

The Law Commission
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SHARING HOMES
A Discussion Paper

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by Command of Her Majesty
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The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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¹ At the date this report was signed, the Chairman of the Law Commission was the Right Honourable Lord Justice Carnwath CVO.

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SHARING HOMES: A DISCUSSION PAPER

EXECUTIVE SUMMARY

The project

1. The Law Commission Discussion Paper “Sharing Homes” examines the property rights of those who share homes. It covers a broad range of people – not only “couples”, married or unmarried, but also friends, relatives and others who may be living together for reasons of companionship or care and support.
2. The Law Commission has not been examining the issue of the rights and obligations of unmarried couples. It is important to emphasise this. The project we have conducted is both broader and narrower than a project on cohabitation would have been. It is broader in that we have placed no limit on the kinds of relationship with which we are concerned. It is narrower in that we have focused on a single area of activity – the home, in an attempt to consider how people who live in the home gain rights in and over it, and whether we can propose any useful reform of the principles which currently apply.

The problem

3. Where two people buy a home together, there is rarely a problem. They are likely to seek legal advice. If they are married, or, although not married, are in a long-term relationship, it is very likely that they will decide to have title to the home registered in their joint names. They will also execute a declaration of trust stipulating what their respective shares in the property are to be – this will then govern the proportions into which the proceeds of sale of the house would be divided in the event of sale.
4. But sometimes a home is purchased and no express arrangements of this kind are made. Or a home-owner invites someone to live with them – a partner, a friend, a carer, a relative. There may be no discussion at all about the potential legal implications of what is happening, or there may be some conversation, but no formal agreement is entered into. Over a period of some years, the person may make very substantial contributions towards the home – assisting with the mortgage payments, paying towards – or even physically building – an extension, or (less directly) dealing with the household bills so that the home owner can pay the mortgage. Eventually the question may arise whether they have obtained a share in the home.
5. This question may require to be answered in several circumstances:
 - Most obviously, where the persons who have been sharing the home cease to do so. It may be that this follows the breakdown of a relationship between them – but it may also occur where one obtains employment elsewhere, or even where one dies. It will be necessary to establish what shares the persons had in the home so that the outgoing sharer (or, if they have died, their estate) can be paid out the capital to which they are entitled.
 - It is very likely that the home will have been purchased with the assistance of a mortgage – there may be more than one if the home-owner has sought funds

for other purposes subsequently. The borrower defaults on the mortgage, and the lender seeks possession of the home so that it can be sold to satisfy the debt which is owed. Can anyone living in the home claim rights which prevail over those of the lender – and thereby defend the possession proceedings?

6. We have not been concerned in this project with the jurisdiction of the court to make orders adjusting property rights on divorce. If a married couple separate, and intend to divorce, the resolution of their finances will not normally require the court to work out their respective shares in the matrimonial home, as its powers are so extensive that such an exercise is unnecessary. However, it remains important to be able to ascertain the spouses' shares on death and where third parties, in particular secured lenders, are concerned.

The current law

7. The current law which determines whether a person has rights in a home which they share with its owner is quite complicated and difficult to apply. It is not ideally suited to the typical informality of those who are sharing a home. The current law can be criticised for several reasons:
 - Much depends on what the court identifies to be the common intention of the parties. This can be a somewhat unrealistic exercise, as people do not tend to think about their home in such legalistic terms.
 - Although certain contributions towards the acquisition of the home can give rise to an interest in it, it is not very clear where the line is drawn between contributions which count and contributions which do not. (For instance, it is accepted that payment of the mortgage instalments is normally sufficient to obtain an interest, but it remains doubtful whether regular payment of household bills which enables the owner to pay the mortgage will suffice.)
 - It does not seem to be the case that extensive work in and around the home – which may include looking after children of a relationship – will result in the acquisition of a share.
 - Quantifying the share is extremely difficult – and has led to decisions which are inconsistent and difficult to reconcile.
 - The uncertainty of the law can lead to lengthy and therefore costly litigation.

The scheme: “a property approach”

8. The Law Commission sought to address these problems by devising a scheme which would determine when a person who was not the owner of the home obtained an interest in it, and what the value of that share would be. We believe that parties should be encouraged to provide for themselves wherever possible, and therefore the scheme would only apply in the absence of the parties having made express arrangements of their own.
 - The scheme would therefore apply where the home was occupied by two or more persons, each of whom occupied it as a home, and at least one of whom would have an interest in it. It would not apply where the parties were in a commercial relationship such as landlord and tenant or landlord and lodger. The parties' intentions, save as expressed in a declaration of trust (in which case the scheme would not apply), would be irrelevant.

- The scheme would be based on the contributions of the parties to the shared home. It would be necessary to define which contributions would qualify – and that definition would be broad so as to include both payments of household expenditure and non-financial contributions – looking after the home and the family, or caring for an elderly relative.
9. The advantages of a contribution-based approach were to be certainty and predictability. It would be possible to value contributions objectively and to aggregate them in such a way as to provide a sum total. The contributions of each party would then be weighed against each other so as to enable their respective shares in the home to be calculated.
 10. It was an underlying objective of the scheme that it would apply irrespective of the nature of the relationship between those who were sharing a home. This objective, adopted so as to ensure that the scheme operated entirely fairly and without discrimination between different classes of relationship, ultimately proved impossible to achieve.
 11. In the Discussion Paper, we set out two examples of how the scheme might work. The first example concerns a couple in their sixties whose son, now aged 22, comes to live with them having dropped out of college. He lives there for ten years, during which time he does not make any financial contributions towards the acquisition of the home (as it is owned outright by his parents as the mortgage has been paid off). However, he does make significant contributions to the household budget as he is on a reasonable income, he pays for some improvements to the house, and he helps his parents with their shopping and around the home. He doesn't pay anything by way of board and lodging. We then ask the question: Should the son obtain a share in the home – and if so, what should it be?
 12. The second example concerns a man who is the owner of a house over which there is a mortgage. His partner, who is expecting his child, comes to live with him. They live together for ten years. The partner makes no direct financial contribution to the house (as she does not have any significant earned income) – but during that time she assumes primary responsibility for the day-to-day care of their child, and she does almost all of the necessary house-work. Should she obtain a share in the home – and if so what should it be?
 13. The problem with an objective valuation of contributions is that it does not allow any flexibility to take account of the different nature of the relationship between the parties. Neither the son in Example 1 nor the partner in Example 2 are paying anything by way of rent. But the expectations are quite different – one might expect the son to pay something, but not the partner. Likewise one might expect the partner to obtain a share – but not necessarily the son.
 14. There are many cases where additional tests or controls are necessary to achieve a fair result whereas there are other cases where they are not – and where their application would lead to unfairness. Yet the basis for distinguishing between the factual situations cannot be expressed in a suitably principled or rational manner.

Conclusions

15. In this Discussion Paper, which concludes the present project, we are not making specific proposals for legislation. The purpose of the Paper is to provide a framework for future public debate and consideration by Government. The main points which emerge from the Paper are as follows:

- We have concluded that it is not possible to devise a statutory scheme for the determination of shares in the shared home which can operate fairly and evenly across all the diverse circumstances which are now to be encountered.
- It is essential that all those who are living together are positively encouraged to investigate the legal consequences of doing so and to make express written arrangements setting out clearly what they intend their rights to be. This is best achieved by executing a declaration of trust.
- Where no express declaration of trust has been executed, we believe that the courts must continue to ask themselves what the parties' intentions were. There are some useful reforms which can be made by the courts themselves taking a broader view of the kinds of contributions from which they might infer "common intention". For instance, where a person who is living with the home owner has paid the household bills and thereby enabled the home owner to pay the instalments due under the mortgage, that should normally be sufficient to enable the courts to infer that the person was intended to obtain a share in the home. We also believe that it would be more just if courts adopted a broader approach to quantifying the value of the share.
- We accept that marriage is a status deserving of special treatment. However, we have identified, in the course of this project, 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 broader based approaches to personal relationships, such as the registration of certain civil partnerships and/or the imposition of legal rights and obligations on individuals who are or have been involved in a relationship outside marriage.
- It is not appropriate for the Law Commission to attempt to define a status which would lead to the vesting of rights and obligations. To do so would not only be well outside the remit of this project, it would also take it outside its function as a law reform body in requiring it to answer very difficult questions of social policy which are essentially matters for Government.
- The Law Commission would be prepared, if asked, to contribute to any further process of consideration of reform in this area in any way which is appropriate given its role as a body concerned with law reform.

PART I

INTRODUCTION

- 1.1 Under Item 1 of our Eighth Programme of Law Reform we have examined the property rights of those who share homes. The Programme explained the scope of the project as follows:

We are reviewing the law as it relates to the property rights of those who share a home, except – for example – where a person’s occupancy is attributable to a tenancy, contractual licence or his or her employment. Our review therefore covers a broad range of people, including friends and relatives who share a home as well as unmarried couples and married couples (other than on the breakdown of the marriage).

At present, a person who is not a legal owner of a shared home will only be able to claim an interest in the home in certain, limited circumstances. Principally, these are when they can establish-

- (a) an equity arising by proprietary estoppel;
- (b) that a resulting or constructive trust has arisen in their favour; or
- (c) that they are a beneficiary under an express declaration of trust.

It is widely accepted that the present law is unduly complex, arbitrary and uncertain in application. It is ill-suited to determining the property rights of those who, because of the informal nature of their relationship, may not have considered their respective entitlements.

- 1.2 As we shall explain below, the project has focused on the defects in the current law concerning the ascertainment and quantification of property rights in the shared home. A frequently encountered problem is that persons who are living together have not given any serious thought to the legal consequences of their sharing arrangements. When those arrangements break down - or when other parties (purchasers, mortgagees, personal representatives) make claims against the shared home, it becomes necessary to establish the respective legal rights of the persons who have been sharing by reference to the rules of implied trusts and proprietary estoppel. These rules are not as clear as they might be, and they can be extremely difficult to apply.
- 1.3 In the course of this project we have attempted to formulate a scheme for the ascertainment and quantification of property rights in the shared home which is easier to operate, and leads to a greater certainty of outcome, than the principles which are currently applied. We have explored to an advanced stage a possible scheme based on the objective evaluation of contributions made. However, we have concluded- for reasons which we will set out - that it is not possible to propose that a contribution-based scheme would comprise an adequate

replacement for the current law. It has, indeed, become clear that the current law offers a degree of flexibility which is positively desirable in that it can respond with some sophistication to different factual circumstances and to different personal relationships.

- 1.4 As we have not been able to formulate provisional proposals, it does not seem appropriate to publish a Consultation Paper. However, we do consider it important, and we hope useful, to provide an account of the attempts we made to devise a contribution-based scheme for the ascertainment and quantification of interests in the shared home. In the course of our work, we have also identified issues which, while not within the scope of this project, we believe do require further consideration. These issues raise questions of policy which are already to some extent being considered by government and which are not, we believe, appropriate questions for answer by the Law Commission, at least in this context.
- 1.5 In this Paper, which we term a Discussion Paper, we report on the problem which we have identified, the means we have explored to deal with the problem, and the difficulties encountered which have led us to the conclusion which we have reached. We then outline, with a view to furthering discussion, those policy issues which we believe are worthy of further consideration.

THE SHARED HOME

- 1.6 In this project, we have not been concerned with homes which are rented by their occupiers but only with homes which they own. We have considered the legal consequences of what has been one of the most important social changes in the twentieth century- the steady expansion of owner-occupation- with particular reference to those who share that occupation with the owner.¹
- 1.7 By the year 2000 seven out of ten homes in England were owned by one or more of their occupiers.² Over the last quarter of a century, living arrangements within those homes have become increasingly diverse, and greater numbers of people are now living together in circumstances which are characterised by informality. While marriage remains popular, cohabitation outside marriage continues to grow, and, as has been recently observed, statistics based solely on the marital status of the parties give “an increasingly incomplete picture of relationships and family circumstances”.³ Moreover, the notion of the “traditional” family, based on one or two parents and their children living together in one unit, does not make allowance for multi-generational living arrangements within a family, where a home which may be legally owned by the head of the family is occupied

¹ The legal regulation of rented homes is currently being considered by the Law Commission: see *Renting Homes - 1: Status and Security (2002) Consultation Paper No 162*.

² 43 per cent of such homes were not “owned outright”, being purchased with the aid of a mortgage: see generally *DTLR Housing in England 1999-2000 (2001)*, Table 7.1.

³ Chris Shaw and John Haskey, “New Estimates and Projections of the Population Cohabiting in England and Wales” (1999) 95 *Population Trends* 7, ONS.

by siblings, children, grand-children, and possibly even great grand-children, many of whom may be adults. As the population ages, there are many elderly siblings or friends who live together for comfort and companionship, and adult children who move in with their elderly parents to provide day-to-day care and support.

- 1.8 The project is centred on a belief in the importance of the home as property. The home is unique. It is the place where life is lived, it is the focus of the family, and the centre-piece of their communal security. It is likely to be a major subject of dispute on relationship breakdown, and its devolution on the death of its owner may also prove to be contentious. It is, in many cases, the single most valuable asset of its owner. It has great economic significance as a means of securing capital advances by way of loan and of recovering debts owed.
- 1.9 The dual function of the home, as place of occupation and capital asset, can be seen very clearly in litigation initiated by creditors. It is often the duty of the court to decide whether, in a given case, priority is to be given to those, typically creditors, who seek to realise its capital value, or to those, typically members of the debtor's family, who wish to continue living there for as long as possible.
- 1.10 Over the last thirty years or so, a recurring question encountered by litigants before the courts in England and Wales has concerned the property entitlements of persons who are sharing, or have shared, homes together. The question arises in various contexts, and the many ways in which it has been answered have emphasised the lack of clear principle in this vital area of the law.
- 1.11 There are four principal circumstances in which the determination of the ownership of the shared home is highly material and to which we will return throughout this paper. They are as follows:
 - (1) The persons (two or more) who share a home cease to do so. Typically, one leaves. It may be that this follows the breakdown of a relationship between the sharers. It may be that the living arrangement is no longer convenient to the person who leaves, as they have obtained employment elsewhere. The question arises of whether the person who leaves is entitled to receive payment of a capital sum representing their share of the property, or indeed, in the event of no satisfaction being obtained, whether that person can force a sale thereof.
 - (2) One of the persons who has been sharing the home dies. The question arises whether that person had an interest in the property, and, if so, what therefore is now to happen to it.
 - (3) The home is subject to a mortgage securing a loan negotiated by its owner or owners to facilitate the acquisition of the property or to provide funds for other purposes. The borrower defaults on the mortgage, and the mortgagee seeks possession in order to realise its security by sale of the property. The question arises whether any of those living in the home can assert an interest in that property against the mortgagee, and whether they can successfully defend the proceedings for repossession.

- (4) A creditor whose debt is not secured over the property by way of mortgage seeks to have the property sold so that the demand can be satisfied. The question arises whether any person who has been sharing with the debtor can successfully hold out against the creditor's claim.
- 1.12 The resolution of these questions is no easy matter. "Who owns what?" may be very simple to ask, but in a short time the enquirer will find themselves immersed in the off-putting, and sometimes obscure, terminology of the law of trusts and estoppel. It may then be necessary to address potentially difficult issues of priority which may themselves depend on proper and timely registration of interests.
- 1.13 **Where legal title to the home is held jointly** by the persons who are sharing it, it is unlikely that there will be significant problems defining their interests in the circumstances we have outlined above. In particular, where title to land is registered in the names of two or more proprietors, it is now required that the proprietors make an express declaration of their beneficial entitlement. Once such a declaration has been made, it will be binding on the parties and conclusive of their respective interests in the land save in highly exceptional circumstances.⁴
- 1.14 This requirement has proved to be extremely valuable, as there is considerable reluctance among those seeking to purchase property together to enter into a legally binding agreement which would govern the parties' future relationship. Some will not have the benefit of legal advice, or sadly some who have legal advice will not be informed of the desirability of this course of action.
- 1.15 Difficulties primarily arise **where legal title is held in the sole name** of one person (the legal owner), but where another, or others, has or have made contributions to its acquisition or has or have otherwise assisted the legal owner in such a way as to enable him to make mortgage payments. No thought is likely to have been given to the legal effect of such contributions on the parties' shares in the property at the time they were made. If the formal legal position as to ownership were to prevail, it would lead to manifest injustice in many cases. Accordingly, the courts have developed rules, appropriately enough by invocation of principles and concepts of equity, in an attempt to ensure that justice is done.
- 1.16 The "default" rules which have been developed have proved at times to be both relatively rigid and extremely difficult to apply. They involve the courts in a search for the parties' common intention and generally require proof of contributions to the shared home which are essentially financial in nature. Legal significance is usually denied to activities such as looking after the home and taking care of children. The way in which a family has chosen to budget may become of distorted relevance in determining whether and if so what interests are to be implied in favour of the person(s) whose names do not appear on the title. Application of the current rules can lead to unfairness as between the parties.

⁴ See para 2.48.

- 1.17 The roots of the problem lie in a lack of “organised thinking” by persons who share homes about their respective rights in the property. Such arrangements which are made tend to be informal and not recorded in writing. The parties will frequently have a close relationship based on love and affection and will have given little thought to the possibility of separation, the legal consequences of one of them dying, or the claims of creditors on the shared home. They may be husband and wife, they may be a couple cohabiting outside marriage, they may be blood relatives (such as parent and child, or brother and sister), they may be friends. Some of these people may believe that the law confers protection on them such that there is no need to address the question of legal entitlements as between themselves. In this belief all would be mistaken.⁵
- 1.18 English law does not have a special property regime for married couples, and in determining whether an individual has obtained property rights over a home which is legally owned by another, the fact that the parties are married will not make any significant difference. The major distinction between married couples and others is that in the event of the “irretrievable breakdown” of a marriage, either party may petition for divorce. There is a statutory jurisdiction available to divorcing spouses which empowers the court to make orders within the exercise of its discretion providing for the redistribution of the family property between the spouses.⁶ The existence of this jurisdiction means that it is almost always unnecessary (and indeed undesirable) for the courts to determine questions of beneficial ownership to the home as a prelude to making orders reallocating the spouses’ property. We should emphasise that this project is **not** considering the current statutory jurisdiction of the courts to make orders for ancillary relief on divorce.
- 1.19 The determination of the respective beneficial interests of the spouses remains of importance when a spouse dies, or when creditors, secured or unsecured, seek to obtain their due recompense from the spouses’ home. Many of the most important decisions which have addressed the respective rights of creditors over the shared home have concerned parties who are or who have been married.
- 1.20 Recent governments have actively promoted marriage, considering it to provide the best foundation for the up-bringing of children,⁷ and Parliament has expressly required the courts to support marriage as an institution.⁸ However, it is undoubtedly the case that marriage is less popular than it was. Although the number of marriages is expected to rise (and the number of divorces to fall) over the next fifteen to twenty years, it is anticipated that by 2005 less than half the

⁵ There is, for instance, a commonly held belief that rights are bestowed on those who live together as “common law” spouses: see A Barlow, J Duncan, G James and A Park, “Just a Piece of Paper? Marriage and Cohabitation” British Social Attitudes, 12th Report (2002), National Centre for Social Research pp 29-58.

⁶ See paras 5.8 - 5.11 below.

⁷ Supporting Families: A Consultation Document (1998) Cm 3968 (Home Office).

