhaps particularly in cohabitants' cases, the courts seem to continue to attach substantial weight to the parties' respective financial contributions.³⁹ Trust law's capacity to give non-financial contributions proper weight – taking full account both of the economic value of those activities and the economic sacrifice sustained as a result of their performance – is therefore doubtful. On the face of it, the remedial stage of a proprietary estoppel claim offers more hope, concerned as it may be with the claimant's reliance losses.⁴⁰ However, unless the applicant can prove a relevant representation or assurance at the outset, no claim in estoppel will arise.
- 4.29 If what is wanted is a remedy responding to the economic disadvantage felt on separation and sustained disproportionately by those who have undertaken child-care and other domestic responsibilities in the home, then the general law of trusts and estoppel does not provide it. Since that law is not designed specifically to deal with that issue, whether it in fact happens to do so in any individual case is entirely fortuitous. The general law is directed at identifying the ownership of particular assets and responding to specific assurances made about the acquisition of rights in relation to property. This means that it erects preconditions

³⁷ See A Lawson, "The things we do for love: detrimental reliance in the family home" (2006) 16 *Legal Studies* 218; R Bailey-Harris, "Dividing the Assets on Breakdown of Relationships Outside Marriage", in R Bailey-Harris (ed), *Dividing the Assets on Family Breakdown* (1998) p 81.

³⁸ *Midland Bank Plc v Cooke* [1995] 4 All ER 562.

³⁹ See *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211 and *Stack v Dowden* [2005] EWCA Civ 857, [2006] 1 FLR 254, where the parties' non-financial contributions get little if any mention during the court's deliberations on quantification.

for successful claims which appear arbitrary and irrelevant if what is desired is a remedy that will apportion the economic impact of the parties' relationship and its breakdown.

Lack of holistic view and flexible remedies⁴¹

- 4.30 Even if the claimant is able to establish an interest in the parties' home, fair outcomes on separation may still not be guaranteed. The law of trusts and proprietary estoppel focus exclusively on the ownership of particular items of property and contributions towards their acquisition. They are neither designed nor able to provide a comprehensive review of the parties' economic positions at the end of a relationship. Trust law, in particular, suffers from its inflexibility in terms of the remedy it offers: a beneficial interest in the particular asset subject to dispute. Even proprietary estoppel, which is able to offer monetary remedies, does not provide the same sort of remedial flexibility that a statutory scheme of specialist family law orders can offer (in particular, periodical payments and, in appropriate cases, pension sharing).
- 4.31 The existing statutory remedies applicable to cohabitants on separation are also arguably deficient, both individually and in terms of the overall package that they produce. They do not go far enough to make up for the shortcomings of the general law, at least where the parties' home is owned by one or both of them rather than rented.⁴²
- 4.32 The occupation order scheme in the Family Law Act 1996 does not offer a satisfactory basis for the long-term resolution of separating cohabitants' problems and was not intended to do so.⁴³
- 4.33 Where the parties are co-owners of property, the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA") offers a mechanism whereby the property may be retained on separation for the occupation of one party with the children. However, the courts' ability to use that remedy may be hampered by some of the constraints which, we believe, may be impeding the use of Schedule 1 to the Children Act 1989. We discuss those constraints in the following paragraphs. It is also important to bear in mind that Schedule 1 will only offer any remedy were the children are still dependent. The party who cared for the children over the course of a long relationship but who can establish no interest in the family home will therefore be left without any substantial remedy.

⁴⁰ See para 3.37.

⁴¹ See Part 7, Examples 1 and 3.

⁴² If the home is rented, the statutory remedy of tenancy transfer is available (see para 3.55), and made economically viable by the availability of housing benefit.

⁴³ Particularly in respect of the non-owning cohabitant where any occupation order will only last for up to 12 months: see 3.53. See Domestic Violence and Occupation of the Family Home (1992) Law Com No 207, para 4.10.

The apparently limited use of Schedule 1 to the Children Act 1989

- 4.34 The most curious feature of the Children Act jurisdiction is its apparent under-use. 1024 applications were made under Schedule 1 in 2004, resulting in just 389 orders.⁴⁴ The bare statistics do not indicate the nature of those applications, in particular, how many of them involved separating cohabitants seeking capital orders. Some will have been “big money” cases that exceeded the Child Support Agency jurisdiction for maintenance.⁴⁵ Others may have been cases where one of the relevant parties was not habitually resident in the UK, in which case the Child Support Agency lacks jurisdiction and basic maintenance is therefore a matter for the courts. So only some of the orders will have related to “ordinary” cohabitants seeking capital orders, and the number of orders made (both in total and attributable to ordinary cases) is surprisingly small.⁴⁶
- 4.35 There are various possible reasons for this apparent under-use. It has been suggested that some advisers overlook, or may even be unaware of, Schedule 1 of the Children Act,⁴⁷ and many cohabitants do not seek advice regarding the property aspects of their separation.⁴⁸ More effective use of that legislation in appropriate cases may go some way to alleviate the financial hardship encountered by cohabitants and their children on separation. However, there appear to us to be some fundamental problems with Schedule 1 (to some extent shared with TOLATA), which may explain why many advisers for good reason discount it on the grounds that it is not a feasible or worthwhile remedy.

THE LIMITS ON THE COURT'S POWERS TO MAKE ACCOMMODATION AVAILABLE

- 4.36 When cohabiting parents separate, two homes must be sustained where there was once one shared household. Orders made under the Children Act 1989 (requiring the non-resident parent to make the home available for the child and primary carer during the child's minority only), and the TOLATA occupation order (only available where the parties are co-owners), both involve maintaining the existing family home and leaving the non-resident parent to find alternative accommodation. Certainly in the case of orders under Schedule 1, once the order expires on the child reaching independence, the property will revert to its owner(s) and the proceeds of any sale apportioned strictly in accordance with the parties' beneficial interests.⁴⁹

⁴⁴ Figures from Performance Directorate, Her Majesty's Courts Service. Data received from the Legal Services Commission show that 100 certificates for General Family Help or Legal Representation were issued in relation to applications for financial provision for a child between April 2004 and March 2006.

⁴⁵ See Part 3, n 113.

⁴⁶ Particularly compared with the numbers of orders made for ancillary relief on divorce each year: see Part 6, n 9.

⁴⁷ M Maclean, J Eekelaar, J Lewis et al, “When cohabiting parents separate – Law and expectations” (2002) 32 *Family Law* 373.

⁴⁸ See generally S Arthur, J Lewis, M Maclean, S Finch and R Fitzgerald, *Settling Up: Making Financial Arrangements After Divorce or Separation* (2002).

⁴⁹ In Schedule 1 cases where the primary carer has no proprietary interest, he or she will receive no share in the capital value of the home.

- 4.37 Since orders under either Act take effect behind a trust, it is necessary to appoint appropriate trustees to hold the property concerned. We understand that this can prove problematic in Schedule 1 cases, and solicitors are often unwilling to act as trustee.
- 4.38 Moreover, whether any order is at all feasible will depend both on the ability of the primary carer to maintain the family home, particularly if it is mortgaged, and on the ability of the other parent to rehouse without access to his or her share of the capital in the family home. If these cannot be done, then no order would in practice be made.
- 4.39 Even assuming that the non-resident parent is able to rehouse without access to the capital, it will not be realistic to make an order if the income (earnings, any benefits⁵⁰ and tax credits, and child support) received by the primary carer are insufficient to service the outgoings relating to the property. Many primary carers will not have enough income at their disposal to do this. The court has no power to order the non-resident parent to pay the mortgage over the home.⁵¹ If the primary carer does not independently have the resources to pay the mortgage, it will only be possible to provide sufficient funds to enable him or her to do so in the following circumstances:
- (1) in a “big money” case (which exceeds the jurisdictional limit of the Child Support Agency), the court has the power to order additional periodical payments in favour of the child which are large enough to cover the mortgage;
 - (2) where a consent order for such periodical payments is made which includes an amount to cover the mortgage payments. However, in so far as the value of such an order exceeded what was payable by the non-resident parent under the Child Support Act formula, that parent would have a clear incentive to apply to the Agency after one year for a maintenance calculation which would replace the consent order;⁵²
 - (3) where the Child Support Agency payments are in any case sufficiently large that, taken in combination with the parent with care’s other income, there are enough funds to meet the child’s basic needs and pay the mortgage; or
 - (4) where a lump sum order is made under Schedule 1 to the Children Act 1989 for the purpose of paying off part of the mortgage capital, thereby

⁵⁰ Income support will cover some mortgage interest payments: Income Support (General) Regulations 1987, r 17 and sch 3.

⁵¹ Even if an applicant satisfies the court that it would be appropriate to make an occupation order simply to gain access to this provision, any order requiring the respondent to pay the mortgage (made under Family Law Act 1996, s 40) is unenforceable: see para 3.54. Any undertaking would also be unenforceable, and, unlike divorce cases, there is no power to order periodical payments in favour of the former cohabitant as a way of indirectly encouraging compliance with the undertaking: see Part 3, n 99.

⁵² Child Support Act 1991, s 4(10)(aa).

reducing the value of the monthly instalments and bringing them within reach of the parent with care.⁵³

- 4.40 But if the non-resident parent needs the capital tied up in the property to rehouse themselves, or otherwise cannot afford to support any of the strategies outlined above, then clearly the Schedule 1 order will be unrealistic. Nor, for the same reasons, would a TOLATA occupation order be possible.
- 4.41 In order to make the most of a limited asset pool in these circumstances, remedial flexibility is essential. In the case of divorcing spouses or civil partners dissolving their relationship, the courts can order sale of the family home and divide the proceeds for the purchase of two, smaller properties which the parties can between them afford to maintain. The courts exercising jurisdiction under Schedule 1 have no express power to order sale. Nor can they order the transfer of capital outright to the primary carer; any transfer of capital for the benefit of the child would be on the basis that, if not exhausted for the child's benefit during minority, it would revert to the non-resident parent when the child attained independence.
- 4.42 On the face of the Children Act 1989, children now have access to largely the same remedies for their benefit, regardless of the nature of the relationship between their parents. To that extent, English law no longer discriminates directly between children on the basis of their birth status.⁵⁴ However, in practice, in cases where assets are modest, the powers available to the divorce courts to make orders for the benefit of the primary carer, and the availability under that legislation of a power to order sale, can be crucial in making the powers relating to children workable.⁵⁵ The lack of equivalent flexibility in cases relating to cohabitants' children could be said to discriminate indirectly against those children.⁵⁶ It might be argued therefore that some reform is necessary, not only for the benefit of the parent with care, but also in the interests of the children.

DELAYED POVERTY FOR THE PRIMARY CARER

- 4.43 Another serious disincentive for the parent with care to rely on the Children Act remedies is the delayed poverty trap that Schedule 1 orders can create. Like the general law, the Children Act does not provide financial relief for the economic disadvantage sustained by the primary carer as a result of the relationship and its breakdown. It only allows orders to be made for the benefit of the child and these are largely limited to capital orders.⁵⁷ Although the parent with care may benefit

⁵³ Care would need to be taken in such a case to avoid falling foul of the rule against capitalised maintenance: *Phillips v Peace* [1996] 2 FLR 230.

⁵⁴ Any such discrimination would clearly violate Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), in conjunction with Article 8. For a recent strong affirmation of this, see *Mazurek v France* ECHR 2000-II, (2006) 42 EHRR 9.

⁵⁵ Mr Justice Munby has suggested that Schedule 1 may not always give the child of cohabitants "the same outcome in real terms" as that provided to the child of spouses by the Matrimonial Causes Act 1973: "Families Old and New – the Family and Article 8" (2005) 17 *Child and Family Law Quarterly* 487, at 497.

⁵⁶ See para 4.70.

⁵⁷ See para 3.63.

indirectly from such orders, once the children reach majority, those orders expire, and so too will that indirect benefit. The Act therefore cannot be relied on to share fairly between the parents the full economic impact of parenthood beyond the children's independence. The current lack of statutory remedy for such former cohabitants, together with the restrictive nature of the law of trusts, means that the non-financial contributions made by that parent may receive no recognition on separation at the end of what may have been a very long relationship.

- 4.44 This also has particular implications for the potential of the Children Act 1989 to require the other parent to make a home available for the children and carer during the child's minority. Any order made providing a home for the children and their primary carer will expire once the children reach majority. The house will at that point revert to its owner(s) and may be sold. The parent with whom the children lived may then be in some difficulty, particularly if that parent does not have any beneficial interest in the property and so a share in the capital released on sale. At that point, the parent will be rendered homeless at a time when he or she is likely no longer to have a priority need for social housing.⁵⁸ He or she may also find it difficult to afford private housing⁵⁹ owing to long-term impairment to earning capacity arising from the child-care that he or she has undertaken. Parents who foresee that predicament may prefer from the outset to pursue alternative options, particularly in social housing, which will offer them long-term residential security, even though this means having to move the children from the family home.
- 4.45 Indeed, its focus on the child's welfare causes the Children Act to produce what might be considered a rather paradoxical result, viewed from the perspective of the adult parties. The parent with primary care of a child near independence, who may have been out of work for many years, may only "receive" a relatively small award for that child's benefit for the short time until majority is reached or education completed. A parent with a young child by contrast may "receive" a larger award for the benefit of the child to cover the longer period of the child's remaining dependence. That makes sense in terms of the child, but not for the parent. The parent of the older child will often have been cohabiting with the other parent for a considerably longer period than the parent with the young child. The longer-term cohabitant might be thought to deserve rather more recognition for the contributions made to the relationship, and the associated economic sacrifices they entailed, over that period. Both parents may sustain significant economic disadvantage in consequence of their status as primary carers.
- 4.46 However, this issue is not something that Schedule 1 of the Children Act 1989 itself could be expected to address. That legislation is concerned with remedies for the benefit of the child. If reform were considered necessary to deal with this problem, it ought therefore to take the form of a separate remedy for the primary carer.

⁵⁸ Since that parent will no longer have dependent children living with him or her: Housing Act 1996, s 189.

⁵⁹ Though housing benefit may be available.

Substantive and procedural complexity⁶⁰

4.47 The position of cohabitants is not assisted by the fact that, in the absence of any comprehensive, tailor-made family law remedy, they need to negotiate a wide range of general and statute law in order to find some sort of remedy on separation.

4.48 Carnwath LJ's recent critique conveys the nature of the problem posed by the general law of property and trusts as it applies to determine cohabitants' disputes on separation:

To the detached observer, [the law as it has developed over the years] may seem like a witch's brew, into which various esoteric ingredients have been stirred over the years, and in which different ideas bubble to the surface at different times. They include implied trust, constructive trust, resulting trust, ... proprietary estoppel, unjust enrichment, and so on. These ideas are likely to mean nothing to laymen, and often little more to the lawyers who use them.⁶¹

4.49 Many of the individual strands of law that must be relied on are therefore complex in their own right. The combination of those strands is not a happy one. The complexity and uncertainty of the law make it difficult for parties to settle their cases privately and for their legal advisers to give clear guidance about what the outcome of litigation might be. Some parties, at least, are consequently inclined to allow the court to decide the outcome rather than settle it themselves. Others might be inclined simply to give up.

4.50 Nor are cohabitants assisted by the procedural complexity entailed in the combination of invoking a mixture of general and statute law, in civil and family proceedings respectively. Cohabitants wishing to argue under the law of trusts must issue proceedings for a declaration under TOLATA. Although it is possible to issue in the Principal Registry of the Family Division, those trusts actions are adversarial civil proceedings, not subject to the Family Proceedings Rules and so not best suited to supporting individuals going through the emotionally difficult transition of separation. Lengthy pleadings are required to ensure that all conceivably relevant facts and remedies are covered, and large numbers of documents must be obtained and scrutinised, often at great expense. Each case will depend not just on who is telling the truth, but on whose recollection appears (rather than necessarily is) the more accurate. Considerable judicial time must be spent receiving oral evidence. This is expensive for the parties and for the court, and most parties will be in no position to afford such substantial legal costs.

4.51 The same parties, and the same property, may simultaneously be the subject of proceedings under Schedule 1 to the Children Act 1989 which has its own requirements.⁶² This inevitably gives rise to a degree of repetition and increased

⁶⁰ See Part 7, Example 1 for the type of facts that would give rise to such problems.

⁶¹ *Stack v Dowden* [2005] EWCA Civ 857, [2006] 1 FLR 254, at [75], per Carnwath LJ, a case dealing with the separation of a cohabiting couple.

⁶² The combination of applications might be used strategically, for example, the claim under Schedule 1 maximised to try to secure an increased beneficial share by way of settlement of the trust claim.

costs, without evident benefit to the parties. Schedule 1 cases are family proceedings, commenced by the completion of specific court forms.⁶³ The particular procedure adopted will depend upon the individual judge.⁶⁴ Such dual applications should ordinarily be heard at the same time as conjoined applications by the same judge in the county court, giving the Schedule 1 application lead status.⁶⁵ However, although any judge can hear a Schedule 1 application, the awkward combination of family and civil proceedings, together with unnecessary duplication of paperwork, remain.

UNCERTAINTY ON SEPARATION

- 4.52 In addition to the problems unfairness and complexity, cohabitants face considerable uncertainty under the current law. Of course, for many applicants the outcome is perfectly clear: they have no remedy or property right. Others might have an arguable claim under the law of implied trusts and estoppel, but for many such applicants, there may remain considerable uncertainty as to whether the claim will succeed and if so, what their remedy or share will be.
- 4.53 The uncertainty surrounding equitable remedies derives from several factors: the law's theoretical complexity and persistent ambiguity on key points; the evidential difficulties involved in establishing the facts necessary to support a claim to an interest; and the consequent unpredictability about whether there is an interest at all, and, if so, its size.
- 4.54 The apparent relaxation of the quantification of constructive trusts recently effected by the Court of Appeal, particularly (in relation to cohabitants) in *Oxley v Hiscock*,⁶⁶ has been subjected to widespread academic criticism for the uncertainty it has produced.⁶⁷ It has been said that:

... there remains a real danger that the endorsement of a generalised culture of 'fair' adjudications of entitlement will not only spawn litigation, but will also introduce an excessive element of uncertainty

⁶³ Disclosure of finances in Schedule 1 cases is made on Form 10A rather than Form E, the form used in ancillary relief cases on divorce. This is a simpler form, but it is not clear why the parties' finances should be considered in so much less detail in Schedule 1 cases. A copy of the forms can be found at <http://www.hmcourts-service.gov.uk/HMCSCourtFinder/FormFinder.do> (last visited 4 May 2006).

⁶⁴ Some, but not all, use the same procedure as that adopted in ancillary relief proceedings on divorce.

⁶⁵ *White v White* [2003] EWCA Civ 924, [2004] 2 FLR 321.

⁶⁶ *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211; and presaged by *Midland Bank Plc v Cooke* [1995] 4 All ER 562.

⁶⁷ Although it has been argued that *Oxley v Hiscock* has, in practice, resulted in a stricter quantification process: see para 3.33 above. For criticism, see, for example, G Battersby, "Oxley v Hiscock in the Court of Appeal: the search for principle continues" (2005) 17 *Child and Family Law Quarterly* 259; M Thompson, "Constructive trusts, estoppel and the family home" [2004] *Conveyancer and Property Lawyer* 496; S Gardner, "Quantum in *Gissing v Gissing* constructive trusts" (2004) 120 *Law Quarterly Review* 541; E Cooke, "Cohabitants, Common Intention and Contributions (again)" [2005] *Conveyancer and Property Lawyer* 555

or of arbitrary (and effectively unappealable⁶⁸) judgment into a field of law which is already unduly complex and unpredictable.⁶⁹

- 4.55 In the context of trust law, this broad quantification exercise poses a real problem for third parties who might find themselves bound by the resulting interest. Estoppel suffers from similar uncertainty as to the precise remedy, but at least in that context the court may select a monetary remedy that will have no implications for third parties. In both cases, however, the uncertainty for the parties remains.

REMEDIES ON DEATH, BUT NOT ON SEPARATION: ILLOGICAL AND UNFAIR?

- 4.56 In 1995, the then Government and Opposition supported the introduction of the special class of cohabitant claimant to the Inheritance (Provision for Family and Dependents) Act 1975 (“the 1975 Act”) as a “useful and uncontroversial measure of law reform”.⁷⁰ The result of this legislative change is that there is a statutory remedy for cohabitants whose relationships are terminated by death, but not for those who separate.

- 4.57 This state of affairs could be considered illogical. Whether the relationship is ended by death or separation, the practical problems which might be felt to justify a remedy are, to some extent, very similar. The current remedy on death presupposes and caters for need. Provision is based on the applicant’s maintenance requirements, and the court is directed to have regard to the length of the relationship and the applicant’s contributions to the parties’ relationship.⁷¹ The sort of hardship to which remedies under the 1975 Act can respond may also be experienced when a relationship ends during the parties’ joint lives, yet no remedy exists to deal with the financial hardship faced on separation. Moreover, the current law may appear to be relatively generous to some and ungenerous to others. Survivors of two-year, childless relationships are entitled to apply for a remedy on the death of their partner, designed to cater for their personal needs. But a cohabitant on separation of a thirty-year relationship during which he or she sacrificed a career in order to assume primary responsibility for the upbringing of four, now adult, children has no access to any remedy specifically designed to deal with the economic impact of the end of that relationship.

- 4.58 There is, of course, at least one key difference between separation and death cases. While the respondent on separation may be unwilling to grant any property to the applicant when their relationship breaks down, the deceased (if the death disrupted a thriving relationship) might often be expected to have wanted the survivor to have something.⁷² However, the law of succession has for some time been prepared to override wishes manifested in the deceased’s will in favour of particular classes of applicant, including cohabitants. The law of family

⁶⁸ See *Supperstone v Hurst* [2005] EWHC 1309 (Ch), [2006] 1 FCR 352, at [60].

⁶⁹ K Gray & S F Gray, *Elements of Land Law* (4th ed 2005) para 10.145.

⁷⁰ Hansard (HC), vol 265, col 199.

⁷¹ Inheritance (Provision for Family and Dependents) Act 1975, ss 1(2) and 3(2A).

⁷² And there is obviously no possibility here, as there is in separation cases, of the relationship resuming.

provision allows some of those deliberately left without inheritance by the deceased nevertheless to obtain something. Deference to the wishes of the party from whom the property would be transferred may therefore not be felt to provide a clear rationale for making remedies available on death but not on separation.

HUMAN RIGHTS LAW IMPLICATIONS?

- 4.59 We now consider the possible implications the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”): does it require us to reform English law, and does it impose any constraints on the shape of any reform undertaken? We shall first address arguments that might be made on behalf of a putative applicant. There are two basic issues to be addressed: direct infringement of any of the substantive rights and the question of possible discrimination in the exercise of those rights contrary to Article 14. We shall then consider the specific question of whether new remedies could violate respondents’ property rights.
- 4.60 The ECHR prescribes a basic level of human rights protection below which states must not fall. So even if the Convention does not require that a particular course of action be taken, individual states remain free to provide additional legal protection, provided they do not thereby contravene any other rights.

Article 8 – the right to respect for family life and home

- 4.61 “Family life” can exist, for the purposes of Article 8, between a cohabiting couple, at least where they have children, including step-children, and possibly even where they do not.⁷³ The court will consider for these purposes whether the couple live together, how long their relationship has lasted, whether they have children together, whether they are financially interdependent, and so on.⁷⁴ The European Court of Human Rights, and English courts, have yet to determine conclusively that same-sex couples, in particular those without children, have “family life” for the purposes of Article 8.⁷⁵

⁷³ *Johnston v Ireland* (1987) Series A No 112, (1987) 9 EHRR 203; *Saucedo Gomez v Spain* App No 37784/97, Commission decision of 26 January 1999 (unreported). In *Johnson*, the Court’s finding of family life related to all of the parties as a unit (parents and child). However, in *Saucedo Gomez*, the Commission found family life to exist between the couple of 18 years without reference to their step-children. Cf *Secretary of State for Work and Pensions v M* [2006] UKHL 11, [2006] 2 WLR 637, at [112], per Baroness Hale.

⁷⁴ See *X, Y and Z v UK* ECHR 1997-II (GC), (1997) 24 EHRR 143.

⁷⁵ See *Mata Estevez v Spain* ECHR 2001-VI: no “family life” between a same-sex couple of ten years’ standing with no children; the housing case, *Karner v Austria* ECHR 2003-IX, (2004) 38 EHRR 24, was decided on the basis of discrimination in the exercise of the right to respect for the home. The House of Lords was recently divided on the issue: *Secretary of State for Work and Pensions v M* [2006] UKHL 11, [2006] 2 WLR 637: contrast Lords Nicholls (at [24]-[30]) and Mance (at [126]-[153]), who hold that until the European Court holds that same-sex couples can have “family life” for the purposes of Article 8, it is not open to the domestic courts to do so. Lord Mance, however, goes on to state that, in light of recent developments throughout Europe, he has little doubt that were the European Court asked to consider the point today, it would find “family life” to exist between same-sex couples. Lord Walker assumes and Baroness Hale holds that a same-sex couple with children from their previous relationships have a “family life” for the purposes of Article 8, and do not address the issue considered by Lords Nicholls and Mance (at [87] and [112]); Lord Bingham implicitly makes the same assumption (at [5]).

4.62 However, even if the couple have a “family life” for these purposes, the state’s failure to recognise such a family by, for example, conferring a legal duty on either cohabitant to maintain the other or a right for the surviving cohabitant to inherit on intestacy, has been held not to breach Article 8.⁷⁶ Moreover, while the right to respect for the home under Article 8 does apply to those who have no legal right to occupy the property in question,⁷⁷ there is no right to be provided with a home;⁷⁸ nor does Article 1 to the First Protocol confer a right to acquire property.⁷⁹ It seems therefore that the UK is under no positive obligation to provide private law remedies for financial relief at the end of any type of relationship.⁸⁰

Article 14 – the right to be free from discrimination in the exercise of Convention rights

Different treatment of cohabitants and spouses

4.63 Although the State is under no obligation to provide any class of person with remedies for financial relief at the end of a relationship, if it chooses to provide such relief for some categories of person (as the UK has in relation to spouses and civil partners), it must not do so in a discriminatory manner. Article 14 of the ECHR prohibits discrimination on grounds of marital status⁸¹ in the exercise of other Convention rights. In some contexts, such as eligibility for welfare benefits and, for the most part, in their relationships with their children,⁸² cohabitants are treated like spouses in English law. In relation to remedies on separation and death, they are not. However, for reasons that we explain below, it seems unlikely that this would currently be regarded by the European Court of Human Rights as a violation of Article 14. There is therefore no need, as a matter of

⁷⁶ *Johnston v Ireland* (1987) Series A No 112, (1987) 9 EHRR 203. This conclusion was reached despite the fact that the parties were legally unable to marry, there being no right at the time to divorce under Irish law – that law in itself did not violate the parties’ Convention rights. Cf *Saucedo Gomez v Spain* App No 37784/97, Commission decision of 26 January 1999 (unreported), at [68], where the Commission apparently attached importance to the fact that Spanish law did enable the couple to marry. Complaints relating to the status of the children in *Johnston* were upheld.

⁷⁷ *Prokopovich v Russia* App No 58255/00, judgment of 18 November 2004 (unreported). The respondent’s property rights might often justify interference with that right; they will almost invariably justify removal of the non-owning partner under the current law in the absence of any claim or remedy under the general law or statute: *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 WLR 570.

⁷⁸ *Qazi v Harrow London Borough Council* [2003] UKHL 43, [2004] 1 AC 983.

⁷⁹ *Marckx v Belgium* (1979) Series A No 31, (1979-80) 2 EHRR 330, at [50].

⁸⁰ Cf *Whiteside v UK* (1994) 76A Decisions and Reports 80 (Commission Decision), on remedies for harassment.

⁸¹ *Rasmussen v Denmark* (1984) Series A No 87, (1984) 7 EHRR 371.

⁸² See, principally, the legal relationship between unmarried fathers and their children.

European human rights law, for domestic reform to subject cohabitants to the same legal regime on separation and death as spouses.⁸³

- 4.64 Since Article 14 operates only in relation to the enjoyment of other Convention rights, it is necessary first to identify whether the subject matter of the complaint falls within the ambit of some other right.⁸⁴ The grant of private law financial remedies on separation and death falls within the ambit of Article 8's protection of family life.⁸⁵
- 4.65 However, mere difference of treatment within such a field does not necessarily amount to discrimination. Discrimination entails treating analogous situations differently on a prohibited ground (here, marital status) without an objective and reasonable justification. The key questions are whether spouses and cohabitants are in analogous situations for the purpose of access to financial relief on separation and death, and, if so, whether the difference of treatment can be justified as pursuing a legitimate aim and as proportionate to that aim.⁸⁶
- 4.66 The European Court and Commission has addressed different treatment of spouses and cohabitants in various contexts, including tax law,⁸⁷ widow's benefits,⁸⁸ and remedies on separation.⁸⁹ It has consistently upheld states' different treatment of cohabitants in relation to remedies on the basis that it is legitimate to promote the traditional concept of the family based on marriage, a special status to which distinctive legal rights and obligations apply, at least where cohabitants are free to marry and so bring themselves within the more beneficial legal protection.⁹⁰ However, it is worth noting that the most recent case concerning financial relief in private law was not strong on the merits: even if the

⁸³ As for discrimination on grounds of sexual orientation, the European Court has yet to bring same-sex couples within the scope of "family life" (see n 75) to provide the basis for a claim under Article 14 in conjunction with Article 8's right to respect for family life. However, in light of recent developments in English law, notably the introduction of civil partnerships, creating a status analogous to marriage for same-sex couples, and the extension of many existing statutory provisions covering cohabitants to include same-sex couples who do not register a civil partnership, it would be proper to extend any reform in this jurisdiction equally to opposite-sex and same-sex couples.

⁸⁴ This does not entail finding that that other right has been breached, simply that the factual situation under consideration falls within the scope of that right: see R Clayton and H Tomlinson, *The Law of Human Rights* (2000) para 17.86 and following.

⁸⁵ *Marckx v Belgium* (1979) Series A No 31, (1979-80) 2 EHRR 330; *Saucedo Gomez v Spain* App No 37784/97, Commission decision of 26 January 1999 (unreported).

⁸⁶ The European Court's analysis of these cases varies: sometimes the analogy is denied altogether; in other cases, the analogy is (apparently) accepted but different treatment nevertheless justified.

⁸⁷ *Lindsay v UK* (1986) 49 Decisions and Reports 181 (Commission Decision); cf *PM v UK* App No 6638/03, judgment of 19 July 2005 (unreported): tax relief for child maintenance payments must be extended equally to both unmarried (separated) and divorced non-resident parents.

⁸⁸ *Shackell v UK* App No 45851/99, decision of 27 April 2000 (unreported); *Quintana Zapata v Spain* (1998) 92 Decisions and Reports 139 (Commission decision).

⁸⁹ *Saucedo Gomez v Spain* App No 37784/97, Commission decision of 26 January 1999 (unreported).

⁹⁰ This factor was emphasised in the recent Spanish cases; cf *Johnston v Ireland* (1987) Series A No 112, (1987) 9 EHRR 203.

applicant had had access to the same legal regime as spouses, little, if any, remedy would have been provided.⁹¹ How the European Court might react in future to a case with stronger merits remains to be seen. It is important to remember that the Convention is regarded by the Court as a “living instrument”, which adapts to changing social conditions.⁹²

- 4.67 In the context of English law, the European Court’s reasoning must now be adapted to accommodate the introduction of civil partnership, since marriage no longer uniquely enjoys remedies supplying financial relief on separation, inheritance under the intestacy rules and family provision on death. The UK may, therefore, no longer be able to justify different treatment of cohabitants and spouses on the basis of promoting marriage alone. However, given the legal similarities of civil partnership and marriage, it seems likely that a similar defence of the different treatment could be maintained, turning on the promotion of families founded on a formal legal commitment (whether by marriage or civil partnership). Opposite-sex and same-sex couples each have access to a legal institution to which the sought-after legal rights and remedies attach.⁹³ Indeed, for reasons which we explain in Part 6, there are good reasons why any new scheme for financial relief introduced for cohabitants should base relief on principles different from those that apply under matrimonial and civil partnership law.

A right to different treatment in the exercise of Convention rights

- 4.68 Another important aspect of discrimination law is the right to be treated differently from others with whom one is not in an analogous situation.⁹⁴ Some cohabitants might argue that they ought not to be subject to the same law as spouses and civil partners in this sphere, precisely because they have not made the same legal commitment.
- 4.69 The key issue then is the significance which should be attached, in the context of financial relief on separation and death, to the presence or absence of formal registration of the parties’ relationship and the commitment that registration entails. While the absence of such formalisation may not be felt to justify a

⁹¹ *Saucedo Gomez v Spain* App No 37784/97, Commission decision of 26 January 1999 (unreported), as the decision of the first instance Spanish court demonstrated.

⁹² Noted by the court in *Shackell v UK* App No 45851/99, decision of 27 April 2000 (unreported). This has been most striking in relation to the Court’s treatment of same-sex couples and trans-gendered persons. The European Court’s relatively brief analysis of the discrimination point should be compared with the rather fuller discussion in the Supreme Court of Canada, considering the equivalent issue under the Canadian Charter of Fundamental Rights and Freedoms: *Attorney General of Nova Scotia v Walsh* [2002] 4 SCR 325. For one view of possible future developments on this issue, see A Barlow and G James, “Regulating Marriage and Cohabitation in 21st Century Britain” (2004) 67 *Modern Law Review* 143, at 169-70.

⁹³ See discussion between the Joint Committee on Human Rights and the Government on discrimination arising from the exclusion of opposite-sex couples from civil partnership: Joint Committee on Human Rights, Fifteenth Report (2003-04) HL 136, HC 885 and Twentieth Report (2003-04) HL 182, HC 1187, Appendix 1. One English tribunal has expressed reluctance to strike out against clear European authority that cohabitants and spouses are not in analogous situations, in the context of tax law: *Holland v Inland Revenue Commissioner* [2003] STC (SCD) 43.

⁹⁴ *Thlimmenos v Greece* ECHR 2000-IV (GC), (2001) 31 EHRR 15.

complete denial of remedies,⁹⁵ it may mean that if any new scheme of remedies for cohabitants were introduced, it should differ in some respects from that applying to spouses and civil partners. In particular, the lack of legal commitment might be felt to affect the extent to which any remedies impinge on respondents' property rights.⁹⁶ It might also have implications for the provision of a right to opt out of any new scheme.⁹⁷

Indirect discrimination against the children of cohabitants?

4.70 We have already referred to the possibility of an argument being made that the operation of the law currently discriminates against the children of cohabitants.⁹⁸ Save in relation to the power to order sale,⁹⁹ the courts' powers to provide financial relief for children are theoretically the same regardless of whether the child's parents were married. However, it appears that the absence of remedies between the parents in cohabitants' cases, with the flexibility that provides to the court, may undermine the courts' ability to provide equivalent financial relief for the children of cohabitants. The idea that the absence of a particular remedy or right for the parent could be regarded as constituting discrimination against the child is an argument to which the European Court has given only the briefest attention, and then in the context of welfare benefits rather than private law remedies.¹⁰⁰ Nevertheless, it is a point that we consider may merit some attention, and it must be treated as being open to argument in a future case addressing private law remedies.

4.71 However, as is the case between the adult parties, the necessary and proper response to this difficulty faced by the children (and by the adults) may not be to subject cohabiting parents (or cohabitants generally) to the same law as married parents. The interests of children of cohabitants may be as well served by the introduction of some other scheme of remedies between the adult parties. The problems identified earlier in this Part cannot be solved only by extending matrimonial remedies to cohabiting parents on separation.

⁹⁵ Even though they may not be required as a matter of ECHR law.

⁹⁶ This depends on the substantive principles on which relief would be granted: see Part 6.

⁹⁷ See Part 10.

⁹⁸ See para 4.42.

⁹⁹ Which is not contained in the Children Act 1989, sch 1.

¹⁰⁰ To our knowledge, the European Court has only once considered whether the legal treatment of the *parent* on grounds of her marital status could be said to constitute discrimination against the *child* where the result is that the income of the household in which the child lives is less than that of a marital child (in the context of widow's benefits): *Shackell v UK* App No 45851/99, decision of 27 April 2000 (unreported): "...whilst it is true that the applicant does not receive Widowed Mother's Allowance, the reason for her not being eligible is that she and her late partner were not married. It is not related to the status of the children, and it follows that the applicant's ineligibility for Widowed Mother's Allowance [does not violate the rights of the children under Article 8 taken in conjunction with Article 14]".

Article 1 to the First Protocol and Article 8 – respondents’ property rights

- 4.72 Any reform must also consider the rights of potential respondents, in particular as regards the impact of relief on their property.¹⁰¹ It has been held that the regulation of rights between individuals under private law will not amount to a “deprivation” of property for the purposes of Article 1 of Protocol 1, unless the law permits the respondent’s property to be taken for a purpose which serves the public interest (rather than the interests of the individual benefited).¹⁰²
- 4.73 An issue may arise regarding “peaceful enjoyment” of the respondent’s property.¹⁰³ But here too, the European Commission has recognised that the state will often require the owner of property to give up assets pursuant to some obligation under private law. Such rules are regarded as “indispensable for the functioning of society under a liberal regime” and cannot in principle be held to breach the Convention, provided that “when making rules as to the effects on property of legal relations between individuals, the legislature does not create an imbalance between them which would result in one person arbitrarily and unjustly being deprived of his goods for the benefit of another”.¹⁰⁴
- 4.74 Provided that any new regime for financial relief were founded on clear principles which offered a sound justification for any order to be made, we consider that no violation of respondents’ property rights would arise. Any argument relating to the respondent’s property rights framed in terms of Article 8 could readily be justified under Article 8(2), as a proportionate interference designed to protect the rights and freedoms of the party benefiting from the relief ordered. Special care would, however, have to be taken in relation to any retrospective operation of a new scheme. We discuss this issue in Part 11.¹⁰⁵

CONCLUSION

- 4.75 We have outlined in this Part the chief criticisms that have been laid at the door of the current law - its unfairness, its uncertainty, its illogicality and, at least for cohabitants with children, its procedural complexity – and surveyed the possible implications of human rights law in this field.
- 4.76 It remains to be seen, however, whether the problems highlighted in this Part, together with the public’s belief in the common law marriage myth and the increase in cohabitation described in Part 2, justify reform of any sort, and if so, in what form and in relation to which cohabitants in particular. We consider those questions in the next Part.

¹⁰¹ Similar arguments could be based on Article 8: see *Logan v UK* App No 24875/94, Commission decision of 6 September 1996, (1996) 22 EHRR CD 178, in the context of child support payments.

¹⁰² *Bramelid v Sweden* App No 8588/79, Commission decision of 12 October 1982, (1983) 5 EHRR 249, 255-256.

¹⁰³ In *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816, Lords Nicholls and Hope (at [42] and [106] respectively) both considered that Article 1 to the First Protocol was engaged by orders for ancillary relief made on divorce.

¹⁰⁴ *Bramelid v Sweden* App No 8588/79, Commission decision of 12 October 1982, (1983) 5 EHRR 249, 256; applied in *Burrows v UK* App No 27558/95, Commission decision of 27 November 1996 (unreported) in relation to the operation of child support.

¹⁰⁵ See *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816.

PART 5

EVALUATING THE CASE FOR REFORM

INTRODUCTION

- 5.1 As we have seen in Part 3, the law does not ignore the position of cohabitants on separation. It could be said that the courts have been attempting to help make up for the absence of a statutory regime dealing more directly with the problems that cohabitants encounter on separation by adapting the general law (to some extent) to fit the demands of the family context.¹ However, as we saw in Part 4, the current law remains subject to considerable criticism.
- 5.2 We now consider whether or not those criticisms can be regarded as justifying any reform, and, if reform providing new remedies on separation is thought to be justified, what the basic shape of such reform should be.
- 5.3 As we have seen, much of the criticism of the current law is predicated on a charge of unfairness and unfitness for purpose.² However, this begs two essential questions:
- (1) whether or not it is “unfair” that the law should provide no remedy for an individual who has voluntarily acted to the economic benefit of another or made an economic sacrifice, where there was neither:
 - (a) a clear intention, agreement, assurance or other “trigger” recognised by the general law as capable of justifying conferment of a property right or remedy; nor
 - (b) formalisation of the relationship in marriage or civil partnership, a step which would give access to the family courts’ jurisdiction to provide financial relief on dissolution of the relationship; and
 - (2) if it is accepted that it is unfair, whether or not the law ought to provide a remedy between cohabitants specifically designed (as the general law is not) to provide a remedy responding to that unfairness.
- 5.4 Despite the criticisms that can be made of the current law, there are many arguments that are made against reform: for example, that it would undermine the institution of marriage; that it would invade the autonomy of those who have deliberately chosen to cohabit rather than marry; that cohabitation outside marriage or civil partnership does not provide sufficient justification for the invasion of an individual’s property rights by providing financial relief on separation; and that a new scheme might be productive of costly, acrimonious and sometimes speculative litigation.

¹ E Cooke, “Cohabitants, Common Intention and Contributions (again)” [2005] *Conveyancer and Property Lawyer* 555, at 561; see also J Dewar, “Land, Law, and the Family Home”, in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (1998).

² See in particular para 4.29.

- 5.5 Consideration of these issues inevitably takes us into the realm of strongly contested social policy questions, the resolution of which must ultimately be a matter for Government and Parliament. While it is not for us to decide these issues, it is appropriate for us to attempt to identify them, and to indicate a view where we have one. We hope that the following discussion will help inform and stimulate a wide-ranging and constructive debate.
- 5.6 In considering whether reform in this area can be justified at all, and, if it can be justified, on what basis and in what cases, we examine the following issues:
- (1) whether it is an adequate answer to the criticisms of the law simply to encourage couples to formalise their relationship through marriage or civil partnership, or to regulate their property and financial affairs through the law of express trust and contract;
 - (2) if that is not an adequate answer, whether any reform should take the form of an opt-in scheme, or a default scheme, which would apply automatically to all relationships falling within its scope, save in so far as the couple had agreed to opt out of it; and
 - (3) if, as we would prefer, any reform were to take the form of a default or opt-out scheme, to which relationships it should (in broad terms) apply. In particular, whether a distinction can and should be drawn between cohabitants with children and those without. We anticipate that there may be a consensus here in relation to some cases, but not others.
- 5.7 It may be helpful if we make clear at the outset that, were the law to be reformed, we do not consider that all cohabitants falling within our terms of reference should have access to financial relief at the end of their relationships. The availability of remedies under any new scheme would be controlled or filtered in two ways:
- (1) limiting eligibility to apply, discussed in general terms here and in more detail in Part 9; and
 - (2) basing the decision as to whether or not relief should be granted on substantive principles, addressed in detail in Part 6.
- 5.8 Access to a remedy would be dependent upon both tests being satisfied. Neither would be sufficient alone, as only parties who were eligible to apply and who satisfied the substantive principles governing the provision of relief would obtain anything. Moreover, for reasons that we explain in Part 6, we do not consider that reform should involve extending the law currently applicable between spouses on divorce to cohabitants.
- 5.9 At various points in this Part, we draw on the growing body of research being conducted in this jurisdiction into the ways in which cohabitants and spouses view and live their relationships, and the outcomes that couples achieve when they separate. Some of these are large-scale, quantitative surveys, which contain data about the lives and attitudes of a large number of people. Inevitably, such surveys are unable to explain why people behave or think as they do. This is the function of smaller-scale qualitative studies, which seek through intensive interviewing of a smaller number of respondents to gain insight into people's family lives and the practical impact of the law on them. More research is

ongoing.³ Taking due account of the inherent limitations in the evidence offered by such research, it nevertheless casts valuable light on the way in which current law and future reform might impact on individuals and their families.

ENCOURAGING COUPLES TO MARRY OR TO SELF-REGULATE

- 5.10 As we noted in the introduction to Part 3, a substantial proportion of the public appear to be labouring under a crucial misunderstanding about the current law's treatment of cohabitants: the "common law marriage myth". Moreover, as far as responses to researchers' inquiries indicate, the legal implications of marriage are a long way down the list of most couples' considerations when deciding whether to marry.⁴
- 5.11 The legal and economic vulnerability to which many cohabitants and their children are exposed on separation is in part the result of this common law marriage myth. Belief in the myth renders many oblivious of the need to protect themselves and their partners by taking proactive steps, such as drafting wills, executing declarations of trust regarding the family home, entering into cohabitation contracts or, indeed, marrying. If individuals do not take such steps while their relationship is secure (and their partners are willing to confer such protection on them), when they separate and belatedly discover the true legal position they are in danger either of finding themselves cut adrift without any remedies at all, or of having to grapple with the law described in Part 3.⁵
- 5.12 However, the fact that a substantial proportion of the public would seem to be badly mistaken about the legal rights and duties attaching to cohabitation and marriage does not of itself justify changing the law to bring it in line with that mistake.
- 5.13 It will seem to many that the most obvious response to cohabitants' problems is to say that the Government, faith groups and other organisations concerned with relationship support should ensure that the public is better educated about the

³ There are several research projects currently underway which are due to report during the course of our work on this topic: see R Tennant, J Taylor and J Lewis, research for the Department for Constitutional Affairs into outcomes for cohabitants on separation; G Douglas, J Pearce and H Woodward, similar research; A Barlow and C Burgoyne, research for the Department for Constitutional Affairs assessing the impact of the Living Together Campaign, and research undertaken as part of the British Social Attitudes Survey 2006 investigating attitudes towards marriage and cohabitation, law and reform options.

⁴ 86% of the engaged couples in one study claimed that legal considerations had not influenced their decision to marry: M Hibbs, C Barton and J Beswick, "Why marry? – Perceptions of the Affianced" (2001) 31 *Family Law* 197. See also J Haskey, "Cohabitation and marital histories of adults in Great Britain" (1999) 96 *Population Trends* 13, at 22, reporting findings from an ONS survey.

⁵ The British Social Attitudes Survey found that fewer than one in ten of the 57% of cohabitants who were owner-occupiers had a written agreement about their shares in the property and only 10% of current and former cohabitants had made or changed a will in consequence of their relationship. Overall, 90% of current and former cohabitants surveyed in 2000 had taken no legal action as a result of their cohabitation: A Barlow, S Duncan, G James and A Park, "Just a Piece of Paper? Marriage and Cohabitation", in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds), *British Social Attitudes: Public policy, social ties. The 18th Report* (2001) p 45. In some cases, the relationship may not have developed to a point at which either party felt such a step would be appropriate, but it seems likely that some were in a position where such action would have been sensible.

legal implications of marriage and civil partnership, as compared with cohabitation. Couples who wish to have access to a regime providing financial relief on separation should, following this argument, be given the clear message that the only means of securing that is to marry or form a civil partnership. Those who do not wish to do that, but who wish to ensure legal protection in the event of separation, should be made to realise that they will have to create their own legal regime via private contract, trusts, wills, and so on. It goes without saying that there may be many other, very good reasons – quite unconnected with access to legal remedies – for wishing to encourage more couples to make the particular commitments entailed in marriage and civil partnership.

- 5.14 The introduction of civil partnership and the Living Together Campaign⁶ are helpfully drawing attention to the legal consequences exclusively offered by marriage and civil partnership, and not available to cohabitants, whether opposite-sex or same-sex. This may enable more people to appreciate the importance of formalising (or not formalising) their relationships in this way, and to disentangle the legal aspects of marriage from other (religious, cultural and so on) facets of the institution which some couples consider less desirable or necessary for their relationship. The Living Together Campaign website has received a considerable number of visitors,⁷ and research is currently being undertaken to see what impact the campaign has had on people's behaviour under the current law.⁸
- 5.15 This initiative could usefully be accompanied by definitive clarification of the law relating to cohabitation contracts. As we have discussed, it seems highly improbable that a modern court would now decline to enforce such a contract (at least in so far as it related to the financial or property relationship between the parties and was otherwise binding under the law of contract).⁹ However, in the absence of binding contemporary authority definitively deciding the point, it would seem desirable for legislation to make clear, for the avoidance of any possible doubt, that such contracts are valid.¹⁰ That would provide those who did not wish to marry with a sound footing on which to regulate their own relationships in private law, using both the law of trusts and of contract.

Would such an initiative alleviate the problems in practice?

- 5.16 However, we are not convinced that, even with the benefit of information campaigns and the clarification of relevant contract law, this answer to the problems of cohabitants would pick up all or even most of the cases in which financial relief on separation might be considered appropriate and necessary. It

⁶ See <http://www.advicenow.org.uk/go/livingtogether/index.html> and <http://www.oneplusone.org.uk/marriedornot/> (last visited 4 May 2006).

⁷ Over 800,000 documents were downloaded from the Advicenow website between August 2004 and February 2006. Of those, over 118,000 visitors downloaded the "living together agreement" materials; over 547,000 downloaded the breaking-up checklist.

⁸ By Professor Anne Barlow and Dr Carol Burgoyne, University of Exeter.

⁹ See para 3.18.

¹⁰ See the Cohabitation (Contract Enforcement) Bill introduced by Mrs T Gorman MP in 1991 under the ten-minute rule.

takes two to marry, to form a civil partnership, or to agree on the terms of a contract.

- 5.17 For many couples, there is no problem. Some couples deliberately choose to cohabit rather than marry (or live singly) precisely because they each wish to retain their legal independence. Couples' freedom to choose the extent to which the law should be involved in their relationship deserves the law's respect, and we shall discuss the implications of these cases for the shape of any reform further below at paragraph 5.51.
- 5.18 However, in some other cases, it is less meaningful to talk in terms of a positive choice not to marry.
- 5.19 For example, one party may wish to marry but the other not be prepared to take that step, perhaps because he or she is unwilling to take on the legal commitment involved. The basic incentive structure created by the current law is such that marriage entails potential liability for the economically stronger party¹¹ towards the other in the event that the relationship fails. Cohabitation does not. If the couple become parents, a legal liability to maintain those children will arise whatever the nature of the relationship between the adults. But in terms of potential financial relief between the adults, cohabitation may seem preferable to marriage for the economically stronger partner. Viewed in those rather simplistic terms (and assuming that the law is understood by the parties and that these sort of legal and economic factors influence their decisions¹²), marriage may seem to come at a potentially high cost to the party likely to be in the economically stronger position on separation.¹³ The current law may therefore be said to create a disincentive for one partner to marry.¹⁴

¹¹ At the outset of the relationship, it may not be clear who the potentially stronger party would be. However, relative economic imbalance is most likely to arise where the parties become parents and one of them incurs greater loss of earning capacity or loss of earnings as a result. While the identity of this party may not be certain at the inception of a relationship, female partners in opposite-sex relationships are more likely to assume primary responsibility for child-care. Some research indicates that having a child is viewed as particularly creating an economic risk for the woman: M Maclean and J Eekelaar, "Taking the plunge: perceptions of risk-taking associated with formal and informal partner relationships" (2005) 17 *Child and Family Law Quarterly* 247, at 257; J Lewis, "Perceptions of Risk in Intimate Relationships: the implications for social provision" (2005) 35 *Journal of Social Policy* 39. See also J Ermisch, *Personal Relationships and Marriage Expectations* (2000) Working Papers of the Institute of Social and Economic Research: Paper 2000-27, University of Essex, on the advantages and disadvantages perceived by cohabitants from cohabitation rather than marriage.

¹² See paragraph 5.25 below.

¹³ One Canadian Supreme Court judge has said "many...cohabitants cohabit not out of choice but out of necessity. For many, choice is denied them by virtue of the wishes of the other partner. To deny them a remedy because the other party chose to avoid certain consequences creates a situation of exploitation. It certainly does not enhance the dignity of those who could not "choose" to cohabit": *Attorney General of Nova Scotia v Walsh* [2002] 4 SCR 325, at [171], per Heureux-Dubé J.

¹⁴ B Hale, "Unmarried Couples and Family Law" (2004) 34 *Family Law* 419, at 422; A Barlow, S Duncan, G James, and A Park, *Cohabitation, Marriage and the Law* (2005) p 109. Compare R Deech, "The Case Against Legal Recognition of Cohabitation" (1980) 29 *International and Comparative Law Quarterly* 480, at 497.

- 5.20 Of course, this incentive structure could have the opposite effect on couples' decisions. The economically weaker party might insist on having the security that marriage provides and refuse to cohabit instead. The stronger party might then give way, on the basis that the potential advantages of marriage appeared to outweigh the risks of divorce occurring at all and the costs of providing financial relief if it did (against the alternative of no cohabitation, or even no relationship, at all). However, if the weaker partner is persuaded to settle for cohabitation (perhaps hoping that marriage will one day follow¹⁵), the other party can enjoy benefits of cohabiting without the risk of any financial liability to the other party should the relationship end.
- 5.21 In other cases, the party wishing to marry may not even raise the question. Some may expect or trust their partner to do "the decent thing" in the event of breakdown, and may have received (legally unenforceable) assurances to that effect.¹⁶ Others may prefer not to "rock the boat" by provoking possible disagreement with the other party and thus upsetting the relationship, particularly if it is fragile. For many, the idea of seeking and acting on legal advice during a relationship is rather alien, even inappropriate.¹⁷
- 5.22 In some cases, one party may be unable to marry his or her cohabiting partner, even if wishing to do so, because he or she is still technically married to someone else. Divorce is now available unilaterally and without proof of fault after five years' separation, but some people may not instigate divorce despite being permanently separated, for example owing to the religious conviction of their spouse.¹⁸
- 5.23 Other couples may agree in principle that marriage or a cohabitation contract would be a good idea, but sheer inertia, or the need to act on perceived higher priorities,¹⁹ may mean that they simply never get around to it. As one commentator has noted in relation to the use of cohabitation contracts:

The number who actually enter into a contract is likely to be considerably smaller than those who are willing to contemplate one in theory: first, both parties must agree in theory that a contract is a good idea, secondly, they must agree on what the terms of the contract are to be, and thirdly, they must actually get round to

¹⁵ Though some mothers with low incomes may cohabit in preference to lone parenthood or "shot-gun" marriage to a partner whose reliability and economic strength is doubtful: C Smart and P Stevens, *Cohabitation Breakdown* (2000).

¹⁶ See the limits of what estoppel will respond to: para 3.35. See also the facts of *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211, at [9]: Mrs Oxley had been given very clear advice about the importance of making an express declaration of trust, but said "I am quite satisfied with the present arrangements, and feel I know Mr Hiscock well enough not to need written legal protection in this matter".

¹⁷ See views of respondents interviewed by A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) p 43.

¹⁸ See for example *Watson v Lucas* [1980] 1 WLR 1493. We consider how any new scheme ought to deal with such "concurrent" relationships at paras 9.138 to 9.161.

¹⁹ Particularly if the couple thinks that marriage is only worthwhile if it can be done "properly", that is to say, with an expensive wedding: see n 62 below.

entering into such a contract. The failure of couples thus to regulate their lives is well documented.²⁰

- 5.24 People are not uniformly blind to the risks that may be involved in family life. Some people may be motivated to secure legal protection through marriage or contractual arrangement, however “unromantic” it may seem to be to marry or contract in order to ensure a degree of financial security in the event of separation.
- 5.25 But it is not realistic to expect that contract alone would in practice provide protection where it is needed. Cohabitants are currently slow to take proactive steps to protect themselves and their partners by way of wills, contracts and so on,²¹ and contracts dealing with the couple’s finances and property may be regarded as rather “cold” and unromantic.²²
- 5.26 Moreover, recent research in this jurisdiction suggests that many people’s behaviour in relationships is determined significantly by factors other than legal and financial considerations.²³ Individuals are often motivated by personal, emotional, cultural or psychological factors, and their perception of what it is morally right to do in their particular situation. Demographic status is also significant.²⁴ Even if they are fully aware of the legal implications of their actions, many individuals do not adapt their behaviour in ways that would protect themselves (or their partner). Their decisions are for this reason no less “rational” than those of individuals who do consciously make decisions about their personal relationships on the basis of the law, just differently so.²⁵
- 5.27 This sort of behaviour may be particularly prevalent in relation to the potential consequences of separation. Cohabitants may be aware of high divorce and separation rates and the likely impact on them of separation unless they take particular protective action in advance (whether by marrying or by drafting an agreement). But people may not act on that information by taking appropriate

²⁰ R Probert, “*Sutton v Mischo de Reya and Gawor & Co – Cohabitation contracts and Swedish sex slaves*” (2004) 16 *Child and Family Law Quarterly* 453, at 462.

²¹ See n 5 above.

²² See, for example, the findings of J Lewis, J Datta and S Sarre, *Individualism and commitment in marriage and cohabitation* (1999) Lord Chancellor’s Department Research Series No 8/99, pp 78-81.

²³ See for example, J Eekelaar and M Maclean, “Marriage and the Moral Bases of Personal Relationship” (2004) 31 *Journal of Law and Society* 510; A Carling, S Duncan and R Edwards (eds), *Analysing Families: morality and rationality in policy and practice* (2002); C Smart and P Stevens, *Cohabitation Breakdown* (2000) p 50; J Lewis, “Marriage, Cohabitation and the Law: Individualism and Obligation” and J Lewis, J Datta and S Sarre, “Individualism and Commitment in Marriage and Cohabitation” (1999) Lord Chancellor’s Department Research Series Nos 1/99 and 8/99; K Kiernan, H Land and J Lewis, *Lone Motherhood in Twentieth Century Britain* (1998) p 11; F McAllister, “Effects of Changing Material Circumstances on the Incidence of Marital Breakdown” in J Simons (ed), *High Divorce Rates: the State of the Evidence on Reasons and Remedies* (1999) Lord Chancellor’s Department Research Series No 2/99 (vol 1).

²⁴ See sources referred to in n 68 of Part 2 on the influence of socio-economic status on marriage, cohabitation, parenthood, separation and divorce.

²⁵ A Barlow and S Duncan, “New Labour’s communitarianism, supporting families and the ‘rationality mistake’: Part II” (2000) 22 *Journal of Social Welfare and Family Law* 129.

steps to acquire legal protection because they do not think that their relationship will end.²⁶ Indeed, many may consider that to take decisions about a relationship based on the hypothesis that it might end might be felt somewhat inconsistent with ongoing commitment to that relationship. Pre-nuptial agreements and cohabitation contracts are unpopular in part for this reason.²⁷ Approaching marriage itself as a way of protecting one's financial interests in the event of that marriage failing might be viewed as similarly antithetical to what marriage ought (in a non-legal sense) to entail.

- 5.28 Many couples, for all sorts of reasons, may therefore fail to sign-up for legal protection, even if it is in their best long-term interests to do so. If actively "opting in" (to marriage, civil partnership, or contractual arrangements) is the only way to acquire legal protection, failure to take that step will leave, and does leave, individuals potentially exposed to what many regard as unfair financial outcomes in the event of relationship breakdown. Whether failure to opt in arises because of the reluctance of one party to take that step, or because of the reticence of the one who would like to marry or have a contract, but does not want to risk jeopardising the relationship by raising the issue, or simply because of mutual trust, it might be considered too harsh to deny all legal protection to the economically weaker party in the event of separation. Even if the failure to take that step were due to inertia, or a lack of proper appreciation of the legal significance of not taking that step, the harshness of the result in some cases could be regarded as a wholly disproportionate sanction for that inactivity.
- 5.29 These arguments may go some way to support the case for providing some measure of financial relief on separation or death between couples who do not marry or form a civil partnership. However, it is important to emphasise that they do not by any means require that such cohabitants should be subjected to the same legal regime as those who have done so. It may still be quite proper to conclude that particular legal consequences and remedies ought to be reserved for those who have made that specific legal commitment.

Promoting stable relationships; dealing with relationship breakdown

- 5.30 Many argue that couples should be encouraged to marry in order to achieve more stable relationships. We applaud those initiatives designed to support stable family relationships and to encourage an understanding of marriage as a serious, lifelong commitment, and not just a wedding. Ultimately, the best outcome for all parties concerned, adult and children, is for families to stay together and happy.

²⁶ J Lewis, "Perceptions of Risk in Intimate Relationships: the implications for social provision" (2005) 35 *Journal of Social Policy* 39, at 46, though the respondents in this survey, whether married or cohabiting, had sought to protect themselves by retaining as much financial independence within their relationships as possible.

²⁷ Of course, another reason for the unpopularity of pre-nuptial agreements currently may be that they are not legally enforceable, but it seems that many would remain unenthusiastic about such agreements even if they were binding, as being rather an "unromantic" way to embark on married life: see J Lewis, J Datta and S Sarre, *Individualism and commitment in marriage and cohabitation* (1999) Lord Chancellor's Department Research Series No 8/99, pp 78-81.

- 5.31 However, it will, sadly, always be the case that some relationships – whether marital or cohabiting – will fail, and financial hardship may consequently arise. It is that lack of stability in relationships, leading to separation, and the financial hardship that may be experienced as a result, which is precisely the problem that financial relief would be designed to deal with.
- 5.32 The financial relief available between spouses and civil partners when their relationships end may be felt to be justified in part, at least, by the legal commitment that the parties made to each other at the outset of their now-failed relationship. But the financial relief provided in those cases is, in large part, designed to alleviate the financial hardship that some divorcing spouses and their children would otherwise encounter were their property to be divided on divorce in accordance with their rights under the general law. It is not an “award” for having been married (no spouse has a right to a fixed share of any property on divorce), and the law has long since ceased to use financial relief on divorce as a way of penalising the party found to be to blame for the marriage’s demise (other than in very exceptional cases).²⁸
- 5.33 The legal status of a couple’s relationship does not affect the nature and extent of the practical economic difficulties that might be encountered by one or both parties on separation. Whether married or not, the practical problems are largely the same and so the need for remedies (of some sort) is the same. As we shall discuss in Part 6, the particular remedies available between spouses and cohabitants might justifiably be different. But the fact that the parties did not formalise their relationship in marriage or civil partnership at the outset may not provide a sufficiently strong reason to deny the casualties of a failed cohabiting relationship access to any measure of financial relief.²⁹
- 5.34 Finally, it is worth considering how promotion of marriage can best be achieved. We agree that marriage is an important social institution. But it can be argued that the objective of promoting marriage does not require us to deny any remedy to individuals experiencing financial hardship at the end of a cohabiting relationship. The institution of marriage, and individual marriages, can be supported without perpetuating the hardship experienced by such individuals.³⁰

Would reforming the law applying to cohabitants discourage marriage?

- 5.35 If cohabitants’ problems cannot effectively be solved by encouraging them to marry, we need also to consider the concerns of those who might argue that providing financial relief for cohabitants would undermine the institution of marriage, on the basis that the provision of that benefit outside marriage (and civil

²⁸ Since the introduction of no-fault divorce by the Divorce Reform Act 1969 and ancillary relief by the Matrimonial Proceedings and Property Act 1970. (See now the Matrimonial Causes Act 1973.) Though see *Miller v Miller* [2005] EWCA Civ 984, [2006] 1 FLR 151, heard on appeal in the House of Lords in February 2006, concerning the relevance of conduct to ancillary relief.

²⁹ See the “functional” case for reform made, for example, by A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) pp 102-106.

³⁰ See the view of the former President of the Family Division, Dame Elizabeth Butler-Sloss, “Family Law Reform – opportunities taken, wasted and yet to be seized”, Bar Council Lecture (December 2005).

partnership) might discourage couples from making that specific legal commitment when they would otherwise have done so.³¹

- 5.36 Debates about family policy often focus on how the provision or withholding of certain legal rights or duties and financial benefits or penalties might affect people's decisions about their relationships. Yet endeavouring to predict the impact of law and legal change on behaviour in intimate family relationships is an exercise fraught with difficulty. As we noted above, people do not always behave as we might expect or wish them to, given the incentive structure created by the legal framework within which we imagine that they make their decisions.³²
- 5.37 In considering this question here it is important to bear in mind the relatively limited scope of the present project and the nature of the legal remedies under consideration. We are not dealing with tax and social security law,³³ or other means by which the State might provide benefits to couples,³⁴ but with private law remedies between the parties to the relationship, designed to achieve a measure of corrective justice between the individuals concerned. The introduction of a package of benefits of that sort might be expected to have a rather different impact on behaviour from the provision of such remedies between couples.
- 5.38 The introduction of remedies between cohabitants would not straightforwardly encourage or discourage marriage or cohabitation, in the way that, for example, providing a particular tax relief to spouses might be hoped to encourage marriage. The tax exemption might benefit both members of the couple equally,³⁵ giving them an equal incentive to marry.³⁶ By contrast, the introduction of remedies exercisable by one cohabitant against the other in the event of separation would not, on the face of it, create an equal benefit to both parties. One party's ability to seek a remedy from the other in the event of separation necessarily connotes a responsibility for the other party, against whom that order would be made.
- 5.39 We have already considered how the current law's provision of financial relief at the end of marriage, but not at the end of cohabitation, might affect couples'

³¹ See generally, for example, P Morgan, *Marriage-Lite: the Rise of Cohabitation and its Consequences* (2000). We do not propose to deal with the more general question about whether marriage has been undermined by the withdrawal of various benefits exclusive to marriage, such as the married person's tax allowance. We are concerned only with the provision of financial relief between cohabitants on separation and death. For a general response to the wider issue, see, for example, J Lewis, *The End of Marriage?* (2001) and M Maclean and J Eekelaar, *The Parental Obligation* (1997) p 143.

³² See sources cited at n 23.

³³ In the case of means-tested benefits, of course, legal recognition of cohabitation (by way of the aggregation rule) works to the disadvantage of the couple, but in a way that gives them no incentive to cohabit in preference to marrying.

³⁴ We are not addressing issues such as the reservation of the inheritance tax exemption to spouses and civil partners.

³⁵ Assuming that the parties would in fact share the economic benefit provided.

³⁶ Of course, the legal and economic framework within which a decision whether to marry might be made will always be far more complex than the existence of one tax relief. Moreover, the decision to marry will usually be determined by factors unrelated to law or pecuniary advantage: see para 5.40.

negotiations about marriage. The introduction of financial relief between separating cohabitants would clearly alter this incentive structure. But it remains difficult to predict how this might affect decision-making about and within relationships, even assuming accurate knowledge and understanding of the law. The availability of some protection for cohabitation might incline the economically weaker party to accept cohabitation rather than insist on marriage. However, depending on the relative generosity of the remedies provided on the separation of cohabitants and on divorce, marriage is likely to remain the potentially more costly option for the economically stronger party and the preferable option for the other party. Cohabitation would, though, no longer necessarily be “free” for the economically stronger party, as it would entail a potential new legal responsibility where none had previously existed, which might reduce that party’s current incentive to refuse to marry.

- 5.40 Finally, however, we must return to the important point made at paragraph 5.26. A change in the law regarding the financial consequences of separation would be unlikely to play any greater role in individuals’ decision-making about their personal relationships than the current law does.³⁷ It seems to us that marriage will always remain highly popular, if not for its legal consequences, then for the strong social, cultural and religious significance of that institution.³⁸ Giving some level of legal protection to individuals whose cohabiting relationships end by separation or death would not detract from this non-legal significance of marriage, nor would it undermine the quality and stability of individual marriages.³⁹ Moreover, in so far as marriage (and civil partnership) and cohabitation remained legally distinctive, the law would continue to cater for diversity within couple relationships.

IS THERE ANY JUSTIFICATION FOR A NEW SCHEME FOR “COHABITANTS”?

- 5.41 If the promotion of marriage and civil partnership, and self-regulation, are not an adequate answer to the problem of cohabitation, we need instead to explore

³⁷ Considerable care must always be taken in drawing conclusions from data relating to other countries and the particular legal schemes in operation there. However, research from Australia suggests that the introduction of legal remedies for cohabitants on separation would not induce more couples to cohabit in preference to marrying. Such laws have been in force in the most populous state, New South Wales, since 1985. A study seeking to track the impact on marriage rates of laws providing financial relief available between cohabitants on separation and death found no evidence of a causal connection between the introduction of that law and declining marriage rates: R Merlo and K Kiernan, “Does legislation recognising *de facto* relationships impact on marriage rates? Evidence from Australia” (2004) unpublished paper. The impact in the three states which were last to legislate (Queensland, Tasmania and Western Australia) was not assessed since those laws had been in force only a short time; those states’ legislation most closely mirrors the substance of the federal laws governing property division and (save in Queensland) maintenance on divorce. Note also the observation that levels of cohabitation in 2000 were very similar in Scotland and England and Wales, despite the fact that Scottish law at that time gave considerably less legal recognition to cohabitation than English law: A Barlow and G James, “Regulating Marriage and Cohabitation in 21st Century Britain” (2004) 67 *Modern Law Review* 143, at 168.

³⁸ See J Ermisch, *Personal Relationships and Marriage Expectations* (2000) Working Papers of the Institute of Social and Economic Research: Paper 2000-27, University of Essex, on the continuing aspiration of most individuals in cohabiting relationship to marry.

³⁹ See n 30.

possible justifications for the introduction of a legal regime for cohabitants. This takes us into new territory. As we noted in the introduction to this Part, we are dealing here with individuals who have not satisfied any of the justifying triggers for legal intervention currently recognised either by the general law (of trusts, estoppel and contract) or by marriage and civil partnership law. Equity will not ordinarily “assist a volunteer” or enforce gratuitous promises, and for good reason. We need therefore to identify a characteristic exhibited by some or all cohabiting relationships, or some other trigger, which can provide a sound conceptual basis for encroaching on the parties’ ordinary property rights in the event of relationship breakdown. A new scheme could accordingly take various forms, which we explore in the following paragraphs.

Creation of a new opt-in scheme?

- 5.42 One option would be to create a scheme under which couples could opt in to a new set of remedies which would only be available to those who have by some positive, formal act consented to be subjected to that scheme, perhaps by way of registration. This would provide a clear basis for intervention, arising from the parties’ choice to bring their relationship within the scheme.
- 5.43 Opt-in schemes – which we shall refer to here as “registered partnerships” – have been introduced in several European states and elsewhere.⁴⁰ They vary considerably in terms of the range of relationships covered and the legal consequences of registration. The principal motivation for reform has often been to provide a new relationship status for same-sex couples, and in several states, registered partnership (like our own civil partnership) therefore applies only to same-sex couples.⁴¹ However, elsewhere, the scheme also applies to opposite-sex couples.⁴² In some of those states, marriage has also now been extended to same-sex couples.⁴³ In others, marriage remains the preserve of opposite-sex couples, who have a choice between marriage and registered partnership, while same-sex couples only have access to registered partnership.⁴⁴
- 5.44 In some jurisdictions, registered partnership offers all, or almost all, of the same rights and responsibilities as marriage.⁴⁵ In others, registered partnership offers a

⁴⁰ See Appendix D for details.

⁴¹ Denmark, Finland, Germany, Iceland, Norway, and Sweden: see Appendix D.

⁴² Australia (Tasmania), Belgium, various Canadian provinces, France, the Netherlands, and New Zealand: see Appendix D. See also Lord Lester’s Civil Partnership Bill 2002, available at http://www.odysseustrust.org/civil_partnerships/index.html (last visited 4 May 2006).

⁴³ Belgium, Canada, the Netherlands and Spain. South Africa has legislation pending, following a decision of the Constitutional Court in 2005: *Minister of Home Affairs v Fourie* CCT 60/04, 2005 (3) SA 429 (SCA).

⁴⁴ See, for example, France.

⁴⁵ For example, New Zealand, having already introduced an opt-out regime of financial relief on separation and death for all cohabitants, opposite-sex and same-sex (Property (Relationships) Amendment Act 2001), has recently also introduced a new formal status – civil union – available to all couples (Civil Union Act 2004).

distinctive, generally less extensive, package of legal consequences.⁴⁶ However, most of these schemes go beyond simply providing registered couples with financial relief in the event of separation or death. They tend to have other implications, for example, elsewhere in family law, and in relation to tax, social security, employment rights and so on, effectively creating a new “status” category throughout the law of potential benefit to both parties.

- 5.45 A registration scheme giving rise to wide-ranging consequences might be expected to have a somewhat higher take-up rate than one which simply provided access to financial relief on separation and death, and nothing more (as any new opt-in scheme would be). But in fact, take-up for these schemes, even where open to both opposite-sex and same-sex couples, is generally low.⁴⁷
- 5.46 “Opt-in” solutions would be favoured by those who wish to protect the autonomy of cohabitants who, it is said, should be free to choose how they wish the law to regulate their relationships. It is said that cohabitants have deliberately rejected marriage, and their property relations should only be subjected to special regulation in so far as both parties have positively elected to bring their relationship within some other legal scheme, or reached a private agreement regarding their property. By requiring agreement, no one can be subjected to legal regulation against his or her wishes.⁴⁸
- 5.47 An opt-in approach would provide ample protection of cohabitants’ autonomy: the exercise of the parties’ autonomy in opting in at the outset would provide the basis for the remedy provided at the end of the relationship. However, it would do nothing at all for the cases we have described from paragraph 5.18 above where the choice to opt in would not meaningfully be available. Nor would it offer any

⁴⁶ See K Waaldijk’s analysis of the laws in the nine European countries that have a form of registered partnership available to same-sex couples (exclusively, or with opposite-sex couples): *More or less together: the level of legal consequences of marriage, cohabitation and registered partnerships for different-sex and same-sex partners* (2005).

⁴⁷ The French PaCS (“pacte civil de solidarité”) appears to be the most popular: since its introduction in 1999, over 170,000 couples have taken it up: *Rapport fait au nom de la Mission d’Information Sur La Famille et les Droits des Enfants* (2006) p 428, available at <http://www.assemblee-nationale.fr/12/pdf/rap-info/i2832.pdf> (last visited 4 May 2006). The available statistics do not differentiate between opposite-sex and same-sex couples, so it is not clear to what extent it is being used by same-sex couples as the only route to formalising their relationship and by opposite-sex couples seeking legal regulation distinctive from that offered them by marriage law. Dutch registered partnership has a slightly lower take-up (same-sex couples have been able to marry in the Netherlands since 2001), and the figures are inflated by the “lightning divorce” phenomenon: see K Boele-Woelki, “Registered Partnership and Same-sex Marriage in the Netherlands”, in K Boele-Woelki and A Fuchs (eds), *Legal Recognition of Same-Sex Couples in Europe* (2003) pp 49-52; I Curry-Sumner, *All’s Well that Ends Registered* (2006) pp 153-5; and [http://statline.cbs.nl/StatWeb/table.asp?PA=37772eng&D1=0-28,35-47&D2=\(I-11\)-I&DM=SLEN&LA=en&TT=2](http://statline.cbs.nl/StatWeb/table.asp?PA=37772eng&D1=0-28,35-47&D2=(I-11)-I&DM=SLEN&LA=en&TT=2) (last visited 4 May 2006). Tasmania’s new scheme (the only registration scheme in Australia), introduced in January 2004 and available to unmarried couples and other “caring” relationships, had attracted 61 registrations by March 2006, none of which were caring relationships and most of which were same-sex couples: data from Tasmanian Registry of Births, Deaths and Marriages, as at 2 March 2006.

⁴⁸ See generally R Deech, “The case against legal recognition of cohabitation” (1980) 29 *International and Comparative Law Quarterly* 480; *Attorney General of Nova Scotia v Walsh* [2002] 4 SCR 325, at [201], per Gonthier J; *Rapport fait au nom de la Mission d’Information Sur La Famille et les Droits des Enfants* (2006) p 87 (Parliamentary report to the Assemblée Nationale).

protection to those who do not advert to the legal consequences of their relationship status. Under an opt-in scheme, the default position would be no different from that which exists under the current law. If couples do not marry or form a civil partnership, they are left to the current law described in Part 3 and the criticisms of it outlined in Part 4. That would continue to be the case for those couples who did not opt in to a new scheme.

5.48 It seems to us that creating a new opt-in scheme would not be the best way forward. English law already provides two opt-in schemes for intimate relationships. Opposite-sex couples may marry. Same-sex couples may register a civil partnership. At the very least, introducing yet another form of opt-in status may be felt unduly to complicate our family law.

5.49 If we exclude the possibility of creating any new opt-in regime, then any opt-in solution effectively entails marriage and civil partnership, or private regulation through contract. We have already explained why this may not be considered a satisfactory solution to the problems experienced by individual cohabitants whose relationships end, and why some reform for cohabitants, as such, may therefore be necessary.

An “opt-out” scheme?

5.50 The alternative is a scheme which would apply automatically to all those relationships which satisfied statutorily prescribed eligibility requirements.⁴⁹ Parties to eligible relationships would be able to apply to court for financial relief under the scheme, without needing to take any prior step to formalise or register their relationship, or to reach a specific agreement about how their property should be divided in the event of separation. This sort of approach, adopted by the Inheritance (Provision for Family and Dependents) Act 1975 (“the 1975 Act”) for cohabitants on death, would ensure the protection of those experiencing financial hardship at the end of eligible relationships which, for whatever reason, had not been formalised.

5.51 But it would also be possible, and important, to protect the autonomy of those who did not wish to be subject to any new law by providing a mechanism for couples who wished to do so to opt-out of the scheme by agreement.⁵⁰ If a couple wished to avoid any scheme for financial relief potentially applying on separation and death, it would be wrong to impose that on them against their wishes. Research examining people’s views on law reform in this area indicates that some are keen to preserve the freedom which the current law reserves for cohabitants.⁵¹ This may be particularly important for couples cohabiting later in life who wish to preserve their assets for children from previous relationships.⁵²

⁴⁹ See Part 9.

⁵⁰ See para 4.68.

⁵¹ S Arthur, J Lewis, M Maclean, S Finch and R Fitzgerald, *Settling Up: Making Financial Arrangements After Divorce or Separation* (2002).

⁵² See also examples given by A Dnes, “Cohabitation and marriage”, in A Dnes and R Rowthorn, *Law and Economics of Marriage and Divorce* (2002) pp 123-4.

- 5.52 The entitlement of couples to opt out ought therefore to form a central part of any reform. The right to opt out would have to be subject to safeguards to ensure that it was not used by one party to exploit the financial or other weakness of their partner. We discuss the design of arrangements for parties to exercise the right to opt out in Part 10, in particular the question of what formalities should be required for such agreements to be binding and what circumstances or events might vitiate them. Moreover, careful consideration would have to be given to the impact of any new scheme on relationships already in existence when the scheme is implemented. We consider the extent to which any new scheme should have retrospective effect, and the implications that would have for the meaningful exercise of a right to opt out in Part 11.
- 5.53 In our view, a scheme that applied by default to eligible cohabitants, subject to a right to opt out, would create an appropriate balance between affording scope for party autonomy and securing fairer outcomes for individuals at the end of cohabiting relationships. It would mean that inactivity would not, as it currently does, leave the more vulnerable party unprotected at the point of separation: the scheme would apply by default in the absence of a valid opt-out agreement.⁵³
- 5.54 Many other jurisdictions have adopted this approach, following the trend set in 1984 by New South Wales, the first jurisdiction to create a statutory scheme for financial relief between cohabitants. That pattern has been replicated across other jurisdictions, including the rest of Australia, most of the Canadian provinces, New Zealand, some parts of Spain, Sweden and, most recently, Scotland.⁵⁴ The jurisdictions differ in terms of the range of relationships covered and the types of remedies provided. Some jurisdictions provide cohabitants who satisfy certain eligibility requirements (generally involving a minimum duration requirement or the birth of a child) with the same scheme of financial relief as spouses.⁵⁵ Others provide a lesser measure of relief. All schemes provide protection automatically to the relationships which satisfy the eligibility requirements, unless the parties have agreed to opt out of the scheme.
- 5.55 The default position, for those relationships falling within the scheme, would therefore be altered. In the absence of positive agreement between the parties, the scheme would apply, so parties would not longer be reliant on the general law on separation. If they reached an agreement to exclude themselves from the ambit of the scheme and/or to make alternative provision for each other in the event of separation by contract and so on, the scheme would not apply.
- 5.56 Although the scheme would apply automatically to all relationships satisfying the eligibility criteria, that simply means that either party would be entitled to apply for financial relief. It would not be necessary for any court application to be made if parties were able to reach their own settlement on separation (although they might wish to obtain a consent order). The new scheme would provide a new

⁵³ This approach is preferred by several commentators in this jurisdiction: see, for example, R Bailey-Harris, "Law and the unmarried couple – oppression or liberation?" (1996) 8 *Child and Family Law Quarterly* 137; Baroness Hale of Richmond, "Coupling and Uncoupling in the Modern World", FA Mann Lecture (November 2005).

⁵⁴ See Appendix C for details.

⁵⁵ Eg New Zealand.

background of legal claims, different from that provided by the current law, in light of which parties could make their own arrangements. Moreover, since the success of any claim would depend upon the applicant being able to demonstrate that relief were warranted under the relevant substantive principles (discussed in Part 6), the right to apply would not mean a right to relief.

To whom ought any opt-out scheme apply?

- 5.57 Before we proceed any further, it is necessary to consider in broad terms what types of relationship could justifiably be brought within the scope of a new opt-out scheme. If the parties were not required proactively to opt in, we would still need to identify a justification for legal intervention where none currently exists.

The diversity of “cohabitation”

- 5.58 Our terms of reference require us to consider the law as it applies to “cohabiting couples”. As we saw in Part 2, “cohabitation” covers a wide range of relationships. Cohabitants as a class share the feature of a common household,⁵⁶ and a level of physical and emotional intimacy akin to that of spouses, but thereafter the concept encompasses a wide range of relationships, in terms of the degree of commitment shared by the parties, the degree of financial interdependence between them, the duration of the relationship, and so on. It is fair to suppose both that different types of cohabiting relationship may have very different legal needs and that the case for any reform might be rather stronger in some situations than in others.
- 5.59 Some commentators who oppose the legal recognition of cohabitants have pointed to what they regard as the lack of commitment necessarily exhibited by cohabitants’ failure to marry.⁵⁷ However, other research suggests that this portrayal of cohabiting couples as a class is unfairly limited, and that commitment “is not the exclusive property of married people”.⁵⁸ Indeed, since large numbers of couples are living together on the assumption that they currently have legal obligations towards each other, their common misapprehension might be thought, ironically, to reinforce their mutual commitment. It certainly seems difficult to square with the notion that cohabiting couples generally are uncommitted and have deliberately chosen to cohabit in order to avoid potential legal liability.
- 5.60 Studies have found various levels of commitment amongst cohabiting couples, and amongst spouses.⁵⁹ One research study usefully introduced the idea of a spectrum of commitment, ranging from cases characterised by features which the researchers describe as “full mutual commitment”, through more “contingent”

⁵⁶ A characteristic which is not unique to “cohabiting couples” but is exhibited by others, including carers, friends, siblings and other blood relatives who, as adults, share a household.