⁸ Family Law Act 1996, s 1.

adult population will be married.⁹ It is quite clear that even among cohabiting couples of the opposite sex, marriage is no longer the norm.

- 1.21 The sociological evidence is to the effect that more people are choosing to cohabit outside marriage, that cohabitation is lasting longer, and that cohabitation is becoming more common amongst older people.¹⁰ At the same time, it is recognised that unmarried cohabitation is not as stable as married cohabitation, in that, even taking account of the frequency of cohabitants “ceasing to cohabit” by getting married, relationships are more likely to break down.
- 1.22 In so far as individuals do not wish (or are not able) to enter into the commitment which marriage involves, there remains a large problem for those determining future legislative policy. Marriage, as we will see, is a status which is easily identifiable and which therefore facilitates legislative control of its consequences. The same cannot be said of more informal living arrangements. The difficulty of describing these relationships only serves to emphasise the problems faced by those who believe that some legal regulation of the consequences of such relationships is necessary. Thus where two unrelated people of the opposite sex live together outside marriage they may be termed “cohabitants” or “common law” spouses or, more formalistically, as persons “living together as husband and wife”.¹¹ There is, for instance, no concept of “common law marriage” known to English law, and those who, although not married to each other, live together “as husband and wife” will not acquire rights in each other’s property from the mere fact of cohabitation. Further definitional difficulties are caused where a same sex couple live together in a mutually supportive relationship.¹²

A PROPERTY-BASED APPROACH

- 1.23 In this project, we have explored the circumstances in which those sharing homes may obtain and enforce property interests against the legal owner of the property, or against those who may be seeking possession of the home in order to sell it.
- 1.24 We believe that every encouragement should be given to those who are sharing, or who are contemplating sharing, a home, to discuss between themselves the legal consequences of their actions, and to formalise their agreement by means of an express declaration of trust.
- 1.25 Where no express provision has been made, the current law requires the court to consider whether an interest has arisen by means of an implied trust or by means of the doctrine of proprietary estoppel. This involves an examination of the

⁹ Chris Shaw, “1996-based population projections by legal marital status for England and Wales” (1999) 95 *Population Trends* 23, ONS.

¹⁰ John Haskey, “Cohabitation in Great Britain: past, present and future trends – and attitudes” (2001) 103 *Population Trends* 4, ONS.

¹¹ Some of these expressions do have current legal significance, others do not. See para 5.13 below.

¹² See *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27.

parties' intentions, based on statements, on conversations and on payments they may have made. We set out a summary of the current law as it concerns express trusts, implied trusts and proprietary estoppel in **Part II** below.

- 1.26 To deal with the inadequacies of the current law, we attempted to devise a scheme which would operate to identify and quantify the parties' beneficial interests in circumstances where no express arrangements have been made. This scheme was to be based on an objective assessment of the economic value of the contributions made by each party sharing the home. The contributions which would qualify were to be widely defined. The court would be able to define, and to declare, the parties' interests by reference to the contributions made. The scheme was not intended to give the court a discretion to adjust or to re-allocate property rights. It would apply to all the different kinds of people who may be sharing a home.
- 1.27 In **Part III** we explain briefly the scheme which we devised. We have, however, concluded that the infinitely variable circumstances affecting those who share homes have rendered it impossible to propose the scheme as a viable and practicable reform of the law. We do not consider that it offers sufficient flexibility, and far from improving on the existing law we believe that its application would make matters worse.
- 1.28 We have therefore concluded that although the existing law is not entirely satisfactory, there is no clear proposal for legislation which could be enacted to reform the means by which beneficial interests in the shared home are defined. However, we do believe that there are ways in which the common law can be usefully developed, and we shall discuss these further in **Part IV**.
- 1.29 The major issue which we have clearly identified as requiring further consideration is beyond the scope of the current project. It concerns the effect of breakdown of a relationship between two (and possibly more) persons who have been sharing a home. The direction of reform in this area would almost certainly require the formulation of a status which would confer rights and carry obligations, one of which would be the right to apply to the court for an order dealing with the financial consequences of the relationship breakdown.
- 1.30 This takes us well outside the scope of the project, as there would be no particular reason to restrict such orders to the shared home. We have however, in Part V, set out an analysis of the possible effect of the nature of the parties' relationship on the legal approach to their relationship and its consequences. This analysis imports connotations of status which the project has hitherto sought to avoid as a means of developing the law.

1.31 The project has led us to conclude as follows:

- (1) It is quite simply not possible to devise a statutory scheme for the ascertainment and quantification of beneficial interests in the shared home which can operate fairly and evenly across the diversity of domestic circumstances which are now to be encountered.**
- (2) Those who wish to obtain an interest in the shared home can do so by means of a trust being declared in their favour. It is essential**

that those who are living together are positively encouraged to investigate the legal consequences of doing so and to make express written arrangements setting out clearly their intentions. This message has been clearly sent out by the courts, and the Land Registry has changed its practice to ensure that those who purchase property jointly make effective provision stipulating their mutual rights and obligations.

(3) The issue of couples living outside marriage, in particular in marriage-like relationships, requires considerable further attention. The property law, which adopts a retrospective approach essentially based on financial contributions to the acquisition of the property, has not proved to be an effective means of doing justice on the breakdown of such relationships. There are two possible (and not by any means mutually exclusive) solutions:

(a) Recognition of certain marriage-like “partnerships” which the parties enter into and have registered, thereby conferring on themselves a set of rights and obligations. This solution would involve the parties “contracting in”.

(b) Recognition of certain “de facto” (again traditionally marriage-like) relationships. Here the law seeks to define circumstances (such as living together for a certain period of time) in which legal rights and obligations will be imposed on the parties. It would be possible for the law to allow parties to “contract out” of the legislation.

(4) There is also an increasing problem concerning persons who are not in any sense “a couple”, but who live together for mutual support or caring. They may or may not be related, but their financial affairs become somewhat inextricably intertwined. This is not by any means a homogenous group. The difficulty of definition does not however detract from the reality of the problem.

1.32 This is not a formal consultation exercise. We make no provisional proposals. We do hope, however, that this Paper will promote discussion at a time when there is likely to be heightened interest in the legal regulation of personal relationships. It is an area of the law in which we lag well behind many other jurisdictions, notably Australia and New Zealand.

1.33 The Law Commission has received assistance and advice from many individuals and organisations- too numerous to mention all by name- over the course of this project. It would like to pay particular tribute to the considerable efforts of the former Commissioner, Charles Harpum. In the last year, we have found invaluable the advice and support of District Judge Stephen Gerlis, Adrian Shipwright of Pump Court Chambers, Elizabeth Cooke of the University of Reading and Jo Miles of Trinity College, Cambridge. But to all who have contributed we are extremely grateful.

PART II

THE CURRENT LAW

INTRODUCTION

- 2.1 This project is concerned with homes which are “owner-occupied”, in the sense that the legal estate¹ in the shared home is vested in one or more of those who are sharing its occupation.² In this Part we will explain the current principles affecting the ownership and occupation of the shared home, with particular reference to the ways in which a person can establish an interest in the property. We have already identified the circumstances in which problems typically arise. Although the primary question which must be asked in each case is a simple one - “Who owns the home?” - the answer itself can be extremely complex. It will frequently involve reference to principles of the law of trusts, which is particularly difficult for lay persons to understand.
- 2.2 In this Part we shall first outline the law relating to trusts of land. This provides the basic principles for determining the rights of those sharing homes as between themselves as well as in relation to third parties such as purchasers and mortgagees (paras 2.4 to 2.40). We shall then explain the advantages of declaring an express trust and the extent to which current law encourages parties to do so (paras 2.41 to 2.52). Finally, we shall summarise the rules of implied trusts and proprietary estoppel which are applied by the courts in the absence of any express arrangement having been made.
- 2.3 It may assist if we briefly explain the terminology used in this Part:
- (1) An **express trust** is created where a person either expressly declares that he or she holds property on trust for another or transfers the property to another expressly subject to a trust. While no particular words are required to create a trust, it is usually very clear that a trust has been created.
 - (2) An **implied trust** is not expressly created, but arises by means of implication from particular circumstances. It can take one of two forms, a resulting trust or a constructive trust:
 - (a) A **resulting trust** is implied (or “presumed”) where a person purchases property in the name of another, or where a person makes a direct financial contribution to the acquisition of property in the name of another.

¹ That is, the freehold interest (the fee simple absolute in possession) or the leasehold interest (the term of years absolute).

² Where the legal estate is vested in a person who is not currently occupying the home, the arrangement is likely to take the form of a tenancy or a licence pursuant to which the occupiers are paying rent to the owner. The implications of such an arrangement in relation to a home are already under consideration by the Law Commission: see Renting Homes 1: Status and Security (2002) Law Com No 162.

- (b) A **constructive trust** is implied to give effect to the “common intention” of persons, typically where there is an agreement, arrangement or understanding between them that a property should be shared beneficially on which agreement one person relies to his or her detriment.
- (3) **Proprietary estoppel** is a doctrine applicable where a person has been encouraged or allowed to believe by an owner of land that he or she has certain rights in or over it. That person then acts to his or her detriment in reliance on this belief. If it is unconscionable for the owner to deny the claimant the rights in question, the court may grant relief to give effect to the expectation which has been engendered. The relief may or may not comprise the grant of an interest in property.

TRUSTS OF LAND

- 2.4 The trust is a device providing for the division of ownership of property into two components: legal title and beneficial ownership.³ In the case of land, legal title can be definitively ascertained (where title registration has been effected) by reference to the land register. Those persons who hold the legal title (“the registered proprietors”) are the trustees of the land. There cannot be more than four. They are given wide powers, to sell, to lease, or to mortgage the land.
- 2.5 The law imposes strict fiduciary duties on trustees. In particular, the trustees are not permitted to benefit from the exercise of their powers - not, at least, in their capacity as trustees. The benefits of the trust must be deflected to the beneficiaries:
 - (1) if land is sold, the proceeds of sale must be divided between the beneficiaries in accordance with their respective beneficial interests.
 - (2) if land is leased, the rental income must likewise be divided between the beneficiaries.

Example 1.

- 2.6 *A and B have had title to a home transferred to them. There is an express trust declaring that they are “to hold the land for the benefit of C and D in equal shares.” A and B are therefore the trustees, and C and D the beneficiaries, of the trust. When A and B sell the house for £300,000, they must pay the proceeds of sale to C and D, as to £150,000 each. If A and B let the house to a tenant, one half of the rent would be paid by them to C and one half to D.*
- 2.7 Where land is jointly owned, it is likely that the persons who are sharing, or at least some of them, are both trustees and beneficiaries. While they cannot benefit from the trust in their capacity as trustees, they can take the benefits to which they are entitled as beneficiaries. Despite the apparent artificiality of the exercise the same rules are to apply as when the identity of the individuals who are

³ “Beneficial ownership” is sometimes referred to as “equitable ownership”. For purposes of clarity of exposition, we shall use the former term in this Paper.

trustees and beneficiaries is different. Again, the beneficial interests dictate the shares of each person in the property which the home represents.

Example 2.

- 2.8 *E and F have had title transferred to them. There is an express trust declaring that they hold the land for the benefit of E (who put up more capital towards the purchase) as to two-thirds and F as to one-third. When they sell the house for £300,000, E is entitled to £200,000 and F is entitled to £100,000. Any rental income would be divided in the same proportions.*
- 2.9 The trust of land was the subject of a consultation exercise and Report by the Law Commission relatively recently,⁴ leading to the enactment of the Trusts of Land and Appointment of Trustees Act 1996.

Legal and beneficial ownership of the shared home

- 2.10 It now appears to be the position that legal or beneficial co-ownership of land will always take effect behind a trust.⁵ While statute has not made express provision to that effect,⁶ the House of Lords has accepted that a trust should be implied in all cases of co-ownership.⁷
- 2.11 Co-owners of land can be either joint tenants or tenants in common. The legal estate can only be held as joint tenants. Beneficial ownership can either take the form of a joint tenancy or a tenancy in common.

Legal title- joint tenancy

- 2.12 Where land is conveyed to two or more persons they will take the legal estate as joint tenants. Since 1925, joint tenancy has been the only form of co-ownership recognised at law.⁸ There is a statutory limit of four co-owners at law, and where an attempt is made to convey into more than four names, only the first four named will be the joint tenants. They will then hold the legal estate on trust for themselves and any other co-owners whose names do not appear on the title.
- 2.13 The most important element of joint tenancy is the right of survivorship. On the death of one joint tenant, his or her interest passes to the remaining joint tenant or joint tenants. Survivorship operates as a highly convenient means of ensuring a transmission of the property without the necessity of making a will. Indeed, a joint tenancy cannot pass by will or on intestacy, as it does not form part of the deceased's estate.

⁴ See Transfer of Land: Trusts of Land (1989) Law Com No 181.

⁵ For full discussion, see *Megarry & Wade - The Law of Real Property*, (6th ed 2000) paras 9-051 *et seq.*

⁶ See Law of Property Act 1925, s 36(1); Settled Land Act 1925, s 34(1).

⁷ "Since [the Law of Property Act 1925]..., undivided shares in land can only take effect in equity, behind a trust for sale upon which the legal owner is to hold the land": *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, 503, *per* Lord Wilberforce. See also *City of London Building Society v Flegg* [1988] AC 54, 77, *per* Lord Oliver of Aylmerton.

⁸ Law of Property Act 1925, ss 1(6), 34(1), 36(2); Settled Land Act 1925, s 36(4).

- 2.14 The right of survivorship is “ideal for trustees”.⁹ The trust property, in this case the home, will pass automatically to the surviving trustee (or trustees) who has then the appropriate power to deal with it. There is no need for the surviving trustee or trustees to have recourse to the personal representatives of the deceased trustee. They will, of course, continue to be bound by the obligations imposed on them by the trust of land.
- 2.15 As the legal estate can only be held on joint tenancy, it is not possible for joint tenants to “sever” their interests in the legal estate and convert them into tenancy in common.¹⁰

Beneficial ownership - joint tenancy or tenancy in common

- 2.16 Beneficial ownership may be as joint tenants or tenants in common. If they are joint tenants, the right of survivorship applies on death so that the interest of the deceased will pass automatically to the surviving joint tenant or joint tenants. The beneficial interest of the deceased will thereby cease and any purported testamentary disposition will be ineffective. This has potentially serious consequences for the relatives of the deceased who may have expected to benefit from the deceased’s interest in the shared home on their death. For this reason, many persons sharing homes may prefer to hold the property beneficially as tenants in common.
- 2.17 If the persons sharing the home are tenants in common, they are said to hold the land “in undivided shares”, each having a distinct share in the property which is (as yet) not divided among the tenants. No tenant in common has a particular “right” to any particular physical “part” of the land. In the event of the property being sold by the trustees, the proceeds of sale will be divided among the tenants in common in accordance with their respective shares in the equity.

THE RIGHT OF SEVERANCE

- 2.18 Severance is the process whereby a joint tenancy is converted into a tenancy in common. It can only be effected with regard to the beneficial ownership, as it is not possible for there to be a tenancy in common of a legal estate. The effect of severance is to confer on the person whose interest is severed a “share” quantified according to the number of joint tenants immediately prior to the severance taking place. Thus, if two persons have held their home as joint tenants beneficially, on severance they will each obtain a half-share. They cannot claim a larger share by reference to the contributions they might have made respectively to the property.¹¹
- 2.19 The methods by which severance can take place are as follows:
- (1) in the same manner as a joint tenancy of personalty could have been severed prior to 1926, that is to say¹²

⁹ *Megarry & Wade*, para 9-003.

¹⁰ See para 2.18 below.

¹¹ *Goodman v Gallant* [1986] Fam 106. See further para 2.20 below.

¹² According to Sir Page Wood V-C in *Williams v Hensman* (1861) 1 J & H 546, 557.

- (a) by an act of any of the persons interested “operating upon his own share”;¹³
 - (b) by mutual agreement;¹⁴
 - (c) “by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common”;¹⁵
- (2) by notice in writing to the other joint tenants;¹⁶
 - (3) by the act of a third party;¹⁷
 - (4) by the acquisition of another estate in the land;¹⁸
 - (5) by homicide.¹⁹

GOODMAN V GALLANT

2.20 An important decision, which emphasises the significance of an express declaration of beneficial entitlement and the limited effect of severance, is *Goodman v Gallant*.²⁰ In 1978, Mrs Goodman and Mr Gallant, who were living together, purchased a property (Mrs Goodman’s former matrimonial home). In the conveyance, they declared that they held the property “upon trust for themselves as joint tenants”. In 1983, by which time the couple had separated, Mrs Goodman served a written notice of severance on Mr Gallant. This was followed by an application to court seeking a declaration as to their respective interests. Mrs Gallant claimed that as she had paid three-quarters of the purchase price of the property, she should now be entitled to three-quarters of the beneficial interest in the house.

2.21 The Court of Appeal held that Mrs Goodman could not go behind the express declaration of trust. On severance of the beneficial joint tenancy, the parties would thereafter hold as beneficial tenants in common in two equal shares. Mrs Goodman was bound by the terms of the trust to which she was a party. She

¹³ Thus an alienation (in whole or in part) of the joint tenant’s interest (eg sale, lease or mortgage) may effect severance: see generally *Megarry & Wade*, paras 9-038 *et seq*.

¹⁴ The agreement need not be specifically enforceable: *Burgess v Rawnsley* [1975] Ch 429, 444, 446.

¹⁵ A unilateral statement by one joint tenant made orally in the course of negotiations will not suffice: *Burgess v Rawnsley* above, 448, *per* Sir John Pennycuick (*cf* Lord Denning MR, 439).

¹⁶ Law of Property Act 1925, s 36(2).

¹⁷ The classic instance is the bankruptcy of the joint tenant: see, *eg*, *Re Gorman* [1990] 1 WLR 616.

¹⁸ The so-called doctrine of merger, now of dubious application: see *Megarry & Wade*, para 9-048.

¹⁹ Severance would ensure that the killer did not benefit from the crime by means of survivorship. The court has a statutory discretion to relieve from the consequences of the forfeiture rule save where the applicant has been convicted of murder: Forfeiture Act 1982, s 2(4)(b).

²⁰ [1986] Fam 106.

could not claim an enhanced beneficial interest on the basis of her financial contribution to the purchase of the land having been greater than Mr Gallant's.

- 2.22 We support the robust approach of the court in *Goodman v Gallant*. We believe that those sharing homes should be given every encouragement to stipulate expressly for their beneficial entitlement. If that is to be the case, it is essential that courts strictly enforce declarations of trust which have been freely and fairly made by the parties.

Resolution of disputes between trustees and beneficiaries

- 2.23 Sections 14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996 provide a ready means for the resolution of disputes concerning trusts of land. Any person who is a trustee of land, or who has an interest in any property which is subject to a trust of land or the proceeds of sale of land, may apply to the court for an order to regulate the exercise by the trustees of any of their functions. Alternatively, they may seek a declaration as to the nature or extent of a person's interest in property subject to the trust.²¹ In response to such an application, the court has a discretion to make such order as it thinks fit. This may include an order that the trustees sell the property and distribute the proceeds as directed.

- 2.24 In exercising this statutory jurisdiction, the court is obliged to have regard to:
- (1) the intentions, if any, of the person(s) who created the trust;
 - (2) the purposes for which the property subject to the trust is held;²²
 - (3) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home; and
 - (4) the interests of any secured creditor of any beneficiary.²³

- 2.25 Although section 14 replaced the jurisdiction vested in the court pursuant to section 30 of the Law of Property Act 1925, the principles to be applied are not the same. In cases under section 30, the normal rule was that, save in exceptional circumstances, the wishes of the person wanting a sale would prevail. The interests of children and families in occupation were treated as secondary.²⁴ However, the replacement of trusts for sale with the "less arcane and simpler"²⁵ trusts of land presaged a change in the treatment of applications by the court. It has been held that section 15 changed the law and that the court has greater flexibility as a consequence.²⁶ As a result, the authorities on section 30 have now

²¹ Trusts of Land and Appointment of Trustees Act 1996, s 14(2).

²² This refers to the purposes subsisting at the time the application comes before the court: *Rodway v Landy* [2001] Ch 703, 711, *per* Peter Gibson LJ.

²³ Trusts of Land and Appointment of Trustees Act 1996, s 15(1). See also the additional factors which must be considered with regard to certain specific applications: *ibid*, s 15(2).

²⁴ *In re Citro (Domenico) (A Bankrupt)* [1991] Ch 142; *Lloyds Bank plc v Byrne & Byrne* [1993] 1 FLR 369.

²⁵ *Mortgage Corpn v Shaire* [2001] Ch 743, 757, *per* Neuberger J.

²⁶ *Ibid*, 758, *per* Neuberger J; *Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 FLR 809, 816, *per* Peter Gibson LJ.

to be treated with caution and in many cases they are unlikely to be of great assistance.²⁷

- 2.26 There is one very important restriction on the court's powers under section 14. It can *declare* existing rights. But it cannot *adjust* or *vary* them. It is a statutory jurisdiction which is much more limited than that exercisable on divorce pursuant to the Matrimonial Causes Act 1973.²⁸ However, the court does have considerable scope in terms of the order which it decides to make. The early signs are that the courts will use their statutory power with greater imagination than was perhaps the case under section 30.²⁹ Where, however, a creditor is not receiving proper recompense for being kept out of his money, this is a powerful consideration in favour of ordering a sale.³⁰

Dealings with third parties

- 2.27 The existence of the trust governs the relationship between the joint owners and third parties who come to deal with the land. Where two persons hold the legal estate on trust for themselves or others, a conveyance of that estate executed by both of those persons will be effective to "overreach" the beneficial interests. The beneficial interests will then be detached from the land and attached to the proceeds of sale which will be held on trust from the date of completion by the former legal owners. The device of overreaching attempts to combine fairness to the beneficiaries with conveyancing facility for the third party purchaser or mortgagee. It is a highly convenient means of dealing with transactions entered into by the trustees of the land.
- 2.28 Trustees of land will overreach the rights of beneficiaries under the trust provided that they comply with the statutory requirements set out in the Law of Property Act 1925.³¹ These provide that the proceeds of sale or other capital money "shall not be paid to or applied by the direction of fewer than two persons as trustees, except where the trustee is a trust corporation".³² Where two or more persons apply to be registered as joint proprietors, the Land Registry will place a restriction on the register and thereby alert any purchaser to the need to deal with a minimum of two trustees.³³ Where payment is duly made to two trustees, the purchaser will take free of the interests of beneficiaries behind the trust even

²⁷ *Mortgage Corp'n v Shaire* above, 761, *per* Neuberger J.

²⁸ See further paras 5.8 - 5.11 below.

²⁹ See, for instance, the order proposed by Neuberger J in *Mortgage Corp'n v Shaire* [2001] Ch 743, 764 *et seq.*

³⁰ *Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 FLR 809, 816, *per* Peter Gibson LJ. Where the application under s 14 is made by the trustee in bankruptcy of one of those sharing the home, somewhat different considerations apply: Trusts of Land and Appointment of Trustees Act 1996, s 15(4); Insolvency Act 1986, s 335A.

³¹ Law of Property Act 1925, s 2(1)(ii).

³² Law of Property Act 1925, s 27(2).

³³ Land Registration Act 1925, s 58(3); Land Registration Act 2002, s 44.

though the beneficiaries are in occupation of the land and have not been consulted about the transaction.³⁴

Example 3.

2.29 *A and B are joint registered proprietors of the freehold interest in a shared home. C, their daughter, aged 30, lives with them. She has a beneficial interest in the home (a one-tenth share) by virtue of constructive trust. If A and B sell their legal estate to D for £200,000, C's beneficial interest will be "overreached". She can no longer occupy the home. She can, however, claim her share in the proceeds of sale, amounting to £20,000, from A and B.*

2.30 The doctrine of overreaching presupposes, in most cases,³⁵ that there are at least two trustees of the land. If there is only one trustee, it will not operate, and case law has had to intervene to remedy the failure of the property legislation to address the effect of dealings with the legal estate by a single trustee. It seems that a purchaser of the legal title will not be bound by the beneficial interest unless:

- (1) where the title to land is registered, the beneficial interest appeared on the register³⁶ or, despite its absence from the register, it took effect as an overriding interest. Typically, this will involve the beneficiary being "in actual occupation", or in receipt of rents and profits, at the time of completion of the purchase.³⁷
- (2) where title is unregistered, the purchaser had notice (actual, constructive or imputed) of the beneficial interest at the time of completion of the purchase. In other words, the purchaser is not a bona fide purchaser of the legal estate for value without notice of the trust.³⁸

Example 4.

2.31 *E is the registered proprietor of the legal estate in a home which he shares with F. By virtue of constructive trust, F has a beneficial interest amounting to one-third. E mortgages the legal estate in favour of a bank without informing F. The bank may be bound by F's interest, which they have not overreached, provided that F is in actual occupation (or in receipt of rents and profits) of the land. If F was aware that E was negotiating a mortgage advance, F will not be able to assert priority over the bank.*

³⁴ *City of London Building Society v Flegg* above.

³⁵ The exceptions being the trust corporation and the sole personal representative, acting as such: see Law of Property Act 1925, s 27(2).

³⁶ Land Registration Act 1925, ss 54, 58; Land Registration Act 2002, ss 42, 44.

³⁷ Land Registration Act 1925, s 70(1)(g); Land Registration Act 2002, Sched 1, para 2, Sched 3, para 2; *Williams & Glyn's Bank Ltd v Boland* [1981] above; *Abbey National Building Society v Cann* [1991] 1 AC 56.

³⁸ *Counce v Counce* [1969] 1 WLR 286; *Kingsnorth Finance Ltd v Tizard* [1986] 1 WLR 783. The decisions take a radically different view of the burden of inquiry imposed on the purchaser. *Tizard* attempts to equate inquiry in unregistered conveyancing with that expected in registered conveyancing as a result of the decision in *Boland*.

Occupation of the shared home

- 2.32 Rights of occupation in the shared home may arise:
- (1) where the person has a beneficial interest under a trust of land; and/or
 - (2) where the person has “matrimonial home rights” pursuant to Part IV of the Family Law Act 1996.
- 2.33 Where a person who is sharing the home with its legal owner has no beneficial interest under a trust of land (and has not been granted exclusive possession of any part of it), they are likely to be no more than a licensee. Unless they can claim “matrimonial home rights”, they will have no effective security in the home.³⁹

Where a person has an interest under a trust of land

- 2.34 Where a person is a beneficiary under a trust of land, their right to occupy the property held on trust seems now to be derived largely, if not exclusively, from statute. The Trusts of Land and Appointment of Trustees Act 1996 confers on a “beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land” a right to occupy the land at any time.⁴⁰ The right applies only if at that time:
- (1) the purposes of the trust include making the land available for his occupation;⁴¹ or
 - (2) the land is held by the trustees so as to be so available.⁴²
- 2.35 There is no right of occupation if the land is not available (as where it has been let) or if it is unsuitable for occupation by the beneficiary (as where the property is not of a residential character, or is not fit for habitation).⁴³
- 2.36 The right of occupation is subject to the power that is given to the trustees to exclude or restrict the right in certain circumstances. First, trustees of land have a power to impose reasonable conditions on any beneficiary in relation to his occupation under the statutory power outlined above.⁴⁴ Secondly, the trustees are given the power to exclude or restrict the entitlement to occupy under the

³⁹ Although the provisions of the Protection from Eviction Act 1977 concerning due process and notices to quit apply to licensees, those licensees who share accommodation with the licensor who is occupying it as his or her only or principal home are specifically excluded: s 3A, inserted by Housing Act 1988, s 31.

⁴⁰ Section 12(1).

⁴¹ Or for the occupation of beneficiaries of a class of which he is a member, or of beneficiaries in general.

⁴² Section 12(1).

⁴³ *Ibid*, s 12(2).

⁴⁴ Trusts of Land and Appointment of Trustees Act 1996, s 13(3). These include conditions requiring the beneficiary to pay any outgoing or expenses in respect of the land, and to assume any other obligations in relation to the land or to any activity which either is or is proposed to be conducted on the premises: *ibid*, s 13(5). The statutory power has been interpreted broadly so that trustees may divide a building subject to a trust of land between those beneficiaries who are entitled to occupy and also require the beneficiaries to share the costs of the works effecting the division: *Rodway v Landy* [2001] Ch 703, 715.

statutory power.⁴⁵ Thirdly, although the Act does not set out all of the factors to which the trustees are to have regard when exercising their powers,⁴⁶ it does specify the intentions of the person who created the trust, the purposes for which the land is held, and the circumstances and wishes of each of the beneficiaries who are entitled to occupy the land under the statute, or would have been if he or she had not been excluded by the trustees when they had exercised their powers on a previous occasion.⁴⁷ Fourthly, where one or more beneficiaries have been excluded or restricted by the trustees in exercise of their powers, the Act specifies conditions which they may impose on the beneficiary⁴⁸ in occupation.⁴⁹ Finally, the Act⁵⁰ severely restricts the circumstances in which trustees may exclude any person who is already in occupation of the land, whether or not that person occupies by virtue of an entitlement under the Act.⁵¹ This safeguard protects not only a beneficiary but, for example, that beneficiary's spouse, partner or child.

Matrimonial home rights

2.37 The refusal of the House of Lords⁵² to recognise that a spouse who had no beneficial interest in the matrimonial home could assert a right to occupy the property against purchasers or mortgagees of the legal estate⁵³ led to the enactment of the first Matrimonial Homes Act in 1967. This measure, and its successors,⁵⁴ put the "deserted wife's equity" on a statutory footing and provided registration machinery whereby the spouse could assert their rights against third parties. It should be noted, however, that since 1967 there has been a highly significant change of practice in that most spouses have the legal title to their home vested in their joint names and both enjoy rights of occupation under the trust of land. The statutory rights have therefore decreased in importance.

⁴⁵ *Ibid*, s 13(1). This power is exercisable only where two or more beneficiaries are entitled to occupy under the statutory power. It cannot be used to exclude *all* the beneficiaries so entitled: *Rodway v Landy* [2001] above, 702. Nor can it be used either unreasonably to exclude any beneficiary's entitlement to occupy land, or to restrict any such entitlement to an unreasonable extent.

⁴⁶ It is implicit that the trustees should have regard to all the circumstances that are relevant in the particular case.

⁴⁷ *Ibid*, s 13(4).

⁴⁸ Or beneficiaries.

⁴⁹ The conditions may require compensation of the excluded beneficiary.

⁵⁰ *Ibid*, s 13(7).

⁵¹ *Ibid*, s 12.

⁵² *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.

⁵³ The famous "deserted wife's equity" (see *Bendall v McWhirter* [1952] 2 QB 466) which met its demise in *National Provincial Bank Ltd v Ainsworth* above.

⁵⁴ Following amendments largely contained in the Matrimonial Homes and Property Act 1981, and consequent upon the Law Commission's Third Report on Family Property (1978) Law Com No 86, the legislation was consolidated in the Matrimonial Homes Act 1983.

Orders regulating occupation of the shared home

- 2.38 If a dispute arises between co-owners as to the right to occupy, it may be resolved by the trustees exercising their statutory powers or by the court pursuant to section 14 of the Trusts of Land and Appointment of Trustees Act 1996⁵⁵ or Part IV of the Family Law Act 1996.
- 2.39 Section 14 of the Trusts of Land and Appointment of Trustees Act 1996 applies where there is a trust of land. Any person who is a trustee, or who has an interest in property which is subject to the trust of the land or its proceeds of sale, may make the application. Part IV of the Family Law Act 1996, which was enacted principally to provide protection from domestic violence,⁵⁶ applies only in relation to dwelling-houses but is not restricted to cases where there is a trust. Part IV is much more detailed than section 14, and it has been judicially suggested that where both jurisdictions are available to the court, it should approach the matter primarily in the context of the former.⁵⁷ The jurisdiction of the court under Part IV is wide. The court may regulate occupation by means of a variety of orders. In broad terms, those who are entitled to occupy (including those with matrimonial home rights) are in the strongest position, but substantial protection is also conferred on those who have no entitlement as such but who have been married to, or have been cohabiting with, an entitled person (and even a non-entitled person).⁵⁸
- 2.40 **We believe that the trust of land offers a machinery for the establishment of beneficial interests in land which is both coherent and flexible. Its integrity has the confidence of practitioners, and the Trusts of Land and Appointment of Trustees Act 1996 provides a means of resolving disputes between those who share homes which is efficient and workable. An effective balance is achieved between the need to protect those with beneficial interests who are occupying the shared home and the need to ensure that dealings with the property can be expeditiously and conveniently effected.**

ENCOURAGING FORMAL ARRANGEMENTS

- 2.41 We have already emphasised how important it is for those who are intending to live together to discuss their mutual rights and obligations in the shared home and to make express provision. If a person wishes to obtain an interest in the shared home, he or she should insist upon an express trust being declared in their favour. A declaration of trust must be evidenced in writing and signed by

⁵⁵ See para 2.23 above.

⁵⁶ The statutory reform of regulation of the occupation of the family home in cases of domestic violence was consequential upon the recommendations of the Law Commission: Family Law: Domestic Violence and Occupation of the Family Home (1992) Law Com No 207.

⁵⁷ *Chan v Leung* (unreported) 30 November 2001, HH Judge McGonigal, sitting as a Deputy Judge of the High Court.

⁵⁸ For further details, see S M Cretney & J M Mason, *Principles of Family Law* (6th ed 1997) pp 244 - 265.

some person who is able to declare such a trust - usually the legal owner.⁵⁹ This will provide security. Not only will the beneficiary have the right to occupy the home, they will also obtain a financial stake in the property.

- 2.42 The Court of Appeal has recently re-emphasised, in very strong terms, the importance of purchasers executing an express declaration of their beneficial entitlement:

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 of 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.⁶⁰

- 2.43 The Land Registry now requires a declaration of trust where land is to vest in persons as joint proprietors, whether on an application for first registration, on a transfer of land with registered title, or on an assent to vesting of land in persons entitled under a deceased's estate. The statutorily prescribed form requires the intending proprietors to state whether they hold on trust for themselves beneficially as joint tenants, as tenants in common or on any other trusts.⁶¹

- 2.44 We realise that it is much easier to ensure that express trusts are created where the home is being purchased. Purchasers will be encouraged by their legal advisers to make express provision concerning their beneficial interests in the property - indeed a failure to advise in such terms may leave a solicitor vulnerable to a professional negligence action.⁶² At paras 2.48 to 2.52 below, we will outline the law relating to express trusts.

- 2.45 Problems are much more likely to occur where one person owns a house into which another comes to live. In this latter situation, it is relatively rare for the parties to make an express declaration of their respective beneficial entitlements. It is unusual for such persons to seek legal advice at such a time, and there is no occasion equivalent to registration of the title to the property following a purchase which would afford an opportunity to advise those sharing the home of the advantages of making formal provision.

⁵⁹ Law of Property Act 1925, s 53(1)(b). The requirement of writing does not apply in the case of implied, resulting or constructive trusts: *ibid*, s 53(2). See para 2.54 below.

⁶⁰ *Carlton v Goodman* [2002] EWCA Civ 545 at [44], *per* Ward LJ. The use of the upper case for emphasis is that of the judge.

⁶¹ Land Registration Rules 1925, rr 19(1), 98, Sched 1, as inserted by Land Registration Rules 1997, r 2(2).

⁶² See *Walker v Hall* [1984] 5 FLR 126, 129, *per* Dillon LJ, 136, *per* Lawton LJ; *Springette v Defoe* [1992] 2 FLR 388, 396, *per* Sir Christopher Slade.

- 2.46 Where no express declaration of trust has been made, any person who wishes to claim an interest in the home must do so by reference to the law of implied (resulting or constructive) trusts or the doctrine of proprietary estoppel. This area of the law is difficult, and the principles, which have been developed by decisions of the courts, are not as clear as they might be. The scheme which we devised, and which we explain in Part III, was intended to provide a more satisfactory, fairer and objectively certain means of ascertaining and quantifying beneficial entitlements to the shared home than the current law.
- 2.47 We outline the current law which applies where the parties have failed to make an express declaration of beneficial entitlement in paras 2.53 to 2.112 below.

EXPRESS TRUSTS

- 2.48 A declaration of trust is conclusive of the beneficial entitlements of those who are parties to the relevant transaction, save where:
- (1) the trust is set aside on the ground of fraud⁶³ or mistake⁶⁴ or is later rectified; or
 - (2) the parties did not assent to the terms of the declaration.⁶⁵

Construing the declaration

- 2.49 The true meaning of any declaration of trust is a matter of construction. The forms of words most usually encountered are considered below.
- (1) The legal estate may be held by A and B *on trust “for themselves as joint tenants beneficially”*. In such a case, A and B will hold as joint tenants in equity. In the event of that joint tenancy being severed, A and B will hold the legal estate on trust for themselves as tenants in common in equal shares.⁶⁶
 - (2) A declaration *“that the transferees are entitled to the land for their own benefit and that the survivor of them can give a valid receipt for capital moneys arising on a disposition of land”* has been held to be conclusive evidence of the parties’ intention to hold as joint tenants beneficially.⁶⁷ Where, however, there is no reference to the parties being entitled to the land “for their own benefit”, the remaining words are not conclusive and in themselves comprise neither an express declaration of beneficial joint

⁶³ “Fraud” would appear to include “actual” undue influence: see *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200, 209, *per* Lord Browne-Wilkinson.

⁶⁴ “Mistake” is difficult to establish, and will not enable parties who have failed to read the relevant documents and have signed them nevertheless to contend that they are not bound by their contents: *Pink v Lawrence* (1978) 36 P & CR 98.

⁶⁵ *Wilson v Wilson* [1963] 1 WLR 601; *Bedson v Bedson* [1965] 2 QB 666; *Pettitt v Pettitt* [1970] AC 777, 813, *per* Lord Upjohn; *Re John’s Assignment Trusts* [1970] 1 WLR 955; *Leake v Bruzzi* [1974] 1 WLR 1528; *Pink v Lawrence* above; *Goodman v Gallant* [1986] Fam 106.

⁶⁶ *Goodman v Gallant* above. See para 2.20 above.