⁵⁷ See, for example, P Morgan, *Marriage-Lite: the Rise of Cohabitation and its Consequences* (2000).

⁵⁸ J Lewis, *The End of Marriage?* (2001) p 189.

cases, to situations where, at the other extreme, there is no evidence of any commitment.⁶⁰

- 5.61 Those couples who exhibit full mutual commitment parties expect their relationship to last and regard themselves as being “as good as married”.⁶¹ The attitudes of couples in this category towards marriage may be quite varied, and that diversity in itself may have implications for how any reform for cohabitants should be devised. They may reject the institution of marriage, or they may see no reason to go through a public ritual (the wedding) where their private commitment to each other is strong, or they may wish to marry but simply be unable to incur the (perceived⁶²) cost of a wedding.
- 5.62 Such couples are perhaps likely to make greater investments in their cohabiting relationships or make greater sacrifices for them than they might have done in shorter or more contingent relationships, particularly if they become parents. Indeed, such couples may be indistinguishable from spouses in the way that they organise and view their domestic and working lives on a day-to-day basis.⁶³
- 5.63 Where the couple’s commitment is more “contingent”, one or both parties currently view cohabitation as the best option, and may be committed at least in the sense that they expect fidelity from their partner during the relationship, but

⁵⁹ In a study of long-term cohabitants and spouses, more similarities in terms of the nature of the parties’ “commitment” were found between the younger spouses and cohabitants than between the younger and older married couples: J Lewis, J Datta and S Sarre, *Individualism and commitment in marriage and cohabitation* (1999) Lord Chancellor’s Department Research Series No 8/99.

⁶⁰ C Smart and P Stevens, *Cohabitation Breakdown* (2000); the few “no commitment” cases they found included “on-off” relationships and “really relationships of convenience” where there was no actual or even potential commitment: p 33.

⁶¹ In Smart and Stevens’ study, these relationships were typically established before cohabitation commenced, there were some legal and financial arrangements, children were planned or wanted by both parties, both were involved in child-care, the parties’ expectations of the relationship were congruent: C Smart and P Stevens, *Cohabitation Breakdown* (2000) p 24. See also the findings of J Lewis, J Datta and S Sarre, *Individualism and commitment in marriage and cohabitation* (1999) Lord Chancellor’s Department Research Series No 8/99; J Eekelaar and M Maclean, “Marriage and the Moral Bases of Personal Relationships” (2004) 31 *Journal of Law and Society* 510; A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005); L Jamieson et al, “Cohabitation and commitment: partnership plans of young men and women” (2002) 50 *Sociological Review* 356.

⁶² Couples may marry with a simple, low-cost, civil ceremony; compare the high average wedding costs reported in the media, ranging from £16,500-£20,000: http://www.bbc.co.uk/relationships/couples/life_postwedding.shtml (last visited 4 May 2006). But it seems that many couples consider that unless and until they can get married “properly”, that is to say, with a large (and expensive) party for all their friends and family, it is not worth doing: J Haskey, “Cohabitation in Great Britain: past, present and future trends – and attitudes (2001) 103 *Population Trends* 4, at 11; A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) pp 70-72.

⁶³ J Lewis, J Datta and S Sarre, *Individualism and commitment in marriage and cohabitation* (1999) Lord Chancellor’s Department Research Series No 8/99. Differences between the couples examined in that study seemed to depend more upon generation than on marital status; see also findings of J Eekelaar and M Maclean, “Marriage and the Moral Bases of Personal Relationships” (2004) 31 *Journal of Law and Society* 510.

there is no presumption (yet) that the relationship will last.⁶⁴ Parties may drift into this sort of cohabitation, perhaps originally for reasons of convenience, but the relationship then continues and may develop.⁶⁵ Some of these couples may be using cohabitation as a form of trial marriage, in which case they may consciously not wish to be subject to laws imposing any sort of financial obligation between them, and may be particularly unlikely to want to be subject to the same level of legal regulation as spouses.

Determining which cohabiting relationships should be eligible for any new scheme

- 5.64 We do not think that the mere fact of cohabitation by itself is enough to justify giving parties to such relationships access to any level of financial relief on relationship breakdown or death, whatever the substantive basis of those remedies were to be. If reform for cohabitants is to be introduced, we therefore need to identify some additional feature or features of some cohabiting relationships which can provide the necessary justification for intervention, and which can be encapsulated in a test capable of adjudication by the courts.⁶⁶ This last point is an important one: while it might instinctively be felt that commitment should be the key to eligibility, that concept is rather difficult to define and identify for legal purposes. Resort to some sort of proxy for commitment is inevitable.

COHABITANTS WITH CHILDREN⁶⁷

- 5.65 We consider that joint parenthood, in combination with cohabitation, provides a strong and sufficient justification for eligibility to apply for some measure of financial relief in the event of separation. Parenthood is a joint endeavour with implications both for the parents and their children of a sort that engage quite

⁶⁴ In Smart and Stevens' study, these cases were characterised by the couple not having known each other long, a lack of legal and/or financial arrangements, pregnancy being unplanned (though not necessarily unwanted) and predating the cohabitation, and the need for significant personal change if the relationship was to last: C Smart and P Stevens, *Cohabitation Breakdown* (2000) p 26.

⁶⁵ It has been suggested that some of these couples are better compared with non-co-residential partners than with spouses: M Murphy, "The evolution of cohabitation in Britain 1960-95" (2000) 54 *Population Studies* 43, at 53. See also the discussion of *Crick v Ludwig* (1994) 117 DLR (4th) 228 in J Mee, *The Property Rights of Cohabitees* (1999) pp 23-26.

⁶⁶ Compare the arguments against reform made by M Garrison, "Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation" (2005) 52 *University of California Los Angeles Law Review* 815, arguing specifically in relation to reform which would subject cohabitants to the same, equal sharing, regime as spouses.

⁶⁷ It is worth observing that the law already offers considerable support for parenting outside marriage. Unmarried fathers may now acquire parental responsibility for their children by jointly registering the birth: Adoption and Children Act 2002, s 111, amending Children Act 1989, s 4. Unmarried opposite-sex couples may become parents with the assistance of donor gametes and reproductive technology: Human Fertilisation and Embryology Act 1990, s 28(3). Both opposite-sex and same-sex cohabiting couples are eligible to be considered for adoption: Adoption and Children Act 2002, s 50 and s 144(4)-(7). Flexible working and other "family-friendly" employment rights apply equally to spouses, civil partners and cohabiting couples: see Part 4; and both the child support legislation and Schedule 1 to the Children Act 1989 apply regardless of the status of the relationship between the child's parents

distinctive public interest considerations in the unhappy event of those parents separating.

5.66 As one commentator has put it:

Characteristically, the “partnership of parenthood” is a life-transforming event, certainly for one, and often for both, parents. The parties are not simply acting altruistically with respect to each other,⁶⁸ but acquiring a joint commitment to a new human being who demands care and support for a significant proportion of the adults’ lives. The presence of a child in a common household demands a life plan [in which the parties have arranged their mode of living and financial arrangements as a basis upon which they followed their common life together for the long-term, in which the parties support each other and use mutual resources (effort, money) in servicing a long-term project]. Such a plan could also be reasonably presumed even if the child they were bringing up was not the child of both of them, for its presence is surely part of the plan.⁶⁹

In that writer’s view, it is the existence of such a life-plan which justifies eligibility for financial relief providing, in particular, compensation for economic sacrifices made for the sake of that relationship.

5.67 Another commentator puts the point in these terms:

We are entitled to treat [the relationship between cohabiting parents] as a socio-economic partnership with wealth-transferring consequences whether or not this was their intention, and whether or not they made a commitment to partnership, because parenthood has effected a change in their relationship which requires limitations to be placed upon their assertion of individualised financial autonomy ... The partnership of parenthood continues to some extent after separation. The parents have shared responsibility to a child and therefore the parent who does not have primary care responsibility has certain financial obligations to the primary caregiver which survive the dissolution of their relationship. ... If [one party] is the primary caregiver to the child of their relationship after separation, [the other] has a responsibility to support [the primary carer] ... because they have chosen together to become parents...⁷⁰

5.68 Inevitably, creating a category of “cohabitants with children” involves difficult questions around the edges: should we include couples who raise a child of only

⁶⁸ In which case, as between friends, no legal obligation of support could reasonably be imposed.

⁶⁹ J Eekelaar, “Friendship”, in *Family Law and Personal Life* (2006), in press. See also J Eekelaar, “Non-marital property”, in P Birks (ed) *Frontiers of Liability* (1994) vol 2, p 204.

⁷⁰ P Parkinson, “Quantifying the Homemaker Contribution” (2003) 31 *Federal Law Review* 1, at 14.

one of them together; what if they only cohabit for a short period, or if cohabitation ceases prior to the child's birth?⁷¹

- 5.69 However, while those questions would have to be addressed in devising the detail of the scheme, we believe that the core idea – that cohabitation plus parenthood should bring a couple within the scope of any new opt-out scheme – is one that is likely to command wide support. Indeed, researchers investigating public views on law reform consistently find that there is very strong support for the provision of some sort of financial remedy between the adults on separation where a couple have children.⁷²
- 5.70 Remedies are important for primary carers in their own right because of the economic sacrifices made by them. However, there is another reason why we believe consultees may consider cohabitants with children as particularly deserving of attention. Where there are children, there is a recognisable public interest in their continuing welfare. Separation of a cohabiting couple inevitably impacts on those children who have been part of their parents' shared household. As Part 4 explained, although Schedule 1 to the Children Act 1989 seeks to protect children whether or not their parents were married, it has important practical limitations. More generally, we have argued that the current law fails to address adequately any financial hardship experienced by the primary carer on separation. This must inevitably affect the quality of life of the children for whom that adult party continues to care.
- 5.71 But we do not think that remedies should be limited to cohabitants whose children are still dependent at the date of separation. The nature of the economic sacrifices made by some primary carers as a result of child-care obligations is such that the impact of those sacrifices is likely to be felt even after the children have attained their independence. Justice between the adult parties requires that relief be available even once the children have left home. The parent who has devoted his or her efforts to raising the couple's family over many years and sustained long-term economic disadvantage as a result ought not to be left without remedy in the event of separation.
- 5.72 Some commentators would urge an enlarged role for the welfare state to assist individuals in these cases, to avoid creating private dependency.⁷³ But we

⁷¹ See Examples 3, 3A and 4 in Part 7, and Part 9.

⁷² See findings of E Cooke and A Barlow, "Community of Property: a Regime for England and Wales?", paper given at the University of Staffordshire, Centre for the Study of the Family, Law and Social Policy, Annual Seminar, February 2006: stratified sample of 73 respondents, semi-structured interviews based on vignettes. An Omnibus Survey conducted in 1995 (2000 respondents) by the Centre for Socio-Legal Studies found considerable support for property adjustment on separation in favour of a cohabiting parent who had for many years cared for the parties' children, having given up work and so made no financial contribution to the property: 85% thought that the claimant should receive a half-share or more of the value of the family home. See also findings of S Arthur, J Lewis, M Maclean, S Finch and R Fitzgerald, *Settling Up: Making Financial Arrangements After Divorce or Separation* (2002); and J Lewis, J Datta and S Sarre, *Individualism and commitment in marriage and cohabitation* (1999) Lord Chancellor's Department Research Series No 8/99.

⁷³ R Deech, "The Case Against the Legal Recognition of Cohabitation" (1980) 29 *International and Comparative Law Quarterly* 480, at 492-494.

consider that there is a case for “strengthening the caring and sharing responsibilities which families have for their own family members”,⁷⁴ in particular where the financial hardship being experienced on separation results from the economic sacrifices that have been made by the primary carer of the couple’s children. There might also be a case for financial relief to respond not only to contributions and sacrifices specifically attributable to the parties’ parenthood, but more generally to the “shared life” which such couples may be said to have.

- 5.73 There is a strong case, therefore, for the creation of specific family law remedies which will tackle that problem directly. Family law remedies could provide much more convenient, flexible responses than the general law described in Part 3 to, in light of the particular needs of the parties and all of their available assets and income.

COHABITANTS WITHOUT CHILDREN

- 5.74 We consider the case of cohabitants without children to be rather more difficult. Such couples do already have access to statutory remedies when their relationship ends by death, either where the relationship had lasted for at least two years immediately prior to the death, or where the survivor was dependent on the deceased.⁷⁵ But, while it may raise the question in our minds, the existence of a remedy on death does not automatically justify the provision of financial relief on separation as well.

- 5.75 It has been argued that, in many respects, cohabitants without children are indistinguishable from other home-sharers, who are excluded from the terms of reference of the current project.⁷⁶ Others may feel that couples who do not have children but who are living together in intimate relationships are distinct from other types of non-intimate home-sharers and couples who do not live together. There is an argument that the relationships of cohabiting couples tend to entail a certain emotional intimacy and intensity, often accompanied by the parties sharing a view of their relationship as a joint venture in life.

- 5.76 We express no view on the merits of these arguments. But whether or not cohabitants without children are distinguishable from other cases is not the question for us here. What matters is whether any couples without children should be included in a new scheme for financial relief.

- 5.77 Various arguments could be made against reform for cohabitants without children. In the absence of children and the specific problems (both for those children and their parents) experienced in those cases, there might be felt to be nothing sufficiently compelling about cases of cohabitants without children to justify their inclusion, and that the potential costs of doing so might outweigh any potential benefits of doing so. Such couples might be felt to lack the implied

⁷⁴ Baroness Hale, “Coupling and Uncoupling in the Modern World”, FA Mann Lecture (November 2005).

⁷⁵ They also already have access to occupation orders and tenancy transfers under the Family Law Act 1996.

⁷⁶ See R Bailey-Harris, “Dividing the Assets on Family Breakdown”, in R Bailey-Harris (ed), *Dividing the Assets on Family Breakdown* (1998) p 85; P Parkinson, “Quantifying the Homemaker Contribution” (2003) 31 *Federal Law Review* 1, at 10.

commitment which does or should arise by virtue of having a child together, and to lack the special needs peculiar to cases involving children (at least where the children are still dependent). Those taking this view might say that cohabitants without children ought to be expected to look after their own interests and not be permitted to look to the law to rescue them from decisions and actions which may, with the benefit of hindsight, appear unwise.

- 5.78 It would clearly be undesirable, in creating a statutory scheme specifically for cohabitants, to encourage litigation or provide remedies in cases where no significant economic injustice in fact arises under the current law. Many cohabitants without children are young couples who live together for a year or two on a more or less trial basis, often in rented property, and then go their separate ways. In most of those cases, it is likely that neither party's economic position will have been affected (positively or negatively) as a result of that short cohabitation. If either party has gained economically from the relationship (for example, thanks to the other party's contribution to the mortgage), the general law may provide a remedy to share that gain.⁷⁷ If either party has made economic sacrifices for the relationship, it may be highly questionable whether that is something for which the other party ought to be required to provide any recompense.
- 5.79 Imagine a young couple, C1 and C2, who are both working and live together in property acquired by C1 before the relationship began. C1 pays the mortgage while C2 pays other bills. They split up after a year. Or imagine another couple who have been carrying on a long-distance relationship, and one party, C3, forces the pace by deciding to give up a job to move across the country to move in with the other, C4, who is rather less keen but does not refuse to give C3 house-space. They split up a year later, C3 having struggled to find a good job, C4 having supported both economically.⁷⁸ There may be several reasons to be hesitant about recommending a scheme which would apply in these cases. In both cases, the relationship was short. While C2 might benefit from a clarification of whether, and if so when, indirect financial contributions will give rise to a share in the home, litigation on what is likely to be a relatively small sum of money would be disproportionate. While C3 might have made a major sacrifice, it is not clear that that is something for which C4 should have to pay anything, not least because of C4's lack of agreement to C3's action; C3's economic losses can perhaps rightly be regarded as self-inflicted, albeit motivated by a desire to further the relationship with C3.⁷⁹
- 5.80 People frequently make ill-advised economic decisions, whether by failing to make the most of what resources they have (C2 would have done better to invest in property too) or sacrificing resources for what turns out to be an elusive benefit (C3 ought not to have given up the job). Sometimes they do this in the context of intimate relationships, sometimes in other contexts. It may not be immediately apparent why the existence of the cohabiting relationship should make the

⁷⁷ Though this is subject to the uncertainty of the law of implied trusts as regards indirect financial contributions to the mortgage.

⁷⁸ See also Examples 8 and 9 in Part 7.

⁷⁹ See also J Eekelaar, "Friendship", in *Family Law and Personal Life* (2006), in press.

difference which justifies the unlucky or unwise individual seeking recompense from another individual.⁸⁰

- 5.81 However, there may be at least some cases involving couples without children where the case for providing the possibility of financial relief is rather stronger. Consultees may consider that the interdependence which flows from an intimate cohabiting relationship is in some cases enough to justify access to flexible remedies in the event of termination of the relationship, even where there are no children.
- 5.82 At least where the relationship has lasted for some time and has ended leaving one party suffering financial hardship as a result, there may be a strong basis for saying that some measure of financial relief on separation would be appropriate. Where the parties are in a relationship which they regard as long-term, they may have merged their assets and become financially interdependent⁸¹ in pursuit of a “life plan” of the sort described by the author quoted in paragraph 5.66 above. In these cases, it might be argued, there is an implicit level of mutual trust and commitment between the parties, such that they are unlikely to advert to strict questions of legal ownership and that in the event of separation, financial relief should be available, at least to share fairly the gains and losses created by the parties’ relationship.⁸²
- 5.83 Some commentators argue the case for reform from the perspective of the functional similarity of some cohabiting relationships with marriages, not distinguishing between those who have children and those who do not: if they are “as good as married”, ought they not to be subject to the same laws on relationship breakdown?⁸³

⁸⁰ See J Mee, *The Property Rights of Cohabitees* (1999) pp 315-6, who posits the example of a man who purchases a second property for rental, and the property is let to a young woman who could have afforded a mortgage but decided to rent instead, effectively paying his mortgage for him; the property market booms, creating a profit for him, and nothing for her.

⁸¹ There might be thought to be some inconsistency in the fact that means-tested benefits rules presuppose, and perhaps encourage or even force, financial interdependence between cohabitants, but that they have no remedies on separation to deal with the consequences to which such financial interdependence may give rise.

⁸² S Gardner has long argued for the law to approach family property from the perspective of “trust and collaboration, rather than autonomy and responsibility”, or a “rubric of communality” or mutualism, instead of the current individualistic approach which focuses on specific intentions about ownership and financial contributions in a way unsuited to the informal family context: “Rethinking Family Property” (1993) 109 *Law Quarterly Review* 263; “Fin de Siècle Chez *Gissing v Gissing*” (1996) 112 *Law Quarterly Review* 378; “Quantum in *Gissing v Gissing* Constructive Trusts” (2004) 120 *Law Quarterly Review* 541. In the absence of judicial development along those lines (see para 5.98 below), legislative intervention would be necessary.

⁸³ See, for example, A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) ch 6, particularly if the purpose of ancillary relief on divorce is essentially to deal with the financial hardship that would otherwise be experienced; see also R Bailey-Harris, “Dividing the Assets on Breakdown of Relationships Outside Marriage”, in R Bailey-Harris (ed), *Dividing the Assets on Family Breakdown* (1998). As we shall explain in Part 6, we do not propose that the law applying to spouses should be extended to cohabitants.

5.84 Another commentator frames the issue differently:⁸⁴

Assuming a world where the public misconceptions about cohabitation had somehow been eliminated, so that people would eschew marriage with a clear knowledge of the risks from a legal point of view but with their instinct for economic self-preservation dulled by normal human optimism, could the law fairly leave them to the consequences of their decision? While different views are obviously possible on this point, it can certainly be argued that sufficient grounds for legislative reform would still exist in this scenario. However, these grounds would not rest directly on the premise that cohabitation was practically indistinguishable from marriage. Rather, the grounds for legislative intervention would be the state's interest in avoiding injustice upon the termination of a relationship where the parties were economically and emotionally interdependent and relied on the relationship rather than their separate legal entitlements to secure their financial well-being.⁸⁵

5.85 We shall consider in Part 9 the various ways in which cohabiting relationships can and have been defined for legal purposes. Settling on a definition which itself captures the sort of mutuality that might be thought necessary to justify any relief between couples without children is difficult. Ultimately, the best, if slightly crude, way of distinguishing between those relationships that do and do not exhibit the required level of sharing would be to impose a minimum duration requirement for cohabitants without children, so that short relationships were simply excluded from eligibility entirely. As we shall see in Part 6, the remedies that we have in mind are "self-limiting", that is to say they would not involve the automatic sharing of assets for those falling within the scheme, but rather a focused response to specific economic injustices arising on separation. But an additional limitation, such as a minimum duration requirement for couples without children, may also be desirable.

5.86 Again, this is an idea that resonates with findings from surveys of public opinion and small-scale qualitative studies of public attitudes towards reform. As well as the presence of children, respondents regard length of relationship and degree of financial interdependence as factors relevant to whether a relationship should be brought within the scope of special legal protection in this area. Conversely, some respondents to questions about childless couples wish to exclude short relationships from the scope of reform, and are concerned about preserving the autonomy of those cohabitants who have positively elected not to marry and who

⁸⁴ The point is made in relation to cohabitants generally, not just those without children.

⁸⁵ J Mee, "Property rights and personal relationships: reflections on reform" (2004) 24 *Legal Studies* 414, at 426. As that author goes on to observe, some non-intimate relationships between other categories of home-sharer may exhibit similar characteristics. But that does not detract from the argument's contribution to the case for reform in relation to cohabitants.

wish to keep their relationship free from legal obligations.⁸⁶ We have already indicated that the latter concern would be catered for by the provision of an opt-out facility for those couples who wished to avoid the scheme.

Conclusions and questions on the broad scope of any new scheme

- 5.87 We are confident that reform should apply to cohabitants with children, at least where the parties are joint parents, and that remedies should be available if separation occurs after the children have left home, as well as where they remain dependent. We shall be seeking consultees' views about other situations involving children (such as step-child cases) in later Parts of this paper.⁸⁷
- 5.88 Cohabitants without children raise more difficult questions of social policy, in relation to which the arguments may be considered to be more finely balanced than in cases of cohabitants with children. We therefore invite the views of consultees on whether any categories of cohabitants without children ought to be included within a new scheme of financial relief on separation. Consultees may take the view that such couples should only fall within the scope of a new scheme if their relationship has lasted a specified minimum duration. Views may, of course, vary markedly as to how long any such period should be and on what basis it should be fixed. We shall discuss this issue in detail in Part 9.

WHAT COULD STATUTORY REFORM OFFER?

- 5.89 Specifically-devised family law remedies for financial relief on separation could:
- (1) ensure proper recognition of the parties' financial and non-financial contributions (not just to the acquisition of particular assets but to their joint lives more generally) and the economic sacrifices they may have involved;
 - (2) avoid arbitrary distinctions and lengthy investigation into facts of, at best, marginal relevance to the reality of family life;
 - (3) provide flexible remedies without jeopardising the interests of third parties;
 - (4) provide a clearer, more legitimate basis for the courts' determination of what fairness demands in any given case; and

⁸⁶ See studies referred to in n 72. The British Social Attitudes Survey posed questions about maintenance remedies on separation and rights to remain in the home following the death of a partner, both in the context of a ten-year, childless, opposite-sex cohabitation. Respondents were asked whether they thought that a cohabitant should have the same claim as a spouse in such situations: 61% favoured awarding maintenance, 93% favoured allowing the survivor to remain in the home: see A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) ch 5. The 1995 Omnibus Survey (see n 72), which asked questions about property adjustment relating to shares in the home on separation, found considerably less support for property adjustment in cases without children. If there had been no children and the claimant had made no financial contribution to the acquisition of the property, only 31% thought a half-share was appropriate and 29% considered that no award should be made; on the same facts, involving a same-sex couple, 24% favoured a half-share and 44% thought that no award should be made.

⁸⁷ See paras 6.205 and 9.57.

- (5) be considered in family, rather than civil, proceedings.

For whom might reform make a difference in practice?

- 5.90 It is proper to acknowledge there are several categories of case for which any reform of remedies on separation would have little impact and perhaps, currently at least, a relatively narrow range of cases which would benefit substantially from any new private law remedies.

Cases which would be unlikely to be affected

PRE-MARITAL COHABITANTS

- 5.91 Many cohabitants marry each other. Having married, they are eligible for the existing remedies applying on divorce or death of one spouse and so are not the concern of this project.⁸⁸

ECONOMICALLY INDEPENDENT COHABITANTS

- 5.92 Many couples are both in full-time employment and remain economically independent of each other, contributing more or less equally to housing and household running costs. A large number of these couples will be young and childless, and many such relationships will be of relatively short duration. Many of these younger couples may rent rather than own their homes. On breakdown of such relationships, it is usually possible to separate with comparative financial ease and the general law may usually be expected to produce appropriate outcomes in case of dispute.

- 5.93 If they rented their home, the parties can simply go their separate ways. If the parties had bought their home together, they will now probably have an express trust, which will significantly simplify matters on separation. Even if they do not have an express trust, they may well have contributed equally to the mortgage, in which case again the case might be straightforward. There is little need for reform in these cases in the sense that different outcomes from those generated by the general law are not evidently required. Indeed, as we shall see, whilst the different options for reform might provide a clearer route to the result, they would be unlikely to produce significantly different outcomes in these circumstances. If just one of them held the legal title to the home, the current law may be less adequate and reform may have an impact. But as we have discussed, certainly if the relationship is short and no children have been born to the couple, there is an argument that such cases ought not to be included in the scope of a new scheme.

COHABITANTS WITH FEW ASSETS AND LOW HOUSEHOLD INCOMES⁸⁹

- 5.94 Many cohabitants (including, in particular, many cohabiting parents) have few assets, rent their home and have low incomes. The existing remedies of tenancy transfer and child support probably already achieve all that can be achieved in

⁸⁸ Indeed, in applying those remedies, the courts increasingly take account of periods of pre-marital cohabitation: see para 6.281.

⁸⁹ See Example 3B in Part 7.

such cases.⁹⁰ Once those remedies have been deployed, there is unlikely to be any point in considering further remedies in private law. The parties simply do not have the assets or income in relation to which any further transfer of resources could appropriately be made. Certainly, further litigation would be futile, assuming that it could even be funded. Resort to state support by one or both parties is inevitable, whether in the form of welfare benefits, tax credits or the use of other public services.⁹¹

- 5.95 This is simply a reflection of the fact that the capacity of private law to provide a remedy is inherently limited by the scale of the parties' assets. Making some form of financial relief available on separation could therefore not eliminate financial hardship. Much of the financial hardship experienced by former cohabitants and their children will therefore have to be addressed by other means. Research into outcomes on divorce, where the remedies are in theory far more extensive, indicates that even in that context many primary carers still experience financial hardship.⁹² Moreover, many respondents experience hardship on divorce as well; it is rarely possible to separate one household into two without both parties going short.⁹³ Since cohabiting families tend to be less affluent than marital families, many primary carers and children will continue to experience financial hardship on separation.⁹⁴
- 5.96 Of course, there remains a role for private law nevertheless to ensure that where resources permit, those resources there are can be more fairly shared between the parties.

Cases likely to be affected

- 5.97 The cases to which any reform of private law could make a significant difference are those involving couples whose home is owner-occupied, whose joint household income is substantially above subsistence level, and who are to some extent financially interdependent. Cases most likely to be affected involve couples with children, given the substantive economic implications of parenthood for both parties. Only a minority of cohabiting couples may currently fall into this category. But a significant number of individuals and, indirectly, their children might benefit from reform of the sort discussed in this paper.

⁹⁰ See paras 3.55 and 3.62.

⁹¹ This is as true of cases involving spouses as it is of cohabitants. We consider some of the special features of small money and debt cases in para 6.298.

⁹² A Perry, G Douglas, M Murch, K Bader and M Borkowski, *How parents cope financially on marriage breakdown* (2000); S Jarvis and S Jenkins, *Marital Splits and Income Changes: Evidence from Britain* (1997) Working Papers of the Institute of Social and Economic Research: Paper 97-4, University of Essex.

⁹³ Perry et al found that while fathers' incomes were less likely to drop, they were more likely to have difficulty finding secure accommodation and had extra expenses to meet owing to their continuing liability to the children of the marriage and their primary carer: n 92.

⁹⁴ K Kiernan, H Land and J Lewis, *Lone Motherhood in Twentieth Century Britain* (1998) p 283.

CAN WE NOT LEAVE IT TO THE JUDGES?

- 5.98 Before we conclude this Part, it is appropriate to explain why we consider that any reform should be effected by Parliament, rather than by reliance on judicial development of the existing law.
- 5.99 It might be argued that there remains scope for the judges to develop the general law of trusts and estoppel, perhaps drawing from the work of their Commonwealth colleagues,⁹⁵ in such a way as would eliminate at least some of the problems described in Part 4.
- 5.100 However, there is a risk of the general law becoming destabilised by such activities, and the exercise raises fundamental questions about the legitimacy of this sort of judicial development.⁹⁶ Is it proper for the courts effectively to make the judgements of social policy⁹⁷ that are necessary for determining what “fairness” demands in these contexts, particularly once the criteria by which fairness is to be identified have become detached from the narrow inquiry characteristic of more traditional property law?⁹⁸ Judicial development would also entail uncertainty about the relationships to which any developed law of trusts or estoppel would apply. The imposition of a clear-cut minimum duration or other eligibility criteria of that sort would clearly be beyond legitimate judicial activity. Yet, as we have discussed, this might be regarded as a central aspect of the social policy judgement to be made. Moreover, whether and when appropriate judicial developments can be made is entirely an accident of litigation – unless and until the right case happens to come along, and reaches the House of Lords,⁹⁹ no real progress can be made. The fact that so many of the criticisms of the current law echo criticisms made in the early 1970s itself suggests that judicial progress may be slow in coming.¹⁰⁰
- 5.101 The courts have always been sensitive to the limits on what they can legitimately do in this area and have highlighted the necessity for legislative intervention to cure the claimed unfairness of the outcomes generated by the general law.¹⁰¹ We share the view that, while there are aspects of the general law which require clarification, a task which is well within judicial competence, the creation of solutions to most of the problems outlined in this paper should be a matter for Parliament. Indeed, as we noted in *Sharing Homes*, even those jurisdictions that

⁹⁵ Notably in Australia, New Zealand and Canada: see J Mee, *The Property Rights of Cohabitees* (1999) for discussion.

⁹⁶ J Mee, *The Property Rights of Cohabitees* (1999) pp 313-8 and J Mee, “Property rights and personal relationships: reflections on reform” (2004) 24 *Legal Studies* 414, at 433.

⁹⁷ Even, or particularly, if that policy is not articulated: G Battersby, “*Oxley v Hiscock* in the Court of Appeal: the search for principle continues” (2005) 17 *Child and Family Law Quarterly* 259, noting the lack of policy discussion in *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211.

⁹⁸ See *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211, at [70], per Chadwick LJ.

⁹⁹ This would seem necessary for any authoritative clarification of the law.

¹⁰⁰ See, for example, Family Property Law (1971) Law Commission Working Paper 42, in the context of the ownership of property during marriage.

¹⁰¹ See, for example, remarks made in *Pettitt v Pettitt* [1970] AC 777, 795, per Lord Reid, 805, per Lord Morris, 810-811, per Lord Hodson; *Burns v Burns* [1984] Ch 317, 332, per Fox LJ, and 345, per May LJ; *Stack v Dowden* [2005] EWCA Civ 857, at [78], per Carnwath LJ.

have more expansive concepts of constructive trust have legislated for cohabiting relationships, in order to deal more satisfactorily with the financial consequences of relationship breakdown.¹⁰²

THE COST OF REFORM?

- 5.102 One other issue that we identified at the start of this Part is the implications in terms of costs, together with the practical impact, of any reform. Some consultees may be concerned that any new scheme could give rise to a large number of complicated claims, flooding the courts at a great cost to the taxpayer. We do not think that a new scheme would have to be costly or burdensome in that way. Moreover, it cannot be ignored that the current law creates costs of its own. Litigation about constructive trusts and proprietary estoppel are extremely complicated. Cases take up significant amounts of court time and some litigants are currently funded by legal aid.
- 5.103 The extent to which a new scheme would give rise to claims would depend entirely on its scope. A new scheme could be set up so as to screen out trivial or malicious claims and only provide remedies where they were really needed.¹⁰³ Any new scheme should also be as simple as possible, creating the minimum of costs for the courts and for users. The extent to which the costs of any new scheme should be borne by the users or the taxpayer is a matter for Government. There is no reason, in theory, why the scheme could not be made self-financing by setting court fees at a level which covered costs. Equally it is not inevitable that the introduction of a new scheme would add to the legal aid bill. It would be a matter for the Legal Services Commission, bearing in mind the other demands on the legal aid fund, to consider whether as a matter of policy applicants and respondents should be eligible for legal aid.¹⁰⁴

CONCLUSIONS

The current law

- 5.104 The general law is not designed specifically to deal with the problems peculiar to the termination of close inter-personal relationships and has struggled to develop in a way that would better accommodate those problems, in particular the economic sacrifices associated with child care. Property law may never respond adequately to the demands of the family context. It is not designed to do so. Much of the substantive uncertainty that currently affects the law used by cohabitants could be said to have stemmed from judicial attempts to stretch the general law to fit the circumstances of cohabitants, because there is no law designed specifically to deal with them.
- 5.105 One result of the current uncertainty is that it is difficult for legal advisers to give clear advice and disputes are costly to litigate. While that might encourage some cases to settle, it may do so particularly where one party is risk averse, leaving that party with an inadequate settlement.

¹⁰² Sharing Homes: A Discussion Paper (2002) Law Com 278, para 4.29.

¹⁰³ There are various checks that could be used to limit claims, whether litigated or not, in particular eligibility requirements and a tight limitation period. See Parts 9 and 11.

¹⁰⁴ See Part 11.

5.106 What statutory remedies currently exist between cohabitants have been developed in an *ad hoc* manner, not as a coherent overall scheme, and do not go far enough to achieve just outcomes on separation. While survivors of cohabiting relationships terminated by death have access to a remedy under 1975 Act, statutory remedies designed to protect the economically weaker adult party on separation are limited. Very few of the laws that can be invoked are directed specifically to achieving a fair outcome between the adult parties at the end of a relationship, and none of them provides a comprehensive overview of the parties' economic positions. Schedule 1 of the Children Act 1989, aimed exclusively at meeting the child's needs, offers nothing directly to the parent who, ill-served by the law of trusts, is left in the economically weaker position at the end of a cohabiting relationship. As we have seen, the practical limitations on the use of Schedule 1 may be reducing its ability to protect the interests of children. Moreover, that legislation does not provide for the cohabiting parent whose children have left home.

Is reform justified?

5.107 Ultimately, it is for Government and Parliament to decide as a matter of social policy whether the introduction of financial relief for cohabitants on separation would be appropriate and, if so, for which categories of cohabitants.

5.108 We consider that in reaching that judgement, the goals of promoting and protecting marriage should be disentangled from the issue of ensuring that individuals do not suffer financial hardship unfairly when their relationships end, whatever the legal status of that relationship was.

5.109 We see considerable merit in urging cohabiting couples to regulate their own affairs and decide without state intervention how they would divide their assets in the event of separation. However, while that solution amply protects the autonomy of the parties, we do not consider for the reasons explained in this Part that it can provide an adequate answer to the problems of cohabiting couples who separate. Only a scheme of remedies applying by default to couples who meet eligibility criteria set out in the legislation could do that. We are aware that any scheme which applied by default to all cohabiting couples might be seen as curtailing the freedom of some. The right to opt out of such a scheme would, we believe, provide sufficient opportunity for those who do not wish to be subject to any new law to avoid it by agreement.

5.110 We do not think it would be appropriate for all cohabiting couples to be subject to such a default regime. Nor, as we explain in Part 6, do we think any new scheme should involve the provision of remedies on the basis of a wide discretion where significant economic injustice had not arisen. But we consider that there is likely to be a consensus in favour of some reform in cases involving cohabitants with children, and we invite the views of consultees regarding the desirability of extending reform to at least some categories of couples without children.

5.111 We provisionally reject the view that any new remedies providing financial relief on separation should attach to a new legal status to which cohabiting couples can “opt in” by registration. Do consultees agree?

5.112 We provisionally propose that any new statutory scheme providing financial relief on separation should be available only between “eligible

cohabitants”, unless the parties have agreed that neither shall apply for those remedies by way of an “opt-out agreement”. Do consultees agree?

- 5.113 We consider that, in cases where the couple have children, the current law governing the resolution of cohabitants’ financial and property disputes on separation is uncertain and capable of producing unfair outcomes, and that reform for this category of case is justified. We provisionally propose that new statutory remedies should be devised to deal with such cases. Do consultees agree?
- 5.114 We invite the views of consultees on whether reform may also be warranted in any cases involving cohabitants without children.

THE REMAINDER OF THIS CONSULTATION PAPER

- 5.115 We have been asked to consider how this area of the law could be reformed to avoid financial hardship for cohabitants and their children. For the rest of this paper, we therefore consider the types of new scheme that could be developed, and how it might apply to both couples with children and those without.
- 5.116 We consider the range of options for reform in terms of the substantive principles on which relief could be granted and set out our provisional preference. We then consider how such principles would apply in different types of case, and ask consultees what they think about the suggested outcomes. In doing so we emphasise that whether different categories of cohabitants, in particular cohabitants without children, should be included at all in any new scheme, and, if so, on what basis, remains an open question.

PART 6

FINANCIAL RELIEF ON SEPARATION: A NEW SCHEME

INTRODUCTION

Reform for cohabitants with children

- 6.1 We have provisionally proposed in Part 5 that new statutory remedies should be introduced on separation providing financial relief between cohabitants with children. Such couples should be automatically eligible to apply for relief.
- 6.2 We have to define “cohabitants with children” for these purposes. In so far as this is an issue relating to eligibility to apply for relief, we deal with it in Part 9. However, the operation of the substantive principles justifying the grant of relief to an eligible applicant might themselves depend on the presence of children. We therefore need to consider which children should be relevant for this purpose. In many cases, where the parties are the joint legal parents of dependent children, this will be entirely straightforward. We shall use that case as a basis for our discussion of the principles which should underpin any new remedies. Later in this Part, we shall consider whether the principles should apply to other situations, including families whose children are no longer dependent, cohabiting step-families and families where the cohabitants are caring for children of whom neither is a parent.

Cohabitants without children

- 6.3 We have also examined the case for extending any reform to couples without children. Consultees may take the view that they ought not to be covered by any new scheme. Alternatively, consultees may take the view that such couples should be included but only if their relationship has lasted for a prescribed minimum duration.
- 6.4 We shall be addressing the issue of eligibility in detail in Part 9. We defer it to that relatively late stage in the paper not because we consider it to be unimportant: it is clearly a crucial aspect of the scheme and to an extent inseparable from the material to be discussed in this Part. Consultees’ views about the acceptability of the scheme proposed in this Part may largely depend on which cohabitants would be eligible to apply under it. However, it is difficult to settle finally on detailed eligibility requirements unless it is known what it is that “eligible cohabitants” would actually be eligible to apply for. The basis on which financial relief, if any, would be provided to those who are eligible may therefore affect consultees’ views about appropriate eligibility criteria.
- 6.5 The basic principles on which we think financial relief under a new scheme should be based are the same, whether between cohabitants with children or cohabitants without children. This Part discusses those principles accordingly. That it does so should not be taken to imply a judgement by us that all or any cohabitants without children should necessarily be included in any new scheme. That is a matter for consultation. Moreover, it is likely that, in practice, the principles that we have in mind would more often be satisfied in cases involving cohabitants with children than those without.

The structure of this Part

- 6.6 The beginning of this Part deals with some important preliminary issues. We identify what we regard as key objectives which any reform should seek to attain. We consider in broad terms whether any new scheme should operate on the basis of fixed rules for division of assets or by way of a judicial discretion, structured by statutory principles.
- 6.7 We then turn to what is perhaps the most theoretically complex aspect of this consultation: the specific principles on which any financial relief between eligible cohabitants should be based. We set out why we have provisionally rejected certain principles (based on need, concepts of “partnership” or equal sharing, and what might be called “global accounting” for all of the parties’ contributions). We then examine our provisional proposals, which adopt principles based on economic advantage and economic disadvantage. We also consider the proper treatment of the costs of child-care.
- 6.8 We consider the range of orders which we think should be available to the courts and related issues about the use of particular types of order, in particular periodical payments and the relevance of the clean break principle.
- 6.9 We consider how any new scheme would interact with existing parts of the law, including claims under the law of trusts and estoppel, Schedule 1 to the Children Act and ancillary relief on divorce.
- 6.10 Our principal concern in this Part is to consider the basis on which remedies could be provided between the former cohabitants themselves. But we shall inevitably have to touch on the existing remedies for the parties’ children, particularly in relation to the interaction of Schedule 1 to the Children Act 1989 with any new scheme operating between the adults. We also consider the range of people against whom an order under that legislation can be made, and ask whether it should be extended to include cohabitants one or both of whom are not parents of the child in question.
- 6.11 We end with a discussion of issues relating to those difficult cases where assets are extremely limited, or are exceeded by the parties’ debts.

The rest of the paper

- 6.12 This Part of the paper seeks to explain the basis on which we consider financial relief ought to be granted by the courts. Part 7 examines how we think those principles could work, and some of the difficult questions that they raise, in the context of some hypothetical cases. This Part and Part 7 are therefore closely related. At various stages in this Part, we shall cross-refer readers to examples in Part 7 which illustrate the point being discussed. The examples in Part 7 will provide consultees with a further opportunity to consider eligibility before our detailed discussion of that in Part 9.
- 6.13 We go on to consider in Part 8 the possible implications of a new scheme of financial relief on separation for remedies on death, before turning in Part 9 to eligibility to apply for remedies on both separation and death.
- 6.14 We have already provisionally proposed that any new scheme should apply by default to those couples whose relationship satisfies statutory eligibility

requirements unless they have, by agreement, opted out of the scheme. We discuss that issue in Part 10.

NOT EXTENDING MATRIMONIAL LAW TO COHABITANTS

- 6.15 Before we turn to the features of any new scheme, we must address the question of whether reform could in fact best be effected simply by extending existing matrimonial law to cohabitants.
- 6.16 Some jurisdictions¹ have responded to the problems faced by cohabitants on separation by extending all or part of the scheme applicable to spouses on divorce to certain eligible cohabiting relationships, commonly those that have either lasted a prescribed minimum duration (two or three years) or produced a child. Those whose relationships are not eligible for inclusion in the scheme are left to the general law.
- 6.17 Some commentators have argued that the most appropriate reform in this jurisdiction would be to extend Part II of the Matrimonial Causes Act 1973 (which applies to divorcing spouses²) to cohabiting parents and other cohabitants of, say, two years' standing.³
- 6.18 Such a proposal would be appealing to some and wholly objectionable to others. It raises two distinct issues:
- (1) whether it is proper to apply the same regime of financial relief on separation to both spouses and cohabitants, whatever that law might be; and
 - (2) whether the law currently applying to spouses and civil partners is suitable for cohabitants.
- 6.19 Some take the view that, as a matter of principle, the remedies available between spouses and civil partners should be different from those (if any) applying between cohabitants, in order to preserve the legally distinctive nature of marriage and civil partnership. From a different perspective, others argue that continued difference is needed in order to protect and respect the diversity of cohabitation and the choice to cohabit instead of marry.⁴
- 6.20 By contrast, others argue that since the law's purpose in this context is essentially remedial, the same law for financial provision on relationship breakdown should apply to spouses and cohabitants, as the form of the

¹ For example New Zealand, some Australian states, some Canadian provinces.

² See extracts in Appendix A. Identical provisions in Civil Partnership Act 2004, sch 5, apply to civil partners on dissolution.

³ See, for example, A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) and R Bailey-Harris, "Law and the unmarried couple – oppression or liberation?" (1996) 8 *Child and Family Law Quarterly* 137.

⁴ See R Deech, "The Case Against the Legal Recognition of Cohabitation" (1980) 29 *International and Comparative Law Quarterly* 480; M Garrison, "Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation" (2005) 52 *University of California Los Angeles Law Review* 815.

relationship makes no difference to the sorts of problems arising on relationship breakdown.⁵

- 6.21 This dispute turns on the answers to a variety of difficult questions: what we think the function of the law in these cases should be: whether it does or should extend beyond a purely remedial function, in particular to a concern for supporting marriage or rewarding a particular type or level of commitment; whether our view about the nature of the remedy required, and what “fairness” requires, might be affected by whether or not the parties’ relationship has been formalised in marriage or civil partnership; and whether the institution of marriage can meaningfully be supported, either practically or ideologically, by making different provision for financial relief on separation for spouses and cohabitants.
- 6.22 To the extent that some of these questions require a political or social judgement, they are not ones to which we can give a final answer. We can only make relatively technical proposals on how to implement what we believe, at this stage, is likely to be the consensus.⁶ Moreover, this project is examining the position of cohabitants, and not reviewing the law of ancillary relief on divorce. We therefore cannot examine the suitability of the Matrimonial Causes Act regime for those to whom it does currently apply or any reforms that might be made to it. Whether or not applying the same law to spouses and cohabitants is, as a matter of principle, the right approach, the only issue within our remit is whether the Matrimonial Causes Act regime is appropriate for cohabitants at all.
- 6.23 We address that question in the course of examining the principles which might underlie a scheme for cohabitants, and conclude that in several respects the Matrimonial Causes Act 1973 regime is not appropriate for cohabitants.⁷ Although the Act provides a broad discretion which might help the courts to respond to the diversity of cohabiting relationships,⁸ we consider that some of the principles used under that legislation may not be regarded by many consultees as appropriate for cohabitants at all. We consider that it would be preferable to devise a scheme for cohabitants, which identifies specific, limited grounds on which financial relief should be granted in such cases.

⁵ See, for example, R Bailey-Harris, “Law and the unmarried couple – oppression or liberation?” (1996) 8 *Child and Family Law Quarterly* 137; and “Dividing the Assets on Breakdown of Relationships Outside Marriage” in R Bailey-Harris (ed), *Dividing the Assets on Family Breakdown* (1998); and Mr Justice Munby, “Families Old and New – the Family and Article 8” (2005) 17 *Child and Family Law Quarterly* 487, at 496-7; and para 5.83.

⁶ But see discussion in Part 5 on the general issue of extending any form of financial relief to cohabitants.

⁷ In seeking principles suitable for the resolution of cohabitants’ cases, it is inevitable that we shall venture into territory covered by the Matrimonial Causes Act and its case law – given the breadth of that jurisdiction it would be impossible not to do so. The difference would lie in those factors and principles that were *not* transposed from ancillary relief to a scheme for cohabitants and the statutory delineation of the court’s discretion in cohabitants’ cases.

⁸ A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) pp 116-117.

KEY OBJECTIVES FOR REFORM: FAIRNESS AND CERTAINTY

6.24 We consider that the following key objectives should be pursued in devising any new scheme of financial relief for cohabitants on separation. In order to deal adequately with criticisms of the current law, any new scheme should aim to:

- (1) produce fair, principled outcomes;
- (2) be sufficiently flexible to relate readily to the various circumstances of those to whom it would apply;
- (3) provide an acceptable degree of certainty of outcome and consistency of results;
- (4) be clear and readily comprehensible; and
- (5) be practical in its application.

6.25 Most people would agree that the division of property between cohabitants when they separate should be “fair”. As we have seen, one of the principal criticisms of the current law is its unfairness. But reaching a consensus on what fairness comprises may be elusive. We must also acknowledge that, in view of the huge variety of cohabiting relationships, it is no easy task to provide a fair resolution in all cases and in relation to all of the numerous problems that cohabitants face on separation. Moreover, as we noted in Part 5, the selection of appropriate eligibility criteria is as pertinent to the issue of fairness as the substantive principles on which relief would be granted to eligible applicants.

6.26 We believe that we must adopt an approach which is principled. Any reform must be coherent, both in terms of its underlying rationale and in terms of the particular basis on which remedies are to be granted. It must be clear about what it is seeking to achieve.

6.27 It is also important, particularly in view of the deficiencies of the current law in this regard, that we provide a scheme which combines fairness with as much clarity and certainty of outcome as is possible in all the circumstances. This is important not only for those who litigate their disputes, but also for the far larger numbers of couples who are likely to settle their cases privately.⁹ Lack of legal clarity and unpredictability of outcome makes the task of legal advisers difficult and the burden on individuals seeking to resolve their disputes without legal advice particularly heavy. It also makes it more likely that couples will seek legal

⁹ Current divorce figures may provide guidance here: in 2004, c.166,000 decrees of divorce were granted; by contrast, only c.31,500 orders for periodical payments, lump sums, property adjustment and pension sharing were made, of which c.12,000 were made by consent and c.15,600 were made for a child; a further c.58,000 ancillary relief orders are described as having been made by consent. This leaves only a small proportion of orders being made by adjudication: Judicial Statistics Annual Report 2004 (2005) Cm 6565, table 5.7. See also findings of G Davis, J Pearce, R Bird, H Woodward and C Wallace, *Ancillary Relief Outcomes: A pilot study for the Lord Chancellor's Department* (1999): only 4.6% of cases in their study of 301 court files were adjudicated, rather than settled (7.3% at final hearing) or based on applications submitted with the consent of both parties (69.4%), cited in J Eekelaar, M Maclean and S Beinart, *Family Lawyers: the divorce work of solicitors* (2000) p 16.

advice,¹⁰ thus increasing their transaction costs even if they do ultimately settle the case without contested litigation.

- 6.28 Moreover, the more robust party might be encouraged by unclear law to “have a go”, even if their claim seemed to lack merit. Where there is an imbalance of power in the relationship, or one party is risk averse, the weaker or more cautious individual faced by unclear law might prefer, as an applicant, to settle for considerably less than what a court might have ordered, or, as a respondent, to settle a speculative claim from the other party, rather than risk court proceedings.
- 6.29 We consider that the selection of appropriate principles should be guided by available research evidence about the wide range of cohabiting relationships in England and Wales,¹¹ the way couples manage their finances, the economic consequences of parenthood, and so on.¹² This would help us to devise a scheme which is suited to the circumstances of those persons whom it would affect. We have already drawn on some of this material in Part 4 in discussing the perceived unfairness of the current law in light of the economic impact of parenting. We shall refer to other research in the course of this Part.
- 6.30 If the objectives outlined in paragraph 6.24 were attained, a new scheme would facilitate the settlement of disputes, and avoid undue forensic complexity. In turn, the process would be accessible to those acting without legal advice or representation. A new scheme would be quicker and cheaper to operate, and more easily comprehensible than the complex set of legal proceedings and principles which cohabitants currently have to negotiate on separation.
- 6.31 We must, however, acknowledge that any reform of this difficult subject must have its limitations. We cannot hope to provide a system that churns out intellectually coherent, substantively fair outcomes by the simple turn of a handle. Any new law, like the present law, will inevitably involve some complexities that are beyond the reach of most non-lawyers. Moreover, given the diversity of cohabiting relationships and the need to cater appropriately for a variety of situations, a simple scheme may not be the most suitable one. Our challenge is to find a satisfactory compromise between the goals of fairness, flexibility, certainty, clarity and practicality.

FIXED RULES OR PRINCIPLED DISCRETION?

- 6.32 The attempt to balance fairness with certainty raises questions about the basic mechanisms whereby financial relief should be granted. It is necessary to steer a careful course between the “Scylla of unfettered discretion and the Charybdis of

¹⁰ Assuming that they can afford such advice or will be eligible for public funding.

¹¹ It is unwise to rely to any significant extent on data about cohabitation in other jurisdictions, where the social, cultural, legal and public policy framework, particularly regarding employment, tax and welfare benefit law, may provide a very different context for cohabitants from that existing here.

¹² Reform in New Zealand has been criticised for failing to consider the research evidence about cohabitants in determining what sort of regime might be appropriate for them: V Grainer, “What’s Yours is Mine: Reform of the Property Division Regime for Unmarried Couples in New Zealand” (2002) 11 *Pacific Rim Law and Policy Journal* 285.

rigid formula”.¹³ As one judge has observed extra-judicially, “the optimum tension between the predictability which flows from firm rules and the flexibility to secure justice in the individual case is notoriously difficult to achieve”.¹⁴

- 6.33 Should the courts’ jurisdiction be based essentially on fixed rules, to which limited exceptions might be made? Or should the court instead exercise a discretion structured by express statutory principles, the application of which in an individual case might require the court to make an evaluation of the parties’ particular circumstances? This may seem a rather abstract question to be posing. But we think it is helpful at the outset of devising a new scheme to consider the choice between systems based on fixed rules and those based on a set of principles that would guide judicial discretion and those resolving their disputes privately.

Fixed rules

- 6.34 The choice between fixed rules and principled discretion is perhaps an easy one to make from an English family law perspective. We are used to discretion in our family law, certainly in relation to court-based remedies. Notably, our system of financial relief on divorce is based on a statutory discretion.¹⁵ This in itself might make the suggestion of a rule-based system for cohabitants in this jurisdiction seem inappropriate.
- 6.35 Many jurisdictions do have rule-based systems for family property generally, cohabitants included.¹⁶ These systems tend to involve the parties sharing equally in a specific pool of assets (rather than all of the assets owned by the parties) on separation.¹⁷ Legislation defines what property falls inside and outside the

¹³ S Cretney and J Masson, *Principles of Family Law* (6th ed) p 497.

¹⁴ Mr Justice Wilson, “Ancillary Relief Reform: Response of the Judges of the Family Division to Government Proposals” (1999) 29 *Family Law* 159.

¹⁵ Matrimonial Causes Act 1973, Part II; Civil Partnership Act 2004, sch 5. When the Law Commission has previously considered introducing systems of co-ownership or community of property for spouses, it was always envisaged that discretionary ancillary relief would remain available in the event of divorce: see Financial Provision in Matrimonial Proceedings (1969) Law Com No 25, para 67; First Report on Family Property: A New Approach (1973) Law Com No 52, para 56; Third Report on Family Property: Matrimonial Homes (Co-ownership and Occupation Rights) and Household Goods (1978) Law Com No 86, para 1.179 and following; Matrimonial Property (1988) Law Com No 175, para 3.6 and 4.20.

¹⁶ See the community of property, deferred community and community of acquests regimes applying in many other jurisdictions in Europe and beyond: see current research by E Cooke, A Barlow, T Callus, A Akoto and P Petkoff; their most recent published paper is E Cooke, A Akoto, A Barlow and T Callus, “Community of Property – A Regime for England and Wales? An Interim Report” [2005] *International Family Law* 133.

¹⁷ See for example Sweden: Cohabitees Act 2003; New Zealand: Property (Relationships) Act 1976, which applies equally to spouses, civil union partners and *de facto* partners with children or of three years’ standing (equal sharing is supplemented by discretionary capital awards based on economic disparity (s 15 of the 1976 Act) and by discretionary awards of maintenance (under the Family Proceedings Act 1980). Note also limited rules ascertaining ownership of some assets under Family Law (Scotland) Act 2006, ss 26 and 27; the effect of these provisions may, in many cases, be superseded by the court’s new adjustive powers on separation under s 28.

relationship property pool.¹⁸ Such “relationship property” schemes reflect the idea that couples who live together have embarked on an equal partnership, and that property relating to that partnership should be divided equally on separation.¹⁹

- 6.36 A system under which each party has a clear, rule-based entitlement over a given pool of assets has many obvious attractions.²⁰ However, the central problem with any rule-based system is that the certainty which it confers comes at significant cost. If the rules are too simple, although they will in consequence be readily comprehensible to non-lawyers, they may lead to unfairness in individual cases which depart from the norm on which the rule was based. If the rules attempt to deal exhaustively with the full variety of circumstances to which they might have to be applied, by creating exceptions to the basic rule or sub-rules for numerous, subtly different situations, they are likely to become too complicated. Not only does this render them considerably less transparent, they may also be liable to attract a high rate of error in their application.²¹ Moreover, the creation of exceptions only makes sense if it is accepted that the basic rule is appropriate for most of the cases to which it would on the face of it apply. If that is not the case, the rule itself becomes hard to justify.
- 6.37 Moreover, rule-based systems always have the potential for dispute at the margins. In relationship property schemes of the sort described above, the definition of what assets falls within the property pool and is therefore subject to the rule must be comprehensive. Identification of the relationship property may be complex, lead to argument between the parties and, like any rule, generate arbitrary results.²² For example, if the inclusion of a particular asset within the pool depends on the date of its acquisition, and on whether that was before or after the commencement of the relationship, dispute about the precise chronology may arise. This may be especially problematic where cohabitants are involved, given the inherent fluidity of the start and end of cohabitation.²³
- 6.38 These problems call into question the suitability of any rule-based scheme which would apply by default to eligible cohabitants in England and Wales. A rule-based system is unlikely to have the flexibility necessary to respond to the diversity of

¹⁸ Schemes adopting this approach generally exclude from “relationship property” gifts and inheritances to one party, as well as property acquired by either party prior to the cohabitation (save where acquired in anticipation of and for the purpose of the relationship). In some other jurisdictions, the parties’ shared home is often included *even if* acquired by one party alone prior to the relationship. Debts may also be included.

¹⁹ See below para 6.92.

²⁰ Compare some commentators’ preference for rights conferred by property law over discretionary family law remedies: A Bottomley, “Our property in trust: things to make and do”, in S Scott-Hunt and H Lim, *Feminist Perspectives on Equity and Trusts* (2001).

²¹ See the history of the Child Support Act 1991 – originally a complex formula, rendered more complex in 1995 in order to try to accommodate various additional factors; reform in 2000 abandoned that approach in favour of a much simplified formula, modifiable by the exercise of administrative discretion in limited circumstances.

²² See, for example, criticisms of the Swedish regime’s treatment of the shared home: E Ryrstedt, “Legal Status of Cohabitants in Sweden”, in J Scherpe and N Yassari (eds), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften* (2005).

²³ N Peart, M Briggs and M Henaghan, *Relationship Property: Consolidated Legislation and Analysis* (2001) p 18.

cohabiting relationships. There is huge variety amongst cohabiting relationships, particularly in terms of the nature and level of commitment and the financial interdependence between the parties. Even if access to a rule-based scheme were strictly limited by stringent eligibility criteria, it is doubtful whether it could safely be assumed that the chosen rule was appropriate for the chosen class, whatever it was.

- 6.39 This is particularly important in view of the fact that we are proposing an opt-out regime, which would apply automatically to all relationships satisfying the eligibility criteria. There is only so much that can be done by eligibility criteria to isolate only (and identify all of) those cases for which the chosen rule might be appropriate. Some deserving cases might end up being excluded, and some apparently undeserving ones included. This is the inevitable result of eligibility criteria. However, unless complex or modified by discretion, the rules themselves would not be able to operate as a further filter for ensuring fair results in the cases that did fall within the scheme. Nor do we consider it would be appropriate to rely on the opt-out facility as a mechanism for removing from the ambit of the scheme those parties for whom the rule would patently not be appropriate.
- 6.40 We consider that the essential balance between fairness and certainty required in an area of law dealing with the diversity of intimate relationships is not readily achievable by a rule-based system. It may only be possible to achieve a better balance by injecting a large measure of judicial discretion into the operation of any exceptions. But then much of the certainty apparently offered by the rules might be lost. We therefore take the view that fixed rules for the resolution of financial and property disputes when cohabitants separate are unlikely to offer the right model for reform.

Preference for discretion structured by principles

- 6.41 We consider that it would be preferable to promote a more flexible approach, enabling the courts to respond more closely to the circumstances of individual relationships and provide a fair outcome for both parties. Such an approach, necessarily based on the exercise of judicial discretion, would fit better with our existing family law. Discretion has a greater capacity than rules to accommodate the facts of individual cases and takes some pressure off the eligibility criteria. However, excessive reliance on discretion may be open to criticism on the grounds that it inevitably entails a loss of certainty.
- 6.42 We consider that the uncertainty inherent in discretion can to some extent be limited by underpinning the exercise of the judges' discretion with a firm foundation of principles, expressly stated on the face of the legislation. These principles should indicate clearly what it is that the courts are being expected to achieve by the exercise of their discretion in each case. The principles should provide (i) a justification for the grant of some relief in the individual case (in addition to the applicant's having satisfied the eligibility criteria), and (ii) a guide to the quantification and nature of that relief.²⁴

²⁴ See P Parkinson, "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 *Federal Law Review* 1.

- 6.43 Unlike fixed rules, which must be applied mechanically to relevant facts, principles would operate more flexibly in pursuit of a fair outcome. The principles would indicate to the court what fairness is understood to entail for this purpose. While carrying substantial weight in shaping the nature of the inquiry required to devise a fair outcome, they would leave room for the solution to be responsive to individual features of the case.
- 6.44 However, while leaving some room for flexibility, the governing principles should be transparent and readily comprehensible in order to promote greater certainty of outcome. This is necessary if the law is to enable parties to reach their own agreements regarding the division of property on separation without the need for litigation or legal advice, and without the risk-averse being driven to accept unfairly low settlements or to accede to unmeritorious claims.
- 6.45 We provisionally reject the view that any new scheme should take effect by reference to fixed rules for property division. Instead, we provisionally propose that the courts should exercise a discretion structured by principles which determine the basis on which relief, if any, is to be granted on separation. Do consultees agree?**

PRINCIPLES UNDERPINNING FINANCIAL RELIEF ON SEPARATION: AN OVERVIEW

- 6.46 As we have already discussed, we consider that a discretionary regime, structured by express principles justifying the grant of relief and offering a guide to the valuation and nature of any relief ordered, is more likely than a rule-based system to provide a suitable scheme for cohabitants.
- 6.47 We now turn to the most difficult issue: the specific principles which should structure the exercise of the discretion under a new scheme. We explore a range of principles that could be used in a new scheme for financial relief on the separation of eligible cohabitants. It may assist if we summarise at the outset the principles which appear to us to offer the most suitable basis for financial relief.
- 6.48 There are several approaches that we provisionally reject:
- (1) we do not consider that remedies should be available on the basis of need alone;²⁵
 - (2) we consider that a “partnership” principle which treated the parties’ contributions to the relationship as *prima facie* justifying an equal division of all or part of their assets would not suit the variety of cohabiting relationships, however tightly the eligibility criteria were drawn;²⁶ and
 - (3) we reject an approach that would seek to evaluate the relative economic value of all of the contributions (of whatever sort) and economic

²⁵ See para 6.62.

²⁶ From para 6.92.

sacrifices made by the parties over the course of their relationship and share the property between them accordingly: “global accounting”²⁷

- 6.49 In light of the first two conclusions, in particular, we provisionally reject the suggestion that the Matrimonial Causes Act 1973 regime should be applied to cohabitants. In so far as that scheme involves the possibility of broad needs-based liability and the equal division of assets on a partnership basis, it would not be appropriate for cohabitants. It would therefore seem preferable to devise a specific scheme which expressly articulates those principles which we do consider appropriate for cohabitants.
- 6.50 We provisionally propose that claims for cohabitants should be restricted to circumstances where the applicant can establish that the economic effects of the relationship, positive and negative, are not fairly shared between the parties on separation. Specifically, such a claim would involve examination of:
- (1) any economic advantage retained by the respondent on separation (whether of capital, income or earning capacity) which arose from the applicant’s contributions during the relationship;²⁸ and/or
 - (2) any economic disadvantage (in terms of capital, income or earning capacity) sustained by the applicant on or after separation as a result of contributions made during the relationship, or to be sustained as a result of continuing child-care responsibilities following separation.²⁹
- 6.51 We also explore the issue of whether the courts should have a specific power to make awards in relation to the costs of child-care, to the extent that they are not covered by relevant tax credit entitlements.³⁰

²⁷ From para 6.115.

²⁸ From para 6.128.

²⁹ From para 6.150.

³⁰ From para 6.195.

Some key terms used

Need – a principle whereby remedies would be aimed simply at maintaining an applicant who was not self-sufficient following separation.

Contributions – domestic, financial or other contributions to relationship and the welfare of the parties and their children, and any associated **economic sacrifices** made as a result.

Partnership – an approach under which the parties' relationship is viewed as having entailed a "partnership" to which each made distinctive, but equally valuable, contributions, potentially justifying an equal share of all or some of a particular property pool.

Global accounting – an approach that would seek to evaluate the relative economic value of all of the contributions (of whatever sort) made by the parties over the course of their relationship and share the property between them accordingly.

Economic advantage – a principle rewarding contributions made by the applicant which have resulted in the respondent retaining some economic benefit (in terms of capital, income or earning capacity) to the exclusion of the applicant at the point of separation. We use the expression **retained benefit** accordingly.

Economic disadvantage – a principle addressing the economic sacrifices (in terms of capital, income or earning capacity) incurred by the applicant as a result of his or her contributions, for example the impairment of earning capacity as a result of child-care responsibilities.

Clean break – a principle requiring the court to consider whether it would be appropriate to make orders which involve terminating the financial obligations between the parties as soon after separation as is just and reasonable.

6.52 A claim for financial relief under the two core principles would proceed as follows:

- (1) A claim could only be made at all where an eligible applicant were able to prove that relevant economic advantage or disadvantage had arisen. If that were not proved, no relief could be granted.
- (2) Assuming that the existence of such economic advantage or disadvantage had been proved, it would then be necessary in broad terms to quantify the scale of the relevant advantage or disadvantage.
- (3) Finally, in light of the economic advantage or disadvantage, the court would then decide what financial relief, if any, ought to be granted. The court would, at this stage, take account of a number of other factors, including the clean break principle and the needs of the parties and any

relevant children, in deciding how the applicant's claim should be met in practical terms.³¹

- 6.53 It might be desirable to add a further threshold for successful claims, which would require the applicant to show that substantial or (more strongly) manifest unfairness would arise if no relief were granted.³²
- 6.54 Although we do not consider that the fact that the applicant has future needs itself provides a justification for financial relief between cohabitants, the principles that we are provisionally proposing would address the applicant's needs to the extent that they reflected an economic disadvantage sustained or a failure to provide reparation in respect of a retained benefit.
- 6.55 The ideas of benefits retained and sacrifices incurred, which the principles of economic advantage and economic disadvantage would be designed to remedy, have resonances with the general law. The law of trusts rewards certain types of contributions according to their positive value.³³ The law of proprietary estoppel will, in some circumstances, provide a remedy for reliance losses. However, as we saw in Part 4, neither body of law recognises cohabitants' contributions in a systematic way, either positively or in terms of the sacrifices associated with them, in dividing the parties' assets on separation.
- 6.56 The principles we are provisionally proposing are similar to those recently enacted for claims between cohabitants, but not yet tested in litigation,³⁴ in Scotland.³⁵ However, we have sought to develop these principles in our own terms. Our discussion of them may differ in some respects from a Scottish analysis of the issues.
- 6.57 It is essential to appreciate that, although the claim under our proposed scheme would be based on finding relevant economic advantage or disadvantage, the courts ought not to be required to quantify awards by applying strict compensatory principles. The claim being made by the applicant would not be in tort, contract, or even restitution. It would be a family law claim to the exercise of judicial discretion in order to obtain redress for any significant economic impact of the relationship and its termination.
- 6.58 The purpose of the principles would be to restrict the scope of possible claims and structure the judicial discretion, to make clear to the court what the applicant would have to prove (and what sorts of evidence might be relevant) in order to

³¹ See from para 6.216 and from para 6.255.

³² From para 6.230.

³³ In some jurisdictions, the general law of quantum meruit will recognise the positive value of non-financial contributions: eg *Buysers v Dean* [2002] NZFLR 1 (New Zealand).

³⁴ The principles adopted for cohabitants in Scotland derive from Scottish divorce law, where they run alongside a number of other principles. Although there is case law addressing them in that context, they have yet to be tested as free-standing principles.

³⁵ Family Law (Scotland) Act 2006, s 28, which came into force on 4 May 2006: the Scottish legislation deals separately with the economic burden of child-care following separation, whether it involves the costs of child-care or the primary carer's inability to take up paid employment. We discuss the latter in terms of economic disadvantage following separation.

establish a claim on separation. The court would be expected to identify any relevant economic advantage or disadvantage arising from the relationship, and to take account of those factors in considering what financial relief, if any, might be fair.

- 6.59 In many cases, it would not be possible (or practical) to calculate the precise value of the economic advantage conferred or, in particular, the economic disadvantage sustained as a result of the relationship, and it might be disproportionate, in terms of costs, to attempt to do so. The principles would therefore indicate the ingredients of a broadly fair outcome on separation, not supply a mathematical formula which would dictate the order to be made. Moreover, we shall see that there are various practical limiting factors (at the third stage identified above at paragraph 6.52) which would necessarily constrain what the court would be able to do, not least the extent of the available assets and the financial needs and responsibilities of the respondent.
- 6.60 Later in this Part, we shall discuss the types of orders which we think should be available to the courts exercising a principled discretion under a new scheme to grant what we shall refer to in general terms as “financial relief”.³⁶ But it may be helpful to indicate at the outset the range of orders that we have in mind, so that consultees can consider our proposals regarding the principles on which relief should be granted with possible orders in mind. In broad terms, we consider that the courts should be able to use the full range of orders for financial provision, property adjustment and pension sharing that they currently use in matrimonial cases, including periodical payments, lump sums, property transfers, orders for sale, and so on.
- 6.61 One final note of introduction. In this and subsequent Parts, we refer to “applicants” and “respondents”. If the case is litigated, whichever party brings the case to court would be formally designated as the applicant. Although many cases, we hope, would not come to court at all, the language of applicant and respondent remains useful. The decision about what financial relief to grant would turn on an evaluation of each party’s contributions. It is likely that in many cases each party would put forward arguments to the effect that they had conferred some economic advantage on the other, or sustained some disadvantage. We therefore use the word “applicant” to refer to the party making a particular claim in relation to his or her own contributions, and “respondent” to refer to the party against whom that argument is being made. Which party was ultimately required to make a transfer of assets to the other would depend on the balance of fairness emerging from an assessment of the relevant claims. So the “applicant” for the purposes of a particular argument might end up being the one who had to transfer property to the other party. In some cases, action might be required of both parties, if resources belonging to each of them were necessarily affected by the settlement reached or order made.³⁷

³⁶ See para 6.246 below.

³⁷ As in ancillary relief cases on divorce. For example, jointly held property is divided so that one party obtains the property and takes on the mortgage while the other receives some compensatory lump sum or other award, such as the benefit of an endowment policy.

ALLEVIATING FINANCIAL HARDSHIP AND RELIEVING NEED

The fact of “hardship” or “need” as a basis for relief?³⁸

- 6.62 We have described this project as one which aims to deal with the financial hardship that may be sustained at the end of a cohabiting relationship.³⁹ However, in our view, it would not be appropriate to use financial hardship itself as the basis for remedies. The mere fact that one party experiences financial hardship on or after separation does not of itself justify requiring the other party to relieve it, for reasons we explain below.
- 6.63 The same could be said of relieving need. The concept of need is in some ways more subtle than hardship. Like hardship, it can be measured objectively, but it can also be understood in relative terms, by reference to the particular standard of living to which the applicant has become accustomed, particularly over the course of a long relationship.⁴⁰
- 6.64 Careful justification is needed to require one adult to meet the needs of another (in either sense) or to relieve the hardship experienced by another. Some commentators have questioned whether need ought to be used as a basis for remedies on divorce,⁴¹ and it is certainly debatable whether need should form any part of a new scheme between cohabitants who have separated. The American Law Institute has highlighted two fundamental problems with the use of “need” as a basis for remedies. First, there is no clear reason why the obligation to support a needy individual (or, put another way, an individual experiencing hardship) should be placed on a former partner, rather than on other (blood) relatives or, via the state, on society in general. Secondly, as we have seen, the law struggles to define “need” consistently: why are the “needs” of the rich in this context so much greater than those of families who are able only to provide for themselves at subsistence level?⁴²
- 6.65 Need (in both senses) is a theme familiar to ancillary relief on divorce. Where the parties have married, the fact of their formal legal commitment may be taken as good evidence that the parties have assumed a responsibility to support each other, certainly during the relationship, when the law imposes an obligation of mutual support.⁴³ It may often be justifiable, subject to the potentially countervailing force of the clean break principle,⁴⁴ for such responsibility to

³⁸ See Example 5 in Part 7.

³⁹ See The Law Commission: Ninth Programme of Law Reform (2005) Law Com No 293, para 3.6.

⁴⁰ See the concept of “reasonable requirements” used in big money divorce cases, at least until *White v White* [2001] 1 AC 596.

⁴¹ Ideological objection is taken to the necessarily “dependent”, even supplicant, position in which this puts applicants for financial relief: see, for example, R Deech, “The principles of maintenance” (1977) 7 *Family Law* 229.

⁴² American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) p 789.

⁴³ See for example Matrimonial Causes Act 1973, s 27, and equivalent provisions of the Civil Partnership Act 2004.

⁴⁴ See para 6.265.

extend beyond the point of divorce in the form of needs-based remedies.⁴⁵ It may also be appropriate, particularly following a long marriage, for awards on divorce to seek, as far as the available assets allow, to maintain a living standard for the parties comparable to that enjoyed during the relationship.⁴⁶

- 6.66 But, whatever the position applying between spouses, we think it would be inappropriate for remedies between cohabitants on separation to be available simply on the basis that the applicant was “in need” or experiencing hardship.⁴⁷ Cohabitants currently have no legal obligation of mutual support during their relationships, let alone after the end of the relationship.⁴⁸ Even if eligibility to apply for relief were confined to relatively long cohabiting relationships, there may be no good reason for concluding that the parties had assumed that sort of responsibility towards each other and so for imposing a liability that is potentially open-ended. Needs-based liability, as such, is therefore hard to justify.⁴⁹

Locating the underlying cause of hardship or need: parties’ contributions

- 6.67 In view of the fact that many of the cohabitants who would benefit from reform currently experience hardship at the end of their relationships, the rejection of hardship and need as bases for relief might appear misguided and harsh. We must therefore make a careful and important qualification.

- 6.68 It is appropriate to distinguish between two categories of hardship or need, according to their cause:

- (1) need unrelated to the relationship, for example, caused by illness, disability or unemployment; and

⁴⁵ Whether the orders made in divorce cases are properly understood as needs-based, despite the prominence of needs in judges’ reasoning, is a complex question which we cannot address in depth here. Note the view of Hale J (as she then was) in *SRJ v DWJ* [1999] 2 FLR 176, 182, that the mere fact of need would be insufficient to justify even any award of maintenance in a short, childless marriage; see also *N v N (Consent Order: variation)* [1993] 2 FLR 868. See also n 50 below on whether awards on divorce will cover needs unconnected with the marriage.

⁴⁶ Such awards may properly be understood as not being needs-based, but rather reflecting an entitlement arising from the parties’ contributions to a long marriage: see the abandonment of the “reasonable requirements” ceiling in *White v White* [2001] 1 AC 596. In so far as such reasoning reflects a “partnership” approach to ancillary relief awards, we consider it below.

⁴⁷ We take this view even though some jurisdictions have extended (at least partly) needs-based remedies to cohabitants, including several Australian states and Canadian provinces; New Zealand law offers needs-based maintenance to cohabitants in addition to the division of relationship property, but the scope of that maintenance remedy is unclear: see J Miles “Financial Provision and Property Division on Relationship Breakdown: an analysis of the New Zealand legislation” (2004) 21 *New Zealand Universities Law Review* 268.

⁴⁸ Although, perhaps somewhat inconsistently, means-tested welfare benefits law operates on the assumption – unenforceable between the parties as a matter of private law – that cohabitants do support each other; the “cohabitation rule” aggregates couples’ incomes and assets in assessing eligibility for means-tested benefits.

⁴⁹ We acknowledge that the remedy currently available to the surviving cohabitant on death under the Inheritance (Provision for Family and Dependants) Act 1975 is needs-based. We shall examine the implications for remedies on death of our views on the proper basis for remedies on separation in Part 8.

- (2) need deriving from the parties' contributions to the relationship, for example, arising from one party's having given up paid employment in order to care for the parties' children.
- 6.69 In most divorce cases (that is, where the available assets do not exceed the parties' needs, and particularly where the parties have children) the court's decision will be driven pragmatically by the aim, so far as possible, to meet the present and future needs of both parties and their children, at least in so far as they fall in the second category.⁵⁰ Particular emphasis is given to the needs of whichever spouse will be the primary carer of the children following the parents' separation. Housing the children together with their primary carer is especially important, and the primary carer may, as a result, often receive more than half of the couple's joint assets.⁵¹
- 6.70 We consider that it is difficult to justify making a former cohabitant responsible for meeting the first category of needs, for the reasons suggested by the American Law Institute. By contrast, on the face of it, there is a case for at least some cohabitants to be required to meet needs falling within the second category.
- 6.71 However, the justification for a remedy in the second situation identified in paragraph 6.68 is not simply that the applicant is experiencing hardship or has needs. The reason why, in these circumstances, the respondent should have to provide relief is that the applicant's needs have arisen in consequence of the contributions made by the applicant to the relationship. Viewed in this light, the applicant's needs are no more than a symptom, in many but not all cases, of a rather different sort of claim: one based on the contributions made by the applicant to the relationship, and associated sacrifices, and the continuing economic impact of those contributions and sacrifices on each party at the point of separation.
- 6.72 A claim for financial relief formulated in those sorts of terms would be more satisfactory than one based on need. It would depend for its force not on the basis that the applicant was dependent or that the respondent had made a long-term commitment to the applicant, but that the applicant was entitled to some

⁵⁰ The current scope of needs-based liability on divorce is unclear. In particular, although disability appears in the statutory checklist, Matrimonial Causes Act 1973, s 25, we are not aware of any reported case law which unambiguously establishes that spouses may be required, following divorce, to meet needs of their ex-spouse associated with long-term illness or disability. The court in *Seaton v Seaton* [1986] 2 FLR 398 did not impose a continuing obligation on the wife to support her disabled husband. But see *K (formerly G) v G* [2004] EWHC 88 (Fam), [2004] 1 FLR 997. The Court of Appeal in *Fleming v Fleming* [2003] EWCA Civ 1841, [2004] 1 FLR 667 seemed to accept that such liability could in principle arise. See also *Bracklow v Bracklow* [1999] 1 SCR 420 (Canada).

⁵¹ The courts also attach importance to providing the other parent with accommodation suitable for the children's visits: *M v B (Ancillary Proceedings: Lump Sum)* [1998] 1 FLR 53; but there may not always be enough assets to enable the respondent to purchase a home: see for example *B v B (Financial Provision: Welfare of Child and Conduct)* [2002] 1 FLR 555. It seems that assets are often split in such a way that the primary carer gets the house, but receives no share in the pension, leaving that spouse vulnerable in the longer term: A Perry, G Douglas, M Murch, K Bader and M Borkowski, *How parents cope financially on marriage breakdown* (2000). Compare the big money cases often reported in the media, where equal sharing leaves each party with considerably more than either could ever meaningfully "need". The Law Society has suggested guidelines for the sharing of assets: *Financial Provision on Divorce: clarity and fairness* (2003) pp 14-15.

degree of financial relief in recognition of the contributions he or she made to the relationship.⁵²

The implications of basing financial relief on parties' contributions

- 6.73 It is proper to acknowledge that a principle based on the parties' contributions could, in theory, result in the making of awards which would go beyond simply alleviating financial hardship or relieving need, strictly construed. Unless a principle is framed expressly and exclusively in terms of hardship or need, it will always have the potential to provide wider remedies to those in need, and to justify the grant of financial relief to applicants who were self-sufficient and not experiencing hardship on separation. Principles based on parties' contributions inevitably rest on a broader concept of economic justice between couples at the end of their relationships.
- 6.74 However, many of those to whom any new law would apply may be in financially insecure positions on separation and so would gain essential, basic protection as a result of such relief being available. Moreover, since the available assets would be limited in most cases, rarely exceeding the parties' respective needs, the courts would in practice be unable to do more than simply alleviate hardship, whatever the theoretical basis of the applicable principles might be. It will never be possible to eliminate financial hardship on relationship breakdown, certainly not via private law alone: the division of the resources that had supported one household between two will often leave both parties short. A degree of financial hardship may therefore continue to be experienced by both.⁵³
- 6.75 But the key point for present purposes is that while the effect of the remedies may be to relieve need, need itself would not provide a satisfactory basis for the award of the remedy. That justification should lie, in our view, in the parties' contributions and associated sacrifices.
- 6.76 We consider that the mere fact that one party has financial or other material needs should not in itself justify the grant of financial relief from the other party on separation. Do consultees agree?**
- 6.77 We consider that the court's decision whether to grant financial relief and, if so, of what value, should be based on principles that focus on:**
- (1) the contributions which have been made by each party to the parties' joint household and to the welfare of the other party and other members of their family, in particular their children; and**
 - (2) the contributions which each shall make to the welfare of their children following their separation.**

Do consultees agree?

⁵² See American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) p 790; R Bailey-Harris, "Dividing the Assets on Breakdown of Relationships Outside Marriage: Challenges for Reformers" in R Bailey-Harris (ed), *Dividing the Assets on Family Breakdown* (1998) p 86.

⁵³ Particularly cases involving limited assets and debts: see paras 5.95 and 6.298.