⁶⁷ *Re Gorman (A Bankrupt)*[1990] 1 WLR 616, 621, 623 - 624, *per* Vinelott J.

tenancy nor a statement indicating equal entitlement as tenants in common.⁶⁸

(3) Where the legal estate is declared to be held on trust for the persons entitled *as tenants in common in equal* (or otherwise expressly stipulated) *shares*, that will be conclusive of their respective beneficial entitlement.⁶⁹

(4) Where a transfer or conveyance of the legal estate into joint names is declared to be upon trust “*for themselves as beneficial joint tenants in common in equal shares*”, the parties will be treated as tenants in common beneficially.⁷⁰ The ambiguity of the declaration is resolved in such a way that survivorship does not apply unless that is the clearly expressed intention of the parties.

2.50 An express declaration is not conclusive of beneficial entitlement in so far as those who were not parties to the transaction are concerned. It cannot bind those who are not privy to the trust. Thus where a house was transferred into the names of A and B for themselves as beneficial joint tenants, B’s parents, who had contributed more than half the purchase price, were still able to assert an interest by virtue of resulting trust.⁷¹

2.51 An express declaration is not conclusive where it has not been executed.⁷² However, such a document may well assist the court in determining what the intentions of the parties were at the time of acquisition of the shared home, and may therefore be of significant evidential weight where a party is making a claim of entitlement pursuant to an implied, resulting or constructive trust.

2.52 **We consider that it is desirable to encourage parties to make express declarations of beneficial entitlement wherever possible. The requirement of HM Land Registry that those who purchase land as joint proprietors should stipulate their beneficial interests is an extremely useful development which should reduce the scope for dispute. It is essential, in order to reward those who make proper provision, that courts continue rigorously to enforce express declarations of trust.**

⁶⁸ *Harwood v Harwood* [1991] 2 FLR 274, 288, per Slade LJ; *Huntingford v Hobbs* [1993] 1 FLR 736, 741, per Sir Christopher Slade; *Mortgage Corp v Shaire* above, 752 - 3, per Neuberger J.

⁶⁹ See, for example, *Hembury v Peachey* (1996) 72 P & CR D46 (nine-tenths/one-tenth shares).

⁷⁰ *Martin v Martin* (1987) 54 P & CR 238; cf *Joyce v Barker Bros (Builders)* (1980) 40 P & CR 512.

⁷¹ *City of London Building Society v Flegg* above. See paras 2.53 *et seq.*

⁷² *Robinson v Robinson* (1977) 241 EG 153, 155. Note, however, *Roy v Roy* (1991) [1996] 1 FLR 541, in which the Court of Appeal held that where title had been transferred into the names of purchasers “as joint tenants in law and equity”, pursuant to a conveyance which was executed only by the vendor, the burden fell on the purchaser seeking rectification of the register to establish that the parties’ intentions were not truly represented by the words of the transfer.

IMPLIED TRUSTS AND PROPRIETARY ESTOPPEL

- 2.53 Many persons who share homes have never made an express declaration setting out their beneficial entitlement in the home. In such cases, the rules of implied trusts and the doctrine of proprietary estoppel have been applied by the courts in an attempt to ensure that justice is done.

Implied trusts

- 2.54 Implied trusts may be “resulting” or “constructive”. Both arise by operation of equity. The general rule is that although a trust of land may be declared orally, it will be unenforceable unless it is evidenced in writing.⁷³ However, the statutory formality requirements do not affect the creation or operation of implied, resulting or constructive trusts, and so no written evidence to establish the existence of such a trust is necessary.⁷⁴ As we shall see, however, proving beneficial entitlement pursuant to an implied trust is not straightforward and may give rise to profound evidentiary difficulties.
- 2.55 A further problem, at least in terms of its effect on the exposition of the relevant principles, is caused by confusion between the various kinds of informally created trusts. In this paper we will refer to resulting and constructive trusts generically as “implied trusts”. However, while there is extensive debate as to the precise nature of resulting and constructive trusts, the two are generally accepted to comprise separate and distinct doctrines.⁷⁵ In particular, the appropriate method of quantification of beneficial entitlement may depend on the type of trust concerned.⁷⁶

The resulting trust

- 2.56 Where the legal estate is conveyed into the name of one party following the payment of some, or all, of the purchase price by another, the presumption of resulting trust holds that beneficial ownership results to the paying party.⁷⁷ Where a resulting trust takes effect, the share obtained by the contributor will be proportionate to the share of the purchase price provided. Thus, where A and B join together, each paying half the capital necessary to fund the purchase of property which is transferred into the name of A alone, the presumption of resulting trust would apply so that A would hold on trust for A and B as to one-half each.
- 2.57 The true doctrinal basis of resulting trust is currently a matter of some dispute.⁷⁸ One view is that it is based on the presumed intention of the parties.⁷⁹ It has been

⁷³ Law of Property Act 1925, s 53(1)(b).

⁷⁴ Law of Property Act 1925, s 53(2).

⁷⁵ *Megarry & Wade*, para 10-009; *Snell's Equity* (30th ed 1999), paras 9-02 *et seq*.

⁷⁶ See further paras 2.81 *et seq* below.

⁷⁷ *Dyer v Dyer* (1788) 2 Cox Eq 92.

⁷⁸ See *English Private Law*, P Birks (ed), paras 4.249-4.256.

⁷⁹ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 708, *per* Lord Browne-Wilkinson; *Megarry & Wade*, para 10-009.

claimed, however, that it is the absence of intention (to pass the beneficial interest in the property to the transferee) which is material.⁸⁰ Whichever view is adopted, the presumption of resulting trust is rebuttable by any evidence of actual contrary intention. Evidence of any intention inconsistent with an intention that the contributor of money was to take a beneficial interest will suffice.⁸¹ This may take the form of evidence that the payment was by way of gift or of loan, or the presumption of advancement may neutralise the imposition of a resulting trust.

Intention to make a gift or a loan

- 2.58 The presumption of resulting trust can be rebutted where the person benefitting from the payment establishes that the payer intended to make a gift or a loan. In the latter case, the creditor would have recourse to the debtor by way of an action of debt. Even where the loan is secured on the debtor's land in the form of a mortgage, the creditor would not obtain a beneficial interest in the property as such.

Presumption of advancement

- 2.59 The countervailing presumption of advancement may arise where the party into whose name the property is transferred is the child or the wife of the transferor. The transaction is treated as one of gift unless it can be shown that the transferor intended otherwise.⁸² The presumption of advancement does not apply where property is purchased by a mother for her child,⁸³ nor to a purchase of property in the name of a husband funded by his wife.⁸⁴ Unsurprisingly, it does not apply as between an unmarried couple living together as husband and wife.⁸⁵
- 2.60 The presumption of advancement is now viewed as being somewhat anachronistic.⁸⁶ A majority of the House of Lords has stated that it would rarely have decisive effect in modern conditions,⁸⁷ and it has more recently been described as "a judicial instrument of last resort".⁸⁸ The gender bias of

⁸⁰ R Chambers, *Resulting Trusts* (1997); P Millett, "Restitution and Constructive Trusts" (1998) 114 LQR 399, 401.

⁸¹ *Megarry & Wade*, para 10-009.

⁸² Thus it can itself be rebutted by evidence of contrary intention: *Stock v McAvoy* (1872) LR 15 Eq 55; *Gross v French* [1976] 1 EGLR 129; *McGrath v Wallis* [1995] 2 FLR 114, 122, *per* Nourse LJ. For a recent case where the presumption of advancement was not displaced, see *Harwood v Harwood* [1991] 2 FLR 274, 294, *per* Slade LJ

⁸³ *Bennet v Bennet* (1879) 10 Ch D 474, 478, *per* Sir George Jessel MR; *Sekhon v Alissa* [1989] 2 FLR 94.

⁸⁴ See *Mercier v Mercier* [1903] 2 Ch 98; *Snell's Equity*, para 9-12.

⁸⁵ *Lowson v Coombes* [1999] 1 FLR 799, *cf* *Cantor v Cox* (1975) 239 EG 121.

⁸⁶ It has been discussed most recently in relation to transfers of property wholly or partly motivated by illegality: *Tinsley v Milligan* [1994] 1 AC 340. For proposals to modify current effect of illegality, see *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (1999) Law Com Consultation Paper No 154.

⁸⁷ *Pettitt v Pettitt* [1970] AC 777, 793, *per* Lord Reid, 811, *per* Lord Hodson, 824, *per* Lord Diplock; see also *Gissing v Gissing* [1971] AC 886 at 907, *per* Lord Diplock.

⁸⁸ *McGrath v Wallis* [1995] 2 FLR 114, 115, *per* Nourse LJ.

advancement is widely thought to contravene Article 5 of the Seventh Protocol to the European Convention on Human Rights in its assertion of the equality of spousal rights and responsibilities.⁸⁹

The current role of the resulting trust

- 2.61 The resulting trust is based on the premise that a person is unlikely to have paid for property altruistically, without some expectation of return by way of beneficial interest. Traditionally, the only contributions which would give rise to the presumption were those at the date of acquisition of the property. The modern reliance on mortgage finance has led to a corresponding diminution in the importance of the resulting trust, as parties have sought to argue, for example, that contributions to the mortgage repayments have conferred on them an equitable interest in the home, and use of resulting trust reasoning is now relatively uncommon:

[I]t is probably best nowadays to regard the resulting trust as applicable only in those relatively rare cases where there is no available evidence of the parties' actual intentions, but contributions of cash have been channelled directly towards the initial purchase of realty.⁹⁰

The constructive trust

- 2.62 The constructive trust "is not capable of precise definition and is continually developing."⁹¹ In general terms, a constructive trust arises where it would be unconscionable for the legal owner of property to deny the beneficial interest of another.⁹² Where disputes arise between those sharing homes, it is the so-called "common intention" constructive trust to which resort is frequently made in an attempt to determine the parties' respective rights and to analyse whether those rights are binding in any respect on third parties, such as mortgagees and purchasers.⁹³ The particular kind of conduct which is likely to give rise to such a constructive trust was considered at length by Lord Bridge in the leading decision of the House of Lords, *Lloyds Bank plc v Rosset*.⁹⁴

⁸⁹ Written Answer, *Hansard* (HL) 21 April 1998, vol 588, col 197.

⁹⁰ K J Gray & S F Gray, *Elements of Land Law* (3rd ed 2001) p 670.

⁹¹ *Snell's Equity*, para 9-38.

⁹² The constructive trust has been employed in a multiplicity of situations, in many cases as a means of imposing a liability to account on a miscreant, although there has been a relatively steadfast refusal to develop constructive trusts as a purely remedial device. For example, where a trustee makes a profit as a result of being a trustee, in the absence of agreement to the contrary, the trustee is deemed to hold that profit on constructive trust for the beneficiaries of the trust. Likewise, where a vendor enters into a specifically enforceable contract for the sale of land, the vendor is deemed to hold the property on constructive trust for the purchaser. And in certain circumstances, the survivor of the authors of mutual wills will hold property on constructive trust for an intended beneficiary.

⁹³ The "common intention" constructive trust is unusual in that in the cases listed above the constructive trust is imposed without regard to the parties' intentions. The earlier major decisions are *Pettitt v Pettitt* above and *Gissing v Gissing* above.

⁹⁴ [1991] 1 AC 107.

LLOYDS BANK V ROSSET

- 2.63 A married couple had purchased a property with the aid of mortgage finance and an injection of capital from the husband's family trust. The property was transferred into the husband's sole name. The question arose, in possession proceedings brought by the mortgagee, whether the wife had acquired any interest in the home. She contended that there had been an agreement between herself and her husband that the property was to be jointly owned, and that in reliance on that agreement she had made a significant contribution in kind to its acquisition by actively participating in renovation works.
- 2.64 The problem, a familiar one in such circumstances, was that of informality. No agreement having been committed to writing, there was a conflict of evidence between the spouses (who were divorced by the time of the hearing) both as to what had been said and what had been done. As a consequence, the court had to search for the parties' "common intention":

The question the judge had to determine was whether he could find that before the contract to acquire the property was concluded they had entered into an agreement, made an arrangement, reached an understanding or formed a common intention that the beneficial interest in the property would be jointly owned. I do not think it is of importance which of these alternative expressions one uses.⁹⁵

- 2.65 On the facts, Mrs Rosset failed to establish an interest in the property. She could not establish that there had been an agreement, arrangement or understanding that she should obtain a beneficial share in the home. Indeed, such evidence as there was supported the view that it was never intended that she should have an interest. The acquisition of the property in the husband's sole name was clearly a deliberate action which the trustees of Mr Rosset's Swiss family trust had insisted upon in order to protect their investment.
- 2.66 In setting out the principles on which he decided that Mrs Rosset had failed to establish an interest in the property by virtue of constructive trust, Lord Bridge drew a "critical distinction" between what have respectively come to be known as cases of "express", and cases of "inferred", common intention:

The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in

⁹⁵ *Ibid*, 127, *per* Lord Bridge of Harwich.

reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.

In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust.⁹⁶

Express common intention

- 2.67 Where a claim is based on “express” common intention, there must be evidence of express discussions between the parties. The intention to be established is not merely an intention to share *occupation* of the property, but an intention to share its *beneficial entitlement* (or its ‘equity’).
- 2.68 Two examples of cases of “express common intention”, both concerning unmarried cohabiting couples, are given by Lord Bridge in *Rosset*.⁹⁷ In *Eves v Eves*,⁹⁸ the male partner told the female partner that the property would be acquired in his name alone because she was under 21. He implied that had she been older it would have been put into their joint names. In *Grant v Edwards*,⁹⁹ the man told the woman that the only reason for the property being acquired in his name¹⁰⁰ was her continuing involvement in divorce proceedings which might be prejudiced in the event of a joint purchase. In neither of these cases was there a true “common intention”, in that the man did not really wish to share the property beneficially with the woman, but a constructive trust was nevertheless imposed, apparently to ensure that the woman obtained the share which the man led her to believe she could have had.¹⁰¹
- 2.69 Where the court finds an express common intention, it must then go on to look for conduct by the claimant acting upon that intention, the so-called “detrimental reliance”. That conduct may, but need not, involve financial expenditure by the claimant.¹⁰² In *Grant v Edwards*,¹⁰³ the claimant made significant contributions to the expenses of the joint household such that the defendant could pay the instalments on the mortgage. In *Eves v Eves*,¹⁰⁴ the

⁹⁶ *Ibid*, 132.

⁹⁷ *Ibid*, 133.

⁹⁸ [1975] 1 WLR 1338.

⁹⁹ [1986] Ch 638.

¹⁰⁰ And that of his brother.

¹⁰¹ This point is convincingly made by S Gardner, “Rethinking Family Property” (1993) 109 LQR 263, 265: “the fact that the men’s statements were excuses ... does not mean that the men were thereby acknowledging an agreement whereby the woman should have a share.”

¹⁰² *Grant v Edwards* [1986] Ch 638, 647, *per* Nourse LJ.

¹⁰³ *Ibid*.

¹⁰⁴ [1975] 1 WLR 1338.

claimant acted upon the statement by the legal owner by decorating the downstairs of the house, painting the brickwork, demolishing a shed and erecting a replacement, and wielding a 14lb sledgehammer to break up the concrete covering the front garden. Although she did not make any financial contribution to the purchase of the property, she was able to assert a beneficial interest arising by virtue of a constructive trust.

Inferred common intention

- 2.70 According to Lord Bridge in *Rosset*, a common intention will only be inferred where there is a direct financial contribution to the purchase price of the property by means of an initial capital payment or payment of mortgage instalments: “it is at least extremely doubtful whether anything less will do.”¹⁰⁵ In such cases, the conduct evidenced by the payments performs a dual role in establishing the common intention and providing the detrimental reliance. Not only does this emphasise the obvious overlap between the constructive trust based on the parties’ inferred common intention and the resulting trust,¹⁰⁶ it can also give rise to confusion in identifying the element of detriment.

Detriment

- 2.71 The claimant must have acted to their detriment in reliance upon the parties’ common intention, whether express or inferred, in the reasonable expectation that an interest would be acquired in the property.¹⁰⁷ Once a common intention has been established, the court must look for detrimental reliance. The burden then lies on the legal owner to show that an act, or a series of acts, was not referable to the claimant’s belief that he or she has an interest in the house. Acts “referable to the mutual love and affection of the parties” will be so classed. No interest will therefore be acquired if the claimant would have performed the acts in any event.
- 2.72 The extent to which acts unrelated to the acquisition or improvement of property will satisfy the requirement for detriment is uncertain.¹⁰⁸ Detriment has been interpreted broadly as including “any act done by [the claimant] ... to her detriment relating to the joint lives of the parties.”¹⁰⁹ Whilst noting that *Eves v Eves*¹¹⁰ indicates that there has to be some link between the common intention and the acts relied on as a detriment, Browne-Wilkinson V-C, in his judgment in

¹⁰⁵ [1991] 1 AC 107, 133.

¹⁰⁶ *Grant v Edwards* [1986] Ch 638, 652, per Mustill LJ; *Lloyds Bank Plc v Rosset* [1991] 1 AC 107, 133.

¹⁰⁷ *Megarry & Wade*, para 10-026.

¹⁰⁸ Indeed there has even been scope for argument over whether a particular act is or is not referable to the acquisition of the property (see *Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512, where the House of Lords held that a payment to reduce the overdraft of a company that had purchased a property used by the parties as their matrimonial home was not referable to its acquisition).

¹⁰⁹ *Grant v Edwards* [1986] Ch 638, 657, per Sir Nicolas Browne-Wilkinson V-C.

¹¹⁰ [1975] 1 WLR 1338.

*Grant v Edwards*¹¹¹ expressly left open the question of what that link needs to be. In particular, he posed (but left unanswered) the question of whether the acts relied upon as a detriment must be inherently referable to the property (such as contributions to the purchase of physical labour on the house).¹¹² Nourse LJ, in the same case, went further by commenting that, although the conduct required “can undoubtedly be the incurring of expenditure which is referable to the acquisition of the house, it need not necessarily be so”.¹¹³

2.73 However, in *Layton v Martin*,¹¹⁴ Scott J suggested that “contributions to the acquisition or preservation of specific property” were essential. Moreover, in *Burns v Burns*,¹¹⁵ May LJ took a very restrictive view of the type of conduct which will suffice, saying that a claim must fail in the absence of financial contributions to the acquisition of the property. But this view does not sit comfortably with Lord Diplock’s assertion in *Gissing v Gissing*¹¹⁶ that what is required is for the claimant to do something to facilitate the acquisition of the property, either by way of direct financial contribution or “some other material sacrifice by way of contribution to or economy in the general family expenditure”.¹¹⁷

2.74 The more liberal approach in *Gissing v Gissing*¹¹⁸ seems to have carried the day, as the House of Lords accepted in *Lloyds Bank plc v Rosset*¹¹⁹ that once an express common intention has been established, it will only be necessary for the claimant “to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement”.¹²⁰ Nevertheless, the precise limits of the concept of detrimental reliance remain somewhat unclear.¹²¹

BURNS V BURNS

2.75 In *Burns v Burns*¹²² the female claimant and the male defendant set up home together in 1961, and two years later a house was purchased for their joint occupation and that of their two children. The house was conveyed into the sole name of the defendant. The purchase price and the mortgage instalments were paid by the defendant. As the claimant stayed at home to look after the children, she did not take up paid work until 1975. From then, she used her earnings to

¹¹¹ [1986] Ch 638.

¹¹² *Ibid*, 656.

¹¹³ *Ibid*, 647.

¹¹⁴ [1986] 2 FLR 227, 237.

¹¹⁵ [1984] Ch 317.

¹¹⁶ [1971] AC 886.

¹¹⁷ *Ibid*, 905.

¹¹⁸ *Ibid*.

¹¹⁹ [1991] 1 AC 107.

¹²⁰ *Ibid*, 132, *per* Lord Bridge.

¹²¹ See A Lawson, “The things we do for love: detrimental reliance in the family home” (1996) *Legal Studies* 218.

¹²² [1984] Ch 317.

pay the rates and the telephone bills and to pay for certain fixtures, fittings and other items of personal property. When the relationship broke down, the claimant argued that she had obtained a beneficial interest in the property by virtue of a constructive trust. Although she had taken his name, the parties never married.

- 2.76 There was no evidence of any discussion between the parties when the house was initially acquired in 1963 to indicate an express common intention that the claimant should have a share in it. None of the later expenditure by the claimant was referable to the acquisition of the house. Nor could the claimant's homemaking services be relevant, as they were not contributions of a financial kind. As Fox LJ put it:

[T]he mere fact that parties live together and do the ordinary domestic tasks is, in my view, no indication at all that they thereby intended to alter the existing property rights of either of them.¹²³

- 2.77 It should not be thought that the reasoning of *Burns v Burns* is founded on the fact that the partners were unmarried. Indeed, the principles concerning the assertion of a beneficial interest in property are neutral of status.¹²⁴ In *Midland Bank plc v Dobson*¹²⁵ a house was purchased in the husband's sole name. The court found no common intention that the property be shared beneficially between them, and no financial contributions attributable to the wife could be established. She therefore had no interest in the property, and the mortgagee seeking enforcement of sale of the property was entitled to obtain possession.¹²⁶

DEVELOPMENTS SINCE ROSSET

- 2.78 Authority subsequent to *Rosset* has appeared to doubt Lord Bridge's requirement that the bargain must have occurred at or before the date of the acquisition of the property. Indeed, earlier case law did not impose such a limitation,¹²⁷ and it now seems clear that the court can look to an agreement, arrangement or understanding subsequent to the acquisition of title to the property.¹²⁸
- 2.79 Recent case-law has also questioned Lord Bridge's suggestion that where a claim is based upon "inferred" common intention it should require a "direct" contribution to the purchase price (whether initially or by way of payment of

¹²³ *Ibid*, 331, citing *Pettitt v Pettitt* [1970] AC 777, 826, *per* Lord Diplock.

¹²⁴ See, for instance, *Gissing v Gissing* [1971] AC 886, 904, *per* Lord Diplock ("whether spouse or stranger"). Although see footnote 140 to para 2.87 below.

¹²⁵ [1986] 1 FLR 171.

¹²⁶ See also *Lloyds Bank plc v Rosset*, above, for another example of a wife whose non-financial contributions did not secure her a beneficial interest in the matrimonial home.

¹²⁷ *Gissing v Gissing* [1971] AC 886, 906, *per* Lord Diplock; *Bernard v Josephs* [1982] Ch 391, 404, *per* Griffiths LJ; *Austin v Keele* [1987] 10 NSWLR 283, 290, PC, *per* Lord Oliver.

¹²⁸ See *Stokes v Anderson* [1991] 1 FLR 391, cited with approval in *Mortgage Corp'n v Shaire* [2001] Ch 743, 750, *per* Neuberger J.

mortgage instalments). In *Le Foe v Le Foe*,¹²⁹ the wife had not made any such “direct” contributions. However, Nicholas Mostyn QC (sitting as a Deputy High Court Judge) noted that “the family economy depended for its function on W’s earnings. It was an arbitrary allocation of responsibility that H paid the mortgage, service charge and outgoings, whereas W paid for day-to-day domestic expenditure.”¹³⁰ This “indirect” contribution was held to be sufficient detriment to furnish a beneficial interest pursuant to a constructive trust. The judge found support in the words of Lord Diplock in *Gissing v Gissing*:

It may be no more than a matter of convenience which spouse pays particular household accounts, particularly when both are earning, and if the wife goes out to work and devotes part of her earnings or uses her private income to meet joint expenses of the household which would otherwise be met by the husband, so as to enable him to pay the mortgage instalments out of his moneys this would be consistent with and might be corroborative of an original common intention that she should share in the beneficial interest in the matrimonial home and that her payments of other household expenses were intended by both spouses to be treated as including a contribution by the wife to the purchase price of the matrimonial home.¹³¹

Quantification of beneficial entitlement

- 2.80 The quantification of a beneficial interest arising under an implied, resulting or constructive trust has caused considerable difficulty. There are two competing objectives which may arise for consideration. The first, loosely based on the concept of resulting trust, is that the claimant should obtain a share commensurate to the value of the contribution which has been made. The second, equally loosely based on the doctrine of constructive trust, is that the court should give effect to the parties’ common intention in so far as that is ascertainable.
- 2.81 It is logical that where the interest is claimed by virtue of a resulting trust, quantification should be conducted by arithmetical assessment of the contribution and by calculation of the proportionate entitlement to the equity, as this correlates with the strict monetary principle which underpins the doctrine. Although this appears straightforward, calculation can be complicated, particularly where the contribution is not by way of cash injection. The courts have had difficulties in giving due credit for contributions as varied as payments due under a mortgage agreement and entitlement to a discount under the right to buy legislation.
- 2.82 Where the interest is claimed by virtue of a constructive trust, based on the parties’ common intention, it would seem similarly logical to quantify the share

¹²⁹ [2001] 2 FLR 970, noted M P Thompson [2002] Conv 273.

¹³⁰ [2001] 2 FLR 970, 973.

¹³¹ [1971] AC 886, 907 - 8.

according to what the parties intended. Unfortunately, the evidence may not support this simple logic. It may be, for instance, that although it is clear that the parties have a common intention to share the property beneficially, it is not possible to ascertain what their respective shares were intended to be. In those circumstances, the court may revert to a contribution-based assessment,¹³² or alternatively quantify the interest according to what is “fair and just”.¹³³

MIDLAND BANK V COOKE

- 2.83 The logical distinction between quantification being based on resulting or constructive trust was cast in doubt by the decision of the Court of Appeal in *Midland Bank plc v Cooke*.¹³⁴ Mr and Mrs Cooke married in 1971 and moved into a house which had been conveyed into the sole name of the husband. The purchase price of £8,500 (and costs) was provided as to £6,540 by way of a mortgage (the instalments of which were subsequently met exclusively by Mr Cooke), as to £1,000 out of Mr Cooke’s personal savings, and as to the remainder (£1,100) by gift from the husband’s parents. The judge at first instance held that Mrs Cooke had a beneficial interest in the home on the following basis. The gift from her parents-in-law was a gift to both spouses jointly. Applying the resulting trust analogy, her share was to be calculated by dividing the purchase price of the property by the amount attributable to the gift to her, an overall percentage of 6.47%. This method of quantification had support from earlier decisions.¹³⁵
- 2.84 The Court of Appeal took a different view. The duty of the judge was to survey the whole course of dealing between the parties relevant to the ownership and occupation of the property and their sharing of its burdens and advantages. The scrutiny was not to be restricted to an analysis of direct financial contributions, but would take into consideration “all conduct which throws light on the question what shares were intended”.¹³⁶ The court was not bound to deal with the matter on the strict basis of the trust resulting from the cash contribution to the purchase price, but was free to attribute to the parties an intention to share the equity in different proportions. Although the wife had made no further

¹³² See, eg, *Crisp v Mullings* [1976] 2 EGLR 103; *Walker v Hall* [1984] 5 FLR 126; *Young v Young* [1984] FLR 375; *Springette v Defoe* [1992] 2 FLR 388; *Huntingford v Hobbs* [1993] 1 FLR 736.

¹³³ *Midland Bank plc v Cooke* [1995] 4 All ER 562; *Drake v Whipp* [1996] 1 FLR 826.

¹³⁴ [1995] 4 All ER 562.

¹³⁵ *Springette v Defoe* [1992] 2 FLR 388, 393, per Dillon LJ:

Since... it is clear in the present case that there never was any discussion between the parties about what their respective beneficial interests were to be, they cannot, in my judgment, have had in any relevant sense any common intention as to the beneficial ownership of the property... The presumption of a resulting trust is not displaced.

¹³⁶ [1995] 4 All ER 562, 574, per Waite LJ, following *Gissing v Gissing* [1971] AC 886, 908, per Lord Diplock and *Grant v Edwards* [1986] Ch 638, 657, per Sir Nicolas Browne-Wilkinson V-C.

financial contributions to the acquisition of the property,¹³⁷ the court held that she was entitled to a half share in the equity to give effect to the parties' common intention. As has been noted:¹³⁸

The odd result of this is that a person who has made a small monetary contribution may end up with a substantial share in the property on the basis of the parties' common intention, whereas one who has made no contribution at all obtains nothing, regardless of any common intention.

DRAKE V WHIPP

- 2.85 In *Drake v Whipp*,¹³⁹ an unmarried couple joined in the purchase of a barn which they intended to convert into a dwelling-house for their joint occupation. The property was conveyed into the sole name of Mr Whipp. The purchase price of £61,254 was met as to £25,000 by Mrs Drake and as to the remainder by Mr Whipp. Conversion works totalling £129,536 were then carried out, only £13,000 of which were contributed by Mrs Drake, although both parties put in many hours of their own labour into the property. Shortly after the barn conversion was completed, the couple's relationship broke down and litigation ensued.
- 2.86 The Court of Appeal considered that there had been a clear common intention that the property be shared beneficially. It accordingly applied constructive trust principles to quantify the parties' respective shares and approached the matter broadly, looking at the parties' entire course of conduct together. Mrs Drake obtained a share of one-third of the equity of the house.
- 2.87 It may seem incongruous that Mrs Drake, who made a financial contribution amounting to 19.4% of the total expenditure on the property, should obtain a smaller share than Mrs Cooke whose equivalent contribution was 6.47%.¹⁴⁰ The decisions show that this method of quantification is essentially arbitrary, as it is notoriously difficult to ascertain what the parties' necessarily unrecorded "common intention" really was.

Proprietary estoppel

- 2.88 Where there are difficulties in establishing a constructive trust, the doctrine of proprietary estoppel may be of assistance. It has wide application, but its boundaries are uncertain and its effects not entirely clear. While the doctrine may operate to confer property rights in the shared home on a claimant, the

¹³⁷ There was evidence that the wife had assumed liability under the mortgage and that she had possibly effected improvements to the property, but neither seems to have been fully explored by the Court of Appeal. See note by S Cretney [1995] Fam Law 675.

¹³⁸ *Megarry & Wade*, para 10-029.

¹³⁹ [1996] 1 FLR 826.

¹⁴⁰ It may be, as *Megarry & Wade* states at para 10-029, fn 78, that the fact that the parties in *Cooke* were married (but were not in *Drake v Whipp*) was a significant (and distinguishing) factor. See also Waite LJ in *Cooke* above, 576.

court may give it effect in other ways, as we will see below. Indeed, the courts have been reluctant to provide an exact definition of proprietary estoppel, preferring to retain the flexibility to develop the jurisdiction.¹⁴¹

2.89 An attempt was made in the late nineteenth century to lay down a definitive test for proprietary estoppel. In *Willmott v Barber*¹⁴² Fry J set out criteria which have come to be known as the “five probanda”.¹⁴³ However, this test has since been found lacking as it is inadequate to deal with many situations in which proprietary estoppel can arise,¹⁴⁴ and the trend in more recent cases has been towards a “broader approach”¹⁴⁵ based upon considerations of whether it would be unconscionable to permit the assertion of the owner’s strict legal rights:¹⁴⁶

(T)he fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.¹⁴⁷

2.90 Notwithstanding the problems of definition, it is possible to identify certain elements as essential to any finding of proprietary estoppel. Megarry & Wade summarise these elements as follows:¹⁴⁸

- (1) An equity arises where—
 - (a) the owner of land (O) induces, encourages or allows the claimant (C) to believe that he has or will enjoy some right or benefit over O’s property;
 - (b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and

¹⁴¹ *Taylor’s Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, 148, per Oliver J; *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, 103, per Robert Goff J.

¹⁴² (1880) 15 ChD 96, 105 - 106.

¹⁴³ (1) The claimant must have made a mistake as to his legal rights.
(2) The claimant must have expended money or “done some act” on the faith of this mistaken belief.
(3) The owner of the land must know of the existence of his own right which is inconsistent with the right claimed by the claimant.
(4) The owner must know of the claimant’s mistaken belief.
(5) The owner must have encouraged the claimant in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

¹⁴⁴ For example, where the claimant has made no *mistake* as to his or her legal rights, but has been encouraged by the owner of the land as to his or her future expectations.

¹⁴⁵ *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 1 WLR 1265.

¹⁴⁶ *Taylor’s Fashions Ltd v Liverpool Victoria Trustees Co Ltd* above.

¹⁴⁷ *Gillett v Holt* [2001] Ch 210, 225, per Robert Walker LJ.

¹⁴⁸ Para 13-001.

- (c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive.
- (2) This equity gives C the right to go to court to seek relief. C's claim is an equitable one and subject to the normal principles governing equitable remedies.
- (3) The court has a wide discretion as to the manner in which it will give effect to the equity, having regard to all the circumstances of the case and in particular to both the expectations and conduct of the parties.
- (4) The relief which the court gives may be either negative, in the form of an order restraining O from asserting his legal rights, or positive, by ordering O either to grant or convey to C some estate, right or interest in or over his land, to pay C appropriate compensation, or to act in some other way.

2.91 Proprietary estoppel does not automatically bestow on C enforceable rights in relation to O's land. It gives rise to an equity to which the court will seek to give effect. The range of possible remedies is diverse. At one end of the spectrum, personal rights are granted, such as a mere licence.¹⁴⁹ At the other end, property rights such as tenancies,¹⁵⁰ easements,¹⁵¹ beneficial interests under a trust,¹⁵² or even an outright transfer of O's interest in the property¹⁵³ may be ordered.¹⁵⁴

2.92 It is often stated that the court has a discretion as to the means by which to give effect to the equity arising by proprietary estoppel. This discretion is not, however, unqualified. The court is obliged, as far as possible, to meet the expectation which has been encouraged, or to ensure that C is compensated in circumstances where that is not equitable or practicable.¹⁵⁵ The court will not give C a greater right or interest than they believed they had or had expected to receive.¹⁵⁶ In addition, the court will order relief amounting to *less* than the

¹⁴⁹ *Inwards v Baker* [1965] 2 QB 29.

¹⁵⁰ *Griffiths v Williams* above; *Watson v Goldsbrough* [1986] 1 EGLR 265; *JT Developments Ltd v Quinn* (1990) 62 P&CR 33.

¹⁵¹ *Crabb v Arun District Council* [1976] Ch 179.

¹⁵² *Holiday Inns Inc v Broadhead* (1974) 232 EG 951.

¹⁵³ *Dillwyn v Llewelyn* (1862) 4 De GF&J 517, 45 ER 1285; *Pascoe v Turner* [1979] 1 WLR 431; *Voyce v Voyce* (1991) 62 P&CR 290; *Durant v Heritage* [1994] EGCS 134; *Lim v Ang* [1992] 1 WLR 113.

¹⁵⁴ The grant of such a property right will not be retrospective, but will operate from the date of execution of the court's order: *Griffiths v Williams* [1978] 1 EGLR 121, *Williams v Staite* [1979] Ch 291, 300.

¹⁵⁵ See generally E Cooke, "Estoppel and the Protection of Expectations" (1997) LS 258, S Gardner, "The Remedial Discretion in Proprietary Estoppel" (1999) 115 LQR 438.

¹⁵⁶ *Watson v Goldsbrough* [1986] 1 EGLR 265; *Dodsworth v Dodsworth* (1973) 228 EG 1115 (where C had expected to be allowed to occupy the property for life, the court was careful to avoid the creation of a strict settlement).

expectations of C where circumstances have changed so as to make it inappropriate to satisfy those expectations in full.¹⁵⁷

- 2.93 The court will have regard to the conduct of the parties in determining what relief is appropriate in the circumstances. Thus in *Pascoe v Turner*,¹⁵⁸ the court took account of O's ruthlessness in attempting to evict C from the house by any possible means, and ordered an outright transfer of the house to C rather than merely giving her a licence to live there for the rest of her life.¹⁵⁹
- 2.94 Although the question is not definitively settled, it seems that an equity arising by estoppel may bind a third party who acquires the land affected by it. Where title to land is registered, an equity arising by estoppel may be protected by entry on the register as a result of which a purchaser of the land will be bound. It is, however, unlikely that such an equity will in fact be protected by registration, as the claimant will rarely have realised the need to register their right. In such circumstances, protection may still be forthcoming in so far as the claimant was in actual occupation (or in receipt of rents and profits) at the date of the relevant transfer.¹⁶⁰ Where title to the land is unregistered, an equity arising by estoppel is binding on a donee (irrespective of notice)¹⁶¹ and on a purchaser with notice of it.¹⁶²
- 2.95 Proprietary estoppel is potentially of considerable importance where a person is seeking to claim an interest in a home shared with another in whose name legal title is vested. The most obvious situations in which estoppel may apply are where the claimant has made improvements to the home, or has made non-monetary sacrifices in the interests of the relationship.¹⁶³ Although some claimants may have enforceable contractual rights against each other, an equity may arise by estoppel in circumstances where there is no valid contract — perhaps because a gift was intended,¹⁶⁴ or the essentials for a valid contract were absent,¹⁶⁵ or because the

¹⁵⁷ *Burrows v Sharp* (1989) 23 HLR 82.

¹⁵⁸ [1979] 1 WLR 431.

¹⁵⁹ See also, *Crabb v Arun District Council* above (where C was awarded a right of way over O's land, the court did not require C to pay anything in return because O had rendered C's land sterile for several years by its high-handed conduct).

¹⁶⁰ Land Registration Act 1925, s 70(1)(g). It is thought that an equity arising by estoppel is a "right" which subsists "in reference to" the land for the purposes of the Land Registration Act 1925. But see now Land Registration Act 2002, s 116. See also *Lee-Parker v Izzet (No 2)* [1972] 1 WLR 775, 780, *per* Goulding J; *Singh v Sandhu* (unreported), 4 May 1995 (CA); *Locobail (UK) Ltd v Bayfield Properties Ltd* (unreported), 9 March 1999, Lawrence Collins QC; *Lloyd v Dugdale* [2001] EWCA Civ 1754; *cf Haberman v Koehler* (1996) 73 P & CR 515.

¹⁶¹ *Voyce v Voyce* (1991) 62 P & CR 290, 294, 296.

¹⁶² *Inwards v Baker* above; *ER Ives Investment Ltd v High* [1967] 2 QB 379, 400, 405; *Lloyds Bank Plc v Carrick* [1996] 4 All ER 630, 642.

¹⁶³ Unlike direct financial contributions, these situations do not give rise to a resulting trust.