CONTRIBUTIONS AND ASSOCIATED SACRIFICES

Introductory observations

- 6.78 If a new scheme for cohabitants is to offer any improvement on the current law applying to them on separation, it is important that all types of contributions, financial and non-financial, direct and indirect, to the economic and other welfare of the couple and their family, and the associated economic sacrifices made, should be capable of giving rise to a claim. This is not to say, however, that all eligible applicants would or should necessarily succeed in obtaining relief, simply by virtue of having made contributions. As we shall see, there are various ways in which the relevant principles could operate to minimise the circumstances in which claims could be made, without unfairly denying claims to those who should be able to obtain relief on separation.
- 6.79 During many relationships, both partners will make a range of financial and non-financial contributions to their life together. Cases in which the parties' roles are neatly divided into homemaker and breadwinner are less common than they were. Increasing numbers of women are working part-time or full-time, even after becoming mothers. The law needs to be able to respond to these mixed contributions.
- 6.80 It may also be desirable to grant relief without requiring proof that the applicant's contributions have facilitated the acquisition of specific (or any) property, in particular where we are considering the economic sacrifices associated with non-financial contributions. Detaching contributions from the acquisition of property (whether generally or in relation to specific assets) means that new issues of principle, and related practical problems of proof and quantification, arise. How should we value contributions for the purpose of quantifying awards? One of the key challenges is dealing with different types of contributions which appear to be incommensurable. How should or could the law compare and weigh financial and non-financial contributions for the purpose of calculating a monetary award?
- 6.81 Whatever principle underpins the quantification of parties' contributions, it should be clear. All of the Australian states now have statutory remedies for separating cohabitants and all states, to a greater or lesser extent, base their property adjustment remedies on the parties' "contributions". However, the Australian courts have encountered considerable difficulty in clarifying how parties' contributions are to be taken into account and rewarded, and it can be hard to discern the basis for awards made.⁵⁴ The difficulty arises in part because the legislation requires the courts to "have regard to" the parties' financial and domestic contributions without providing further guidance as to how they should undertake this exercise.⁵⁵ To adopt the language of one judge (writing extrajudicially in relation to the Australian courts' discretion on divorce), it can be

⁵⁴ New South Wales was the first state to legislate in this field and has the most extensive case law. The key, controversial and somewhat ambiguous decision is *Evans v Marmont* (1997) 42 NSWLR 70.

⁵⁵ The original intention behind the provisions is evident from the Report on De Facto Relationships (1983) New South Wales Law Reform Commission Report No 36, para 7.42 and following. It seems that it was envisaged that a positive rather than negative (reliance loss/economic disadvantage) approach to valuing contributions would be adopted, and that experience from the divorce courts would guide valuation of domestic contributions.

said that the courts have been told how to drive the bus, but have not been told where to drive it.⁵⁶ Lack of clarity about the relevance and potential value of contributions may encourage litigants seeking to maximise their share of the assets to catalogue their various contributions exhaustively, regardless of whether those contributions had any impact on either party's economic position.⁵⁷

- 6.82 In light of this experience, we think it would be necessary for any new scheme to provide clear guidance about the way in which parties' contributions should be relevant to the grant of financial relief.

Attaching positive value to contributions

- 6.83 We think that part of any scheme should involve attaching positive value to at least some of the parties' contributions, and distributing the parties' property in accordance with a valuation of those contributions. There are various ways in which such a scheme could operate. We shall distinguish chiefly between three approaches:

- (1) equal sharing or partnership;
- (2) global accounting; and
- (3) economic advantage.

- 6.84 The competing approaches each have different merits and demerits. Those that might appear easier to apply could generate unsuitable results in many cases. Those that seem more likely to generate suitable results, tailored to the specific circumstances of each case, may for that reason sometimes cause practical difficulties, for example, regarding proof that particular contributions have caused relevant economic effects. All raise difficult theoretical questions and we are keen to receive consultees' views on these. The aim is, as ever, to find a satisfactory compromise between the objectives for reform set out at paragraph 6.24.

Recognising economic sacrifices incurred through contributions

- 6.85 One of the principal criticisms of schemes based exclusively on a positive valuation of the parties' contributions is that they fail adequately to address the economic sacrifices incurred in making certain types of contributions. The chief example of this is the potential impairment of earning and pension-saving capacity and the ability to undertake paid employment at all consequent upon undertaking child-care responsibilities. Those sacrifices may be more extensive than the positive value of those contributions, however the latter are measured. To disregard those sacrifices and to concentrate only on the positive value of certain contributions in awarding financial relief would perpetuate a significant aspect of the current law's perceived unfairness.

⁵⁶ Justice Chisholm, seminar paper "Looking for Destinations in Property Adjustment" (1995), cited by P Parkinson, "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 *Federal Law Review* 1, at 6, n 18.

⁵⁷ See P Parkinson, "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 *Federal Law Review* 1, at 15, discussing cases within the matrimonial jurisdiction.

- 6.86 Where the assets available for division are quite limited, sharing existing capital assets even equally might leave some applicants facing greater financial hardship than the respondent on separation, in particular as a result of the impact of child-care responsibilities during the relationship on their earning capacity. This dissatisfaction with the operation of equal sharing rules and partnership principles prompted calls for reform in New Zealand and New South Wales.⁵⁸ Any positive contribution principle therefore needs to be accompanied by some other principle focusing on the economic sacrifices made by those making non-financial contributions to the family's welfare.
- 6.87 This is where a principle based on "economic disadvantage" would have a role to play. This would focus on the economic sacrifices entailed in the parties' contributions, both during the relationship and, where child-care obligations continue on separation, following it. Indeed, as we shall see, the economic disadvantage incurred as a result of making various "domestic" contributions might be thought to provide a somewhat stronger justification for an award than an attempted assessment of their positive value. We discuss the operation of such a principle from paragraph 6.150 below.

A combined scheme

- 6.88 We envisage a scheme based on two principles, one addressing the positive value of the parties' contributions, the other examining the economic sacrifices incurred in consequence of them. Under our preferred principles (economic advantage and economic disadvantage), not all contributions and sacrifices would count, but only those which caused one party to retain a benefit or to suffer continuing economic disadvantage (for example, in terms of earning capacity) at the point of separation.
- 6.89 Since both parties might have made relevant contributions, determining whether any financial relief should be granted, and to whom, would depend on weighing both parties' claims, and identifying the net imbalance between them at the point of separation. We discuss this aspect of the exercise from paragraph 6.216.

ATTACHING POSITIVE VALUE TO PARTIES' CONTRIBUTIONS

- 6.90 A scheme based positively on contributions must address four basic issues:
- (1) To what must contributions be made in order to count:
 - (a) the acquisition or retention of capital assets or other economic resources (such as earning capacity); or
 - (b) family life more generally?

⁵⁸ See, for example, Review of the Property (Relationships) Act 1984 (NSW) (2002) New South Wales Law Reform Commission Discussion Paper No 44, para 5.58 and following; and motivations for reforms to New Zealand's matrimonial property regime, which was extended to *de factos* in 2001, in particular the introduction of additional compensation in cases of "economic disparity": Property (Relationships) Act 1976 (as amended), s 15. Contrast Swedish law, which permits departure from equal sharing to let the property owner retain assets, but not to grant a greater share to the other party: Cohabitees Act 2003, s 15.

- (2) What sorts of contributions count:
 - (a) financial contributions only;
 - (b) non-financial (but still economically or otherwise valuable) as well as financial contributions; and
 - (c) if the contribution must be associated with the acquisition of specific resources (under 1a, above), must that contribution be direct or indirect?
- (3) How should the value of contributions be translated into monetary terms, or percentage shares, for the purposes of quantifying an award:
 - (a) by reference to some measure of their economic value; or
 - (b) on some basis which seeks to acknowledge the non-economic value of contributions, for example, by viewing the parties' relationship as a partnership to which each makes distinctive but equally valuable contributions?
- (4) From what resources should those contributions be rewarded on separation:
 - (a) all resources available to each of the parties; or
 - (b) only from a specified "pool" of property?

Alternative approaches to the positive valuation of parties' contributions

6.91 There are several ways in which parties' various contributions could translate into awards for financial relief. We consider below and provisionally reject approaches involving equal sharing/partnership and global accounting, before outlining our currently preferred approach: a principle of economic advantage focusing on retained benefits.⁵⁹

Equal sharing and "partnership" regimes

6.92 There is considerable merit in a scheme which quantifies awards of financial relief by dividing the parties' assets, or a portion of them (such as assets acquired during the course of the relationship), either equally or in other proportions, perhaps depending on the length of the relationship. This sort of approach avoids the need inherent in some other schemes to seek to place a specific value on the parties' various contributions to their relationship, and sharing the property accordingly. However, this approach is not without its problems, and its suitability for cohabitants is questionable.

6.93 As we noted earlier, some jurisdictions have adopted rule-based schemes under which cohabitants' contributions are recognised by an equal sharing of property

⁵⁹ Combined with a principle of economic disadvantage.

acquired during the relationship.⁶⁰ As a result, there is ordinarily no requirement for the court to investigate the actual and relative economic value of the parties' contributions, whatever form they may have taken. Instead, the fact of the parties' relationship – viewed as a joint venture – is itself taken by the terms of the legislation to justify equal sharing of the “relationship property” pool.⁶¹

- 6.94 We have already expressed the view that a rule-based scheme might not be appropriate in the English context. We do not operate a system of deferred community of property for spouses, and it would seem inappropriate to introduce such a scheme for cohabitants, where the flexibility of a discretionary regime would seem to be particularly valuable. However, it is worthwhile addressing a discretionary version of an equal sharing rule, what we shall refer to as the partnership approach. This approach is evident in the way that some Australian courts have developed their wide discretion to provide contributions-based remedies between cohabitants, and is also reflected in some decisions on ancillary relief in Australia and in England and Wales on divorce.⁶²
- 6.95 On a partnership approach, cohabitants' contributions, whether non-financial or financial, could be viewed as deserving financial recognition on separation not because of any intrinsic economic worth, but because they were made pursuant to a “partnership” between the parties that is now being dissolved. On this approach, each party's contributions, whether in running the home or funding it, might be regarded as deserving of equal recognition by a broad division of assets on separation, without reference to the actual economic value (if any) of the contributions made.⁶³ The existence of the parties' relationship would be taken to justify giving their contributions this special value and the resulting (potentially substantial) encroachment on the respondent's property law entitlements.⁶⁴

⁶⁰ For example, Sweden (which also has equal sharing for spouses and registered partners, but in relation to a wider asset pool than for cohabitants), New Zealand (which has largely the same rules for spouses, civil union partners and cohabitants). Note also the limited provisions relating to the ownership of particular assets in the Family Law (Scotland) Act 2006, ss 26-27, subject to the grant of relief under s 28.

⁶¹ Loosely speaking, detailed statutory rules in each jurisdiction prescribe which items of property fall within the pool subject to equal sharing. Parties retain outright ownership of assets not falling within that pool, save in so far as they are required to satisfy a claim under the general law in respect of those particular assets or a claim under some other principle of the family law scheme.

⁶² In English divorce cases, the parties' contributions are one of eight factors to be considered, and, depending on the length of the marriage and the extent of the parties' respective needs and available assets, they may often provide the basis for the court's decision. It is likely that courts will take a similar approach to financial relief on the dissolution of civil partnerships. Compare *White v White* [2001] 1 AC 596; *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] 2 FLR 108; *Foster v Foster* [2003] EWCA Civ 565, [2003] 2 FLR 299.

⁶³ See, for example, in relation to financial contributions of different value, *Foster v Foster* [2003] EWCA Civ 565, [2003] 2 FLR 299. See also *Gazzard v Winders* (1998) 23 Fam LR 716 (Australia), discussed in the Review of the Property (Relationships) Act 1984 (NSW) (2002) New South Wales Law Reform Commission Discussion Paper No 44, paras 5.55-5.56.

⁶⁴ Some commentators and courts would qualify such an entitlement by reference to the factor of time, so that non-financial contributions would only yield an equal share if made over a long period: J Eekelaar, “Asset Distribution on Divorce – The Durational Element?”

- 6.96 The extent to which each party made financial contributions to the household over the course of a relationship may vary, particularly when one or other of them was out of paid employment owing to child-care responsibilities. The key factor underpinning this approach would be that the parties are equal partners, embarked on a joint venture in life, so that the precise economic value of the contributions each made, and the nature of those contributions, should not determine the nature and extent of any financial relief granted in the event of separation.⁶⁵
- 6.97 If there were to be such a scheme, there would be a strong case, particularly perhaps in relation to cohabitants, for it to apply only to property acquired during the parties' relationship: the fruits of the partnership, including business assets of either party. Equal sharing could therefore exclude property acquired by either party before or after their relationship. It might also be proper to exclude gifts or inheritances acquired by one party during the relationship.⁶⁶

EVALUATION OF THE PARTNERSHIP APPROACH FOR COHABITANTS

- 6.98 It seems clear from attempts to base financial relief parties' contributions in the English and Australian divorce context that partnership approaches may tend towards equal sharing of at least a particular pool of the parties' assets.⁶⁷ If the actual economic value of the parties' contributions is not used as the basis for

(2001) 117 *Law Quarterly Review* 552 and "Asset Distribution on Divorce – Time and Property" (2003) 33 *Family Law* 828; *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] 2 FLR 108. Compare R Bailey-Harris, Case Commentary: *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), (2003) 33 *Family Law* 386, 388. However, this approach may only be necessary and appropriate if the property to be shared is not confined to property acquired during the relationship, but also includes pre-acquired property. Compare *Foster v Foster* [2003] EWCA Civ 565, [2003] 2 FLR 299; A Scully-Hill, "Presuming Equality or Doing the Section 25 Exercise?" (2003) 62 *Cambridge Law Journal* 570. See also the proposals of A Barlow and C Lind, "A matter of trust: the allocation of rights in the family home" (1999) 19 *Legal Studies* 468.

⁶⁵ See *Foster v Foster* [2003] EWCA Civ 565, [2003] 2 FLR 299, at [18] per Hale LJ.

⁶⁶ See the terms of some rule-based schemes in other jurisdictions, and the practice of the English divorce courts: see, for example, *White v White* [2001] 1 AC 596 and subsequent cases dealing with inherited wealth, and *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 236 and other cases, involving pre-acquired wealth. It is here, in particular, that the Australian divorce courts have run into difficulties: see P Parkinson, "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 *Federal Law Review* 1.

⁶⁷ The Australian courts have been criticised for decisions in many divorce cases giving no clear guide as to how assets should be divided, particularly where the case involves pre- or post-acquired assets, inheritances and so on, as opposed to the standard case of the long marriage over the course of which the wealth was accumulated by the parties' efforts: P Parkinson, "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 *Federal Law Review* 1; B Fehlberg, "With All My Wordly Goods I Thee Endow? The Partnership Theme in Australian Matrimonial Property Law" (2005) 19 *International Journal of Law, Policy and the Family* 176. Subject to the continuing debates about the relevance of the length of the marriage, pre-acquired and inherited wealth, and the remote possibility of the "stellar" contribution, English courts have largely come down against attempts to measure the parties' contributions with any precision: *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] 1 FLR 139; *Parlour v Parlour* [2004] EWCA Civ 872, [2005] Fam 171; but see *Sorrell v Sorrell* [2005] EWHC 1717 (Fam), [2006] 1 FLR 497.

awards, it is hard to find a clear or obvious alternative to equal sharing, at least of property acquired during the relationship. This is unsurprising, given the difficulty of evaluating different types of contributions, which might fairly be regarded as being essentially incommensurable. Some favour bringing the length of the relationship into account, so that the relief granted to applicants seeking a share of assets owned by the other party on the basis of non-financial contributions would be scaled by reference to the period of time over which those contributions had been made. But it can be objected that this perpetuates discrimination against the party who makes non-financial contributions, giving them less weight in the sharing of partnership assets.⁶⁸

- 6.99 Particularly if a partnership approach were likely to entail equal sharing, we need to consider carefully whether that outcome and the premise on which it is based would be appropriate for cohabitants. In our view, clear justification is needed for any private family law scheme which would give parties' contributions a value greater than their actual financial worth. In the absence of any express agreement between the parties, that justification, if it exists, is to be found in the nature of the parties' relationship.⁶⁹ If that justification cannot be found, we ought instead to tie remedies to the actual economic impact of each party's contributions.
- 6.100 At this point, the inseparability of the substantive principles justifying relief and the question of who ought to be eligible to apply for that relief becomes apparent.
- 6.101 Current English law has no presumption in favour of equal sharing between spouses on divorce.⁷⁰ However, where parties have married or formed a civil partnership, it is arguable that a partnership approach is appropriate: by formalising their relationship in that way, the parties may be taken to have signalled an intention to form a joint partnership to which their contributions should be valued equally. Whether or not equal sharing is suitable for spouses, there are reasons to be cautious about its adoption in cohabitants' cases.⁷¹ In the absence of the clear commitment to a joint partnership inherent in marriage or some specific agreement reached by the parties,⁷² it is not immediately clear why such an approach, entailing as it does a substantial encroachment on property rights, ought to be imposed on the party whose efforts most directly accumulated the assets in financial terms. The mere fact that the parties were cohabiting may

⁶⁸ Compare views of commentators referred to in n 64 above.

⁶⁹ Compare the spectrum of relationships described by S Gardner, "Rethinking Family Property" (1993) 109 *Law Quarterly Review* 263, at 291-292, for the purposes of a developed law of trusts.

⁷⁰ *White v White* [2001] 1 AC 596: it is used instead as a "yardstick" against which the judge's decision must be checked to ensure that there is "good reason" for any outcome which does not involve equal sharing.

⁷¹ See the views of M Garrison, "Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation" (2005) 52 *University of California Los Angeles Law Review* 815, who argues against the extension of deferred community of property systems to cohabitants, in favour of more modest equitable remedies designed to respond to the particular economic impacts of the relationship, though she opposes statutory remedies devised on that basis specifically for "cohabitants"

⁷² And enshrined in a contract or declaration of trust over particular assets.

not provide the necessary justification for this level of financial adjustment between the parties on separation.

Cases in which partnership may not be appropriate

- 6.102 In Parts 2 and 5, we noted the variety of cohabiting relationships, in particular in terms of the nature and level of commitment shared by the parties which might be considered relevant to determining whether and for whom a “partnership” approach would be suitable. Evidence about the way that cohabitants manage their money and property during their relationships may offer further guidance. Research examining the money management practices of opposite-sex cohabitants in this jurisdiction⁷³ suggests that they are more likely than spouses to keep their finances separate (rather than jointly pooled) during their relationships, particularly where they are young, have no children, and the woman is in full-time work.⁷⁴ Data about home ownership is also instructive. A far larger proportion of cohabiting couples than spouses live in property which is registered in the name of just one of the partners.⁷⁵
- 6.103 If many couples do not pool their resources, it may be fair to suppose that they do not view their relationships in terms of equal financial partnership while they are on-going. If so, it would seem inappropriate to apply a partnership approach as the default position in the event of their separation.⁷⁶ If there had been a marked imbalance in the parties’ contributions, either from lack of pooling, or because the parties contributed different proportions of their income (perhaps not as the result of mutual agreement, but by virtue of one party’s simply failing to “pull their weight”), then equal sharing of property acquired during the relationship might seem inappropriate. Such a relationship would appear to lack the underlying sense of partnership that this approach presupposes.
- 6.104 Nor is it clear that length of relationship alone necessarily affects money management practices. In the absence of a significant event, such as starting a family or taking on a mortgage, couples may continue long-term with a system

⁷³ Equivalent research is currently being undertaken on money management by same-sex couples, by C Burgoyne (University of Exeter) and V Clarke (University of West of England).

⁷⁴ See J Pahl, “Individualisation in Couple Finance: Who Pays for the Children?” (2005) 4 *Social Policy and Society* 381; C Vogler, “Cohabiting couples: rethinking money in the household at the beginning of the twenty first century” (2005) 53 *Sociological Review* 1.

⁷⁵ Of over 1.2 million cohabiting home owners in England in 2004-5, over half a million were solely owned, giving a ratio of about 40:60 solely: jointly owned, though that may sometimes simply be the result of property being acquired before the relationship began (and so which could for that reason be excluded from a scheme based on partnership sharing, rather than a deliberate decision to maintain financial independence). Only 14% of cases involving spouses involved sole ownership by one spouse: data from Office of the Deputy Prime Minister, *Survey of English Housing* (2004-5), tables “Households: by household type by tenure” and “Owner-occupier households: by number of owners by whether own outright or buying with a mortgage”. Data for Wales is collected separately; data by reference to relationship status of household reference person is not yet available.

⁷⁶ Unsurprisingly, given the current law, concepts of individual ownership currently drive cohabitants’ settlements on separation: S Arthur, J Lewis, M Maclean, S Finch and R Fitzgerald, *Settling Up: Making Financial Arrangements After Divorce or Separation* (2002).

adopted at the outset of their relationship.⁷⁷ If it is the case that the longevity of relationships does not increase the likelihood of pooling, requiring a minimum relationship duration threshold to be satisfied before the couple were eligible for financial relief based on the partnership principle might not do any better at ensuring that the law corresponded with parties' expectations and practices.

- 6.105 The partnership approach could also produce undesirable results. For example, applicants in high value cases might be thought to obtain an unjustified windfall, in so far as the award far exceeded the true economic impact (positive and negative) of the relationship on them. Attempts to modify the outcome in such cases would inevitably involve departing from the partnership approach by attaching some significance to the actual economic value of each party's contribution, which would in fact bring us closer to our provisionally preferred "economic advantage" approach.

Cases in which partnership might be more desirable

- 6.106 An argument can be made for distinguishing cases where the parties have children (whether or not those children are still dependent) from those who do not. Cohabitants with children behave more like spouses (with or without children) in their money management and so are more likely to operate a joint pool system.⁷⁸ That being the case, a partnership approach might be appropriate for cohabiting parents.⁷⁹
- 6.107 This view seems to resonate with public opinions about possible reform in this area. One large-scale study found considerable support for dividing the value of the family home at least equally (in favour of the primary carer, who – the question supposed – had made no financial contribution to the purchase of the property) on the separation of cohabiting parents.⁸⁰ By contrast, only a minority of respondents favoured equal division where the cohabiting couple, who had been together "for a number of years", had no children, with almost as many respondents considering that the party who had made no financial contributions should get nothing.⁸¹

⁷⁷ See the evidence from a qualitative study of 42 couples between (first) marriage and the first wedding anniversary: C Burgoyne, J Reibstein, A Edmunds and V Dolman, "Money management systems in early marriage: factors influencing change and stability" (2006) *Journal of Economic Psychology* (forthcoming).

⁷⁸ C Vogler, "Cohabiting couples: rethinking money in the household at the beginning of the twenty first century" (2005) 53 *Sociological Review* 1.

⁷⁹ See also the view of P Parkinson, "Quantifying the Homemaker Contribution" (2003) 31 *Federal Law Review* 1.

⁸⁰ Omnibus Survey findings from a study conducted in 1995 for the Law Commission by the Centre for Socio-Legal Studies. The question was asked in relation to both married and cohabiting couples, with only slightly less support in the cohabiting cases than the married cases. The following percentages of respondents thought that the primary carer (female) should get half the value of the house: when there were young children still at home, 77% (wives) and 73% (female cohabitants); when the children were independent, 80% (wives) and 73% (female cohabitants). A significant number of respondents favoured giving the entire value of the house to the primary carer when the children were still dependent.

⁸¹ 31% half share, 20% a third, 29% nothing.

- 6.108 This distinction between cases where there are children and those where there are not is reflected in the views of respondents in a recent qualitative study.⁸² While just over half of respondents agreed with the general proposition that the assets of couples who had been together for over three years should be shared in some proportion, only half of those thought equal sharing would be appropriate. A significant minority opposed the idea entirely, concerned about “gold-diggers” and that sharing would be unfair in cases of short-term cohabitation where there were no children; they preferred the idea of dividing property according to financial contributions in such cases.⁸³ However, there was considerable support for equal sharing of property for couples with children, either immediately or once the children had left home; views were fairly similar whether or not the couple were married.⁸⁴
- 6.109 Partnership for cohabiting parents, specifically, may therefore be an attractive option. The birth of a child may not always indicate that the parties view their relationship thereafter as an equal partnership. Pregnancy may precipitate cohabitation or be unplanned, rather than being the deliberate decision of an established, fully committed cohabiting couple who wish to take their relationship forward into joint parenthood.⁸⁵ But there may be sufficient justification for nevertheless imposing partnership as the default approach in such cases.
- 6.110 However, in cases where the existing capital assets were limited, equal sharing of those assets might not always provide an adequate remedy for a party whose earnings and earning capacity had been impaired as a result of child-care responsibilities. Even if sale of the home were deferred until the children had attained independence and the capital shared at that point, many primary carers might still experience financial hardship owing to impaired earning capacity which was not adequately compensated by the share of capital enjoyed under a partnership principle.⁸⁶ There would therefore remain an important role for additional relief based on a principle of economic disadvantage.⁸⁷

⁸² E Cooke and A Barlow, “Community of Property: a Regime for England and Wales?”, paper delivered at Centre for the Study of the Family, Law and Social Policy, University of Staffordshire (February 2006). 75 respondents, interviewed in depth.

⁸³ Over half of respondents held this view in relation to a specific vignette involving a seven year relationship with no children, even if the parties were married; the suggestion of sharing other than by reference to financial contribution was even less popular for a similar cohabiting couple.

⁸⁴ Only 10 out of 75 respondents favoured different treatment of spouses and cohabitants in cases involving children. 45 out of 75 respondents favoured equal division (with either deferred or, less popularly, immediate sale) in the cohabitants’ case.

⁸⁵ C Smart and P Stevens, *Cohabitation Breakdown* (2000). See para 2.21 above on the incidence of unplanned pregnancies amongst spouses and cohabitants.

⁸⁶ Particularly if the available capital was quite limited.

⁸⁷ Compare the proposals of A Barlow and C Lind, “A matter of trust: allocation of rights in the family home” (1999) 19 *Legal Studies* 468.

CONCLUSIONS

- 6.111 Although on the face of it a partnership approach might appear clear and relatively easy to apply,⁸⁸ we are concerned that it may not be suited to large numbers of cohabitants and that it cannot provide a satisfactory basis, certainly on its own, for financial relief on separation between cohabitants.⁸⁹ A scheme based on equal division of partnership assets would have to rely heavily on the eligibility criteria to exclude cases for which such an outcome would seem unsuitable. The fact that it does not currently operate even as a presumption for division of assets in financial relief on divorce is a reason to be cautious.
- 6.112 Parties could, of course, opt out of such a scheme if they did not wish to be subject to it. But it would seem preferable for the default position to be one which is likely to be suitable for the majority of cases to which it would apply in order to minimise the burden of opting out. Moreover, if in seeking to exclude the undeserving, a minimum duration requirement were set too high, cases in which a remedy were thought to be merited, albeit not one based on partnership, might be excluded.
- 6.113 Some cohabitants do make a clear commitment to an equal life partnership, as may be inferred from complete pooling of resources or specialisation of roles (for example, one partner goes out to work while the other raises their children). A new scheme could be devised in such a way that, even if it were not adopted as a presumption, the court could be free to adopt a partnership approach where the parties had in fact arranged their finances on that basis. However, it might be undesirable for the decision about the applicable approach to depend upon the court's determination of whether the relationship in question had the necessary hallmarks of "partnership" making such an approach appropriate. The nature of such an inquiry, where the parties are in dispute on this very point, might be time-consuming and costly, and its outcome uncertain and unpredictable.⁹⁰ There might be a case for automatically treating all cohabitants with children in accordance with a partnership principle, avoiding the need to inquire into the suitability of the approach in each case. But we are not, at this stage, convinced that partnership would be appropriate in those cases, and, even if adopted for those cases, it might remain necessary to have alternative principles available for situations – even involving children – in which partnership seemed likely to produce unfair outcomes.
- 6.114 It seems preferable to adopt a single principle that would be suitable for the full range of cases falling within the scheme, so that it would be immediately clear in each case what the basis for relief, if any, would be.

⁸⁸ Though there could be considerable scope for dispute about what property should be subject to sharing on this basis.

⁸⁹ The Scottish Law Commission reached a similar conclusion in 1992, hence the omission from the principles adopted for financial relief between cohabitants on separation of the "fair sharing" principle from Family Law (Scotland) Act 1985, s 9(1)(a). See Report on Family Law (1992) Scot Law Com No 135, para 16.15.

⁹⁰ Particularly given the tendency for many cohabitants to drift into and through their relationships, with possibly conflicting motivations and expectations as to how the relationship might develop: see J Mee, *The Property Rights of Cohabitees* (1999) p 11.

Focusing on economic value: global accounting

- 6.115 If we are not to adopt a partnership principle, or if alternative principles are required for those cases in which partnership would not be an appropriate way of valuing the parties' contributions to the relationship, we need to examine approaches based on the actual economic value of the parties' contributions. This is less straightforward than might at first sight appear, particularly in relation to non-financial contributions.
- 6.116 One approach would be global accounting: identifying and valuing all contributions made by each party over the course of the relationship, and deciding whether the parties' various property holdings, income and so on at the point of separation fairly reflected the balance of those contributions, or whether some transfer in favour of one party was necessary. Associated sacrifices (lost earnings, earning capacity, and so on) would also be brought into account, so that the grant of relief, if any, would depend upon the overall balance of positive contributions and sacrifices made by each party. For example, past loss of earnings incurred by an applicant who had undertaken child-care responsibilities would be counterbalanced to some extent by the financial support provided by the other party during the relationship.

FINANCIAL CONTRIBUTIONS

- 6.117 In some cases, where the parties had principally made financial contributions, this might work relatively straightforwardly. The actual value of the financial contributions made by each party to their mutual welfare (for example, mortgage payments or rent, utility and grocery bills, purchase of household goods; capital investments in each other's businesses and property) would be identified and their property distributed on separation accordingly. Assessment of the parties' contributions up to the point of separation would proceed simply by reference to the financial value of the contributions each had in fact made, so there would be no "subsidy" or windfall for the party who happened to contribute less (or retain fewer personal savings) owing to lower earning capacity.
- 6.118 However, even in relation to financial contributions, difficult questions would arise. For example, while contributions relating to the basic outgoings on the parties' shared home might be straightforward enough to deal with, more difficult questions would arise regarding other "lifestyle" expenditure. It would seem inappropriate for gifts made by one party to the other to be brought into account.⁹¹ But what about expenditure on holidays and other leisure pursuits? And what if the applicant, because he or she could afford to do so, chose to do the parties' grocery shopping in an upmarket delicatessen rather than the supermarket? Where applicants spent money on property, it would at least be possible to reward that contribution by allocating that property to them on separation. But where the money were spent on ephemeral items, it would not be available to be divided between the parties at the point of separation.
- 6.119 To give such contributions no weight at all as part of the global account might seem unfair to the party who had made them. However, it would also seem unfair

⁹¹ They were not, presumably, made on condition of the parties' relationship continuing. Compare Law of Property (Miscellaneous Provisions) Act 1970, s 3 regarding engaged couples.

to require the respondent to account for the benefit obtained from this sort of expenditure, certainly in so far as the applicant's lifestyle would inevitably be shared by the respondent for the duration of their relationship.⁹² In a sense, the respondent had little choice but to accept the value of those contributions and might be in no position to provide reparation on separation for the value of those benefits.⁹³ Of course, the inability of the respondent to provide relief to the applicant might prevent any application being made in such cases. But the issue would remain relevant in so far as the party who had provided the lavish lifestyle sought to use those advantages to negate any claim for economic disadvantage brought by the other party.⁹⁴ The better view may be, as we suggest below, to disregard all contributions made during the relationship which did not result in a retained benefit in the hands of the respondent at the point of separation.

NON-FINANCIAL CONTRIBUTIONS

- 6.120 Substantial difficulties would also arise in valuing many non-financial contributions, for the purpose of comparison with financial contributions.
- 6.121 The intrinsic economic value of non-financial contributions is evident from the fact that equivalent services may be purchased commercially: had the parties not performed the domestic activities of child-rearing, housekeeping, gardening, DIY, it might have been necessary to engage professional child-carers, cleaners and so on.⁹⁵ Non-financial contributions could accordingly be valued and rewarded by reference to rates payable to professional service providers.⁹⁶
- 6.122 Some early cases in New South Wales took this approach to non-financial contributions,⁹⁷ but the Australian courts have since largely rejected it.⁹⁸ It can be strongly argued that a commercial valuation wholly fails to capture the nature and extent of those contributions when performed by a partner. Indeed, it is probably fair to say that they do not have a commercial value because contributions of that sort are not available on the market:

No doubt a homemaker will invariably perform some, at least, of the tasks of a domestic servant but her contribution to the family unit will

⁹² Consider facts such as *Lissimore v Downing* [2003] 2 FLR 308.

⁹³ Contrast the sort of basic provision which respondents would certainly have had to provide for themselves, without the relationship; for example, the respondent who has received rent-free accommodation would otherwise have had to live somewhere, if not somewhere as luxurious as the home the applicant happened to provide.

⁹⁴ Some Australian commentary questions the appropriateness of allowing such expenditure to be brought into account: J Wade et al, *Australian De Facto Relationships Law*, para 8-290, comment on *Wilcock v Swain* (1986) 11 Fam LR 302 (Australia). It is suggested that such contributions should be regarded as agreed living expenses, which simply reduce the fund available for distribution on separation and cannot be used to counterbalance a claim by the other party.

⁹⁵ The contribution of these activities to "informal" GDP is substantial: Office for National Statistics, *Social Trends 36* (2006) p 86 and table 5.27.

⁹⁶ Less tax and the benefit of free bed and board during the relationship.

⁹⁷ See, for example, *D v McA* (1986) 11 Fam LR 214 (Australia).

⁹⁸ Eg *Black v Black* (1991) 15 Fam LR 109 (Australia); *Evans v Marmont* (1997) 42 NSWLR 70 (Australia).

usually be infinitely greater than that. In many cases, she will be the uniting force and will provide the support, love and affection so necessary to maintain a happy family unit. Although it is impossible to generalise [,] the contribution of a homemaker and parent will usually extend to the performance of a myriad of tasks beyond the range of activities performed by a domestic servant.⁹⁹

- 6.123 While a commercial measure may be less inappropriate in this sense where the applicant has worked without remuneration in the other party's business, reducing contributions within the home to commercial rates seems demeaning of those who fulfil these valuable roles and so is not an attractive option. It could generate protracted and unproductive argument about the quality of services supplied by the applicant and whether the full commercial rate was warranted.¹⁰⁰
- 6.124 The commercial value approach also makes assumptions about what is the appropriate comparator by which the economic benefit provided should be measured. Ought the benefit to be measured by reference to what the position would have been had the respondent not had a partner to perform these tasks and so had to employ help or do the work him or herself? Or by reference to the position as it would have been (provided the evidence supports the hypothesis) if the homemaker had instead been engaging in full-time paid employment outside the home, thus providing the household with greater income with which to hire domestic help and possibly leaving a surplus for other expenditure?¹⁰¹ On the latter view, no economic value might have been conferred by the applicant devoting time to the home instead of paid work, though that party might have sustained serious economic disadvantage as a result. Indeed, in so far as the domestic contributions fulfilled the adult parties' needs, rather than those of the parties' children, it is worth considering what the position would have been had the parties been single. The applicant would presumably have had to do his or her own housework, cooking and so forth anyway, and the marginal increase in that work created by the presence of the respondent might not be thought to warrant a remedy.
- 6.125 In light of this, while it is important not to overlook the reality that these contributions are economically valuable, it is doubtful whether performance of domestic tasks, without more, can satisfactorily be brought within a scheme

⁹⁹ *Black v Black* (1991) 15 Fam LR 109, 117, per Clarke JA. See also observations of Watkins J in *Regan v Williamson* [1976] 1 WLR 305, 308 and 309, considering damages for the loss of a mother's services in the context of a fatal accidents case.

¹⁰⁰ P Parkinson, "Quantifying the Homemaker Contribution" (2003) 31 *Federal Law Review* 1, at 17-18.

¹⁰¹ See *Coyle v Coyle* 2004 FamLR 2 (Scots), at [38].

based on some measure of their positive value.¹⁰² It might be better for claims relating to non-financial contributions generally to be framed in terms of any economic disadvantage thereby incurred.¹⁰³ Indeed, the economic sacrifice incurred as a result of making such contributions, for example in terms of the lost earnings and suppressed earning capacity of a parent out of paid employment for several years, may be rather greater than the positive value of the domestic services supplied. That being the case, framing the claim in those terms would seem to us to do rather better at ensuring that the true economic impact of such contributions were taken into account.

CONCLUSIONS

- 6.126 We do not favour a global accounting approach. Even if conducted in broad-brush manner, it seems unattractive. We have already highlighted some particular difficulties that would be encountered in valuing non-financial contributions and handling certain sorts of financial contributions. Moreover, it seems to us that this approach would tend to encourage “competition” between the parties. Each would have a clear incentive to try to obtain a larger share of the assets than the other by seeking to demonstrate (in exhaustive, itemised detail) that they had, on balance, over the course of what might have been a long relationship, made more (or more valuable) “contributions” or greater sacrifices¹⁰⁴ than the other party.¹⁰⁵
- 6.127 While it might be applauded for seeking to provide a perfectly calibrated justice,¹⁰⁶ this global accounting could constitute a potentially mammoth undertaking, and be a grossly disproportionate, expensive use of party, lawyer and (where litigated) court time. The scheme would also have the disadvantage of being very backward-looking, requiring as it would a full examination and quantification of every contribution made and sacrifice incurred. We consider that a better approach would be to focus on the position of each party at the point of separation, effectively “writing off” contributions and sacrifices made earlier which in fact had no lasting impact at that point.

¹⁰² See the analysis by P Parkinson, “Quantifying the Homemaker Contribution” (2003) 31 *Federal Law Review* 1, at 11 and 15-20; contrast the concerns of commentators L Flynn and A Lawson, “Gender, Sexuality and the Doctrine of Detrimental Reliance” (1995) 3 *Feminist Legal Studies* 105, at 108, that failing to take non-financial contributions into account leaves no room to reward applicants who have done most of the domestic work, as well as working outside the home. In so far as this imbalance in fact had no economic impact on the parties, Parkinson views this as a matter of relational rather than economic justice, and so not something that should be brought into account in granting financial relief.

¹⁰³ See below, at para 6.150.

¹⁰⁴ See para 6.116 above: this approach would bring parties’ economic sacrifices into account as well.

¹⁰⁵ See n 57 and associated text above.

¹⁰⁶ Which would also call for considerable care in conducting the balancing exercise and avoiding the risk of double-counting: for example, by rewarding an applicant both for the value of rent-free accommodation provided to the other party, and the positive value of mortgage payments made; or by providing a “commercial rate” award for non-financial contributions and a full economic disadvantage claim.

Our preferred approach: the economic advantage principle

- 6.128 We consider that it would be preferable for contributions to trigger a claim for financial relief based on their positive value only where the applicant could prove that they had given rise to an identifiable economic advantage (whether in the form of capital, income or earning capacity) retained by the respondent at the point of separation. This principle would operate in tandem with the economic disadvantage principle, similarly focused on the position on and following separation, which we explore below.
- 6.129 It is proper to acknowledge at the outset of this discussion that while we consider that this principle is in essence the right one for cohabitants, it raises various practical and theoretical questions (not all of which may be identified below), and the answers to which are not obvious. We welcome consultees' views.

NO FULL RETROSPECTIVE INQUIRY¹⁰⁷

- 6.130 The principal advantage of this approach to the valuation of parties' contributions (and associated sacrifices) is that it would focus on the position at separation. There would be no need to identify and ascribe positive value to each and every contribution made by the parties during the relationship and bring them all into account. It would be necessary only to consider whether the respondent had retained some relevant economic benefit at the end of the relationship which he or she had been enabled to acquire in part as a result of contributions made by the applicant. That would inevitably entail some degree of retrospectivity, as it would be necessary to identify those contributions which had given rise to the retained benefit. But the scope of the inquiry would be considerably more limited than it would be under a "global accounting" approach.
- 6.131 It seems to us sensible to take the view that where the parties' contributions do not have economic consequences that survive the relationship, they should be written-off.¹⁰⁸ We therefore do not think it would be desirable for applicants to make claims simply in relation to the value of financial or other support that they have provided for their partner during the relationship, or (in terms of economic disadvantage) in relation to past earnings lost during the relationship. Consequently neither party should, for example, be able to make a claim of economic advantage in relation to:

- (1) housekeeping money provided and spent during the relationship; or
- (2) rent-free accommodation provided during the relationship.

Nor, as we shall explore below from paragraph 6.161, should claims of economic disadvantage be permitted in relation to:

- (3) past earnings lost as a result of caring for children or working unpaid in the home during the relationship.

¹⁰⁷ See Example 1 in Part 7.

¹⁰⁸ It might be possible in many cases to regard such contributions as cancelling each other out in any event: for example, where one gives up paid work to make domestic contributions and the other provides financial support during the relationship.

- 6.132 In examples (1) and (2), a claim should only be possible if the other party has retained some financial benefit following the parties' separation as a result of those contributions. In example (3), a claim should only be made if the applicant experienced economic disadvantage on separation, for example because he or she now finds it hard to get paid employment as a result of having worked unpaid in the home or because of looking after children during or following the relationship.
- 6.133 The focus would therefore be on the "pluses" and "minuses" held by each party at the point of separation, compared with where they were at the start of the relationship. To some extent, this would necessarily involve looking backwards, to see how those gains and losses arose, and to some extent would entail a degree of hypothetical inquiry about what would otherwise have been. But it would avoid a protracted accounting for the entire relationship.

CONTRIBUTING TO A RETAINED BENEFIT

The basic parameters of the claim

- 6.134 In the absence of an express agreement to share ownership, the current law only clearly rewards those who make a direct financial contribution towards the acquisition of property. In our view, this is too narrow an approach. We consider that it should be possible for eligible cohabitants to make a claim based on the principle of economic advantage wherever it can be shown that:
- (1) the respondent had been enabled to retain some economic benefit (in terms of a gain in capital, income, or earning capacity) at the point of separation, and
 - (2) that gain had been caused at least in part by contributions made by the applicant.
- 6.135 In many cases, this would involve direct or indirect financial contributions of to the acquisition of property.¹⁰⁹ The applicant who had contributed directly to mortgage payments in relation to property held in the other party's name would, as under the current law of resulting trust, be able to make a corresponding economic advantage claim. Moreover, the applicant who could show, for example, that his or her payment of household bills or child-care costs enabled¹¹⁰ the respondent to pay the mortgage on the latter's property would accordingly be entitled to claim a share in the value of that property.¹¹¹
- 6.136 The principle could be extended beyond this core example in two ways.
- 6.137 First, financial contributions might assist not in the acquisition of a capital asset, but instead in the acquisition of an earning capacity and income; for example, the

¹⁰⁹ See Examples 1, 1A and 8A in Part 7.

¹¹⁰ The applicant in this case ought to be able to demonstrate that his or her payments were necessary for the respondent to be able to afford the mortgage, as there would otherwise be insufficient connection between those payments and the retained benefit.

¹¹¹ This would firmly enshrine the indirect financial contribution principle which remains elusive in the law of trusts.

applicant might have paid the respondent's fees for some professional training which enabled the respondent to acquire remunerative employment.

- 6.138 Secondly, it might sometimes be possible to demonstrate that non-financial contributions had enabled the respondent to acquire property or some other economic benefit. A clear example of this would involve an applicant who had worked without pay in the respondent's business, or who had made improvements to the respondent's property.¹¹² Or the provision of rent-free accommodation to the applicant might have enabled that party to make substantial savings.

Valuing the claim

- 6.139 In all of these situations it might be considered unfair for the respondent to retain on separation the entire benefit acquired to the total exclusion of the applicant. Some reparation may be appropriate. But careful consideration needs to be given to how the value of the applicant's claim should be determined.

- 6.140 One approach would be simply to recoup the applicant's expenditure or (where the contribution had been non-financial) pay the cost of the applicant's services (effectively a claim for the commercial value of the services provided), leaving the respondent to enjoy any increase in the value of the asset. Alternatively, relief could be calculated by reference to some defined share in the value of the benefit retained.¹¹³

- 6.141 Which approach is preferred might depend upon the nature of the benefit in the respondent's hands. Where the retained benefit were property that had increased in value over the course of the relationship as a result of market forces, it might be argued that the first approach would be unfair. If the applicant were simply provided with the cash value of his or her contribution, the respondent would be left with what is essentially a windfall. The law of resulting trusts precludes this, ensuring that those who make relevant contributions to the acquisition of property share equally in the increases (and decreases) in the value of that asset. It might be objected that to give the applicant anything other than compensation for the value of the contribution would be to enter into "partnership" territory, an approach that we have provisionally rejected. However, the case for partnership in this context is arguably rather different, and narrower. Here, we are talking about a benefit which has been acquired, and retained, in part as a result of contributions made by the applicant, and so without which the respondent would not have been able to retain the asset at all. No such causal link would be required for general sharing of assets under the partnership approach. So to that extent, the applicant's contribution in this context might be regarded as sufficiently closely connected with the retained benefit in the respondent's hands that sharing, rather than mere reimbursement, is fair. It would still be necessary to determine the basis on which the parties' shares should be calculated. But at

¹¹² See Examples 7 and 7A in Part 7. Compare Matrimonial Property and Proceedings Act 1970, s 37.

¹¹³ See P Parkinson, "The Property Rights of Cohabitees – is Statutory Reform the Answer?", in A Bainham, D Pearl and R Pickford (eds), *Frontiers of Family Law* (2nd ed 1995) ch 21, comparing "restitutionary" and "partnership" approaches.

least where the applicant's contribution (whether direct or indirect) had been financial, that would not be difficult.

- 6.142 Different considerations might apply where the retained benefit was in the form of income or earning capacity, since those can only come into existence or be fully realised as a result of active endeavour by the respondent. In these cases, simple reimbursement might be more appropriate.

The requirement of causation and potential difficulties of proof

- 6.143 Whatever the range of contributions that could give rise to an economic advantage claim, we do consider that any claim would have to involve proof that the applicant had contributed, directly or indirectly, to the respondent's retained benefit. A family court could be expected to approach this issue with a suitably broad brush, and would not apply itself with the rigour characteristic of a chancery court hearing a claim which relies on the tracing process. But this principle rests on the premise that it would be inappropriate to provide awards for the value of contributions regardless of whether they resulted in the retention of some discernible benefit in the hands of the respondent. So, for example, although they may have saved the respondent expenditure on hiring domestic assistance (or saved the respondent from having to do the housework and so on personally), domestic contributions that did not enable the respondent to generate any additional wealth would not give rise to any claim under this principle. In our view, the better way of dealing with that sort of non-financial contribution would be, where applicable, through the economic disadvantage principle.

- 6.144 This approach to economic advantage would leave applicants vulnerable to the possibility that respondents would not retain any benefit at the end of the relationship in respect of which a claim could be made. This might be the result of misfortune or a preference to expend money freed up by the applicant's contributions on ephemeral items rather than capital assets.¹¹⁴ But we do not consider that any unfairness inherent in such situations is sufficiently grave to warrant a remedy. Take the example of an applicant who has paid household bills but cannot prove (perhaps because the home is owned outright) that he or she has thereby enabled the respondent to acquire anything. The party paying the bills has enjoyed the benefit of accommodation provided by the other party during the relationship. If the value of that accommodation might be less than the value of the bills, so be it; the applicant can perhaps fairly be required to accept that consequence of his or her choice to make those payments.

- 6.145 The insistence on proof that the applicant's contribution had been a cause of the respondent's retained benefit and the identification of that benefit would therefore inevitably limit the potential for these claims to succeed. Moreover, particularly in relation to non-financial contributions, proof that the applicant's activities had

¹¹⁴ Special anti-avoidance rules (as used in divorce cases) would, of course, apply to deal with deliberate attempts to frustrate the applicant's claim by the disposal of assets on separation; such rules would enable the courts either to recover such property in some circumstances, or prevent the respondent from disposing of it in the first place. See also discussion of financial and litigation misconduct at para 6.236 below.

contributed in any significant way to the respondent's economic advantage might be difficult.

- 6.146 In many cases, the causal link would be easy to prove, as for example where the applicant has done substantial building work on the respondent's property. Those contributions, while non-financial, have a very obvious, tangible impact on the value of the assets held by the respondent on separation. Rather harder are cases where the nature of the applicant's claimed contribution were more intangible: for example, domestic support provided by the applicant which is said to have enabled the respondent to progress further in his or her career than would otherwise have been possible, alongside raising a family.¹¹⁵
- 6.147 One response to this difficulty would be to confine economic advantage claims to cases based on financial contributions, leaving non-financial contributions to the economic disadvantage principle discussed below. However, such a restriction seems unacceptably arbitrary. The possibility of such claims based on non-financial contributions ought not to be ruled out, however difficult they may be to establish in practice in some cases. As we have seen, in situations involving unpaid work in the respondent's business or improvement to property, the economic advantage would be easy to prove, and the applicant may have sustained no economic disadvantage; having worked throughout the relationship, the applicant is likely to have skills and experience which would enable him or her to obtain new employment elsewhere. To deny that party any claim for financial relief might seem unfair in all the circumstances where it can be proved that the respondent has benefited substantially from the applicant's free services.¹¹⁶
- 6.148 It might be argued in response to this that, though not paying him or her, the respondent has been supporting the applicant during the relationship. But we consider that that is too narrow a view of the situation. While that support would have gone some way to compensate for the lack of income in terms of subsistence, the applicant would not for that reason retain a benefit at the end of the relationship equivalent to that retained by the respondent. To leave the respondent with all of the assets at the end of the relationship may therefore be unfair.¹¹⁷

THE ASSETS FROM WHICH RELIEF WOULD BE GRANTED

- 6.149 The economic advantage principle would identify specific resources in the hands of the respondent to which the applicant had contributed and which would limit the value of the award. But it seems to us that there is no reason why any financial relief granted should derive from that resource. It should be open to the court and respondent to use any available resource to meet any order made.

¹¹⁵ See for example the failed economic advantage claim in *Coyle v Coyle* 2004 FamLR 2, at [35]-[39].

¹¹⁶ Compare S Gardner, "Rethinking Family Property" (1993) 109 *Law Quarterly Review* 263, at 283-285 on the impermissibility of "subjective devaluation" in these cases.

¹¹⁷ There might in some cases be potential for the argument to be framed instead in terms of economic disadvantage, for example in relation to lost opportunities to pay into a pension.

ECONOMIC DISADVANTAGE¹¹⁸

Introductory observations

- 6.150 As we saw in Part 4, it is the current law's failure to respond adequately to the sacrifices made, in particular, by those who undertake primary child-care responsibilities which makes the outcomes between separating cohabitants with children so arguably unfair. It is therefore essential that the economic sacrifices arising from such contributions should be covered by any new scheme.

Basic questions for an economic disadvantage scheme

- 6.151 The following issues arise in relation to a scheme based on economic disadvantage:

- (1) what should count as economic disadvantage for these purposes?
- (2) should the award relate to disadvantage sustained in the past, to be sustained in the future as a result of past events, or both? Should continuing child-care responsibilities following separation and further economic sacrifices arising from them be brought into account?
- (3) how should the extent of any economic disadvantage be quantified?
- (4) what other factors might limit the extent to which that disadvantage can or ought to be reflected in any relief that is granted?

- 6.152 We address each of these in the following sections, focusing principally on loss of earnings and loss of earning capacity arising as a result of the applicant discharging child-care and other caring responsibilities in the home. As with positive evaluations of the parties' contributions, perhaps the more difficult questions concern quantification of the sacrifices made and their translation into an order. However, before we address those questions, it will be helpful to make some observations about the character of these claims, as we envisage them.

The character of the claim and its implications for relief granted

- 6.153 However quantifiable the economic disadvantage sustained by the applicant may be, it would not be appropriate as a matter of principle (in any cases) or realistic in practice (in most cases) to expect the respondent to incur responsibility for the full amount. Before we look more closely at issues of proof and quantification, it is important that the character of the claim be properly understood in order to identify the nature of the court's task and the framework within which these claims would be assessed.

SHARED RESPONSIBILITY

- 6.154 A claim based on economic disadvantage in the form of lost earning capacity and so on may appear to have parallels with actions in tort. However, we consider that the nature of a claim based on economic disadvantage in family law should be understood differently from claims for compensation made in the civil courts. The applicant with an economic disadvantage claim would not be the unwitting,

¹¹⁸ See Examples 1-1B, 3, 4, 6, 9 and 10 in Part 7.

or unwilling, victim typical of the civil law. The economic disadvantage sustained by the applicant is the product of the parties' life together, arising from decisions and choices which they jointly made, and for which the parties ought ordinarily to share responsibility.¹¹⁹

- 6.155 Applicants ought to be required to take what steps they reasonably could to minimise the extent of the disadvantage sustained on separation by seeking to maximise whatever earning capacity they had at that point, in so far as that were reasonable and consistent with continuing caring responsibilities.

AIMING FOR FAIR APPORTIONMENT, NOT SUBSTANTIVE ECONOMIC EQUALITY

- 6.156 The objective of the claim would be limited to addressing disadvantages arising from the impact of the relationship on the applicant, and to which the applicant was exposed at the point of separation.

- 6.157 Even after a claim was met, the applicant's economic position might still be inferior to that of the respondent, in consequence of differences in the parties' respective qualifications, skills and earning capacity on entering into the relationship.¹²⁰ But it would not be the purpose of an economic disadvantage claim to eliminate that disparity between the parties. Had the relationship never occurred, or had the parties made different decisions in the course of their relationship, that disparity would still exist. Whatever the position may be for spouses, the mere fact that the parties used to cohabit, for however long,¹²¹ would not in our view justify granting a less affluent applicant a legally enforceable expectation to share equally in the respondent's wealth following separation or to maintain the standard of living to which he or she had become accustomed.

- 6.158 The claim would not, therefore, be designed to achieve full substantive economic equality between the parties. Instead, it would simply aim to ensure fair apportionment of any economic sacrifices made as a result of their relationship at the point of separation.

CLAIM LIMITED AT THE POINT OF ECONOMIC EQUALITY

- 6.159 In some cases, parties might have conducted themselves in what appears to be an economically irrational way, for example, where the party with the greater earning power gave up paid work in order to care for the children. The economic disadvantage sustained by such an applicant might be so great that meeting it in

¹¹⁹ See Example 9 in Part 7.

¹²⁰ We do not consider it to be the job of family law to deal with wider issues relating to women's earnings and employment, such as occupational segregation and unequal pay, as highlighted by the Women and Work Commission, *Shaping a Fairer Future* (2006), by aiming invariably to place parties following separation on an equal economic footing. Our focus is on the impact on earning capacity of the parties' relationship.

¹²¹ Eekelaar has argued that compensatory claims ought to be scaled by reference to the living standard of the respondent (in order to avoid what is to some extent an inherently hypothetical inquiry into the scale of economic disadvantage suffered by the applicant in terms of earning capacity and so on) and having regard to the duration of the relationship and opportunities to mitigate the loss: "Friendship", in *Family Law and Personal Life* (2006), in press. That might not be sufficient where the disadvantage stems from child-care responsibilities which may last much longer than the relationship itself.

full – or even in half, in recognition of the parties’ shared responsibility for the decision to leave paid employment – would allow the applicant to overtake the respondent (in terms of standard of living) on separation.

- 6.160 In our view, that would be inappropriate.¹²² Having elected to tie their economic ambitions to the relationship and thereby to the limitations of the other party’s assets and earning power, such applicants ought not to be permitted (in effect) to change their minds on separation and seek full recovery, in an attempt to return them to the position they would have been in had the relationship not occurred or had they not given up work. That consideration should impose a further principled limit on the size of awards.

FOCUS ON ECONOMIC DISADVANTAGE AT THE POINT OF SEPARATION

- 6.161 We also consider it appropriate to confine claims to economic disadvantage felt on and following separation, excluding claims in relation to those earnings lost during the period of the relationship itself. Just as the economic advantage principle would exclude consideration of past contributions which had generated no retained benefit on separation, so economic sacrifices which did not leave the applicant in a disadvantaged position on separation ought also to be written off.¹²³
- 6.162 While the relationship is continuing, the applicant’s “disadvantage” might be regarded as being, at best, latent. He or she has given up work, but has done so in reliance on the support provided by the other party and the relationship. Moreover, the fact that the applicant had not been in paid employment might have been felt by all members of the household, as the level of income available to the household would be consequently reduced, and so to that extent the disadvantage would be shared during the relationship.¹²⁴
- 6.163 It is not until the relationship ends that the effects of the sacrifices made by the applicant clearly become confined to that individual. Our focus therefore is on the economic disadvantage the applicant will experience in the future as a result of sacrifices made during the relationship and, where continuing childcare responsibilities prevent the applicant from returning to full-time paid work, following it. Unless some adjustment is made between the parties at that point, the applicant may be left unfairly bearing the future burden of those sacrifices.

¹²² See also the further limitation that would often be imposed by the respondent’s needs and financial obligations to others: para 6.223 below.

¹²³ See paragraph 6.131 above. Compare Eekelaar’s analysis of this issue and the object of the loss in “Friendship”, in *Family Law and Personal Life* (2006), in press.

¹²⁴ This assumes that parties share income equally within the household where one is not working full-time. However, research suggests that this is often not the case: see work discussed by K Rake (ed), *Women’s Incomes over the Lifetime* (2000) pp 92-3. If an equal sharing or partnership approach were adopted as a positive measurement of parties’ contributions, the applicant’s share in the fruits of the partnership might be regarded in itself as ample recompense for any past earnings losses.

A FRAMEWORK FOR GIVING A “FAIR ACCOUNT” TO ECONOMIC DISADVANTAGE

- 6.164 All this implies that applicants should have to show that, following separation,¹²⁵ they have a standard of living which:
- (1) as a result of the breakdown of the relationship is lower than it was during the relationship;
 - (2) is lower than that of the respondent on separation, and
 - (3) is lower than that which the applicant would have enjoyed, had it not been for economic sacrifices made as a result of contributions made by the applicant to the parties’ relationship and, in appropriate cases, following separation as a result of continuing child-care responsibilities.
- 6.165 The court’s award would, therefore, be directed to bringing the parties’ economic positions on separation closer, to the extent that the disparity between them was attributable to the impact of their contributions to the relationship. The applicant could, at best, expect to be brought to the same level as the respondent (if the extent of the economic disadvantage – and any relief granted on the basis of an economic advantage claim – justified it), but not to overtake the respondent.
- 6.166 We believe that in the general run of cases it should be possible to implement a scheme based on economic disadvantage in a way that ensures a proportionate approach to the exercise of proving and quantifying claims, given the scale of the resources available for division between the parties. Critical factors in achieving this would be robust judicial case-management and careful structuring of the decision-making framework by the governing legislation.
- 6.167 Given the character of the claim as we envisage it, the quantum of the economic disadvantage would not translate directly into an award of financial relief. While the broad scale of the disadvantage would remain significant to the court’s decision about the quantum of any relief, the character of the claim would reduce the need to calculate the extent of the disadvantage with complete precision.¹²⁶ The claim for financial relief is ultimately not a claim for compensation, but rather for the exercise of discretion in favour of the applicant, in light of economic disadvantage sustained, the assets available and so on (as to which, see paragraph 6.222 and following below).
- 6.168 We now turn to the particular elements of the claim, as identified in the four questions set out in paragraph 6.151.

Causes and timing of economic disadvantage

What should not be the subject of an economic disadvantage claim?

- 6.169 It is important to identify clearly what we think should not be capable of being framed in terms of an economic disadvantage claim. Any claim between

¹²⁵ And after any award had been made reflecting the positive value of the parties’ contributions: see para 6.216 below on the interaction of the two claims.

¹²⁶ Though those who can afford to do so would undoubtedly seek to calculate the precise scale of the sacrifices made.

cohabitants should only relate to the contributions that they had made to their relationship. Many individuals might suffer economic disadvantage when their relationship ends in the sense that they then lose the financial support that their partner had been providing, and so are exposed to the economic effect of, for example, being unemployed. However, we do not consider that need or hardship alone justifies a remedy. It would therefore be necessary to demonstrate that the economic disadvantage suffered on separation was the result of relevant contributions made during, and, in the case of childcare, after the parties' relationship.

6.170 Nor do we think that it should be open to an applicant to argue that as a result of deploying existing resources in a certain way, other, potentially more profitable opportunities were foregone. Imagine the applicant who has paid household bills, or provided rent-free accommodation to the other party. Suppose that none of these had given rise to a retained benefit in the hands of the respondent, so no economic advantage claim could be made. Each of those applicants might alternatively try to put their claim in terms of economic disadvantage:

- (1) by paying the bills, I was unable to make contributions to my personal pension; or
- (2) by giving the respondent house-room for free, I was unable to take in a paying lodger.

6.171 In our view, each of these claims is so wholly hypothetical that it would be unacceptable to give them any weight. Of course, it is proper to acknowledge that the sort of economic disadvantage claim which we do wish to accommodate also entail an inherent element of hypothesis, at least in its quantification. While it may be perfectly clear that some sacrifice has been made as a result of reducing or ceasing paid employment, measuring the scale of that loss would necessarily require some suppositions about what would otherwise have happened to the applicant. However, we consider that there is a significant distinction between (i) sacrificing future earnings and earning capacity for the benefit of the relationship as a result of non-financial contributions; and (ii) choosing to deploy existing financial resources in one way rather than another.¹²⁷ In particular, the latter case does not involve any detriment to future earning capacity.

6.172 Nor, as we have already explained, do we think it should be possible to make claims in respect of past losses of earnings covering the period of the relationship.

What could be the subject of an economic disadvantage claim?

6.173 The most important type of claim that should be possible would relate to the economic disadvantage sustained by a partner who reduces paid employment in order to undertake child-care, care for another dependent family member or other domestic tasks. Where the children are still dependent on separation, it would be

¹²⁷ The case of choosing to work unpaid in the respondent's business, thereby losing the opportunity to pay into a pension fund, perhaps sits on the cusp of this distinction, in so far as the applicant here has chosen to offer clearly marketable services for free.

necessary also to consider the ongoing disadvantage likely to be experienced as a result of continuing child-care responsibilities.

6.174 Relevant sacrifices for these purposes include personal losses sustained by the applicant on separation in consequence of child-care provided during and following the relationship, such as:

- (1) loss of income;
- (2) loss of earning capacity; and
- (3) loss of opportunity to accumulate personal savings (including, in particular, pension savings).

6.175 We consider separately below the costs of any professional child-care necessary to enable the applicant to work following separation where the children are still dependent, at paragraph 6.195.

Proof and quantification of economic disadvantage

6.176 Proving and quantifying economic disadvantage, particularly that relating to the applicant's lost earnings and earning capacity, raises difficult questions.

6.177 There may be considerable scope for factual dispute, with consequent forensic costs, regarding issues such as:

- (1) whether the applicant had any earning capacity to begin with and, if so, what;
- (2) whether the applicant unilaterally chose not to take advantage of an opportunity to take up or continue paid employment against the wishes of the respondent, or whether the parties had agreed that the applicant should remain at home for the sake of the children (whether as a matter of mutual choice or necessity);
- (3) how to take account of the uncertainty of employment prospects in the current labour market, where the "job for life" is considerably less common than it was; and
- (4) how to disentangle the effects of the relationship from other factors affecting – or which might in future affect – the applicant's position, such as a depressed labour market or chronic illness.

6.178 As we have explained above, the claim is based on the notion that the parties should take joint responsibilities for decisions that they have made which resulted in the applicant making economic sacrifices. We would not think it appropriate for an applicant to impose the consequences of an imprudent, unilateral decision to give up work on the respondent. But we would not wish to encourage regular

factual dispute about whether these decisions were indeed mutual.¹²⁸ We envisage that in most cases it would be appropriate and easy for the court to infer that the relevant decision had been a mutual one, particularly where it related to career sacrifices for the sake of child-care. It might be appropriate, at least in child-care cases, to put the onus on the respondent to demonstrate that that was not the case, and that the applicant had voluntarily forgone a clear opportunity to engage in paid employment, against the respondent's wishes.

- 6.179 Any economic disadvantage claim of this sort inevitably entails a degree of hypothetical inquiry about what the applicant's earning capacity would otherwise have been, particularly where there are few careers in which age and experience alone necessarily lead to promotion.¹²⁹ Few if any applicants could plausibly claim that they would have reached the top of whatever career ladder they had been on when they left the labour market. The question is whether and to what extent an attempt should be made to calculate the loss by reference to the particular circumstances of the applicant, or by reference to other material.
- 6.180 There are various ways in which an economic disadvantage claim could be proved and quantified, based to a greater or lesser extent on the specific circumstances of the applicant.

Formulaic approaches

- 6.181 Some proposals for reform adopt a formula-based approach in order to try to avoid the forensic problems presented by attempts precisely to quantify the extent of economic disadvantage actually incurred by individual applicants. They forgo any attempt to calculate the applicant's actual earning capacity loss in favour of using substitute proxy measures.
- 6.182 American proposals base claims on the earning capacity of applicants' former partners. Use of such a proxy might be justified if individuals generally found partners with similar educational levels and occupations to their own; if that were so, then the position of the respondent would provide a good rough estimate of what the position of the applicant would have been had it not been for the impact of the relationship, child-care in particular, on his or her position.¹³⁰ However, data suggests that most British couples have different educational levels,¹³¹

¹²⁸ If it were proved that the applicant had foregone a clear opportunity to return to work against the wishes of the respondent, one response might be to say that the respondent could be expected to share some responsibility for the impact of choices made during the relationship – continuation of the relationship may be regarded as assent to the consequences of the partner's choice – but ought not to be forced to share responsibility for continuing, avoidable effects of those choices following separation. Contrast the approach taken in *X v X [Economic disparity]* [2006] NZFLR 361 (New Zealand).

¹²⁹ P Parkinson, "Reforming the Law of Family Property" (1999) 13 *Australian Journal of Family Law* 117, at 136.

¹³⁰ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002). The ALI proposals would not require applicants to prove that the relationship had in fact caused them any economic disadvantage; the remedy would be available wherever their earning capacity was substantially less than the respondent's.

¹³¹ The available data report findings for married and cohabiting couples as one group: see data from 1996 reported by C Hakim, *Work-Lifestyle Choices in the 21st Century* (2000) p 209, table 7.4.

making such a proxy less suitable for a remedy which does not aim to achieve substantive economic equality, that is, that the parties should enjoy the same living standard following separation.¹³² While reference to the other party's earnings might be useful in those cases where the parties had in fact been working in similar sectors, the adoption of a general formula for all cases based on that measure seems inappropriate.

- 6.183 Australian proposals adopt a general proxy based (for the vast majority of female applicants) on national averages for women's earnings, scaled according to level of educational attainment.¹³³ Such proposals are obviously dependent upon the existence of relevant data in a readily accessible and useable form.
- 6.184 Whilst they might bring advantages of certainty, these approaches may fail to capture the individual features of particular cases, leaving individual applicants under- or over-compensated. Even assuming that suitable proxy evidence were available, it would be necessary to retain some judicial discretion to make adjustments where the evidence in the individual case demanded it. For example, where supervening disability had deprived the applicant of the relevant earning capacity, no remedy or a more limited remedy might be appropriate.¹³⁴

Individualised approaches

- 6.185 Given the problems with using formulae, and despite the inherently hypothetical nature of the exercise, it might be preferable to attempt to identify the economic disadvantage sustained by the applicant on a more individualised basis. This task can be performed with varying degrees of forensic rigour and method, ranging from a technical, forensic approach and precise method of calculation akin to that familiar to tort law to a more broad-brush evaluation of the applicant's position and the quantum of the sacrifice.
- 6.186 The New Zealand¹³⁵ and Scottish¹³⁶ courts both have experience of seeking to measure individual applicant's economic disadvantage arising from child-care

¹³² Contrast the American proposals which do, depending on the length of the relationship, have that aim: the longer the relationship, the greater the applicant's justification for seeking equalisation with the respondent at separation: American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) ch 5.

¹³³ M Harrison, K Funder and P McDonald, "Principles, Practice and Problems in Property and Income Transfers" in K Funder, M Harrison and R Weston (eds), *Settling Down: pathways of parents after divorce* (1993). See also P Parkinson, "Quantifying the Homemaker Contribution" (2003) 31 *Federal Law Review* 1, at 48-50. It is necessary to use data based on women's earnings in order to protect private law respondents from being required to compensate their former partners for the gendered nature of the labour market: see n 120 above.

¹³⁴ We have explained why, if the loss of earnings and earning capacity derived from disability rather than from parenthood, we do not think it appropriate to require the respondent to pay: see discussion of needs-based relief above, at para 6.62 and following.

¹³⁵ Property (Relationships) Act 1976, s 15 (New Zealand). The first reported case to consider the provision (*Fischbach v Bonnar* [2002] NZFLR 705) adopted a technique described as "judicial plucking out of the air": B Atkin, "Editorial: Courts trudge through statutory sludge" (2002) 4 *Butterworths Family Law Journal* 31. Since then, the courts have been more rigorous, but approaches differ.

responsibilities and other causes. The approach taken by those courts is necessarily affected by the particular statutory context in which the issue arises,¹³⁷ but useful guidance may nevertheless – with appropriate caution – be gleaned.

- 6.187 In many of the reported New Zealand cases, claims have failed owing to insufficient proof of causation. But where the quantification issue has arisen, the New Zealand experience suggests that courts may receive actuarial and other expert evidence in order to substantiate claims of economic disadvantage.¹³⁸ Despite conceding that the issue must ultimately be settled “as a matter of impression on the evidence as a whole”, they have nevertheless required clear evidence that the applicant would have retained or acquired a particular level of employment and earnings had it not been for the relationship.¹³⁹
- 6.188 It has been said of Scottish law that “claims under [the economic advantage/disadvantage] principle are particularly difficult to quantify”.¹⁴⁰ But the Scottish Law Commission nevertheless considered it sufficiently sound to recommend its use in the new scheme for cohabitants, and it has now been incorporated in the Family Law (Scotland) Act 2006. The Commission said that that “although a claim based on contributions or sacrifices could often not be valued precisely, it would provide a way of awarding fair compensation, on a

¹³⁶ Family Law (Scotland) Act 1985, s 9(1)(b), which applies on divorce, now also forms the basis of the new regime for cohabitants in the Family Law (Scotland) Act 2006, s 28. There are no reported cases involving cohabitants yet. The Scottish courts have been criticised for making insufficient use of s 9(1)(b) in divorce cases, instead favouring the use of the “serious financial hardship” principle under Family Law (Scotland) Act 1985, s 9(1)(e); this principle is not available to cohabitants under the 2006 Act: J Thomson, *Family Law in Scotland* (4th ed 2002) p 159.

¹³⁷ The New Zealand legislation offers little explicit guidance to the courts regarding the operation of the “economic disparity” principle, and judges and academics have struggled to identify an appropriate approach: for analysis, see B Atkin and W Parker, *Relationship Property in New Zealand* (2001) ch 5 and J Miles, “Dealing with Economic Disparity: an analysis of section 15 Property (Relationships) Act 1976” [2003] *New Zealand Law Review* 535. In Scotland, guidance offered by divorce cases must be read in light of the fact that the economic advantage/disadvantage principles in that context are part of a wider scheme, which starts with “fair” (usually equal) sharing of the matrimonial property pool; in cohabitants’ cases, they are free-standing principles which, along with awards based on the economic burden of child-care following separation, provide the sole basis for awards. We must await decisions under the Family Law (Scotland) Act 2006 to see how the courts interpret them in this context.

¹³⁸ *V v V* [2002] NZFLR 1105: applicant was qualified primary school teacher at the start of the relationship and the standard pay scale for that public sector job made it straightforward to determine where the applicant would have been had it not been for her career break. *McGregor v McGregor (No 2)* [2003] NZFLR 596: applicant worked as a secretary in a specialised field, in relation to which expert evidence from a recruitment consultant was adduced.

¹³⁹ See Hardie Boys J in *Turner v Turner* (HC Dunedin, AP 16/86, 21 November 1986), quoted in *Mackie v Mackie* [1993] NZFLR 213, 217-8.

¹⁴⁰ J Thomson, *Family Law in Scotland* (4th ed 2002) p 157.

rough and ready valuation, in cases where otherwise none could be claimed [under the general law]”.¹⁴¹

- 6.189 Scottish courts hearing economic disadvantage claims in divorce litigation have allowed various methods of proof, including expert evidence¹⁴² and evidence of colleagues whose career progress had not been inhibited by family responsibilities of the sort experienced by the applicant.¹⁴³ Where the applicant has been out of work for many years, the courts have sometimes¹⁴⁴ been willing to take into account common sense evidence of economic disadvantage in fashioning the final award – in a rough and ready way - despite the lack of precise evidence proving what the applicant’s position would otherwise have been.¹⁴⁵
- 6.190 The leading Scottish case on quantification under the economic disadvantage principle on divorce expressly rejected an attempt to apply the Ogden tables (used in personal injury cases to calculate future earnings losses) as a basis for quantifying economic disadvantage in family law. Lady Smith said:¹⁴⁶

I do not accept that it is appropriate to approach the application of the economic disadvantage principle ... as though an award were being made in a personal injuries case. The inappropriateness of doing so is highlighted by the fact that, in applying the statutory provisions, the question arises as to whether any economic disadvantage suffered by the pursuer has been balanced by economic disadvantage suffered by the defender Moreover, the court is directed to take "fair account" which clearly involves an exercise of discretion.¹⁴⁷ These requirements underline that ... an overall view of the fairness and reasonableness of the outcome must be looked at.

These provisions do not, in my opinion, require that a step by step calculation of sums due under each principle be carried out, which was the approach of the pursuer's counsel, as though a compensatory award was being calculated. ... Clearly, the approach required may have to be a subtle one, depending on the circumstances of the case.

Conclusion on quantification

- 6.191 The question of quantification is undeniably difficult and the experience of those jurisdictions that operate a compensatory principle of this sort has not been

¹⁴¹ Report on Family Law (1992) Scot Law Com No 135, para 16.20.

¹⁴² *Wilson v Wilson* 1999 SLT 249.

¹⁴³ *Adams v Adams (No 1)* 1997 SLT 144; *Coyle v Coyle* [2004] FamLR 2.

¹⁴⁴ Attitudes, even of individual judges, vary: compare remarks of Lord McCluskey in *Cunniff v Cunniff* 1999 SLT 992, 997F-I; and *Ali v Ali (No 3)* 2003 SLT 641, 647I-648D.

¹⁴⁵ *Loudon v Loudon* 1994 SLT 381.

¹⁴⁶ *Coyle v Coyle* 2004 FamLR 2, at [49]-[50] and [52].

¹⁴⁷ The new Act does not include the “fair account” formula, but simply confers on the court a discretion to make orders “having regard to” the economic disadvantage, and “in respect of” the economic burden of child-care.

entirely satisfactory. We welcome consultees' views on the feasibility of the various options available. We have already explained how we would characterise these claims as a fair apportionment between the parties of economic disadvantage arising on separation: from paragraph 6.153 above. The approach of Lady Smith in *Coyle* is compatible with that approach: a family law remedy should be an exercise in fair accounting, not a strict mathematical calculation of compensation for loss, and the proof and quantification of such claims should be approached accordingly. We would expect the mechanism of proof adopted to be proportionate to the value of the claim and the assets available.

- 6.192 We accept the force of criticisms that reform based on economic disadvantage presupposes a "middle class paradigm": the professional woman who forgoes a career in order to have children. In many cases it may be clear that some disadvantage has been incurred even if it is not susceptible of precise measurement. The middle class case may be rather different from that of the school-leaver with minimal qualifications and experience, who makes no particular career sacrifice when parenthood begins.¹⁴⁸ But if parenthood has impaired the latter individual's ability to engage in paid employment, difficulties of proof ought not entirely to bar any relief on that ground. Although we are not attracted by the adoption of a formulaic approach for all cases, reference to average earnings for someone of the applicant's level of educational attainment¹⁴⁹ might in some cases be the only way of gaining any appreciation of the disadvantage sustained by the applicant during the relationship and on separation. Using a more formulaic method, tempered by judicial discretion, might be the only realistic way to estimate the extent of economic disadvantage sustained by the applicant.
- 6.193 Moreover, as we have already indicated at paragraph 6.52, the value of the economic disadvantage would not translate directly into an award. In deciding what financial relief to grant, the court would have a number of other factors to bring into account, as we discuss below. Ultimately, the best that an economic disadvantage principle could do would be to seek to achieve an equitable distribution of net economic disadvantage between the parties, given a balancing of each party's claims and, crucially, the available assets.

The assets from which relief would be granted

- 6.194 Just as in cases of economic advantage, we do not consider that relief for economic disadvantage should have to derive from a particular pool of property. Limiting the claim in that way would render the applicant's success entirely dependent upon the nature and classification of the parties' assets.¹⁵⁰ While relief based on the economic advantage principle would be based on the scale and value of specified pool of assets or other resources having been enhanced as a result of the applicant's contributions, the corresponding sacrifice made by an

¹⁴⁸ P Parkinson, "Reforming the Law of Family Property" (1999) 13 *Australian Journal of Family Law* 117, at 137.

¹⁴⁹ And/or perhaps to retraining costs: see para 6.229.

¹⁵⁰ Contrast New Zealand, where claims for economic disparity take effect over the relationship property pool: Property (Relationships) Act 1976, s 15. Scottish law does not confine economic disadvantage claims in that way.

economic disadvantage applicant need not have entailed any acquisition of resources in the hands of the respondent. If the case were “asset poor”, no award would be possible, however extensive the applicant’s economic disadvantage or the respondent’s resources outside the relevant property pool.¹⁵¹ It would therefore be unduly restrictive to confine economic disadvantage claims to any particular asset pool.

Child-care costs

- 6.195 There is one issue related to the economic disadvantage sustained on separation which should be considered separately: the costs of child-care. The applicant might only be able to work following separation (now without the support of the relationship) with the assistance of professional child-care.
- 6.196 The new Scottish legislation for financial relief between cohabitants on separation includes a claim in respect of the “economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents”.¹⁵² This principle, which also features in Scottish ancillary relief on divorce, addresses both the applicant’s inability to work full-time owing to child-care and the costs of professional child-care that might have to be engaged to enable that parent to work.¹⁵³ We have included the economic disadvantage arising from continuing child-care following separation in our discussion of the economic disadvantage generally. That leaves the question of child-care costs.
- 6.197 In many cases, as in Scotland, the child-care element of working tax credit will go some way to assist with the costs of child-care in these cases. But since the tax credit does not cover the full cost of the care required, there will always be a surplus to be paid privately.¹⁵⁴
- 6.198 The Child Support Act 1991 and the operation of the Child Support Agency, also both applicable in Scotland, do not fall within the scope of this project. This paper assumes the existence of an administrative child support scheme, assessing maintenance payable by non-resident parents on the basis currently applying to

¹⁵¹ We consider below the separate question of whether awards should take the form of capital or periodical orders.

¹⁵² Family Law (Scotland) Act 2006, s 28(2)(b). The Scottish Parliament consider it appropriate to include the economic burden of child-care following separation, a principle which covers child-care costs, as an element of financial relief between cohabitants, as something distinct from child maintenance (“aliment”): Scottish Parliament, Justice 1 Committee Official Report, Family Law (Scotland) Bill Stage 2 debates, col 2378 (23 November 2005), Deputy Minister for Justice (Hugh Henry).

¹⁵³ J Thomson, *Family Law in Scotland* (4th ed 2002) p 160.

¹⁵⁴ Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002, SI 2002 No 2005, reg 20(3), as amended. Note the concerns that child-care costs may still be too high for many parents: see Part 4, n 32. There may also be cases where the tax credit is not available because the parent is not eligible for it.

cases arising since March 2003, the “new” formula.¹⁵⁵ Since child support is entirely a matter for the Child Support Agency to determine where it has jurisdiction, it is the one part of the financial package on separation over which the courts have limited, if any, control. We must consider how any new court-based scheme for financial relief on separation would relate to child support in this area. We must also address here the existing powers of the English courts to provide remedies for the benefit of children under Schedule 1 to the Children Act 1989.¹⁵⁶

6.199 Child support is designed to contribute towards the maintenance of the child during minority. The liability can only be discharged by the making of regular payments.¹⁵⁷ However, like court-based awards under the Children Act 1989, child support is not designed to respond to the economic impact of parenthood felt by the adult parties and so does not address economic sacrifices made by the primary carer. Under the child support formula of the original Child Support Act,¹⁵⁸ the maintenance requirement specifically included a “parent as carer” element. That part of the payment was designed to serve a purpose similar to that of the carer’s allowance in court orders under the Children Act 1989.¹⁵⁹ It accordingly contributed to the support of the child’s carer, but it did not address the particular economic sacrifices that the individual parent with care might have had to make in order to provide that care.¹⁶⁰ The formula applying to all new cases includes no such discrete element attributable to the carer. The fractions of income payable under the basic rate are based on roughly half of the average spending on children by two parents living together.¹⁶¹

¹⁵⁵ Child Support, Pensions and Social Security Act 2000, amending, amongst other legislation, Child Support Act 1991, s 11 and sch 1: based on a percentage of the non-resident parent’s net income, according to the number of children for which it is payable. There are still large numbers of cases in the system which are subject to the old formula: N Wikeley, “Child Support – Looking to the Future” (2006) 36 *Family Law* 360, at 361, discussing the future of child support in light of the current Henshaw review.

¹⁵⁶ Contrast the more limited powers of the Scottish courts to order “aliment” for the child: Family Law (Scotland) Act 1985, ss 1-4, to the extent that the courts’ jurisdiction is not excluded by the Child Support Act 1991, s 8. Note the express provision for child-care costs in s 4(4) of the 1985 Act.

¹⁵⁷ And not, for example, by way of a one-off capital sum or the provision of accommodation for the child.

¹⁵⁸ Child Support Act 1991, s 11 and sch 1, as originally enacted.