¹⁶⁴ *Dillwyn v Llewelyn* (1862) 4 De GF & J 517, 45 ER 1285; *Inwards v Baker* above.

contract was void for uncertainty.¹⁶⁶ Furthermore, the court has much greater discretion in satisfying an equity arising by estoppel than it does when enforcing a contract, as the rights of the parties are not fixed at the time when C acts to their detriment, but may be varied by the court to take account of subsequent events.¹⁶⁷

CAMPBELL V GRIFFIN

2.96 In *Campbell v Griffin*,¹⁶⁸ the claimant, a single man, commenced living with a Mr and Mrs Ascough, a retired couple in their late seventies, as their lodger (paying £10 a week for a room in their house) in 1978. As the couple became increasingly frail, the claimant assumed the role of a carer, cleaning the house, maintaining the garden, helping with shopping, and preparing meals, although he continued to pay rent until about 1992. By this date, they were treating the claimant as a son, and they made assurances that he had a home for life. Mr Ascough did make a codicil to his will leaving the claimant (inter alia) a life interest in the house, but this failed as he predeceased his wife and she took by survivorship. Mrs Ascough could not at that time make any disposition in the claimant's favour as she suffered from dementia and lacked testamentary capacity.

2.97 The Court of Appeal, having found that an equity had arisen in favour of the claimant, again considered the minimum required to do justice to the claimant. While the assurance was that he obtain a life interest, this was, in the view of Robert Walker LJ, "disproportionate": it was not so compelling as to demand total satisfaction, and it did not take account of the effect on other persons with claims on the Ascoughs' estate. An order that the estate pay the claimant a sum of £35,000 (payment to be charged on the property) was made.

JENNINGS V RICE

2.98 In *Jennings v Rice*,¹⁶⁹ the claimant had known Mrs Royle, a widow, since 1970 when he worked for her as a part-time gardener. Over the course of many years he became her carer, running errands, and doing work in the home. Although she no longer paid him for his services from the mid 1980s, she had made vague promises that she would see him right and that her house would be his one day. For the last three years of her life (she died in 1997), and following a burglary of her house, the claimant spent nearly every night on the sofa in Mrs Royle's sitting

¹⁶⁵ *Crabb v Arun District Council* above. See P Millett (1976) 92 LQR 342 refuting the contrary suggestion in P Atiyah (1976) 92 LQR 174.

¹⁶⁶ *Holiday Inns Inc v Broadhead* above, 987. See also, *Ramsden v Dyson* above, 170; *Plimmer v Wellington Corpn* (1884) 9 App Cas 699, 713; *Lee-Parker v Izzett (No 2)* above.

¹⁶⁷ The court is not bound to assess financial damages on a contractual basis, but maintains "a more flexible approach designed to achieve justice between the parties": *Baker v Baker* [1993] 2 FLR 247, 258, *per* Roch LJ.

¹⁶⁸ [2001] EWCA Civ 990.

¹⁶⁹ [2002] EWCA Civ 159.

room to provide her with some security- he did have a house of his own. Despite the promises she had made, Mrs Royle died intestate.

2.99 The Court of Appeal held it to be essential that in assessing the value of the claimant's equity there should be proportionality between the expectation which had been generated and the detriment which had been suffered. While the claimant may have expected to receive the house (valued at £435,000) from Mrs Royle, that was not proportionate to the detriment. The decision of the judge at first instance to award a sum of £200,000 as the minimum necessary to satisfy the equity was upheld.

2.100 Both these cases highlight the flexibility offered by proprietary estoppel in its response to particular factual circumstances. The doctrine is not restricted by the necessity to establish a "common intention" that the property be shared beneficially or a direct financial contribution to its acquisition such as is required to prove beneficial entitlement pursuant to a constructive or resulting trust. Indeed, the administrative inconvenience of imposing a trust of land was commented upon in *Campbell v Griffin*.¹⁷⁰ However, this inflexibility inevitably causes some uncertainty and unpredictability, as it is difficult for the parties to know the extent of their rights without going to court.

PROPRIETARY ESTOPPEL AND THE CONSTRUCTIVE TRUST

2.101 There are many similarities between the doctrine of proprietary estoppel and the "common intention" constructive trust, as explained by Browne-Wilkinson LJ in *Grant v Edwards*:

In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both, the claimant must have acted to his or her detriment in reliance on such belief. In both, equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilisation between them: but they rest on the same foundation and have on all other matters reached the same conclusions.¹⁷¹

2.102 The House of Lords further acknowledged the assimilation of constructive trust and proprietary estoppel in the land-mark decision of *Lloyds Bank plc v Rosset*, Lord Bridge referring loosely to the acquisition of a beneficial interest by way either of a constructive trust or a proprietary estoppel.¹⁷² Since then, there have

¹⁷⁰ *Per* Robert Walker LJ:

[The grant of a life interest to Mr Campbell] would produce a situation of a trust of land (under the Trusts of Land and Appointment of Trustees Act 1996) which would probably involve disproportionate legal expenses (including trustees' remuneration) and might well lead to further disputes (especially in relation to Mr Campbell's keeping the property in good repair and condition).

¹⁷¹ *Grant v Edwards* [1986] Ch 638, 656, *per* Browne-Wilkinson LJ.

¹⁷² [1991] 1 AC 107, 132.

been several judicial statements to similar effect.¹⁷³ One distinguished commentator has argued that as the claimant must establish the same criteria for each, any remaining distinction is in consequence illusory:

Surely, it is time the courts and counsel moved beyond pigeon-holing circumstances into constructive trusts and proprietary estoppels and looked at this basic principle of unconscionability underlying both concepts.¹⁷⁴

2.103 Professor Hayton has acknowledged that the “apparently vague standard” of unconscionability may leave a “grey penumbra of uncertainty” surrounding the law, but he considers that the parties “have only themselves to blame”¹⁷⁵ - as they could have expressly regulated their own affairs. He believes that third parties should not be bound by any equity enjoyed by the claimant unless it would be unconscionable for the former to assert his strict legal rights over the latter.

2.104 However, differences do remain between proprietary estoppel and the constructive trust:

- (1) According to orthodox doctrine, the common intention constructive trust is thought to result from a frustrated bargain between the parties, whereas proprietary estoppel is based on the notion of frustrated expectation.¹⁷⁶ It may be, however, that very little now turns on this difference of emphasis.¹⁷⁷
- (2) Where a claim to a constructive trust is made, at least where there has been no “agreement, arrangement or understanding” between the parties that the property be shared beneficially, the courts require proof of direct contributions by the claimant to the purchase price.¹⁷⁸ But where a claim is made in proprietary estoppel, detrimental actions need not entail financial expenditure.¹⁷⁹ The real test is whether the detriment is sufficiently substantial such that it would be unconscionable to allow the assurance to be disregarded.¹⁸⁰
- (3) A beneficial interest under a constructive trust arises as soon as the claimant acts to his detriment in reliance on the “agreement,

¹⁷³ *Burrows v Sharp* (1991) 23 HLR 82, 90, per Dillon LJ; *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (2000) 80 P & CR 256, 263, per Robert Walker LJ; *Yaxley v Gotts* [2000] Ch 162, 176, per Robert Walker LJ.

¹⁷⁴ D Hayton, “Equitable Rights of Cohabitees” [1990] Conv 370, 378.

¹⁷⁵ *Ibid*, 385.

¹⁷⁶ *Lloyds Bank plc v Rosset* above.

¹⁷⁷ Gray & Gray at p 758.

¹⁷⁸ *Lloyds Bank plc v Rosset* above at 132 - 3, per Lord Bridge.

¹⁷⁹ *Greasley v Cooke* [1980] 1 WLR 1306; *Re Basham* [1986] 1 WLR 1498; *Gillett v Holt* [2001] above, 232, per Robert Walker LJ.

¹⁸⁰ *Jones v Watkins* (unreported) 26 November 1987 (CA), cited in *Gillett v Holt* above, 226.

understanding or arrangement” with the defendant. However, it has been traditionally considered that the “equity” arising from proprietary estoppel must mature in the form of a court award in order to constitute a property interest.¹⁸¹

- (4) Although the court retains an element of “discretion” in relation both to proprietary estoppel and constructive trust, this discretion appears to be wider where estoppel is concerned.

CRITICISMS OF THE CURRENT LAW

- 2.105 The principles applicable by the courts where no express declaration of trust has been made have frequently been criticised as unsatisfactory.

“Common intention” constructive trust

- 2.106 “Common intention” has been described as a “myth”.¹⁸² It is certainly difficult to explain every decided case on the basis of the parties’ intention being “express” or “implied”, and there is ample evidence of courts taking an inventive approach to the facts and discovering a common intention where none in truth exists.¹⁸³ The parties may never have discussed the matter save in the most general terms, and they may well have been under some misconception as to the rights conferred on them by virtue of their status (married or otherwise) pursuant to the general law. In relation to at least some of the cases, the astute comment of one critic is certainly justified:

“The necessary common intention can be either express or implied, but it is supposed to be real, and not invented by the judge. However, it seems clear that this rule has little connection with judicial practice. Agreements are in reality found or denied in a manner quite unconnected with their actual presence or absence.”¹⁸⁴

The relevance of contributions

- 2.107 We have seen how the doctrines of resulting and constructive trust may operate so as to confer an interest consequent upon a contribution being made to the acquisition of the property. However, the principles which govern this area are by no means clear or easy to apply. Whilst it seems that a qualifying contribution must be financial in nature, it remains unclear whether it must be directly referable to the acquisition of the property, or, indeed, when a contribution is direct or indirect.¹⁸⁵ It does not seem satisfactory to us that the way in which the parties sharing the home have agreed to administer their household budget

¹⁸¹ *Megarry & Wade*, para 13-028.

¹⁸² N E Glover & P N Todd, “The Myth of Common Intention” (1996) 16 *Legal Studies* 325.

¹⁸³ S Gardner, “Rethinking Family Property” (1993) 109 *LQR* 263, 265.

¹⁸⁴ *Ibid*, 264.

¹⁸⁵ See, for instance, *Le Foe v Le Foe* above, para 2.79.

should have a decisive effect on whether the house is to be treated as beneficially owned by one or both of them. In some cases, the allocation of financial responsibility could even be deliberately contrived to the advantage of the party with legal title.

Discrimination against home-makers

- 2.108 The decision in *Burns v Burns*¹⁸⁶ highlights the difficulty faced by those who have shared a home for a long time but who cannot establish the requisite “common intention” nor prove a “financial” contribution as they have been occupied full-time at home, possibly bringing up children. A strong argument can be made to the effect that the current law discriminates against those who do not earn income from employment.¹⁸⁷

The quantification of beneficial entitlement

- 2.109 The case law indicates that the principles of quantification are uncertain, with decisions being made which are (not entirely surprisingly) inconsistent and difficult to reconcile. In *Midland Bank plc v Cooke*,¹⁸⁸ the court found that the wife of the legal owner had acquired a beneficial interest in the matrimonial home pursuant to a common intention constructive trust. The method of quantification of that interest adopted was wide-ranging, the court finding that the wife had acquired a one-half share in the equity although she had made a financial contribution of less than one-twelfth to the acquisition of the property. This case is difficult to reconcile with *Drake v Whipp*,¹⁸⁹ where a much greater financial contribution resulted in a far smaller beneficial interest.

The unpredictability of estoppel

- 2.110 The unwillingness of the courts to define precisely the scope of proprietary estoppel means that the doctrine is flexible and can be developed as appropriate. However, the corollary is that certain elements of the doctrine remain unclear and that it is difficult to predict when it will operate. For example, there is currently debate regarding the concept of unconscionability, as well as the definition of detrimental reliance. Furthermore, the extent to which proprietary estoppel and the common intention constructive trust overlap remains a difficult issue.¹⁹⁰

¹⁸⁶ See paras 2.75 - 2.76 above.

¹⁸⁷ See further *White v White* [2001] 1 AC 596 at para 5.10 below.

¹⁸⁸ See at paras 2.83 - 2.84 above.

¹⁸⁹ See paras 2.85 - 2.86 above.

¹⁹⁰ See paras 2.101 - 2.104 above.

The litigation consequences

2.111 The lack of coherent principle does not assist parties or their lawyers in attempts to arrive at a compromise.¹⁹¹ The emphasis on the parties' "common intention" has compelled the courts to examine closely evidence of conversations between the parties, sometimes over many years, which were unlikely at the time to have appeared to be significant in terms of acquisition of proprietary entitlement. The nature of the resulting forensic exercise has been well described as a "painfully detailed retrospect".¹⁹²

The primary emphasis accorded by the law in cases of this kind to express discussions between the parties ("however imperfectly 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.¹⁹³

2.112 **The current requirements for establishing the existence of an interest under a trust are not ideally suited to the typical informality of those sharing a home. We feel that to demand proof of an intention to share the beneficial interest in the home can be somewhat unrealistic, as people do not tend to think about their home in such legalistic terms. The emphasis on financial input towards the acquisition of the home fails to recognise the realities of most cohabiting relationships. Finally, and importantly, the uncertainties in the present law can cause lengthy and costly litigation, wasting court time, public funding and the parties' own resources.**

2.113 In order to deal with the criticisms of the current law, we attempted to devise a scheme to determine whether a person had a beneficial interest in the shared home (and if so, to quantify that interest) although there had been no express declaration of beneficial entitlement. It would be open to the parties to "contract out" by making express provision.

2.114 In Part III, we set out the scheme which we devised, and we explain why we concluded that this is not a satisfactory means of reforming the law. We shall return to the principles of implied trusts and proprietary estoppel in Part IV when we consider whether there is scope for judicial development of the principles currently applied which may lead to greater clarity, greater fairness, and greater certainty.

¹⁹¹ R Mnookin and L Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" [1979] 5 Yale LJ 950.

¹⁹² *Hammond v Mitchell* [1991] 1 WLR 1127, 1129, per Waite J

¹⁹³ *Ibid*, 1139.

PART III

A PROPERTY APPROACH

- 3.1 In developing a property-based solution to the problems with the existing law, we aimed to achieve a fairer result than is possible under the current law for occupiers who share the home with the legal owner of the home, but who are not themselves legal owners of it; and to simplify the law, making it more accessible and predictable.
- 3.2 In paragraphs 3.3 – 3.54 below, we describe the scheme which we have developed and considered. We illustrate the operation of the scheme by reference to examples at paragraphs 3.55 – 3.74. In paragraphs 3.75 – 3.100 we explain why we have concluded that a scheme of this kind does not offer a viable solution to the problems in the existing law.

AN OUTLINE OF THE SCHEME

- 3.3 The scheme would only apply in the absence of a valid express arrangement made between those who share the home. Parties should be encouraged wherever possible to make express provision, and such provision should therefore be binding on them.
- 3.4 The scheme would lead to:
- (1) the exclusion of any reliance on the parties' common intention where they are sharing a home within the scope of the scheme;
 - (2) the replacement of the doctrines of implied trust and proprietary estoppel in the determination of beneficial ownership of the shared home;
 - (3) the creation of a statutory default scheme for the ascertainment and quantification of beneficial ownership which would offer greater certainty, clarity and consistency.
- 3.5 More precisely, the scheme would apply where two or more persons shared a home, one of whom, A, was a legal (or beneficial) owner, and the other of whom, B, was not a tenant, employee, lodger or boarder of the legal owner. When B made a financial contribution whether direct or indirect, and other than as a gift, to the acquisition, improvement, or retention of the shared home, then B would obtain an interest in the equity of the property commensurate to the value of the contribution made. B might also gain a beneficial interest in the shared home through non-financial contributions to the construction or improvement of the home, or to the parties' joint lives.
- 3.6 In circumstances where B obtained an interest in the shared home under the scheme, it would be pursuant to a "statutory trust".

PRINCIPAL FEATURES OF THE SCHEME

No express arrangement

- 3.7 Where an express declaration of beneficial entitlement had been made in relation to those sharing the home, this would exclude the operation of the scheme. This

principle, consistent with the objective of encouraging self-regulation, would allow parties to “contract out” of the scheme, but only in circumstances where express provision was made. It would frustrate that objective were parties permitted to “contract out” despite making no alternative provision for themselves.

The shared home

- 3.8 Property would come within the scope of the scheme in so far as it comprised a “shared home.” It was the occupation of the home that was to be shared. The claimant and the person or persons with an interest must have been living (or have lived) in the property. It would not, for instance, be sufficient if one party, who was living elsewhere, were to store items in a room in a house which was occupied by the legal owner.
- 3.9 There would be three conditions to be fulfilled in each case:
- (1) The property should be occupied by two or more persons.
 - (2) Each person should occupy the property as a home.
 - (3) At least one such person should have a legal or beneficial interest in the property.
- 3.10 The number of persons occupying the home would be irrelevant. The problem which we are seeking to address can arise where two or more persons are living together.
- 3.11 At least one of the persons sharing the home would have to have a legal or beneficial interest in the property upon which a statutory trust could be based. As the scheme involved the conferment of proprietary entitlement, the claim would have to be made against a person who had capacity to confer a proprietary interest in favour of the claimant.
- 3.12 We considered whether our provisional proposals should be limited in their scope to the “only or principal home” of the persons involved.¹ We did not think that they should be, and we concluded that the scheme should apply wherever a home was shared. It should be immaterial that one, both or all of the parties, have other homes which they share, either with the same parties or with others.
- 3.13 The scheme was deliberately broad in its scope: all those who shared a home would potentially fall within the scheme, subject only to very limited exclusions.

Excluded sharers

- 3.14 As far as possible, we wished to pay no regard to the nature of the relationship between the persons who were sharing the home. This seemed central to a property-based approach in which contributions were to be objectively assessed.

¹ The application of the law in relation to capital gains tax, assured tenancies, secure tenancies and Rent Act regulated tenancies is restricted in this way. The Law Commission provisionally proposed, in *Renting Homes (2002) Consultation Paper No 162*, the removal of the “only or principal home” test.

However, it was clear that certain types of individual should be denied entitlement to claim pursuant to the statutory trust.

- 3.15 We did not envisage that minors would acquire a beneficial interest in the home, even where they had made relevant contributions.
- 3.16 We would exclude from the operation of any scheme those sharing a home pursuant to a genuinely commercial relationship. In such circumstances, the parties would normally have made express arrangements concerning the consequences of their joint occupation, but even where they had not it could be inappropriate for beneficial interests to be acquired. We therefore sought to exclude those who hold from the legal owner as employees, tenants, contractual licensees (such as lodgers and boarders), and tenants at will. A useful working definition would, we thought, be that set out in section 62(3)(c) of the Family Law Act 1996:

those who live or have lived in the same household merely by reason of one of them being the other's employee, tenant, lodger or boarder.

Trust-based

- 3.17 Consistent with the property approach, the parties' respective interests would take effect behind a trust, which may conveniently be termed (for the purposes of exposition) a "statutory trust". The legal title would be held by the registered proprietors on trust for all those beneficially entitled. Third parties dealing with the statutory trust could protect themselves by overreaching the interests of the beneficiaries.² Beneficiaries would be able to register their interest by means of a restriction on the register of title. One advantage of the imposition of a trust in these circumstances would be that there is existing machinery for the ascertainment of rights and obligations and for the resolution of disputes as between the legal owner(s) of the home and those who are beneficially entitled, by virtue of the Trusts of Land and Appointment of Trustees Act 1996. Retaining the device of the trust as the means of holding the shared property would enable the scheme to benefit from the flexibility and coherence of the existing trust law.³

Proprietary interest

- 3.18 Under the scheme, a home-sharer who had made a relevant contribution would earn a *proprietary* interest, not just a personal right to be repaid the value of the contribution. The significance of a proprietary interest lies primarily in the potential for it to be binding on third parties, and the greater enforceability of a right attaching to real property. A beneficial interest in real property brings with it also a right of occupation, although this is not an absolute right.

Pro rata

- 3.19 We did not perceive the contribution made as being merely a payment akin to a debt which the contributor expected to be repaid at some undefined point in the

² See paras 2.27 - 2.31 above.

³ See para 2.40 above.

future; it was more of the nature of an investment in the home. Consistent with this view, the contributor should gain a *proportionate* share, that is a share proportionate to his or her contribution. It would obviously be unrealistic to confer an interest on each party exactly equal in value to the contributions which had been made, as it would be extremely unlikely that the total value of relevant contributions would equal the value of the equity in the shared home – indeed in many cases, particularly where the parties had been sharing the home for a long time, the total value of contributions would exceed the equity. The parties would receive shares in the property in the same proportions as the respective totals of their relevant contributions. The statutory trust would facilitate the operation of what we called the *pro rata* principle.

The date at which the beneficial interest arises

- 3.20 Under the current law, a proprietary interest under a resulting or constructive trust arises at the time when detriment is incurred. It does not depend for its existence on recognition by the court, and it is in this sense “retrospective”. This is to be contrasted with a system (such as the “traditional” view of proprietary estoppel)⁴ where the interest does not arise until accepted by the court. If a party has to apply to the court for recognition of his or her interest in a property, then litigation is encouraged, and there is less protection for the contributor against third party interests. We followed the approach of the current law applicable to resulting and constructive trusts, which appeared to us to be correct in principle.

Contribution-based

- 3.21 We considered that the basis of the law should continue to derive from the circumstances immediately prior to the determination of ownership of the shared home, rather than, for instance, to require the court to address the future needs and resources of the parties. This approach reflected the nature of the project and its focus on how the ownership of the shared home should be determined as a matter of *property* law. We therefore considered that
- (1) the ascertainment of property rights should be based on the contributions made by the parties; but
 - (2) the contributions relevant to this assessment should not be exclusively confined to those that are referable to the acquisition of the property.
- 3.22 We envisaged that (in those cases where no valid express arrangements had been made) the court would examine what the parties had respectively contributed to the property and quantify their respective interests on the basis of those contributions. In formulating our scheme, we emphasised that proof of a contribution would be essential to acquisition of a share. Central to this property law model based on contributions to the shared home was the notion that a party would not get “something for nothing”. Save where the parties had come to an express arrangement concerning their shares in the home, a beneficial interest was to be earned.

⁴ See para 2.91 above.

Disregarding the parties' intentions

- 3.23 In the absence of a valid express arrangement, we were keen to reduce the influence of the parties' intentions so far as possible. We considered this to be an essential ingredient of a successful contribution-based scheme, as it would then avoid the conceptual uncertainty and probative difficulties inherent in the notion of common intention.⁵ It should also obviate protracted and costly arguments over whether or not an interest had arisen.
- 3.24 However, we soon realised that it may be unrealistic, and impractical, to deny any importance whatsoever to intentions which are not given the requisite formal expression. In particular, rigid adherence to a policy of disregarding informally expressed wishes would mean that any substantial gift of property (or money or services) from one person sharing the home to the other would generate an enhanced beneficial interest in the absence of a formal statement that this was not to be the case.
- 3.25 We therefore worked on the basis that a relevant contribution would be presumed to give rise to an interest in equity, but that the presumption would be rebuttable by evidence that the contributor intended to gift or lend the property or services in question.

THE VALUATION OF CONTRIBUTIONS

- 3.26 Further difficult questions then arose. What contributions were to give rise to an interest in the property? And how would each contribution be valued? It was essential, we believed, for a contribution-based scheme to stipulate as clearly as possible which contributions were relevant, which were not, and how the value of relevant contributions was to be assessed. We now turn to these issues.

Relevant contributions

- 3.27 A "relevant contribution" would be one which would earn the contributor an interest within our scheme. We divide this section into financial and non-financial contributions, as we concluded that different considerations would apply in respect of each.

Financial: direct and indirect

- 3.28 We provisionally concluded that "relevant contributions" should include payments directly attributable to the acquisition, retention or improvement of the shared home.
- 3.29 We considered that the kinds of contribution which it was at least arguable should be reflected in the property interests of those who share homes were:
- (1) The value of existing beneficial interests in the property when the parties begin to share it as a home.
 - (2) Capital sums paid at the time the property was acquired.

⁵ See para 2.106 above.

- (3) Any discount on the price of the property obtained as a result of the status of one of the parties (for instance where the right to buy is exercised).
 - (4) Payments made towards the instalments of any mortgage debt secured over the property.
 - (5) Payments made towards the improvement of the property.
- 3.30 It would be possible for contributions of this nature to be objectively valued without undue difficulty. More difficult, however, were indirect contributions, for instance to “general household expenditure”. These might need to be taken into account for the following reason.
- 3.31 For example, two persons lived together. One paid off the mortgage. The other regularly incurred expenditure on the groceries, the household bills, joint holidays, and possibly the purchase of high value chattels such as cars. It would seem inequitable if the person who paid off the mortgage could deny the person who lived with them, and whose payment of other items of household expenditure freed their income to pay the mortgage, an interest in the property. Too much would depend on what may well have been an arbitrary allocation or assumption of the parties’ respective responsibilities towards the household budget.⁶

Valuation of financial contributions

- 3.32 The court would have to make an overall assessment of the economic value of the contributions made by each party to their shared home.
- 3.33 While we were concerned that our proposals should be based soundly on principle, we realised that pragmatism was essential. We took the provisional view that, in an attempt to avoid protracted and costly litigation and its ancillary costs, the court should be actively encouraged to take a “broad brush” approach to issues such as quantification. We therefore envisaged that assessment of the economic value of contributions to the parties’ joint lives should be conducted in a relatively impressionistic manner, with emphasis being placed on the approximate nature of the exercise.
- 3.34 The “approximate valuation” approach would have the merits of being neither arbitrary, nor over-precise. The court would not be required to carry out a precise mathematical exercise, calculating exactly what each party had contributed and formulating their share accordingly. This approach would provide a framework against which negotiated settlements would take place, which would assist in the majority of cases, in which costs may outweigh the benefits of litigating. The costs of litigation would tend to make it worthwhile only where substantial sums are at stake.
- 3.35 The court would be required to balance the parties’ contributions under the various heads of contribution, adjusting the figure to take account of possible

⁶ See, for a recent decision where an attempt was made to deal with this problem, *Le Foe v Le Foe*, para 2.79 above.

overlap, and then to aggregate the total attributable to each party. The parties' "approximate shares" could then be calculated (as fractions or percentages of the equity), and the beneficial interest in the home divided according to the *pro rata* principle. In an attempt to encourage courts to think in broad terms, it would be useful to direct the use of "banding" (by analogy with rating valuations) – fixed by reference to specific percentages of the overall equity of the home. We had in mind to limit the courts to assessing shares at gradations of five per cent (thus 5%, 10%, 15% and so on).

- 3.36 In ascertaining the parties' shares, it might be necessary to make allowance for the fact that a particular contribution was made some years previously and that it is necessary to take account of changes in the value of money, in particular the erosive effect of inflation. This "uprating process", which may not be equally applicable to all forms of contribution, could be facilitated by the use of inflation tables, but we would emphasise again that the court was being invited to make an approximation.

Chattels

- 3.37 Some "general household expenditure" would comprise the purchase of items of considerable value (cars, computer equipment, hi-fis) intended for use in the shared home or for the parties generally. We considered how chattels should be treated in this valuation exercise, and concluded that where a chattel had been purchased as part of "general household expenditure", the person purchasing the chattel should have the right to choose whether their contribution should be assessed by reference to the value of the use of the chattel to the parties or by reference to its capital value.

Non-financial contributions

HOME-MAKING AND CARING CONTRIBUTIONS

- 3.38 In the same way as indirect financial contributions by one sharer would enable another to make the direct payments towards the acquisition of a home (in other words, if B met the utility bills, and thereby enabled A to pay the mortgage), non-financial contributions by one sharer might enable another to pay for the home. Where a person took responsibility for the shopping, the cleaning, looking after children or other dependants, maintaining the house and garden, and dealing with contractors, they might enable the other person or persons to go out to work and to generate an income out of which the mortgage instalments were paid. There is a strong argument that this endeavour should be rewarded by means of the conferment of a beneficial interest in the home.
- 3.39 Two examples may be given.
- (1) A female legal owner goes out to work full-time, leaving at home her male partner. He does not undertake any paid work as he is looking after their three children who are all under school age. He does the shopping and all the house-work, thereby enabling the woman to work long hours and to advance in her employment.
 - (2) A single man's mother is widowed in her sixties. He gives up his rented accommodation and goes to live with his mother, whose health

deteriorates over the course of the next five years. He shops and cooks for her and keeps the house clean. He does not make any direct financial contribution towards the house, as the mortgage had been paid off prior to his father's death.

- 3.40 In neither of these cases is the provider of the services likely to obtain a beneficial interest in the home under the current law. Yet they have each provided services which are of economic value and which have conferred a benefit on the other party.
- 3.41 This type of contribution raised difficult issues. It was essentially a contribution towards the household or the family and it was at best indirectly related to the acquisition of the property. A legal owner might argue that non-financial contributions should only count as "relevant contributions" insofar as they enabled the owner to acquire, or retain the home (such as by paying off the mortgage), and so contributions made subsequent to the acquisition of the home should not confer an interest on the contributor. The contributor would argue, however, that his or her contributions were of value to the other person, and that if the conferment of a beneficial interest was an appropriate means of recognising the contribution, it did not diminish once the mortgage had been paid off.

Valuation of home-making and caring services

- 3.42 Valuation of the contribution made (in money terms) was a potentially difficult, and, some might argue, demeaning process. Nevertheless, we did not feel that such services should be ignored merely because quantification may be well nigh impossible in absolute terms. Consistent with our overall approach, it was clear that the scheme should focus on the economic value of home-making or caring activities.⁷

ECONOMIC BENEFIT

- 3.43 We considered that an appraisal of economic value based on the economic benefit conferred by the home-making contribution was a possible approach. In essence, the court could be directed to value the home-making and caring contribution by reference to the economic benefit conferred over the course of the period during which the home had been shared.
- 3.44 For purposes of calculation, the court could adopt an annual sum which would represent full-time home-making.⁸ In cases where the party had not worked full-time, this sum would be proportionately reduced so as to achieve a multiplicand. The object would be to achieve a balance between the parties in terms of their respective contributions to home-making, as we realised that in most cases both parties will have provided some home-making services. "Full-time" homemaking would mean that the person concerned had worked full-time in or towards the

⁷ This is implicit in the adoption of an approach based on economic benefits and detriments discussed below.

⁸ Although it is highly likely that the market rate for such services would be low relative to other rates of earning.

making of the shared home. It would not mean that the other party had not also provided full or part-time home-making services.

- 3.45 The court could then consider how much home-making (on average) each party undertook in a particular year. The value of the home-making activities over the period during which the home had been shared would then be determined by applying a multiplier. This would of necessity generate a relatively impressionistic assessment of each party's contribution, but it would recognise the value of what had been done.

ECONOMIC DETRIMENT

- 3.46 We took the view that account should not be taken of economic detriments incurred, save possibly in relation to the cost of lost opportunities where the claimant would have earned more had he or she been in paid employment for the relevant period.

A discretion in respect of non-financial contributions only

- 3.47 The scheme we were developing differed from the system of ancillary relief on divorce⁹ in that it was intended to reflect past contributions rather than to accommodate the parties' present and future needs. The court would be making a declaration of beneficial ownership rather than effecting a reallocation of property rights by an exercise of its discretion. However, we acknowledged that the range of contributions would be extended in such a way as to encroach onto areas which until now have been considered the province of judicial discretion.
- 3.48 We did not consider that a statutory adjustive discretion was desirable, because it would introduce scope for unpredictability with its attendant disadvantages. And yet we were not sure that the economic value of non-financial contributions could be fairly and objectively assessed. We therefore considered the possibility of a statutory discretion being available purely as a means of evaluating non-financial contributions.

Countervailing benefits

- 3.49 Some form of benefit may have been received by a contributing party. In that event, the value of that benefit should be taken into account and off-set against the contribution, maybe by a credit to the other party. Countervailing benefits were most likely to take the form of free accommodation in the shared home.

ACCOMMODATION

- 3.50 We acknowledged the benefit of accommodation provided by crediting the legal owner of the home with an amount equivalent to the interest on the money tied up in the home. To avoid double-counting, where such a credit is included, the net value of the house at the start of the home-sharing was not uprated.

⁹ See paras 5.8 - 5.11.

Possible controls

Disproportionality

3.51 We shall consider below two examples of how the scheme would work in practice. It became clear that it was desirable, in an attempt to ensure that indirect financial contributions did not unduly distort the quantification process, to limit the scope of claims on indirect financial contributions to *disproportionate* indirect financial contributions towards the acquisition, retention or improvement of the home. Thus, where two parties shared a home, the contribution of each party would be calculated, and then the smaller contribution be subtracted from the larger. The remaining amount would then be attributed to the larger contributor as a relevant contribution. We show the effect of this approach in the worked examples below.

Imposition of a minimum period of sharing

3.52 Sharing a home would not of itself give rise to any beneficial entitlement under a statutory trust. It would be necessary for the claimant to establish that they had made a “relevant contribution” to that home. There was strength in the argument that once such a contribution had been made, then a claim should be tenable.

3.53 However, we realised that there was a risk that a claim might be brought where the parties had lived together for a very short time and the contribution made had been relatively insignificant. We were particularly keen to ensure that any proposed scheme did not offer those who had been living together, possibly for a short period of time, a means of expressing the anger and resentment which may be felt at the termination of a relationship by commencing and pursuing litigation against the other party.

3.54 We therefore considered whether, where a claim was based on non-financial contributions, a minimum period of occupation in the shared home by the claimant should be imposed as a safeguard against claims of this kind. Any such period would have to be significant, and we provisionally settled on two years as being the length of the minimum period of sharing. Once the time threshold was passed, contributions made in the “qualifying period” would count in the assessment. We did, however, realise the strength of the counter argument that a party might make very substantial contributions in the first few months of sharing the home as decorations and refurbishments might be taking place.

WORKED EXAMPLES

3.55 As the following two examples illustrate, the property approach which we considered was intended to involve the court in a valuation of the parties’ contributions to the shared home. But, as we shall see, these straight-forward examples also indicate very clearly the practical limitations of such an approach.

Example 1

- 3.56 *A and B are in their sixties. They have now paid off the mortgage on their property, which they own beneficially as joint tenants. Their son, C, aged 22, drops out of college and comes to live with them. The house is worth £200,000. A and B's combined annual income from their pensions is £15,000. C earns £30,000 net pa. C stays for ten years.*
- 3.57 The scheme would require the court to assess the respective contributions of A and B – and C – as follows:
- (1) *A and B would be credited with total contributions of £375,000*
 - (a) the opening net equity of £200,000
 - (b) direct financial contributions (improvements etc) of, say, £10,000
 - (c) indirect financial contributions (general household expenditure – say 60% of net income) of £90,000
 - (d) indirect non-financial contributions (homemaking – say £7,500 pa) of £75,000.
 - (2) *C would be credited with total contributions of £100,000*
 - (a) direct financial contributions of, say, £20,000
 - (b) indirect financial contributions (into the household budget) of, say, £80,000.
- 3.58 On this calculation, the equity in the shared home would now be divided *pro rata* as to 79% for A and B, and as to 21% for C.
- 3.59 The problem with this outcome is that many would argue that the calculations result in C receiving rather more than he deserved. To overcome this, additional tests could be applied to reduce C's share:
- (1) A and B could be credited with a sum representing the accommodation (as a “countervailing benefit”) they have provided C – say £10,000 pa.¹⁰ This would increase their total contributions to £475,000, and the *pro rata* shares would become 83% and 17% respectively.
 - (2) Indirect financial contributions could be disregarded save and in so far as they were disproportionate. A and B contribute £10,000 more than their son over the ten year period. Taking no account of accommodation costs, A and B would then total £295,000. C would total £20,000. The *pro rata*

¹⁰ This would involve rejecting the argument that once C has made a relevant “contribution” to the shared home, he should not be accountable for the accommodation cost on the ground that he has a beneficial interest behind a statutory trust and therefore a right of occupation.

shares would be 94% and 6%. If accommodation costs were also taken into account, A and B's contribution would total £395,000 and C's £20,000, translated into 95% and 5% *pro rata*.¹¹

- (3) It would be possible to eliminate C's claim altogether by requiring that he prove a "detriment". Instead of crediting A and B with the accommodation costs, C's overall input could be quantified by deducting those costs from the direct and indirect contributions he has made. This would mean that C could not show a contribution at all – the "total contributions" of £100,000 being off-set by the total accommodation costs of £10,000 pa for ten years.

Example 2

- 3.60 *F purchased a house in his sole name, with the assistance of mortgage finance, for £150,000, of which £100,000 is provided by the secured loan. Shortly afterwards, G, who is expecting F's child, goes to live with him. F does not serve any notice contracting out of the scheme on G. (Had he done so, that would deny G any entitlement to claim.) No mention is made of G paying rent.*
- 3.61 *F and G live together for ten years. F has earned £40,000 net pa on average over that period. G has earned (part-time) £5,000 net pa on average, and has made no direct financial contributions to the house. They have spent 75% of their income on their joint lives.*
- 3.62 The respective contributions of F and G would be assessed as follows:
- (1) *F's total contributions would amount to £362,500:*
 - (a) the opening net equity of £50,000
 - (b) direct financial contributions (mortgage payments, 5% pa) of £50,000
 - (c) indirect financial contributions (75% income, minus mortgage payments) of £262,500.
 - (2) *G's total contributions would amount to £187,500:*
 - (a) indirect financial contributions (75% income) of £37,500
 - (b) indirect financial contributions (say £15,000 pa) of £150,000.
- 3.63 On this calculation, the equity in the shared home would now be divided *pro rata* as to 66% for F and 34% for G. The parties' beneficial interests in the statutory trust would cede priority to the mortgage.

¹¹ Although accommodation costs appear to have very little impact on C's share, this is due to the fact that C had a very small share to begin with.

3.64 In Example 1, we considered ways of reducing C's share, as we thought it was strongly arguable that he received more than he deserved. However, in this case, it may be that the current attribution of a 35% share to G seems "about right", and we are therefore reluctant to apply the additional tests. If, however, those further factors were to be applied, the effect would be as follows:

- (1) If F were credited with a similar sum representing the accommodation provided for G – say - £2,500 pa - F's total contributions would now be £387,500, and the *pro rata* shares 67% and 33% respectively.
- (2) If indirect financial contributions were disregarded save and in so far as they were disproportionate, G's share would be reduced as her financial contributions would be netted off those of F. F's share would rise to 70% and G's would be 30%.
- (3) If accommodation costs were deducted from G's contribution in an attempt to evaluate her "detriment", this would reduce her total contributions to £162,500. Her *pro rata* share (on the basis that F is not credited with accommodation costs, F's total contributions would now amount to £362,500) would be 31%.

Unwelcome results

3.65 These two relatively straightforward factual situations show that there are some cases where additional tests or controls are necessary to achieve a fair result whereas there are other cases where they are not and where their application would lead to unfairness. Yet the basis for distinguishing between the factual situations cannot be expressed in a suitably principled or rational manner.