¹⁵⁹ See para 3.68 above. The child support carer element was calculated by reference to income support levels, not the standard of living of the parents and child. For discussion see S Cretney and J Masson, *Principles of Family Law* (6th ed 1997) pp 512-3. It was controversial amongst non-resident parents, particularly former cohabitants, who objected to having to support their former partners in this way when (unlike former spouses) they had never been under any legal obligation to support the parent with care. The view of the Scottish Law Commission when the old child support formula was in force was that there was no need for the “economic burden of child-care” principle to be adopted for cohabitants: Family Law (1992) Scot Law Com No 135, para 16.16.

¹⁶⁰ It simply covered the welfare benefit otherwise payable to that individual, and so was not tailored to the actual costs of professional child-care or the actual extent of the loss of earnings and earning capacity incurred by the parent with care.

¹⁶¹ Department of Social Security, *A new contract for welfare: Children’s Rights and Parents’ Responsibilities* (1999) para 2.5.

6.200 Since child support does not and is not intended to share the wider economic impact of parenthood between the adult parties, there is clearly a distinct role to be played by remedies between the former cohabitants based on an economic disadvantage principle dealing with loss of earning capacity, and so on. The issue of how the costs of child-care should be dealt with, given the existing remedies available for the benefit of the child, is less straightforward.

6.201 The courts have powers under Schedule 1 to the Children Act 1989 to make periodical payments to cover what may broadly be described as school fees, in all types of case.¹⁶² However, it has been held that these do not extend to the costs of nursery school and child-minding for very young children.¹⁶³ In that case, which arose before the introduction of the current tax credit system, the Court of Appeal observed that

In point of fact the nursery fees and the child minder's charges are sought in order to enable the mother to go out to her own job. It is in essence a periodical maintenance charge which may be said to apply indirectly to the child but more directly to the mother.¹⁶⁴

Since the parents had not been married, there was no basis on which the mother could make a claim for financial relief against the father in her own right. So in view of the Court's conclusion that it had no power to make the relevant order under Schedule 1, no order could be made.

6.202 However, where they have jurisdiction to make additional periodical payments for the benefit of the child under Schedule 1 to the Children Act 1989 (in "big money" cases which exceed the jurisdictional limit of the Child Support Agency), the courts have made awards envisaging that such payments might be used to pay for professional child-care.¹⁶⁵

6.203 There might be a case for ensuring that the courts have jurisdiction in relation to the costs of child-care, whether those costs be regarded as being for the benefit of the child or for the benefit of the parent. Without that assistance, the parent's ability to realise whatever earning capacity he or she has might in some cases be impeded.

6.204 In many cases, however, tax credits will be available to cover much of the costs, and the practical utility of any claim between the former cohabitants would inevitably be limited by respondents' ability to pay, particularly having regard to the fact that they will already be paying child support. It might ordinarily be appropriate to view the respondent's child support payments as providing his or her contribution to child-care costs not met by tax credits. But that might be

¹⁶² That is to say, not just in those "big money" cases that exceed the jurisdictional limit of the Agency: Child Support Act 1991, s 8(7).

¹⁶³ *Re L M (a minor)*, judgment of 9 July 1997, Court of Appeal (unreported): a case regarding a 15 month old child.

¹⁶⁴ *Re L M (a minor)*, judgment of 9 July 1997, Court of Appeal (unreported), per Sir Stephen Brown, President.

¹⁶⁵ Child Support Act 1991, s 8(6); *F v G (Child: Financial Provision)* [2004] EWHC 1848 (Fam), [2005] 1 FLR 261.

thought to overlook the importance of meeting such costs in order to enable the primary carer to work. Viewed in that light, such payments may be key to reducing that party's economic disadvantage. We are keen to receive consultees' views on whether (given these factors and existing powers of the courts under Schedule 1 to the Children Act 1989 in high value cases) it would be useful in practice, and appropriate as a matter of principle, that a new scheme for financial relief between cohabitants on separation should include the possibility of orders to help meet the costs of child-care.

Cohabitants “with children”: which children?¹⁶⁶

- 6.205 In considering cases between cohabitants with children, we have assumed thus far a straightforward case involving joint parents of dependent children. We now need to consider whether the same principles should apply to other cases where there are children living in the cohabitants' household. In particular, in making a claim for economic disadvantage, ought it to matter whether the children cared for by the applicant were children of both parties, or of the respondent only, the applicant only, or neither of them? We shall refer to all of these as “children of the family”. Similar issues might arise regarding the relationships of the parties to another family member for whom care had been provided.
- 6.206 The key questions relating to remedies between the adults are whether claims relating to economic disadvantage arising from child-care provided by the applicant should be available in relation to any child of the family, whether that care were provided (1) during the relationship, or (2) following separation. It is also necessary to ask whether any distinction ought to be drawn between cases where:
- (1) the child is the child of both parties;
 - (2) the child is not the child of both parties, but of the respondent (in the event that the non-parent applicant was the primary carer during the relationship and/or following separation);
 - (3) the child in question is that of the applicant, but not of the respondent; and
 - (4) the child is the child of neither party.

Joint legal parents¹⁶⁷

- 6.207 Clearly, where the parties are as a matter of law the parents of children whom they have raised together, financial relief should be available to the party who has undertaken more of the child-care and whose economic position will in consequence be more disadvantaged following the parties' separation. Any child of both parties born following separation for whom the applicant will be caring should also be relevant for these purposes. Although such an applicant, like any other, would be expected to take whatever steps were reasonably available to maximise their earnings and earning capacity following separation, that applicant

¹⁶⁶ See Example 4 in Part 7.

¹⁶⁷ See Part 9 n 71.

may face substantial economic disadvantage in the future as a result of caring for the child following separation.

- 6.208 Where the parties had adopted a family lifestyle in which one of them was a full-time (or part-time) stay-at-home parent throughout the children's upbringing, even where the children are no longer dependent on separation, one party may experience economic disadvantage (in terms of impaired earning capacity and so on) long into the future. In our view, the case for financial relief between the adults to reflect the consequences of that care is as strong here as it is in the case where the children are still at home.¹⁶⁸

Cases where the parties are not joint legal parents

- 6.209 Potentially more complex are cases where the parties are not both the legal parents of all or some of the children who lived with them during their relationship. These cases may be further complicated by the fact that some of these children will spend time in, or may also be members of, another household with their (other) legal parent. The cohabitants' household may or may not have been the children's principal residence during the parties' relationship. But the amount of time spent by the children in each household may vary considerably, from more or less equal time, to a situation where stays in the other parent's household are relatively short¹⁶⁹ or infrequent. Evidently, the less time the child spent in the cohabitants' household, the less substantial would be the parties' contributions towards that child's welfare that might provide a basis for relief under any new scheme.

THE RESPONDENT'S CHILD

- 6.210 Where the applicant has taken on child-care responsibilities for the child of both of them or for the respondent's child, it is self-evidently fair that the respondent should be required to provide financial relief in relation to any economic disadvantage sustained by the applicant as a result. New Scottish legislation limits claims relating to care provided following separation to children of whom both parties are the parents.¹⁷⁰ But we think it would be appropriate to require respondents to provide appropriate relief where (perhaps unusually) the child being cared for by the applicant following separation is the respondent's and not that of the applicant.

THE APPLICANT'S CHILD

- 6.211 More difficult issues arise where the child is from the applicant's earlier relationship. In this case, the proper view might be that any financial relief relating to the applicant's care for that child should be (or have been) made by the other parent, not the current respondent, certainly to the extent that the disadvantage arose from care provided prior to the relationship now under consideration. But

¹⁶⁸ See Example 1A, and the discussion in Part 4 regarding the paradox of Children Act 1989, sch 1, for this party: the older the children, the less long such a party will be indirectly benefited by remedies made for the benefit of the children, despite the fact that the carer has been performing that role for many years.

¹⁶⁹ Perhaps with no overnight stay.

¹⁷⁰ Family Law (Scotland) Act 2006, s 28(2)(b). It was suggested that a claim could be made against the respondent parent for aliment of the child in such cases.

there might sometimes be grounds for saying that the first remedy was limited in contemplation of the second relationship or that the second partner, particularly perhaps over a long relationship, had accepted some level of responsibility for the applicant, together with his or her continuing child-care responsibilities.

THE CHILD OF NEITHER PARTY

- 6.212 Potentially even more varied are cases where the child is, as a matter of law, the child of neither cohabitant. However, wherever such a child had been treated by both parties as a child of their family, such responsibility arguably ought to be shared. For the duration of the relationship, and possibly thereafter, they may be regarded as having implicitly agreed to share the economic consequences of raising that child together.

Conclusions

- 6.213 Since the circumstances of these cases are so varied, we consider that it would be preferable not to curtail the court's powers by a rule that excluded the possibility of certain claims being made in any particular category of case. In many cases, families will be composed of children from past relationships and the current relationship. It could be very complicated to seek to distinguish between the care provided to different children within the family and the economic effect on each party of the applicant's having provided that care.
- 6.214 The best view might be that it does not matter whose children the applicant stayed at home to care for, provided that it was explicitly or implicitly agreed by the parties that he or she should do this, while the family was supported financially by the respondent. It ought therefore to be open to the court to consider the extent to which any children who were not the respondent's had been treated by the parties as children for whom they had undertaken an obligation to care.¹⁷¹ In such cases, the applicant's care for the child may be regarded as partly discharging the respondent's own responsibility, a fact which would justify some sharing of the economic disadvantage arising.
- 6.215 We invite the views of consultees on the question of which children should be "relevant" to the provision of financial relief between "cohabitants with children".**

OPERATING THE TWIN PRINCIPLES: ECONOMIC ADVANTAGE AND DISADVANTAGE

- 6.216 We now consider how the economic advantage and economic disadvantage principles would operate. In particular, we consider:
- (1) how cross-claims from the respondent and multiple claims by the applicant would affect the net value of an award made to the applicant;
 - (2) various practical limitations on the extent of relief that could be granted; and

¹⁷¹ Whether or not that had been formally enshrined, for example, in a joint residence order.

- (3) the possible imposition of an additional “substantial” or “manifest unfairness” threshold for claims to succeed.

Respondents’ claims: countervailing benefits¹⁷²

- 6.217 Inevitably, both parties would be in a position to argue that they had made contributions to the relationship, and it would be necessary to balance the parties respective claims in order to ascertain what, if any, financial relief should be granted and to whom.
- 6.218 No remedy to recognise the economic advantage conferred or disadvantage sustained by the applicant would be necessary where and to the extent that those contributions had been fully compensated by benefits received from the respondent during the relationship. Ordinarily, we do not think that it would be fair to allow respondents to assert the value of support¹⁷³ provided to the applicant during the relationship as a means of defending a claim for economic disadvantage. The latter claim would be confined to continuing disadvantage experienced on separation, as opposed to past earnings losses. Financial support that did not provide the applicant with a retained benefit on separation could not meaningfully be regarded as providing compensation for that.
- 6.219 However, it might sometimes be appropriate to allow respondents to defend claims by pointing to certain benefits they had provided to the applicant, even if those benefits were not retained by the applicant on separation. For example, suppose that the respondent had made transfers of capital to the applicant that were specifically designed to provide that applicant with long-term economic security, but which the applicant had instead squandered. It may be unfair to bar the respondent from defending the claim by reference to such payments, which could effectively be regarded as compensation paid in advance. There might be felt to be something inconsistent in allowing that defence, while requiring applicants asserting a claim on the basis of their financial contributions to demonstrate a retained benefit at the point of separation.¹⁷⁴ But there might be a tenable distinction between seeking to raise and seeking to defend a claim, in these narrow circumstances, by reference to such contributions.
- 6.220 It would also be necessary to take account of the effect of certain “contributions” to be made by each party following separation. For example, while one party might continue to provide care for the couple’s children following separation, the other might make provision for the child by providing accommodation under Schedule 1 to the Children Act 1989 from which the applicant (primary carer)

¹⁷² See Example 1B in Part 7.

¹⁷³ Or a luxurious lifestyle.

¹⁷⁴ See para 6.144 above.

would indirectly benefit.¹⁷⁵ In so far as that benefit alleviated some of the applicant's economic disadvantage, no further relief would be necessary.¹⁷⁶

Applicants' claims: avoiding double-counting or over-compensation¹⁷⁷

- 6.221 There are various ways in which a particular contribution might be taken into account, and care would have to be taken to avoid including a particular contribution under more than one head of claim and so making provision for it twice over. In particular, any claim by the applicant based on economic advantage should be considered before those based on economic disadvantage. Since the latter claim would depend on there being a disparity in the parties' situations on separation, the applicant's position post-separation should be assessed in light of any provision which would be made under the economic advantage principle. The economic disadvantage claim would then only deal with any difference between the award made pursuant to the economic advantage claim, and the remaining extent of the economic disadvantage.

Practical limitations on claims

- 6.222 In addition to the limits implied as a matter of principle from the nature of the claims being made, there are practical limitations on what any order can fairly and reasonably achieve. These could, and in some cases should, cap awards that the principles alone might otherwise indicate. This discussion is particularly important in so far as awards would not be taken from a particular pool of property, but could in theory call on all financial resources at the disposal of each party, including future income.

Available resources and respondents' needs and obligations

- 6.223 The aim of financial relief on separation would be to distribute the parties' resources fairly between them in light of the economic advantages retained and economic disadvantages arising on separation. In the vast majority of cases, those resources would be limited.¹⁷⁸ In particular, many respondents would have children living with them full- or part-time following separation, or have ongoing

¹⁷⁵ The interaction of Schedule 1 to the Children Act 1989 with any new scheme is considered below at para 6.259.

¹⁷⁶ In our view, the same would not apply to payments of child support. These are legally required from the non-resident parent (respondent) as a contribution towards that child's needs. The parent with care (applicant) does not derive a benefit from those payments which is equivalent to that provided by accommodation necessarily shared with the child. However, the fact of the respondent's child support payments would clearly be relevant to the court's decision about what relief, if any, to grant in so far as they reduced the extent of the resources available for that purpose.

¹⁷⁷ By confining the scheme to retained benefits and economic disadvantage following separation, there is considerably less risk of double-counting than might arise under a "global accounting" scheme of the sort we have rejected. If, contrary to our currently preferred view, a wider "partnership" approach were adopted as a way of positively valuing contributions, that would further limit the role required of an accompanying economic disadvantage principle; a partnership award might often be expected to reduce the disparity between the parties on separation considerably.

¹⁷⁸ In some big money cases, the scale of the assets is almost meaninglessly large, in the sense that the income and living standards they provide can be attained with only part of the massive fortune involved – the surplus makes no difference.

financial obligations towards children from past or new relationships. They would have a strong argument that the court should not, by the order it makes for financial relief between the cohabitants, impair their ability to meet the needs of those children. The presence of such children would often limit the quantum of relief that could be ordered. Moreover, while the priority is likely to be to house the children and their primary carer, the court should also be able to ensure, wherever possible, that the respondent has accommodation suitable for staying-visits by the children.¹⁷⁹

- 6.224 Any court-based remedy would therefore take full account of the financial resources and existing obligations of the respondent in deciding whether to make any order in favour of the applicant, and the need for respondents to maintain themselves. The best that any award could be expected to do, therefore, would be to take fair account of economic advantage and economic disadvantage, in light of the assets available and the legitimate financial needs and obligations of the respondent. Moreover, since it would be preferable, where possible, to effect a clean break between the cohabitants,¹⁸⁰ any financial relief might often be made by way of capital transfers, so as not to increase the amount of periodical payment required from the respondent (in addition to any child support that would be payable).

A needs-based ceiling?

- 6.225 One way of avoiding some of the potential forensic difficulties associated with proof of at least some forms of economic advantage and economic disadvantage might be to reduce substantially the theoretical function of those principles. Proof that relevant economic advantage had been retained or economic disadvantage had arisen on separation would be a precondition of any claim succeeding. But thereafter, the extent of any relief granted could be limited by reference to the needs of the applicant. For example, applicants would receive relief reflecting the economic disadvantage they had sustained, but only to the point required to maintain them; or put another way, applicants would receive needs-based remedies, but only in relation to needs caused by the division of functions in their relationship.¹⁸¹ If so, any economic disadvantage that went beyond the parties' needs would not be covered; and applicants who had sustained some economic disadvantage, but were nevertheless self-sufficient at separation, would receive nothing at all on this ground.
- 6.226 As we have noted already, there may only be a very few cases where the assets are sufficiently extensive that an economic disadvantage award could in practice do more than simply alleviate applicants' needs. The courts' interpretation of needs in the divorce context tends to be conditioned, at least in the case of long relationships, to the standard of living to which the parties are accustomed.¹⁸² Whether or not the same approach were adopted in these cases, in practice, the best that any award could do in most cases, whatever underlying basis the claim were based on, would be to meet some of the applicant's needs.

¹⁷⁹ See n 51.

¹⁸⁰ See para 6.265.

¹⁸¹ See para 6.67 and following.

- 6.227 However, whatever the practical effect of awards in individual cases, we retain our reservations about using need as a basis for remedies. The arguments we made from paragraph 6.62 above about needs-based relief apply equally to the idea of capping economic disadvantage claims (or any other type of claim) at the point of need. Whilst perhaps pragmatically attractive, such capping would be difficult to justify as a matter of principle, as it would mean that the economic impact of the relationship on the parties might not be fully shared on separation.
- 6.228 Nor would this needs-based cap provide a way of avoiding the problems of proof and quantification associated with economic disadvantage. If it is accepted that cohabitants ought only to be responsible for their partner's needs on separation to the extent that those needs arise from the relationship, and not from factors such as disability and unemployment (for which the respondent has no responsibility), it would remain necessary to prove and quantify (at least in a broad-brush way) the extent to which the applicant's economic position on separation was attributable to the relationship and its termination.

Transitional support and retraining costs?

- 6.229 A similar pragmatic limitation could involve requiring respondents to provide no more than transitional support designed to help applicants get back on their feet, even if the full scale of their potential claim were far greater. Where assets were limited and so any award would have to be made out of income, the prospect of long-term periodical payments of the sort that might be required to provide full relief to the applicant may be undesirable. It might be preferable to limit the remedy to a transitional period, perhaps related to the time it will take for the applicant to obtain any retraining necessary to return to paid employment. That would enable a clean financial break to be achieved between the parties as soon as possible, whilst not ignoring the legitimacy of the applicant's argument for some sort of support. We consider the clean break question in full below.

A final filter on claims: substantial or manifest unfairness?¹⁸³

- 6.230 Under our proposed scheme no award would be necessary at all unless it could be shown that, taking account of economic advantage conferred and disadvantage sustained, the parties' respective financial positions at the point of separation were unfair, and that some adjustment between them would therefore be appropriate. However, it might be helpful to add a final filter to claims, the purpose of which would be to make clear that legal intervention resulting in the award of financial relief would only be appropriate at all if and where it would be substantially or (more strongly) manifestly unfair not to provide a remedy. Such a threshold for claims might usefully provide a further deterrent to hopeless claims.¹⁸⁴

¹⁸² They would not necessarily take the same view when dealing with cohabitants.

¹⁸³ See Examples 8A and 9 in Part 7.

¹⁸⁴ Though, conversely, it might also encourage parties to exaggerate claims in an attempt to ensure that they overcame that threshold.

- 6.231 We envisage that in most cases, the chief factor of fairness for these purposes would be the size of the claim: if the value of the retained benefit or economic disadvantage were small, it might be disproportionate to pursue a claim at all. But value is relative, and what may be a trifling sum for an affluent applicant might be of great practical value to someone less well-off.
- 6.232 An assessment of fairness might also depend on the parties' relative responsibility for benefits retained or sacrifices made, the parties' respective needs, and other wider circumstances of the case. It would be possible, and in our view desirable, for at least some of these wider circumstances to be expressly identified in the legislation as factors for the court to take into account in exercising its discretion. But often, these sorts of factors would make it unfair or otherwise inappropriate to make an award, rather than not to do so.

THE RELEVANCE OF CONDUCT

- 6.233 We do not consider it appropriate that fault or conduct generally should play a significant part in a new family law scheme for financial remedies between cohabitants on separation.
- 6.234 It is generally accepted that conduct is irrelevant to financial provision on divorce, save in the most extreme cases.¹⁸⁵ The experience and criticisms of fault-based divorce show how difficult and arbitrary it can be to adjudicate on fault within intimate relationships. The "blame", if any, is rarely attributable to just one of the parties, so an identification of guilty and innocent parties for the purposes of financial provision will often be problematic. Moreover, generally inviting evidence and argument about conduct may only exacerbate the tensions that inevitably surround the break-up of many personal relationships, to the likely detriment of any children and the adult parties themselves.¹⁸⁶
- 6.235 Separation by cohabitants clearly involves no formal adjudication or assessment of fault – the parties are free to separate for whatever reason, unilaterally or by mutual consent and without any official sanction. However, there may be cases where one party's behaviour had been such that it would be manifestly unfair to ignore it in the context of financial relief.
- 6.236 One clear example is financial and litigation misconduct.¹⁸⁷ That form of misconduct bears directly on the court's ability to grant financial relief. It might, for example, involve dissipating assets that should be made available to meet the other party's claims, or causing the other party to incur unnecessary legal costs in seeking to assert a reasonable claim for relief or to defend an unreasonable

¹⁸⁵ But see *Miller v Miller* [2005] EWCA Civ 984, [2006] 1 FLR 151, heard on appeal in the House of Lords in February 2006.

¹⁸⁶ Facing the Future: A Discussion Paper on the Ground for Divorce (1988) Law Com No 170, and Ground for Divorce (1990) Law Com No 192. See also the finding of recent research by financial and business advisers Grant Thornton that 96% of solicitors from the top 100 family law firms think that conduct should not be taken into account on ancillary relief applications because it would result in longer and more hostile proceedings: reported in "Family lawyers fear inclusion of conduct in divorces" (2006) 150 *Solicitors Journal* 485.

¹⁸⁷ For example *Clark v Clark* [1999] 2 FLR 498 and *Le Foe v Le Foe and Woolwich plc* [2001] 2 FLR 970; see generally S Cretney, J Masson and R Bailey-Harris, *Principles of Family Law* (7th ed 2003) paras 14-062 to 14-063.

claim. In many cases, the court will be able to deal with the relevant misconduct via anti-avoidance measures or costs orders.¹⁸⁸ However, where that is not possible, it should be possible for the court to take account of that conduct in determining what, if any, award to make.

- 6.237 It can be argued that it is inappropriate to introduce other aspects of conduct into financial relief. This is particularly so where the scheme for financial relief is essentially based on considerations of economic justice, since many forms of conduct have no direct bearing on those issues. However, as in the case of ancillary relief on divorce, it would be appropriate to leave room for the court to take account of conduct where it would be inequitable to disregard it, for example, where serious domestic abuse has impaired the applicant's economic security.¹⁸⁹
- 6.238 **We invite the views of consultees on the principles which should justify and quantify awards of financial relief between cohabitants on separation.**
- 6.239 **We provisionally reject the view that the substantive law governing financial relief between spouses on divorce (Part II of the Matrimonial Causes Act 1973¹⁹⁰) should be extended to cohabitants on separation. Do consultees agree?**
- 6.240 **We consider that, in determining whether to grant relief and, if so, what the relief should be, the court should have regard to whether, and to what extent, either party's economic position following separation (in terms of capital, income or earning capacity) was:**
- (1) **improved by the retention of some economic benefit arising from contributions made by the other party during the relationship ("economic advantage"); or**
 - (2) **impaired by economic sacrifices made as a result of that party's contributions to the relationship, or as a result of continuing child-care responsibilities following separation ("economic disadvantage").**

Do consultees agree?

- 6.241 **We invite the views of consultees on the factors to which the court should have regard when considering the justification for, and quantum of, any financial relief to be granted in accordance with the principles of economic advantage and economic disadvantage.**

¹⁸⁸ See discussion in Part 11.

¹⁸⁹ For examples from the ancillary relief jurisdiction of domestic violence being taken into account see *Jones v Jones* [1976] Fam 8; *H v H (Financial Provision; Conduct)* [1994] 2 FLR 801; *H v H (Financial Relief: Attempted Murder as Conduct)* [2005] EWHC 2911 (Fam) (unreported). See also the views of P Parkinson, "Quantifying the Homemaker Contribution" (2003) 31 *Federal Law Review* 1, at 50-51 on situations where the loss arising at the end of a relationship can be regarded as self-inflicted.

¹⁹⁰ And to civil partners under the Civil Partnership Act 2004, sch 5.

- 6.242 We invite the views of consultees on whether awards should be limited to “transitional support”, with particular reference to the costs of retraining that may be necessary to enable the applicant to re-enter the labour market.
- 6.243 We invite the views of consultees on whether a new scheme for financial relief between cohabitants should include a power to make awards in appropriate cases to assist the party with whom any relevant children will principally live following separation with the costs of child-care.
- 6.244 We invite the views of consultees on whether awards should only be made where it would be substantially or manifestly unfair not to do so.
- 6.245 We consider that parties’ conduct should not be taken into account in considering claims for financial relief on separation, save where that conduct relates to litigation or financial misconduct, or where it would otherwise be inequitable to disregard it. Do consultees agree?

THE COURT’S ORDER

- 6.246 Whether or not it would be appropriate to apply the substantive law of ancillary relief to cohabiting couples on separation, there is a clear case for putting the range of orders used in matrimonial cases at the disposal of courts providing financial relief between cohabitants.¹⁹¹ One of the criticisms of the general law as it applies to cohabitants is the very restricted range of remedies that the courts have available to them.¹⁹²
- 6.247 Except for orders applying to pension funds and orders for sale, all of these orders are available to courts determining applications brought by survivor cohabitants under the Inheritance (Provision for Family and Dependants) Act 1975 (“the 1975 Act”), and applications made in relation to cohabitants’ children under Schedule 1 to the Children Act 1989.¹⁹³ Save for pension sharing and periodical payments, these family court orders largely mirror, in effect, the sorts of orders available to civil courts for enforcing debts, and so in that sense there is nothing particularly special about them which would justify confining them to matrimonial cases. They are simply practical tools for obtaining financial redress from a respondent.

The menu of family law financial and property orders

- 6.248 The orders that we have in mind are therefore as follows:

Financial provision

- (1) periodical payments either until a specified event, or over a specified term, or until the order is superseded;

¹⁹¹ With the obvious exception of variation of nuptial settlements.

¹⁹² See Part 4.

¹⁹³ Orders for the benefit of children are not listed separately here. Children Act 1989, sch 1, replicates for the children of cohabitants and others the range of orders available to the children of spouses and civil partners under the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004, with the apparent exception of the order for sale.

- (2) secured periodical payments, for the same periods as above;
- (3) lump sums, which may be payable by instalments;
- (4) any of these may be directed to pension trustees, where pension earmarking is ordered;
- (5) interim payments on account pending full trial or final settlement;

Property adjustment

- (6) property transfer;
- (7) property settlement, including orders requiring one party to make property available for the other's occupation until a certain event, at which point the property either reverts to the owner or may be sold and its proceeds divided between the parties in shares decided by the court;

Order for sale of property

- (8) ancillary to secured periodical payments, lump sum or property adjustment orders; and

Pension sharing

- (9) pension sharing involves a division of the pension fund so that part of it may be transferred to the applicant in order to form a pension fund in the name of that party, entirely separate from the pension retained by the other. It must be distinguished from pension earmarking whereby the fund is kept intact but the court directs the trustees to divert certain benefits to the applicant when those benefits become payable.

6.249 We provisionally propose that in granting financial relief to cohabitants on separation, the courts should have available to them the following menu of orders:

- (1) periodical payments, secured and unsecured;**
- (2) lump sum payments, including by instalment;**
- (3) property adjustment;**
- (4) property settlement;**
- (5) orders for sale;**
- (6) pension sharing; and**
- (7) interim payments ordered on account pending a full trial or final settlement.**

Do consultees agree?

6.250 Next, we consider three issues relating to the particular use of those orders:

- (1) whether all forms of order should be available on the same substantive basis, or whether different principles should apply to different types of orders;
- (2) what factors should be relevant to the court's choice of order; and
- (3) whether there should be any restrictions on the making of periodical payments orders.

What basis for each type of order?

6.251 Some jurisdictions make different types of order available on different substantive grounds. For example, in New Zealand, capital orders are available to give effect to equal sharing and economic disparity principle, leaving needs-based claims to be satisfied by orders for periodical payments.¹⁹⁴

6.252 We do not think that it is desirable to attach particular principles exclusively to particular forms of order. Outcomes of cases might otherwise depend arbitrarily upon the scale and liquidity of the respondent's capital. In cases that were asset rich, there would be no difficulty in ordering an immediate capital settlement of the claims by lump sums and other property transfers. If assets were not plentiful, but the law only permitted capital orders to be used to give effect to a particular principle, then it might be impossible to give applicants all that should be due to them. For the courts to be hostage to the particular pattern of available income and assets in this way is undesirable. Moreover, to have different principles for different sorts of orders may simply generate complex technical argument regarding the proper characterisation of a particular claim.¹⁹⁵

6.253 We therefore consider that the court should have the full range of orders at its disposal in all cases. The various types of order ought instead to be viewed simply as vehicles for giving effect to the courts' conclusion about what degree of adjustment is required following application of a uniform set of principles.¹⁹⁶ To give the courts equal access to all forms of order would provide them with the flexibility necessary to give effect to that conclusion.

6.254 We consider that all types of order should be available to the court on the same substantive basis. Do consultees agree?

Considerations relevant to the choice of order

6.255 We have already examined the principles which we consider could be used to justify and quantify the value of any relief to be granted. When it comes to translating that conclusion into a particular set of orders, we consider that it is

¹⁹⁴ Property (Relationships) Act 1976, Family Proceedings Act 1980.

¹⁹⁵ See J Wade et al, *Australian De Facto Relationships Law*, para 7-955.

¹⁹⁶ This view has been accepted in the context of ancillary relief on divorce: *McFarlane v McFarlane*, *Parlour v Parlour* [2004] EWCA Civ 872, [2005] Fam 171, decided that periodical payments ought not only to be deployed for the purpose of meeting needs.

inevitable and desirable that the courts should take account of some additional matters that might have been excluded up to this point.

The adult parties' needs

- 6.256 Although we do not consider that relief should be granted on the basis of need, we do consider that it would be entirely appropriate, in deciding what particular type of relief to grant, to have regard to the parties' respective needs and the type of resources that they currently have available to them. So, for example, one party might have a particular need to occupy the parties' former home because of difficulties that he or she would otherwise encounter in attempting to find his or her own accommodation. Or the home might have been specially adapted in light of the applicant's disability; though needs associated with disability should not be a basis for granting relief or a factor that should affect the quantum of any relief granted, it ought to be relevant to the court's decision about what orders to make.

Children's needs and the interaction of a new scheme with Schedule 1 to the Children Act 1989¹⁹⁷

- 6.257 None of the principles that we have considered for cohabitants' cases would mean that the mere presence of children justified relief, though economic sacrifices associated with undertaking child-care would often underpin a substantial claim based on economic disadvantage. To that extent, our proposed scheme would differ from the Matrimonial Causes Act 1973, where "first consideration" is given, in general terms, to the welfare of minor children of the family in making orders for the benefit of the spouses.¹⁹⁸
- 6.258 However, the presence of children (whether of the relationship in question, past relationships or new ones) should clearly be relevant to the nature of the financial relief ultimately granted between the adults. In particular, having determined the value of the adjustment that must be made, the court might decide which particular assets to use to satisfy the award by reference to whichever party has primary care for children of the family following separation.
- 6.259 This issue inevitably raises questions about the interaction of any new scheme providing remedies between the cohabitants with existing remedies for the benefit of the parties' children under Schedule 1 to the Children Act 1989. As we discussed in Part 4, one of the chief problems with the current operation of the Children Act remedies is that without the remedial flexibility afforded by the remedies available between the adults, it is often not possible to make the most of limited assets.¹⁹⁹ The introduction of a new scheme between the cohabitants would therefore help free up the potential of the Children Act scheme in some cases. However, consideration needs to be given to how the two regimes would interact.

¹⁹⁷ See Example 1 in Part 7.

¹⁹⁸ This includes step-children and other children treated by them as children of the family, as well as the children of both of them: Matrimonial Causes Act 1973, s 52, excluding foster children. See also the Civil Partnership Act 2004, sch 5, para 20.

¹⁹⁹ See para 4.34.

6.260 In divorce cases, orders specifically for the children's benefit are not commonly required, as the children of divorcing spouses will be amply protected by orders made for the adult parties (for example in relation to the matrimonial home). But that is in the context of a far broader discretion for awards between spouses than is being contemplated here for cohabitants. Depending on the scope of any new scheme for cohabitants, we might expect that remedies for the children would continue to have greater significance in cohabitants' cases than they do on divorce.

6.261 In practice, the remedies granted for the benefit of the children and relief for the applicant would be considered as part of one overall package, not least given the fact that transfers of capital between the adults may be required to facilitate the provision of accommodation for both parties together with the children. But in order to ensure that the children's needs were properly catered for, it might be appropriate for the court to consider applications under the Children Act before turning to the claims between the adults. As we have seen, this would also affect the extent of the remedy required for the applicant's benefit, as that party would to some extent indirectly benefit from the Children Act orders, particularly from the provision of accommodation.²⁰⁰

6.262 We consider that by giving precedence to any Children Act application and ensuring that the needs of the children were taken into account when deciding what order to make between the adult parties, the welfare of the parties' dependent children would be given adequate weight.²⁰¹ We would like to hear from practitioners, in particular, for their views on whether this would go far enough to protect the interests of children.

6.263 We consider that, having determined that some remedy is justified and calculated its quantum in accordance with the principles outlined above, the court should have regard, in particular, to the following factors when deciding what order(s) to make:

- (1) the needs of both parties and any children living with them; and**
- (2) the extent and nature of the financial resources which each party has or is likely to have in the foreseeable future.**

Do consultees agree?

6.264 We invite the views of consultees on:

- (1) generally, how the welfare of children ought to be taken into account in the provision of financial relief between cohabitants; and**
- (2) specifically, how existing remedies for children of the cohabitants should interact with a new statutory scheme for financial relief between cohabitants on separation.**

²⁰⁰ See para 6.220 above.

²⁰¹ We address the procedural interaction of claims under Children Act 1989, sch 1, and those under any new scheme in Part 11.

Periodical payments and the desirability of the clean break

- 6.265 Despite our general view that all orders should be equally available to the court on the same substantive principles, there may remain valid reasons for wishing to restrict the availability of periodical payments on other grounds.
- 6.266 Since its statutory recognition in divorce cases in 1984, the clean break principle has been given increasing emphasis.²⁰² This principle reflects the view that it is generally desirable (where appropriate, just and reasonable) to reduce or eliminate any continuing economic ties between the parties, enabling them to go their separate ways in life.²⁰³ It encourages the use of capital orders at the point of divorce with any periodical payments orders being strictly time-limited. In general, pursuit of the clean break might be thought particularly appropriate in cohabitants' cases.²⁰⁴
- 6.267 The clean break principle has no application to the financial obligations owed to the parties' children (obligations to pay child support and other liabilities continue after divorce) or to the parties' continuing social roles as parents. Moreover, it is recognised in divorce cases that where the parties have children and capital is limited (so that immediate capital transfer cannot effect an adequate settlement) a clean break between the spouses may be unwise.²⁰⁵
- 6.268 The clean break principle poses a dilemma. If pursued as an objective in its own right, and one which may take precedence over the substantive principles which otherwise justify particular relief being granted, it comes at the potential cost, where there is not enough available capital on separation, of leaving the applicant without full relief. It might appear unfair to pursue the clean break at the expense of achieving economic justice between the parties, to some extent leaving economic gains and losses lying where they fell on separation. On the other hand, the prospect of economic liability dragging on into the future with no clear end-point might seem unduly onerous. The policy underpinning the clean break may therefore be thought to attract some weight in its own right, even if it comes at the cost just identified.
- 6.269 In our view, part of the solution may lie in the use of orders for lump sums payable by instalments, and strictly time-limited periodical payments that cannot be extended. These options enable awards to be made even where there is insufficient capital immediately available to meet the award in full, but by settling the total quantum at the outset and then devising a schedule for payment of that sum over a defined, non-extendable period, both parties would know where they stood.

²⁰² Matrimonial Causes Act 1973, s 25A. See *McFarlane v McFarlane*, *Parlour v Parlour* [2004] EWCA Civ 872, [2005] Fam 171.

²⁰³ The clean break may even extend beyond the grave, barring each party from making a claim against the other's estate on death: Inheritance (Provision for Family and Dependents) Act 1975, s 15 and s 15 ZA. We discuss this in Part 8.

²⁰⁴ In another sense, a clean break would be fostered by our proposed short limitation period for the making of claims between cohabitants, which would (by contrast with spouses' cases) prevent the making of an original application for relief long after the parties had separated: see Part 11.

- 6.270 In any event, we anticipate that orders for periodical payments would be relatively uncommon. For periodical payments to be both feasible and necessary, the respondent must both be in a position to afford them and have insufficient capital to enable a clean break to be made.
- 6.271 Those observations aside, at the time of writing, we await with interest the decision of the House of Lords in *McFarlane v McFarlane* and *Parlour v Parlour*, which is expected to address the role of the clean break principle in divorce cases. Until that decision is available, we do not consider it appropriate to make any firm proposal for the precise operation of the clean break principle in cohabitants' cases.²⁰⁶
- 6.272 We invite the views of consultees on the weight to be attached to the clean break principle between cohabitants. In particular, how should the clean break principle relate to the operation of the substantive principles otherwise determining the award that should be made?**

Periodical payments and the effect of repartnering

- 6.273 In divorce cases, periodical payments orders are automatically terminated by remarriage of the recipient.²⁰⁷ This makes sense, particularly in so far as those orders are needs-based: the new spouse has an obligation to maintain the recipient of the periodical payments which eliminates the former spouse's obligation to pay. If a recipient of periodical payments merely cohabits, it is open to the payer to seek variation (and possible termination) of the order. However, it is common for orders for periodical payments to specify that the order will terminate in the event of the recipient cohabiting for more than six months with a third party.
- 6.274 We need to consider what effect repartnering should have for periodical payments under a new scheme for cohabitants, where they were ordered at all:
- (1) should they terminate automatically, or only on application to court?
 - (2) should the effect depend on the nature of the new relationship: whether it is a marriage or civil partnership, or a new cohabitation?
- 6.275 Under our provisional proposals, orders would not be based on need as such. The rationale suggested above for the termination of periodical payments on remarriage in divorce cases would therefore not apply directly. For example, the loss of earning capacity justifying relief based on economic disadvantage would remain. Moreover, particularly if the new relationship were not a long one, the recipient of the payments might not be able to claim equivalent relief from that

²⁰⁵ *Suter v Suter* [1987] Fam 111, *Atkinson v Atkinson* [1996] 1 FLR 51, *Fleming v Fleming* [2003] EWCA Civ 1841, [2004] 1 FLR 667.

²⁰⁶ Argued in February 2006, on appeal from the Court of Appeal: [2004] EWCA Civ 872, [2005] Fam 171.

²⁰⁷ Or formation of a civil partnership. Matrimonial Causes Act 1973, s 28 and Civil Partnership Act 2004, sch 5, para 47.

new partner in the event of separation, as the economic disadvantage to which the applicant would remain subject would (largely) derive from the previous relationship.

6.276 However, there are nevertheless strong grounds for arguing that such payments should terminate, either automatically or on application to the court, where the recipient forms a new relationship, particularly if that relationship was or became one which made it eligible in the event that it too came to an end.²⁰⁸ If the grant of relief were directed at alleviating the disadvantage sustained on separation (when the support provided by the relationship was removed, exposing the applicant to the effects of the economic sacrifices made), the inception of a new relationship which provided full economic support for the applicant should at least be a relevant consideration. It would seem unfair to require the respondent to continue to provide support through periodical payments for loss of future earnings if in fact the applicant was not experiencing the full impact of that disadvantage as a result of the new relationship. A respondent could justifiably complain that the applicant was being compensated, at least to some extent, twice over: by being supported by the new relationship and by the receipt of the periodical payments.²⁰⁹

6.277 We invite the views of consultees on the effect that subsequent marriage, civil partnership or cohabitation with a third party should have on a periodical payments order made in favour of a former cohabitant on separation.

INTERACTION OF NEW REMEDIES WITH THE MATRIMONIAL CAUSES ACT 1973²¹⁰

The relevance of post-marital cohabitation to periodical payments ordered on divorce

6.278 We next need to consider the case of a divorced spouse receiving periodical payments who subsequently cohabits with a new partner. As we have seen, currently, cohabitation does not automatically terminate such payments as a matter of law, though the payer may apply to court for variation of the order in light of the financial contributions that the new partner can and should make to the former spouse's household.²¹¹ Or the order itself may have specified that payments should cease on more than six months' cohabitation. But currently, the new cohabiting relationship does not give rise to any potential liability. If a new

²⁰⁸ In which case an application for financial relief from the new partner could be made in the event of separation.

²⁰⁹ See also P Parkinson, "Reforming the Law of Family Property" (1999) 13 *Australian Journal of Family Law* 117, at 137-138: this question also has implications for the calculation of capital awards, particularly if the applicant is in a new relationship at the time when the application is considered – ought the capital sum to be discounted to take account of the contingency (or actuality) of a new relationship? If anything, and contrary to the clean break principle, this might make the use of periodical payments (terminating on a new relationship) appealing, as a means of guarding against both over- or under-compensation.

²¹⁰ And equivalent provisions of the Civil Partnership Act 2004.

²¹¹ *Suter v Suter* [1987] Fam 111, *Atkinson v Atkinson* [1996] 1 FLR 51, *Fleming v Fleming* [2003] EWCA Civ 1841, [2004] 1 FLR 667.

scheme for cohabitants were introduced, what effect ought the cohabiting relationship to have on the periodical payments? Ought those payments to terminate automatically, as they do on remarriage?

- 6.279 Where a new relationship failed to satisfy the eligibility requirements for a new scheme, there would seem little justification for taking a different view about the relevance of cohabitation to the periodical payments from that which is taken now. Unlike marriage or civil partnership, even eligible cohabitation²¹² would still not give rise to any obligation of mutual support during the relationship. It could therefore be argued that even eligible cohabitation should not automatically terminate periodical payments. Until the new relationship at least fell within the eligibility requirements, there would not even be a potential financial obligation between the new couple. Any financial liability would arise only between eligible cohabitants in the event of separation or, as now, on death.
- 6.280 On the other hand, the importance of maintenance obligations between spouses during marriage in practice lies in the fact that they can be enforced when the parties are separated but still formally married.²¹³ Viewed in that light, there is a case for (at least) eligible cohabitation automatically to terminate periodical payments. If the parties to that relationship separated, the cohabitant who had been married would be eligible to apply for remedies from his or her former cohabiting partner. This could be said to be equivalent of the maintenance obligation between (separated) spouses. The fact that the cohabitants would have had no legal responsibility towards each other during the relationship might be thought to make no practical difference.

Pre-marital cohabitation by spouses who later divorce²¹⁴

- 6.281 The divorce courts increasingly take account of pre-marital cohabitation as contributing to length of the relationship in granting ancillary relief. It has a bearing, amongst other things, on the way in which the court values the parties' contributions to the marriage,²¹⁵ at least to the extent that the pre-marital relationship had a permanent rather than trial quality about it.²¹⁶
- 6.282 Once the parties had married, they would no longer be eligible under any new statutory scheme for cohabitants. However, the divorce courts' current practice suggests that the fact of the parties' marriage transforms the pre-marital cohabitation, lifting it out of the general law that currently applies to that

²¹² See Part 9.

²¹³ Orders will automatically terminate if the parties live together for more than six months: Domestic Proceedings and Magistrates' Courts Act 1978, s 25.

²¹⁴ Or form a civil partnership which is later dissolved.

²¹⁵ For the purposes of Matrimonial Causes Act 1973, s 25(2)(d) and (f).

²¹⁶ See for example *CO v CO (Ancillary Relief: Pre-Marriage Cohabitation)* [2004] EWHC 287 (Fam), [2004] 1 FLR 1095; *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] 2 FLR 108. Dates of engagement have also been considered pertinent, even if the parties are not then cohabiting: *J v J (Ancillary Relief: Periodical Payments)* [2004] EWHC 53 (Fam), [2004] 1 FCR 709. For criticism, see S Gilmore, "Duration of marriage and seamless preceding cohabitation?" (2004) 34 *Family Law* 205; J Edwards, "Duration of marriage: From 'I do', 'I promise' or 'I may'?" (2004) 34 *Family Law* 726.

relationship. Marriage should therefore have the same effect where a new scheme took the place of the general law. There should therefore be no need to refer to the new scheme in a case involving cohabitants who had married by later divorced and sought ancillary relief under the Matrimonial Causes Act 1973.

6.283 We invite the views of consultees on the interaction of any new remedial scheme for cohabitants with the Matrimonial Causes Act 1973²¹⁷ in relation to:

- (1) cohabitants who marry and subsequently divorce; and**
- (2) an ex-spouse in receipt of periodical payments who cohabits with a third party.**

INTERACTION OF ANY NEW REGIME WITH EXISTING REMEDIES BETWEEN THE COHABITANTS UNDER THE GENERAL LAW²¹⁸

6.284 We might expect that a new statutory scheme for cohabitants on separation would largely take over from the general law of trusts and estoppel. It is difficult to envisage situations in which eligible applicants would fail to obtain relief under the scheme but would have a successful argument for a share in the respondent's property under the general law. The scheme would provide much fuller recognition and relief for non-financial contributions than the law of implied trusts and estoppel (in the absence of a sufficiently specific and generous common intention, representation or assurance²¹⁹). The scheme would apply across the whole range of assets owned by the parties, rather than requiring specific claims to be made in relation to specific items of property.²²⁰ Financial contributions which failed to generate an economic advantage claim would be even less likely to succeed under the general law

6.285 Moreover, successful invocation of the scheme would necessarily work as a trump card: an award under the legislation would necessarily interfere with whatever property rights of the respondent the general law would recognise.²²¹

6.286 However, there would be cases where for some reason the general law would continue to govern the parties' respective rights and obligations on separation.²²²

²¹⁷ And with equivalent provisions of the Civil Partnership Act 2004.

²¹⁸ Where the cohabitants were engaged or had agreed to form a civil partnership, consideration would also have to be given to the interaction of any new scheme with the Law Reform (Miscellaneous Provisions) Act 1970, ss 2-3 (and Civil Partnership Act 2004, s 74). See *Cox v Jones* [2004] EWHC 1486 (Ch), [2004] 2 FLR 1010.

²¹⁹ J Mee, "Property rights and personal relationships: reflections on reform" (2004) 24 *Legal Studies* 414, at 447.

²²⁰ That would be a requirement in some cases of retained benefit, though the relief granted would not necessarily have to derive from that source.

²²¹ See *Tee v Tee* [1999] 2 FLR 613 in the context of divorce. Third party rights over any property belonging to either party would clearly still take priority.

For example, the relationship might not satisfy the eligibility criteria for the new scheme. This inevitably means that applicants uncertain about their eligibility would feel it necessary to make a case under the general law, as well as under the scheme, in case the latter claim failed. As we discussed above, an eligible applicant who failed to establish a claim under the scheme would be unlikely to have a tenable claim under the law of implied trusts or estoppel in any event. In that case, legal ownership of the parties' assets on separation would accurately reflect the beneficial title and so would determine who left with what.²²³

6.287 The continued relevance of the general law would to some extent therefore give rise to greater complexity than currently exists: any new scheme would add to the law already applicable. However, provided the new scheme were sufficiently generous to clearly eligible applicants that most preferred to invoke it instead of, rather than simply alongside, the general law, most cases should not in practice be weighed down by that theoretical complexity.

6.288 We invite the views of consultees on the interaction of any new statutory scheme with the general law as it applies to cohabitants.

REFORM OF EXISTING REMEDIES FOR THE BENEFIT OF CHILDREN

6.289 Subject to the criticisms made of its practical operation in Part 4, Schedule 1 to the Children Act 1989 is largely satisfactory in its own terms. It essentially mirrors provisions in the matrimonial and civil partnership legislation under which the courts may make orders for the benefit of children rather than the adult parties.²²⁴ However, there is one key point at which the substantive law as it applies to children of spouses/civil partners and other children differs: the liability of step-parents and other non-parents who have nevertheless treated the child as a child of their family.

6.290 The Child Support Act 1991 imposes a legal obligation to maintain a child only on those recognised by law as the parents of that child. The policy underpinning that Act is clear and it is no part of our present work to propose that child support obligations and the remit of the Child Support Agency should extend beyond legal parents. We are concerned exclusively with discretionary court-based remedies.

6.291 English and Scottish law part company on the issue of liability of non-parents. The English courts can make orders requiring someone to provide for a child of whom he or she is not the legal parent. However, that power only applies where:

²²² It would, of course, remain relevant to the extent that it is necessary to establish the parties' ownership during the relationship and where third party interests are at stake. Moreover, if the new legislation were not invoked by either party, the general law would apply by default. We do not think it would be appropriate to provide that the scheme should apply as a code to the exclusion of the general law (contrast Property (Relationships) Act 1976 (New Zealand), s 4); our scheme would be remedial, rather than generating entitlements to defined shares in assets on separation.

²²³ Save where an express trust had conferred a beneficial share on the applicant in any event.

²²⁴ One important difference is that orders for sale can be made for the benefit of children under the Matrimonial Causes Act 1973, but not under the Children Act 1989.

- (1) that person is a spouse or civil partner; and
- (2) the spouses/civil partners have treated the child in question as a child of their family (whether or not either of them is the child's legal parent).²²⁵

By contrast, the Scottish court can require a (former) cohabitant – or any others who “accept” a child as part of their family – to aliment²²⁶ a child of whom he or she is not the legal parent.²²⁷

6.292 Particularly in view of the large numbers of cohabiting step-families,²²⁸ it seems appropriate in the course of this project to consider whether it should be possible for claims to be made for the benefit of children under the Children Act 1989 against former cohabitants who have treated a children as a “child of the recently-separated family”.²²⁹

6.293 It is important to appreciate that, unlike the Child Support Act, court-based remedies are discretionary. Whether such an order was made would therefore depend on the particular circumstances of the case. The Children Act specifically requires the court, in deciding whether to make an order against a married non-parent, to have regard to:

- (1) whether that person has assumed responsibility for the maintenance of the child and, if so, the extent to which and basis on which he assumed that responsibility and the length of period during which he met that responsibility;
- (2) whether he did so knowing that the child was not his child; and
- (3) the liability of any other person to maintain the child.²³⁰

6.294 The arguments in favour of some liability attaching to the non-parent perhaps centre on the premise that liability is appropriate if, and to the extent that, that individual has in fact assumed some responsibility towards the child and, in step-parental cases,²³¹ the cohabiting parent.

6.295 It might be felt that it is only appropriate to infer such an assumption of responsibility where the non-parent has undertaken an explicit legal commitment towards the parent through marriage or civil partnership. But it is important to note that, in the case of married step-parents, the fact of marriage does not itself create responsibility towards the child. It is additionally necessary to demonstrate

²²⁵ Children Act 1989, sch 1, para 16(2); *J v J (A Minor: Property Transfer)* [1993] 2 FLR 56.

²²⁶ Meaning “to maintain”.

²²⁷ Family Law (Scotland) Act 1985, s 1. See J Thomson, *Family Law in Scotland* (4th ed 2002) p 198.

²²⁸ See para 2.7(2).

²²⁹ There could be a case for extending non-parent liability, as in Scotland, beyond even cohabiting relationships. To that extent, the issue must be regarded as being outside our terms of reference.

²³⁰ Children Act 1989, sch 1, para 4(2).

²³¹ Contrast the cases where neither cohabitant is a parent of the child.

that the child was treated as a child of the family and the court will have regard to the factors outlined above. The fact that an assumption of responsibility towards the child is not assumed from the marriage itself might suggest that the fact of marriage need not be regarded as the key to liability in relation to that child. This may be particularly so in cases where neither spouse is a parent of the child, in which case there is no assumption of liability to a parent of the child at all.

- 6.296 Liability for non-parents raises difficult questions about the respective liability of parents and others where the child moves between successive relationships. It would be undesirable to use such liability as a way of relieving the child's legal parent (who is primarily responsible to maintain the child) from his or her obligations. However, there may be cases where the other person who would have been liable to maintain the child is clearly unable to do so, not least where that parent has died, and so where the non-parent might deliberately have undertaken a substantial moral (if not legal) responsibility towards the child. It would be a matter for the court to determine what provision, if any, from the non-parent would be appropriate.
- 6.297 We invite the views of consultees on whether the liability of those who are not parents under Schedule 1 to the Children Act 1989 should be extended to include "cohabiting step-parents" and other non-parents in cohabiting families.**

CASES INVOLVING LIMITED ASSETS AND DEBTS

- 6.298 In the course of preparing this consultation paper, we have been aware that current family law, particularly as it applies to divorcing spouses, offers little guidance for the resolution of cases where parties' assets and incomes are very limited or where they have substantial debts, which may exceed the value of their assets. Most of the case law relating to divorcing spouses deals with "big money" cases where the available assets comfortably exceed the parties "needs", however the latter are construed. Inevitably, it is here that the principles, if any, that underpin awards in such cases can be most fully explored, as the ample asset pool imposes few practical limitations on the judge.²³²
- 6.299 By contrast, appellate decisions offer little reported guidance to those dealing with cases at the lower end of the economic spectrum about how their cases should be resolved. Judges dealing with divorce cases at least have at their disposal the broad discretion conferred by the Matrimonial Causes Act 1973. This permits them to adopt a pragmatic, problem-solving approach, unconstrained by the parties' formal property rights. The judge can seek to fashion an outcome which is as fair as possible in light of the circumstances of the parties and their past relationship, in so far as the limited assets enables him or her to do so. By contrast, save where the property is rented,²³³ the judge dealing with a small money case involving cohabitants can currently do nothing to assist the party with

²³² The nature of the assets, in particular their liquidity, may impose some constraints on the form of order that can be made, if not the quantum of the relief.

²³³ In which case the tenancy transfer remedy, combined with the potential payment of housing benefits, offer a solution.

no property rights. As we have explained in Part 4, the judge has only very limited room for manoeuvre under Schedule 1 to the Children Act 1989.²³⁴

- 6.300 Any new scheme would go some way to alleviate the difficulties in cohabitant cases by providing judges with a set of substantive principles better suited to deal with the economic impact of separation and the remedial flexibility necessary to make the most of modest assets. It might be expected that the costs of resolving cohabitants' claims under a new, coherent scheme might be more proportionate to the asset pool at stake than the current law. The mix of civil and family proceedings, general property and statute law that must currently be negotiated necessarily makes cohabitants' cases disproportionately costly to resolve. Individuals acting without legal advice, common in those cases where the parties' assets and income just exceed the eligibility requirements for legal aid, would also benefit from clearer law. This is also a factor that must be considered when devising the procedure and court forms for any new law.²³⁵
- 6.301 However, there is only ever so much that private law remedies can do to alleviate, or share, financial hardship in these cases. Moreover, there is one limitation that constrains the courts' options, even where the parties are married: third party rights. Where the parties' problems are the result of debts, whether arising from a mortgage, other secured loan, credit card or other credit arrangements, the judges can only operate within the limits imposed by the law protecting the interests of those third party creditors. Nor can the court formally redistribute the debt between the parties.²³⁶ There is sometimes scope for creative use of the law to relieve parties from the immediate demands of creditors, and for debt counsellors and legal advisers to work together where debt crisis and relationship breakdown coincide. But, ultimately, the debts must be paid.²³⁷
- 6.302 We invite the views of consultees regarding any matters specific to cases involving limited assets and debts.**

²³⁴ See para 4.38.

²³⁵ See Part 11.

²³⁶ Though in appropriate cases, an order could be made for periodical payments or a lump sum to cover all or part of the debt formally owed by just one party.

²³⁷ The law relating to insolvency, mortgagees' and other creditors' rights is beyond the scope of this project. Third party rights also impose restrictions where, for example, the parties' home is co-owned by another family member. For research into how couples currently manage debts on separation, see S Arthur, J Lewis, M Maclean, S Finch and R Fitzgerald, *Settling Up: Making Financial Arrangements After Divorce or Separation* (2002), especially pp 46-7.

PART 7

FINANCIAL RELIEF ON SEPARATION: HOW WOULD IT WORK?

INTRODUCTION

- 7.1 In Part 6, we outlined the principles that we provisionally consider should govern claims for financial relief brought by eligible cohabitants on separation. In this Part, we explore in more detail how those principles might operate in some specific factual situations, illustrating a cross-section of different claims that might arise. This gives us the opportunity to examine some of the more difficult questions that arise about the scope of each principle and the proper approach to the quantification of claims under them. In relation to each case, we outline how we consider the issues would be disposed of under the current law and then examine how our principles might be expected to operate.
- 7.2 Inevitably, the examples are simplified, and not all variables or different categories of claim that might arise are tested by the examples given here.
- 7.3 Which of these cases were ultimately included in any new scheme would depend on the scope of the relevant eligibility criteria, as we have discussed in Part 5 and examine in detail in Part 9. Some of the cases discussed here might therefore not fall within the scheme at all.
- 7.4 We welcome consultees' views about these examples and the practical and theoretical issues to which they give rise. Responses to individual examples might be affected by various factors, but principally:
- (1) the length or other characteristics of the relationship, such as whether there are children: should this relationship be included in the scheme at all, whatever the nature of the claim might be?
 - (2) the principles on which the claim is made: is it appropriate to allow a claim to be made in relation to this sort of contribution or sacrifice at all, whatever sort of cohabiting relationship it is?
 - (3) the way in which the court should approach the proof and quantification of the claim in each case.
- 7.5 We would be greatly assisted in analysing consultees' responses if they could, as far as possible, indicate their views about the examples specifically by reference to those issues. Consultees should of course feel free to discuss other issues and to offer examples of their own to test points that are not covered by any of the examples given here.
- 7.6 We should make two other important preliminary points. First, our discussion of "what the court may do" should not suggest that we anticipate that parties will be resorting to litigation in every case. We would hope that the majority of cases could be settled by private negotiation, with the assistance, where appropriate, of mediation or some other method of dispute resolution. However, parties to all types of dispute, civil and family, "bargain in the shadow of the law" and so what

the court might be expected to do in the event of contested litigation would form the backdrop to private negotiations.

- 7.7 Secondly, we must stress that our examples can only be broadly indicative. Current family law (including the law governing financial relief on divorce and on the dissolution of civil partnerships) does not generally provide hard and fast rules that can be applied mechanically to individual cases to provide a certain outcome. Instead, cases are dealt with on their facts relying on the discretion of the court. We have provisionally proposed that this type of approach is the most suitable for any new scheme between cohabitants, with a strong principled basis which would structure the exercise of the court's discretion. It is in the nature of a discretionary regime that the courts are able to take account of the particular features of individual cases in fashioning a fair outcome. Consequently, it would be misleading to suggest precise outcomes in any of the following factual examples. Our purpose here is to indicate in broad terms what we think the outcome would be in each situation.

COHABITANTS WITH CHILDREN

- 7.8 We have stated above that we consider there to be a strong case for a new scheme on separation where cohabitants have children. We intend to illustrate this by reference to three core examples (1, 2 and 3) where the cohabiting relationships are of differing duration. In Example 4, we explore the difficult issue of which children should be relevant for these purposes, in particular, the issue of whether a child who is not the child of both cohabitants should be relevant to a potential claim for financial relief on separation. Example 5 illustrates a case where, despite the presence of children, it may not be appropriate to order any financial relief.

Example 1

A and B have been living together for fifteen years in a house solely owned by A, bought before the relationship began. They have two children. A and B were originally both working in information technology jobs. A paid the mortgage instalments on the house as they fell due, while B paid other bills; both were contributing to pensions. After the first child was born, they decided that B would work part-time. A had recently been promoted so the household expenses could be met by his earnings. After the second child was born, they decided that B would not go back to work. It was becoming increasingly difficult to fit taking the children to and from child-care around work commitments and they decided that the children would benefit from B staying at home. B has been out of paid employment now for five years, and is not able to return to a job similar to the one she had before. The younger child has just started school on short days. A and B have recently separated, and they have agreed that the children will live principally with B.

- 7.9 Under the current law, A would be liable to pay child support in relation to the two children at least until they reached 16. Where the Child Support Agency has jurisdiction, the courts are ordinarily unable to make periodical payments orders for the children's benefit. However, B could apply for an order in relation to the parties' home under Schedule 1 to the Children Act 1989 for the benefit of the

children, for example requiring A as the owner of the house to allow the children to occupy it until they complete their education. B would benefit indirectly from such an order as she is the children's primary carer. Whether it is practicable for the court to make such an order would depend entirely on whether the parties had sufficient resources both to retain the family home and to pay for alternative accommodation for A. If they do not, then the court cannot in practice make such an order.

- 7.10 However, the court currently has no power to require A to make any kind of financial order for B's benefit, either while the children are still with her or after they leave home.
- 7.11 In the absence of family law remedies, B would currently have to formulate a claim for a share in the house by reference to the law of implied trusts or proprietary estoppel. There was no express "common intention" to share ownership or any assurance that B would acquire such a share, nor has B made a direct financial contribution to the acquisition of the house. It is unclear on the current state of the law whether B's contributions to the household expenses might give rise to a share. It would be costly for her to bring proceedings in order to establish a share, and her prospects of success are far from certain.
- 7.12 Under our proposed scheme, it would become possible for B to apply to the family court in her own right for financial relief following the parties' separation. B would be required to base her claim on the contributions that she had made to the relationship and to the family, and on any sacrifices associated with those contributions. In assessing the claim, the court would be required to consider the parties' respective financial positions at the point of separation.
- 7.13 At the point of separation, A remains the owner of the house, has a good income, a healthy earning capacity and adequate pension provision; he is financially secure. B, by contrast, is financially vulnerable. She has no current income, her earning capacity and pension entitlements have been impaired by her time out of the labour market and it is unclear under the current law whether she has any share in the home.
- 7.14 Let us first consider claims for economic advantage. The parties each made a number of positive contributions during the course of the relationship which are unlikely to have given rise to any retained benefit in the hands of the other party on separation. These include B's substantial domestic contributions (looking after the home and raising the children). Although A has avoided the need to incur the expense of hiring domestic assistance or childcare, it would be difficult for B to establish that her contributions in these areas have enabled A to generate any additional retained wealth. Similarly A would be unlikely to succeed in a claim based on his provision to B of rent-free accommodation during the relationship or his financial support of the family since B gave up work, as these contributions will not usually give rise to lasting gains on separation. A's payment of the mortgage during the relationship will also not give rise to a claim as he owns the house in any event so he retains the benefit of those payments.¹

¹ See para 6.128.

- 7.15 The only claim based on economic advantage which might succeed relates to B's financial contributions to the household expenses while she was working. B would be able to make an economic advantage claim based on these financial contributions to the extent that she could prove that they were necessary to enable A to pay the mortgage; at the point of separation, A would retain the benefit of those payments as the sole owner of the property unless an order for financial relief were made.²
- 7.16 The more substantial part of B's claim would rest on the lasting economic disadvantage that she is likely to have sustained as a result of the contributions that she has made to her shared life with A. B has made a substantial economic sacrifice during the relationship for the sake of the family by giving up her job in order to raise the children.³ Whilst the relationship was continuing this arrangement might not have appeared particularly disadvantageous to B; the family operated as a unit. A and B were each making important contributions to it and each shared its benefits. However, the economic consequences of that arrangement become a problem for B on separation when her non-financial contributions are no longer matched by A's financial support. These consequences are likely to have a continuing economic impact on B. Since she worked in a fast-moving sector in which skills depreciate quickly as a result of reduced experience, she might need to retrain before she can acquire employment in the same field. B is also likely to continue to have to make some sacrifices following separation as a result of the continuing responsibility for the care of the children that will fall to her as primary carer, which might prevent her from being able to return immediately to full-time paid employment.
- 7.17 Under our proposed scheme, B would not be able to make any claim against A in respect of past earnings lost during the course of the relationship as a result of her giving up paid work to look after the children; the scheme concentrates on the position of the parties at the end of the relationship.⁴
- 7.18 However, B is likely to have incurred losses during the relationship which are continuing at the point of separation. The fact that B has been out of the employment market for a number of years may have significant lasting impact on her future earning capacity and perhaps, in the longer-term, her pension entitlements. It is unlikely that B will be unable to work at all. The court would require her to limit her loss so far as possible by seeking suitable employment, and now that the younger child has started school, she can reasonably be expected to return to work (at least part-time).⁵ It may be that, given her qualifications, B will be able to return to a relatively good job, but she may not find as well-paid a position as that which she would have held had she not taken a career break. Moreover, if B is to maximise her earning capacity by returning to work full-time following separation, she may require professional child-care when the children are not at school.

² See paras 6.135 and 6.141.

³ See para 6.150.

⁴ See paras 6.131 and 6.172.

⁵ See para 6.155.

- 7.19 B would therefore be able to make a strong case for financial relief based on:
- (1) the ongoing economic disadvantage created by the parties' joint decision that she should give up work;
 - (2) (if a new scheme included provision relating to this) any ongoing child-care costs (to the extent that B's tax credit entitlements do not cover them and A could afford to contribute towards them); and
 - (3) (possibly) the financial contributions she made to the household expenses while she was working.
- 7.20 In exercising its discretion to grant any remedy, the court would consider making orders designed to ensure that the parties more fairly share any benefit retained by A and the disadvantage sustained by B. The particular type of order the court would make would depend on a number of factors such as the extent of the assets available and the needs of both parties for suitable accommodation (in B's case, in particular, with the children).⁶ For example, the court might order that the house be sold and the proceeds of sale divided in proportions broadly reflecting a fair division of the qualifying economic advantage and disadvantage. This might enable, or at least help, A and B each to acquire a smaller property which they could afford to maintain and which would be better suited to their respective needs and those of the children. Alternatively, if the parties could afford to maintain the family home and find further accommodation for A, the court might order that the house be retained for the children's occupation with B until they reach a certain age or complete their education, at which point it would be sold and the proceeds divided.
- 7.21 This case raises the issue of how any new scheme would interact with existing remedies for the benefit of the children under Schedule 1 to the Children Act 1989. Whether the issue of the children's accommodation is determined under Schedule 1 or as part of its wider deliberations under a new scheme for financial relief between the parties, the outcome on that point should be the same.⁷
- 7.22 In view of B's reduced pension entitlement, the court might consider whether it should make an order for some limited sharing of A's pension, having regard to the potential for B to return to full-time employment in the future and so to continue to pay in to her pension fund.
- 7.23 The court might also consider making an order for periodical payments against A. It would take account of the fact that A is already paying child support and may not be able to afford additional periodical payments for B, whether specifically to cover child-care costs (if that formed part of any new scheme) or more generally to help alleviate her economic disadvantage. The desirability of a "clean break" between the parties would militate against imposing any long-term continuing financial obligation on A towards B (as opposed to the children). That concern might have less weight in relation to the sharing of any child-care costs than in relation to other payments for B's benefit. In deciding whether a periodical

⁶ See para 6.255.

⁷ See para 6.259.

payments order should be made at all, and, if so, for what purpose, for how much and for how long, the court would take these factors into account.⁸

Example 1A

- 7.24 Let us now consider how a court might respond if A and B separated at a time when their children had become independent of their parents. Fifteen years on, the children have left home. A and B have been living together for 30 years. B has worked only intermittently, and part-time, since the younger child was born. The mortgage has been paid off.
- 7.25 Under current law, there would be no child support liability, and there would be no possibility of any provision being made under Schedule 1 to the Children Act 1989, as the children are now adults. B may seek to formulate a claim to a share in the house by reference to the law of implied trusts or proprietary estoppel, but her prospects of success are no clearer than they were in Example 1, 15 years earlier in the relationship.
- 7.26 Yet the degree of economic imbalance between the parties on separation is, if anything, more extreme. A as the owner of the house, free of mortgage, still has a substantial income and a generous pension entitlement on his retirement. B is still unlikely to be able to establish any share in the house, and although she has a small income from her part-time employment, she has (now in her fifties) little prospect of improving her earning capacity significantly by re-training. Let us also suppose that her pension provision is only very modest, as a result of her employment history.
- 7.27 Under our proposed scheme, B would be able to present a strong claim for financial relief. Her economic advantage claim based on her indirect financial contributions to the mortgage, though modest in size, would remain as before. Since A was clearly able to cover both mortgage and bills after B gave up work, it would be hard for her to prove the required link between any later contributions that she makes to household running costs and the repayment of the mortgage. But her substantial domestic contributions towards the couple's shared life have given rise to significant economic disadvantage.
- 7.28 In determining the quantum of B's claim, the court would take account of the difficulty that she now faces in terms of her future employment prospects and pension-saving capacity in view of her age and the time that she has been absent from the labour market. However, given the length of the relationship and of B's absence from the labour market, and her limited prospects for acquiring substantial employment at this point, it would be impossible to quantify in any meaningful way the precise quantum of those sacrifices, and impractical to attempt to do so. It would not be plausible for B to claim that she would have reached the top of whatever career ladder she had started on. But nor would it be plausible for A to suggest that B would have entirely failed to retain or progress in employment at all. We envisage that, assuming that the available assets are of an "ordinary" scale, the court in such a case would adopt a pragmatic approach,

⁸ See para 6.265.

more or less evenly splitting the parties' resources between them.⁹ Since the mortgage is paid off, there might be sufficient capital in the house, in combination with pension-sharing, to enable a clean break to be made, with the effect that A will not be required to make periodical payments to B. The court would therefore be likely to make orders for financial relief, including (if necessary) an order for the sale of the house and division of the proceeds between A and B, and an order for pension sharing.

Example 1B

- 7.29 Suppose the same facts as in Example 1A, but that the house had been B's rather than A's and that A had, nevertheless, paid most of the mortgage instalments over the years, once B gave up work.¹⁰ Here we have a situation where both parties would have a claim to make: B for her substantial economic disadvantage, A for the economic advantage enjoyed by B on separation, in the form of the retained benefit (the equity in the house) produced in large part by A's payment of the mortgage. Under the current law, A would have a clear case for a substantial share in the value of the property, under the law of implied trusts. But B would, as before, have no claim in relation to her economic disadvantage.
- 7.30 In deciding this case, the court would clearly have to balance the parties' respective claims. To the extent that B retains the home on separation (putting to one side A's claim under the law of trusts), her economic disadvantage claim is to that extent already remedied. Depending on the value of the respective claims, this may be a situation in which no relief would in fairness be required, as B has the security of the home, and A, albeit deprived of a share in the property, is regarded as thereby satisfying B's claim.
- 7.31 This case raises very clearly the issue of how any new scheme would interact with the general law. If A asserted a claim under the law of resulting trust, B could respond by invoking the new scheme, which we envisage would take priority where the parties fall within its scope and it were invoked by one of them. The net result would be that A's claim would be treated as one of economic advantage under the scheme (which, certainly if framed originally in terms of resulting trust, would have the same value as it would under the general law) and the court would balance the parties' respective claims as just described.¹¹

Example 2

C and D have been together for 12 years and have two children. After the birth of each child, D went back to work full-time after maternity leave. They both have well-paid and relatively flexible jobs, with room for home-working, and so have been able to share the tasks of taking the children to and from child-care, school, and holiday activity schemes, and of working at home while looking after the children during holidays. They are joint owners of their home, which is expressly held in equal shares, and each contributed equally to the

⁹ See paras 6.191 and 6.255.

¹⁰ See para 6.217.

¹¹ See para 11.76.

mortgage repayments. They are now separating, and are planning to share child-care responsibilities.

- 7.32 Under current law, the express declaration of trust dictates that C and D are entitled to equal shares in the value of the property. Child support is payable by the non-resident parent, but would be reduced to reflect their shared care arrangements. The parties might be in dispute about whether the family home should be sold immediately or should be retained, at least during the children's minority, so that the children can live there with one of them. That dispute would be addressed by the court principally under Schedule 1 to the Children Act 1989.
- 7.33 In this case, there would be little doubt that C and D would be eligible to claim on separation. They have lived together for a considerable time but, more importantly, they have two children. The presence of the children should, in our view, render the parties eligible to make a claim on separation.¹²
- 7.34 However, when we examine the nature of the parties' economic relationship, we think it unlikely that the principles we have provisionally proposed would lead the court to make an order for financial relief. We think that such an outcome would be entirely fair.
- 7.35 This is because neither party is likely to be able to establish that the other has obtained an economic advantage by the retention of some economic benefit or that they have themselves sustained an economic disadvantage on separation. During the relationship, both parties have continued in full-time employment and contributed equally to paying the mortgage and other household costs on their jointly-owned home. Moreover, both have an earning capacity which is intact on separation and they plan to share their child-care responsibilities following separation. As a result, neither party's economic position is more vulnerable than the other's in consequence of the relationship and its termination.
- 7.36 The court may be required to resolve any dispute about the future of the parties' home, as discussed above.

Example 2A

- 7.37 In Part 10, we discuss a difficult question relating to the future treatment of express trusts of land by any new scheme, in particular, whether they ought in themselves to be treated as opt-outs with respect to the trust property, so that that property is immune from the exercise of the court's discretion to grant financial relief. Suppose that in Example 2, although the parties expressly held the property in equal shares, D had in fact made a far larger proportion of the mortgage payments than C. Under the general law, it is not open to that party to go behind the express trust and seek a larger share on the basis of those payments.¹³ One solution would be that under the scheme the court would have power to adjust the beneficial shares unless the parties had also agreed expressly to opt out of the scheme. Another would be that under the new scheme

¹² See Parts 5 and 9.

¹³ *Goodman v Gallant* [1986] Fam 106, although a remedy in equitable accounting might in some circumstances be available: see 10.131.

the declaration of trust should continue to be conclusive. If so, D would be prevented from making an economic advantage claim in relation to those payments. But as we discuss in Part 10, there would remain a question about whether the existence of the trust should lead to the removal of the value of the house from the scheme, or only bar this particular type of economic advantage claim.

Example 3

E and F had been living together for about three months in E's house when they discovered that F had become pregnant. E was happy to support the family so F did not return to work after the baby was born and her maternity leave ended. Unfortunately, their relationship foundered soon afterwards, and they are now separating, after less than two years together.

- 7.38 In this case, the current law would require E to pay child support and F would be able to claim capital orders under Schedule 1 to the Children Act 1989 for the benefit of the child. Whether any such order could be made, in particular regarding the occupation of E's house, would depend on whether the parties could afford to maintain not only that property but also new accommodation for E. F would have no claim against E in her own right: a general promise by E to support F would not give rise to any claim.
- 7.39 F is in a vulnerable financial position. Although the couple did not live together for very long, the case for F obtaining some relief may be thought to be strong. The birth of the child (and the child's continuing need for care) has a significant effect, at least in the short term, on F's ability to go to work. The court would therefore have to examine the extent of the economic disadvantage sustained by F. In doing so, it would be required to assess the viability of F returning to work. Unlike B in Example 1, F has not been out of employment for very long, and it may be that she can return to at least part-time work fairly soon without any significant effect on her earning potential in the longer term.¹⁴
- 7.40 But each case will depend very much on its own facts. Although it may be reasonable to expect F to take steps to obtain employment and thereby to limit the extent of her future losses, she may need to pay for professional child-care in order to be able to work at all. If a new scheme included provision for child-care payments, there would be a case for E to assist with F's child-care costs in addition to his child support payments, to the extent that the costs of that care are not covered by F's tax credit entitlements, and if E can afford to do so.
- 7.41 The size of F's claim for economic disadvantage would depend on the court's view of the effect of the relationship on her financial position. If F can return to employment without serious impact on her future earning potential, then her claim would be considerably smaller than it would be if any return to employment would be at a significantly lower level. If F is able to recover well-paid employment now, she may be able to meet her accommodation costs and necessary child-care costs, alone if necessary, without great difficulty. If not, her claim for financial

¹⁴ See para 6.176.

relief would be that much stronger. In principle, the claim would arise only where the difficulty were caused by her absence from the labour market rather than a change in that market.

- 7.42 Claims for the benefit of the child under Schedule 1 to the Children Act 1989 would still be available.

Example 3A

- 7.43 Alternatively, E and F might only have been going out with each other when F became pregnant, decide to cohabit as a result of that unplanned pregnancy, but subsequently separate. F's claim in such circumstances would basically be the same as that in Example 3. The issue that particularly arises from these facts is whether the fact that the parties were not cohabiting when the female partner became pregnant should affect F's eligibility to apply for financial relief if they do cohabit but then separate. The pregnancy itself was not the result of the parties' cohabitation, but F's decision not to return to work after the birth might well have been affected by the fact of E's support.

Example 3B

- 7.44 Suppose that E and F were living in social housing and that both had very low incomes and no significant assets. In such a situation, the courts already have the power to transfer tenancies between the parties under Schedule 7 to the Family Law Act 1996 and might, depending on the facts, do so in favour of F, who might be eligible for housing benefit to help pay the rent. E would be liable for child support, and F would have other benefits and tax credit entitlements to help support her and the child.
- 7.45 It would probably not be worthwhile for either party to make a claim under any new scheme, simply because of the limited nature of the assets and income available. E would be unable to afford to make any payments to F in addition to those he is already liable to make under the child support legislation, and the existing remedy of tenancy transfer provides F and the child with a means of securing accommodation.¹⁵

Example 4

- 7.46 Many cohabiting households are step-families. Example 4 highlights some aspects of the difficult question of how a new scheme should respond to cases involving children who are not the children of both cohabitants. This issue is relevant to two aspects of the scheme. First, should the presence only of "children of the family" who are not children of both cohabitants make that couple eligible under a new scheme?¹⁶ Second, should such children be relevant when considering economic advantage and disadvantage claims, in so far as the relevant benefit or sacrifice is said to have arisen from care provided by one party to those children?¹⁷ If the answer to either or both of those questions is "yes", it

¹⁵ See para 5.94.

¹⁶ See Part 9.

¹⁷ See para 6.209.

will be necessary to determine which children should be taken into account for those purposes.

G has a young son, X, from a previous relationship. That relationship ended soon after the couple discovered that G was pregnant, and the father cannot be traced. G and H's relationship began shortly after X was born, and H has always treated X as if he were his own son. When G returned to work after maternity leave, she found it difficult to balance work, home and child-care commitments, and H often helped by looking after X. When X was one year old, H moved in with G and X, and they decided that H would reduce his working hours so that he could look after X before and after nursery (and, later, school) and during holidays. It made most sense financially for H to work less as G's job was less flexible and better paid. G and H have recently separated, and X will remain with G.

- 7.47 We may loosely refer to children such as X as "children of the family". G is X's legal parent, H is not, but X has been treated by them as a child of their family.
- 7.48 Any claim that H might want to make on his own behalf under the current law would have to be under the general law of implied trusts and estoppel. But it is not at all clear that such a claim would have any prospect of success, in the absence of any relevant agreement or assurance that H would have a share in G's property.
- 7.49 Under our proposed new scheme, the question arising from these facts is whether H might have a claim against G for economic disadvantage. The application of the economic advantage and disadvantage principles, relating to care provided for children such as X raises some difficult questions. In a case like this, where the non-parent, H, is the one who provided the care and sustained economic disadvantage as a result, there is a strong case to allow a claim to be made. It is clear that H cared for X because of the relationship with G, and would not otherwise have done so. If X will be living with G following the separation, H would probably now be able to return to full-time work and so minimise the extent of the disadvantage suffered. To the extent that H was unable to do this, there may remain some disadvantage in relation to which G could be expected to provide some relief. This may or may not be realistic in practical terms, as it will be necessary to ensure that G has sufficient resources available to support both herself and X.
- 7.50 More difficult issues may be felt to arise where the children who live with the couple were from the applicant's previous relationship, but it is the applicant-parent who cared for them during the relationship, rather than the non-parent. Cases where the couple are raising children who are not the children in law of either party also require special consideration.
- 7.51 Under the current law, H is not liable to pay child support in respect of X. Only the legal parents of children are so liable. Moreover, where the parties cohabit rather than marry or form a civil partnership, the court's powers to make orders under

Schedule 1 to the Children Act 1989 against step-parents and others do not currently apply.¹⁸

Example 5

- 7.52 It should not be assumed, as we saw in Example 2, that simply because cohabitants have children living with them, an order for financial relief would be appropriate on separation.

J has recently moved in with K and L, K's child from her previous relationship. K owns the property and works full-time, with the support of good quality, affordable child-care facilities. J has always found it hard to hold down a job and has been unemployed for most of their relationship. K therefore pays the mortgage and the vast majority of the bills, J making small financial contributions occasionally and taking on some of the housework. They are now separating after two years together.

- 7.53 Neither party would have a claim against the other under the current law on these facts, and nor do we think they should under any new scheme.
- 7.54 Even if this couple were eligible to apply (whether by virtue of the presence of L or because of the length of the relationship), this is a case in which we take the firm view that no remedy would or should arise in any event. The second filter, the principles governing the basis on which relief would be granted, would not be satisfied. There would be no need even to rely on the possible third filter (of "substantial" or "manifest" unfairness) to preclude the claim.
- 7.55 J, the economically weaker party, has conferred no economic advantage on K that K retains on separation. Nor has J sustained any economic disadvantage as a result of contributions to the parties' relationship. J may be in need at the point of separation, but that is simply a consequence of J's unemployment and not something for which K should bear any responsibility, however long their relationship had lasted.¹⁹
- 7.56 K might feel aggrieved at having supported J throughout the relationship without any significant economic recompense from J at any point. But the requirement that K prove some retained benefit in J's hands on separation would not be satisfied here and so K would not have a claim either, even assuming that J could afford to meet it. We think this is the right outcome.²⁰

COHABITANTS WITHOUT CHILDREN

- 7.57 We now turn to examples of how the proposed scheme might work if it extended to cohabitants without children.

¹⁸ But see para 6.289 above, where we invite views on a possible extension of Children Act 1989, sch 1.

¹⁹ See para 6.169.

²⁰ See para 6.130.

Example 6

M and N have been living together for over ten years in a house bought by N before their relationship began. N's elderly mother, O, became unable to live alone as a result of growing dementia. M and N could not face putting O in residential accommodation, so they decided that O should come to live with them. M and N were both in full-time work, but they decided that M would give up work in order to care for O. After five years, the stress of this situation on M and N's relationship is too much, and they separate. O remains with N.

- 7.58 Under the current law, M's only conceivable claim would be based on implied trusts or proprietary estoppel, neither of which looks likely to succeed on the facts in the absence of some agreement or assurance that M would acquire a share in N's property, or any financial contribution by M to its acquisition.
- 7.59 Under our proposed scheme, M's claim would be based on economic disadvantage.²¹ M has given up work in order to look after N's dependent relative as a result of which M may sustain economic disadvantage at the point of separation. As in the cases involving children, M would not be able to claim in relation to past earnings losses, but her absence from the workforce over the last five years might cause a loss of earning capacity on separation. Even if M were now able to return to paid employment, there might remain some disadvantage that cannot be recovered, in which case the court would make an order for financial relief in favour of M. The court would take account of the extent of N's resources in deciding what relief to grant M. It may be that, in view of the parties' respective financial circumstances and the continuing need for O to be housed in N's property, a lump sum payment would be appropriate. O's housing need would militate against making an order for sale. If there were not sufficient liquid capital available to enable the lump sum to be paid in full immediately, the court could instead order its payment by instalments.
- 7.60 It might be wondered whether M should be able to make a claim against N in relation to economic disadvantage sustained in consequence of care provided by O if (in the absence of a claim under the general law of implied trusts or estoppel) neither M (nor N, if N had cared for O) would have an equivalent claim against O, who might be regarded as the more immediate beneficiary of M's contribution. The possibility of claims against O fall outside the scope of this project. However, consideration would also need to be given here to whether N should be able to claim financial relief from M if N had been the one to care for O, in view of the blood relationship between N and O.
- 7.61 The issue on these facts is whether there should be a claim between M and N, designed to share fairly between them an economic disadvantage (effectively a reliance loss) which had arisen from their relationship and its termination. If the care given by either party to O might not have been provided, at least in that way or to that extent, had it not been for the support provided by the other party to the relationship, then it would seem appropriate for relief to be available in principle

²¹ See para 6.150.

to share the resulting reliance loss when the relationship ends.²² Any assets belonging to O could, however, be taken into account in deciding what relief, if any, N should provide for M; N ought not to be able to assert a continuing need to support O to the extent that O's own resources could be used for that purpose.

- 7.62 We acknowledge that this might be felt to be a rather difficult area, and would welcome consultees' views.

Example 7

P is a self-employed builder. His partner Q inherits a large house from her parents which is all-but derelict. P and Q move in, and P spends a year working on re-building the property. However, as soon as it is fully refurbished the relationship breaks down. P and Q never discussed the ownership of the house.

- 7.63 Under the current law, P would be restricted to a claim against the house based on implied trust or proprietary estoppel. However, the parties' failure ever to discuss the issue of the ownership of the house, and P not having financially contributed to its acquisition, are likely to doom such a claim to failure.
- 7.64 Under our proposed scheme, there is no question of economic disadvantage, but P would be able to argue that as a result of his extensive contributions to the renovation and refurbishment of the property, Q has obtained a substantial benefit in terms of an increase in the value of her property. That is a benefit which Q retains on separation to the exclusion of P. It might be thought to be fair that Q should to some extent share that benefit with P.
- 7.65 As for quantification of P's claim, to give P an award based on the value of the work undertaken (rather than a share in the value of the property, consequent on P's work and any rise in market value) may be felt to leave Q with a windfall (to the extent of any rise in value over and above the cost of P's labour) which it would be unfair for Q to retain to the exclusion of P.²³

Example 7A

- 7.66 Suppose alternatively that P worked unpaid throughout a ten year relationship in Q's private limited liability company, that the parties' home and other assets were in Q's name, and that the company had prospered as a result of P and Q's combined, extensive efforts.
- 7.67 As in the previous example, P's contribution may not have given rise to any significant economic disadvantage. Having worked throughout the relationship, albeit for no pay, P may be able to find similar, paid employment elsewhere when the relationship ends. There might, however, be an argument that P had lost opportunities to make any pension or other savings during the relationship as a result of being unpaid. The value of the financial support provided to P by Q during the relationship arguably ought not preclude that claim, as such support would not give rise to any retained benefit in P's hands on separation.

²² See paras 6.173 and 6.178.

²³ See para 6.139.

- 7.68 However, P might also have a claim for economic advantage, in so far as Q retained economic benefits, in the form of a prospering business, at the point of separation. Again, consideration needs to be given to the appropriate measure for valuing P's claim. Should it relate to the unpaid wages (assessed on a commercial basis), and so to the basic value of the work done, or to some potentially larger share in the value of the business?²⁴

Example 8

R and S, who are both in their twenties, have been living together for two years in a flat that they rented together from a private landlord. They have both worked full-time throughout the relationship and have kept their finances separate. They have shared the cooking and cleaning, and shared the rent and all household bills equally. They are now separating.

- 7.69 This is an example of a case which many may consider should fall outside a new scheme. Whilst there may be pragmatic reasons why couples such as this should not be eligible to apply to court at all, the scheme would not in any event provide them with a remedy.
- 7.70 The partners have contributed equally to all their bills, neither has retained any benefit in the property as it is rented, and the relationship has been economically neutral for each of them in terms of earnings and earning capacity. These would appear to be circumstances where the gains and losses, if any, should lie as they fall, and the court would not consider any need to make an order for financial relief on separation.
- 7.71 It should be noted that under current law, the court has power under Schedule 7 to the Family Law 1996 to transfer the tenancy between the parties. But there may be no point in making an application for such an order if R and S's lease is an assured shorthold tenancy which confers little by way of security of tenure.²⁵

Example 8A

- 7.72 Alternatively, the same couple might have been living in property bought by R before the relationship began. Suppose that during the relationship, R had been paying the mortgage and S all the other household bills.
- 7.73 In this case, there might be potential for an economic advantage claim to be made by S on the basis that R has retained a benefit, S would have to prove that the payment of the household bills enabled R to pay the mortgage and so accrue equity in the property. However, there are reasons to be sceptical about whether such a claim should succeed. First, the amount of equity actually acquired by R's mortgage payments over a period is likely to be minimal; this might be a situation where a third filter of "substantial" or "manifest" unfairness would provide a useful role in preventing a relatively low value claim from proceeding.²⁶ Secondly, if R

²⁴ See para 6.139.

²⁵ See para 3.60.

²⁶ See para 6.230.

had been able to pay both mortgage and bills before S moved in, S would find it difficult to show that S's payments had enabled R to pay the mortgage and so contributed to the benefit retained by R. It would be different if there were evidence that before S started paying the bills, R was about to sell the property as a result of being unable to afford the mortgage payments alone.

- 7.74 Difficult questions might be thought to arise in circumstances where the housing market had increased dramatically in value over the period of the parties' relationship. However, we would not consider it appropriate for R to be allowed to make up for the lack of economic advantage claim by making a speculative argument for economic disadvantage based on having devoted resources to paying bills for the shared household with S, rather than investing in property.²⁷

Example 9

T was very keen on his girlfriend U, with whom he had been conducting a long-distance relationship for some time. He wanted to force the pace. She was not so sure. He gave up his job to move across the country to live with her in the house which her parents had bought for her outright. U had not suggested this, but she did not object. She supported T financially during their relationship, T making little effort to find a new job. The relationship did not prosper and they split up within a year of T moving in.

- 7.75 Under the current law, T's only conceivable claim would be based on implied trusts or proprietary estoppel, neither of which looks likely to succeed on the facts in the absence of some agreement or assurance that T would acquire a share in U's property, or any financial contributions by T to its acquisition. Although T may have suffered economic disadvantage as a result of giving up his employment and going to live with U, this is a case where it might well be thought that no relief should be awarded under a new scheme.
- 7.76 It may be argued that, by imposing a minimum duration requirement as a condition of eligibility, the right to bring a claim in such circumstances would be effectively denied. However, that may not be an entirely satisfactory answer. Views about the fairness of such a claim might differ depending on how long the minimum duration requirement would be.
- 7.77 There is in any event an important reason why T's claim should not succeed on these facts. An applicant should only be able to succeed in a claim of economic disadvantage where it is a consequence of the parties' joint decision. If the court takes the view that T effectively imposed himself and his economic sacrifice upon U, and apparently made no efforts to obtain further employment during the relationship, it would not make any order in favour of T, however long the relationship endured. This could be viewed as a case in which the possible third filter would have a role to play in excluding the claim. But we consider that the economic disadvantage principle itself would not be satisfied in such facts.²⁸

²⁷ See para 6.170.

²⁸ See para 6.178.

Example 10

W and V have been living together since 1975, when he was 30 and she was 28. When they decided to set up home together, V was a primary school teacher and W a surgeon. Only a few months after the couple began to live together, W became a consultant. The couple moved from rented accommodation to a house bought in W's sole name. At the same time, they agreed that V should give up work as W's income was more than sufficient to maintain them both. This arrangement allowed them to spend more time together when W was not working and freed V to look after the house and garden. The parties had hoped to have children but this proved impossible.

W has recently asked V to leave the house as he has become involved with a younger colleague. At the time of separation the house is free of any mortgage. In addition to the house, W has substantial assets in his name. He is nearing retirement when he will enjoy a significant pension income. V has no income, very limited pension entitlements from her contributions while a teacher and few assets.

- 7.78 Under the current law, V's only conceivable claim would be based on implied trusts or proprietary estoppel, neither of which looks likely to succeed on the facts in the absence of some agreement or assurance that V would acquire a share in W's property, or any financial contribution by V to its acquisition.
- 7.79 Under our proposed scheme, V would be unlikely to be able to make an economic advantage claim in relation to her domestic contributions to the couple's shared household during the relationship.²⁹ However, she would be able to make a claim on the grounds of economic disadvantage. She has sustained significant economic disadvantage as a result of the couple's joint decision that she should give up her career for the sake of their shared life. V has little prospect of obtaining employment at the age of 59, having not worked for many years.
- 7.80 In determining the quantum of V's claim, the court would take account of the difficulty she now faces in finding employment. The court would also consider her position on reaching the age of retirement given her limited pension entitlements. There are likely to be sufficient assets available to W (especially the house free of mortgage) to make a capital award which, in combination with pension-sharing, would enable a clean break.

CONCLUSION

- 7.81 We have sought in this Part to give some impression, through worked examples, of how the substantive principles which we are provisionally proposing might be expected to operate in particular factual situations. We invite consultees to give us further examples which they think usefully bring out some of the practical and theoretical issues to which our provisionally proposed scheme might give rise.

²⁹ See para 6.150.

- 7.82 It is important, our view, to bear in mind in all this that the scheme would be operated by way of judicial discretion, which would to some extent deal with the individual features of particular cases. However, we nevertheless consider it essential that the principles themselves should be sufficiently well-developed that they provide answers to the basic questions necessary to give a clear structure to the exercise of the judge's discretion, and to give parties who do not take their cases to court a clear basis on which to negotiate their own settlements.
- 7.83 We invite the views of consultees on the Examples set out in Part 7. In particular, we invite consultees to indicate in which of the Examples they consider that financial relief should or should not be available, and why.**

PART 8

REMEDIES ON DEATH

INTRODUCTION

- 8.1 Many cohabitants make wills in an attempt to ensure that their partner obtains all, or most, of their estate in the event of their death. Provided that the will complies with the relevant formalities laid down in statute, and that the testator has capacity at the time of execution, the will should be effective to carry out the testator's intentions. If, however, the testator made a will before he or she began to cohabit and forgot to revise it to include a new partner, that will (subject to formal requirements) would stand, even though it might not reflect the true wishes of the testator at the time of death and did not provide for the testator's new partner.
- 8.2 It is often the case that a person dies intestate: either wholly intestate (leaving no effective will) or partially intestate (although leaving a will, it does not dispose effectively of all of the person's estate). In such circumstances, the rules of intestacy are engaged in order to determine the devolution of such part of the estate which has not been disposed of by will. These rules have traditionally been based on a presumption of the likely intentions of the deceased had he or she made a will.
- 8.3 The devolution of a deceased's estate, whether by the dispositions contained in a will or on an application of the intestacy rules (or by a combination of the two), may be subject to challenge by certain classes of applicant under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"). Such applicants may contend that they have not obtained "reasonable financial provision" from the deceased's estate and that in consequence the court should make an award in their favour in the exercise of its statutory discretion to do so. This jurisdiction is based principally on satisfying the legitimate needs of the applicants rather than giving effect to the presumed intentions of the deceased.
- 8.4 In this Part we first consider the case for reforming the rules of intestacy in order to provide for a cohabitant of the deceased. We provisionally propose that a cohabitant should not have any automatic entitlement on intestacy. We then turn to the 1975 Act and consider criticisms of it. We make provisional proposals for its amendment in order to ensure consistency with our proposed reforms concerning financial relief on separation. Finally, we examine the case for reform of two rules concerning the revocation of existing wills.

INTESTACY

Criticisms of the intestacy rules

- 8.5 As we explained in Part 3, a cohabitant currently has no entitlement to any share of the estate on the intestacy of his or her partner. This means that an application may have to be made under the 1975 Act for provision to be made.
- 8.6 However, that may not always be desirable. The Deputy Official Solicitor has explained to us a particular problem that is by no means rare. An unmarried couple, M and W, live together in a house owned by the male partner, M. The

house, which is the couple's only substantial asset, is subject to a large mortgage, and is the home of the couple and their young children.¹ If M dies intestate, the house passes on intestacy to his children, and W is entitled to no part of his estate. The children cannot service the mortgage. In order to protect the home against the mortgagee, in the interests of both herself and the children, W must bring proceedings under the 1975 Act. The respondents would be the children, who must, as minors, be represented. Significant costs are therefore incurred and adversarial positions adopted at a time when W and the children should be working together.

- 8.7 It may be that the matter is ultimately resolved; an order is usually made whereby the house is transferred to W on her undertaking to provide a home to the children during their minority. But this is wasteful both of financial and emotional resources. The consent of the lender must be obtained before W can secure title to the house, and counsel's advice is normally required by the Official Solicitor in order to ensure that the settlement is in the interests of the minor children. This seems to us to be a serious problem.

Should cohabitants be included in the intestacy rules?

- 8.8 Some common law jurisdictions do make provision for surviving cohabitants under their intestacy rules. All Australian states confer on cohabitants an automatic entitlement if they satisfy a minimum duration requirement, and many provide automatic entitlement where a cohabitant had a child with the deceased (regardless of the length of the relationship).² New South Wales, the Northern Territory and Tasmania go further; a cohabitant of any duration inherits in the same way as a surviving spouse.³ The Canadian provinces of Alberta, British Columbia, Manitoba and Saskatchewan provide automatic inheritance rights for cohabitants who satisfy a minimum duration requirement or who had a child with their deceased partner.⁴ In New Zealand, cohabitants inherit as surviving spouses if they satisfy a three-year duration requirement. They also inherit if they had children with the deceased, or if they made a substantial contribution to the relationship and (in either case) serious injustice would result if they did not inherit.⁵
- 8.9 It can be strongly contended that, if the objective of the intestacy rules is to give effect to the putative wishes of the intestate regarding the disposition of his or her estate, conferring rights to succeed on the intestate's cohabitant would be entirely

¹ The children may be the children of both parties, or the children of M by a previous relationship. If M is not their father, they would have no entitlement themselves on intestacy, and they would not be the appropriate respondents to an action by W under the 1975 Act.

² We discuss eligibility in detail in Part 9.

³ Wills, Probate and Administration Act 1898 (New South Wales), s 61B(2), Administration and Probate Act 1970 (Northern Territory), sch 6, part II(a), and Administration and Probate Act 1935 (Tasmania), s 44(3B). In the Northern Territory and Tasmania, this does not apply where the intestate leaves issue.

⁴ Intestate Succession Act 2000 (Alberta), Estate Administration Act 1996 (British Columbia), Intestate Succession Act 1989-1990 (Manitoba) and Intestate Succession Act 1996 (Saskatchewan).

⁵ Administration Act 1969 (New Zealand).

appropriate. However, this apparently attractive proposal founders when faced with the serious factual complexities of human relationships. Both the Law Commission and its Scottish counterpart have previously considered, but ultimately rejected, reform of this kind.

- 8.10 The Law Commission conducted a project on the law of intestacy culminating in a final report in 1989.⁶ In the course of that project, the Commission rejected the vesting of intestacy rights in cohabitants, explaining its reasoning as follows:⁷

A few consultees argued that the intestacy rules should automatically provide for cohabitants. This view was shared by the majority of the respondents in the public opinion survey.⁸ However, we do not favour this approach. To include cohabitants within the intestacy rules would mean that the simplicity and clarity of the rules would be sacrificed. There would have to be very complex provisions to determine how the property should be divided between, for example, a surviving spouse and a surviving cohabitant. As well as making the rules more complex, it would also increase the costs and cause delays in the administration of estates because disputes could easily arise as to whether a particular individual was a cohabitant.

- 8.11 We believe these problems remain. Putting to one side the potential adverse effects on the expeditious administration of estates, there are two major obstacles in the way of accommodating a cohabitant of the deceased within the intestacy rules: determining the priority of the cohabitant in relation to other relatives of the deceased, and quantifying the cohabitant's share.

- 8.12 The difficulty with any reform of the intestacy rules is that account must be taken of the very wide range of persons who may argue the case for entitlement to the estate: not only spouses, civil partners and cohabitants, but also children of former marriages or former relationships. It would be necessary to decide whether and to what extent the cohabitant should have priority over, for example:

- (1) a surviving spouse or civil partner from whom the intestate was separated at the time of death (and who may or may not have commenced proceedings for divorce or dissolution including a claim for ancillary relief);
- (2) the children of the intestate's marriage (or former marriage); and

⁶ Distribution on Intestacy (1989) Law Com No 187. See also Distribution on Intestacy (1988) Law Com Working Paper No 108.

⁷ Distribution on Intestacy (1989) Law Com No 187, at para 58.

⁸ Distribution on Intestacy (1989) Law Com No 187, p 15, n 92: In the situation where the intestate is survived by a cohabitant and sibling, 83% of the respondents in the public opinion survey considered that the cohabitant should have a share in the estate. The British Social Attitudes Survey in 2000 also found overwhelming support (93%) for the proposition that, in the event of intestacy, a surviving cohabitant of a ten year relationship without children should have the same right to remain in the home following the partner's death as a spouse: A Barlow, S Duncan, G James and A Park, "Just a piece of paper? Marriage and cohabitation", in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds), *British Social Attitudes: the 18th Report* (2001), pp 48-49.

(3) the children of the intestate and the cohabitant.

- 8.13 In terms of quantification, there is a strong argument that not all cohabitants should obtain the same share as of right. A cohabitant who has lived with the deceased for twenty years should, one would have thought, be entitled to a larger share of the estate than someone who has only cohabited with the deceased for a matter of months. While it can be argued that a minimum duration requirement between these extremes could be imposed, that begs the question of where the line should be drawn. Any such demarcation can be criticised on the grounds that it is arbitrary, risks both the inclusion of the undeserving and the exclusion of the deserving, and remains an unsophisticated and inflexible means of achieving fairness between the competing parties.
- 8.14 In the early 1990s, the Scottish Law Commission conducted a consultation exercise, which included a public opinion survey, on the question of rights of intestate succession for cohabitants.⁹ Although this evinced considerable support for the conferment of some succession rights on cohabitants, no clear pattern emerged as to how the estate should be divided up between the cohabitant and other potential applicants. In consequence, the Scottish Law Commission recommended that cohabitants should be able to apply to the court for an award out of their deceased partner's estate (whether the deceased died testate or intestate) if reasonable provision had not been made for them.¹⁰ This recommendation was particularly striking as there is no generally applicable family provision legislation in Scotland.¹¹ The Family Law (Scotland) Act 2006 implements the recommendation in part only, limiting cohabitants' right to apply for discretionary provision to circumstances where the deceased died intestate.¹²
- 8.15 In our view, the inability of fixed rules to deal with the variety of factual circumstances that may arise makes vesting rights on intestacy in the deceased's surviving cohabitant an exercise fraught with difficulty. That being the case, we believe that it is prudent to leave the intestacy rules alone, and to adapt the discretionary jurisdiction of the 1975 Act in order to achieve the necessary flexibility and to ensure broad fairness between competing applicants to the deceased's estate.
- 8.16 We accept that serious difficulties may exist as a result of the current degree of reliance being placed on the jurisdiction of the 1975 Act. It can be seen that problems of the kind outlined by the Deputy Official Solicitor could be resolved expeditiously were surviving cohabitants to obtain an automatic entitlement on their deceased partner's intestacy. However, as we have explained, it is not at all obvious what the precise extent of any such entitlement should be, and it would

⁹ The Effects of Cohabitation in Private Law (1990) Scottish Law Commission Discussion Paper No 86.

¹⁰ Report on Family Law (1992) Scot Law Com No 135, para 16.24 and following.

¹¹ The Scottish Law Commission is currently conducting a review of the law of succession in Scotland. Information about the project is available on their website: <http://www.scotlawcom.gov.uk/html/cpsuccession.htm> (last visited 4 May 2006).

¹² Family Law (Scotland) Act 2006, s 29. The Act also departs from the recommendations of the Scottish Law Commission in that it does not list the factors to which the court is to have regard in considering such a claim.

be difficult to quantify without reference to the position of other potential applicants who may be affected in some way.

8.17 We provisionally reject the view that cohabitants should have an automatic entitlement to a share of their deceased cohabitant's estate on intestacy. Do consultees agree?

FAMILY PROVISION

Criticisms of the law of family provision

8.18 As we have explained in Part 3,¹³ the 1975 Act (as amended) provides a scheme for those who claim that the disposition of an estate (whether effected by will, by the intestacy rules, or by a combination of the two) has failed to make them reasonable financial provision. On proof of such a claim, the court may make orders designed to ensure that the applicants obtain such provision from the estate. Cohabitants can potentially apply under two categories: “dependants” and “cohabitants”. The cohabitant category was introduced because of problems with the operation of the dependants’ category, in particular since it excluded individuals who had provided full valuable consideration for their maintenance by the deceased.¹⁴ However, as currently formulated, those two categories may between them fail to deal appropriately with all cases in which it would be proper for a remedy on death to arise.¹⁵

8.19 For example, it may be argued that a cohabitant of less than two years’ standing who has given birth to the parties’ child ought, like cohabitants without children who can satisfy the two-year test, to be able to make an application for financial provision without having additionally to demonstrate dependency.¹⁶ Although it may usually be possible to establish dependency in such cases,¹⁷ it may be asked whether that ought to be a precondition of the claim. There might be a case for such cohabitants to be included automatically. It is proper to acknowledge that, in so far as the reported case law offers any guide to the operation of the Act,¹⁸ some cohabitants do currently receive generous awards

¹³ See para 3.82.

¹⁴ See Distribution on Intestacy (1989) Law Com No 187, Part IV.

¹⁵ There has to date been no empirical study of the operation of the Inheritance (Provision for Family and Dependants) Act 1975 as it applies to cohabitants. Any criticism of the current position can therefore only be based on an analysis of the statutory provisions and decided case law, which is not necessarily representative of all of the claims which are in fact made, and of course do not disclose the circumstances of those who might have wished to make a claim but found themselves unable to do so.

¹⁶ See facts such as those in *Kotke v Saffarini* [2005] EWCA Civ 221, [2005] 2 FLR 517, (a case under the Fatal Accidents Act 1976, where there is no catch-all “dependant” category to save those who fail to satisfy the two-year cohabitation test; cf recommendations made in Claims for Wrongful Death (1999) Law Com No 263, para 3.46). The child would, of course, have a remedy in his or her own right, but (like the remedies supplied by the Children Act 1989, sch 1) that remedy would not be directed at dealing with the economic impact of child-care for the surviving parent. We discuss the case further below at 9.38.

¹⁷ Recent cases take a generous approach, even where the cohabitants have no children: eg *Churchill v Roach* [2002] EWHC 3230 (Ch), [2004] 2 FLR 989, 1005.

¹⁸ See n 15 above.

under the 1975 “maintenance” standard. However, such generosity is not uniformly displayed.

8.20 Where applicants do not fall within the “cohabitant” category because they cannot satisfy the minimum duration requirement they must instead claim as “dependants”. But it is not always the most deserving applicants who receive awards: those who have given more than they have taken (for example, by devoting care and possibly financial support to an ailing partner) may not be able to claim because they were not dependent on the deceased.

8.21 Moreover, the basis upon which relief for the surviving cohabitant is provided may also be considered to be inappropriate. The 1975 Act currently provides applicants other than spouses and civil partners with a needs-based remedy: reasonable financial provision for their maintenance.¹⁹ Where the deceased has not made a formal commitment to the claimant by marriage or civil partnership, it may be appropriate for needs-based remedies to be available in limited circumstances:

(1) where it can be inferred:

(a) from the passage of time (as is currently the case under the cohabitant category); or

(b) otherwise demonstrated on the facts (as is currently the case under the dependant and child of the family categories),

that the deceased did assume such a responsibility towards the claimant; or

(2) where the deceased ought by law to be rendered responsible for that person’s needs (the child category²⁰).

8.22 As we discussed in Part 6, needs-based relief on separation between cohabitants may be difficult to justify as a matter of principle. While different considerations arguably arise in this context (for example where it is clear that the deceased had assumed a responsibility to maintain the applicant prior to death), it seems appropriate to ask the same question in relation to financial provision on death.

The implications for provision on death of a new claim on separation

8.23 Current law does not provide the cohabitant (or the dependant) with an inter vivos remedy, that is, a claim for financial relief exercisable against the other party should the relationship end during the parties’ joint life-times. Only when death intervenes does a potential claim crystallise against the estate of the deceased. On the assumption that a new scheme of financial relief on separation were introduced for cohabitants as we provisionally propose, cohabitants would be able to claim whether their relationship ended by separation (under that new scheme) or on their partner’s death (under the 1975 Act). Reviewing the basis on

¹⁹ Inheritance (Provision for Family and Dependants) Act 1975, s 1(2)(b).

²⁰ The courts have been more restrictive in their treatment of claims by adult children, in relation to whom no lifetime support obligation may be owed.

which the existing remedies on death are granted seems to us to be a natural corollary of considering adoption of a new scheme for financial relief on separation.²¹

- 8.24 We consider it important to ensure that there is an appropriate level of consistency between any new scheme for financial relief on separation and financial provision on death. However, this is not to say that the same result should arise irrespective of whether the relationship was terminated by separation or by death: there might be very good reasons why a more generous award is appropriate in one case rather than the other.
- 8.25 The connection between remedies on death and separation is evident from the example of spouses. Spouses and civil partners are currently the only adult applicants under the 1975 Act who also have a potential family law claim²² for financial relief on separation. The existence of that other remedy (ancillary relief) is reflected in the definition of “reasonable financial provision” under the 1975 Act in such cases: the court is required to have regard to the award that the survivor could have expected had the relationship ended by divorce²³ rather than death.²⁴
- 8.26 In the absence of any equivalent claim on separation for the other categories of adult applicants under the 1975 Act, it may be appropriate for remedies on death for such applicants to be limited to needs-based relief. However, if financial relief on separation of cohabitants were introduced, a similar issue about the correspondence between the two remedies would arise. This may in turn raise questions about the suitability of the criterion of “need”. As we discussed in Parts 5 and 6, need may not offer the most appropriate basis on which to provide relief between cohabitants on separation; nor may relief on separation be dependent for its justification on a clear assumption of responsibility. In view of our provisional rejection of a needs-based remedy on separation, this has obvious implications for the substantive basis on which financial provision on death is provided. The possibility of alternative rationales for relief is at least implicit in the 1975 Act’s requirement that the court have regard to contributions made by the surviving cohabitant to the welfare of the deceased’s family and to the duration of the relationship.²⁵ If any new scheme for financial relief on separation were not needs-based, then it might be desirable to revise both the basis on which remedies for surviving cohabitants are granted and the eligibility criteria for cohabitants’ claims under the 1975 Act. It is to these issues that we now turn. We will also consider the impact of a death shortly after separation.

²¹ Compare the review of spousal provision under the family provision legislation following the introduction of current ancillary relief law on divorce, which bore fruit in the Inheritance (Provision for Family and Dependants) Act 1975: Second Report on Family Property: Family Provision on Death (1974) Law Com 61.

²² As opposed to some claim under the general law of trusts and so on.

²³ Or dissolution, in the case of civil partners.

²⁴ Inheritance (Provision for Family and Dependants) Act 1975, s 3(2).

²⁵ Inheritance (Provision for Family and Dependants) Act 1975, s 3(2A). These factors, and the survivor’s age, also apply to applications by spouses and civil partners: Inheritance (Provision for Family and Dependants) Act 1975, s 3(2).

Consistency of definition of eligible cohabitant

- 8.27 In our view, the basic definition of “cohabitant” adopted for the purposes of eligibility to apply under any new statutory scheme for financial relief on separation should be carried through into the 1975 Act. In so far as the definition we recommend is different from that currently contained in the family provision legislation, we should recommend amendment of the 1975 Act accordingly.
- 8.28 In Part 9, we explore what additional eligibility criteria might have to be satisfied before a cohabitant could claim under a new scheme on separation. We shall also examine in Part 9 the two-year minimum duration requirement applicable to all claims brought within the cohabitant category under the 1975 Act, even by cohabitants with children. As we shall discuss in Part 9, there might be grounds for adopting a less strict eligibility test (particularly as regards any minimum duration requirement) for the purposes of claims on death than for claims on separation. It may also be appropriate to dispense entirely with a minimum duration requirement in the case of cohabitants who had children. Whatever amendments were made to the 1975 Act, it would remain possible for a cohabitant who was dependent on the deceased to apply as a dependant if the eligibility criteria to claim as a cohabitant were not satisfied.²⁶

“Reasonable financial provision”

THE MAINTENANCE STANDARD

- 8.29 Currently, the definition of “reasonable financial provision” relevant to cohabitants under the 1975 Act is “such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance”.²⁷ This maintenance standard is applicable to all other applicants for provision under the 1975 Act with the exception of the spouse or civil partner of the deceased.²⁸
- 8.30 The maintenance standard applies at two stages. First, the applicant must show that the disposition of the deceased’s estate effected by will or the intestacy rules or a combination of the two is not such as to make reasonable financial provision for the applicant.²⁹ Secondly, if this burden is discharged by the applicant, the court must determine whether and in what manner it should exercise its powers.³⁰ In so doing, the court cannot award to the applicant more than reasonable financial provision. However, it may award less than is required by the applicant for his or her maintenance, as in the exercise of its discretion the court has to have regard to a range of considerations such as the size and nature of the net

²⁶ Inheritance (Provision for Family and Dependents) Act 1975, s 1(1)(e), for which no minimum duration requirement exists, and which may currently provide access to the Act for many cohabitants with children whose relationship with the deceased lasted less than two years.

²⁷ Inheritance (Provision for Family and Dependents) Act 1975, s 1(2)(b).

²⁸ Inheritance (Provision for Family and Dependents) Act 1975, s 1(2)(a), applicable to spouses and civil partners of the deceased save where they are judicially separated at the time of the death.

²⁹ Inheritance (Provision for Family and Dependents) Act 1975, s 1(1).

³⁰ Inheritance (Provision for Family and Dependents) Act 1975, ss 2, 3.

estate and the competing claims of other applicants and beneficiaries.³¹ If the net estate is not large enough in all the circumstances to cater for the “maintenance” demands of an applicant,³² the court should make a more limited award.

- 8.31 In order to achieve consistency between financial relief on separation and financial provision on death, we consider that it would be necessary to ensure that the standard of reasonable financial provision applicable to cohabitants under the 1975 Act bore some relation to the criteria applicable to the quantification of claims by cohabitants for financial relief on separation. In so far as our provisional proposal is that financial relief on separation not be based on need, this would be likely to involve replacement of the maintenance standard and reference to a “separation analogy”.

A SEPARATION ANALOGY

- 8.32 There is, of course, at present no general power in the court to grant cohabitants financial relief on separation.
- 8.33 Under the current law, if an application is made by a spouse or civil partner of the deceased for reasonable financial provision under the 1975 Act, the court is required to have regard to the provision which the applicant might reasonably have expected to receive if, on the day on which the deceased died, the marriage,³³ instead of being terminated by death, had been terminated by divorce.³⁴ This so-called “divorce analogy” should not be given undue weight for, as the Court of Appeal has recently recognised, “there is self-evidently a profound difference between a marriage which ends through the death of one of the spouses, and a marriage which ends through divorce”.³⁵
- 8.34 It is now acknowledged that the divorce analogy is not the objective for the court in spousal claims, nor does it impose a ceiling on the award that may be made by the court. It is not “a starting point” for ascertaining what constitutes reasonable financial provision, but merely one of the factors to which the court is to have regard, albeit “a very important consideration and one which the statute goes out of its way to bring to the court’s attention”.³⁶
- 8.35 The history of the divorce analogy is instructive. It was introduced by the 1975 Act, following the enactment of the Matrimonial Proceedings and Property Act

³¹ Inheritance (Provision for Family and Dependants) Act 1975, s 3(1).

³² Or if the court considers that it is necessary in achieving a proper balance between competing applicants to the estate that those demands are not met in full.

³³ Or civil partnership. References to marriage should be taken to include civil partnerships, and references to divorce should be taken to include dissolution of civil partnership.

³⁴ Inheritance (Provision for Family and Dependants) Act 1975, s 3(2), excepting judicially separated spouses and civil partners.

³⁵ *Cunliffe v Fielden* [2005] EWCA Civ 1508, [2006] 2 WLR 481, at [30], per Wall LJ.

³⁶ *Re Besterman (Deceased)* [1984] 1 Ch 458, 469, per Oliver LJ, as later followed with approval in *Re Krubert (Deceased)* [1997] Ch 97, 104, per Nourse LJ, and *P v G, P and P (Family Provision: Relevance of Divorce Provision)* [2004] EWHC 2944 (Fam), [2006] 1 FLR 431, at [223]-[227], per Black J. The comments of Waite J in *Moody v Stevenson* [1992] Ch 486, 503, seeking to elevate the importance of the divorce analogy were not followed in these later cases.

1970, which provided the basis of the law of ancillary relief as it applies on divorce today under the Matrimonial Causes Act 1973.³⁷ Until that point, remedies for spouses both on divorce and death³⁸ had been based on maintenance. When the new law of ancillary relief was introduced, it became apparent that unless the law of family provision for surviving spouses were amended, the divorced spouse potentially stood to gain more than the widow or widower, as the new law opened up the potential for remedies on divorce based on considerations other than need. The abandonment of the maintenance standard for spouses under the 1975 Act and the introduction of the divorce analogy therefore ensured that the surviving spouse was able to do at least as well as the spouse whose marriage ended on divorce.³⁹

- 8.36 If we were to recommend the creation of a scheme for financial relief on separation, it would be possible for the first time for a court considering an application by a surviving cohabitant under the 1975 Act to consider what relief would have been likely to have been granted had the relationship ended by separation rather than by death. It seems to us that it would promote our objective of consistency between claims on separation and claims on death to introduce a “separation analogy” in relation to the 1975 Act. This separation analogy would serve the same purpose in relation to a cohabitant’s claim as the divorce analogy does currently in relation to a claim by a spouse or civil partner.⁴⁰ It would therefore be neither the objective for the court in determining the cohabitant’s application, nor the ceiling for the exercise of its powers. It would, however, be an important consideration for the court in deciding whether reasonable financial provision has been made, and, if not, what award should be made in favour of the applicant.
- 8.37 In so far as remedies on separation would not be available simply on the basis of the applicant’s needs, this change to the 1975 Act would potentially give some applicants more generous provision than they are currently able to enjoy (in so far as maintenance currently forms a theoretical cap on what they may receive). Of course, this assumes that the available assets would be sufficiently extensive, in light of other claims, to provide the applicant with more than was necessary to cater for his or her needs in any event.
- 8.38 Conversely, abandonment of a maintenance standard in favour of a separation analogy, where remedies on separation were not needs-based, might potentially deprive some cohabitants of needs-based claims that they would otherwise have enjoyed under the 1975 Act (in the absence of a finding of dependency which brought them within the dependants category).⁴¹

³⁷ As amended by the Matrimonial and Family Proceedings Act 1984.

³⁸ Under the Inheritance (Family Provision) Act 1938.

³⁹ See Second Report on Family Property: Family Provision on Death (1974) Law Com No 61, paras 28 and 34.

⁴⁰ Inheritance (Provision for Family and Dependants) Act 1975, s 3(2).

⁴¹ Though note also that in many cases, the applicant’s needs would in practice be catered for by an award made under the principles of economic advantage and disadvantage that we propose in Part 6.

- 8.39 Although need may not provide an appropriate basis for remedies on separation,⁴² it may still be considered an appropriate basis in some cases for provision on death. It would be possible to incorporate the separation analogy in such a way as did not preclude the court from making needs-based awards on death if such an award seemed appropriate in all the circumstances.

OTHER CONSIDERATIONS FOR THE COURT

- 8.40 Currently, the court is specifically required to have regard to the applicant's age, the duration of the cohabitation, and the contribution made by the applicant to the welfare of the deceased's family, including any contribution made by looking after the home or caring for the family.⁴³ The reference to contributions may be particularly apposite if, following consultation, we decide to make recommendations for a statutory scheme of financial relief on separation in which such contributions would play a major role.

Former cohabitants

- 8.41 In the event of an application for financial relief being available to cohabitants on their separation, it would be logical to allow at least some former cohabitants to apply for provision under the 1975 Act as well as cohabitants. We need to distinguish between two categories of case: cases where death occurs after an application for financial relief has been made; and cases where death occurs after separation but before a claim had been made.

IMPACT OF DEATH ON AN EXISTING CLAIM FOR FINANCIAL RELIEF

- 8.42 A claim for financial relief on separation has obvious similarities to a claim for ancillary relief on divorce (or dissolution of a civil partnership). It is established law that the latter claim does not survive the death of either party to the divorce proceedings.⁴⁴ As a result, in the event of the respondent's death, the applicant who wishes to continue to seek a remedy must do so by means of an application under the 1975 Act.⁴⁵ We consider that the same principles should apply in relation to financial relief between cohabitants on separation. The claim should abate on the respondent's death, but the applicant should be able to pursue an application against the respondent's estate under the 1975 Act.⁴⁶

DEATH AFTER SEPARATION BUT BEFORE A CLAIM HAS BEEN MADE

- 8.43 If cohabitants separated but, before either could make a claim for financial relief under a new scheme, one of them died, the survivor would not be entitled to make a claim under the separation scheme against the estate of the deceased. In

⁴² For the reasons discussed from para 6.62.

⁴³ Inheritance (Provision for Family and Dependents) Act 1975, s 3(2A). Equivalent factors apply to cases involving a surviving spouse or civil partner.

⁴⁴ *D'Este v D'Este* [1973] Fam 55.

⁴⁵ On the assumption that the deceased has not made reasonable financial provision for the applicant. It may of course be (1) that the deceased left a will in favour of the applicant which remains valid (and, as the parties had not been divorced, was not affected by the provisions of Wills Act 1837, s 18A); or (2) that the deceased died intestate and the applicant as surviving spouse inherited the entirety, or the most part, of the estate.

⁴⁶ Assuming that the relevant jurisdictional rules are satisfied: see Part 11.

such circumstances it would be equitable to allow the survivor to make an application under the 1975 Act, even though the parties were not cohabiting immediately before the death of the deceased.

- 8.44 It would be necessary to impose limits on who could bring such a claim, lest a person who had cohabited with the deceased many years before his or her death should seek to capitalise on the death by bringing an unmeritorious application for family provision. Applying the same reasoning that has led us to propose this extension of the class of cohabitants, this could be dealt with by requiring that, in order to be eligible to apply for financial provision, the former cohabitant was, at the time of the death, entitled to bring a claim for financial relief on separation. In Part 11 we provisionally propose that a claim for financial relief should be made within one year of the parties' separation. It should follow that a claim under the 1975 Act by a former cohabitant should only be tenable where the applicant and the deceased separated within twelve months of the deceased's death. The usual time limit for claims under the 1975 Act (that they must be commenced within six months of the grant of probate or letters of administration) would then apply.

Barring applications under the Inheritance (Provision for Family and Dependents) Act 1975

- 8.45 The court has power, on granting a decree of divorce,⁴⁷ to make an order "if it considers it just to do so" to the effect that neither party shall be entitled to apply for an order under the 1975 Act in the event of the other's death.⁴⁸ This power is now routinely exercised. We think it would be sensible for the court, on making an order for financial relief on separation, to have a similar power restricting either cohabitant from subsequently making an application for family provision. In view of the restrictive limitation periods referred to above and discussed in Part 11, such a power would seldom need to be invoked, but it may be a useful precaution in certain cases. It would be unreasonable and unnecessary for a cohabitant who has received what a court considered was appropriate on separation from their former partner to make a claim against that partner's estate.

Opting out of the 1975 Act

- 8.46 If parties can opt out of any new remedies on separation, should they be able to opt out of the remedies available on death? There is currently no facility for any applicant to opt out of the 1975 Act as such, save by way of a consent order on divorce which includes a restriction under section 15 of the 1975 Act.⁴⁹ Any suggestion that a potential applicant should be permitted to opt out of the 1975 Act by private agreement therefore needs careful consideration.

⁴⁷ Or a dissolution order, in the case of civil partnerships.

⁴⁸ Inheritance (Provision for Family and Dependents) Act 1975, s 15(1). Such an order can also be made when the court grants a decree of nullity or judicial separation. In relation to civil partners, see s 15ZA(1), inserted by the Civil Partnership Act 2004, sch 4, para 21.

⁴⁹ See Family Property Law (1971) Law Commission Working Paper No 42, paras 3.66-3.68 and Second Report on Family Property (1974) Law Com No 61, paras 185-188. Spouses cannot oust the jurisdiction of the court under the 1975 Act by agreement: *Re S (Deceased)* [1965] P 165; *Re M (Deceased)* [1968] P 174, this is an application of the public policy enunciated in *Hyman v Hyman* [1929] AC 601.

- 8.47 We have already explained why we think it is important that cohabitants should have the right to opt out of a statutory scheme for financial relief.⁵⁰ The reasons justifying that conclusion may apply with equal force to relief provided on separation and that provided on death. We can see that where two people want to live together but do not wish their relationship to give rise to the prospect of a legal claim under the 1975 Act in the event of the death of either of them, it may be thought that the parties' wishes should be respected. The motivation for such actions could be, for instance, a desire to provide for one's children on death in preference to one's partner. This may be particularly pertinent where the children are from a previous relationship.
- 8.48 At the same time, we should alert consultees to possible practical difficulties in the way of making such provision. As we have already explained, a cohabitant may bring a claim under the 1975 Act against the estate of their deceased partner either as a "cohabitant" or as a "dependant" of the deceased. It would be necessary to ensure, if an opt out were to be effective, that the person would not be able to claim under either of these heads. It would also be necessary to ensure that those opting out of a right to claim under the 1975 Act did so freely and with full knowledge of the consequences of their actions. We would anticipate that protections similar to those built into any scheme for opting out of financial relief on separation (and discussed generally in Part 10) would be required.
- 8.49 We consider that it would be appropriate for there to be some correlation between remedies available to eligible cohabitants on separation and on death. Do consultees agree?**
- 8.50 We provisionally propose that, if a new scheme for financial relief for cohabitants on separation were enacted, then in relation to the Inheritance (Provision for Family and Dependents) Act 1975:**
- (1) the definition of cohabitants for the purposes of the 1975 Act should be amended to match the definition used under the new scheme;**
 - (2) the definition of "reasonable financial provision" applied to cohabitants' claims under the 1975 Act should be reviewed to ensure consistency with the new scheme applying on separation;**
 - (3) in determining a cohabitant's claim for provision under the 1975 Act, the court should be required to have regard to the provision that the applicant might reasonably have expected to receive in proceedings for financial relief on separation;**
 - (4) the court should be entitled, on granting a cohabitant financial relief on separation, to direct that neither cohabitant should subsequently be entitled to make an application under the 1975 Act in the event of the other's death; and**

⁵⁰ See para 5.51.

- (5) claims should be permitted under the 1975 Act on the same basis by those “former cohabitants” who cease to cohabit with the deceased in the twelve-month period immediately before the deceased’s death.

Do consultees agree?

- 8.51 We invite the views of consultees as to whether cohabitants should be entitled to opt out of the right to claim financial provision under the 1975 Act against their partner’s estate (whether as cohabitant or as dependant of their partner) in the event of their partner’s death.

Claims by children

- 8.52 In Part 6, we considered the extent to which a cohabitant should be financially responsible, not only for his or her own children, but also for those of his or her partner. A similar question arises in relation to the 1975 Act.

- 8.53 Claims may be made under the 1975 Act by:

- (1) a child of the deceased;⁵¹ and
- (2) any person (not being a child of the deceased) who, in the case of any marriage or civil partnership to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage or civil partnership.⁵²

For the purposes of exposition, we shall refer to (2) as “a step-child” of the deceased.⁵³ It is clear that “child” for these purposes identifies the relationship between the parties, so the applicant need not have been a minor at the time of death or, in (2), at the time of the marriage between the deceased and the child’s parent.⁵⁴

- 8.54 In either case, the claim to reasonable financial provision is based on the maintenance standard, that is the applicant is entitled to receive such financial provision as is reasonable in all the circumstances of the case for his or her maintenance.⁵⁵

- 8.55 There is a possible problem in relation to the class of step-children. The definition is, it will be noted, restrictive. Treating a child as a child of the family does not in itself suffice. The claim will only be possible if the deceased was married⁵⁶

⁵¹ Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(c).

⁵² Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(d), as amended by the Civil Partnership Act 2004, sch 4, para 15(4).

⁵³ The concept of “child of the family” extends beyond that category to include children of whom neither the deceased nor his partner was a parent, but it is in the case of step-children in particular that the problem of “lost inheritance”, discussed in the text below, particularly arises.

⁵⁴ *Re Callaghan* [1985] Fam 1.

⁵⁵ Inheritance (Provision for Family and Dependants) Act 1975, s 1(2)(b).

⁵⁶ Or a party to a civil partnership.

(usually, but not necessarily, to the parent of the child concerned). If, therefore, A and B lived together and brought up C, B's child by a previous relationship, C would not be able to claim financial provision on A's death unless at some time A and B had been married to (or in a civil partnership with) each other.⁵⁷

- 8.56 There have been few reported claims by step-children under the 1975 Act. It has become apparent, however, that the courts are prepared to give considerable weight to applicants' loss of their "inheritance" from their natural parent.⁵⁸
- 8.57 In *Re Callaghan*,⁵⁹ the applicant's mother remarried following widowhood. The mother then predeceased her husband, who had in the interim treated the applicant as his child. The mother died intestate and her estate, which was not substantial, devolved in its entirety upon her husband. When the husband in turn died intestate, the intestacy rules benefited the husband's relatives and not the applicant. In *Re Leach*,⁶⁰ the applicant's father remarried following widowhood. The father then predeceased his wife, who had in the interim treated the applicant as her child. The father had made a will making his wife the sole beneficiary. When the wife died intestate, the intestacy rules benefited her relatives and not the applicant. In both cases, the applicants had been adult when the parent married and at the death of both their parent and step-parent.
- 8.58 In both cases, the applicants, having "lost their parents' inheritance", brought claims under the 1975 Act as step-children and obtained awards of reasonable financial provision from the court.⁶¹ In neither case, it should be said, could the applicants have established dependency on their step-parents at the time of the step-parents' death.⁶²
- 8.59 The claim in each of these cases was only possible because the applicant's parent had married the deceased. Had the widowed, now dead, parent merely cohabited with the new partner (the immediate deceased), then even if the applicant had been treated by the partner as a child of the family, no claim would have been possible. In the event of the applicant's parent dying and passing their estate to the partner by will, the applicant could have made a claim at that time as a "child of the deceased" (provided he or she could satisfy the maintenance standard). If the applicant had not made such a claim then, he or she could be prejudiced later. It would not be possible, in the event of the partner in turn dying

⁵⁷ Unless C can demonstrate dependency on A and so apply as a "dependant" of the deceased under Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(e).

⁵⁸ This concept may be thought to be problematic in English law (contrast other, civilian jurisdictions), which does not confer any right to a fixed inheritance on any category of family member. See First Report on Family Property: A New Approach (1973) Law Com No 52, paras 31-45; it was never even proposed for children.

⁵⁹ [1985] Fam 1.

⁶⁰ [1986] Ch 226.

⁶¹ Although it may be thought that the applicants, in both cases relatively self-sufficient adults, would find the maintenance threshold difficult to surmount, the courts were sympathetic to their plight.

⁶² So no claim as a "dependant" of the deceased would have been possible under Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(e).

and passing their estate to others by will (or on an application of the intestacy rules), for the applicant to claim against the partner's estate.

8.60 We are concerned by the disadvantage to which the children of unmarried cohabitants may be subject as a result of the restricted definition of "child of the family" in the 1975 Act. However, it is important to note that where the applicant can establish dependency upon the deceased partner – as may invariably be the case where the applicant was a minor being cared for by the deceased at the time of the death – a claim would currently be possible under the "dependant" category.⁶³ The difficulty arises only, therefore, in cases where such dependency cannot be demonstrated and so particularly, though not exclusively, in cases where the applicant "child" is adult.

8.61 We invite the views of consultees on whether the definition of "child of the family" contained in the Inheritance (Provision for Family and Dependants) Act 1975 should be amended so that those treated as children of the family in relation to a cohabiting couple should also qualify as applicants.

RULES IN RELATION TO WILLS

8.62 There are two rules we examine here as having particular relevance to cohabitants. First, we consider the revocation of a will by the testator's subsequent marriage, which may have unintended consequences where the testator marries, or enters a civil partnership with, an existing cohabitant who is the principal beneficiary of the revoked will. Secondly, we consider whether there should be rules denying testamentary benefits conferred upon and rescinding the appointment of executorship of a cohabitant of the testator following the parties' separation, by analogy with sections 18A and 18C of the Wills Act 1837.

The effect of marriage on a will

8.63 Subject to certain exceptions which we shall not dwell upon here,⁶⁴ a will is revoked by the marriage, or registration of civil partnership, of the testator.⁶⁵ This is important where cohabitants execute wills in favour of their partner, and they subsequently marry. If they are not aware of the operation of this rule, there is the danger of the will being revoked, thereby leaving the deceased intestate.

8.64 The effect of the revocation rule is not restricted in its application to those who have been cohabiting prior to marriage or civil partnership. It is, however, the case that those who formalise an existing relationship by marriage or civil partnership, without adverting to the revocation rule, may suffer consequences which they did not intend. Those consequences may be redressed to some extent by the operation of the intestacy rules (under which the now-spouse will be the principal beneficiary of the estate as the deceased's surviving spouse) and

⁶³ Inheritance (Provision for Family and Dependants) Act, s 1(1)(e).

⁶⁴ Revocation will not take place where it appears from the will that at the time it was made, the testator was expecting to be married to his partner, and it is shown that the testator intended that the will (or some provision within it) should not be revoked by the expected marriage.

⁶⁵ Wills Act 1837, s 18 (spouses), and s 18B (civil partners), as inserted by the Civil Partnership Act 2004, sch 4, para 1, 2 and 5.

possibly by a claim under the Inheritance (Provision for Family and Dependents) Act 1975 (where the now-spouse will be entitled to the more generous standard of “reasonable family provision” applicable to spouses).

- 8.65 We do not believe that this is an appropriate opportunity to consider this issue as it is of much wider application than the scope of the current project. We also believe that there are practical steps that can be taken to publicise the marriage revocation rule to those (cohabitants or others) who are intending to marry or enter into a civil partnership.
- 8.66 We consider that there is no justification to amend the current law that (subject to exceptions) a will is revoked by the testator’s subsequent marriage or civil partnership. Do consultees agree?**

The effect of the separation of cohabitants on a will

- 8.67 Section 18A of the Wills Act 1837⁶⁶ provides that where a testator dies on or after 1 January 1996, and his or her marriage had previously been dissolved or annulled after a will had been made, any appointment of the former spouse as executor or trustee, or any conferment on the former spouse of a power of appointment, shall take effect as if the former spouse had died on the day of dissolution or annulment. Additionally, any property devised or bequeathed to the former spouse shall pass as if the former spouse had died on that date.⁶⁷
- 8.68 The divorce rule can be justified on the basis that by the time spouses are divorced, it is unlikely that they would wish their former spouse to receive testamentary benefits.⁶⁸ As the rule applies subject to any contrary intention appearing in the will, people can override the rule by making it clear in their will that, despite the impending divorce, they wish their former spouse to benefit. But it seems reasonable that the default position should be that the former spouse takes no benefit, and may not accept appointment as executor or as trustee.
- 8.69 The question arises whether a similar rule should apply in relation to cohabitants. If a testator has appointed his partner as the executrix of his estate, and has made testamentary gifts in her favour, their separation may mean that it is no longer appropriate or consistent with the testator’s wishes for her to act as executrix or to obtain the gifts contained in his will.
- 8.70 However, the application of such a rule to cohabitants would not be free of difficulty. Marriage, civil partnership, divorce, annulment and dissolution are all matters of public record. Cohabitation, and the cessation of cohabitation by the

⁶⁶ Civil partners are covered by an equivalent provision: Wills Act 1837, s 18C, inserted by the Civil Partnership Act 2004, sch 4, para 1, 2 and 5. For the purposes of exposition, the text refers only to spouses.

⁶⁷ Wills Act 1837, s 18A (spouses), and s 18C (civil partners). An earlier provision (contained in Administration of Justice Act 1982, s 18(2)) continues to apply where testators died on or after 1 January 1983 and on or before 31 December 1995. This provision (deeming a “lapse” of a gift in favour of the former spouse) was criticised following the decision of the Court of Appeal in *Re Sinclair* [1985] Ch 446 and the Law Commission recommended its amendment: *The Effect of Divorce on Wills* (1993) Law Com No 217.

⁶⁸ Royal Commission on Marriage and Divorce (1956) Cmnd 9678 (Morton Commission), at paras 1187-1191.

separation of the parties, are not. It is important, therefore, to set out the implications of extending sections 18A and 18C of the Wills Act to cohabitants.

- 8.71 First, before the rule could be applied, it would be necessary to determine whether, at the time of the execution of the will, the testator was indeed cohabiting with his or her partner. The will may have been executed many years before the testator's death, and it may therefore be easier to assert than to prove that at the time of execution the relevant parties were indeed cohabitants. The partner is unlikely to be co-operative on this issue, as it would be contrary to the partner's interests to be found to have been cohabiting with the testator at the time of execution of the will. Secondly, it would be necessary to determine that, at the time of the testator's death, the parties were no longer cohabiting. We consider in Part 9 below the issues that may be involved in proof of separation. Again, this is a matter on which there is likely to be conflicting evidence, and we would anticipate a serious risk that the deceased's partner and the deceased's estate would hold opposing views.
- 8.72 From the point of view of those administering the deceased's estate, and those who are recipients of the deceased's bounty, requiring an examination of the testator's domestic circumstances (both at the time of the execution of the will and at the time of the death) could be time-consuming and costly. It may, of course, be contended that this project is by definition dealing with informal relationships for which there is no readily available proof of commencement or termination. If we acknowledge that there is a need for reform then we should make recommendations accordingly.
- 8.73 The problem of informality could be mitigated, albeit only in part, by making some event other than separation the trigger for the application of the rule. For instance, it may be sufficient for a separation agreement to have been entered into by the parties, or for proceedings for financial relief on separation to have been instigated by one or other of the partners, or for an order for financial relief to have been made by the court. Any of these would provide ample indication that the parties no longer wished to consider themselves as a couple. Not only would such evidence indicate that the relationship had broken down, it would also indicate that at some past date (although not necessarily at the date of the execution of the will) the parties were cohabiting.
- 8.74 On balance, however, we do not consider that the application of this rule to cohabitants is desirable. We can see that in certain cases, where the will was executed many years ago and may have been forgotten by the time of separation, or where the deceased had not been in receipt of legal advice, application of the rule may have beneficial effects. But it seems to us that, in the large majority of cases, testators who separate from their partner would take steps to ensure that their former partner no longer benefits from provisions contained in their will. We think that to introduce a provision dealing with the minority of cases where a testator fails to take such steps would be a disproportionate response to the problem, having regard in particular to the possibly adverse impact of any such rule on the administration of estates.
- 8.75 We consider that there should be no equivalent provision to sections 18A and 18C of the Wills Act 1837 applicable where, subsequent to the execution of a will, a testator separates from a person with whom he was**

cohabiting and whom he appointed as executor or trustee, or devised or bequeathed property, in the terms of the will. Do consultees agree?

PART 9

ELIGIBILITY TO APPLY

INTRODUCTION

- 9.1 In Part 5, we discussed eligibility in broad terms, contrasting cohabitants with children and those without, in order seeking a basic justification for providing access to a scheme of financial relief on separation. In this Part, we consider in more detail how the eligibility tests for a new scheme on separation could be framed. Later Parts consider other issues broadly related to eligibility: the right of couples to opt out of the operation of any new scheme by agreement (Part 10), limitation periods, the retrospective operation of any new scheme, and the jurisdiction of the domestic courts (Part 11).
- 9.2 In Part 8, we explained how we envisaged that reform of the existing remedies under the Inheritance (Provision for Family and Dependants) Act 1975 (“the 1975 Act”) could be effected were a new scheme of financial relief on separation introduced. We suggested as part of that provisional proposal that the basic definition of cohabitants eligible to apply under that Act should be the same as that under a new scheme on separation. We shall consider in this Part whether other aspects of eligibility to apply – such as the presence of children or satisfaction of a minimum duration requirement – ought to be the same for both remedies on separation under a new scheme and on death under a revised 1975 Act.
- 9.3 We have postponed detailed consideration of this important issue until this relatively late position in the paper because the question of eligibility to apply can only be settled on in the light of the nature of the relief granted under a new statutory scheme.
- 9.4 We have already suggested that there is a case for cohabitants with children to be included automatically in any new scheme on separation. We invited consultees’ views on the question of cohabitants without children, but suggested that, if they were to be included, the imposition of a minimum duration requirement as a precondition for eligibility to apply might be appropriate. We need now to examine those options more closely, in light of the remedies that would be potentially available between parties to eligible relationships.
- 9.5 It is important to bear in mind that this project is concerned with a relatively narrow issue: the circumstances in which those who have been cohabiting should be entitled to make financial claims against their former partner on separation, or against their partner’s estate on death. We are not involved in an attempt to define “cohabitation” for any wider legal purposes. In particular, we are not recommending the creation of a new, comprehensive legal status (like “spouse” or “civil partner”) which would confer on those who qualify a range of rights and obligations in a variety of private and public law contexts.
- 9.6 One final point of introduction. It seems to us appropriate that eligibility should be regarded as a characteristic of relationships rather than of the individuals within

them. There are some situations in which lack of eligibility might arise from a characteristic of just one party,¹ and one could in theory devise a system whereby (depending on the nature of the concern arising from that characteristic) that party was not eligible to claim, or was immunised against claims brought by the other party, but that otherwise the scheme would operate between the parties. It seems to us more satisfactory that any individual “disabilities” of this sort, if they are to exclude the operation of the scheme at all, should do so entirely rather than partially.² We therefore deal entirely in the following discussion with the eligibility of relationships.

Eligibility under opt-in and opt-out schemes compared

- 9.7 Although our clear preference for any reform is an opt-out scheme, it may nevertheless be helpful to examine the contrast, in terms of eligibility, between opt-in and opt-out schemes.
- 9.8 Defining and identifying eligibility under an opt-out (or “default”) scheme raises issues very different from those pertinent to opt-in schemes. In the case of marriage and civil partnership, the existence and recognition of the relationship is conclusively established on production of a valid certificate.³ There is an expectation that spouses will live together, have sexual relations, raise children, and so on. But in fact none of these is required for a marriage to be recognised in law as such. The parties can conduct themselves however they wish; the marriage certificate is the passport to legal recognition and a formal process of dissolution marks its end. The parties’ marital status, alone, is what makes the spouses eligible to apply for financial relief.
- 9.9 Like the legal consequences of marriage and civil partnership, the legal consequences of any new opt-in scheme (such as some other form of registered partnership) would attach only to those partners who had completed specified formal requirements, and by virtue of their having done so. Parties to opt-in relationships would be eligible to apply for remedies simply because they had explicitly chosen to opt in, and thereby to undertake any legal commitments and assume any legal responsibilities that opting in entailed.
- 9.10 This being the case, the definition of relationships eligible for registration in an opt-in scheme (like the eligibility requirements for marriage and civil partnership⁴) would need only to identify the basic types of relationships to which the legislature wished to grant the right to opt in; for example, that the parties be of the opposite or the same sex, that they not be related within prohibited degrees,

¹ We consider two: legal minority and the existence of a concurrent relationship with a third party.

² For example, imagine a system which allowed minor cohabitants to receive financial relief, but not to have orders made against them. In some cases it might not be obvious at the outset (owing to the need to balance the parties’ various claims) whether the outcome of any proceedings would be an order in favour of or against the minor. To go through the exercise only to discover that the conclusion could not be given effect owing to the bar on orders against minors would seem wasteful of time and resources.

³ And compliance with the very basic requirements implied by the law of nullity: Matrimonial Causes Act 1973, ss 11-13; Civil Partnership Act 2004, ss 49-51.

⁴ See n 3.

and so on. Once eligible parties had validly opted in, either party would be automatically eligible to apply for financial relief on the basis of their opt-in, without any inquiry into the nature of the parties' relationship being necessary.⁵

- 9.11 By contrast, since an opt-out scheme would apply by default to those relationships falling within its scope (where the parties had not opted out by agreement), eligibility criteria would have a substantial role to play in identifying those relationships for which access to the scheme would be appropriate.⁶
- 9.12 Cohabiting relationships are only recognised by law in so far as the parties in fact live their lives in the way that the statute in question regards as necessary for "cohabitation" for its particular purposes to exist. The very informality of these relationships means that there are cases where there might be argument about whether the parties satisfy the eligibility requirements, whatever they may be. In particular, attempts to measure the length of cohabiting relationships may sometimes be made difficult by the fact that the parties themselves may not be in agreement about when the relationship began or ended, which in turn implies that they may not agree on the characteristics of "cohabitation".⁷
- 9.13 In view of our provisional preference for a default regime, the remainder of this Part will explore eligibility requirements appropriate to such a scheme.

Existing statutory recognition of cohabitants

- 9.14 The application of laws to cohabitants by default (rather following the parties opting in) is not new to English law. Since the early twentieth century,⁸ cohabiting relationships have been recognised by statute in various contexts. In many of those contexts, cohabitation is subject to default regimes which, unlike the scheme that we are provisionally proposing here, cannot be avoided by

⁵ Though, of course, the functional aspects of the parties' relationship would (as currently between spouses and civil partners) be very important to the court's decision about what financial relief, if any, would be fair.

⁶ Tasmanian law nicely illustrates the different way in which opt-in and default relationships are defined. "Significant relationships" under the Relationships Act 2003 (Tasmania) can be established either (i) by examining the couple's relationship by reference to the statutory checklist of factors, or (ii) simply by registering it: that fact itself proves that the relevant relationship exists. Registration is available between two unrelated, unmarried adults who have a relationship as a couple.

⁷ J Haskey, "Cohabiting couples in Great Britain: accommodation sharing, tenure and property ownership" (2001) 103 *Population Trends* 26. Some commentators oppose reform for "cohabitants" on a default basis owing to the difficulties of definition: e.g. M Garrison, "Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation" (2005) 52 *University of California Los Angeles Law Review* 815, at 848-852.

⁸ See R Probert, "Cohabitation in Twentieth Century England and Wales: Law and Policy" (2004) 26 *Law and Policy* 13.

agreement. Several of them involve private law remedies dependent on the exercise of judicial discretion.⁹

- 9.15 Until recently, statutes referring to cohabitants were understood to cover only opposite-sex couples. However, following *Ghaidan v Godin-Mendoza*,¹⁰ the Civil Partnership Act 2004 expressly amended statutes applying to cohabiting couples so that they now cover both opposite-sex cohabitants who have not married and same-sex cohabitants who have not registered a civil partnership.¹¹ Opposite-sex and same-sex cohabitants should be equally eligible under any new scheme.¹²
- 9.16 Despite this wide-ranging legal recognition of cohabitation, the law has not adopted a consistent definition of cohabitation for use in all contexts. Indeed, the word “cohabitation” itself is not always used, even where it seems clear that that is, broadly speaking, the sort of relationship contemplated by the provision in question.

ELIGIBILITY TO APPLY UNDER A NEW SCHEME: BASIC REQUIREMENTS

Basic description of the relationship

- 9.17 As the terms of reference make clear, this project is concerned only with what are commonly termed “couples”,¹³ whose relationships will typically be characterised by (sexual) intimacy¹⁴ and exclusivity.¹⁵ We consider separately below the requirement of a shared household.
- 9.18 Existing legislation uses various terms to refer to cohabitants; the words “couple” and “cohabitant” appear only occasionally. The most common formula uses the “marriage analogy”, while some more recent legislation has referred to “partners in an enduring family relationship”. The question here is what terminology should

⁹ See, for example, remedies for domestic violence (Family Law Act 1996), fatal accidents compensation (Fatal Accidents Act 1976), family provision on death (Inheritance (Provision for Family and Dependents) Act 1975), succession to certain tenancies (various Housing Acts and the Rent Act 1977). Contrast the rule-based relevance of a cohabiting partner to the calculation of child support (Child Support Act 1991, sch 1 part 1), and the treatment of cohabitants as a single economic unit for the purposes of means-tested for welfare benefits (Social Security Contributions and Benefits Act 1992). Cohabitants have also been recognised for common law purposes, eg *Barclays Bank v O'Brien* [1994] 1 AC 180, 198, per Lord Browne-Wilkinson.

¹⁰ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

¹¹ Including the Inheritance (Provision for Family and Dependents) Act 1975. One statutory provision that has not been amended, Human Fertilisation and Embryology Act 1990, s 28(3), is the subject of a Department of Health consultation; see n 71.

¹² See Part 4, n 83.

¹³ Relationships between more than two individuals are not included. Such relationships are not recognised for the purposes of social security law. See Department of Work and Pensions, *Decision Makers Guide*, vol 3, ch 11, para 11042 available at <http://www.dwp.gov.uk/publications/dwp/dmg/> (last visited 4 May 2006). The New South Wales Law Reform Commission took the view that such relationships were excluded by their failure to satisfy the marriage analogy: *Report on De Facto Relationships* (1983) New South Wales Law Reform Commission Report No 36, para 17.17.

¹⁴ See para 9.45 below.

¹⁵ But see para 9.138 below regarding concurrent relationships.

be used in any new legislation creating a scheme for financial relief on separation and, in particular, whether the marriage analogy is desirable.

Marriage analogy¹⁶

- 9.19 Several statutes define cohabitation by analogy with marriage or civil partnership. For example, section 1(3) of the Fatal Accidents Act 1976¹⁷ allows actions for compensation in respect of a wrongful death to be brought by, among others:

any person who—

(i) was living with the deceased in the same household immediately before the date of the death; and

(ii) had been living with the deceased in the same household for at least two years before that date; and

(iii) was living during the whole of that period as the husband or wife or civil partner of the deceased.

- 9.20 Section 62(1) of the Family Law Act 1996 defines “cohabitants”, for the purpose of eligibility to apply for occupation and non-molestation orders, as:¹⁸

two persons who are neither married to each other nor civil partners of each other but who are living together as husband and wife or as if they were civil partners.

- 9.21 The marriage analogy formula is used in the recent Scottish legislation introducing financial relief for cohabitants.¹⁹

Other formulae for describing couple relationships

- 9.22 More recent English legislation uses novel formulae, which are intended either to identify intimate relationships other than those between cohabitants, or to identify a larger category within which at least some cohabitants would fall. To our knowledge, they have yet to receive authoritative judicial interpretation.

- 9.23 For example, adoption legislation now permits adoption by “couples”, defined to include:

¹⁶ Legislation using this technique was amended by the Civil Partnership Act 2004 to include a “civil partnership analogy” for same-sex cohabitants. See for example Rent Act 1977, sch 1, para 2(2); various Housing Acts; Child Support Act 1991, sch 1 para 10C(4) and (5); Social Security Contributions and Benefits Act 1992, s 137. The Criminal Injuries Compensation Authority uses this formula to define eligibility to claim in fatal cases: Criminal Injuries Compensation Authority, *Guide to compensation following a fatal injury* (2005) para 2(13)(c). Some older legislation took a rather more direct, and confusing, approach to the marriage analogy: eg “unmarried wife”; “reputed spouse”.

¹⁷ This class of dependant was inserted by the Administration of Justice Act 1982, and extended to same-sex cohabitants in 2004.

¹⁸ Cohabitants were first included in the scope of remedies for domestic violence by the Domestic Violence and Matrimonial Proceedings Act 1976.

¹⁹ Family Law (Scotland) Act 2006, s 25.

two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.²⁰

- 9.24 The words used here are not themselves defined, though the Act excludes close blood and adoptive relations from their scope.²¹ It is clear that cohabiting couples are intended to fall within this definition, though the Act does not expressly require that the parties be living “together” or “in the same household”, as other statutes do; that might be thought to be implicit in the concept of an enduring family relationship.²²
- 9.25 Section 62(3) of the Family Law Act 1996 includes a new category²³ of “associated person” relationship, eligible to apply for occupation and non-molestation orders, involving those who “have or have had an intimate personal relationship with each other which is or was of significant duration”. The legislation includes a separate category for cohabitants (defined above) to which more substantial remedies attach, so this new provision applies to relationships which are not co-residential. But it illustrates the variety of terminology currently used in legislation to refer to familial relationships.

Descriptions and definitions used in other jurisdictions

- 9.26 There are a variety of approaches amongst those jurisdictions that currently operate default schemes.²⁴ However, they tend to share two basic features: (i) a general term and basic definition for the relationship; combined with (ii) a checklist of factors to aid the identification of such relationships. Some schemes adopt more rigid definitions and presumptions that the relevant relationship exists which arise once basic facts are proved. Schemes commonly require the relationship to have lasted a minimum duration (or to have produced a child) before the parties will be eligible to apply for financial remedies on separation and death.
- 9.27 The basic terminology varies:
- (1) cohabitant (Scotland, Sweden);
 - (2) *de facto* partner (several Australian states, New Zealand);

²⁰ Adoption and Children Act 2002, s 144(4). This formula is also used in the Sexual Offences Act 2003; the Anti-Social Behaviour Act 2003; the Paternity and Adoption Leave Regulations 2002, SI 2002 No 2788; the Flexible Working Time (Eligibility, Complaints and Remedies) Regulations 2002, SI 2002 No 3236; and the Coroners (Amendment) Rules 2005, SI 2005 No 420.

²¹ Adoption and Children Act 2002, s 144(5) and (6).

²² In similar vein, proposals for reform of civil registration would have permitted a “life partner” to register a death: General Register Office, *Civil Registration: Vital Change* (2002) para 2.21.

²³ Inserted by the Domestic Violence, Crime and Victims Act 2004, s 4.

²⁴ We shall not discuss forms of common law marriage, which are still recognised by some states of the United States of America. Scotland has just abolished its concept of “marriage by cohabitation with habit and repute”: Family Law (Scotland) Act 2006, s 3.

- (3) domestic partnership/relationship (some Australian states, American law reform proposals²⁵);
- (4) putative spouse (South Australia);
- (5) significant relationship (Tasmania).

9.28 The basic definitions of these concepts vary in their precise content. There are perhaps three basic ingredients, used either singly or in combination:

- (1) the marriage/civil partnership analogy:
 - (a) “a man and a woman who are (or were) living together as if they were husband and wife” or “two persons of the same sex who are (or were) living together as civil partners”;²⁶ or
 - (b) two people who “have a marriage-like relationship”;²⁷
- (2) the language of “couplehood”:
 - (a) two people who “live together as a couple”;²⁸ or
 - (b) two people who “have a relationship as a couple”;²⁹ and/or
- (3) reference to living arrangements and/or a shared household:
 - (a) two people who “live together on a permanent basis as a couple and who have a joint household”;³⁰
 - (b) “two persons ... who for a significant period of time share a primary residence and a life together as a couple”;³¹ or
 - (c) “the relationship between two people ... living together as a couple on a genuine domestic basis”.³²

Discussion

9.29 Whilst the marriage analogy may be convenient and would fit with much existing domestic legislation, is not without its problems.

²⁵ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002).

²⁶ Family Law (Scotland) Act 2006, s 25(1)(a) and (b).

²⁷ Australia: Northern Territory, South Australia and Western Australia. See Appendix C.

²⁸ Australia: New South Wales; New Zealand. See Appendix C.

²⁹ Australia: Tasmania. See Appendix C.

³⁰ Sweden: see Appendix C.

³¹ American Law Institute proposals for reform: *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002).

³² Australia: ACT; see also similar tests in Victoria and Queensland. See Appendix C for references.

- 9.30 Some couples object to the analogy because they have deliberately chosen not to marry, for social or ideological reasons (though not necessarily because they consciously reject the legal implications of marriage). Others object that likening cohabitants to married couples misses the point that cohabitants have not married each other. The expression has also become somewhat cumbersome now that the marriage analogy has to be accompanied by a civil partnership analogy for same-sex relationships. A uniform expression using the language of “couples” might be easier and more readily understood by lay people.
- 9.31 There is also evidence that legal tests using the marriage analogy may have contributed to the common law marriage myth.³³ There have been calls recently for the expression “common law marriage” to be expunged from official forms, media and other sources.³⁴ Although the law does not use that expression to refer to cohabitants, the other, rather confusing legal formula “not married to each other [but] ... living together as husband and wife” does appear on court forms.³⁵ Benefit application forms³⁶ use a similar wording, though perhaps make matters slightly clearer by inserting “if”: “living together as *if* husband and wife”. By these means, the concept of common law marriage continues to seep into the public consciousness, contributing to the myth. One response to this problem, of course, is to educate the public more carefully about the significance of these expressions. Nevertheless, it may be desirable to adopt an alternative form of words, perhaps drawing on some of the examples from other jurisdictions and the more recent domestic legislation cited above.
- 9.32 We invite the views of consultees on whether any legislative definition of those eligible to apply as cohabitants for financial relief on separation should be expressed by analogy to marriage and civil partnership, or in other terms.**

An express co-residence or joint household requirement

- 9.33 In some contexts, it is a statutory precondition of legal recognition that parties share a household.³⁷ The concept of a “household” is well known to the law. A household is different from a house: a house may be shared, but the occupants might operate entirely separate households within it. What matters for these purposes is the degree of domestic interaction between the parties. A shared household necessarily involves sharing a physical home. However, the mere fact of that one partner is temporarily absent from that place or maintains a second

³³ A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law* (2005) p 44.

³⁴ <http://www.advicenow.org.uk/go/clm/index> (last visited 4 May 2006).

³⁵ See, for example, the notes for guidance on the form for applying for a non-molestation order: <http://www.hmcourts-service.gov.uk/courtfinder/forms/fl401.pdf> (last visited 4 May 2006).

³⁶ See, for example, the DWP information leaflet WK1, “Financial help if you work or are looking for work” p 3.

³⁷ We shall see below that the shared household is in any event a strong indication of a marriage-like relationship.

home elsewhere will not of itself prevent that individual from being a member of the household, provided that he or she is otherwise sufficiently integrated into it.³⁸

9.34 Recent case law, in the context of fatal accidents claims, has endorsed the following set of propositions for establishing whether two people are living together in the same household as husband and wife:³⁹

- (1) each case is fact sensitive: that is, dependent upon its peculiar facts;
- (2) the relevant word in the statute which the court must consider is “household” and not “house”;
- (3) living together is the antithesis of living apart;
- (4) parties will be in the same household if they are tied by their relationship; and
- (5) the tie of that relationship may be manifest by various elements, not simply living under the same roof, but the public and private acknowledgement of their mutual society and the mutual protection and support which binds them together.

9.35 The concept of cohabitation necessarily involves some degree of co-residence and a joint household. A co-residence or joint household requirement is for the most part an easy test to apply, but there are more peripheral cases in relation to which the question “how much cohabitation is required?” has to be asked.⁴⁰

9.36 The issue can be illustrated by the case of *Kotke v Saffarini*.⁴¹ The Fatal Accidents Act 1976 expressly requires, in order for a survivor to be eligible to claim, that the couple lived together as husband and wife in the same household for two years preceding the death.⁴² In *Kotke v Saffarini*, two years prior to his death, the deceased had a house in Doncaster where he slept several nights of the week and kept the bulk of his clothes and belongings, leaving just a few clothes and essentials in his partner’s home in Sheffield for when he visited, principally at weekends. He was spending increasing amounts of time in Sheffield and he and his partner had discussed buying a house together. But his position was complicated by the negative equity in his house, and it was convenient for him to go to work in London from Doncaster because of the better train connection; he also continued to use Doncaster as his address for official purposes. They shared shopping expenses when he was in Sheffield.

³⁸ *Pounder v London Underground Ltd* [1995] PIQR P217; cf *Kotke v Saffarini* [2005] EWCA Civ 221, [2005] 2 FLR 517, discussed below at para 9.38.

³⁹ *Kotke v Saffarini* [2005] EWCA Civ 221, [2005] 2 FLR 517, at [23] and [39]; applied in *Pitt v Industrial Roofing Ltd* [2005] EWHC 1194 (QB), judgment of 27 April 2005, QB (unreported).

⁴⁰ See also the facts of *Horsfield v Giltrap* [2000] NZFLR 1047, which were not regarded by the judge as constituting a “*de facto* marriage”.

⁴¹ *Kotke v Saffarini* [2005] EWCA Civ 221, [2005] 2 FLR 517.

⁴² Fatal Accidents Act 1976, s 1(3)(b).

- 9.37 The judge concluded that at the point two years before the death, whatever their future intentions might have been, the couple's domestic lives were insufficiently integrated to constitute a joint household. This was an unfortunate conclusion for the claimant, who not long into the last two years had become pregnant, and before her partner's death had given birth to his child. A few months after the birth he had let the Doncaster house and finally moved to her Sheffield home. They were clearly sharing a household by the end, but because they had not done so for a full two years before the death, the claim could not go forward.⁴³
- 9.38 At the crucial two-year point, the couple in *Kotke* could perhaps be described as "living apart together".⁴⁴ Such couples may have stable, long-term relationships, but continue to live apart, even after the birth of children. Such couples may be found to share "family life" for the purposes of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").⁴⁵ The assumption that a lack of shared household and co-residence automatically deprives a relationship of the mutuality necessary to warrant any legal protection might be too simplistic. Where there are children, the impact of the relationship on the primary carer's earning capacity may be very similar to that arising in cases of cohabitation.⁴⁶
- 9.39 However, while cases involving couples who "live apart together" may share some of the features of cases involving cohabitants, such couples may at least be assumed to have their own homes. To that extent, it may be easier to unravel their joint lives in the event of separation and death, and the lack of shared household probably reduces the risk of financial interdependence which generates the difficulties that new remedies on separation would seek to address. The law of trusts might be felt to be adequate to deal with any financial dealings between the parties, and Schedule 1 to the Children Act 1989, together with child support, adequate to provide remedies for any children they might have.
- 9.40 Another danger of drawing a line based on a shared household might be to discourage the commencement of cohabitation when the female partner becomes unexpectedly pregnant. The potentially liable partner might be discouraged from moving in if the fact of cohabitation would bring the couple within the scope of a new scheme. However, this assumes that people's conduct of their personal relationships is influenced significantly by the law, an assumption which, as we discussed in Part 5, may not commonly be the case.⁴⁷ Moreover, potential liability already exists in such cases for child support and

⁴³ We have previously recommended that any dependant should be able to claim under the Fatal Accidents Act: Claims for Wrongful Death (1999) Law Com No 263, para 7.7. Were the same facts to occur in relation to a claim on separation or death, the same problem would arise if a minimum duration requirement were imposed, unless couples with children were exempted from it. Though note that under the Inheritance (Provision for Family and Dependants) Act 1975, a cohabitant of less than two years' standing might be eligible to apply as a "dependant".

⁴⁴ See para 2.15.

⁴⁵ *Kroon v Netherlands* (1994) Series A 297-C.

⁴⁶ Note the remedy provided by Family Proceedings Act 1980 (New Zealand), ss 79-81.

⁴⁷ Not least if the parties' "knowledge" of the law is flawed or vague; see on this specific point C Smart and P Stevens, *Cohabitation Breakdown* (2000) p 50.

under Schedule 1 to the Children Act 1989, so the introduction of new remedies might not make a difference to behaviour in that regard.⁴⁸ As ever, though, seeking to make any prediction of the likely impact of reform on relationship behaviour is a difficult exercise.

9.41 Since this project is concerned with cohabitation, any couple that does not share a household would fall outside the scope of any new statutory scheme.

9.42 We provisionally propose that any legislative definition of those eligible to apply should expressly require that the parties shared a joint household. Do consultees agree?

Identifying eligible relationships: the checklist approach

9.43 The marriage analogy and other tests (on their face) only take us so far. What features of a relationship make it analogous to marriage? What are the indicia of an “enduring family relationship”, and what further qualification does the word “partners” add?⁴⁹ In the absence of further criteria in the statutes, the courts tend to apply these tests with the aid of a judicially-developed checklist of factors that the relevant type of relationship might be expected to exhibit.

9.44 The domestic “checklist” approach originates in social security law, which has for many years⁵⁰ treated cohabitants (defined by way of the marriage analogy) as a single economic unit for the purposes of means-tested benefits, just as spouses and civil partners are. That body of law created a set of six “admirable signposts”⁵¹ which have been borrowed by the courts for use in other contexts⁵² to assist in the identification of cohabiting relationship as “living together as husband and wife”:

- (1) whether the parties are members of the same household;
- (2) the stability of their relationship;
- (3) whether and to what extent the parties are financially interdependent;
- (4) whether the parties have a sexual relationship;
- (5) whether the parties have children together; and

⁴⁸ Not least if the parties had only limited resources, in which case the prospect of financial relief might be only theoretical. If the couple rent their home, the remedy of tenancy transfer already exists: Family Law Act 1996, sch 7.

⁴⁹ “Enduring family relationship” has yet to receive authoritative judicial attention.

⁵⁰ See, for example, the Widows’, Orphans’ and Old Age Contributory Pensions Act 1925, s 21(1), the National Assistance Act 1948 and subsequent legislation; now Social Security Contributions and Benefits Act 1992, s 137, Jobseekers Act 1995, s 35(1), State Pension Credit Act 2002, s 17(1), and Tax Credits Act 2002, s 3.

⁵¹ See originally *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498. Department of Work and Pensions, *Decision Makers Guide*, vol 3, ch 11, available at <http://www.dwp.gov.uk/publications/dwp/dmg/> (last visited 4 May 2006).

⁵² Adopted in the context of domestic violence in *G v F (Non-molestation order: jurisdiction)* [2000] Fam 186. The more recent statutory formulae, which do not use the marriage analogy, have yet to be judicially interpreted.

- (6) whether the parties are acknowledged publicly as husband and wife.
- 9.45 Although it has been said that it is the general characterisation of the relationship that is important,⁵³ whether the parties' relationship is found to fall within the category specified in the legislation depends in large part on how their relationship matches these factors. The relationship need not satisfy all of the criteria to be recognised; for example, few cohabiting couples nowadays pretend to be married.⁵⁴ Nor is the checklist exhaustive of all factors that could be addressed; all of the circumstances relating to the relationship will be examined. However, the existence of a sexual relationship⁵⁵ has been regarded as particularly important.⁵⁶
- 9.46 Checklist factors aside, the Court of Appeal recently examined the marriage analogy test in the context of tenancy succession. It approved the suggestion that, in order for the parties to be regarded as "living together as husband and wife" for those purposes, they must have had "an emotional [relationship] of mutual lifetime commitment rather than simply one of convenience, friendship, companionship or the living together of lovers" (at least at some point in the relationship), and that their relationship must be "openly and unequivocally displayed to the outside world" and so be considered by society to be intended to be permanent.⁵⁷

Checklists in other jurisdictions

- 9.47 Other jurisdictions with default schemes often supplement the basic definition of the qualifying relationship with an express statutory checklist of factors designed to aid the court in identifying those relationships that fall within the definition.⁵⁸
- 9.48 Some schemes seek to provide greater certainty in the identification of qualifying relationships by defining the relationship closely without reference to a checklist. For example, where there are children, the American Law Institute have proposed that two persons should be classified as domestic partners simply by virtue of their maintaining a common household with their common child⁵⁹ for a defined period.⁶⁰ The scheme for financial provision then applies automatically with no room for further analysis of the parties' relationship. The child is thus the crucial factor that triggers the application of the scheme.

⁵³ *Re J (Income Support: Cohabitation)* [1995] 1 FLR 660, 665.

⁵⁴ Cf the non-marriage cases, discussed below: para 9.162.

⁵⁵ At least at some point in the relationship: *Re Watson (deceased)* [1999] 1 FLR 878.

⁵⁶ *Re J (Income Support: Cohabitation)* [1995] 1 FLR 660, 665.

⁵⁷ *Nutting v Southern Housing Group Ltd* [2004] EWHC 2982 (Ch), [2005] 1 FLR 1066, at [9] and [17].

⁵⁸ South Australia, uniquely in Australia, does not; see also Sweden and the Spanish autonomous region of Catalonia, regarding stable pair relationships. See Appendix C

⁵⁹ Ie a child of which each is either the child's legal parent or parent by estoppel (a concept defined elsewhere in their proposals relating to child law).

⁶⁰ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) para 6.03(2). These proposals have not been implemented by any state of the USA.

POSITIVE OR NEGATIVE USE OF THE CHECKLIST

- 9.49 In Australian and New Zealand legislation, as under current English law, the checklist of factors operates as a basis for positively identifying qualifying relationships.
- 9.50 The approach of the American Law Institute to relationships without children is different.⁶¹ It sets up a presumption that parties are “domestic partners”, subject to the scheme, where they share a common household and are not related by blood or adoption. The checklist may then be used to rebut the presumption.

EXHAUSTIVE OR INCLUSIVE CHECKLISTS

- 9.51 The checklist may be exhaustive: that is to say, only the factors listed and no other features of the case may be considered.⁶² Alternatively, the checklist is inclusive, so that the court is free to consider all the circumstances of the case, not just those enumerated in the list.⁶³ The legislation may also specify that a relationship may be eligible even if not all factors are present.⁶⁴

THE FACTORS

- 9.52 The checklists often contain many factors extending well-beyond the six signposts used thus far by English law and touching on almost every aspect of domestic life. They variously include:
- (1) the duration of the relationship;
 - (2) the nature of the relationship;
 - (3) the degree of mutual commitment to a shared life;
 - (4) the nature and extent of common residence;
 - (5) whether the parties maintained a common household;
 - (6) whether or not the parties had a sexual relationship;
 - (7) the emotional or physical intimacy of the parties' relationship;
 - (8) the extent of financial interdependence or dependence, if any;
 - (9) the extent to which any financial dependence was encouraged or fostered by the relationship;
 - (10) the ownership, use and acquisition of property;

⁶¹ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) para 6.03(3).

⁶² The Family Law (Scotland) Act 2006, s 25, identifies factors which “shall” be considered by the court in characterising the relationship, but does not expressly state that the list is exhaustive of factors to which regard may be had.

⁶³ Eg New Zealand and some Australian states. See Appendix C.

⁶⁴ New Zealand: see Appendix C.

- (11) the performance of household duties;
- (12) whether the parties have or care for children, either of both or one of them;
- (13) the reputation and public aspects of the relationship;
- (14) oral or written statements or promises made to each other, or representations made jointly to third parties, regarding their relationship;
- (15) the extent to which the parties acknowledged responsibilities to each other, for example, by naming the other as eligible to receive benefits under an employee-benefit plan; and
- (16) the parties' participation in a commitment ceremony or registration as a domestic partnership.⁶⁵

Discussion

9.53 Checklists bring both advantages and disadvantages. A checklist approach inevitably brings with it a level of uncertainty and subjectivity in decision-making. That concern may be overstated – plenty of relationships clearly fall within the concept of cohabitation. But there will always be cases where the proper characterisation of the relationship is more arguable.⁶⁶ This may, however, just reflect the inevitable uncertainty attendant on identifying relationships which have not been formalised.

9.54 The checklist approach is familiar to English courts and perhaps helps to locate that intangible quality of a relationship that makes two people a couple. Ascertaining whether the couple were “cohabiting” in the relevant sense necessarily entails an examination of how the parties organised their joint lives, and a checklist indicates in advance the types of factors to which the court should have regard. If applied in an inclusive rather than exclusive way,⁶⁷ and without requiring any particular factors to be present, it also caters for the diversity of couple relationships.

9.55 We provisionally propose that any legislative definition of those eligible to apply should include an express, non-exhaustive checklist of factors to which the court would have regard in determining whether a couple were cohabiting. Do consultees agree?

9.56 We invite the views of consultees on the factors that they consider should be included in such a statutory checklist.

⁶⁵ The last three factors are taken from the American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002). They also include participation in a void marriage that does not give rise to the economic consequences of marriage: see para 9.162.

⁶⁶ The courts are likely to adopt a purposive approach in such circumstances; see, for example, Wall J in *G v F (Non-molestation order: jurisdiction)* [2000] Fam 186 in the context of access to remedies for domestic violence.

⁶⁷ See para 9.51.

AUTOMATIC ELIGIBILITY FOR “COHABITANTS WITH CHILDREN”?

- 9.57 The selection of eligibility criteria ought to depend, at least in part, on the nature of the remedies that would be available to eligible relationships. As we discussed in Part 5, it may be the case that simply demonstrating the existence of a “couple” relationship ought not by itself to generate an eligibility to apply for any new remedies. Additional criteria might be imposed, depending on the nature of the remedy.
- 9.58 One option is that any new scheme should be confined to cohabitants with children. It may be felt that the case for allowing these cohabitants access to financial relief on separation and death⁶⁸ is sufficiently strong that they should be automatically eligible to apply, whatever the duration of the relationship.⁶⁹ Some other jurisdictions, however, do impose a minimum duration requirement in these cases too, albeit (usually) one shorter than that applying to couples without children.⁷⁰

Joint parents

- 9.59 If cohabitants with children were to be automatically eligible (or subject to a shorter minimum duration requirement), it would become necessary to identify which children should count for this purpose. This is initially straightforward. Wherever the couple are the legal parents of a child, they should be automatically eligible.⁷¹ The case for automatic eligibility would be particularly strong, in our view, if financial relief were to be based on economic advantage and disadvantage. Since parenthood is perhaps the principal cause of substantial

⁶⁸ Currently, the Inheritance (Provision for Family and Dependents) Act 1975 provides no exception to the two-year minimum duration requirement for “cohabitants” claims, but many applicants would in practice be able to bring themselves within the “dependants” class. In *Kotke v Saffarini* [2005] EWCA Civ 221, [2005] 2 FLR 517, it was the lack of exemption from the minimum duration requirement for couples with children, and the lack of dependant category in that context, which denied the surviving cohabitant a remedy under the Fatal Accidents Act 1976.

⁶⁹ This is the standard approach in many other countries which have default regimes (in particular Australian states and New Zealand) and is the approach recommended by the Law Society, *Cohabitation: the case for clear law* (2002) and Resolution (published under the name Solicitors Family Law Association), *Fairness for Families: proposals for reform of the law on cohabitation* (2000).

⁷⁰ This is currently the position adopted in several Canadian provinces; for example, in Manitoba, the usual three-year requirement is reduced to one where the parties have a child: Family Maintenance Act c.F20 (Manitoba), s 1. Several others simply require in cases where there is a child that the relationship be of “some permanence”. The Irish Law Reform Commission has considered merely shortening the duration requirement from three to two years where there is a child, rather than dispensing with it entirely: Consultation Paper on the Rights and Duties of Cohabitees (2004) Irish Law Reform Commission CP 32-2004. Nova Scotia applies a blanket two-year requirement (Maintenance and Custody Act 1989 (Nova Scotia), s 2(aa).

⁷¹ This includes cases where the parties have adopted the child as a couple (Adoption and Children Act 2002, s 50, s 144(4)-(6)); and where they have become parents as a result of licensed treatment with donor gametes (Human Fertilisation and Embryology Act 1990, s 28(3)). The Department of Health has recently consulted on the status provisions in the Human Fertilisation and Embryology Act 1990, specifically asking whether civil partners and other same-sex partners should be covered in the same way as spouses and opposite-sex couples: *Review of the Human Fertilisation and Embryology Act 1990* (2005) ch 8 – available at <http://www.dh.gov.uk/assetRoot/04/11/78/72/04117872.pdf> (last visited 4 May 2006).

economic disadvantage within relationships, it would be unacceptable to deny remedies to such individuals where pregnancy occurred early in the relationship and separation followed shortly thereafter.

- 9.60 In our view, an applicant should also be automatically eligible where those children have become independent of their parents. It would seem unfair to bar a claim being made by an applicant if separation occurs immediately following the youngest child reaching 18 or leaving home.⁷²
- 9.61 Similarly, there might be a case for allowing automatic eligibility, once the child were born, in cases where the relationship ended during the applicant's first pregnancy with a child of whom the respondent would be a parent.⁷³ It would again seem unfair for the putative respondent to be able to avoid liability under any new scheme⁷⁴ by moving out before the child's birth.⁷⁵

Other cohabitants with children⁷⁶

- 9.62 Matters become more complex once we depart from the central case of joint parenthood. This will not be uncommon. A large number of cohabiting families with dependent children are step-families,⁷⁷ composed of adults with children of one or both parties from previous relationships. The parties may also be jointly responsible (whether pursuant to a residence order or some other formal arrangement,⁷⁸ or informally) for the upbringing of other children of whom neither party is the legal parent.⁷⁹
- 9.63 We have discussed this issue already in relation to the substantial principles (in Part 6) where we asked whether the applicant ought to be able to make an economic disadvantage claim in relation to the care of children who are not the

⁷² In the vast majority of cases, such a couple would have been cohabiting for at least 18 years, and so would readily satisfy a minimum duration requirement. Contrast Queensland and Western Australia which expressly limit automatic eligibility to cases where the child is under 18 and, in Western Australia, to cases where serious injustice would be done to the party caring for the child were no order made.

⁷³ This ought to include pregnancy by assisted reproduction as a result of which the respondent would become a legal parent under Human Fertilisation and Embryology Act 1990, s 28(3).

⁷⁴ Assuming that the relationship had not lasted any minimum duration that might otherwise apply.

⁷⁵ As recommended in Norway: *Samboerne og samfunnet*, NOU 1999: 25, see J Asland, "Legislation on Informal Cohabitation in Norway", in K Boele-Woelki (ed) *Common Core and Better Law in European Family Law* (2005). This eligibility criterion applies under existing Norwegian legislation: Lov av 4. Juli 1991, nr. 45 om rett til felles bolig og innbo når husstandsfelleskap opphører [Act relating to the right to the joint residence and household community], section 1.

⁷⁶ See Example 4 in Part 7.

⁷⁷ See para 2.7(2).

⁷⁸ Matrimonial law excludes foster children from the scope of the concept "child of the family", but the presence of foster children, for whose maintenance payment is received from the state, may be relevant to the exercise of the court's discretion in making awards between the adults.

⁷⁹ For example, where grandparents take over the care of a grandchild: *Re A (Child of the Family)* [1998] 1 FLR 347.

joint children of both parties. In that context, we concluded that it might be desirable to allow claims on this basis to be made not only in relation to care for a child of whom both parties were the legal parents, but also in relation to other “children of the family”.⁸⁰

- 9.64 However, it is necessary to revisit the issue in this context, since eligibility and the application of the substantive principles to eligible cases can and ought to be examined separately. For example, while it might be considered appropriate to allow care for step-children to underpin an economic disadvantage claim, there could be arguments for saying that automatic eligibility to apply for financial relief in the event of death or separation ought not to arise as soon as a couple with children from previous relationships started cohabiting, especially if the applicant would not be caring for the respondent’s children after separation. In practice, it is perhaps likely that cases involving claims for economic disadvantage based on care for a child of whom the applicant is not a parent would involve longer relationships, which would therefore satisfy a minimum duration requirement in any event.⁸¹
- 9.65 On the other hand, it might be argued that a decision to cohabit where one party has children from a previous relationship is likely to be made carefully on both sides, and that it would therefore be appropriate to presume that there is a serious level of commitment between the parties in such cases which would make it appropriate for them to be eligible from the outset of the relationship.
- 9.66 Some Australian states include cases where one party will be caring for the other’s child following separation as exceptions to the minimum duration requirement that would otherwise apply, but only where “serious injustice” would be caused to the party caring for the child were no order made.⁸²
- 9.67 We consider that cohabitants who are by law the parents of a child born before, during or following their cohabitation ought to be automatically eligible to apply for remedies under any new scheme on separation. Do consultees agree?**
- 9.68 We invite the views of consultees on whether cohabitants with a child who is not the child by law of both parties ought to be eligible regardless of the length of their relationship, and, if so, in what circumstances.**

⁸⁰ See para 6.209.

⁸¹ A case where there was a joint residence order in relation to a step-child or other child of the family, or where the applicant had incurred substantial economic sacrifice as a result of caring for the respondent’s child, or where the applicant would, on separation, be caring for the respondent’s child, is only likely to arise between longer term cohabitants.

⁸² Australian Capital Territory, New South Wales, Northern Territory, Tasmania, Victoria. Resolution (published under the name Solicitors Family Law Association), *Fairness for Families: proposals for reform of the law on cohabitation* (2000) would automatically include cases where the parties had treated a child as the child of their family.

A MINIMUM DURATION REQUIREMENT FOR “COHABITANTS WITHOUT CHILDREN”?

- 9.69 If cohabitants without relevant children⁸³ were to be included within the scheme, two questions would arise. First, whether such couples should only be included where their relationship satisfied a minimum duration requirement. Secondly, whether there were any situations in which it ought to be open to the court to waive a minimum duration requirement that would otherwise apply.

Minimum duration requirements

Current English law

- 9.70 The only remedies currently available between separating cohabitants (tenancy transfer and occupation orders) have no minimum duration requirement.⁸⁴ The mere existence of the relationship is enough to attract legal protection, without needing additionally to show that it has lasted a given length of time. This is also the case for remedies for domestic violence,⁸⁵ means-testing for welfare benefits;⁸⁶ calculation of child support;⁸⁷ and succession to some tenancies on death.⁸⁸ By contrast,⁸⁹ access to fatal accident compensation⁹⁰ and eligibility to apply for discretionary provision on death of the partner under the Inheritance (Provision for Family and Dependants) Act 1975 depend on two years' cohabitation (even where the couple had a child).⁹¹
- 9.71 As we discuss below, whether a minimum duration is required should depend on the policy requirements of each legal context and the nature of the remedy. There is clearly less justification for onerous restrictions on eligibility to apply where for protection from domestic violence is at stake,⁹² than in the context of access to financial or property remedies which affect third parties.⁹³

⁸³ The scope of this category depends on the answer to the previous questions.

⁸⁴ Family Law Act 1996, sch 7 and Part IV.

⁸⁵ Family Law Act 1996, Part IV.

⁸⁶ Social Security Contributions and Benefits Act 1992, s 137.

⁸⁷ Child Support Act 1991, sch 1, Part 1: where children of a “partner” of the non-resident parent may reduce the amount payable.

⁸⁸ Rent Act 1977, Housing Act 1988; contrast Housing Acts 1985 and 1996 for which the parties must have been cohabiting for one year prior to death.

⁸⁹ Succession to some tenancies depends on one year's cohabitation: Housing Acts 1985 and 1996; cf Rent Act 1977 and Housing Act 1988.

⁹⁰ Fatal Accidents Act 1976, as amended by the Administration of Justice Act 1982.

⁹¹ Though in many cases, it may be possible for the survivor to claim as a “dependant”. But if the 1975 Act's treatment of “cohabitants” were reformed as we have suggested in Part 8, only those who fell within that category of claimant would benefit from that reform.

⁹² This may also be reflected in courts' decisions. The court in *G v F (Non-molestation order: jurisdiction)* [2000] Fam 186 adopted a generous, purposive approach to the identification of cohabitation; this decision pre-dated the introduction of the new category for intimate personal relationships, which need not be co-residential.

⁹³ Again, this may sometimes be reflected in courts' decisions: *Kotke v Saffarini* [2005] EWCA Civ 221, [2005] 2 FLR 517; *Nutting v Southern Housing Group Ltd* [2004] EWHC 2982 (Ch), [2005] 1 FLR 1066; cf *Gully v Dix* [2004] EWCA Civ 139, [2004] 1 WLR 1399.

9.72 Even where no minimum duration is prescribed, the passage of time may often be integral to proving that the parties are cohabiting at all.⁹⁴ Without evidence of clear intentions at the outset of a relationship, the passage of time may be used to demonstrate that a relationship is sufficiently stable to be categorised as cohabitation and so to warrant the legal recognition in question.

Reform proposals and other jurisdictions⁹⁵

9.73 Existing proposals for remedies on separation and death in this jurisdiction would require that the parties either cohabit for at least two years, or cohabit and have a “relevant child”.⁹⁶ The proposed minimum duration fits with existing English legislation that sets a two-year limit.⁹⁷ Uniformity is a desirable objective,⁹⁸ but it is worth asking whether it is proper to adopt a minimum duration requirement at all for a new scheme, and, if so, whether two years is, on grounds other than uniformity,⁹⁹ an appropriate limit to adopt.

9.74 Many other jurisdictions with default remedies prescribe minimum duration requirements, usually of two¹⁰⁰ or three¹⁰¹ years. South Australia requires relationships to have lasted for five years in order to qualify for provision on death.¹⁰²

9.75 Other jurisdictions do not require a defined period of time to have elapsed before the relationship is eligible for remedies, even where the couple have no

⁹⁴ For example, in the case of eligibility to apply to adopt, no time period is specified, but the relationship must be “enduring” in order to qualify: Adoption and Children Act 2002, s 144(4)(b).

⁹⁵ One scheme may adopt different criteria and time limits for relationships to qualify for different rights and remedies. See South Australia: three years for claims on separation, five years for claims on death. Other Australian states tend to work the other way around: two years on separation, but no specified duration on death.

⁹⁶ See Law Society, *Cohabitation: the case for clear law* (2002) pp 13 and 26. “Relevant child” would be broadly construed to include adoptive children, children born by licensed assisted reproduction and non-commercial surrogacy, and children in respect of whom the parties have a joint residence order. Resolution would include any case where the parties had treated a child as a child of their family: Resolution (published under the name Solicitors Family Law Association), *Fairness for Families: proposals for reform of the law on cohabitation* (2000) p 4.

⁹⁷ See para 9.70 above.

⁹⁸ This influenced some members of the New South Wales Law Reform Commission who preferred a three-year limit, in line with other legislation then in force: Report on De Facto Relationships (1983) New South Wales Law Reform Commission Report No 36, para 9.9.

⁹⁹ Not least in so far as a central plank of the uniformity argument is the minimum duration requirement under the Inheritance (Provision for Family and Dependents) Act 1975, which is itself under review in this project.

¹⁰⁰ Several Australian states usually require two years to have elapsed before claims can be made on separation and death, but there is considerable variation between the states in the finer detail of the schemes, particularly regarding the availability of claims on death for relationships of less than two years; see also several Canadian provinces.

¹⁰¹ New Zealand; South Australia; several Canadian provinces. The Irish Law Reform Commission recommended a minimum duration of three years (or two years if a couple have a child): Consultation Paper on the Rights and Duties of Cohabitees (2004) Irish Law Reform Commission CP 32-2004, para 1.04.

¹⁰² Family Relationships Act 1975, s 11(1), Administration and Probate Act 1919.

children.¹⁰³ However, although there may be no explicit duration requirement, where the definition of the relationship refers to “stability”, “continuity”, or “permanence” that element might often be most easily demonstrated by the passage of time.¹⁰⁴ The Family Law (Scotland) Act 2006 requires the court to consider the length of the relationship in classifying the relationship as one of cohabitants, but does not set any minimum duration for eligibility to apply for financial relief on separation and death.¹⁰⁵

Relating eligibility to the remedy: rule-based and discretionary schemes compared

- 9.76 A minimum duration requirement could be considered to have at least two functions. At the level of principle, it could serve as a mechanism for isolating those cases which might be thought to merit access to a particular type of remedy. Whether such a function were necessary would depend at least in part on the nature of the remedy in question, an issue we discuss in this section. Pragmatically, a minimum duration requirement could serve the purpose of barring large numbers of cases from coming to court at all.
- 9.77 Our provisional proposal in relation to both separation and death is that any new remedy should operate by way of judicial discretion, rather than by way of automatic equal sharing on separation or entitlement to a defined share on intestacy. This preference for discretionary over rule-based approaches has potential implications for eligibility criteria.
- 9.78 Where a scheme is rule-based, the eligible applicant is automatically granted whatever share the rule prescribes. This gives the eligibility criteria immense significance as they have to identify, as closely as possible, those relationships for which the prescribed outcome is just. A detailed definition addressing particular aspects of the relationship relevant to the appropriateness of that entitlement or a stringent minimum duration test may therefore be required.
- 9.79 By contrast, eligibility criteria are less crucial where a scheme is discretionary. The fact that the relationship falls within the scheme entitles the applicant to apply. But whether any award is made, and, if so, in what form and how valuable, depends on further close examination of individual features of the case and satisfaction of whatever substantive principles justify relief being granted. This means that the eligibility criteria have less work to do, leaving the substantive principles and the court’s remedial discretion to fashion an appropriate outcome.
- 9.80 Despite our provisional preference for discretionary remedies, the following discussion explores the different implications of the various rule-based and discretionary options examined in Parts 6 and 8.

¹⁰³ New South Wales’ and Tasmania’s intestacy rules allow a *de facto* partner of any duration to inherit where there is no surviving spouse or children of another relationship; in the latter cases, the relationship must have lasted for two years minimum in order to qualify.

¹⁰⁴ Sweden; Slovenia, which refers to relationships “lasting for a longer time”, intended to identify relationships akin to marriage (see M Geč-Korošec and S Kraljić, “The Influence of Validly Established Cohabitation on Legal Relations between Cohabitants in Slovene Law”, in A Bainham (ed), *International Survey of Family Law* (2001).

¹⁰⁵ Family Law (Scotland) Act 2006, s 25.

Remedies on separation: the implications of different principles

9.81 The options for remedies on separation may be regarded as falling into two broad camps for the purposes of eligibility criteria:

- (1) remedies which seem most suitable for cases where there is a clear level of commitment or assumption of responsibility between the parties: rule-based equal sharing, discretionary schemes based on “partnership” and needs-based remedies; and
- (2) remedies which respond to the actual economic impact (if any) on each party of their contributions to the relationship: economic advantage and economic disadvantage, including future child-care costs. These remedies may be described as “self-limiting”, an expression which we explain at paragraph 9.85 below.

9.82 In our view, the nature and strength of the case for imposing a minimum duration requirement differs in each category.

Rule-based or partnership-based schemes

9.83 Rule-based equal sharing and discretionary schemes based on partnership or need would, in our view, warrant a minimum duration requirement. Any form of automatic entitlement should be conferred with caution. Given the variety of cohabiting relationships and the lack of clear assumption of mutual responsibility akin to that made on marriage, any law imposing this more expansive sort of remedy ought to be reserved to cases which exhibited clear evidence of commitment to a stable relationship. That would be particularly important, in our view, for wide needs-based remedies covering needs unconnected with the relationship, such as disability.

9.84 Proof that the relationship has lasted a given duration might be thought to provide easy, if imperfect, proxy-evidence of that commitment. However, as we noted in Part 6, the mere passage of time may not be a factor which, in itself, necessarily leads to greater financial interdependence. Life events such as marriage, buying a home on mortgage, and starting a family may be more indicative of the sort of commitment which such schemes presuppose.¹⁰⁶

“Self-limiting” discretionary remedies

9.85 The Scottish Law Commission¹⁰⁷ recommended that no minimum duration requirement be incorporated in the scheme now enacted by the Family Law (Scotland) Act 2006, based on the principles of economic advantage and disadvantage. When originally putting forward this reform in its Discussion Paper, the Scottish Law Commission said:

There is no compelling reason of principle why [any qualifying period of cohabitation] should be [required]. The operation of the principle

¹⁰⁶ See C Burgoyne, J Reibstein, A Edmunds, V Dolman, “Money management systems in early marriage: factors influencing change and stability” (2006) *Journal of Economic Psychology*, forthcoming, discussed at para 6.104 above.

¹⁰⁷ Report on Family Law (1992) Scot Law Com 135, Part XVI.

would be self-limiting because it would come into operation only if there were relevant contributions or sacrifices, advantages or disadvantages. Indeed, relevant events, such as contributions to the purchase or improvement of a home, or the giving up of employment in the interests of the other partner, would often occur at or near the beginning of the cohabitation. On the other hand, there could be a strong practical reason for requiring a qualifying period of cohabitation before allowing a cohabitant to apply to a court for an order for financial provision. This would serve to sift out cases where there was no long-term commitment. As a practical matter it would seem to be undesirable to burden the courts with applications from disappointed parties to short-term relationships. If a qualifying period were thought desirable the choice of period is to some extent an arbitrary one. The period should be long enough to separate casual arrangements from those involving a relationship of some permanence, but not so long as to deny relief to too many deserving cases. We would suggest that a period of three years might be considered. It could, of course, be changed later in the light of experience.¹⁰⁸

9.86 In the event, no minimum duration was recommended. The Scottish Law Commission's Report emphasised the self-limiting nature of the remedies.¹⁰⁹ That view is reflected in the Family Law (Scotland) Act 2006.¹¹⁰

9.87 There is a lot of force in this view. The self-limiting and discretionary nature of the economic advantage/disadvantage principle means that no relief would be granted where no relevant benefit had been retained or sacrifice made. If a relevant benefit or sacrifice had arisen, the length of the relationship might be felt to be irrelevant. Shorter relationships are perhaps less likely to have given rise to the types of loss or contribution for which compensation or reward is necessary, and that fact will itself prevent any claim from being successful. But as the Scottish Law Commission points out, a substantial contribution could be made early in the relationship by one partner.

9.88 On the other hand, where a direct financial contribution to the acquisition of property has been made early on, that is something that the English law of implied trusts can remedy satisfactorily, so a minimum duration requirement would not prejudice many such applicants.¹¹¹ The general law deals less well, if at all, with economic sacrifices. In those cases, a minimum duration test might well deny otherwise deserving applicants any remedy.¹¹² However, if cohabitants with children were not subject to a minimum duration requirement, the majority of

¹⁰⁸ The Effects of Cohabitation in Private Law (1990) Scottish Law Commission Discussion Paper No 86, para 5.14.

¹⁰⁹ Report on Family Law (1992) Scot Law Com 135, para 16.4.

¹¹⁰ The former Commissioner responsible for Report on Family Law (1992) Scot Law Com 135 has expressed the view that had any of the remedies proposed been more absolute than this more open approach might not be appropriate and a qualifying minimum duration – at least for that remedy – might have been necessary: oral evidence of Professor Eric Clive, Scottish Parliament, Justice 1 Committee, Official Report, col 1939 (25 May 2005).

¹¹¹ See Example 8A in Part 7 for discussion of indirect financial contributions in this context.

¹¹² Remedies for the benefit of the child are of course available automatically.

those cases in which an economic disadvantage claim would be likely to be made would be eligible. In cases involving couples without children where, for example, a job had been given up in the early stages of the relationship, it might be easier to find another job quickly if the relationship had only been short.¹¹³

Implications of a minimum duration requirement

- 9.89 If a minimum duration requirement were to be fixed, new problems would arise. Fixing any particular time period would inevitably exclude cases falling just short of the line. This could create pressure for exceptions to be introduced to cover classes of case deemed likely to warrant a remedy even if the relationship is short (or involves no relevant child): we discuss various options below. This is the approach that has been taken in Australia.¹¹⁴ If no minimum duration were imposed, then the legislature would be relieved of the task of trying to predict the categories of case, if any, in which the minimum duration requirement should be waived. A minimum duration requirement would also inevitably encourage dispute about relationships' length, or about the scope of any exceptions to the minimum duration requirement.
- 9.90 All this is necessarily the effect of any restriction on access to remedies; limitation periods have a similar effect. The question is where the balance lies between the practical advantages to be gained from imposing a limit and the risk of injustice being done as a result. Even though they may be arbitrary and attract litigation in marginal cases, minimum duration rules, like limitation periods, offer important benefits. In most cases, where it is clear whether or not the minimum duration requirement is satisfied, such rules provide complete certainty so both parties know where they stand. A minimum duration requirement may be felt to provide a useful, clear-cut mechanism for barring trivial or unmeritorious claims, even allowing for the self-limiting and discretionary nature of the remedy, keeping the floodgates closed and preventing nuisance claims.¹¹⁵ It might reduce the costs incurred in court time spent considering cases with no realistic prospect of success. Save in those cases where there was serious dispute about whether the relationship had reached the required length to the day, this approach would also provide certainty.
- 9.91 Moreover, practical considerations aside, and even allowing for the self-limiting nature of the principles which we are provisionally proposing should underpin remedies on separation in any new scheme, there remains a further point of principle, discussed in Part 5. A minimum duration requirement might be thought necessary to identify those relationships for which the prospect of any financial relief, whatever its basis, were justifiable.
- 9.92 We have suggested in Part 6 that claims by eligible applicants could in any event be limited by requiring the applicant to demonstrate that "substantial" or "manifest unfairness" would arise if no relief were granted. We would welcome consultees'

¹¹³ See Example 9 in Part 7.

¹¹⁴ Report on De Facto Relationships (1983) New South Wales Law Reform Commission Report No 36, para 9.6, 9.8.

views on whether there would be any need for such a test in addition to a minimum duration requirement.

What period?

- 9.93 If a minimum duration were to form part of the eligibility criteria, it would be necessary to settle on a particular duration. Where English legislation currently specifies a minimum duration (for entitlement to apply for provision on death and to claim under fatal accidents legislation) the period required is two years. The reason why that period was originally selected is unclear.¹¹⁶
- 9.94 A duration could be selected by reference to research evidence about the typical length of cohabiting relationship and the characteristics of cohabiting relationships of different lengths. Norway's committee of experts on cohabitation recommended two years on the basis of evidence regarding the relative probabilities of cohabitation and marriage ending at various points. This suggested that after two years cohabitation in Norway (in 1999) becomes more stable and marriage-like.¹¹⁷ The two-year requirement in New South Wales reflects its Law Reform Commission's 1983 recommendation, based on "case studies [that] suggest that *de facto* relationships of this duration involve substantial intermingling of finances, joint purchases of property and other assets, and non-financial contributions in the form of housework and improvements to household property".¹¹⁸
- 9.95 These two examples illustrate some of the different criteria that can be used to select a minimum duration. By focusing on economic and social behaviour within relationships, the Australian approach could be described as "functional": by what point do cohabitants as a group tend to organise their lives such that the relationship impacts significantly on their economic positions, making it

¹¹⁵ These considerations commended a minimum duration requirement to Resolution (published under the name Solicitors Family Law Association): *Fairness for Families: proposals for reform of the law on cohabitation* (2000) pp 4-5.

¹¹⁶ The fatal accidents provision originates in an amendment moved by the Government during the passage of a Bill in the Lords, and which was not debated in the Commons. There is no indication in the debates of why two years in particular was selected, but the intention behind the inclusion of the time-requirement was to identify relationships which had some degree of permanence and functioned much as marriages do: Hansard (HL), vol 429, col 1106 (The Lord Chancellor). It is worth noting that in 1982, cohabiting relationships were much less common than today; two years might have been regarded as quite a long period. Having adopted two years for the Fatal Accidents Act, two years apparently became the period of choice for English legislation, and it was suggested (without discussion) for amendments to the Inheritance (Provision for Family and Dependents) Act 1975: Family Law: Distribution on Intestacy (1989) Law Com No 187, para 59; enacted by the Law Reform (Succession) Act 1995 with very little parliamentary debate.

¹¹⁷ *Samboerne og samfunnet*, NOU 1999: 25, p 125 and p 277 and following; see J Asland, "Legislation on Informal Cohabitation in Norway" in K Boele-Woelki (ed), *Common Core and Better Law in European Family Law* (2005).

¹¹⁸ Report on De Facto Relationships (1983) New South Wales Law Reform Commission Report No 36, para 9.8.

appropriate to provide remedies to unravel their joint life?¹¹⁹ By contrast, the Norwegian approach could be characterised as “commitment-based”: at what point does cohabitation tend to become sufficiently stable that remedies are merited?

- 9.96 As we have already discussed, whether and when commitment ought to be a component of qualifying relationships perhaps cannot be considered, as a matter of principle, without reference to the type of remedies on offer. But whatever approach is adopted, this sort of exercise must be based on relevant local research data of the sort reported in this consultation paper, as social conditions vary by country. Moreover, it must be accepted that minimum duration rules are an imperfect tool for identifying commitment: some deeply committed relationships may be short (especially if cut short by untimely death) while some very long relationships may in fact entail little commitment or interdependence.

The relevance of breaks in cohabitation

- 9.97 A minimum duration requirement ought to pose no problem for cases where one party was in hospital,¹²⁰ overseas or otherwise temporarily absent from the shared household for any period. Where the parties still regard the relationship as ongoing despite the temporary physical absence, and the absent party still a member of the joint household, the clock should continue to run.¹²¹
- 9.98 More difficult is a relationship which is “on-off”, but whose “on” periods cumulatively meet the required duration. Ought continuous cohabitation be required, or should it be possible for the clock to be stopped for any period of time?

Alternative triggers for short relationships?

- 9.99 If a minimum duration requirement were adopted for cohabitants “without children”, it would be necessary to decide whether any characteristics or circumstances ought to allow parties to shorter relationships nevertheless to apply for some or all of the remedies offered by the scheme. These would be cases where the extra factor means that the rationale on which remedies are awarded (whether that rationale be functional, related to commitment, or something else) might be felt to apply despite the relationship’s relatively short length.
- 9.100 We have already considered cases where the couple have children. Other circumstances that might warrant this treatment include:
- (1) the fact that one party has cared during the relationship and/or will be caring after the relationship for a child whose presence does not automatically entitle the parties to apply for financial relief, as discussed above at paragraph 9.62;

¹¹⁹ See also American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) p 921.

¹²⁰ See *Re Watson (deceased)* [1999] 1 FLR 878.

¹²¹ By analogy with matrimonial law relating to separation: see para 9.116 and following.

- (2) the fact that one party has cared during the relationship and/or will be caring after the relationship for some other dependant of the other party,¹²² for example an elderly relative; or
- (3) the fact that one party has made a substantial contribution, whether financial or otherwise, to the relationship, including contribution towards the costs of the other party's education or training, or made a substantial sacrifice for the benefit of the relationship.¹²³

9.101 We have already discussed, at paragraph 6.230, the possibility that a "substantial" or "manifest unfairness" test might be imposed as precondition to a successful claim, even by an eligible applicant. Alternatively, such a test could be used specifically in relation to short relationships as part of the test for eligibility to be granted. As well as setting out the types of case in which short relationships may attract remedies, it could additionally be required that, given those circumstances, "the court is satisfied that failure to provide a remedy would result in serious injustice" before allowing an application.¹²⁴

9.102 Whether any of these triggers, and if so which of them, ought to be included again ought to depend on the nature of the remedies. For example, the third exception suggested above could operate as a safety valve for one of the schemes generally thought to require a commitment-based minimum duration, perhaps enabling more modest relief to be granted in such cases. It would ensure that where an individual had in fact sustained substantial economic advantage or disadvantage pursuant to a relationship, that could be remedied, even if the relationship had not lasted long enough to warrant the more expansive remedy that would otherwise apply.

Deeming relationships to be short

9.103 Consideration also needs to be given to the converse situation: relationships which meet the ordinary duration requirement, but where it seems inappropriate for the applicant to be eligible to apply.

9.104 New Zealand's system of equal sharing of a particular pool of property (including the shared home and household goods) has different rules for short relationships (of under three years). In these cases, property is shared in accordance with the parties' respective contributions to the relationship, rather than equally. In addition, the courts have a power to "deem" a relationship to be short, even though it has lasted long enough to meet the ordinary minimum duration, if it would be just in all the circumstances to do so.¹²⁵ Effectively, this involves a judgement that in the circumstances equal sharing would be unfair and that the contributions rule ought to be adopted instead.

¹²² See Example 6 in Part 7.

¹²³ This category might include cases in which the parties had chosen to have a child and one of them had left work in the expectation of childcare, but where, as a result of suffering a miscarriage or failing rounds of assisted reproduction, the couple did not fall within the cohabitants with children category.

¹²⁴ For example, all Australian states, save South Australia: see Appendix C; New Zealand, Property (Relationships) Act 1976, s 14A.

¹²⁵ Property (Relationships) Act 1976, ss 2E and 14-14A.

9.105 This sort of exclusionary exception to a minimum duration rule is perhaps only necessary in rule-based systems. Where the court has a discretion regarding the appropriate remedy, that discretion may itself be enough to ensure that justice is done in cases where the parties' contributions have been markedly unbalanced.

Remedies on death: building on the separation analogy

9.106 Here too, we view the options as falling into two broad camps:

- (1) if, contrary to our provisional proposal, the intestacy rules were amended to include cohabitants, a minimum duration requirement for eligible surviving cohabitants would be appropriate (subject, perhaps, to an exception where the couple had children, in a relevant sense¹²⁶); but
- (2) if, as we provisionally propose, the existing remedy under the Inheritance (Provision for Family and Dependents) Act 1975 were amended to create a "separation analogy" for cohabitants, rather than confining their claims to "reasonable financial provision for their maintenance", there is an argument that whatever eligibility requirements apply to remedies on separation should also apply to claims under the 1975 Act.

Intestacy rules

9.107 For reasons discussed in Part 8, we do not consider that an intestacy rule for cohabitants is capable of efficient administration and so we prefer to develop the court's existing jurisdiction. However, if cohabitants were included in the intestacy rules, it would, in our view, be appropriate to impose a minimum duration requirement.

9.108 Curiously,¹²⁷ some Australian states allow *de facto* partners to inherit automatically on intestacy without fulfilling the minimum duration that applies to claims on separation.¹²⁸ The lack of minimum duration requirement, combined with the problematic nature of cohabitation itself, causes difficulty where the family members dispute the existence of a *de facto* relationship and this simply delays the administration of estates. In our view, it may be very difficult to differentiate between a fleeting arrangement and a more committed relationship of the sort where automatic inheritance would be objectively appropriate (and regarded as appropriate by the individuals involved). There will, of course, be cases where a deeply committed cohabitation that would otherwise have lasted for years is cut tragically short, but, in the absence of a will, those cases may be better dealt with by discretionary provision.

¹²⁶ Many Australian states have minimum duration requirements, save in cases where the couple have a child; some have no minimum duration requirement in any case: see paras 8.08 and 9.108.

¹²⁷ Information supplied by the New South Wales Law Reform Commission suggests that the New South Wales provision may be the result of a drafting error.

¹²⁸ Except where there is also a surviving spouse or children from another relationship. See Appendix C for the relevant legislation. The issue of provision for *de facto* partners on intestacy is currently under review: Uniform succession laws: intestacy (2005) New South Wales Law Reform Commission Issues Paper No 26.

9.109 The automatic share vested in beneficiaries of the intestacy rules is a paradigm example of the sort of right (rather than remedy) which should be restricted to cases where it is clear that this sort of entitlement would be appropriate, and best reflects what the deceased's intentions might have been. All existing categories of beneficiary can claim either a blood relationship or a formalised relationship of marriage or civil partnership with the deceased. If the list were to be extended beyond those categories to someone who is a legal stranger of the deceased there should be clear evidence that the relationship was a stable and committed one. In the absence of any other satisfactory way of reaching that conclusion, a minimum duration offers the only, imperfect, means of identifying such relationships.

Provision under the 1975 Act

9.110 Cohabitants are currently eligible to apply for remedies under this legislation where the parties lived together for at least the two years immediately before the death. In so far as provision is essentially needs-based, the imposition of a minimum duration requirement may be an appropriate mechanism for identifying those cases where it can be said that the deceased might have assumed some responsibility for the applicant's maintenance. However, there are no exceptions to that requirement, so that, for example, the cohabitant of less than two years who has a child by the deceased is not entitled to claim as a cohabitant, and will instead have to demonstrate dependency.¹²⁹ If dependency cannot be shown, then the survivor will not be eligible to claim at all, though it seems that the courts are prepared to be quite generous in their assessment of such claims.¹³⁰

9.111 Under the existing scheme, claims are based on maintenance. We have provisionally proposed, however, that "reasonable financial provision" under the Inheritance (Provision for Family and Dependants) Act for "cohabitants" (as opposed to dependants) should be detached from the maintenance standard and subjected to the separation analogy.

9.112 There is a case for saying that whatever eligibility requirements were created for a new scheme of remedies on separation should be carried through into the 1975 Act. The foregoing discussion of minimum duration in relation to remedies on separation, and the automatic eligibility of cohabitants with children, therefore applies by extension to these cases. There might also be thought to be some advantage in terms of public understanding of the law if the same eligibility criteria applied to both claims on separation and death.

9.113 On the other hand, there might be a case (in relation to cohabitants without children) for allowing a shorter minimum duration for eligibility on death than on separation. As we noted above, the ability of the passage of time reliably to demonstrate commitment is challenged most starkly by the death which cuts prematurely short a fully committed relationship, intended by both parties to be long-term.

¹²⁹ Cf *Kotke v Saffarini* [2005] EWCA Civ 221, [2005] 2 FLR 517, where the Fatal Accidents Act 1976 has no general "dependency" category for claimants who do not fall within any of the relationships identified by the legislation.

¹³⁰ See for example *Churchill v Roach* [2002] EWHC 3230 (Ch), [2004] 2 FLR 989; *Gully v Dix* [2004] EWCA Civ 221, [2004] 1 WLR 1399.

9.114 We invite the views of consultees on:

- (1) whether parties who do not have a relevant child should have lived together as cohabitants for a specified minimum duration before they are eligible to apply for financial relief on separation (“a minimum duration requirement”);**
- (2) how any such minimum duration requirement should be selected;**
- (3) how long any such minimum duration requirement should be;**
- (4) whether the same period should apply to claims on separation and claims on death under the Inheritance (Provision for Family and Dependents) Act 1975;**
- (5) how any minimum duration requirement should deal with breaks in the continuity of the parties’ cohabitation; and**
- (6) whether there are any circumstances (other than those already considered in relation to cohabitants with children) in which any minimum duration requirement should be waived, and if so what those circumstances should be.**

9.115 We invite the views of consultees on whether the two-year minimum duration requirement currently applying to claims by cohabitants under the 1975 Act should be amended, particularly in relation to cohabitants with children.

IDENTIFYING THE END OF THE RELATIONSHIP

9.116 Defining the onset of cohabitation is more difficult than identifying the start of a marriage, given the lack of formal requirements for the creation of the relationship. Similarly, since cohabitation ends without the need for legal proceedings and court order, pinpointing its termination may be difficult too. It depends principally on the erosion of those factors which resulted in the relationship’s initial recognition.

9.117 A recent case¹³¹ considered this issue in relation to eligibility to apply for financial provision on death of the alleged partner, for which it is currently necessary to show that the parties were living in the same household as husband and wife for two years “immediately before” the death.¹³²

9.118 The parties had lived together for 27 years in property owned by the deceased. The deceased’s addiction to alcohol and the serious problems that this caused had occasionally driven the applicant to leave the home temporarily for short periods, at most for a week. Three months prior to the death, following a disturbing suicide threat by the deceased, the applicant had left again, taking only a small suitcase of clothes. Her doctor advised her to leave temporarily owing to

¹³¹ *Gully v Dix* [2004] EWCA Civ 139, [2004] 1 WLR 1399.

¹³² Inheritance (Provision for Family and Dependents) Act 1975, s 1(1A). Similar issues arise under s 1(1)(e) in relation to claims by other dependants.

the adverse effect of the deceased's behaviour on her own health. The deceased had (as was usual) appealed, via his partner's daughter, for her to come back, but the daughter had not passed on those messages for fear that her mother would immediately return. He died before she returned.

- 9.119 Could the applicant be regarded as living in the same household as the deceased as his wife immediately before his death? Both the trial judge and the Court of Appeal held that she could, applying divorce case law on the concept of separation.¹³³ Whatever the precise situation on the ground at the moment of death, what mattered was the general state of affairs. The settled relationship between the parties, revealed by their history, was clearly akin to that of husband and wife. The temporary suspension of the physical aspect of that relationship by virtue of their residing in separate places did not, in the circumstances, terminate it. The applicant and deceased still shared a household as husband and wife and would be regarded as doing so until the circumstances showed that the relationship had irretrievably broken down, by virtue of one or both parties demonstrating a "settled acceptance or recognition that the relationship is in truth at an end".¹³⁴ On the evidence, the couple therefore had the relevant type of relationship "immediately before" the death.

Remedies on separation

- 9.120 For the purposes of remedies on separation, it would be necessary to show that cohabitation had ended during the parties' joint lifetime in order for a particular remedy or other legal consequence to flow.¹³⁵ Identifying the particular point at which the relationship ended would also be important for the operation of any limitation period.¹³⁶
- 9.121 For these purposes, the obvious analogy is matrimonial case law dealing with separation. Parties might be separated even though they continued to live under the same roof, where they did not share the same household either at all¹³⁷ or not in the capacity of husband and wife.¹³⁸ Alternatively, as *Gully v Dix*¹³⁹ demonstrates, a couple might still be regarded as living together as a couple even though temporarily physically separated.¹⁴⁰
- 9.122 In some cases, parties may be unable to disentangle their domestic lives sufficiently to be regarded as living in separate households. In order to cater for such cases, it could alternatively be possible to permit one of them to invoke the

¹³³ *Santos v Santos* [1972] Fam 247.

¹³⁴ *Gully v Dix* [2004] EWCA Civ 139, [2004] 1 WLR 1399, at [24].

¹³⁵ For the time being, only tenancy transfers under the Family Law Act 1996, sch 7.

¹³⁶ See Part 11.

¹³⁷ *Hopes v Hopes* [1949] P 227, a desertion case which has been relied upon in separation cases.

¹³⁸ *Fuller v Fuller* [1973] 1 WLR 730: where the husband returned to live in the household as a lodger of the wife and her new partner.

¹³⁹ *Gully v Dix* [2004] EWCA Civ 139, [2004] 1 WLR 1399.

¹⁴⁰ See also *Santos v Santos* [1972] Fam 247.

court's jurisdiction simply by applying for relief.¹⁴¹ In such cases, no limitation problem would arise.

Remedies on death

9.123 In this context, the end of the relationship may deprive an individual of access to a remedy that would otherwise have been enjoyed. We have, however, provisionally proposed that former cohabitants should be eligible to apply for a remedy where they separated from the deceased within twelve months of his death and had not instigated proceedings for a remedy on separation, or any such proceedings had been overtaken by the death.¹⁴²

9.124 We invite the views of consultees on how the separation of cohabitants should be identified for the jurisdictional purposes of:

- (1) determining eligibility to apply; and**
- (2) application of the limitation period for financial relief.**

SPECIAL ISSUES

Eligibility to apply under a new scheme: basic exclusions

9.125 In defining cohabitation for particular legal purposes, lines must be drawn somewhere and some relationships would inevitably fall outside the scheme. The question is what lines should be drawn and how. Current domestic legislation dealing with cohabitants does not set out any basic exclusions from eligibility, in terms of the "capacity" of the individuals involved or otherwise.¹⁴³ Nor have the courts yet had to consider whether they ought to apply. But some of them have been addressed administratively in the context of social security.

9.126 Other jurisdictions which operate default schemes on separation and death often exclude certain types of relationship automatically. Most obviously, the parties must not already be in a formalised relationship with each other, whether marriage or some other form of registered partnership permitted by their jurisdiction. Some jurisdictions set a minimum age limit, sometimes higher than the legal age for marriage, either expressly or impliedly via a requirement that the parties be adults.¹⁴⁴ Some expressly exclude a specified range of blood relations or family members within the prohibited degrees for marriage from their scope.¹⁴⁵

¹⁴¹ This is possible under Swedish law: Cohabitees Act 2003, s 2.

¹⁴² See para 8.41.

¹⁴³ The only "capacity" requirement on the face of the statutes used to be that the parties be of opposite sex, but this no longer applies in most contexts.

¹⁴⁴ In many jurisdictions (as in England and Wales), minors aged 16 and above can marry, but legal recognition of cohabiting relationships by those jurisdictions is reserved until adulthood/18.

¹⁴⁵ Though, in some cases, blood relations may qualify for recognition under some other, wider category of partnership: see for example New South Wales.

Relatives

- 9.127 The family relationships between blood relatives fall outside the scope of this project.¹⁴⁶
- 9.128 In so far as the project is concerned with couples, between whom sexual relations might ordinarily be characteristic, the criteria for eligibility ought to exclude parties between whom sexual relations would be criminal because of their family relationship, even if consensual.¹⁴⁷ This is the approach adopted by social security law.¹⁴⁸
- 9.129 The restriction could be extended, as in other jurisdictions, to all relations falling within the prohibited degrees for marriage and civil partnership.¹⁴⁹ The range of prohibited degrees is broader than the criminal law's restrictions as it applies between adults, in so far as it covers certain adoptive and step-relations, as well as blood relatives.¹⁵⁰ For the purposes of social security law, a couple will not currently be regarded as cohabitants, living together as husband and wife, if they fall within the prohibited degrees.¹⁵¹

Minors

- 9.130 The analogy with the criminal law and marriage law suggests that relationships in which one or both parties is a minor under the age of 16 should not be recognised as cohabitants. Any sexual relationship here would involve both criminal law and child protection issues.¹⁵²
- 9.131 The criminal law in some circumstances goes further and outlaws sexual activity between minors, including those aged 16 and 17, and particular people close to them. Notably, the definition of "family relationships" for these purposes is substantially wider than it is for the offences between adult relatives and for the prohibited degrees for marriage.¹⁵³ However, no offence is committed where the child is over 16 and lawfully married to, or a civil partner of, the other party.¹⁵⁴ In

¹⁴⁶ The Law Commission: Ninth Programme of Law Reform (2005) Law Com No 293, pp 18-19

¹⁴⁷ Sexual Offences Act, 2003, ss 64-65, which covers parents, grandparents, children, grandchildren, siblings, half-siblings, uncles and aunts (who are blood relations of the defendant), nieces and nephews.

¹⁴⁸ Department of Work and Pensions, *Decision Makers Guide*, vol 3, ch 11, para 11080 available at <http://www.dwp.gov.uk/publications/dwp/dmg/> (last visited 4 May 2006).

¹⁴⁹ Marriage Act 1949, sch 1 and Civil Partnership Act 2004, sch 1. Australian states restrict *de facto* relationship on this basis, though the range of prohibited degrees in Australian law is narrower than here.

¹⁵⁰ Marriage Act 1949, sch 1 and Civil Partnership Act 2004, sch 1. The restrictions on in-law relationships are due to be lifted, following the European Court of Human Rights decision in *B and L v UK* App No 36536/02, [2006] 1 FLR 35; see Baroness Ashton, Written Ministerial Statement, Hansard (HL), vol 675, col WS110, and the draft Marriage Act 1949 (Remedial) Order 2006.

¹⁵¹ Department of Work and Pensions, *Decision Makers Guide*, vol 3, ch 11, para 11031 available at <http://www.dwp.gov.uk/publications/dwp/dmg/> (last visited 4 May 2006).

¹⁵² Sexual Offences Act 2003, ss 5-13; Children Act 1989, Part IV.

¹⁵³ Sexual Offences Act 2003, ss 25-29.

¹⁵⁴ Sexual Offences Act 2003, s 28.

those cases, the child's parent should have consented to the relationship.¹⁵⁵ While parental consent could be required for any new opt-in regime, no such procedure could be put in place for "authorising" cohabitation under a default regime which, being informal, cannot accommodate that sort of formal mechanism.

- 9.132 Again, this is reflected in social security law's refusal to recognise a couple as cohabitants, if sexual intercourse between them (whether it actually occurs or not) would amount to a criminal offence.¹⁵⁶
- 9.133 The age of 18, of course, also marks the point at which individuals reach majority, and that may itself be a good reason to select 18 as the minimum age for cohabitants. In Part 10, we address one particular issue relating to minority: the impact of legal minority on such individuals' capacity to conclude binding opt-out agreements.¹⁵⁷
- 9.134 On the other hand, to exclude minors entirely from the scheme might be unfair. For example, a young woman of 17 who became pregnant by her cohabiting partner might be considered to have a strong claim on the merits for some degree of financial relief. Were the relationship to be ended by death, a minor in those circumstances could, however, be classified as a dependant if not a cohabitant for the purposes of the Inheritance (Provision for Family and Dependents) Act 1975, and so be entitled to claim against the estate of his or her deceased partner.
- 9.135 We invite the views of consultees on whether relationships to which one or both parties is a minor at the time that the claim would be made or when the parties are relatives within the prohibited degrees should be eligible, in any circumstances, for the purposes of financial relief on separation.**

Carers

- 9.136 Relationships between carers and dependants are also excluded from the scope of this project.¹⁵⁸ Many spouses find themselves acting as carers for their husband or wife, particularly in later life. The same is true of many cohabitants. So the fact that the relationship involves a considerable caring element would, of course, not bar it from eligibility under a new scheme. The exclusion must instead be understood to apply to those relationships based principally on caring, whether by a blood relative or friend of the dependent individual. Where the parties are blood relations, they fall outside the terms of reference in any event on that basis.

¹⁵⁵ See the formalities relating to parental consent to marriage or civil partnership of a minor: Marriage Act 1949 s 3; Civil Partnership Act 2004, s 4.

¹⁵⁶ Department of Work and Pensions, *Decision Makers Guide*, vol 3, ch 11, para 11030 available at <http://www.dwp.gov.uk/publications/dwp/dmg/> (last visited 4 May 2006).

¹⁵⁷ See para 10.20.

¹⁵⁸ The Law Commission: Ninth Programme of Law Reform (2005) Law Com No 293, pp 18-19

Commercial relationships

- 9.137 Relationships which are essentially commercial (such as landlord and lodger or tenant) are also excluded from this project. Again, there is scope here for ambiguity. In some cases, an intimate relationship might develop between the parties such that they can properly be regarded as a couple, or one partner might happen to rent other property to the other as part of a commercial venture which is incidental to their relationship. Although cohabiting couples might be expected to contribute jointly to the running of the household, continued payment of rent (as such) in respect of their shared home might detract from a finding that the parties have become a couple to whom any new family legislation (as opposed to the law of landlord and tenant) ought to apply.¹⁵⁹

Concurrent relationships

- 9.138 The terms of reference for this project state that “at the very least the relationship should involve cohabitation and bear the hallmarks of intimacy and exclusivity”.¹⁶⁰ In most cases that raises no problems. However, there are at least two categories of case in which the concept of exclusivity needs closer examination.

A “moribund” marriage and a concurrent cohabiting relationship

- 9.139 Before the liberalisation of divorce law in 1969, it was quite common for parties to marriages that had irretrievably broken down to live apart. They could not terminate their legal relationship, but they could lead separate lives and form new relationships. The marriage for all day-to-day purposes would be moribund, but the legal status remained. Despite the liberalisation of divorce law, there are still occasionally cases where, for one reason or another, the parties cannot or do not dissolve their marriage. In some cases, this may be because of the religious convictions of one or both spouses.¹⁶¹ One individual can therefore be technically a spouse or a civil partner of one person and yet cohabit with another. This social reality is recognised by the Office for National Statistics: for the purposes of the General Household Survey, individuals who are separated but not yet divorced and are cohabiting with a third party are counted as cohabitants.¹⁶²
- 9.140 We need therefore to consider how any new scheme should deal with these cases. If the existence of a moribund marriage precluded a finding of eligible cohabitation, it goes without saying that eligible cohabitation alongside a “live” marriage could not be possible. The same considerations would apply to a moribund civil partnership.

¹⁵⁹ This is particularly important in so far as it would affect the proper characterisation of “contributions” to the parties’ joint life: rent, as such, ought to be treated differently from the sort of contribution to joint living expenses which a contributions-based scheme would recognise. See Part 6.

¹⁶⁰ The Law Commission: Ninth Programme of Law Reform (2005) Law Com No 293, p 18, n 2.

¹⁶¹ Eg *Watson v Lucas* [1980] 1 WLR 1493. One spouse may be waiting for the five-year separation threshold to be satisfied before he or she can obtain a divorce (Matrimonial Causes Act 1973, s 1(2)(e)).

¹⁶² Office for National Statistics, *Social Trends* 36 (2006) table 2.11.

Concurrent “live” relationships

- 9.141 The second situation involves an individual who is maintaining two (or more) active relationships, probably between two households.¹⁶³ One or both of that individual’s partners may be oblivious of the other relationship.¹⁶⁴ This category must be subdivided further, according to whether the second relationship is another cohabitation, or a “live” marriage or civil partnership. However, if it is concluded that a moribund marriage cannot bar eligible cohabitation, that might suggest that the status of one cohabitant as a spouse or civil partner is not a bar to the recognition of the cohabitants’ relationship, and that what matters is the functional existence of two relationships. If that is so, then whether the other relationship is a marriage or another cohabitation, the underlying issue might be thought to be the same.

Current English law on concurrent relationships

- 9.142 It is clearly not possible for an individual to be simultaneously a spouse or a civil partner of more than one person. Similarly, an individual cannot be both a spouse and a civil partner.¹⁶⁵ However, a second, bigamous marriage or civil partnership, although void, will nevertheless be recognised in some legal contexts; in particular, it may attract financial relief on death or decree of nullity. An innocent party, unaware of the bigamous nature of the relationships, would certainly be entitled to claim financial relief; even the bigamous party might in some circumstances be granted some relief, particularly if the other spouse had been aware of the bigamous nature of the marriage.¹⁶⁶
- 9.143 It is clear that a surviving cohabitant may currently make a claim under the Inheritance (Provision for Family and Dependents) Act 1975, even if the deceased remained technically married to someone else at the point of death.¹⁶⁷
- 9.144 The issue also arises in relation to tenancy succession, where it has been dealt with both in case law¹⁶⁸ and legislation.¹⁶⁹ It has been said in that context that

¹⁶³ But contrast the polygamous non-marriage cases discussed below.

¹⁶⁴ See, for example, *Jessop v Jessop* [1992] 1 FLR 591. The case involved a seaman who, unbeknown to anyone, was apparently happily married to one woman and simultaneously cohabiting with another, both families having children. The wife and partner only discovered each other’s existence when the seaman died intestate. The case did not test whether the law would recognise the cohabiting relationship, as the claim under the Inheritance (Provision for Family and Dependents) Act 1975 was made by the wife against the cohabitant. The latter had been provided for satisfactorily by the operation of the doctrine of survivorship on the home she jointly owned with the deceased and by an allocation from the deceased’s pension trustees.

¹⁶⁵ Matrimonial Causes Act 1973, s 11(b); Civil Partnership Act 2004, s 3(1)(b).

¹⁶⁶ Bigamy does not bar a claim outright; the court will take all the circumstances into account in exercising its discretion; see *Whiston v Whiston* [1995] Fam 198; *Rampal v Rampal (No 2)* [2001] EWCA Civ 989, [2002] Fam 85.

¹⁶⁷ *Churchill v Roach* [2002] EWHC 3230 (Ch), [2004] 2 FLR 989: the marriage in that case was moribund.

someone who was a party to two “live” relationships would find it impossible to demonstrate that he was “residing with” more than one partner for the purposes of that legislation.¹⁷⁰

- 9.145 The Department of Work and Pensions takes the view that, for the purposes of social security means-testing, a couple must be monogamous for their relationship to be analogous to husband and wife. So where a relationship with more than one person is conducted under the same roof, each of the individuals involved – save for any individuals who are married to each other - will be treated as separate individuals.¹⁷¹ Similarly, it has been held that it is not possible for these purposes to be a member of more than one household simultaneously.¹⁷² These restrictions cover two live relationships, not (expressly) the moribund marriage.

The approach of other jurisdictions

- 9.146 Other jurisdictions vary considerably in their approach to this issue in the context of financial relief on separation and death of cohabitants. Some jurisdictions expressly bar the possibility of a cohabiting relationship being found to exist alongside a marriage.¹⁷³ Some also expressly preclude concurrent cohabiting relationships.¹⁷⁴ Others expressly permit both possibilities: a concurrent marriage and cohabitation, or two concurrent cohabiting relationships.¹⁷⁵
- 9.147 A number of other jurisdictions sit in the middle, expressly permitting the co-existence of cohabitation with a marriage, but not expressly providing one way or the other for concurrent cohabiting relationships. For example, most Australian states expressly contemplate the possibility of a *de facto* relationship (that is to say, a cohabiting relationship) existing at the same time that one or both of the

¹⁶⁸ *Watson v Lucas* [1980] 1 WLR 1493: successful claim by cohabitant in a moribund marriage to succeed to his deceased partner’s tenancy as a “member of the tenant’s family”; this case preceded the introduction of the provision expressly catering for cohabiting partners, hence use of the “member of the family” test. The fact of the marriage did not bar the applicant from being a member of his partner’s family, provided that their relationship was sufficiently interdependent and stable.

¹⁶⁹ Legislation deals with the competing claims of a surviving spouse and cohabitant when the partner common to both relationships dies. See the various solutions adopted by, for example, the Rent Act 1977, sch 1, para 2(3); Housing Act 1988, s 17; cf Housing Act 1996, s 133.

¹⁷⁰ *Watson v Lucas* [1980] 1 WLR 1493, 1499, per Stephenson LJ.

¹⁷¹ Department of Work and Pensions, *Decision Makers Guide*, vol 3, ch 11, para 11034 available at <http://www.dwp.gov.uk/publications/dwp/dmg/> (last visited 4 May 2006).

¹⁷² Commissioner’s Decision *R(SB) 8/85*.

¹⁷³ Sweden: Cohabitees Act 2003, art 1 para 3. Consultation Paper on the Rights and Duties of Cohabitees (2004) Irish Law Reform Commission CP 32-2004, para 1.18 and following: the Irish Law Reform Commission has taken the view that the Irish Constitution precludes recognition of a cohabiting relationship where one of the partners is married to a third party.

¹⁷⁴ Eg Spain’s autonomous community of Aragon: see Appendix C.

¹⁷⁵ New Zealand, Australia’s Northern Territory, Queensland and Western Australia: see Appendix C.

parties is married to another person. While none of these states' legislation expressly permits (or rules out) concurrent *de facto* relationships for all purposes, case law allows for the conceptual possibility of concurrent relationships,¹⁷⁶ albeit that cases of two *de facto* relationships might be rare.¹⁷⁷

- 9.148 The Family Law (Scotland) Act 2006 is understood to allow for the possibility of a (moribund) marriage and cohabitation existing simultaneously, though it does not expressly say so on its face. But the Parliamentary Committee responsible for the Bill took the view that maintaining two concurrent cohabiting relationships should not be possible. It was felt that the definition of cohabitation in the Bill – “living with another person as if they were husband and wife”¹⁷⁸ – could not allow an individual to cohabit with more than one person at the same time.¹⁷⁹
- 9.149 Provisions expressly permitting a finding of cohabitation where a concurrent marriage exists may deal with cases of moribund marriages, but different considerations arise where the marriage is live. In that case, as in cases of concurrent cohabiting relationships, the issue is whether a cohabiting relationship can be found to exist for legal purposes at all where one partner is actively engaged in another relationship (whether it be married or another cohabiting relationship) at the same time.¹⁸⁰ It may be difficult in such cases to satisfy the statutory criteria required for a cohabiting relationship to exist. We must await judicial interpretation of the Scottish provision.

Discussion

- 9.150 We are aware that careful thought will have to be given to what many consultees are likely to regard as the prior rights of any spouse, even if the marriage in question is, for all practical day-to-day purposes, moribund. Wherever one cohabitant is married to another person, even if that marriage is moribund, the two spouses have an on-going legal status and are entitled to instigate matrimonial proceedings for financial relief against each other. The surviving spouse also automatically inherits on intestacy, or under any valid will made in his or her favour, even if the spouses have not seen each other for years. Moreover, unlike the innocent party to a bigamous marriage, the innocent party to a concurrent cohabitation is not able to rely on the guarantee that might be felt to be implicit in compliance with the marriage formalities that his or her partner was “free”.
- 9.151 On the other hand, since this project is concerned to relieve financial hardship arising on the termination of cohabiting relationships, it would seem appropriate

¹⁷⁶ See the comments of the Full Court of the Supreme Court of New South Wales in *Green v Green* (1989) 17 NSWLR 343.

¹⁷⁷ Report on De Facto Relationships (1983) New South Wales Law Reform Commission Report No 36, para 17.14 and following; J Wade (ed), *Australian De Facto Relationships Law*, para 2-630.

¹⁷⁸ Family Law Bill (Scotland) 2005, cl 18.

¹⁷⁹ Scottish Parliament, Justice 1 Committee Official Report, Stage 1, Family Law (Scotland) Bill 2005, 7 July 2005, available at <http://www.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-08-vol01-01.htm> (last visited 4 May 2006).

¹⁸⁰ Compare the comments of Stephenson LJ in *Watson v Lucas* [1980] 1 WLR 1493, 1499.

to consider the possibility of relief being granted in at least some cases of concurrent relationships. This is particularly so in relation to those who honestly believe that their partners are not simultaneously party to another live relationship elsewhere, even if the partner remains formally married or in a civil partnership, and whether or not the innocent party is aware of that. As in the case of bigamous marriages, it may be appropriate to leave the question of relief to the discretion of the court in all the circumstances, rather than to bar an application entirely.

- 9.152 If the possibility of two live relationships were to be considered, but membership of the same household is an indispensable requirement of cohabitation, English law would have to adjust its understanding of household membership in this context. Although dual-household membership is rejected for the purposes of social security law,¹⁸¹ it may not be regarded as incompatible with the purpose of financial remedies on relationship breakdown and death.
- 9.153 In following sections, we consider particular implications of concurrent relationships in separation and death cases respectively. As in other contexts, the nature of the financial relief that might be provided under a new statutory scheme affects the approach to this issue. We use the expression “common partner” to refer to the individual who is involved in both relationships.

CONCURRENCY AND REMEDIES ON SEPARATION

- 9.154 Unlike the death of the common partner, which necessarily causes both relationships to end simultaneously and so requires the resolution of both cases, separation might only affect one relationship at a time. The key problem posed by separation cases is the source of assets used to satisfy any order. Since English law adopts a system of separate property, even during marriage, the party to the other relationship cannot by right prevent the common partner’s assets from being subjected to a court order in favour of the party to the separated relationship. Clearly, however, any remedy would diminish the assets available to other household and any children within it and so the courts should at least be required to have regard to the impact of any order made on the common partner’s other household, particularly in so far as dependent children were affected. In this regard, the concurrent relationship case is not entirely dissimilar to that of a respondent in ancillary relief proceedings on divorce who invokes his or her obligation to maintain a new family as a factor relevant to the court’s discretion regarding the relief to be granted to the former spouse.¹⁸²
- 9.155 However, depending on the nature of the principles underpinning any new remedies, the existence of a concurrent (rather than successive) relationship would necessarily also impact on the way in which the court exercised its powers.

¹⁸¹ See para 9.145.

¹⁸² See *Roberts v Roberts* [1970] P 1, in which it was held that the respondent can assert moral as well as legal obligations to support others, including a new cohabiting partner and children of that relationship, as a relevant factor in ancillary relief proceedings; *Delaney v Delaney* [1990] 2 FLR 457.

- 9.156 In a rule-based system requiring the equal sharing of relationship property, it would be necessary to allocate particular items of property to each relationship. Depending on the scope of the “relationship property” concept, that might be difficult where an asset was not readily attributable solely to either relationship. Less difficulty would arise if the rule were limited to the home and household goods.
- 9.157 In the case of discretionary relief based on economic disadvantage no special difficulty would arise, as the remedy would focus on the situation of the applicant, and not on any particular asset pool. Principles of economic advantage and partnership might, however, call for some link between the applicant’s contributions and particular assets or gains. This might again require the court to engage in an exercise of apportionment between the two relationships.

CONCURRENCY AND REMEDIES ON DEATH

- 9.158 The problem of concurrent relationships is particularly acute where the death of the common partner causes both relationships to end simultaneously.

Intestacy rules

- 9.159 Concurrent relationships would pose a particular problem if we were to bring cohabitants within the intestacy rules. It would be necessary to decide what priority a surviving cohabitant should have relative to a surviving spouse (whether the marriage were moribund or not). It may seem unfair, in some cases, for a spouse whom the deceased has not seen for decades to inherit on intestacy ahead of a surviving long-term cohabitant. However, the 1975 Act already enables appropriate adjustments to be made where other applicants, including a cohabitant, are judged to be more deserving. A decision would also have to be made about how any new statutory legacy or interest in the residue for a surviving cohabitant should be shared, if at all, where more than one person appeared to be eligible.¹⁸³ In view of our provisional proposal that this route should not be taken, we shall not explore the issue further here.

Claims under the Inheritance (Provision for Family and Dependents) Act 1975

- 9.160 Concurrent relationships of all sorts pose less of a problem in the context of the 1975 Act, where the court has a discretion. At least where (as in *Churchill v Roach*¹⁸⁴) the marriage is moribund, there is nothing in the Act to bar a cohabitant from making a claim. It is important to appreciate that a court dealing with the entire estate on death has at its disposal a wide range of assets for distribution between competing applicants. Moreover, the legislation effectively directs the

¹⁸³ Other jurisdictions have adopted various approaches to this problem. Several Australian states permit a cohabitant to take priority over a surviving spouse provided that relationship lasted for a minimum duration immediately before the death and the deceased had no children other than issue of that cohabiting relationship. Where there is more than one eligible cohabitant, the statutory legacy is shared equally. Contrast also existing English law on succession to tenancies in such cases, where the issue is made all the more acute by the fact that there is only one tenancy which cannot be shared, and so must be allocated to one or other surviving partner: see n 169.

¹⁸⁴ *Churchill v Roach* [2002] EWHC 3230 (Ch), [2004] 2 FLR 989.

court to weigh the claims of competing applicants when deciding on what remedy, if any, to provide for any one of them.¹⁸⁵

9.161 We invite the views of consultees on whether a person should be eligible to apply as a cohabitant for financial relief on separation in respect of any period of cohabitation during which they or their partner was married to, or the civil partner of, or cohabiting with another person.

Non-marriage cases

9.162 In order to create a valid marriage it is necessary that the parties comply with the basic tests set out by the laws of nullity.¹⁸⁶ Failure to satisfy one or more of those requirements may result in the marriage being either voidable¹⁸⁷ or void.¹⁸⁸ Even a void marriage may have legal consequences. Of particular importance in this context is the court's power to make all of those financial and property orders that it could make on divorce in the course of proceedings brought to declare a marriage void. So the outcome for the parties at the "end" of their marriage may be indistinguishable from divorce, despite the marriage being void. This will be particularly important where one or both parties were innocently unaware of the problem rendering their marriage void and they have relied on their marriage accordingly. For example, a party to a void marriage might have given up work to raise children and made other domestic contributions that would not be rewarded adequately by the general law, but only (in the event of death of the other spouse or separation) by matrimonial law.

9.163 However, there is a further category of case to which no such remedies apply, the so-called "non-marriage". These are cases where the parties are found to have departed so far from the law regulating the creation of marriage that they cannot be held even to have a void marriage and receive the benefits that flow from that.

9.164 Some of these cases involve parties who go through a ceremony which creates a marriage under their religious law but in circumstances that do not comply with the formalities necessary for such ceremonies¹⁸⁹ to create a valid marriage for the purposes of English civil law.¹⁹⁰ Parties to such non-marriages may be unaware

¹⁸⁵ Inheritance (Provision for Family and Dependants) Act 1975, s 3(1).

¹⁸⁶ Matrimonial Causes Act 1973, ss 11-13; see also Civil Partnership Act 2004, ss 49-50; and associated legislation prescribing the formalities for the creation of a valid marriage: Marriage Act 1949, as amended; Civil Partnership Act 2004, Part 2, Chapter 1.

¹⁸⁷ That is, either party may apply during their joint lives to have the marriage annulled; if that is not done, the marriage will be treated as valid.

¹⁸⁸ That is, legally not valid at all, and any person, even after both "spouses" are dead, may apply for a declaration that the marriage is void.

¹⁸⁹ See Marriage Act 1949, ss 41-44.

¹⁹⁰ *Gandhi v Patel* [2002] 1 FLR 603; *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6. Some cases may be saved by the presumption of valid marriage, but this doctrine is problematic, and both it and the concept of non-marriage have been criticised: R Probert, "When are we married? Void, non-existent and presumed marriages" (2002) 22 *Legal Studies* 398.

of the additional formalities required by English law.¹⁹¹ They may proceed in the honest belief that they are validly married for all purposes. For the purposes of their faith, they are married, and the applicable religious law may itself provide for some financial relief on separation or death. However, the decisions of religious courts are not enforceable by the civil courts, and the content of that law and the outcomes it produces may be different from those that civil law would provide. Unlike void marriages, these relationships are not recognised by civil matrimonial law. For civil law purposes, their relationship is at best one of cohabitants and so (at least where the relationship is actually monogamous¹⁹²) they fall within the scope of this project.¹⁹³

- 9.165 Unlike most cohabitants, parties to non-marriages have committed themselves to each other in a ceremony which one or both of them may believe creates a valid marriage. To that extent, they perhaps have the strongest claim for some sort of remedy on separation or death of their supposed spouse. The existence of a religious marriage could be a factor to be taken into account by the court in determining whether the parties' relationship was sufficiently stable to fall within the concept of cohabitant for the purposes of any new statutory scheme.

¹⁹¹ The Muslim Parliament of Great Britain is seeking to increase understanding within the Muslim community of the status of their marriage ceremonies as a matter of civil law: see http://www.muslimparliament.org.uk/marriage_guidelines.htm (last visited 4 May 2006).

¹⁹² Some of these non-marriages will be (at least potentially, or even actually) polygamous. It is not possible to contract a polygamous marriage for the purposes of civil law within England and Wales, though English law does recognise polygamous marriages contracted abroad by parties not then domiciled in the UK: see generally Lowe and Douglas, *Bromley's Family law* (9th ed 1998) pp 50-52. These cases may involve relationships conducted within the same household (and so to the knowledge of all parties), rather than separately (and so with the possibility that one or more parties may be unaware that more than one relationship is being carried on). However, despite the parties' awareness of the situation, it may be appropriate to consider whether financial relief on separation is required for such cases. See *Re Sehota* [1978] 3 All ER 385, where a claim under the Inheritance (Provision for Family and Dependants) Act 1975 was permitted by the second wife of the deceased, who had at some points during the marriage shared a household with the husband and the first wife.

¹⁹³ Cohabitation as such is significantly less common within the Asian population of England and Wales than in other ethnic groups: Office for National Statistics, *Census 2001*, Table S106; K Kiernan and K Smith, "Unmarried parenthood: new insights from the Millennium Cohort Study (2003) 114 *Population Trends* 26, at 28-29 and table 5.

PART 10

COHABITATION CONTRACTS AND OPT-OUT AGREEMENTS

INTRODUCTION

- 10.1 We have provisionally proposed in Parts 5 to 9 that:
- (1) parties to cohabiting relationships who satisfy statutory eligibility requirements should have access to new statutory remedies on separation;
 - (2) these statutory remedies should take the form of a specific scheme for financial relief between eligible cohabitants on separation, under which the courts exercise a discretion structured by principles; and
 - (3) the remedies available to cohabitants under the Inheritance (Provision for Family and Dependents) Act 1975 (“the 1975 Act”) should be amended so that they correlate with any new remedies that are available on separation during the parties’ joint lives.
- 10.2 We have also provisionally proposed in Part 5 that cohabitants should be able to oust the operation of the statutory scheme for financial relief on separation by means of an agreement that neither shall apply for financial relief.
- 10.3 Any agreement which removes or modifies the mutual obligations and responsibilities of the cohabiting parties between themselves cannot affect their financial liability towards their children.¹
- 10.4 In this Part, we consider:
- (1) the variety of agreements that might be made by cohabitants and the enforceability of cohabitation contracts;
 - (2) the potential significance of an “opt-out agreement”;
 - (3) the aims of a scheme that allows cohabitants to opt out of statutory remedies;
 - (4) who should be able to enter into opt-out agreements;
 - (5) how explicitly (if at all) an opt-out agreement should oust the operation of a new statutory scheme;
 - (6) the scope of opt-out agreements: what they ought to, or might, cover;

¹ See Child Support Act 1991, s 9; a consent order for child maintenance will only exclude the possibility of applications to the Agency for at most one year: s 4(10)(aa), and not at all if the parent with care claims relevant benefits: s 6.

- (7) what formalities, if any, should be required for an opt-out agreement to be binding (“qualifying criteria”);
- (8) what circumstances, if any, should permit a court to set aside the terms of an opt-out agreement (“grounds for review”); and
- (9) whether a express declaration of trust, executed by both parties, should take effect as an opt-out agreement and, if so, what its scope as an opt-out should be.

10.5 In Part 8, we invited consultees’ views on whether opting out should also be possible in relation to the 1975 Act. For ease of exposition, the discussion in this Part proceeds on the assumption that couples should be entitled to opt out from financial relief both on separation and on death, and (largely²) on the same basis in each case. Consultees are welcome, however, to distinguish between cases of separation and death in their responses to the questions raised in this Part.

THE VARIETY OF AGREEMENTS THAT MAY BE MADE BY COHABITANTS

10.6 Cohabitants may enter into a range of agreements that provide for their rights and responsibilities. Such agreements may do any (or all) of the following:

- (1) provide for how the cohabitants will organise their finances and other issues during their relationship;
- (2) provide for how the cohabitants would divide their property and finances in the event that their relationship ends;
- (3) determine, at the point of separation, how they will now divide their property and finances; or
- (4) declare how a particular asset is owned.³

Cohabitation contracts

10.7 Whether or not a new statutory scheme is introduced for cohabitants on separation, the legal force of cohabitation contracts may be felt to need clarification, for the avoidance of any possible doubt about their validity.⁴ Contracts can set out how the parties propose to manage their finances and property during the currency of their relationship. They can also set out how the parties would divide their finances and property should their relationship end (by separation or death⁵). If couples were assured that cohabitation contracts could be enforced, it is possible that more of them might exercise their freedom of choice and avoid future litigation by entering into such contracts.

² See text to n 12 for one issue where the question of provision on death must be treated differently from separation.

³ We consider whether a declaration of trust can be treated as an opt-out at para 10.124.

⁴ See from para 3.15.

⁵ In so far as it is a contract for a will: *Theobald on Wills* (16th ed 2001) para 10-02 and following; or involved mutual wills. For the parties to determine the outcome on death, they may need to execute wills. We discuss this issue at para 10.35.

10.8 All cohabitants should be able to enter into cohabitation contracts. Capacity to enter into such contracts should not be dependent on the eligibility requirements under any new statutory scheme. The sort of contracts which we are concerned with here could lawfully be made by any persons, whatever the nature of their relationship.

10.9 We provisionally propose that legislation should provide (for the avoidance of doubt) that, in so far as a cohabitation contract deals with the financial or property relationship of the parties, it is not contrary to public policy. Do consultees agree?

Opt-out agreements

10.10 For the purposes of the following discussion, the term “opt-out agreement” means an agreement made between eligible cohabitants before, during or following a period of cohabitation, containing terms which have the effect of ousting the jurisdiction of the court under any new statutory scheme providing financial relief on separation and death. That agreement might also go further by providing positively for how the parties’ assets will be divided should separation or death occur. We discuss below how joint express declarations of trust might be treated in this context.⁶

10.11 In this section, we are only concerned with agreements that are intended to have effect on the termination of relationships. We do not discuss agreements dealing with financial and other matters that arise during a couple’s relationship⁷ since they would not be affected by any proposals we make for a new statutory scheme. In so far as a cohabitation contract that dealt with the currency of the relationship also ousted the operation of any new scheme, it would fall within the definition of an opt-out agreement.

THE POTENTIAL SIGNIFICANCE OF AN OPT-OUT AGREEMENT

10.12 An opt-out agreement would enable the parties, at least to some extent, to determine for themselves the division of their assets on the termination of their relationship, rather than it being for the court to decide. The extent to which that would be the case would depend on the status given to such agreements.

10.13 An opt-out agreement could give rise to one of three possible consequences:

- (1) it could be merely a factor that the court would take into account when making adjustments under a new scheme;
- (2) it could be binding, but the court would have the power to ignore the agreement in certain circumstances; or
- (3) it could be completely binding (subject to the general law).

We shall need to decide which of these approaches to adopt.

⁶ See para 10.124

⁷ Except in so far as we have provisionally proposed that such agreements should not be contrary to public policy.

- 10.14 We can envisage various circumstances in which eligible (or potentially eligible) cohabiting couples might wish to opt out of any new statutory scheme. For example:

Y and Z were both married previously. Y was divorced and Z was widowed. They both have independent adult children from those marriages. They would like to live together but they do not want to marry: Y's divorce settlement was hard won and they each want to retain their financial independence, partly to protect their children's inheritances. They therefore do not want their cohabitation to give rise to the possibility that either might have a claim in the event of their separation or the death of one of them.

- 10.15 Y and Z wish to ensure that their assets pass to the children of their first relationship when they die, rather than to their new partner. Others might wish to preserve inherited capital for the benefit of other relatives. Some might have been given money by a parent to buy property with their partner and they, or their parent, may wish to ensure that the money is returned to their parent (or at least preserved for that cohabitant's future use) if the property were sold. Some couples might simply want to affirm their financial independence from each other.

DESIGNING AN OPT-OUT

- 10.16 We believe that any provision for opting out of the remedial scheme must be:
- (1) sufficiently certain, so that couples who chose to opt out could be sure that a court would uphold their agreement in all but highly exceptional circumstances;
 - (2) sufficiently protective of vulnerable parties, so that the court would have the power to overturn opt-out agreements in limited, appropriate circumstances; and
 - (3) accessible, in the sense of not being unnecessarily burdensome or expensive, so that those with few assets (who may therefore have the greatest need to protect them) could make effective agreements easily.
- 10.17 Opting out would deprive the parties of access to remedies which they would otherwise have enjoyed. This has implications for the format that opt-out agreements should take and formalities that might be required for agreements to be binding. We consider that it is important that such agreements should be executed in a manner which:
- (1) draws both parties' attention to the significance of the step being taken;
 - (2) provides certainty (as a matter of evidence) that opting out had been effected; and
 - (3) limits opportunities for the exercise of undue influence on the party who potentially stands to lose more as a result of opting out.
- 10.18 It would be necessary for the courts to have some power to set aside agreements, not least where the agreement was vitiated as a matter of general

law or where any special formalities had not been observed. But we are concerned that any scheme that we recommend should not create too much scope for the court to intervene and so prevent parties from relying on their agreements with confidence.

- 10.19 There are various mechanisms which might produce the desired outcome. Each has its attractions and each its potential drawbacks. At this stage, we do not intend to put forward provisional proposals, but rather to invite consultees' views on each model. We are interested to receive views on how the models might be improved or how some of them might be amalgamated to form a suitable scheme.

WHO SHOULD BE ABLE TO ENTER INTO AN OPT-OUT AGREEMENT?

- 10.20 It would not matter whether (at the point of entering the agreement or at any point in the future) the parties were eligible under a new statutory scheme. Parties might wish to enter into opt-out agreements at a point before any new statutory scheme potentially applied to them.
- 10.21 In Part 9, we considered whether it should be possible for relationships where one party is under the age of 18 to be eligible under any new scheme. The mere fact that minors might not be eligible under a new scheme would not itself justify preventing them from entering into opt-out agreements. However, there may be other reasons why minors should not be able to enter into binding opt-outs.
- 10.22 Under English law, the only contracts which are binding on a minor are "contracts for necessities",⁸ that is clothes, food, medicine and lodging, and contracts for apprenticeship, education and services. Subject to these exceptions, contracts with minors are voidable at the minor's option, but can be enforced against any party who was not a minor at the time the contract was made.
- 10.23 If this general principle were applicable to opt-out agreements (which would not usually be contracts for necessities), in cases where only one party was a minor, that party would be protected either way. If it were in the minor's interests that the agreement be enforced, the minor would be able to enforce it. If the minor's interests would be prejudiced by the agreement, he or she could avoid it and apply under the scheme instead.
- 10.24 Take the example of A and B who are 17 and 19 years old respectively. They purport to enter into an opt-out agreement, and B seeks to rely on that agreement against A in separation proceedings five years later. The fact that A was not eligible under the new statutory scheme when the agreement was made (assuming that the scheme did not apply to minors) would be irrelevant to the enforceability of the agreement. Applying English contract law to their opt-out agreement would render it voidable at A's option; A could therefore enforce the opt-out agreement against B (who was not a minor when the agreement was made), but B could not enforce it against A.
- 10.25 It is interesting to note, however, that some other jurisdictions take a different view. For example, in New Zealand, the usual contractual rule is expressly

⁸ *Chitty on Contracts* (29th ed 2004) para 8-004.

suspended by the Act so that minors are allowed to make fully binding agreements under the legislation, although, if the minor is under eighteen and has never been married, the contract must be scrutinised by the court.⁹ In Sweden, if one of the parties to a cohabitation agreement is a minor, consent must be obtained from the child's guardian.¹⁰

- 10.26 We provisionally propose that parties should be able to enter into an opt-out agreement regardless of whether their relationship is eligible under any new statutory scheme at the point of entering the agreement or subsequently.**
- 10.27 We invite the views of consultees on whether minors should be entitled to enter into opt-out agreements, and if so, whether those agreements should be treated as contracts made by minors.**

SHOULD AN OPT-OUT AGREEMENT EXPLICITLY OUST THE OPERATION OF A NEW STATUTORY SCHEME?

- 10.28 There is a strong argument for saying that if cohabitants intend to oust the scheme, their agreement should state expressly that that is the case. If the parties are giving up an entitlement to apply for remedies that they would otherwise have, it is essential that they be aware of what they are doing. Evidence of that knowledge, and that the parties did indeed intend to opt out of the scheme, would best be supplied by an express acknowledgement of that fact on the face of the agreement.
- 10.29 It may be too onerous, however, to insist that the agreement refer to the legislation by name. Particularly if not given specific legal advice, parties might not refer to the statutory scheme expressly, but refer in more general terms to claims for financial relief. For example, the parties might state expressly in their agreement that no financial relief is to be given to either party, save for that contained within the agreement. It might be appropriate to allow such terms to eliminate the possibility of a claim being made under a new statutory scheme.
- 10.30 More difficult would be those cases where an agreement provided simply for how the parties' assets (whether all or some of them) would be divided in the event of separation or death. Such an agreement might not refer expressly to the relevant legislation or state in more general terms that the agreement was intended to prevent the possibility of claims for financial relief being made in future. We would have no clear evidence in these cases from the agreement itself that the parties were aware of, or intended to oust, the statutory scheme. We discuss this issue further below at paragraph 10.36.
- 10.31 We invite the views of consultees as to whether an opt-out agreement should only be effective if it expressly states in specific or more general terms that neither party is to be entitled to apply for financial relief under any new statutory scheme.**

⁹ Property (Relationships) Act 1976, ss 21(1)-(3).

¹⁰ Cohabitees Act (Sweden), s 9.

THE SCOPE OF OPT-OUT AGREEMENTS

Agreements that simply oust the scheme

- 10.32 Some parties' agreements might simply exclude the scheme entirely, without making express alternative arrangements for the determination of the ownership of the parties' property or its division between them following separation or death. In such a case, the general law would apply. There seems to us to be no reason why parties should not be able to make such basic agreements, which simply oust the operation of the new scheme.

Agreements that also seek to make positive provision for the parties

- 10.33 Other parties might go further than simply ousting the scheme by making their own provision for how their assets should be divided, thus displacing both the statutory scheme and the general law of property and trusts in favour of the parties' agreed distribution of income and property.

Can positive provision be made?

- 10.34 In so far as the agreement were concerned with the position on any future separation, this would be straightforward. Such an agreement could be made by way of contract (to be performed in the event of separation).¹¹
- 10.35 Special considerations arise regarding provision on death. Parties may make agreements concerning income or capital provision which, as a matter of construction, are binding even though the person making provision has subsequently died. Such agreements would be enforceable against the deceased party's estate. More difficult is the case where the agreement is not intended to take effect until one party's death. It would be possible for the parties to provide for each other on death by executing a trust which either created immediately vested shares in possession, or a series of life and reversionary interests. It is not straightforwardly possible to achieve the same effect by contract, as the parties' intentions appear to be "testamentary" in that the provision is to take effect only on death and not before. The appropriate method of achieving such objectives would be by execution of a will, although it may be that depending upon the circumstances the parties' agreement could be construed as comprising a contract to create a will.¹²

Over what assets would the opt-out apply?

- 10.36 The parties might make an agreement which sought to set out how their property would be divided in the event of separation or death. Such an agreement might seek to determine future property division and financial provision in two ways:
- (1) by providing that specific assets should go to each party; or
 - (2) by providing that each party should obtain a specified proportion of a pool of assets and/or receive a specified regular payment from the other party.

¹¹ We discuss the treatment of express trusts in this context from para 10.124 below.

¹² *Theobald on Wills* (16th ed 2001) para 10-02 and following.

- 10.37 An agreement dealing with specific items of property would be highly unlikely to cater comprehensively for all of the parties' assets. It might have dealt with all of the parties' assets at its inception, but the identity of those assets might have changed subsequently as old assets were disposed of and new assets acquired. However, we do not think it necessary that an agreement should deal with all of the parties' assets in order to qualify as an opt-out agreement. Some couples might find it suitable to list particular assets which would belong solely to one or other party in the event of separation or death, and those which would be divided in some other way. In some cases, one party might wish to ensure that a particular, much-loved asset should remain with him or her on separation or death, but not be concerned about how the rest of the assets were divided.
- 10.38 If parties had included a provision expressly opting out of the statutory scheme, it would generally be clear from the terms of that provision whether the scheme were excluded entirely or only in relation to particular assets or issues. Were the law to allow for "implied" opt-outs, simply on the basis of alternative provision having been made (as discussed in paragraph 10.30), the court might then be faced with a difficult question of construction when it came to determine whether, and, if so, to what extent, the operation of the statutory scheme were excluded. The difficulty arising from this is another reason to be hesitant about allowing such implied opt-out agreements to have effect.
- 10.39 Suppose that Y and Z (from our example in paragraph 10.14 above) entered into an opt-out agreement which made provision for a specific asset (say, a car). The parties may have intended (or simply assumed) any one of the following outcomes regarding their other property. That the car should belong to Y, but that:
- (1) the court should remain free to divide the remaining assets pursuant to the statutory scheme, treating Y's receipt of the car as part of Y's share;
 - (2) the court should remain free to divide the remaining assets pursuant to the statutory scheme, but not treat the value of the car as counting towards Y's share, so Z cannot be compensated for the fact that Y has the car; or
 - (3) Y's receipt of the car should be by way of compromise of any claim Y might have against Z for financial relief, and so Y could not make any claim in the event of separation or Z's death.
- 10.40 Whether an opt-out agreement that covered a specific asset had the meaning in (1), (2) or (3) would depend on the interpretation of its terms, in light of the existence of our proposed statutory scheme. Depending on the construction of the agreement, the parties would remain free to pursue a claim for financial relief in respect of assets in relation to which the agreement was silent.
- 10.41 Another approach might involve distinguishing between provision made for capital and income. For example, if the agreement covered only capital and did not in general terms oust the scheme, the court could have jurisdiction under the

scheme in respect of any application relating to income.¹³ However, we have reservations about drawing any such distinction. Is the “capital” or “income” nature of an agreement or a claim to be determined by the character of the asset in the hands of the applicant or the respondent? As the English courts have recently held in the context of divorce orders, there is no reason why payments made to one party from income should have to be used by the recipient as income.¹⁴ Likewise, payments made from capital might be put to day-to-day expenditure, as if it were income.

10.42 We discuss below whether an express joint declaration of trust would be classified as an opt-out agreement. If it were so classified, it would only operate in relation to the asset that was the object of the trust.

10.43 We invite the views of consultees on whether, if an opt-out agreement relates only to part of a couple’s financial affairs and does not exclude the parties from making any application to court:

- (1) the couple should be bound by the terms of the agreement in respect of the assets or issues that the agreement covers; but**
- (2) the court should remain free to deal with the assets and issues not covered by the agreement.**

QUALIFYING CRITERIA AND GROUNDS FOR REVIEW

10.44 It is necessary to consider whether any particular formalities or other “qualifying criteria” should be satisfied before an opt-out agreement would be effective to exclude the operation of the statutory scheme and be enforceable in its own terms. Requiring certain formalities to be complied with could give both parties a better opportunity to consider what they were agreeing to and whether or not it was a suitable agreement for both of them.

10.45 Alternatively (or additionally) the parties could be protected by giving the court the power to refuse to enforce an opt-out agreement (even if it satisfied any prescribed qualifying criteria) in light of the circumstances prevailing when one party sought to enforce it (“grounds for review”).

10.46 In our view, the more by way of qualifying criteria than were required by the scheme (or voluntarily taken by the parties), the less opportunity there should be for the courts to overturn it. Parties who had been given the opportunity to consider an agreement carefully and to take advice on it should not be permitted later to apply to the courts to overturn the agreement simply because they have changed their mind. Conversely, the less demanding the qualifying criteria (or the fewer the precautions voluntarily taken by the parties at the outset), the more expansive should be the grounds for review.

10.47 There are, of course, two other possibilities. First, that the general law alone regulate opt-out agreements, with no special statutory formalities or grounds for

¹³ *Sykes v Sykes* (1979) FLC 90-652 (Australia); *K v K (Ancillary Relief: Pre-nuptial Agreement)* [2003] 1 FLR 120.

¹⁴ *McFarlane v McFarlane, Parlour v Parlour* [2004] EWCA Civ 872, [2005] Fam 171.

review. Secondly, that the law require both onerous qualifying criteria and confer on the courts a wide power of review.

Qualifying criteria

- 10.48 There are currently no special rules regarding formalities for making a cohabitation contract, save those imposed by the general law.¹⁵ It could be argued that it would be unfair to require more formality than is currently required by the general law, but we disagree. Any new statutory scheme for cohabitants would give them access to remedies which are not currently available. Where that scheme were being rendered unavailable, it might be considered necessary to protect those concerned by making it clear that this was being done, and to provide evidential certainty in relation to alleged opt-out agreements.
- 10.49 Requiring qualifying criteria to be satisfied in order for an opt-out agreement to be enforceable might favour knowledgeable cohabitants, aware of their legal position under the scheme and the preconditions for opting out. An unscrupulous individual could make an agreement with his or her partner, deliberately not complying with the qualifying criteria, knowing that if it became disadvantageous to him or her at a later stage it could be overturned.
- 10.50 However, a failure to prescribe any qualifying criteria might lead to lengthy cases involving disputed evidence about whether an agreement had been made at all and, if so, what its terms were.¹⁶ On balance, we consider that this would be the worse scenario and that qualifying criteria are therefore appropriate. We consider below what weight, if any, a court might attach to an agreement which did not comply with any qualifying criteria.

Comparative survey

- 10.51 It is useful to consider what requirements are demanded by other jurisdictions for what we call opt-out agreements to be enforceable.
- 10.52 In New Zealand, in order to be binding, a cohabitation agreement must be in writing and signed by both parties, and comply with the following further conditions:
- (1) each party to the agreement must have independent legal advice before signing the agreement;
 - (2) a lawyer must witness the signature of each party to the agreement; and

¹⁵ In particular in relation to trusts of land and contracts for the disposition of interests in land: see Law of Property Act 1925, ss 52 and 53; Law of Property (Miscellaneous Provisions) Act 1989, s 2. The requirements for wills are prescribed by the Wills Act 1837, s 9.

¹⁶ Contrast the criticism of the current law that so much may turn on alleged conversations held years ago: para 4.9.

- (3) the lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer¹⁷ explained to that party the effect and implications of the agreement.¹⁸
- 10.53 In Sweden, cohabitation and termination agreements must be in writing and signed by the parties to be valid.¹⁹
- 10.54 In Australia, different states have different rules prescribing the qualifying criteria for formal cohabitation agreements. In New South Wales, an agreement will be binding if:
- (1) the agreement is in writing;
 - (2) the agreement is signed by the party against whom it is sought to be enforced;
 - (3) each party to the relationship was, before the time at which the agreement was signed by him or her, furnished with a certificate by a solicitor which states that the solicitor provided legal advice to that party, independently of the other party to the relationship, as to the following matters:
 - (a) the effect of the agreement on the rights of the parties to apply for an order for property adjustment or maintenance; and
 - (b) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and
 - (4) the certificates referred to accompany the agreement.²⁰

Possible qualifying criteria

- 10.55 There is therefore a range of formalities (over and above those that may be required by the general law) and other qualifying criteria which new legislation could require to be observed before an opt-out agreement would be binding. We have already discussed the issue of how explicitly an agreement should oust the statutory scheme to be treated as an opt-out agreement at all.

AGREEMENT BETWEEN THE PARTIES

- 10.56 We have assumed throughout the preceding text, and when discussing the right to opt out in Part 5, that there must be agreement between the parties. Although unlikely to occur in practice, it might be possible for potential applicants unilaterally to surrender any future claim that they have under the scheme. The

¹⁷ Although the statute does not indicate whether the lawyer witnessing the agreement must be different from the lawyer providing independent legal advice, or whether the witnessing lawyer also needs to explain the effect and implications of the agreement, we are told by practitioners that one lawyer may offer all advice required and act as witness to one party. Only two lawyers therefore need be involved.

¹⁸ Property (Relationships) Act 1976 (New Zealand), s 21F(2)-(5).

¹⁹ Cohabitees Act 2003 (Sweden), s 9.

²⁰ Property (Relationships) Act (New South Wales) 1984, s 47(1)(b)-(e).

respondent would be unlikely to disagree that such a unilateral opt-out should be effective. However, it should not be possible for a potential respondent to opt out of the statutory scheme by unilateral declaration.²¹

A REQUIREMENT OF WRITING

10.57 At the outset, we should make it clear that by “writing” we mean a written paper document rather than any other form of writing (such as an email or other electronic document). As we discuss below, we envisage that such documents should be signed.

10.58 We consider that a writing requirement for basic opt-out agreements would perform at least two functions. First, it would serve a cautionary function, by alerting parties to the significance of the step being taken. Secondly, it would increase evidential certainty, reducing the potential for dispute about the existence and terms of alleged oral agreements. If agreements not recorded in writing in any way were regarded as binding, this would invite the possibility of lengthy disputes in which one party sought to establish the existence of an agreement and its terms while the other sought to refute it.²² Moreover, if the writing requirement (and other qualifying criteria) were applicable equally to any alternative provision that were being made, it could help protect the position of those who agree to opt-out on condition of such provision being made.

10.59 There are at least four options for writing requirements, in addition to any that might be required in specific circumstances by the general law:

- (1) that the agreement be “evidenced in writing”;²³
- (2) requirement that the agreement be contemporaneously made “in writing”,²⁴ and that either
 - (a) only those terms that were in writing would be enforceable, and those that were not would simply be ignored; or
 - (b) provided some of the agreement were in writing, all terms that could be proved, including oral terms, would be enforceable; or
- (3) that the agreement be “in writing” and incorporate all of the terms which the parties have expressly agreed in one document, on pain of the entire agreement otherwise being void.²⁵

²¹ Certainly not in a way that would bar a claim being made in relation to facts which predated that purported opt-out.

²² The potential for such disputes is demonstrated by current case law: see the discussion of oral agreements in the context of implied trusts and proprietary estoppel at para 4.9.

²³ In all its material terms, with the option for parties to waive any term not evidenced in writing which was entirely for their benefit, and to cure the omission of any term to their detriment by consenting to perform it: see generally *Chitty on Contracts* (29th ed 2004) para 4-026.

²⁴ Maintenance agreements between spouses must currently be “in writing” in order to be binding: Matrimonial Causes Act 1973, 34, subject always to the court’s power to review agreements under s 35 and in the event of one party applying for ancillary relief inconsistent with the agreement’s terms; see below para 10.88.

- 10.60 Of these, only (2a) would preclude attempts to prove the existence of oral terms, as each of the others would leave an incentive to do so, whether to void the entire agreement, (in the case of (3)), to prove the existence of terms outside the writing (in the case of (2b)), or to prove the existence of some collateral contract, (in the case of (1)). Complete certainty may therefore be elusive. Use of “entire agreement” clauses might be desirable.²⁶ Although (2a) would avoid that problem, it would create a trap for those who did not realise that only those terms of the agreement which had been written down would be enforceable.
- 10.61 The “cautionary” function would best be served by a requirement of contemporaneous writing. Since an “evidenced in writing” requirement could be satisfied by writing prepared some time after the original agreement had been made, it might therefore not perform the cautionary function adequately. However, the fact that the writing would have to contain all the material terms agreed, and that it would have to be signed and that signature witnessed (see below), might go some way to make up for the fact that it were not executed contemporaneously with the agreement.
- 10.62 In order to advance the third of our suggested functions of a writing requirement – protection of the party who agreed to opt out only on condition of alternative provision being made - whatever writing requirement were adopted ought to apply to all aspects of the agreement, that is to say both the basic opt-out and any alternative provision agreed between the parties.²⁷ All aspects of the agreement ought ideally to be contained or recorded in the same document. That would ensure that it was clear to both parties what the conditions of each other’s consent to the basic opt-out agreement were, and that the formal validity of both opt-out and alternative provision were dependent on the same test. In an ideal world, where no alternative provision was to be made in return for the opt-out, the agreement ought to state expressly that that were the case, but that may be too much to require as a precondition of the validity of the basic opt-out. The onus would be on the party seeking to avoid the agreement to prove that not all parts of the agreement had been recorded in writing.
- 10.63 In considering this issue, it is important to bear in mind our later question about what weight the court should give to an agreement that failed to comply with whatever qualifying criteria (including writing requirement) were imposed. As we shall see, in the context of agreements to opt out, any breach of any formality requirement could be cured by the court essentially giving effect to the parties’ agreement (provided its existence and terms were proved) in the exercise of its discretion were the statutory scheme invoked by either party.
- 10.64 Whatever writing requirement were adopted, it might be helpful to provide expressly that any subsequent variation to, or cancellation of, an agreement

²⁵ As under the Law of Property (Miscellaneous Provisions) Act 1989, s 2, subject to the possibility of rectification by the court or the finding of a collateral contract.

²⁶ See *Chitty on Contracts* (29th ed 2004) para 4-018.

²⁷ Even if that agreement might not otherwise be subject to any comparable formality requirement under the general law.

should also have to satisfy it. This would seem particularly important in so far as the subsequent agreement related to the opt-out, but would also be helpful in so far as it made alternative provision from that originally agreed. There would otherwise be potential for the original agreement, and the certainty it provides, to be undermined by protracted disputes about alleged subsequent conversations and events.

SHOULD AGREEMENTS BE SIGNED?

- 10.65 If an agreement should be written, we think that the parties should each sign the document in order to confirm their agreement to it. We do not think that this would be unduly onerous and it would avoid dispute at a later date.²⁸

SHOULD AGREEMENTS BE WITNESSED?

- 10.66 When two people sign a legal document there is always the risk that one might forge or force the other's signature, or that one might claim that their signature was forged or forced. Some deeds, such as wills, or transfers of land, are witnessed in order to avoid just such potential challenges. The disadvantage of a requirement that agreements be witnessed is that it necessarily exposes the parties' private ordering of their affairs to third parties. Such a requirement might prove to be a deterrent to opting out. However, a requirement of witnessed signatures might help to avoid later challenges about the circumstances in which the agreement was made.
- 10.67 We consider that these three requirements – that the agreement be written, signed and witnessed – have three particular merits. They would offer a degree of certainty both that the parties had in fact considered and agreed to the terms of the document. They would also give the act of opting out a degree of formality which itself drew the parties' attention to the significance of the step that they were taking. But they would also not be expensive to undertake.

SHOULD THE PARTIES MAKE FULL DISCLOSURE OF THEIR ASSETS?

- 10.68 If cohabitants intended to opt out of the statutory scheme, they might reasonably wish to know what assets their partner has before they did so. No professional adviser could be expected to offer an opinion on whether or not an agreement were reasonable unless provided with that information.
- 10.69 However, some couples, keen to keep their finances wholly separate from one another, might find a requirement of full disclosure an unwarranted intrusion. It would be possible to provide that such a requirement would not be necessary for the validity of an agreement, but instead be treated as a relevant circumstance in any later proceedings in which one party sought to set aside the agreement.

ADVICE FROM AN INDEPENDENT THIRD PARTY

- 10.70 There are three levels of advice which could be offered to cohabitants considering whether to make an opt-out agreement, and which could be required as a precondition of the agreement's enforceability:

²⁸ It should at least be necessary for the person against whom the agreement is sought to be enforced to have signed it.

- (1) general advice about the existence of the statutory scheme and the nature of what would be lost if the parties opted out of it;
- (2) general advice on the meaning of an agreement which the parties had written for themselves; and
- (3) specific advice about whether an agreement were appropriate for a particular couple, in light of the remedies potentially available under the statutory scheme.

General advice as to existence of the statutory scheme and the nature of what would be lost by opting out

10.71 It would be highly desirable for general advice to be given as to the existence of the statutory remedies, so that a couple was aware, in very broad terms, of what they were giving up. It would also be possible to offer more detailed advice about the nature of the statutory scheme, the benefits lost, and the burdens avoided, by one or both parties were they to opt out. This advice would not be specifically tailored to the individual couple and could be given by advice agencies rather than by solicitors. However, couples might be disappointed (or misled) by receiving only general advice, rather than more individualised advice as to whether a particular agreement was suitable for them. Moreover, this level of advice would not help the parties be sure that their agreement in fact did what they wanted it to do.

General advice from an independent person as to the meaning of a proposed agreement

10.72 Such advice would enable couples to know that they were signing an agreement which said what they intended (particularly as regards alternative provision made by the agreement, beyond the basic opt-out). The advice could be given by advice agencies, if they felt able to do so. The cost of obtaining such advice would be small. However, this advice would not be concerned with whether the couple were making a good bargain. Again, some couples might erroneously think that the advice they received provided confirmation that the agreement was prudent, even though their adviser had made it clear that this was not the function or nature of the advice given. We are interested in consultees' views on the utility or otherwise of such advice.

Advice as to whether an agreement was appropriate²⁹

10.73 As we have seen above, it is a requirement in some jurisdictions for agreements to be considered by a lawyer, who will give advice at some level (the level varies depending on the jurisdiction) before the parties sign it. Some jurisdictions consider such lawyer-endorsed agreements to be wholly binding, with very few grounds to avoid them. Other jurisdictions allow challenges on certain grounds, notwithstanding that a lawyer has advised.

²⁹ See also para 10.142 below relating to the competence of conveyancers to give advice in connection with opt-out agreements and trusts of land.

- 10.74 Before any adviser can express a view on the adequacy (or otherwise) of the benefits of an agreement to their client they will seek full disclosure from both parties. They will require information about the parties' finances and their intentions and expectations. They will ask the parties to consider their future plans, the potential for life-changing events and how they intend to cope with them.
- 10.75 Giving this level of advice is time-consuming. This is particularly so because lawyers might want to take advice in turn from financial advisers on, say, the valuation of pensions. Conversely, financial advisers retained by the cohabitants would be able to offer advice on the value of proposed benefits but not the legal effect of particular clauses. This means it is inherently expensive and would therefore only be appropriate for, and indeed accessible by, some couples. For those with limited means, the expense would be likely to be out of proportion to their resources.
- 10.76 Another difficulty is that couples might not think of every eventuality which could affect them. If advisers were expected to do so for them, and to provide for every possible alternative in the agreement (with the possibility of a negligence suit if they failed to do so) they would either be forced to pay vast indemnity insurance premiums, the cost of which would be passed on to the client, or they would refuse to undertake the work altogether. Clearly, much would depend here on the extent of the adviser's assumption of responsibility.³⁰
- 10.77 There may therefore be practical problems with solicitors providing independent legal advice. However, we are aware that solicitors do already draft cohabitation contracts and we would like to receive their views on how much work is involved in the process and how far they consider that their duties to the client extend.
- 10.78 Whether or not it were legally required as a precondition for a binding opt-out agreement, where the parties had chosen to receive independent legal advice, we think that the courts should have only a minimal power of review, if any. We are particularly concerned that any agreements made after specific, detailed legal and financial advice should not be susceptible to challenge in the courts save where the agreement was vitiated under the general law, where the parties had failed to comply with any formalities required for opt-out agreements or (perhaps) owing to supervening events. The possibility of this last ground for challenge is discussed below. By contrast, where the parties had not obtained independent legal advice, a wider power of review might be warranted.

³⁰ The experience of New South Wales provides an example of how subjecting legal advisers to too wide an obligation may be unworkable in practice: Review of the Property (Relationships) Act 1984 (NSW) (2002) New South Wales Law Reform Commission Discussion Paper No 44, paras 4.51 to 4.59. The original legislation included a requirement that solicitors advise each party as to whether an agreement was to his or her advantage, "financially or otherwise", and whether it was "prudent ... to sign the agreement". There was concern that this requirement went beyond the scope of solicitors' expertise; their function is to provide legal, rather than financial, advice. The Property (Relationships) Act 1984 was subsequently amended and now requires solicitors to provide "legal advice [relating to] the effect of the agreement ... and the advantages and disadvantages ... of making the agreement": s 47(1)(d), as amended.

10.79 We invite the views of consultees on what qualifying criteria, if any, should be necessary for an opt-out agreement to be binding.

Model opt-out agreements

10.80 By “model agreements” we mean draft agreements or discrete clauses which could be used by cohabitants to formulate their personal opt-out agreements. They would not be mandatory but would assist those wishing to self-regulate to do so without incurring the expense and trouble of instructing a solicitor to draft the agreement. Model agreements might assist parties in complying with whatever qualifying criteria the law imposed, provide some level of general advice, and encourage parties to consider all of the pertinent issues by prompting them appropriately at each stage of the document. Offering a series of standard terms which couples could use without having to instruct a solicitor might help couples to consider how they would deal with potential future situations. They could be accompanied by explanatory booklets and companion websites.³¹

10.81 New Zealand is, to our knowledge, the only jurisdiction which offers a statutory form of model cohabitation contract for the use of cohabitants.³² However, this contract is very basic and as a result is rarely, if ever, used by legal practitioners. We think that if we offered a model agreement it should be sufficiently detailed to be useful to parties, advice agencies, lawyers and financial advisers.

10.82 While it might be helpful for model agreements to be made available, an agreement contained in legislation, even secondary legislation, would be difficult to amend and slow to adapt to changes in society. We do not consider that it should be the first choice method for designing and disseminating a model agreement. There could be a place for model agreements drafted by a group of organisations with specialist knowledge of family law. It was suggested to us that, if it had the resources to do so, the Law Society could co-ordinate and oversee a group comprising members of Resolution, the Family Law Bar Association and others with the ability and experience to draft an agreement of this nature.

10.83 However, all that such an agreement could offer would be the opportunity for couples to word binding agreements that expressed their wishes. It would not offer advice on the suitability or otherwise of such agreements for their individual circumstances. Moreover, couples using such models without the benefit of advice might find that the agreement they made was not the agreement that one or both of them intended. This could be a great drawback to the utility of model agreements.

10.84 We invite the views of consultees on the use of model agreements and how they should be drafted.

³¹ See currently the Advicenow website’s skeleton of issues to be considered in the making of “living together agreements”: <http://www.advicenow.org.uk/go/livingtogether/index.html> (last visited 4 May 2006).

³² Property (Relationships) Act 1976, s 21E. The model agreement was created by the Property (Relationships) Model Form of Agreement Regulations 2001, and is available at http://www.justice.govt.nz/pubs/reports/2001/relation_property/regulations.PDF (last visited 4 May 2006). The purpose of introducing model agreements was “to minimise the legal expenses of those who wish to enter into a cohabitation contract” (s 21(E)(1)).

Grounds for review

- 10.85 We consider here the events or circumstances which might allow a court to set aside an opt-out agreement and make alternative provision on separation or death.

Contracts made between spouses (and civil partners)

- 10.86 In considering the circumstances in which the courts should be entitled to review opt-out agreements, it is useful to begin by examining the position of spouses and civil partners. Their ability to enter into and enforce pre-nuptial agreements and separation agreements is not unfettered, and there is a substantial difference in the treatment of pre-nuptial contracts and agreements made on separation. The law's treatment of these agreement provides a background for our consideration of how a new scheme could treat equivalent agreements made by cohabitants.

PRE-NUPTIAL CONTRACTS

- 10.87 For decades, pre-marital agreements were given no weight in divorce proceedings. They were considered to be contrary to public policy on the ground that they contemplated the dissolution of the marriage.³³ This view is now changing, albeit slowly. Prenuptial agreements are now held to be one of the factors which should be taken into account when a judge considers an application for ancillary relief.³⁴ Recent cases, notably those dealing with short marriages, have given pre-nuptial agreements quite substantial weight in shaping the relief granted, provided that the spouse seeking to depart from the agreement had understood it, had been properly advised as to its terms and had not been put under pressure by the other party to sign it.³⁵ It is significant that in *K v K*, where a child had been born since the marriage, the agreement contemplated the birth of a child and it was held that no unforeseen circumstance had arisen since the agreement was made that would make it unjust to hold the parties to it.³⁶ The case illustrates how agreements can be effectively drafted to deal with subsequent "life-transforming" events.

SEPARATION AGREEMENTS

- 10.88 A separation agreement is an agreement made by spouses in the process of divorcing which sets out how their property and finances should be divided. Separation agreements between spouses have never been viewed as void or contrary to public policy, but the courts have taken the view that parties cannot

³³ *N v N (Jurisdiction: Pre-nuptial Agreement)* [1999] 2 FLR 745; *X v X (Y and Z intervening)* [2002] 1 FLR 508.

³⁴ Under Matrimonial Causes Act 1973, s 25(2)(g). The same approach will probably be taken towards contracts made by civil partners.

³⁵ See for example *S v S (Matrimonial Proceedings: Appropriate Forum)* [1997] 1 WLR 1200; *M v M (Prenuptial Agreement)* [2002] 1 FLR 654; *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120.

³⁶ *K v K (Ancillary Relief: Pre-nuptial Agreement)* [2003] 1 FLR 120. The court upheld the agreement as to its capital provision, but, as the agreement did not touch on the question of maintenance, it felt free to make an order for periodical payments.

wholly oust the jurisdiction of the court by such an agreement.³⁷ If a couple make a separation agreement and, at a later date one party seeks to have it set aside by making an application to court for ancillary relief, that party must show good reason why the agreement should be ignored. It is nevertheless advisable for parties to enshrine their agreement in a consent order, so that it will then be enforceable and may be relied upon like any other court order.

- 10.89 If a party to a separation agreement applies to the court for ancillary relief, the court must consider various factors in deciding what weight to give the agreement. It must consider the conduct of both parties leading up to the agreement, the circumstances surrounding the making of the agreement, the importance that the parties attached to it and the parties' subsequent conduct in consequence of it.³⁸ It must look at the issues of undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, bad legal advice and any important (but unforeseen or overlooked) change of circumstances. The court must be satisfied that it would be unjust and unfair to hold the parties to the agreement.³⁹ In practice, the courts are very reluctant to overturn such agreements, particularly when freely negotiated with full knowledge of the relevant circumstances and made with the benefit of legal advice.⁴⁰

The position of cohabitants compared

- 10.90 One rationale for the restrictions on spouses' contractual freedom and the consequent scope of the court's powers to review pre-nuptial and separation agreements might be found in the legal commitment made by them when they formalise their relationship in marriage. It could be argued that when two people marry or register a civil partnership they effectively opt into an agreement drafted by the state. The "contract" to which they agree prescribes terms relating to their treatment of each other during the relationship and gives each party the right to apply to court for financial relief on dissolution.
- 10.91 Whatever the suitability of this regime for spouses and civil partners, we do not consider that the same level of flexibility may be appropriate for cohabitants who, it can be argued, have a strong claim to retaining greater contractual freedom. Unlike spouses, cohabitants have not positively elected to subject themselves to a particular legal scheme. A new statutory scheme would apply to them by default in order to provide protection to the party in a weaker economic position in consequence of the relationship on separation. Where a couple do not wish their

³⁷ *Wilson v Wilson* (1845) 14 Sim 405, (1848) 1 HLC 538; *Hyman v Hyman* [1929] AC 601.

³⁸ *Edgar v Edgar* [1980] 1 WLR 1410; *G v G (Financial Provision: Separation Agreement)* [2000] 2 FLR 18.

³⁹ *Edgar v Edgar* [1980] 1 WLR 1410, 1417, per Ormrod LJ. See also *Camm v Camm* (1983) 4 FLR 577, where poor legal advice received by the wife, and pressure from the husband's belligerent and uncooperative attitude, resulted in the Court of Appeal increasing the level of the wife's periodical payments contained in the parties' separation agreement. In *B v B (Consent Order: Variation)* [1995] 1 FLR 9, bad legal advice resulted in the court increasing the wife's periodic payments under a consent order.

⁴⁰ *Smith v McInerney* [1994] 2 FLR 1077; *X v X (Y and Z Intervening)* [2002] 1 FLR 508, at [103], where Munby J refused to vary a separation agreement because the wife had received legal advice and there was no inequality of bargaining power.

relationship to be subject to that scheme, we consider it important that they should have a meaningful opportunity to avoid it by agreement. We think it important that any opportunity for the court to review the agreement and set it aside should therefore be limited clearly by statute, particularly if onerous qualifying criteria had been satisfied at the point of making the agreement.

Comparative survey

10.92 It is again instructive to consider how other jurisdictions have dealt with the enforcement of opt-out agreements.

10.93 In New South Wales,⁴¹ a cohabitation contract (that is to say, an agreement made before or during cohabitation) will not be enforced if:

- (1) the circumstances of the parties have so changed that enforcement would lead to serious injustice;⁴² or
- (2) if the parties have, by their words or conduct, revoked or consented to the revocation of the agreement, or that the agreement has otherwise ceased to have effect.⁴³

This involves a consideration of the conduct of the parties and the circumstances following the date when the contract was entered into.⁴⁴

10.94 The New Zealand courts have a wider jurisdiction, not limited to subsequent events.⁴⁵ A court may set aside an agreement⁴⁶ “if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice”.⁴⁷ In so determining, the court is instructed to have regard to:⁴⁸

- (1) the provisions of the agreement;
- (2) the length of time since the agreement was made;
- (3) whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made;

⁴¹ Formalities for making binding cohabitation contracts in New South Wales are described at para 10.54.

⁴² Property (Relationships) Act (New South Wales) 1984, s 49(1). This provision applies to separation contracts in the same way that it applies to cohabitation contracts.

⁴³ Property (Relationships) Act (New South Wales) 1984, s 50. A separation contract (an agreement made in contemplation of separation, or after separation) cannot be rendered unenforceable on this ground.

⁴⁴ See also De Facto Relationships Act 1991 (Northern Territory), s 46(2).

⁴⁵ Similar approaches are taken in Sweden (Cohabitees Act 2003, s 9) and in Canada (see for example Family Law Act (Ontario) 1990, s 56(4) and Marital Property Act 1980 (New Brunswick), s 41(b)).

⁴⁶ Formalities for making binding cohabitation contracts in New Zealand are described at para 10.52.

⁴⁷ Property (Relationships) Act 1976, s 21J(1).

⁴⁸ Property (Relationships) Act 1976, s 21J(4).

- (4) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties);
- (5) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement; and
- (6) any other matters that the court considers relevant.

10.95 In the case of an agreement about the outcome on death, whether the estate of the deceased spouse or *de facto* partner has been wholly or partly distributed.⁴⁹

10.96 The “serious injustice” standard was introduced in 2001 in place of a simple “unfairness” standard. The legislative intent was to raise the threshold for court intervention and to give more weight to contractual certainty. The New Zealand courts have responded to this change and now exercise their power to set aside agreements very restrictively.⁵⁰

What grounds for review should we adopt?

10.97 There will always be cases when the courts must intervene to overturn an agreement, even if they are only occasions when the agreement is vitiated on grounds recognised by the general law or for failure to comply with any additional formalities that might be required. Some would argue that the law should go no further, even in relation to agreements made years before they come to be enforced.⁵¹ Careful consideration must be given before any greater power of review is introduced.

10.98 It is difficult to achieve a proper balance here. On the one hand, it is important to respect the parties’ autonomy. To intervene and to review their agreements too readily may undermine the confidence of cohabitants in the integrity of opt-out agreements and as a result provide insufficiently strong incentives to self-regulate. There is a premium on certainty. Offering an opt-out which could be reviewed by the courts in almost every case would be offering only an illusory freedom to contract out.

10.99 On the other hand, it is important to protect the vulnerable and to take adequate account of the inherent difficulty of providing for future events. The process must be fair and just. We reiterate the proposition we put forward in paragraph 10.46: that the more formalities were required before an agreement was made, the less opportunity there should be for overturning it at a later date.

10.100 It is important to contrast the treatment of agreements reached at the point of separation, and those concluded at the outset of cohabitation, possibly many years before a subsequent separation or death. The grounds for review of the

⁴⁹ Property (Relationships) Act 1976, s 21J(5). (Although the courts have the power to overturn such contracts, they are usually unimpeachable on the grounds of public policy: see Butterworths, *Family Law in New Zealand* (11th ed 2003) para 7.207.

⁵⁰ *C v S* [2004] NZFLR 546; *Harrison v Harrison* [2005] NZFLR 252.

⁵¹ R Deech, “The Case Against Legal Recognition of Cohabitation” (1980) 29 *International and Comparative Law Quarterly* 480, at 496.

former category of agreement should be extremely limited, and may perhaps be confined to grounds available under the general law and failure to comply with any qualifying criteria.⁵² The latter arguably raise more difficult issues. The passage of time, possibly of many years, between the agreement being made and the moment of its enforcement, and events occurring in that intervening period, may have rendered an agreement that was perfectly fair at the time it was made grossly unfair at the time it is sought to be enforced.

OVERTURNING ON THE GROUNDS PROVIDED BY THE GENERAL LAW

- 10.101 Opt-in agreements would be subject to the general law and would therefore be susceptible to challenge on the grounds of fraud, duress, undue influence, misrepresentation, mistake and so on. Agreements could also (though very rarely) be rendered unenforceable by events outside the control of the parties under the doctrine of frustration.⁵³

REVOCAION BY CONDUCT

- 10.102 We have suggested that any formalities required for agreements' creation should also be observed on its variation or revocation. However, there may also be cases where the parties have, by their own conduct, effectively revoked the agreement (for example, if the parties agreed that they would hold their assets separately but then intermingled them completely). In such circumstances, the agreement should not stand.⁵⁴

FAILURE TO OBSERVE QUALIFYING CRITERIA

- 10.103 If an agreement had been made which did not comply with any formalities or other qualifying criteria that were required by statute in order for an opt-out agreement to be binding, it would not bind the parties. However, such an agreement would not have to be completely ignored. In the Northern Territory of Australia, a "formal agreement" is enforceable provided that it is in writing and signed. If the parties omit these basic formalities, they will be considered to have made a "basic agreement". Such basic agreements are not enforceable if subsequently disavowed by one party, but they are a matter for the court to

⁵² See, for example, the position in New South Wales (para 10.93). A cohabitation contract can be made before or during a relationship, and a separation contract can be made after separation, or in contemplation of separation. The terms of both can be ignored if the parties did not comply with the prescribed formalities or if they revoked the contract (by words or conduct). However, only cohabitation contracts (and not separation contracts) can be varied on the substantive ground that the parties' circumstances have so changed that enforcement of the agreement would result in "serious injustice".

⁵³ The narrowness of the doctrine of frustration may be avoided, where the wording of the agreement permits, by the device of construing the contract in such a way that it does not apply at all to the problem that has arisen. It would not, however, be safe to rely on this device as a cure for the limitations of the doctrine of frustration in dealing with cohabitants' agreements.

⁵⁴ See *Sykes v Sykes* (1979) FLC 90-652, an Australian family case dealing with a pre-marital agreement which the courts deemed to have been terminated by implied agreement because the parties had acted contrary to its terms over a long period and with a substantial asset or series of assets.

consider when adjudicating on cohabitants' respective shares of their joint asset pool.⁵⁵

- 10.104 For example, suppose that in our case in paragraph 10.14 Y had made it clear to Z as a condition of Z moving in that Z should have no claim against Y in the event of separation, and Z had implicitly accepted this term by moving in. That agreement did not comply with the requisite formalities. However, it might be proper for the court to take the parties' implicit agreement into account when deciding what order, if any, it would be fair to make in all the circumstances.
- 10.105 However, to allow informal agreements to have any potential significance to the court's deliberations might undermine much of the certainty that formalities are designed to create and invite the sort of protracted forensic inquiry that we are seeking to avoid. If such agreements were to have any weight, then in our view the higher the level of adherence to the formalities and the greater the level of advice received, the more weight the judge should give to the agreement. It would be one thing to take account of a signed, written, witnessed agreement which failed to satisfy the qualifying criteria only for want of relevant legal advice (if such advice were required for the agreement to be binding), but quite another to encourage evidence of oral agreements to be given.
- 10.106 We invite the views of consultees on the significance, if any, to be attached to agreements which did not comply with the qualifying criteria required for agreements to be binding.**

SUPERVENING EVENTS

- 10.107 We consider that the most likely reason for an applicant wishing to overturn an opt-out agreement would be the occurrence of an event subsequent to the making of the agreement which had not been anticipated by the couple when the agreement was made. If a couple's agreement had anticipated the eventuality in question and catered for it, then it should not be open to either of them later to seek to set aside the agreement if that eventuality indeed arose.
- 10.108 This is an issue which would, in practice, usually apply only in relation to agreements made before or during the parties' relationship. Separation agreements would rarely, if at all, be susceptible to being reopened as a result of subsequent events for two reasons:
- (1) unlike agreements made at the outset of cohabitation, agreements reached at the point of separation would be performed shortly after they were made, leaving little opportunity for anything to supervene; and
 - (2) the restrictive limitation period for claims to be made under the new statutory scheme would itself prevent many cases from coming to court after the agreement had been reached.⁵⁶

⁵⁵ De Facto Relationships Act 1991 (Northern Territory), s 45(2).

⁵⁶ See para 11.72.

Birth of a child

- 10.109 It may be that the terms of the agreement should be susceptible to review if the parties had a child together. However, using the birth of a child as an automatic ground for substantive review in all cases might be inappropriate because so many cohabitants have children; few agreements would stand. It might, in effect, make the offer of the opportunity to opt out largely illusory.
- 10.110 We consider, therefore, that any such ground of review should only apply in situations where the parties' agreement had not contemplated and made provision for the adult parties in the event that a child were born. If the parties had thought about how they should deal with that situation, it would seem oppressive for the court to intervene.

Marriage of the parties to each other

- 10.111 If cohabitants married or formed a civil partnership they would exchange the private ordering that they had effected through an opt-out agreement for the "public ordering" of marriage, which currently restricts the parties' freedom to contract in this way and is likely to revoke any will that either party has made.⁵⁷ We consider, therefore, that opt-out agreements should cease to be binding if the parties marry or become civil partners, but should instead be taken into account by the court as if they were pre-nuptial contracts.⁵⁸

Grave and unforeseen change of circumstances

- 10.112 We do not consider that the mere effluxion of time should be sufficient to allow the reopening of an agreement. Save where one of the specified events of the sort contemplated above had occurred (birth of a child or the parties' marriage), it seems to us that the court should only have a power to intervene, if at all, on proof that some other grave and unforeseen (or, more restrictively, unforeseeable) change of circumstances had occurred in that period.

Dealing with the effluxion of time: sunset clauses

- 10.113 Any agreement made between a cohabiting couple before or during their relationship is likely to become less relevant to the parties' circumstances with the passage of time. It is important that they keep this in mind, and update it at regular intervals.
- 10.114 One way of encouraging parties to ensure that their agreement remains suitable would involve the use of sunset clauses. The law could insist that sunset clauses be placed in every cohabitation agreement, by providing generally that no agreement could last beyond a specified period or that it would be ended by a specific event. This would ensure that couples continued to keep in mind their agreement and the need to update it by giving agreements a limited shelf-life; that is, they would end after a particular period or on the occurrence of a particular event. If the parties failed to reaffirm the agreement's terms or to

⁵⁷ Wills Act 1837, s 18.

⁵⁸ If the contract were made long before marriage was even contemplated, the court might be inclined to give it less weight than one made immediately prior to the marriage in light of the circumstances then existing.

renegotiate them, the agreement would lapse and the statutory scheme would apply if the parties separated.

10.115 The New South Wales Law Reform Commission considered the utility of sunset clauses in its Review of the Property (Relationships) Act 1984 (New South Wales).⁵⁹ It concluded that the disadvantages associated with them outweighed their potential benefits. These disadvantages included the increased legal costs for obtaining advice on each agreement and the cost of renegotiating the agreement. To this we would add that we could envisage problems in ensuring that couples took the necessary action at the appropriate time in order to revise the agreement. Sunset clauses could be exploited by an unscrupulous partner who could wait until the agreement had lapsed and then make a claim under the (more advantageous) default scheme. The New South Wales Law Reform Commission also noted that no other document, such as a will, which deals with an individual's property becomes unenforceable due to the passage of time. It concluded that sunset clauses would be useful in agreements which dealt with particular assets, since those assets might be sold and the agreement would then lapse, but that they would be less useful in cases where the couple had agreed the proportion of assets that each party would receive in the event of separation.

10.116 We think that a statutory provision requiring the use of sunset clauses in every case would be unwieldy and unhelpful, and too much of an imposition on those whose circumstances may be such that no review is necessary. We therefore consider that this issue would better be dealt with privately, by the optional insertion of such a clause into cohabitation agreements tailored to the parties' individual circumstances. For example, the birth of a child might be made the subject of such a clause, rather than the parties making express provision to deal with the eventuality at the outset.

10.117 We invite the views of consultees on the potential role of “sunset clauses”.

An alternative or additional requirement of manifest injustice?

10.118 In New Zealand and certain states in Australia,⁶⁰ a cohabitation agreement may be set aside on the grounds that it would cause serious injustice to one or other party if it were enforced. In other Australian states,⁶¹ the court has the right to vary an agreement if, since its making, the circumstances of the parties have so changed that it would lead to serious injustice to enforce the original agreement. In Sweden, a cohabitation contract may be set aside if it is “unreasonable”.⁶²

⁵⁹ Review of the Property (Relationships) Act 1984 (NSW) (2002) New South Wales Law Reform Commission Discussion Paper No 44, para 4.119-4.121.

⁶⁰ Including the Northern Territory, Queensland, the Australian Capital Territory and, unless the parties have contracted out of the provision, South Australia.

⁶¹ New South Wales, Tasmania and Western Australia.

⁶² Cohabitees Act 2003, s 9.

10.119 There are two distinct issues here:

- (1) whether an agreement that is, on the face of it, manifestly unjust should be set aside by the court simply because of that injustice – that is, should manifest injustice be a ground for setting aside an agreement?
- (2) whether any subsequent and supervening event following the making of an agreement should only lead to the agreement being set aside if, as a result of that event, it would be manifestly unjust to enforce the agreement.

10.120 We invite the views of consultees as to what circumstances, if any, should permit the courts to set aside the terms of an otherwise binding opt-out agreement. In particular, we seek consultees' views on the following:

- (1) **whether the court's powers to set aside an agreement should be limited to the grounds for setting aside contracts under the general law and failure to comply with qualifying criteria;**
- (2) **if other grounds should be included, whether these should relate to:**
 - (a) **events or circumstances at the time of the making of the agreement;**
 - (b) **subsequent, supervening events or circumstances;**
 - (c) **in either case, should legislation identify particular events having that effect and, if so, what should they be? Or should they be defined generically and, if so, how?**
 - (d) **in either case, ought the court to have the power to set aside terms of the agreement simply on the ground that a relevant event occurred? Or ought the court's power to intervene be limited, for example, to situations where, in light of the specified event, enforcement of the agreement would result in manifest injustice to either party?**
- (3) **whether any formal distinction should be drawn between agreements made at the point of separation and those made earlier.**

Result of an agreement being set aside

10.121 If a ground for review justifying the court's intervention were established, it may not be necessary for the entirety of the opt-out agreement to be rendered unenforceable. The agreement might deal appropriately with some assets but not with others. The court would then be faced with the problem of whether to implement those terms which still appeared fair, or whether to overturn the entire agreement and consider the parties' financial affairs afresh.

10.122 It is tempting to suggest that the former option should be applied in all cases. This would have the advantage of allowing the parties to retain their autonomy as far as possible. However, it is possible to envisage circumstances in which

allowing part of the agreement to stand would give the court insufficient leeway to make an appropriate order.

10.123 We invite the views of consultees on how the court should proceed where an otherwise binding opt-out agreement has been set aside:

- (1) ought the court to have the power, where possible, to sever those terms affected by the vitiating circumstances, exercise its adjustive jurisdiction in relation to the issues covered in that area of the agreement, but otherwise enforce the agreement? or**
- (2) ought the agreement to fall entirely, leaving the court to exercise its jurisdiction without any limitation by the agreement, but having regard, where appropriate, to its terms?**

THE STATUS OF EXPRESS DECLARATIONS OF TRUST

10.124 We must give separate consideration to the status of express trusts, and in particular express trusts of land, made by parties contemplating cohabitation or by those who are already cohabiting. Ought such trusts, if executed by both parties,⁶³ constitute an opt-out from any new statutory scheme in respect of the asset over which the trusts are declared?

10.125 Currently, declarations of trust are used by cohabitants as a means of fixing their respective shares in assets purchased either in joint names or in the name of one cohabitant only. Such express declarations of trust will create immediately vested proprietary interests in possession. In the absence of any statutory scheme providing financial relief, these trusts currently determine how the parties' property will be divided in the event of separation.⁶⁴ Such division will be in accordance with the shares that they own as a matter of property law pursuant to the declaration of trust.

10.126 Members of the judiciary⁶⁵ have exhorted cohabitants to make express declarations of trust in order to reduce the number of cases where claimants are compelled to rely upon implied trusts or proprietary estoppel. As we noted in Part 3, new Land Registry rules in fact now make it compulsory for joint purchasers to declare the trusts on which property is held.

10.127 However, we need to consider the position as it would be were a new statutory scheme providing financial relief on separation created, and were cohabitants permitted to opt out of the Inheritance (Provision for Family and Dependents) Act 1975. We shall discuss in Part 11 the retrospective impact of any new scheme, which will be particularly relevant to those who will have executed express trusts prior to the implementation of any new statutory scheme and done so on the

⁶³ Trusts involving third parties presumably should be excluded.

⁶⁴ On death, the trust defines (and would continue to define for the purposes of a new scheme) the extent to which the asset falls within the deceased's estate or is the property of the survivor, but currently does not of itself exclude the survivor from making a claim under the Inheritance (Provision for Family and Dependents) Act 1975.

⁶⁵ See Part 3, n 14.

basis that they will determine what happens on separation.⁶⁶ Here, we consider the relevance of express trusts declared after the coming into force any new scheme.

- 10.128 If the effect of a jointly declared express trust were to opt out of any new scheme in relation to the trust property, it would have to be subject to the same qualifying criteria and susceptible to the same grounds of challenge as any other opt-out agreement. In order to avoid protracted litigation about the juridical nature of a particular agreement between cohabitants (and therefore about the required formalities, and possible grounds for review), we must consider whether a trust should be treated as an opt-out for the purposes of a new statutory scheme.
- 10.129 Clearly, for a trust to operate as an opt-out, both cohabitants would have to be party to it; unilateral declarations of trust could not oust the scheme unless accompanied by a separate opt-out agreement. But whether the trust should, itself, be treated as an opt-out under the scheme is a difficult issue.

The scope of any opt-out created by a trust

- 10.130 There are at least two ways in which the scope of an opt-out created by a trust could be treated. First, and most broadly, if an express trust concerning the ownership of a particular asset were treated as an opt-out, it could be treated as having the effect of excluding the new scheme entirely in relation to that asset and/or its value.
- 10.131 Alternatively, an express trust could be given much narrower significance, quite different from ordinary opt-out agreements. The scheme could provide that the existence of the express trust should bar an applicant only (and very specifically) from making an economic advantage claim in relation to the respondent's share under the trust on the basis that the applicant had in fact made greater financial contributions to the acquisition of that trust property than were reflected in his or her own share.⁶⁷ The trust property could otherwise remain available to meet claims arising from other contributions to the parties' relationship generally, whether they involved other forms of economic advantage or economic disadvantage.⁶⁸
- 10.132 This difference of approach has significant implications for the discussion which follows.

⁶⁶ See para 11.85.

⁶⁷ The classic *Goodman v Gallant* situation: [1986] Fam 106. Though, by analogy with the remedy of equitable accounting, a claim for economic advantage in respect of such payments made during the relationship could remain tenable where the respondent had failed to honour an agreement to pay a certain proportion of the mortgage payments, with the result that the applicant had paid more than had been agreed. The same would apply with regard to any payments made following separation but before final settlement of the claim for financial relief were reached. See generally *Clarke v Harlowe* [2005] EWHC 3062 (Ch), [2005] WTLR 1482.

⁶⁸ At para 7.37, we discuss this issue in relation to the practical operation of a new scheme .

Different types of trust

Trusts of land

ARGUMENTS AGAINST TREATING EXPRESS TRUSTS OF LAND AS OPT-OUTS

- 10.133 Any opt-out from the scheme should be made voluntarily. The problem with many trusts of land in this regard is that the parties have no choice but to make them. If land is purchased by more than one person, the Land Registry now requires purchasers to state how they wish to hold the property beneficially to enable the Registrar to enter a Form A Restriction.⁶⁹
- 10.134 If trusts of land were treated as binding opt-outs, then all couples who bought property jointly would be taken to have opted out of the new scheme in respect of that property. However, given the Land Registry's requirement of an express trust, it would be impossible to be sure (simply on the basis of a trust of land having been declared) that the parties intended such a trust to operate as a mechanism to divide their property on separation, to the exclusion of the statutory scheme.
- 10.135 If a trust were treated as an opt-out, but the parties nevertheless wanted the statutory scheme to apply to them on separation, they would effectively be required to opt back into the new scheme. This might seem unduly cumbersome, onerous and potentially expensive. More seriously, it would significantly undercut the policy underpinning an opt-out scheme; it would automatically deprive the economically weaker party of the protection which the scheme was intended to provide and it would do so in relation to what is likely to be the parties' most valuable asset. The potentially weaker party would then have to persuade the other party either to opt back in or to agree to hold the property in shares that were favourable to the weaker party.⁷⁰
- 10.136 It seems to us, therefore, that there is a very strong argument for saying that a trust of land executed in these circumstances ought not by itself to be treated as an opt-out. If the parties wished to opt out, and to do so in the same terms as those in the declaration of trust, they should be required to make a separate agreement to that effect, or to ensure that the terms of the trust itself made it clear that it was intended to have that effect.
- 10.137 However, this does depend on the scope of the opt-out, as discussed at paragraph 10.130 above. The concerns expressed here would be of far less weight were the trust only to preclude an economic advantage claim relating to the parties' contributions to the acquisition of the trust property.

⁶⁹ The information is required under the provisions of the Land Registration Act 2002, s 44(1), and the Land Registration Rules 2003, r 95(2)(a). It must be given on Form FR1 in the case of first registration, and on Form TR1 in the case of a transfer of registered land.

⁷⁰ At this point, the relative inflexibility of a trust, and the difficulty of predicting the future and so what might be a fair outcome at the point of separation or death may make agreement difficult. To give one party a larger share of the beneficial title now (larger than would have been justified in view of the financial contributions being made by that party to the acquisition of the property and so than might otherwise have been chosen) just in case a larger share would achieve a fairer distribution on future separation may seem unduly generous. But it is very hard to predict what might prove appropriate.

ARGUMENTS IN FAVOUR OF TREATING EXPRESS TRUSTS OF LAND AS OPT-OUTS

- 10.138 There are arguments the other way which may be felt to be particularly strong if the opt-out were confined in the way discussed at paragraph 10.131. Currently, express declarations of trust provide certainty for cohabitants on separation.⁷¹ Removing that certainty could lead to numerous cases being brought to court as parties made claims in the hope that they would be paid something for “nuisance value” by their former partners.
- 10.139 Moreover, if trusts could not in themselves be treated as opt-outs, those couples who did want the terms of the trust to determine property division and financial provision on separation or death would have to make a separate agreement to achieve their aim. The process of both executing a deed of trust and drawing up an opt-out agreement might be considered cumbersome, onerous and be potentially expensive (though no more so, and possibly less so, than the “opt-back-in” requirement discussed at paragraph 10.135).
- 10.140 We have already discussed the formality requirements for opt-out agreements in general terms. If trusts were treated as opt-outs, certain safeguards could be put in place to ensure that parties understood what they were doing. Parties could be advised at the time of purchase that, unless they subsequently made a mutual variation of the trust deed, they would be bound by the terms of the trust in the event of separation or death. This would effectively force the parties to consider how they wished to deal with their largest asset should they separate and so encourage couples to take responsibility for their own situation (though, as we noted above, this may be counterproductive for the potentially weaker party). It might reduce the number of cases between cohabitants which went to court, since their greatest asset would be divided on the basis of the trust.
- 10.141 This raises important issues about the advice that would be given to cohabitants when they purchased property were a new statutory scheme created, whether or not the trust were itself treated as an opt-out.

ADVISING ON TRUSTS OF LAND ALONGSIDE A NEW SCHEME

- 10.142 At present, a conveyancing solicitor dealing with the transfer of a property to cohabitants advises them both on the issue of beneficial interests and the distinction between joint tenancies and tenancies in common. Solicitors are allowed to advise both parties in this way on the basis that a trust deed is a non-contentious document.
- 10.143 Whatever the current position may be regarding trust deeds, an opt-out from any new scheme by its nature would clearly be contentious. It would entail the parties giving up rights to apply for financial relief under a new scheme. It might often be apparent which party was likely to be the one who would be disadvantaged by the opt-out. If a joint declaration of trust were to be treated as an opt-out (certainly if it constituted an entire opt-out in relation to the property) it would

⁷¹ Though not on death, where, although the trust will determine what falls within the estate, a claim by the survivor under the Inheritance (Provision for Family and Dependents) Act 1975 remains possible.

become a contentious document.⁷² It could be argued that whether or not it were a requirement of the trust's validity as an opt-out,⁷³ both parties should receive separate legal advice before agreeing to the trust's terms. It is therefore necessary to consider what level of advice cohabitants would require on executing such trusts. This has important implications for conveyancers, particularly if express trusts of land were themselves to be treated as opt-outs. We are keen to receive the views of conveyancers about what sort of advice they would be able to provide.

Other express trusts

- 10.144 In the case of other trusts, where the parties do not declare the trust pursuant to a statutory requirement that they do so, different considerations may arise. Here, at least, the parties would have chosen to declare the trust. However, it may not be safe to assume from the mere fact of the trust's having been declared that the parties intended thereby to oust the statutory scheme (certainly entirely, as discussed at paragraph 10.130. Other motives might lie behind the trust being executed; for example, simply as a device to hold property or for tax planning purposes.
- 10.145 As in the land context, we could not be sure from the mere fact of the trust's having been executed that the parties intended that the trust should govern the destination of the property on separation and death, to the exclusion of the statutory scheme. Unless it were clear either from the face of the trust or from the surrounding circumstances that the parties intended to oust the scheme, we could not safely treat trusts as opt-outs. Again, therefore, it might be desirable either for some separate document to be executed, setting out the opt-out agreement, or for an explicit statement to be made on the face of the trust deed to the effect that the operation of the scheme was to be excluded either generally or in relation to the trust property.
- 10.146 We invite the views of consultees on whether an express trust declared by both cohabitants should be treated in any circumstances as an opt-out, or whether the court should have the power to override such trusts when providing financial relief on separation or death.**
- 10.147 If consultees consider that an express trust itself ought not to be treated as an opt-out, we invite views on how the arrangement of property pursuant to such a trust could, if the parties desired, be transposed into an opt-out agreement that would apply on separation or death.**
- 10.148 If consultees consider that an express trust ought to be treated as an opt-out, we invite views on whether those advising purchasers (whether they are solicitors, licensed conveyancers or other advisers) about express trusts of land should be able to advise both parties about the effect of the declaration of trust, and about any aspect of the statutory scheme and the right to opt out.**

⁷² If it only precluded the making of claims regarding contributions to the acquisition of the property, the position would arguably be no different from now.

⁷³ See paras 10.70 to 10.78 above.

OPT-IN BY AGREEMENT?

- 10.149 Throughout this Part, we have considered the issue of opting out of a statutory scheme. It might also be possible to use agreement in limited cases as a mechanism for opting in. We have already raised that possibility in a rather specific context in our discussion of trusts, in so far as express declarations of trust were automatically treated as opt-outs, effectively requiring those who wished to do so to opt back in.⁷⁴
- 10.150 However, it has been suggested that there might also be a place for opt-in agreements in relation to couples who, although cohabiting in the required sense, were not eligible to apply under a new statutory scheme, for example because they had not lived together for any minimum period or had not had children (if such facts were set as eligibility requirements), but who nevertheless wished to be subject to the scheme. It would be possible to permit such couples to opt in by agreement, thereby allowing them, in the event that their relationship founders and they are unable to agree the terms on which they will separate, to take the issue to the family courts and to be dealt with under the statutory scheme. In so far as a minimum duration requirement would function as a measure of the parties' commitment, effectively making that a precondition of the claim, there is a case to be made for allowing parties to make their commitment clear at an earlier point by agreeing that they wish to be subject to the scheme.
- 10.151 We invite the views of consultees on whether cohabitants who would otherwise not be eligible to apply, having not satisfied any minimum duration requirement or had children, should be entitled in any circumstances to opt in to the statutory scheme by agreement.**

⁷⁴ Para 10.135.

PART 11

PROCEDURE, JURISDICTION AND OTHER ISSUES

INTRODUCTION

- 11.1 In the course of this Consultation Paper we have explained the deficiencies of the current substantive law applying between cohabitants on the termination of a relationship by separation, in particular. In Parts 5 to 7, 9 and 10, we have set out questions designed to elicit opinions on the design of a statutory scheme whereby, subject to the parties opting out, claims could be made on separation. In Part 8, we have provisionally proposed consequential reform of existing remedies for cohabitants under the Inheritance (Provision for Family and Dependents) Act 1975.
- 11.2 In this Part, we consider in outline what we perceive to be the procedural implications of a new scheme for financial relief on separation, and in particular how it would fit within existing procedural structures.¹
- 11.3 We have been guided by the conviction that any new system should be readily accessible to all those who would be likely to derive benefit from it, and readily comprehensible to all those whom it would be likely to affect. It should be:
- (1) fair;
 - (2) transparent;
 - (3) straightforward; and
 - (4) cost-sensitive – that is, proportionate to the assets at stake.

PROCEDURAL ISSUES RELATING TO THE SEPARATION SCHEME

Family proceedings

- 11.4 We are strongly of the view that claims pursuant to a new scheme should be characterised as family proceedings rather than as civil proceedings. They should be heard in the family courts, and the procedure should be governed by the Family Proceedings Rules.
- 11.5 Although we are keen to see any new remedy given a simple, case-managed procedure, it is not for the Law Commission to propose new forms or court rules. This is properly a matter for the Family Procedure Rule Committee.
- 11.6 The Family Proceedings Rules (the Rules) have an overriding objective (applicable to ancillary relief claims) of enabling the court to deal with cases

¹ Claims on death would continue to be subject to the procedural and other rules applying to claims under the Inheritance (Provision for Family and Dependents) Act 1975.

justly.² Subject to the views of the Family Procedure Rule Committee, we would seek to advance a similar objective in relation to our proposed separation scheme.

- 11.7 The Rules define “dealing with a case justly” in ancillary relief proceedings as including, so far as is practicable -
- (a) ensuring that the parties are on an equal footing;
 - (b) saving expense;
 - (c) dealing with the case in ways which are proportionate -
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
 - (d) ensuring that it is dealt with expeditiously and fairly; and
 - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.³

11.8 We hope that any new scheme would alleviate the present problems faced by cohabitants whose family disputes may currently form the subject matter of several different cases heard in different courts by different benches. These separate hearings often result in an unnecessary duplication of work.

The court

- 11.9 The first issue is the level of court that would be appropriate to hear claims brought under the statutory separation scheme.
- 11.10 Three levels of court routinely hear family cases at first instance: the family proceedings court, the county court and the High Court. On 1 April 2005, following the recommendations of the Auld Review⁴ the Magistrates Courts Service became part of Her Majesty's Courts Service. This linked the administration of magistrates', Crown, county and Supreme Courts for the first time. Family proceedings courts, which are part of the magistrates' courts structure, became subject to the same administration as the High Court and county courts.

² Family Proceedings Rules, r 2.51D(1), originally inserted by the Family Proceedings (Amendment No 2) Rules, SI 1999 No 3491.

³ Family Proceedings Rules, r 2.51D(2), inserted by the Family Proceedings (Amendment No 2) Rules, SI 1999 No 3491.

⁴ Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001). Available at <http://www.criminal-courts-review.org.uk/ccr-00.htm> (last visited 4 May 2006).

- 11.11 This unification has lent strength to proposals for a unified family court system including all three tiers of family courts. Proposals for unification have been put forward by various organisations (including the Law Society,⁵ Resolution (formerly the Solicitors Family Law Association),⁶ and more recently by the Family Law Bar Association,⁷ by the Association of District Judges⁸ and by Dame Elizabeth Butler-Sloss,⁹ the former President of the Family Division). The Department for Constitutional Affairs is keen to consider such plans and to ensure that cases are heard at appropriate levels, and has recently consulted on the question.¹⁰
- 11.12 Various suggestions for the method of unification have been made. One proposal, which has been proposed by the Department for Constitutional Affairs among others, is to introduce a “gatekeeper” process whereby after proceedings are issued, different cases are categorised and allocated by (in many instances) a district judge to the most appropriate level of court. The present discussion section should be read with this background in mind.
- 11.13 The family proceedings court currently has a limited role in relation to financial disputes between cohabitants. Property disputes brought under the Trusts of Land and Appointment of Trustees Act 1996 or under the general law of trusts are heard (depending on the complexity of the case and the amount at stake) either in the county court or the High Court. If the amounts involved are small, the family proceedings court has power to hear applications for maintenance of a child or for capital provision under Schedule 1 to the Children Act 1989. However, the majority of such claims are heard in the county court, and a small number in the High Court.
- 11.14 Jurisdiction to hear claims for ancillary relief on divorce (under Part II of the Matrimonial Causes Act 1973) is vested in the county court and the High Court. The large majority of these claims are heard by district judges sitting in the county

⁵ The Law Society’s Family Law Committee first called for the establishment of a unified family court in *A Better Way Out* (1979). Since then it has supported various initiatives for reform of the family court system including the Family Courts Campaign (later merged with the National Council for Family Proceedings).

⁶ Solicitors Family Law Association, *Proposals for a Unified Family Court* (1992). Since this paper was published, Resolution (formerly the Solicitors Family Law Association) has supported various initiatives for reform of the family court system including the Family Courts Campaign (later merged with the National Council for Family Proceedings).

⁷ Informal discussions with members of the judiciary in 2004.

⁸ Association of District Judges, *A Vision for the Future* (2004). The proposals for the future of the family justice system suggested a unified scheme with a gatekeeper judge in children law cases.

⁹ Guidance issued by the President of the Family Division, *The Private Law Programme* (2004) pp 6-7, where the President refers to the identification of gatekeeper judges to transfer cases to the appropriate level of court in private children law cases.

¹⁰ Department for Constitutional Affairs, *Focusing judicial resources appropriately: The Right Judge for the Right Case* (2005) Consultation Paper No 25/05.

court or in the Principal Registry of the Family Division. As a result they have an unrivalled expertise in the exercise of the jurisdiction.¹¹

11.15 A claim under any new scheme for financial relief on separation which we are provisionally proposing would place similar demands on the court as a claim for ancillary relief. Most applicants, we envisage, would be seeking capital provision by way of lump sum payment or transfer of property. We would anticipate that orders for periodical payments would be made in relatively few cases. There would be many cases where an applicant would bring proceedings for financial relief both under the separation scheme and under Schedule 1 to the Children Act 1989, and such proceedings should be joined and heard together. The family proceedings court is only authorised to make lump sum orders in Schedule 1 proceedings of up to £1000. We are therefore of the view that it would be sensible that separation claims should be heard for the most part in the county court, with the potential for complex cases to be heard in the High Court.

11.16 Subject to any reforms to the court structure as it applies to family cases, we provisionally propose that claims under a new scheme for financial relief on separation should be heard in the county court or the High Court. Do consultees agree?

The process

11.17 There are several issues concerning the court process on which we would welcome views. Although all have relevance beyond remedies on separation, they would impact upon our proposed scheme and therefore come within the scope of the consultation.

Procedural rules

11.18 We have already expressed the view that claims for financial relief should be characterised as family proceedings, that the Family Proceedings Rules should therefore be applicable, and that it should be the responsibility of the Family Procedure Rule Committee to promulgate the relevant forms. It would be necessary for the parties to provide and to exchange information about their respective finances so that the court has the relevant material on which to act, and the ancillary relief process is the obvious model to consider.

11.19 Parties in ancillary relief hearings usually give disclosure of their financial position on a standard court form, Form E.¹² We are aware that completion of Form E is a lengthy exercise, and it may be that a simpler form would be desirable for some cohabitants' claims. It would be necessary also to consider the likelihood of such claims being joined with claims under Schedule 1 to the Children Act 1989 which

¹¹ It is currently rare for the Family Proceedings Court to hear an application for maintenance for a spouse or civil partner under the Domestic Proceedings and Magistrates' Courts Act 1978, although it can make orders for periodical payments and lump sums up to £1,000 on proof of desertion. Likewise the county courts' jurisdiction under the Matrimonial Causes Act 1973, s 27, allowing the court to make lump sum and periodical payments orders to a spouse or civil partner who can prove that their partner failed to provide reasonable maintenance, is exercised very rarely.

¹² This may be found on HM Courts Service website at http://www.hmcourts-service.gov.uk/courtfinder/forms/form_e_1200.pdf (last visited 4 May 2006).

requires details of an applicant's finances on a different form, Form 10A.¹³ These would be matters for the Rule Committee.

11.20 Family proceedings tend towards informality. Judges have greater powers to admit hearsay evidence, counsel are rarely robed, and litigants are often invited to address the judge directly. We consider that this degree of informality would be appropriate for cohabitants' claims.

11.21 We provisionally propose that claims by cohabitants under our proposed scheme for financial relief on separation should be treated as family proceedings, and the promulgation of rules should be referred to the Family Procedure Rule Committee. Do consultees agree?

Case management

11.22 Case management would be of considerable importance. At an early stage, consideration might have to be given to (1) whether it is necessary to obtain valuations of capital assets in cases where the amount of capital involved is small, (2) whether the claim is capable of mediation or some other alternative dispute resolution, and (3) whether there should be split trials.

VALUATION OF ASSETS

11.23 Following disclosure, each party would be likely to be asked to provide a valuation of the assets that had been disclosed. It would be necessary to ensure that valuations were ordered only where it was proportionate to do so.

MEDIATION

11.24 Many cohabitants' claims are likely to be susceptible to compromise. Mediation, and other alternative methods of dispute resolution, might often¹⁴ be an appropriate means of facilitating agreement. Therefore, it would be necessary to ensure that there was ample opportunity within the process for claims to be referred to mediation, not only immediately following commencement of the litigation but also at later stages. The difficult question of penalising parties by way of costs orders for failure to agree to mediate would also have to be addressed.

USE OF SPLIT TRIALS OR APPLICATIONS TO STRIKE OUT

11.25 In order to bring a successful claim under our proposed statutory scheme, a applicant would be required to prove that:

- (1) the applicant and the respondent's relationship fell within the basic definition of cohabitants; and

¹³ This may be found on HM Courts Service website at http://www.hmcourts-service.gov.uk/courtfinder/forms/c10a_1205.pdf (last visited 4 May 2006).

¹⁴ Although not always. We are aware that in some cases there is an imbalance of power because of, for example, domestic violence and that this renders the mediation process impossible.

- (2) their relationship satisfied any additional eligibility requirements, for example relating to the presence of children or a minimum duration requirement.
- 11.26 If these issues were to be raised, we consider that the question of whether the parties came within the jurisdiction of the new scheme should be determined at a preliminary hearing before a family judge. If the applicant failed to prove these qualifications, any claim under a new statutory scheme for cohabitants would have to be dismissed. The applicant would, however, remain entitled to claim under the general law of implied trusts, with its more generous limitation period.¹⁵ In addition, the applicant might have a claim under Schedule 1 to the Children Act, which would continue.
- 11.27 In some cases, the issue of whether or not the new law applied to a case might be best tried separately before the parties were put to the expense of discovery and obtaining valuations of assets, contributions, earning capacity, and so on. To do so would have the potential to save the parties a considerable amount in legal costs. In the event of the applicant succeeding, it might encourage the parties to negotiate a compromise, with the assistance of mediation if appropriate. In the event of the respondent succeeding, no further legal costs would be incurred in respect of a claim under any new statutory scheme.
- 11.28 However, there is a risk that splitting trials might only add to the costs of the action. We doubt therefore that it should become routine to order split trials in such cases. It may be best to leave each case to the discretion of the judge. Rather than allowing a separate trial of jurisdictional matters, it would always be possible for the respondent to apply for the claim to be struck out unless the applicant could satisfy the court that it had jurisdiction.
- 11.29 **We invite the views of consultees on the case management of cohabitants' claims under any new scheme, both generally and with particular reference to the issues of:**
- (1) **valuation of assets;**
 - (2) **mediation and alternative dispute resolution; and**
 - (3) **the desirability of split trials.**

Costs

- 11.30 The applicable principles on costs in civil litigation are to be found in the Civil Procedure Rules. To simplify, the traditional rule in civil litigation is that "costs follow the event" so that the loser pays the legal costs of the winner.
- 11.31 In 2004, the President's Ancillary Relief Advisory Group proposed that there should be a different approach to costs in ancillary relief cases. Orders for costs should not normally be made. Instead, the legal costs should be a charge on the

¹⁵ Claimants have six years to bring a claim under the law of trusts: Limitation Act 1980 s 21(3).

matrimonial property before its division between the parties. Only in exceptional cases, where a party is guilty of “litigation misconduct” or fraud, should a costs order be made against them. The Family Proceedings Rules were amended to incorporate this scheme,¹⁶ which came into effect on 3 April 2006.

11.32 In our view, a consistent approach to costs as between ancillary relief claims and claims between cohabitants under a new scheme would be sensible.

11.33 We invite the views of consultees on whether steps should be taken to ensure consistency of approach on orders for costs as between ancillary relief claims and claims made by cohabitants under any new scheme on separation.

Openness

11.34 It had generally been assumed by practitioners that family proceedings were heard in private, that details of cases should not be disclosed and that neither party might, for instance, publish the content of the pleadings or even the judgment. These assumptions have recently been questioned by a series of cases.¹⁷ The Department for Constitutional Affairs (“DCA”) intends to consult on the general question of openness in family proceedings, and its consultation paper on the question is expected to be published later this year.¹⁸

11.35 This is a general issue of wider significance than our current project. In view of the consultation exercise being conducted by the DCA, we do not intend to solicit views of consultees here. We do, however, anticipate that whatever reforms emanate from the current DCA consultation exercise could usefully be applied to cohabitants’ claims under any new scheme on separation.

Public funding

11.36 Public funding is becoming increasingly difficult to obtain, for instance in relation to ancillary relief on divorce, and it would be for the Legal Services Commission to decide whether or not to make public funding available for cases brought under any new scheme. If parties were able to apply for public funding, the costs to the Commission’s Children and Family Services budget might rise, although it may be that any increase could be offset by means of the statutory charge. There might, however, be a corresponding decrease in the costs to the fund of Trust of Land Act applications, currently funded by the Commission from its civil budget.

11.37 Without public funding, one party might be represented in proceedings while the other was not. We are aware, however, that it is not uncommon in the family courts for one party to be represented while the other is not. In injunction

¹⁶ By the Family Proceedings (Amendment) Rules 2006, SI 2006 No 352.

¹⁷ *Clibbery v Allen* [2002] EWCA Civ 45, [2002] Fam 261; *Harb v His Majesty King Fahd Bin Abdul Aziz* [2005] EWCA Civ 632, [2005] 2 FLR 1108. See also *Re D (A Child) (Intractable Contact Dispute: Publicity)*, *F v M (Contact Orders)* [2004] EWHC 727 (Fam), [2004] 1 FLR 1226.

¹⁸ Announcement by Harriet Harman on 12 January 2006: Hansard (HC), vol 441, col 167WH.

hearings, for example, the respondent is often unrepresented while the applicant has legal advice. We do not think that this would prove a difficulty in cases between cohabitants under our proposed scheme.

11.38 However, it would be particularly important to ensure that the application process was easily understood by applicants who act in person and that the judge should be ready and able to give such assistance to litigants in person as was appropriate and consistent with the overriding objective to deal with cases justly. It is also important that the law should be clear enough to allow parties to reach a settlement by negotiation rather than through the court. We are aware of the extra time and work which members of court staff undertake to guide litigants in person through the court system. Our view is that the litigants concerned are already receiving such assistance when they are involved in proceedings relating to trusts. We do not think that the work for court staff would increase as a result of any new law.

11.39 We invite the views of consultees as to the public funding of cohabitants' claims under any new scheme on separation and as to the ways in which the accessibility of the scheme to those acting without legal advice or representation could be maximised.

ANTI-AVOIDANCE

11.40 Section 37 of the Matrimonial Causes Act 1973 contains provisions avoiding certain transactions intended to prevent ancillary relief being granted at all or to reduce the amount of any award made within ancillary relief proceedings.¹⁹ The court has powers to restrain such transactions before they take place and to set dispositions aside when they have occurred.²⁰ These are important and useful provisions. In our view, it would be necessary to have such provisions in relation to any new scheme on separation applicable between cohabitants.

11.41 We provisionally propose that any new scheme should include anti-avoidance provisions modelled upon section 37 of the Matrimonial Causes Act 1973 to prevent the disposition of assets, and to set aside dispositions that have been made, in order to frustrate a claim for financial relief. Do consultees agree?

ENFORCEMENT

11.42 Orders for financial relief on separation should be supported by efficient enforcement machinery. Various enforcement procedures are currently available to enforce orders for ancillary relief on divorce and orders made under Schedule 1 to the Children Act 1989. We consider that the same enforcement procedures should be available in respect of orders for financial relief made under a new scheme.

¹⁹ Similar provisions are included in the Civil Partnership Act 2004, sch 5, part 14.

²⁰ Interestingly, no such powers are available under Schedule 1 to the Children Act. Any applicant who wishes to prevent a respondent attempting to frustrate a claim under Schedule 1 must apply for a freezing injunction under the Civil Procedure Rules. Such applications must be made in the High Court as the county court has no jurisdiction to entertain them.

- 11.43 **We provisionally propose that the machinery that is currently available to enforce family court orders should be available to enforce orders for financial relief made under any new scheme.**

JURISDICTION AND APPLICABLE LAW²¹

- 11.44 It is important that the territorial extent of any new scheme for financial relief on separation should be defined.²² That is to say, we need to determine when and on what basis the English courts should have the power to hear and decide a case, given the parties' connections with this and other jurisdictions. In most cases, where the couple have only ever lived, separately or together, in England and Wales, and all of their property is located here, this is entirely straightforward. But other cases have a substantial foreign element²³ which prompt questions about whether our courts should have jurisdiction over the case at all and, if so, what law our courts should apply to decide the case: English law, or the law of some other country?²⁴
- 11.45 This is important for various types of couples, for example, those who form relationships while living in this country and subsequently remove to another jurisdiction; individuals from other jurisdictions, in particular within the European Union, who migrate here with existing partners; and UK citizens who have been living abroad who return home with a new partner.²⁵

Jurisdiction in family law: a developing area

- 11.46 The jurisdiction of English courts²⁶ in family law varies according to the particular area of family law concerned and the applicable legislation in that area. Some

²¹ In view of the fact that our proposed scheme would be a specialist branch of "family law", created by statute, we shall not consider here the jurisdictional rules relating to claims made under the general law of trusts, estoppel and so on. See *Dicey and Morris on The Conflict of Laws* (13th ed 2000).

²² The position in relation to financial provision death is already governed by the terms of the Inheritance (Provision for Family and Dependents) Act 1975, which we discuss below.

²³ Including Scotland, particularly in light of its new scheme under the Family Law (Scotland) Act 2006.

²⁴ J Carruthers and E Crawford, "The Property of Married and Cohabiting Parties – National Report for Scotland", submitted to the TMC Asser Institute, The Hague (2002).

²⁵ For immigration rules relating to cohabitants, see the Immigration Rules, Part 8, Section 1, rr 295AA-295O, available at http://www.ind.homeoffice.gov.uk/ind/en/home/laws___policy/immigration_rules/part_8/part_9.html? (last visited 4 May 2006).

²⁶ We use this expression to refer to courts of both England and Wales.

fields are now the subject of European Community Regulations,²⁷ notably Brussels II *Bis*,²⁸ and, to a much lesser extent, Brussels I.²⁹

- 11.47 We understand that the European Commission will be publishing a Green Paper later this year on the issue of jurisdiction and recognition and enforcement of judgments in the area of matrimonial property throughout the European Union. This paper might extend to an examination of the positions of cohabitants, as well as spouses and various Member States' schemes for "registered" partners.³⁰ Any proposals that we may make in relation to private international law in the course of this project might have to be reviewed in light of the Commission's Paper and the outcome of that consultation. Our discussion of the issue here is therefore essentially exploratory, and we encourage consultees to contribute to that discussion and to any consultation on this issue at EU level.

Current rules on jurisdiction in family law

- 11.48 It may be helpful for the purposes of selecting appropriate rules for any new scheme on separation to have regard to rules currently operating in comparable parts of family law.

JURISDICTION TO ORDER ANCILLARY RELIEF ON DIVORCE

- 11.49 The English courts' jurisdiction to order ancillary relief on divorce varies, according to whether those courts also granted the divorce decree.
- 11.50 If the English court itself granted the decree of divorce, it will have jurisdiction to make financial provision as well. Ancillary relief jurisdiction therefore flows primarily from the jurisdiction rules governing the divorce, currently those set out in EC Regulation, Brussels II *Bis*.³¹ Under this Regulation, the English court has jurisdiction to grant a decree of divorce where one or more of the following applies:

²⁷ Further European developments concerning jurisdiction, the recognition and enforcement of judgments and applicable law are currently under consideration in relation to several areas of family law: see Green Papers on Applicable Law and Jurisdiction in Divorce Matters, Brussels, 14.03.2005, COM (2005) 82 final; on Succession and Wills, Brussels, 01.03.2005, COM (2005) 65 final; and on Maintenance Obligations, Brussels, 15.04.2004, COM (2004) 254 final. Available at http://europa.eu.int/comm/off/green/index_en.htm (last visited 4 May 2006). For UK and other responses to these papers, see http://europa.eu.int/comm/justice_home/news/consulting_public/news_consulting_public_en.htm (last visited 4 May 2006).

²⁸ "Brussels 2 *Bis*" Regulation on Jurisdiction 2201/2003/EC (OJ L338 23.12.2003 p 1), repealing "Brussels 2" Regulation on Jurisdiction 1347/2000/EC (OJ L160 30.06.2000 p 19).

²⁹ "Brussels 1" Regulation on Jurisdiction 44/2001/EC (OJ L12/1 16.01.2001 p 1).

³⁰ This includes UK civil partnership. Other states' schemes for registered partnership vary in whether they apply to opposite-sex as well as same-sex couples, and in the similarity of registered partnership to marriage, in terms of the conditions for creation and dissolution and the legal consequences of registration.

³¹ "Brussels 2 *Bis*" Regulation on Jurisdiction 2201/2003/EC (OJ L338 23.12.2003 p 1), repealing "Brussels 2" Regulation on Jurisdiction 1347/2000/EC (OJ L160 30.06.2000 p 19). Residual domestic rules will apply if there is not jurisdiction under the EC Regulation: Domicile and Matrimonial Proceedings Act 1973, s 5.

- (1) the parties are both habitually resident in England and Wales;
- (2) the parties were last habitually resident in England and Wales and one of them still resides here;
- (3) the respondent is habitually resident in England and Wales;
- (4) in the event of a joint application, either party is habitually resident in England and Wales;
- (5) the applicant is habitually resident in England and Wales and he or she has resided here for at least a year immediately before the application was made; or
- (6) the applicant is habitually resident in England and Wales and he or she has resided here for at least six months immediately before the application was made and is domiciled here; or
- (7) both parties are domiciled in England and Wales.

11.51 The Matrimonial and Family Proceedings Act 1984 determines when the English court has jurisdiction to grant ancillary relief in relation to divorces obtained overseas. The court's leave is required for any application for ancillary relief to be made, and substantial grounds are required for leave to be granted. Jurisdiction here arises if:³²

- (1) either party was domiciled in England and Wales when the application for leave is made, or was so domiciled when the overseas divorce was obtained;
- (2) either party was habitually resident in England and Wales throughout the period of one year ending with the date when the application for leave was made, or was so resident for a year preceding the divorce decree; or
- (3) either party had, at the date of the application for leave, a beneficial interest in possession in a dwelling house situated in England and Wales which was at some time during the marriage a matrimonial home of the parties to the marriage.

11.52 It might be argued that the Brussels II *Bis* Regulation does not provide a suitable analogy for cohabitants' cases, in so far as the regulation is expressly concerned with the dissolution of matrimonial ties, and so of personal status, and not directly with financial relief. Indeed, the latter is expressly excluded from its scope.³³ Obviously, in the case of cohabitants, there is no "divorce" or similar change of legal status, and so no analogy based on divorce law works precisely. However, English law takes the view that its courts may properly grant financial relief wherever it has granted the divorce decree. It may therefore be felt that the matters of divorce and financial relief are not so far removed from each other that

³² Matrimonial and Family Proceedings Act 1984, s 15.

³³ "Brussels 2 *Bis*" Regulation on Jurisdiction 2201/2003/EC (OJ L338 23.12.2003 p 1), recital 8.

the substance of Brussels II *Bis* could not be used by analogy as a basis for jurisdiction to grant financial relief between cohabitants on separation.

- 11.53 In some ways, the 1984 Act analogy is also inappropriate. By definition, these cases have a strong foreign element in consequence of the fact that the court of another country has already taken jurisdiction over the couple by granting the divorce decree. It is perhaps because of that that the 1984 Act includes a requirement of leave and the requirement that, even if one of the conditions set out above applies, the court further consider whether in all the circumstances it is the appropriate forum for the application.³⁴ However, the basic grounds on which jurisdiction may be taken are nevertheless instructive for the development of a new scheme for cohabitants' cases. The third option is particularly suited to applications for financial relief, turning as it does on the presence within England and Wales of a key asset over which the court might wish to exercise its jurisdiction.

ORDERS FOR "MAINTENANCE", INCLUDING SCHEDULE 1 TO THE CHILDREN ACT 1989

- 11.54 Whether the divorce is granted by the courts of this jurisdiction or overseas, applications for "maintenance"³⁵ fall within the scope of EC Regulation, Brussels I.³⁶ Brussels I provides that a respondent domiciled in a Member State may be sued for maintenance in the courts of that State,³⁷ or in the State where the maintenance creditor is domiciled or habitually resident, or, if the matter is ancillary to proceedings concerning the status of a person, in the court which according to its own law has jurisdiction to entertain those proceedings.³⁸
- 11.55 Orders made under Schedule 1 to the Children Act 1989 are also subject to Brussels I. The range of orders available to the court in some trans-national cases is limited. Where the parent against whom the order is made lives in England and Wales but the child lives outside England and Wales with his or her primary carer,³⁹ the courts have jurisdiction only to make orders for periodical payments.⁴⁰

³⁴ Matrimonial and Family Proceedings Act 1984, s 16.

³⁵ This gives rise to potential characterisation problems: see *Van den Boogard v Laumen* [1997] ECR I-1147. It may be necessary to distinguish between those parts of the court's order which cater for the applicant's needs, and those parts of it which can be regarded simply as a division of property arising from the marital relationship. Only the former will be subject to Brussels I.

³⁶ "Brussels 1" Regulation on Jurisdiction 44/2001/EC (OJ L12/1 16.01.2001 p 1).

³⁷ "Brussels 1" Regulation on Jurisdiction 44/2001/EC (OJ L12/1 16.01.2001 p 1), art 2(1).

³⁸ Provided, in the latter case, that jurisdiction is not based solely on the nationality of one of the parties: "Brussels 1" Regulation on Jurisdiction 44/2001/EC (OJ L12/1 16.01.2001 p 1), art 5(2). See also art 24: jurisdiction also arises where the respondent enters an appearance other than simply to contest jurisdiction.

³⁹ Parent, special guardian, or person in whose favour a residence order in respect of the child is in force.

⁴⁰ Including secured periodical payments: Children Act 1989, sch 1, para 14. Cf the more limited jurisdiction of the Child Support Agency: Child Support Act 1991, s 44.

INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

- 11.56 Jurisdiction under this Act depends upon the deceased having been domiciled in England and Wales at the time of death.⁴¹
- 11.57 It has recently been observed that the domicile rule is looking increasingly antiquated now that jurisdiction in most of family law depends principally on habitual residence.⁴² Moreover, there may be thought to be a lacuna in the law. Matrimonial jurisdiction depends largely on habitual residence;⁴³ if the respondent to those proceedings does not die domiciled in England and Wales, the proceedings cannot then be transferred to the court's jurisdiction under the Inheritance (Provision for Family and Dependants) Act 1975.⁴⁴
- 11.58 The time may be ripe for a reconsideration of whether domicile is an appropriate ground for jurisdiction under the 1975 Act, but it falls outside the scope of the present project. Cohabitants' claims under that Act will therefore continue to depend upon the deceased's domicile.

Jurisdiction under a new scheme for financial relief on separation

- 11.59 We are currently of the view that the jurisdictional rules for a new statutory scheme for cohabitants, which are currently entirely a matter for domestic law to determine, should be modelled on Brussels II *Bis*. The habitual residence test has become the most common ground for jurisdiction throughout family law, and we consider it is sensible to harmonise jurisdictional rules applying to different categories of domestic family proceedings as far as possible.
- 11.60 Any domestic rules would obviously have to accommodate any international instrument within which the applicant's claim fell, such as the optional ground for jurisdiction in relation to maintenance under Brussels I.⁴⁵
- 11.61 Adoption of the Brussels II *Bis* model might also suggest that the rule of *lis pendens*, should be applied, so that the court first seised takes exclusive jurisdiction,⁴⁶ in preference to the common law approach of *forum non conveniens*.

⁴¹ Inheritance (Provision for Family and Dependants) Act 1975, s 1(1); Second Report on Family Property: Family Provision on Death (1974) Law Com No 61.

⁴² *Cyganik v Agulian* [2006] EWCA Civ 129, [2006] 1 FCR 406, at [58], per Longmore LJ.

⁴³ Though see art 3.1(b) of Brussels II *Bis* and the optional jurisdiction for maintenance claims in Brussels I.

⁴⁴ *Harb v His Majesty King Fahd Bin Abdul Aziz (No 2)* [2005] EWCA Civ 1324, [2006] 1 WLR 578, at [15], per Thorpe LJ.

⁴⁵ Under Brussels I, art 5(2). However, in so far as our currently preferred scheme would not in theory be based on the parties' maintenance requirements, it might be argued that any orders made would fall outside the scope of that Regulation.

⁴⁶ See Brussels II *Bis*, art 19. Note also Brussels I, art 22(1), whereby the courts of the Member State in which property is situated has mandatory jurisdiction in proceedings which have as their object rights *in rem* in immoveable property. Whether a claim relates to rights *in rem* may not be an entirely straightforward matter.

Applicable law

General rule

- 11.62 In our view, the issue of applicable law is more straightforward. English law applies the *lex fori* (the law of the forum, here English law) to family law matters, including grounds for divorce and consequences of divorce such as ancillary relief, dealt with in the courts of this jurisdiction,⁴⁷ and we consider that the same should apply to financial relief between cohabitants on separation and death. In so far as jurisdiction were based on the parties' habitual residence and it were a requirement that claims be brought within twelve months of separation, it is likely that *lex fori* would in any case be the law of the place in which the parties had (most recently) been cohabiting.
- 11.63 The application of the *lex fori* would be subject to the acquiescence of the *lex situs* (the law of the place in which the property is situated), at least in relation to immoveable property not located within the geographical bounds of the forum, and possibly also in relation to moveable property.⁴⁸

Cohabitation contracts, opt-out agreements and choice of law clauses

- 11.64 The validity of choice of law clauses can only be addressed in light of the applicable law in relation to cohabitation contracts and opt-out agreements generally. Whatever approach is taken, it might be desirable that legislation set out the rules governing applicable law, rather than that the courts be left to deal with the issue.
- 11.65 The Rome Convention on the law applicable to contractual obligations does not apply to contractual obligations relating to "rights and duties arising out of a family relationship".⁴⁹ Although, to our knowledge, this point has not been tested in litigation in this jurisdiction, it seems likely that cohabitation contracts are not subject to the Convention.⁵⁰
- 11.66 At common law, the *lex fori* is not applied to issues relating to contracts, including marital contracts.⁵¹ In relation to cohabitation contracts, the preferable law for determining the creation, validity, interpretation and effect of such contracts might be the "proper law of the cohabitation" (the law of the place with the closest connection to the cohabiting relationship) or "the proper law of the contract" (the

⁴⁷ *Sealey v Callan* [1953] P 135.

⁴⁸ The *lex situs* will, at the very least, determine the enforcement of any order that the English court might purport to make over such property. See generally J Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of law rules concerning inter vivos transfers of property* (2005) paras 2.51-2.67.

⁴⁹ Rome Convention on the law applicable to contractual obligations (1980), art 1(2)(b).

⁵⁰ See also Proposal for a Regulation on the law applicable to contractual obligations (Rome I), Brussels, 15.12.2005, COM (2005) 650 final. The Regulation would essentially convert the substance of the Rome Convention into an EC Regulation, and so, like the Convention, would expressly exclude from its scope "contractual obligations relating to a family relationship or a relationship which, in accordance with the law applicable to it, has similar effects, including maintenance obligations" and "obligations arising out of matrimonial relationship or a property ownership scheme which, under the law applicable to it, has similar effects to a marriage, wills and succession": art 1(2)(b) and (c).

⁵¹ See L Collins (ed), *Dicey and Morris on The Conflict of Laws* (13th ed 2000).

law of the place with the closest connection to the contract). The parties' personal laws would probably govern their individual capacity to contract, or perhaps the proper law of the cohabitation. Whether an express choice of law clause could be binding would therefore be governed by the law governing the contract itself.

- 11.67 However, when a marital contract or settlement made under a law allowing such agreements to be binding on divorce is asserted in the course of ancillary relief proceedings in this jurisdiction, the English courts will not simply give effect to it. The *lex fori* which governs ancillary relief is mandatory, and so trumps the proper law of the contract (or trust) which would otherwise apply to disputes relating to it. The courts treat such agreements (and the foreign law which might otherwise apply to them) in the same way as agreements made under English law: as not binding and therefore only a factor to be taken into account by the court in exercising its discretion.⁵² Some commentators have criticised English law for adopting this approach, and approved of cases which indicate that an English court might give substantial weight to such agreements.⁵³
- 11.68 There is therefore a clear choice to be made in devising a new scheme for cohabitants. Should any new scheme for financial relief on separation adopt for cohabitation contracts⁵⁴ and purported opt-out agreements the approach currently applicable to marital contracts, or should it allow the relevant foreign law to apply?
- 11.69 If the matrimonial law approach were adopted, then once the court's jurisdiction under the scheme had been invoked, English law would apply. Particularly in so far as the agreement purported to oust the jurisdiction of any court to make orders for financial relief, it might be thought desirable that English law (with its safeguards for opt-out agreements discussed in Part 10) should determine whether the agreement should have that effect. On pragmatic grounds, the time and cost that would be incurred in attempting to rely on foreign law, and the difficulties that our courts might face in attempting correctly to interpret and apply it, might seem disproportionate to any benefit that might be thought to accrue to the parties from permitting them to nominate their preferred law.
- 11.70 However, since the English family courts, in exercising their discretion under English law to determine what a fair outcome would be, are increasingly taking a "sideways look" at the outcome that would have been provided under the relevant

⁵² *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45; *N v N (Overseas Divorce: Financial Relief)* [1997] 1 FLR 900; *C v C (Variation of Post Nuptial Settlement)* [2003] EWHC 742 (Fam), [2004] Fam 141; cf the views expressed in *S v S (Matrimonial Proceedings: Appropriate Forum)* [1997] 1 WLR 1200, 1203, per Wilson J.

⁵³ *Jaffey on the Conflict of Laws* (2nd ed 2002) pp 507-9.

⁵⁴ Note that the Recognition of Trusts Act 1987, sch 1, art 15, permits the forum to apply its own laws to issues relating to the personal and proprietary effects of marriage. Except in the context of succession, there is no such saving for wider "family" obligations, akin to that used in the Rome Convention on contractual obligations. Disputes relating to trusts would therefore be subject to the Recognition of Trusts Act 1987, provided the court characterised the issue as a trust point, rather than simply as one of financial relief under the new statutory scheme (see commentary on *C v C (Variation of Post Nuptial Settlement)* [2003] EWHC 742 (Fam), [2004] Fam 141: R Bailey-Harris (2004) 34 *Family Law* 861.

foreign law, such costs may be unavoidable.⁵⁵ Moreover, cases involving contracts made under foreign law might be relatively rare, and it can be argued that party autonomy ought to prevail in those cases.

11.71 We invite the views of consultees on the private international law aspects of any new scheme for financial relief on separation, in particular:

- (1) do consultees consider that Brussels II *Bis* provides a suitable analogy for jurisdictional rules for any new scheme for financial relief on separation of cohabitants?**
- (2) do consultees consider that the law of England and Wales should apply as the governing law in all cases arising in an English forum concerning:**
 - (a) financial relief on separation;**
 - (b) cohabitation contracts; and**
 - (c) opt-out agreements; and**
- (3) do consultees consider that there are any other implications which cases with an international dimension may have for the development of any new scheme?**

LIMITATION PERIOD FOR CLAIMS ON SEPARATION⁵⁶

11.72 Our provisional view is that claims should have to be brought expeditiously following separation. This seems particularly desirable in relation to cohabitants, who should be able to draw a line under their past relationship as soon as possible. Moreover, to allow claims to be made a considerable time after the end of the relationship might lead to complications if the former cohabitants have commenced other relationships following separation. We do not think that in most cases it would be unreasonable to expect claims to be brought within one year of the parties' separation.⁵⁷

11.73 However, there may be circumstances where one year may be too short. For example, a man and a woman may have been living together for some time (but not necessarily for the required minimum duration, if one is recommended) when they separate. At that point, neither would have a claim against the other. Subsequently, the woman discovers that she is pregnant by her former partner. She might have a substantial claim against him for financial relief, but if she discovered her pregnancy sometime after their separation she would effectively have a shorter time to bring her claim than other applicants.

⁵⁵ See *C v C (Variation of Post Nuptial Settlement)* [2003] EWHC 742 (Fam), [2004] Fam 141.

⁵⁶ The Inheritance (Provision for Family and Dependants) Act 1975 has its own limitation period: see 8.44.

⁵⁷ For discussion about determining the date of separation, see paras 9.116 to 9.119.

11.74 Cases in which cohabitants are expecting children at the time of separation could be accommodated either by:⁵⁸

- (1) making specific provision that the claim must be brought within twelve months of the birth of the child; or
- (2) by making general provision to the effect that the court should be able (in exceptional circumstances) to grant permission to bring a claim out of time.

11.75 We appreciate that, on the face of it, this rule would also benefit a cohabitant who was aware that she was in the early stages of pregnancy at the time when the parties separated. We think that it might be expensive and difficult to inquire into the timing of the applicant's knowledge. However, if route (2) were adopted, the question of when the applicant discovered she was pregnant could be brought to the attention of the judge when the application for leave to apply out of time was considered.

11.76 We must also consider the possibility of extending the limitation period so that a respondent could use the new scheme defensively. Suppose that A and B in Example 1B in Part 7 were potentially eligible under a new scheme, but neither made a claim because they considered that their respective claims would cancel each other out. After the scheme's limitation period expired, but within the general law's limitation period, A might attempt to make a resulting trust claim. We consider that, in such circumstances, B (whose economic disadvantage claim may not be mirrored by any comparable claim under the general law) should be able to invoke the scheme in order to defend the trust law claim.⁵⁹

11.77 We provisionally propose that claims under a new statutory scheme should be brought within one year of the parties' separation. Do consultees agree?

11.78 We invite the views of consultees as to whether:

- (1) the time period for making a claim under any new scheme should be extended to one year from the birth of a child of the cohabitants where, at the time of separation, the applicant is pregnant by the respondent;**
- (2) there should be a general discretion vested in the court to extend the time period for making a claim in exceptional circumstances;**

⁵⁸ In considering how to deal with such cases for the purposes of limitation, medical negligence cases provide an analogy. There, the claimant has the usual three years to issue a claim as they would have in any tort claim involving personal injury: Limitation Act 1980, s 11. However, that time runs either from the date on which the claimant's cause of action accrued (generally, when the claimant sustained injury caused by negligent treatment), or the date on which he or she discovered (or, if earlier, the date on which he or she ought reasonably to have discovered) that he or she had sustained a significant injury attributable to negligent treatment: Limitation Act 1980, s 14.

⁵⁹ Compare the usual limitation rules that apply to defences and counterclaims, discussed in *Chitty on Contracts* (29th ed 2004) para 28-122 and following.

- (3) it should be specifically provided that a party who would be out of time for the purposes of making a claim under any new scheme ought to be permitted to invoke a claim under the scheme defensively to an action brought by the other party under the general law.

RETROSPECTIVE OPERATION OF ANY NEW SCHEME

11.79 There are two key areas that need to be considered in relation to retrospectivity:

- (1) the treatment of relationships that began and ended prior to any new scheme coming into force; and
- (2) the treatment of relationships that began prior to the scheme coming into force, but continued thereafter.

No full retrospectivity

11.80 It would clearly not be appropriate for any new scheme to apply to relationships which ended prior to new legislation coming into force. Indeed, it might be argued that the application of a new scheme to such relationships would interfere with respondents' property rights in a way that violated Article 1 to the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁶⁰

Treatment of existing relationships

11.81 More difficult issues arise in relation to the treatment of relationships which began prior to the new law and which were continuing when it came into force.⁶¹ While the basis for the remedy granted might relate to contributions made during part of the relationship which predated the coming into force of the Act (an issue we consider below), the remedy granted to applicants would provide financial relief as a result of the post-commencement event of separation. These cases therefore straddle the retrospective/prospective line.

11.82 Three particular questions arise:

- (1) the impact on existing property and contractual rights, in particular express trusts and cohabitation contracts;
- (2) whether, if a minimum duration test had to be satisfied in order for an applicant to be eligible to apply for remedies, cohabitation prior to the new law should count towards that requirement, or whether the clock should only start to run from the commencement of the new law; and
- (3) whether, if the scheme did apply to such relationships, the provisions dealing with the right to opt out should be brought into force early, to

⁶⁰ See Part 4. Cf discussion in *Wilson v First County Trust* [2003] UKHL 40, [2004] 1 AC 816, at [161], per Lord Scott.

⁶¹ See J Mee, "Property rights and personal relationships: reflections on reform" (2004) 24 *Legal Studies* 414, at 447-449.

enable those in existing relationships who wished to do so to regulate their own affairs before the main part of the Act came into force.

Impact on existing property and contractual rights

- 11.83 Assuming for the time being that the scheme could apply to relationships that began before the new scheme came into force, we consider here the implications of that position for the parties' existing property and contractual rights.

EXISTING IMPLIED TRUSTS AND ESTOPPEL EQUITIES

- 11.84 Since we do not propose that any new scheme should prevent claims being brought under the general law, no applicant with an accrued implied trust or estoppel claim would be deprived retrospectively of such an interest.⁶²

EXPRESS TRUSTS AND COHABITATION CONTRACTS

- 11.85 Many cohabitants buying their home together hold it on trust, with the extent of their beneficial interests expressly declared, it is now compulsory to make an express declaration of the beneficial interest, as a result of new Land Registry rules.⁶³ Given the current lack of remedies for cohabitants, many of those couples making express declarations will have done so not only to determine the basis on which the property is to be held during the relationship, but also on the clear understanding that these are the shares to which each will be entitled in the event that they separate or one of them dies. A similar issue arises in relation to any cohabitation contract that might have been made by the parties.
- 11.86 It might be considered undesirable that a new scheme should upset these settled arrangements made between cohabitants under the current law. The current advice from solicitors, and consequential expectations among those who have been legally advised, is that a declaration of trust, in particular, is conclusive.⁶⁴ As a matter of policy, it might seem difficult to justify applying a new default scheme to couples who have made their own provision in that way. It might be burdensome to insist that, if they wished those arrangements to stay in place, such couples should take fresh steps to opt out of any new regime.
- 11.87 On the other hand, it might not be appropriate to exclude such couples from the scheme entirely. An express trust could only affect the trust property, and not exclude the remainder of the couple's financial relations from the reach of the scheme. Moreover, these couples could not realistically be described as having opted out of a scheme that was not in existence when they made their agreement. Nor would the fact that they were quite content to make those arrangements in the absence of a statutory scheme of the sort introduced necessarily indicate that they would have reached the same agreement had the new scheme been in force. The existence of the new scheme might radically alter the context in which they reached their agreement.

⁶² See 6.284: though if the new scheme were invoked, it would trump any counterclaim under the general law.

⁶³ See para 3.11.

⁶⁴ Advice regarding cohabitation contracts might sometimes be slightly qualified.

SEPARATE PROPERTY HOLDINGS

- 11.88 There remains, of course, the straightforward fact that any retrospective operation of a new scheme would potentially impact on the parties' separate property holdings. Just as some parties have expressly agreed on their shares in jointly held property on separation by executing trusts and contracts defining their interests, others might have deliberately self-regulated by simply keeping their assets entirely separate. Such "agreements", albeit not manifested in any binding legal instrument, ought to be treated in the same way as express trusts and contracts for the purposes of the retrospective application of a new scheme.

CONCLUSIONS

- 11.89 Since any new scheme would operate remedially, rather than by creating property rights, it is fair to observe that any order made against respondents would not entail any retrospective expropriation of their property, with consequent implications for prior dealings with third parties. Any order would have only prospective effect on respondents' resources. To that extent, the force of concerns about retrospectivity must be considerably diminished.⁶⁵
- 11.90 We consider that the remedial, discretionary nature of the sort of scheme that we currently prefer could appropriately be applied to relationships which began prior to the Act coming into force, and that it would be proper for the court to be able to interfere with express arrangements made prior to existence of the new scheme. However, the discretionary nature of the scheme would enable the court to have regard, where appropriate, to prior arrangements and expectations of the parties.
- 11.91 Although this would mean that respondents' existing property rights could be interfered with by the court's order, we consider that the potential for such interference could be made more proportionate⁶⁶ by providing an opportunity for couples to opt out of the scheme, as such, before it comes into force. We discuss this below at paragraph 11.95.

Satisfying a minimum duration requirement

- 11.92 Suppose that a new scheme applied to couples without children only if their relationship had lasted at least two years. If relationships already in existence had to satisfy that minimum duration requirement with continued cohabitation post-commencement, many deserving putative applicants currently in long-term relationships might be denied access to a remedy which it had been judged appropriate to give individuals in their position, should the relationship falter before the minimum duration requirement were satisfied. On the other hand, putative applicants whose relationships faltered just before the Act came into force would suffer exactly the same problem. The effect of drawing any line would be to exclude some apparently deserving cases.

⁶⁵ Note that the New South Wales and Scottish regimes applied retrospectively to relationships already in existence and continuing when the legislation came into force. We discuss the case of New Zealand below.

⁶⁶ To secure compliance with respondents' rights under the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms, art 1. It seems likely that the European Court of Human Rights would afford a wide margin of appreciation in this area.

- 11.93 It would also be necessary to consider whether, even supposing the minimum duration requirement were so satisfied, the court could have regard to contributions made by the parties before the Act came into force and, in particular if the scheme applied only to certain of the parties' assets, whether assets acquired prior to the Act ought to be excluded. It seems to us that the operation of any distinction between contributions made and assets acquired pre- and post-commencement would be extremely burdensome, so it would seem preferable for the entire period of the relationship to be relevant to the grant of relief, even if eligibility depended entirely on post-commencement events.
- 11.94 If existing relationships did have to satisfy any minimum duration requirement during the lifetime of the legislation, that would reduce the need for the next mechanism – early opt-outs. However, if couples with children would be automatically eligible, opportunity for early opt-out might remain desirable.

Early opportunity to opt out?

- 11.95 The experience of New Zealand when it introduced its radical reforms⁶⁷ is instructive. That scheme applied retrospectively in so far as relationships in existence when the law came into force were covered, and pre-commencement cohabitation counted towards the three-year duration ordinarily required for cohabitants without relevant children to fall within the scheme. However, the provisions of the Act which permitted couples to opt out of the scheme came into force earlier, and received considerable media attention, so that those couples who wished to do so could opt out before the new regime potentially applied to them.
- 11.96 It seems to us at this stage that the best balance between the interests of putative applicants and respondents might be secured by providing, as in New Zealand, that:
- (1) any new scheme should apply to extant relationships and that pre-commencement cohabitation should count towards any minimum duration rule; but
 - (2) the rules permitting parties to make opt-out agreements should come into force one year prior to commencement of the substantive provisions.
- 11.97 This arrangement would enable parties wishing to do so to secure their property rights by opting out or withdrawing from a relationship that would otherwise be eligible under the scheme.

No retrospectivity at all?

- 11.98 The only remaining option would be for the scheme to apply only to relationships which began after the Act came into force. This would give any new scheme a very long run-in, leaving the millions of current cohabiting couples and their

⁶⁷ Subjecting certain cohabitants of three years duration or with a child to the same regime as spouses (equal sharing of relationship property on separation and death, and ousting the operation of the general law in relation to relationships falling within the scheme): Property (Relationships) Act 1976, ss 2D, 2E and 4.

children to deal with the deficiencies of the current law identified in Part 4. This does not seem to us to be a satisfactory option.

11.99 We invite the views of consultees on the proper way in which to balance the interests of putative applicants and respondents in relation to the retrospective operation of any new scheme, or whether any scheme should instead operate only prospectively.

IMPACT OF REFORM

- 11.100 We have referred at various points in this paper to the potential impact of any legislative reform of the law governing cohabitants.⁶⁸ Changes to the law would be likely both to confer benefits and impose costs.
- 11.101 Current practice requires Government Departments considering policy recommendations to assess the regulatory impact of law reform proposals on business (particularly small businesses), charities and the voluntary sector.
- 11.102 We consider that the reform options provisionally proposed and otherwise discussed in this paper are unlikely to have any significant impact on business. However, reform in this area would potentially impact on those areas of the charitable and voluntary sectors that provide advice and support to individuals on family law matters, for example, in terms of increased demand for assistance.
- 11.103 We are at present unconvinced that reform would give rise to any significant negative impact on such organisations. As this paper makes clear, there is already a raft of law that applies to cohabitants. Much of that law would be unaffected by the provision of new or revised statutory remedies on separation and death. Any new statutory remedies on separation would largely replace complicated equitable remedies about which cohabitants currently seek advice. We would be grateful for any information or views which either support or challenge this preliminary view.
- 11.104 It is also necessary to look beyond the matters formally required to be considered in a Governmental regulatory impact assessment. We wish to be able to assess whether reform options could give rise to wider adverse consequences⁶⁹ and, if so, how such impact could be minimised and whether it is disproportionate to the benefits likely to be achieved. We would therefore be grateful for any information or views about the wider impact of our provisional proposals and other reform options on individuals and on the resources of judicial, Governmental and other relevant organisations.
- 11.105 We invite the views of consultees on the impact of the provisional proposals and reform options discussed in this paper and would welcome**

⁶⁸ See in particular Parts 5 to 7, 10 and this Part.

⁶⁹ For example, increased cost to individuals and to the public purse.

any other information relevant to the assessment of the consequences of reform.

PART 12

LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

INTRODUCTION

- 12.1 We set out below a list of our provisional proposals and consultation questions on which we are inviting the views of consultees. We would be grateful for comments not only on the issues specifically listed below, but also on any other points raised in this paper. It would be helpful if, when responding, consultees could indicate either the paragraph of this list to which their response relates, or the paragraph of this paper in which the issue was raised.

PART 5: EVALUATING THE CASE FOR REFORM

- 12.2 We provisionally reject the view that any new remedies providing financial relief on separation should attach to a new legal status to which cohabiting couples can “opt in” by registration. Do consultees agree?

[Paragraph 5.111]

- 12.3 We provisionally propose that any new statutory scheme providing financial relief on separation should be available only between “eligible cohabitants”, unless the parties have agreed that neither shall apply for those remedies by way of an “opt-out agreement”. Do consultees agree?

[Paragraph 5.112]

- 12.4 We consider that, in cases where the couple have children, the current law governing the resolution of cohabitants’ financial and property disputes on separation is uncertain and capable of producing unfair outcomes, and that reform for this category of case is justified. We provisionally propose that new statutory remedies should be devised to deal with such cases. Do consultees agree?

[Paragraph 5.113]

- 12.5 We invite the views of consultees on whether reform may also be warranted in any cases involving cohabitants without children.

[Paragraph 5.114]

PART 6: FINANCIAL RELIEF ON SEPARATION: A NEW SCHEME

- 12.6 We provisionally reject the view that any new scheme should take effect by reference to fixed rules for property division. Instead, we provisionally propose that the courts should exercise a discretion structured by principles which determine the basis on which relief, if any, is to be granted on separation. Do consultees agree?

[Paragraph 6.45]

12.7 We consider that the mere fact that one party has financial or other material needs should not in itself justify the grant of financial relief from the other party on separation. Do consultees agree?

[Paragraph 6.76]

12.8 We consider that the court's decision whether to grant financial relief and, if so, of what value, should be based on principles that focus on:

- (1) the contributions which have been made by each party to the parties' joint household and to the welfare of the other party and other members of their family, in particular their children; and
- (2) the contributions which each shall make to the welfare of their children following their separation.

Do consultees agree?

[Paragraph 6.77]

12.9 We invite the views of consultees on the question of which children should be "relevant" to the provision of financial relief between "cohabitants with children".

[Paragraph 6.215]

12.10 We invite the views of consultees on the principles which should justify and quantify awards of financial relief between cohabitants on separation.

[Paragraph 6.238]

12.11 We provisionally reject the view that the substantive law governing financial relief between spouses on divorce (Part II of the Matrimonial Causes Act 1973¹) should be extended to cohabitants on separation. Do consultees agree?

[Paragraph 6.239]

12.12 We consider that, in determining whether to grant relief and, if so, what the relief should be, the court should have regard to whether, and to what extent, either party's economic position following separation (in terms of capital, income or earning capacity) was:

- (1) improved by the retention of some economic benefit arising from contributions made by the other party during the relationship ("economic advantage"); or

¹ And to civil partners under the Civil Partnership Act 2004, sch 5.

- (2) impaired by economic sacrifices made as a result of that party's contributions to the relationship, or as a result of continuing child-care responsibilities following separation ("economic disadvantage").

Do consultees agree?

[Paragraph 6.240]

- 12.13 We invite the views of consultees on the factors to which the court should have regard when considering the justification for, and quantum of, any financial relief to be granted in accordance with the principles of economic advantage and economic disadvantage.

[Paragraph 6.241]

- 12.14 We invite the views of consultees on whether awards should be limited to "transitional support", with particular reference to the costs of retraining that may be necessary to enable the applicant to re-enter the labour market.

[Paragraph 6.242]

- 12.15 We invite the views of consultees on whether any new scheme for financial relief between cohabitants should include a power to make awards in appropriate cases to assist the party with whom any relevant children will principally live following separation with the costs of child-care.

[Paragraph 6.243]

- 12.16 We invite the views of consultees on whether awards should only be made where it would be substantially or manifestly unfair not to do so.

[Paragraph 6.244]

- 12.17 We consider that parties' conduct should not be taken into account in considering claims for financial relief on separation, save where that conduct relates to litigation or financial misconduct, or where it would otherwise be inequitable to disregard it. Do consultees agree?

[Paragraph 6.245]

- 12.18 We provisionally propose that in granting financial relief to cohabitants on separation, the courts should have available to them the following menu of orders:

- (1) periodical payments, secured and unsecured;
- (2) lump sum payments, including by instalment;
- (3) property adjustment;
- (4) property settlement;
- (5) orders for sale;

- (6) pension sharing; and
- (7) interim payments ordered on account pending a full trial or final settlement.

Do consultees agree?

[Paragraph 6.249]

12.19 We consider that all types of order should be available to the court on the same substantive basis. Do consultees agree?

[Paragraph 6.254]

12.20 We consider that, having determined that some remedy is justified and calculated its quantum in accordance with the principles outlined above, the court should have regard, in particular, to the following factors when deciding what order(s) to make:

- (1) the needs of both parties and any children living with them; and
- (2) the extent and nature of the financial resources which each party has or is likely to have in the foreseeable future.

Do consultees agree?

[Paragraph 6.263]

12.21 We invite the views of consultees on:

- (1) generally, how the welfare of children ought to be taken into account in the provision of financial relief between cohabitants; and
- (2) specifically, how existing remedies for children of the cohabitants should interact with any new statutory scheme for financial relief between cohabitants on separation.

[Paragraph 6.264]

12.22 We invite the views of consultees on the weight to be attached to the clean break principle between cohabitants. In particular, how should the clean break principle relate to the operation of the substantive principles otherwise determining the award that should be made?

[Paragraph 6.272]

12.23 We invite the views of consultees on the effect that subsequent marriage, civil partnership or cohabitation with a third party should have on a periodical payments order made in favour of a former cohabitant on separation.

[Paragraph 6.277]

12.24 We invite the views of consultees on the interaction of any new remedial scheme for cohabitants with the Matrimonial Causes Act 1973² in relation to:

- (1) cohabitants who marry and subsequently divorce; and
- (2) an ex-spouse in receipt of periodical payments who cohabits with a third party.

[Paragraph 6.283]

12.25 We invite the views of consultees on the interaction of any new scheme with the general law as it applies to cohabitants.

[Paragraph 6.288]

12.26 We invite the views of consultees on whether the liability of those who are not parents under Schedule 1 to the Children Act 1989 should be extended to include “cohabiting step-parents” and other non-parents in cohabiting families.

[Paragraph 6.297]

12.27 We invite the views of consultees regarding any matters specific to cases involving limited assets and debts.

[Paragraph 6.302]

PART 7: FINANCIAL RELIEF ON SEPARATION: HOW WOULD IT WORK?

12.28 We invite the views of consultees on the Examples set out in Part 7. In particular, we invite consultees to indicate in which of the Examples they consider that financial relief should or should not be available, and why.

[Paragraph 7.83]

PART 8: REMEDIES ON DEATH

12.29 We provisionally reject the view that cohabitants should have an automatic entitlement to a share of their deceased cohabitant’s estate on intestacy. Do consultees agree?

[Paragraph 8.17]

12.30 We consider that it would be appropriate for there to be some correlation between remedies available to eligible cohabitants on separation and on death. Do consultees agree?

[Paragraph 8.49]

² And with equivalent provisions of the Civil Partnership Act 2004.

12.31 We provisionally propose that, if a new scheme for financial relief for cohabitants on separation were enacted, then in relation to the Inheritance (Provision for Family and Dependants) Act 1975:

- (1) the definition of cohabitants for the purposes of the 1975 Act should be amended to match the definition used under the new scheme;
- (2) the definition of “reasonable financial provision” applied to cohabitants’ claims under the 1975 Act should be reviewed to ensure consistency with the new scheme applying on separation;
- (3) in determining a cohabitant’s claim for provision under the 1975 Act, the court should be required to have regard to the provision that the applicant might reasonably have expected to receive in proceedings for financial relief on separation;
- (4) the court should be entitled, on granting a cohabitant financial relief on separation, to direct that neither cohabitant should subsequently be entitled to make an application under the 1975 Act in the event of the other’s death; and
- (5) claims should be permitted under the 1975 Act on the same basis by those “former cohabitants” who cease to cohabit with the deceased in the twelve-month period immediately before the deceased’s death.

Do consultees agree?

[Paragraph 8.50]

12.32 We invite the views of consultees as to whether cohabitants should be entitled to opt out of the right to claim financial provision under the 1975 Act against their partner’s estate (whether as cohabitant or as dependant of their partner) in the event of their partner’s death.

[Paragraph 8.51]

12.33 We invite the views of consultees on whether the definition of “child of the family” contained in the Inheritance (Provision for Family and Dependants) Act 1975 should be amended so that those treated as children of the family in relation to a cohabiting couple should also qualify as applicants.

[Paragraph 8.61]

12.34 We consider that there is no justification to amend the current law that (subject to exceptions) a will is revoked by the testator’s subsequent marriage or civil partnership. Do consultees agree?

[Paragraph 8.66]

12.35 We consider that there should be no equivalent provision to sections 18A and 18C of the Wills Act 1837 applicable where, subsequent to the execution of a will, a testator separates from a person with whom he was cohabiting and whom he appointed as executor or trustee, or devised or bequeathed property, in the terms of the will. Do consultees agree?

[Paragraph 8.75]

PART 9: ELIGIBILITY TO APPLY

12.36 We invite the views of consultees on whether any legislative definition of those eligible to apply as cohabitants for financial relief on separation should be expressed by analogy to marriage and civil partnership, or in other terms.

[Paragraph 9.32]

12.37 We provisionally propose that any legislative definition of those eligible to apply should expressly require that the parties shared a joint household. Do consultees agree?

[Paragraph 9.42]

12.38 We provisionally propose that any legislative definition of those eligible to apply should include an express, non-exhaustive checklist of factors to which the court would have regard in determining whether a couple were cohabiting. Do consultees agree?

[Paragraph 9.55]

12.39 We invite the views of consultees on the factors that they consider should be included in such a statutory checklist.

[Paragraph 9.56]

12.40 We consider that cohabitants who are by law the parents of a child born before, during or following their cohabitation ought to be automatically eligible to apply for remedies under any new scheme on separation. Do consultees agree?

[Paragraph 9.67]

12.41 We invite the views of consultees on whether cohabitants with a child who is not the child by law of both parties ought to be eligible regardless of the length of their relationship, and, if so, in what circumstances.

[Paragraph 9.68]

12.42 We invite the views of consultees on:

- (1) whether parties who do not have a relevant child should have lived together as cohabitants for a specified minimum duration before they are eligible to apply for financial relief on separation (“a minimum duration requirement”);
- (2) how any such minimum duration requirement should be selected;

- (3) how long any such minimum duration requirement should be;
- (4) whether the same period should apply to claims on separation and claims on death under the Inheritance (Provision for Family and Dependents) Act 1975;
- (5) how any minimum duration requirement should deal with breaks in the continuity of the parties' cohabitation; and
- (6) whether there are any circumstances (other than those already considered in relation to cohabitants with children) in which any minimum duration requirement should be waived, and if so what those circumstances should be.

[Paragraph 9.114]

12.43 We invite the views of consultees on whether the two-year minimum duration requirement currently applying to claims by cohabitants under the 1975 Act should be amended, particularly in relation to cohabitants with children.

[Paragraph 9.115]

12.44 We invite the views of consultees on how the separation of cohabitants should be identified for the jurisdictional purposes of:

- (1) determining eligibility to apply; and
- (2) application of the limitation period for financial relief.

[Paragraph 9.124]

12.45 We invite the views of consultees on whether relationships to which one or both parties is a minor at the time that the claim would be made or when the parties are relatives within the prohibited degrees should be eligible, in any circumstances, for the purposes of financial relief on separation.

[Paragraph 9.135]

12.46 We invite the views of consultees on whether a person should be eligible to apply as a cohabitant for financial relief on separation in respect of any period of cohabitation during which they or their partner was married to, or the civil partner of, or cohabiting with another person.

[Paragraph 9.161]

PART 10: COHABITATION CONTRACTS AND OPT-OUT AGREEMENTS

12.47 We provisionally propose that legislation should provide (for the avoidance of doubt) that, in so far as a cohabitation contract deals with the financial or property relationship of the parties, it is not contrary to public policy. Do consultees agree?

[Paragraph 10.9]

12.48 We provisionally propose that parties should be able to enter into an opt-out agreement regardless of whether their relationship is eligible under a new statutory scheme at the point of entering the agreement or subsequently. Do consultees agree?

[Paragraph 10.26]

12.49 We invite the views of consultees on whether minors should be entitled to enter into opt-out agreements, and if so, whether those agreements should be treated as contracts made by minors.

[Paragraph 10.27]

12.50 We invite the views of consultees as to whether an opt-out agreement should only be effective if it expressly states in specific or more general terms that neither party is to be entitled to apply for financial relief under any new statutory scheme.

[Paragraph 10.31]

12.51 We invite the views of consultees on whether, if an opt-out agreement relates only to part of a couple's financial affairs and does not exclude the parties from making any application to court:

- (1) the couple should be bound by the terms of the agreement in respect of the assets or issues that the agreement covers; but
- (2) the court should remain free to deal with the assets and issues not covered by the agreement.

[Paragraph 10.43]

12.52 We invite the views of consultees on what qualifying criteria, if any, should be necessary for an opt-out agreement to be binding.

[Paragraph 10.79]

12.53 We invite the views of consultees on the use of model agreements and how they should be drafted.

[Paragraph 10.84]

12.54 We invite the views of consultees on the significance, if any, to be attached to agreements which did not comply with the qualifying criteria required for agreements to be binding.

[Paragraph 10.106]

12.55 We invite the views of consultees on the potential role of "sunset clauses".

[Paragraph 10.117]

12.56 We invite the views of consultees as to what circumstances, if any, should permit the courts to set aside the terms of an otherwise binding opt-out agreement. In particular, we seek consultees' views on the following:

- (1) whether the court's powers to set aside an agreement should be limited to the grounds for setting aside contracts under the general law and failure to comply with qualifying criteria;
- (2) if other grounds should be included, whether these should relate to:
 - (a) events or circumstances at the time of the making of the agreement;
 - (b) subsequent, supervening events or circumstances;
 - (c) in either case, should legislation identify particular events having that effect and, if so, what should they be? Or should they be defined generically and, if so, how?
 - (d) in either case, ought the court to have the power to set aside terms of the agreement simply on the ground that a relevant event occurred? Or ought the court's power to intervene be limited, for example, to situations where, in light of the specified event, enforcement of the agreement would result in manifest injustice to either party?
- (3) whether any formal distinction should be drawn between agreements made at the point of separation and those made earlier.

[Paragraph 10.120]

12.57 We invite the views of consultees on how the court should proceed where an otherwise binding opt-out agreement has been set aside:

- (1) ought the court to have the power, where possible, to sever those terms affected by the vitiating circumstances, exercise its adjustive jurisdiction in relation to the issues covered in that area of the agreement, but otherwise enforce the agreement? or
- (2) ought the agreement to fall entirely, leaving the court to exercise its jurisdiction without any limitation by the agreement, but having regard, where appropriate, to its terms?

[Paragraph 10.123]

12.58 We invite the views of consultees on whether an express trust declared by both cohabitants should be treated in any circumstances as an opt-out, or whether the court should have the power to override such trusts when providing financial relief on separation or death.

[Paragraph 10.146]

12.59 If consultees consider that an express trust itself ought not to be treated as an opt-out, we invite views on how the arrangement of property pursuant to such a trust could, if the parties desired, be transposed into an opt-out agreement that would apply on separation or death.

[Paragraph 10.147]

12.60 If consultees consider that an express trust ought to be treated as an opt-out, we invite views on whether those advising purchasers (whether they are solicitors, licensed conveyancers or other advisers) about express trusts of land should be able to advise both parties about the effect of the declaration of trust, and about any aspect of the statutory scheme and the right to opt out.

[Paragraph 10.148]

12.61 We invite the views of consultees on whether cohabitants who would otherwise not be eligible to apply, having not satisfied any minimum duration requirement or had children, should be entitled in any circumstances to opt in to the statutory scheme by agreement.

[Paragraph 10.151]

PART 11: PROCEDURE, JURISDICTION AND OTHER ISSUES

12.62 Subject to any reforms to the court structure as it applies to family cases, we provisionally propose that claims under a new scheme for financial relief on separation should be heard in the county court or the High Court. Do consultees agree?

[Paragraph 11.16]

12.63 We provisionally propose that claims by cohabitants under our proposed scheme for financial relief on separation should be treated as family proceedings, and the promulgation of rules should be referred to the Family Procedure Rule Committee. Do consultees agree?

[Paragraph 11.21]

12.64 We invite the views of consultees on the case management of cohabitants' claims under any new scheme, both generally and with particular reference to the issues of:

- (1) valuation of assets;
- (2) mediation and alternative dispute resolution; and
- (3) the desirability of split trials.

[Paragraph 11.29]

12.65 We invite the views of consultees on whether steps should be taken to ensure consistency of approach on orders for costs as between ancillary relief claims and claims made by cohabitants under any new scheme on separation.

[Paragraph 11.33]

12.66 We invite the views of consultees as to the public funding of cohabitants' claims under any new scheme on separation and as to the ways in which the accessibility of the scheme to those acting without legal advice or representation could be maximised.

[Paragraph 11.39]

12.67 We provisionally propose that any new scheme should include anti-avoidance provisions modelled upon section 37 of the Matrimonial Causes Act 1973 to prevent the disposition of assets, and to set aside dispositions that have been made, in order to frustrate a claim for financial relief. Do consultees agree?

[Paragraph 11.41]

12.68 We provisionally propose that the machinery that is currently available to enforce family court orders should be available to enforce orders for financial relief made under any new scheme.

[Paragraph 11.43]

12.69 We invite the views of consultees on the private international law aspects of any new scheme for financial relief on separation, in particular:

- (1) do consultees consider that Brussels II *Bis* provides a suitable analogy for jurisdictional rules for any new scheme for financial relief on separation of cohabitants?
- (2) do consultees consider that the law of England and Wales should apply as the governing law in all cases arising in an English forum concerning:
 - (a) financial relief on separation;
 - (b) cohabitation contracts; and
 - (c) opt-out agreements; and
- (3) do consultees consider that there are any other implications which cases with an international dimension may have for the development of any new scheme?

[Paragraph 11.71]

12.70 We provisionally propose that claims under a new statutory scheme should be brought within one year of the parties' separation. Do consultees agree?

[Paragraph 11.77]

12.71 We invite the views of consultees as to whether:

- (1) the time period for making a claim under any new scheme should be extended to one year from the birth of a child of the cohabitants where, at the time of separation, the applicant is pregnant by the respondent;
- (2) there should be a general discretion vested in the court to extend the time period for making a claim in exceptional circumstances;
- (3) it should be specifically provided that a party who would be out of time for the purposes of making a claim under any new scheme ought to be permitted to invoke a claim under the scheme defensively to an action brought by the other party under the general law.

[Paragraph 11.78]

12.72 We invite the views of consultees on the proper way in which to balance the interests of putative applicants and respondents in relation to the retrospective operation of any new scheme, or whether any scheme should instead operate only prospectively.

[Paragraph 11.99]

12.73 We invite the views of consultees on the impact of the provisional proposals and reform options discussed in this paper, and would welcome any other information relevant to the assessment of the consequences of reform.

[Paragraph 11.105]

APPENDIX A

ENGLISH LEGISLATION

FINANCIAL PROVISION ON DIVORCE

Matrimonial Causes Act 1973¹

- A.1 Section 25 Matters to which court is to have regard in deciding how to exercise its powers [to make orders for financial provision, property adjustment, orders for sale or pension sharing orders]

(1) It shall be the duty of the court in deciding whether to exercise its powers [to make orders for financial provision, property adjustment, orders for sale or pension sharing orders] and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(2) As regards the exercise of the powers of the court [to make orders for financial provision, property adjustment, orders for sale or pension sharing orders] in relation to a party to the marriage, the court shall in particular have regard to the following matters—

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

¹ Schedule 5 to the Civil Partnerships Act 2004 makes equivalent provision for civil partners.

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

(3) As regards the exercise of the powers of the court [to make orders for financial provision, property adjustment or orders for sale] in relation to a child of the family, the court shall in particular have regard to the following matters—

(a) the financial needs of the child;

(b) the income, earning capacity (if any), property and other financial resources of the child;

(c) any physical or mental disability of the child;

(d) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

(e) the considerations mentioned in relation to the parties to the marriage in paragraphs (a), (b), (c) and (e) of subsection (2) above.

(4) As regards the exercise of the powers of the court [to make orders for financial provision, property adjustment or orders for sale] against a party to a marriage in favour of a child of the family who is not the child of that party, the court shall also have regard—

(a) to whether that party assumed any responsibility for the child's maintenance, and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;

(b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;

(c) to the liability of any other person to maintain the child.

A.2 Section 25A Exercise of court's powers in favour of party to marriage on decree of divorce or nullity of marriage

(1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers [to make orders for financial provision, property adjustment, orders for sale or pension sharing orders] in favour of a party to the marriage, it shall be the duty

of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.

(2) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.

(3) Where on or after the grant of a decree of divorce or nullity of marriage an application is made by a party to the marriage for a periodical payments order in his or her favour, then, if the court considers that no continuing obligation should be imposed on either party to make or secure periodical payments in favour of the other, the court may dismiss the application with a direction that the applicant shall not be entitled to make any future application in relation to that marriage for an order [for financial provision].

APPENDIX B

SCOTTISH LEGISLATION

FINANCIAL PROVISION ON DIVORCE

Family Law (Scotland) Act 1985

B.1 Section 8 Orders for financial provision

(1) In an action for divorce, either party to the marriage and in an action for dissolution of a civil partnership, either partner may apply to the court for one or more of the following orders—

(a) an order for the payment of a capital sum to him by the other party to the action;

(aa) an order for the transfer of property to him by the other party to the action;

(b) an order for the making of a periodical allowance to him by the other party to the [action];

(baa) a pension sharing order;

(ba) an order under section 12A(2) or (3) of this Act;

(c) an incidental order within the meaning of section 14(2) of this Act.

(2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is—

(a) justified by the principles set out in section 9 of this Act; and

(b) reasonable having regard to the resources of the parties.

(3) An order under subsection (2) above is in this Act referred to as an “order for financial provision”.

[...]

B.2 Section 9 Principles to be applied

(1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—

(a) the net value of the matrimonial property should be shared fairly between the parties to the marriage or as the case may be the net value of the partnership property should be so shared between the partners in the civil partnership;

(b) fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family;

(c) any economic burden of caring—

(i) after divorce, for a child of the marriage under the age of 16 years,

(ii) after dissolution of the civil partnership, for a child under that age who has been accepted by both partners as a child of the family,

should be shared fairly between the persons;

(d) a person who has been dependent to a substantial degree on the financial support of the other person should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from—

(i) the date of the decree of divorce, to the loss of that support on divorce,

(ii) the date of the decree of dissolution of the civil partnership, to the loss of that support on dissolution;

(e) a person who at the time of the divorce or of the dissolution of the civil partnership, seems likely to suffer serious financial hardship as a result of the divorce or dissolution should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

(2) In subsection (1)(b) above and section 11(2) of this Act—

“economic advantage” means advantage gained whether before or during the marriage or civil partnership and includes gains in capital, in income and in earning capacity, and “economic disadvantage” shall be construed accordingly;

“contributions” means contributions made whether before or during the marriage or civil partnership; and includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family.

B.3 Section 10 Sharing of value of matrimonial property

(1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial property or partnership property shall be taken to be shared fairly between persons when it is shared equally or in such other proportions as are justified by special circumstances.

(2) The net value of the property shall be the value of the property at the relevant date after deduction of any debts incurred by one or both of the parties to the marriage or as the case may be of the partners—

(a) before the marriage so far as they relate to the matrimonial property or before the registration of the partnership so far as they relate to the partnership property, and

(b) during the marriage or partnership,

which are outstanding at that date.

(3) In this section “the relevant date” means whichever is the earlier of—

(a) subject to subsection (7) below, the date on which the persons ceased to cohabit;

(b) the date of service of the summons in the action for divorce or for dissolution of the civil partnership.

(4) Subject to subsection (5) below, in this section and in section 11 of this Act “the matrimonial property” means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)—

(a) before the marriage for use by them as a family home or as furniture or furnishings for such home; or

(b) during the marriage but before the relevant date.

[(4A) Equivalent definition of partnership property.]

(5) The proportion of any rights or interests of either person—

(a) under a life policy or similar arrangement; and

(b) in any benefits under a pension arrangement which either person has or may have (including such benefits payable in respect of the death of either person),

which is referable to the period to which subsection (4)(b) above refers shall be taken to form part of the matrimonial property or partnership property.

(6) In subsection (1) above “special circumstances”, without prejudice to the generality of the words, may include—

(a) the terms of any agreement between the persons on the ownership or division of any of the matrimonial property or partnership property;

(b) the source of the funds or assets used to acquire any of the matrimonial property or partnership property where those funds or assets were not derived from the income or efforts of the persons during the marriage or partnership;

(c) any destruction, dissipation or alienation of property by either person;

(d) the nature of the matrimonial property or partnership property, the use made of it (including use for business purposes or as a family home) and the extent to which it is reasonable to expect it to be realised or divided or used as security;

(e) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce or the dissolution of the civil partnership.

[...]

B.4 Section 11 Factors to be taken into account

(1) In applying the principles set out in section 9 of this Act, the following provisions of this section shall have effect.

(2) For the purposes of section 9(1)(b) of this Act, the court shall have regard to the extent to which—

(a) the economic advantages or disadvantages sustained by either person have been balanced by the economic advantages or disadvantages sustained by the other person, and

(b) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property or the partnership property or otherwise.

(3) For the purposes of section 9(1)(c) of this Act, the court shall have regard to—

(a) any decree or arrangement for aliment for the child;

(b) any expenditure or loss of earning capacity caused by the need to care for the child;

(c) the need to provide suitable accommodation for the child;

(d) the age and health of the child;

(e) the educational, financial and other circumstances of the child;

(f) the availability and cost of suitable child-care facilities or services;

(g) the needs and resources of the persons; and

(h) all the other circumstances of the case.

(4) For the purposes of section 9(1)(d) of this Act, the court shall have regard to—

(a) the age, health and earning capacity of the person who is claiming the financial provision;

(b) the duration and extent of the dependence of that person prior to divorce or to the dissolution of the civil partnership;

(c) any intention of that person to undertake a course of education or training;

(d) the needs and resources of the persons; and

(e) all the other circumstances of the case.

(5) For the purposes of section 9(1)(e) of this Act, the court shall have regard to—

(a) the age, health and earning capacity of the person who is claiming the financial provision;

(b) the duration of the marriage or of the civil partnership;

(c) the standard of living of the persons during the marriage or civil partnership;

(d) the needs and resources of the persons; and

(e) all the other circumstances of the case.

(6) In having regard under subsections (3) to (5) above to all the other circumstances of the case, the court may, if it thinks fit, take account of any support, financial or otherwise, given by the person who is to make the financial provision to any person whom he maintains as a dependant in his household whether or not he owes an obligation of aliment to that person.

(7) In applying the principles set out in section 9 of this Act, the court shall not take account of the conduct of either party to the marriage or as the case may be of either partner unless—

(a) the conduct has adversely affected the financial resources which are relevant to the decision of the court on a claim for financial provision; or

(b) in relation to section 9(1)(d) or (e), it would be manifestly inequitable to leave the conduct out of account.

B.5 Section 12 Orders for payment of capital sum or transfer of property

(1) An order under section 8(2) of this Act for payment of a capital sum or transfer of property may be made—

(a) on granting decree of divorce or of dissolution of a civil partnership; or

(b) within such period as the court on granting the decree may specify.

[...]

B.6 Section 13 Orders for periodical allowance

(1) An order under section 8(2) of this Act for a periodical allowance may be made—

(a) on granting decree of divorce or of dissolution of a civil partnership;

(b) within such period as the court on granting the decree may specify; or

(c) after such decree where—

(i) no such order has been made previously;

(ii) application for the order has been made after the date of decree; and

(ii) since the date of decree there has been a change of circumstances.

(2) The court shall not make an order for a periodical allowance under section 8(2) of this Act unless—

(a) the order is justified by a principle set out in paragraph (c), (d) or (e) of section 9(1) of this Act; and

(b) it is satisfied that an order for payment of a capital sum or for transfer of property, or a pension sharing order, under that section would be inappropriate or insufficient to satisfy the requirements of the said section 8(2).

[...]

FINANCIAL PROVISION ON SEPARATION FOR COHABITANTS

Family Law (Scotland) Act 2006

B.7 Section 25 Meaning of “cohabitant” in sections 26 to 29

(1) In sections 26 to 29, “cohabitant” means either member of a couple consisting of—

(a) a man and a woman who are (or were) living together as if they were husband and wife; or

(b) two persons of the same sex who are (or were) living together as if they were civil partners.

(4) In determining for the purposes of any of sections 26 to 29 whether a person (“A”) is a cohabitant of another person (“B”), the court shall have regard to—

(a) the length of the period during which A and B have been living together (or lived together);

(b) the nature of their relationship during that period; and

(c) the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.

[...]

B.8 Section 26 Rights in certain household goods

(1) Subsection (2) applies where any question arises (whether during or after the cohabitation) as to the respective rights of ownership of cohabitants in any household goods.

(2) It shall be presumed that each cohabitant has a right to an equal share in household goods acquired (other than by gift or succession from a third party) during the period of cohabitation.

(3) The presumption in subsection (2) shall be rebuttable.

(4) In this section, “household goods” means any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation in any residence in which the cohabitants are (or were) cohabiting for their joint domestic purposes; but does not include—

(a) money;

(b) securities;

(c) any motor car, caravan or other road vehicle; or

(d) any domestic animal.

B.9 Section 27 Rights in certain money and property

(1) Subsection (2) applies where, in relation to cohabitants, any question arises (whether during or after the cohabitation) as to the right of a cohabitant to—

(a) money derived from any allowance made by either cohabitant for their joint household expenses or for similar purposes; or

(b) any property acquired out of such money.

(2) Subject to any agreement between the cohabitants to the contrary, the money or property shall be treated as belonging to each cohabitant in equal shares.

(3) In this section “property” does not include a residence used by the cohabitants as the sole or main residence in which they live (or lived) together.

B.10 Section 28 Financial provision where cohabitation ends otherwise than by death

(1) Subsection (2) applies where cohabitants cease to cohabit otherwise than by reason of the death of one (or both) of them.

(2) On the application of a cohabitant (the “applicant”), the appropriate court may, after having regard to the matters mentioned in subsection (3)—

(a) make an order requiring the other cohabitant (the “defender”) to pay a capital sum of an amount specified in the order to the applicant;

(b) make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents;

(c) make such interim order as it thinks fit.

(3) Those matters are—

(a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and

(b) whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of—

(i) the defender; or

(ii) any relevant child.

(4) In considering whether to make an order under subsection (2)(a), the appropriate court shall have regard to the matters mentioned in subsections (5) and (6).

(5) The first matter is the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interests of—

- (a) the applicant; or
- (b) any relevant child.

(6) The second matter is the extent to which any economic disadvantage suffered by the applicant in the interests of—

- (a) the defender; or
- (b) any relevant child,

is offset by any economic advantage the applicant has derived from contributions made by the defender.

(7) In making an order under paragraph (a) or (b) of subsection (2), the appropriate court may specify that the amount shall be payable—

- (a) on such date as may be specified;
- (b) in instalments.

(8) Any application under this section shall be made not later than one year after the day on which the cohabitants cease to cohabit.

(9) In this section—

“appropriate court” means—

- (a) where the cohabitants are a man and a woman, the court which would have jurisdiction to hear an action of divorce in relation to them if they were married to each other;
- (b) where the cohabitants are of the same sex, the court which would have jurisdiction to hear an action for the dissolution of the civil partnership if they were civil partners of each other;

“child” means a person under 16 years of age;

“contributions” includes indirect and non-financial contributions (and, in particular, any such contribution made by looking after any relevant child or any house in which they cohabited); and

“economic advantage” includes gains in—

- (a) capital;
- (b) income; and

(c) earning capacity;

and “economic disadvantage” shall be construed accordingly.

(10) For the purposes of this section, a child is “relevant” if the child is—

(a) a child of whom the cohabitants are the parents;

(b) a child who is or was accepted by the cohabitants as a child of the family.

B.11 Section 29 Application to court by survivor for provision on intestacy

(1) This section applies where—

(a) a cohabitant (the “deceased”) dies intestate; and

(b) immediately before the death the deceased was—

(i) domiciled in Scotland; and

(ii) cohabiting with another cohabitant (the “survivor”).

(2) Subject to subsection (4), on the application of the survivor, the court may—

(a) after having regard to the matters mentioned in subsection (3), make an order—

(i) for payment to the survivor out of the deceased’s net intestate estate of a capital sum of such amount as may be specified in the order;

(ii) for transfer to the survivor of such property (whether heritable or moveable) from that estate as may be so specified;

(b) make such interim order as it thinks fit.

(3) Those matters are—

(a) the size and nature of the deceased’s net intestate estate;

(b) any benefit received, or to be received, by the survivor—

(i) on, or in consequence of, the deceased’s death; and

(ii) from somewhere other than the deceased’s net intestate estate;

(c) the nature and extent of any other rights against, or claims on, the deceased’s net intestate estate; and

(d) any other matter the court considers appropriate.

(4) An order or interim order under subsection (2) shall not have the effect of awarding to the survivor an amount which would exceed the amount to which the survivor would have been entitled had the survivor been the spouse or civil partner of the deceased.

[...]

(6) Any application under this section shall be made before the expiry of the period of 6 months beginning with the day on which the deceased died.

(7) In making an order under paragraph (a)(i) of subsection (2), the court may specify that the capital sum shall be payable—

(a) on such date as may be specified;

(b) in instalments.

(8) In making an order under paragraph (a)(ii) of subsection (2), the court may specify that the transfer shall be effective on such date as may be specified.

(9) If the court makes an order in accordance with subsection (7), it may, on an application by any party having an interest, vary the date or method of payment of the capital sum.

(10) In this section—

“intestate” shall be construed in accordance with section 36(1) of the Succession (Scotland) Act 1964 (c.41);

“legal rights” has the meaning given by section 36(1) of the Succession (Scotland) Act 1964 (c.41);

“net intestate estate” means so much of the intestate estate as remains after provision for the satisfaction of—

(a) inheritance tax;

(b) other liabilities of the estate having priority over legal rights and the prior rights of a surviving spouse or surviving civil partner; and 40

(c) the legal rights, and the prior rights, of any surviving spouse or surviving civil partner; and

“prior rights” has the meaning given by section 36(1) of the Succession (Scotland) Act 1964 (c.41).

APPENDIX C

SCHEMES FOR COHABITANTS IN OTHER JURISDICTIONS

INTRODUCTION

- C.1 The table that follows lists a number of jurisdictions that have enacted statutory schemes that apply to cohabitants who satisfy statutory eligibility criteria. The schemes apply automatically, without the need for cohabitants to enter into a formal contract or register their relationship with State authorities. Many, but not all, of the schemes allow cohabitants to opt out by entering into a formal contract or by informing State authorities that they wish their relationship to fall outside the scheme.

| Country and province | | Legislation |
|----------------------|------------------------------|---|
| Argentina | Rio Negro | Law of Civil Union 2003 (Ley de Unión Civil de la Pcia de Río Negro) |
| Australia | Australian Capital Territory | Administration and Probate Act 1929 Domestic Relationships Act 1994 Family Provision Act 1969 Legislation Act 2001 |
| | New South Wales | Family Provision Act 1982 Property (Relationships) Act 1984 Wills Probate and Administration Act 1898 |
| | Northern Territory | Administration and Probate Act 1969 De Facto Relationships Act 1991 Family Provision Act 1970 |
| | Queensland | Acts Interpretation Act 1954 Property Law Act 1974 Succession Act 1981 |

| | | |
|--------|-------------------|--|
| | South Australia | Administration and Probate Act 1919 De Facto Relationships Act 1996 Family Relationships Act 1975 Inheritance (Family Provision) Act 1972 |
| | Tasmania | Administration and Probate Act 1935 Relationships Act 2003 Testator's Family Maintenance Act 1912 |
| | Victoria | Administration and Probate Act 1958 Property Law Act 1958, as amended by the Property Law Amendment Act 1987 |
| | Western Australia | Administration Act 1903 Family Court Act 1997 Inheritance (Family and Dependents Provision) Act 1972 Interpretation Act 1984 |
| Canada | Alberta | Adult Interdependent Relationships Act 2002 Family Law Act 2003 Dependants Relief Act 2000 Intestate Succession Act 2000 |
| | British Columbia | Estate Administration Act 1996 Family Relations Act 1996 Wills Variation Act 1996 |

| | | |
|--|---------------------------|--|
| | Manitoba | Common-Law Partners' Property and Related Amendments Act 2002 Dependants Relief Act 1989-1990 Family Maintenance Act 1987 Family Property Act 1992 Intestate Succession Act 1989-1990 Vital Statistics Act 1987 |
| | New Brunswick | Family Services Act 1980 Devolution of Estates Act 1973 Marital Property Act 1980 Provision for Dependants Act 1973 |
| | Newfoundland and Labrador | Family Law Act 1990 Family Relief Act 1990 Intestate Succession Act 1990 |
| | Nova Scotia | Intestate Succession Act 1989 Maintenance and Custody Act 1989 Testator's Family Maintenance Act 1989 Vital Statistics Act 1989 |
| | Ontario | Family Law Act 1990 Succession Law Reform Act 1990 |
| | Prince Edward Island | Dependants of a Deceased Person Relief Act 1988 Family Law Act 1988 Probate Act 1988 |

| | | |
|-------------|--------------|--|
| | Saskatchewan | Dependants' Relief Act 1996 Family Property Act 1997 Family Maintenance Act 1997 Intestate Succession Act 1996 |
| Croatia | | Family Act 2003 Act on Same-Sex Unions 2003 |
| Hungary | | Hungarian Civil Code section 578/G |
| Mexico | | Civil Code for the Federal District, Articles 291, 293, 294, 301, 302, 1602 and 1635 |
| New Zealand | | Property (Relationships) Act 1976 Administration Act 1969 Family Proceedings Act 1980 Family Protection Act 1955 |
| Norway | | Household Community Act 1991 (Lov av 4 juli 1991 nr 45 om rett til felles bolig og innbo når husstandsfellesskap opphører) |
| Portugal | | Protection of De Facto Unions Act 2001 Law Number 7/2001 (Lei No 7/2001, de 11 de Maio. Adopta medidas de protecção das uniões de facto) |
| Scotland | | Family Law (Scotland) Act 2006 |
| Slovenia | | Marriage and Family Relations Act 1976 |
| Spain | Andalusia | De Facto Couples Law 2002 (Ley 5/2002, de 16 de diciembre, de parejas de hecho) |
| | Aragon | Unmarried Couples Law 1999 (Ley 6/1999, de 26 de marzo, relativa a las parejas estables no casadas) |

| | | |
|--------|----------------|--|
| | Asturias | Stable Couples Law 2002 (Ley 4/2002, de 23 de mayo, de parejas estables) |
| | Canary Islands | De Facto Couples Law 2003 (Ley 5/2003, de 6 de marzo, de Canarias, sobre parejas de hecho) |
| | Catalonia | Stable Union of De facto Couples Law 1998 (Ley 10/1998, de 15 de Julio, de uniones estables de pareja) |
| | Navarre | Unmarried Stable Couples Law 2000 (Ley 6/2000, de 3 de julio, para la igualdad juridica de las parejas estables) |
| Sweden | | Cohabitees Act 2003 |

APPENDIX D

“OPT-IN” REGIMES IN OTHER JURISDICTIONS

INTRODUCTION

- D.1 The table that follows lists a number of jurisdictions that have enacted statutory registered partnership regimes. Couples can choose to opt in to these regimes by complying with the statutory procedures. The legal consequences of opting in vary considerably between jurisdictions.

| Country and province | | Legislation |
|----------------------|-------------------|---|
| Argentina | Buenos Aires City | Law of Civil Union 2002 (Ley de Unión Civil de la ciudad autonoma de Buenos Aires) Same-sex and opposite-sex couples |
| | Rio Negro | Law of Civil Union (Ley de Unión Civil de la Pcia de Río Negro) |
| Australia | Tasmania | Relationships Act 2003 Part 2 Same-sex and opposite-sex couples |
| Belgium | | Statutory Cohabitation Act 1998 amending Book 3 of the Civil Code Same-sex and opposite-sex couples |
| Canada | Alberta | Adult Interdependent Relationships Act 2002 Same-sex and opposite-sex couples |
| | British Columbia | Family Relations Act 1996 Same-sex and opposite-sex couples |
| | Manitoba | Common-Law Partners' Property and Related Amendments Act 2002 Vital Statistics Act 1987 Same-sex and opposite-sex couples |

| | | |
|-------------|-------------|---|
| | Nova Scotia | Vital Statistics Act 1989 Same-sex and opposite-sex couples |
| | Quebec | Act instituting civil unions and establishing new rules of filiation 2002 (Bill 84 Loi instituant et établissant de nouvelles regles de filiation) Same-sex and opposite-sex couples |
| Denmark | | Registered Partnerships Act 1989 Same-sex couples only |
| Finland | | Act on Registered Partnerships 2001 Same-sex couples only |
| France | | Civil Code, Title XII of Civil Covenants of Solidarity and of Concubinage, Article 515 Same-sex and opposite-sex couples |
| Germany | | Registered Partnership Act 2001 (Lebenspartnerschaftsgesetz) Same-sex couples only |
| Iceland | | Law on Registered Cohabitation 1996 Same-sex couples only |
| Luxembourg | | Law relating to the legal effects of certain partnerships 2004 (Loi relative aux effets légaux de certains partenariats) Same-sex and opposite-sex couples. |
| Netherlands | | Registered Partnerships Act 1997 Same-sex and opposite-sex couples |
| New Zealand | | Civil Union Act 2004 Same-sex and opposite-sex couples |

| | | |
|----------|------------------|--|
| Norway | | Registered Partnerships Act 1993 (Lov 1993-04-30 nr 40: Lov om registrert partnerskap) Same-sex couples only |
| Scotland | | Civil Partnerships Act 2004 Same-sex couples only |
| Slovenia | | Law on Registered Same-Sex Partnership 2005 Same-sex couples only |
| Spain | Aragon | Unmarried Couples Law 1999 (Ley 6/1999, de 26 de marzo, relativa a las parejas estables no casadas) Same-sex and opposite-sex couples |
| | Balearic Islands | Stable Couples Law 2001 (Ley 18/2001, de 19 de diciembre, de parejas estables) Same-sex and opposite-sex couples |
| | Basque Country | Regulation of De Facto Couples Law 2003 (Ley 2/2003, de 7 de mayo, reguladora de las parejas de hecho del País Vasco) Same-sex and opposite-sex couples |
| | Catalonia | Stable Union of De facto Couples Law 1998 (Ley 10/1998, de 15 de Julio, de uniones estables de pareja) Same-sex and opposite-sex couples |
| | Canary Islands | De Facto Couples Law 2003 (Ley 5/2003, de 6 de marzo, de Canarias, sobre parejas de hecho) |
| | Cantabria | De Facto Couples Law 2005 (Ley 1/2005, de 16 de mayo, de parejas de hecho de la Comunidad Autónoma de Cantabria) Same-sex and opposite-sex couples |

| | | |
|--------------------------|---------------|---|
| | Extremadura | De Facto Couples Law 2003 (Ley 5/2003, de 20 de marzo de Extremadura, sobre parejas de hecho) Same-sex and opposite-sex couples |
| | Madrid | De Facto Unions in the Community of Madrid Law 2001 (Ley 11/2001, de uniones de hecho de la Comunidad de Madrid) Same-sex and opposite-sex couples |
| | Navarre | Unmarried Stable Couples Law 2000 (Ley 6/2000, de 3 de julio, para la igualdad juridica de las parejas estables) |
| | Valencia | Regulation of De Facto Unions Law 2001 (Ley 1/2001, de 6 de abril, reguladora de las uniones de hecho) Same-sex and opposite-sex couples |
| Sweden | | Registered Partnership (Family Law) Act 1994 Same-sex couples only |
| Switzerland | | Registered Partnership Act 2005 Same-sex couples only |
| United States of America | California | California Family Code Division 2.5 Same-sex couples (and opposite-sex couples over the age of 62) |
| | Connecticut | Act Concerning Civil Unions Same-sex couples only |
| | San Francisco | San Francisco Administrative Code Chapter 62 Domestic Partnerships Same-sex and opposite-sex couples |
| | New Orleans | City of New Orleans Code of Ordinance Chapter 87 Same-sex and opposite-sex couples |

| | | |
|--|---------|---|
| | Vermont | Act Relating to Civil Unions Same-sex couples only |
|--|---------|---|

APPENDIX E

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- E.1 We are particularly keen to acknowledge the help that we have received from members of our legal advisory group, which comprises:

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- E.2 We have corresponded with and spoken to a number of individuals and organisations during the course of preparing this consultation paper. We are grateful to them for their assistance. The contents of this consultation paper are entirely our responsibility.

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Jon Woolf, Law Society of England and Wales
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Clerics and advisers of the Catholic Bishops' Conference of England and Wales
Clerics and advisers of the Churches Main Committee, the Church of England

Organisations and groups

Advicenow
Age Concern England
Association of Contentious Trust and Probate Specialists
Association of District Judges
Buddhist Society
Court of the Chief Rabbi
Family Law Bar Association
Family Law in Partnership
Irish Law Reform Commission
Law Reform Commission of New South Wales
Law Society of England and Wales
Law Society of Northern Ireland
Law Society of Scotland
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Society of Trusts and Estates Practitioners
Stonewall
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