3.66 The problem with G's claim is that the scheme requires the court to consider her actions in a manner which is somewhat disconnected from reality. She would not normally think of herself providing "home-making services", even "child-caring services". She, the child and F are a family. She has supported F by staying at home and looking after the child. She has in consequence worked only part-time. On breakdown of her relationship with F, she is in need of some financial assistance and support to enable her to provide for herself and the child. While the Child Support Act will ensure that she obtains income from F, and she can also claim capital provision under the Children Act 1989 for the benefit of the child, there is no direct route available for her to seek relief for her own financial predicament.¹²

3.67 The claim of C has the effect of eroding the accrued rights of his parents who may have been entirely oblivious to the consequences of their actions. It bristles with human rights implications.¹³

¹² See para 5.16.

¹³ In particular, implications in regard to the First Protocol to the European Convention on Human Rights, Art 1.

- 3.68 Once it is accepted that a qualifying contribution is rewarded by the conferment of a *pro rata* beneficial interest, the claimant can assert a right of occupation, pursuant to statute, and can also ask the court for the property to be sold in order that his share be realised. The court would not necessarily accede to such an application, but it would be highly contentious to give persons the right to make a claim in such circumstances.
- 3.69 C's claim would have greater merit if it could be shown that his parents had in some way encouraged his expectation of an interest – had, for instance, intimated that if he came and lived with them, helped them with the shopping, drove them about, cooked, washed up and cleaned the house, he would obtain some reward (even if only in their wills). Such a claim could be more effectively dealt with by proprietary estoppel. It may be a doctrine of uncertain operation, but it can at least respond with subtlety to the factual – and indeed the emotional – nuances of human relationships.
- 3.70 In short, while both C and G are sharing a home with the legal owner(s), the legal consequences of their home-sharing should as a matter of principle be dealt with quite differently, in order to reflect the different types of grievance we are seeking to address. In C's case, the grievance is the loss suffered by relying upon his parents' undertaking that they would in some way compensate him for moving in with them; in G's case, it is the loss suffered consequential upon the breakdown of her relationship with the legal owner. It is in our view impractical to devise a single scheme to deal fairly with these different needs.
- 3.71 There can be little doubt that a court would instinctively have greater sympathy for the unmarried mother (G) in Example 2 than for the child of elderly parents (C) in Example 1. But when it comes to characterising their respective claims, it is not really possible to articulate the differences without reference either to the probable intentions of the parties or to the nature of the relationship from which the claim has arisen.
- 3.72 We applied certain controls in an attempt to limit the claim which can be made by C. However, they do not seem appropriate where G is concerned. It seems wholly reasonable that C should pay for the accommodation provided by his parents, but wholly unreasonable that G should account for the accommodation cost where the legal owner is her cohabitant and the father of her child. The difference in treatment cannot be accounted for by application of the contribution-based principle underlying the scheme.
- 3.73 Again, injustices arise in the application of the disproportionality principle to non-financial contributions. This principle was introduced into the scheme to mitigate some of what were perceived to be unjust effects produced by the scheme, and in some cases, the result is indeed fairer (as in Example 1), but it can be disastrous in some very typical cases of cohabitation outside marriage.
- 3.74 It will be clear from the above discussion that it is tempting to allow a property-based scheme to become "ends-driven" – in other words to attempt to modify the method of calculation so that it produces results which appear objectively fair

and reasonable. Before very long, it is easy to lose sight of the principles which provided the initial rationale for the scheme, and the attempted reform becomes immersed in obscurity.

THE PROBLEMS OF THE SCHEME

- 3.75 The essence of the reform which we have been considering can be simply described. It would involve retention of the trust as the device responsible for balancing the respective rights of those with interests in the shared home. Parties would be encouraged to make express declarations of trust which would be rigorously enforced by the courts. But where no such express provision had been made, the court would no longer be required to carry out an examination of the parties' intentions. Instead, beneficial entitlement would follow from proof of contribution. The problem of informality was to be addressed by replacing intention with contribution. It was hoped that the latter would be easier to identify and to put a value upon.

The rejection of intention

- 3.76 The uncompromising rejection of intention, central to the scheme, was ultimately impossible to justify. It may be possible to encourage parties into making express provision, but they cannot be compelled to do so.
- 3.77 The consequences could be alarming. Take Example 1 above. It may never have crossed the minds of A and B that their son C would, as a result of living with them and helping out in their home, be able to claim an interest in their home. Yet unless they made express provision denying that he had such an interest he would be able to make a claim. Or they may have indicated to him that if he came and lived with them and helped out he would obtain a half share in the house. Such a statement, although relied upon by C, would no longer have any effect as a matter of law.
- 3.78 We accept that the current emphasis on the parties' intentions causes problems of its own – in particular in proving what those intentions were. But to disregard intention altogether could have the result of prejudicing many of those who would have obtained a beneficial interest under the present law.

The definitional problem

- 3.79 There is a problem with the scope of the scheme – to whom should it apply? The definition seeks to eliminate those who have entered into a commercial arrangement with the legal owner – as employee, as tenant, as lodger or as licensee. There is no doubt that such a demarcation would lead to litigation as claimants sought to establish that they were within the scheme. In that litigation, the question of intention would once more arise, as the court determined, for example, whether the person was the employee or the tenant of the legal owner.
- 3.80 Again, in determining which person should be able to claim beneficial entitlement under the scheme, the nature of the relationship between the legal

owner and the claimant would be impossible to disregard. Indeed, it is the nature of that relationship which would dictate the answer to the question.

- 3.81 Real problems would arise where a person lives, rent-free, in the home at the invitation of the legal owner. This may be nothing more than an act of charity or kindness by the legal owner – or the parties may be involved in an intimate relationship. Contributions by the occupier towards the expenses of the home or the household may be made by the claimant out of gratitude for the accommodation provided by the legal owner – or they may be made in the context of the parties “sharing their lives”. The only distinguishing factor between these factual circumstances would once more be the parties’ intentions.

Undue advantage for those who share

- 3.82 In effect, the scheme would impose a form of statutory co-ownership on those who fail to make express provision and thereby fall within its remit. This may in some cases confer disproportionate benefit on a person who has been sharing the home with the legal owner.
- 3.83 Take by way of example a person (P) who is caring for her elderly parents. She spends 30 hours a week at their home cleaning, shopping, nursing, changing beds and so forth. She does not live with them, as she has a husband and children. Her brother (like C in Example 1 discussed above) who works full time out of the house does spend a small number of hours each week (usually in the early hours) caring for his parents. He lives in his parents’ home. Why should C be able to claim but not P?
- 3.84 The simple answer would be that C “qualified” by reason of sharing the home with his parents. P does not qualify because she does not live there. It almost goes without saying that it would be very difficult to justify permitting C to claim but not P. The link between the services provided (the caring) and the home is tenuous. In so far as the claim is for the cost of caring (and that surely is what it is) it should be irrelevant that the carer is living in.

The problem of proof

- 3.85 We have criticised the existing law in that it requires claimants to prove that a conversation (“however imperfectly remembered”, *per* Lord Bridge in *Rosset*)¹⁴ took place at some time in the past, on the contents of which conversation the claimant must have relied, typically by making payments towards the home. The court will often be called upon to inspect the parties’ bank accounts going back many years to see what payments were made and when.
- 3.86 The provisional scheme was intended to defeat this objection by putting all the emphasis on the financial contribution itself. It would not be necessary to establish a common intention to share beneficially, and so the proof of financial contribution would itself be enough.

¹⁴ [1991] 1 AC 107, 132.

3.87 However, the proposed scheme would create problems of its own. The proof of contributions would inevitably involve the production and inspection of bank accounts, and oral evidence may well be necessary as the court determines by whom a particular payment has been made. While we have advanced the case for applying a “broad brush” to issues of quantification, it seems to us naive to assume that the proposed scheme would lead to much by way of savings in court time.

The inflexibility of the statutory trust

3.88 The relationship between the proposed scheme and the existing law would be a critical question. It was always envisaged that the scheme would take over entirely once the criteria for its operation had been satisfied. Where parties shared a home within the meaning of the legislation, it would not be possible to claim an interest in that home by reference to resulting or constructive trust or proprietary estoppel. However, it must be admitted that this may have unfortunate, and undesirably restrictive, consequences.¹⁵

3.89 This is particularly the case where claims are brought by “carers” who have been sharing the home with the person for whom they have been caring. As we have mentioned above, there is no principled reason why two claims by “carers” should be treated differently. Yet all would depend on whether the court were to hold that the carer and the cared-for were sharing a home. If they were, then it would be a matter of assessing the contributions made. If they were not, it would be a matter of identifying the minimum necessary to do equity between the parties, taking account of the expectation and the detriment, and applying the principle of proportionality.

3.90 In Part II, we referred to two recent decisions of the Court of Appeal, *Campbell v Griffin* and *Jennings v Rice*, as an illustration of the flexible response of the doctrine of proprietary estoppel to the expectation generated by the legal owner’s conduct.¹⁶ Cases such as these would be included within the scope of the scheme, assuming that the court was satisfied in each case that the claimant was in fact occupying the home with the legal owner.¹⁷ It would therefore be necessary to quantify the claimant’s interest by reference to the value of the (non-financial) contribution which had been made.

3.91 The resulting remedy could differ significantly, not only in substance, but also in form. The broad nature of relief available to satisfy a proprietary estoppel claim may lead either party to contend that the arrangement was outside the scope of

¹⁵ A further problem is that the scheme would operate as far as the shared home is concerned, requiring the court to value the contributions made – but the defendant may have generated an expectation that the claimant obtain an interest in some other property altogether: see the inheritance-expectation cases, such as *Gillett v Holt* [2001] Ch 210.

¹⁶ See paras 2.96 - 2.100 above.

¹⁷ And was not excluded, eg as being a lodger, relevant to facts such as those in *Campbell v Griffin*.

the statutory scheme. These cases have certainly indicated a flexibility afforded to the courts when confronted with an equity arising by way of estoppel which application of our proposed scheme, with its conferment of a beneficial interest pursuant to a statutory trust, would inevitably deny.

- 3.92 The imposition of a trust may be singularly inappropriate, particularly in cases where the contributions made are relatively insignificant. It would be much easier, perhaps, for the court to be able to order the payment of a lump sum (which could itself be charged on the home) to compensate the claimant. The lack of flexibility of the proposed statutory trust would be a serious drawback.
- 3.93 The intention has always been to impose a “statutory trust” where the parties sharing the home have not come to an express arrangement dealing with their respective beneficial entitlements in the property. There would be no further role for the rules of implied (resulting and constructive) trust or proprietary estoppel. This radical exclusion of the principles applicable to informal arrangements for the purchase and the sharing of properties could only be justified if we were able to prove (beyond a shadow of a doubt) that the replacement scheme was better (indeed much better) and that it worked. Try as we have, we have been unable to do this.

Prospective or retrospective

- 3.94 An important issue is whether the scheme could be implemented with effect only in relation to home-sharing which began after a set date, or with retrospective effect. The disadvantage of the proposals having prospective effect only would be:
- (1) the complexity of more than one scheme being in effect at a time – the applicable law would be determined by the date the claimant started to share the home;
 - (2) that this state of affairs could continue for a long time; and
 - (3) that, if one party stood to gain by arguing that the old law applied rather than the new, and there was conflicting evidence about the date on which the sharing period started, there would be a clear incentive for parties to litigate on the point.
- 3.95 As one of our aims in making provisional proposals was to simplify the law, these difficulties obviously make it preferable that any reform should have retrospective effect: from the day the reforms came into force, they would apply to all property and sharers within the scheme. However, we have some concern that making such a reform retrospective would aggravate the existing problem of compatibility with the European Convention on Human Rights.

The lack of a unifying principle

- 3.96 In truth, there are two principles underlying the scheme:
- (1) that contributions made towards the acquisition, improvement and retention of the shared home should give rise to a beneficial interest in the property, and

(2) that contributions towards “home-making” should have a similar effect.

3.97 The former concerns contributions which are directly attributable to the property, but the non-financial contributions are better described as contributions towards the parties’ joint lives. Such a distinction highlighted very clearly the contradictions which are at the heart of the project.

3.98 It can of course be argued that it does not matter that there are two underlying principles, provided they are not logically inconsistent. But the nagging doubt with the so-called “non-financial contributions” is that the scheme obscures the true nature of the claim. It may be a claim of a restitutionary nature, the claimant arguing that the services which have been provided have unjustly enriched the respondent. Or it may be that it is a claim for the loss of opportunity occasioned as a result of relationship breakdown.

3.99 Let us refer once more to *Burns v Burns*.¹⁸ We do not doubt that Mrs Burns (who lived with her “common law husband” for over fifteen years, brought up their children, and was then deserted) was not well served by the legal system. But she would articulate her claim on the basis of the loss she had suffered as a result of the breakdown of her relationship with Mr Burns and, possibly, the loss of the opportunity to improve her earning capacity over the time she was dependent upon him. Had they been married, she would have had a substantial claim for ancillary relief on divorce. Describing her problem in property law terms as a failure to give credit for “non-financial contributions” is to misdescribe it.

CONCLUSION

3.100 In Part II above, we highlighted cases which illustrated the injustice which may result from the operation of the law as it is. We sought to develop a scheme based on property law principles which would be fairer than the current law. We do not think this can be done. The property law scheme does not go far enough in remedying injustices which arise under the current law, but creates new ones of its own. It is not, therefore, one which we can even provisionally propose.

¹⁸ [1984] Ch 317, at paras 2.75 - 2.76 above.

PART IV

A WAY FORWARD

- 4.1 In Part II we identified several difficulties with the principles currently applied to determine whether a person has obtained a beneficial interest in the shared home in the absence of the parties having made express provision. We realise that one possible approach to reform would be to rationalise the rules of implied trusts in such a way as to lead to greater fairness, certainty, and predictability of operation.
- 4.2 However, we have considerable reservations about recommending any statutory reform of the present law of implied trusts. The principles which give rise to implied trusts are doctrines of common law which have been developed by the courts over many years. For the most part, those common law doctrines have served us well, and we do not consider that the problems we are now addressing justify a complete codification of the law of implied trusts. There is a real risk that statutory intervention on the fringes of this area of the law could have unforeseen and unintended consequences, and could even hinder further judicial development of the underlying legal principles.
- 4.3 The possibility of judicial development of the law does however remain, and in this Part we shall discuss whether there are particular ways in which reform could be advanced by the courts. We shall first consider how the other leading common law jurisdictions- Australia, Canada and New Zealand- have dealt with the problem- and how their courts have applied and developed doctrines such as the constructive trust.¹ We shall see that while for the most part these jurisdictions have adopted a somewhat more expansive approach to constructive trust than that apparent in England and Wales, the underlying problems of uncertainty and obscurity remain. We shall however make suggestions for the continuing development of the common law by the English courts.
- 4.4 It is important to note that in many Australian states, and in New Zealand, a legislative solution has been applied, and that the principles emanating from their courts are now only invoked where the legislation is inapplicable.²

Australia: “unconscionability”

- 4.5 Traditionally, Australian courts followed the English approach in applying the doctrine of the common intention constructive trust to resolve property disputes between those sharing a home.³ From the 1980s, however, the courts developed

¹ See generally S Gardner, “Rethinking Family Property” (1993) 109 LQR 263; J Mee, *The Property Rights of Cohabitees* (1st ed 1999).

² See further paras 5.19 *et seq.*

³ See, eg, *Wirth v Wirth* (1956) 98 CLR 228. The three elements of this type of constructive trust were described by O’Byrne J in *Hohol v Hohol* [1981] VR 221, 225 as common intention, detrimental reliance and the requirement that it be a fraud on the claimant for the defendant to deny the former any share in the beneficial interest in the property.

the concept of “unconscionability” as the basis of the constructive trust.⁴ This approach required the court to make an objective assessment of the parties’ conduct rather than to carry out a search for their “common intention”.

4.6 The Australian courts viewed the sharing of the home as a joint venture,⁵ focusing on the pooling of resources which often occurs in such situations. A more flexible concept of constructive trust was applied in order to prevent the unconscionable retention of disproportionate contributions to the “joint relationship”.⁶ It appears that a claimant must establish the following elements in order to found a constructive trust:

- (1) the parties entered into some form of “joint endeavour”;⁷
- (2) the claimant contributed in some way to that endeavour; and
- (3) it would be unconscionable for the other party to retain the benefit of those contributions in the event of separation or the termination of the joint endeavour.

4.7 A wide range of financial and non-financial contributions may be taken into account.⁸ More importantly, it remains to be seen whether, in the absence of any financial contribution, non-financial contributions (in particular domestic services) will be sufficient to found a constructive trust.⁹ Similarly, some reported decisions reveal a persistent demand for either a link between

⁴ *Muschinski v Dodds* (1985) 160 CLR 583, *Baumgartner v Baumgartner* (1987) 164 CLR 137.

⁵ See *Muschinski v Dodds* above, at p 620, *per* Deane J. In *Baumgartner v Baumgartner* above, the judgments referred to a “joint relationship”, making clear that a commercial element is unnecessary (*per* Mason CJ, Wilson and Deane JJ at p 164; Gaudron J at p 157).

⁶ *Baumgartner v Baumgartner* above.

⁷ Or “joint venture”. There is no requirement that the parties should have specifically intended to set up a joint venture. The courts look to the reality of the situation with regard, eg, to the extent the parties shared their lives and resources (*Hibberson v George* (1989) 12 Fam LR 725).

⁸ See, eg, *Miller v Sutherland* (1990) 14 Fam LR 416 (assisting in building home); and *Baumgartner v Baumgartner* above (where the claimant was awarded a sum representing the earnings she had lost as a result of her career break to have a child). In *Marks v Burles* [1994] DFC 95 White J remarked at p 155:

Even though the High Court was moved to recognise a non-financial contribution to the joint relationship there has by no means been an importation of the principles of the *Family Law Act 1975* (Cth).

⁹ See *Bryson v Bryant* (1992) 16 Fam LR 112 where the majority of the Supreme Court of New South Wales (Sheller JA and Samuels A-JA) decided that domestic services would only be relevant where they were in addition to some financial contribution. Kirby P (at p 126) strongly objected to-

leaving (those) who have provided ‘women’s work’ over their adult lifetime to be told most condescendingly, by a mostly male judiciary that their services must be regarded as ‘freely given labour’ only.

contributions and the acquisition, conservation or improvement of the property in question,¹⁰ or a physical pooling of assets.¹¹

- 4.8 The Australian courts will not impose a constructive trust in cases where a non-proprietary remedy would be sufficient to do justice to the claimant.¹² For example, where the claimant has contributed towards improvements to the property, the courts are likely to compensate the claimant by imposing a charge on the property in their favour to the amount expended rather than conferring on them a beneficial interest under a constructive trust.¹³ The outcome in respect of quantum is unpredictable.¹⁴ However, as is the case with the common intention constructive trust, the new model trust will have retrospective effect, despite the absence of an express declaration by the court.¹⁵
- 4.9 With the new model constructive trust Australia can be said to have made a distinctive contribution to the development of equitable doctrines,¹⁶ the most obvious advantage of which is the avoidance of the search for a common intention to share the beneficial interest. However complexity may have increased, as the common intention trust continues to be argued as a separate doctrine,¹⁷ thereby impeding the development of the broad concept of unconscionability as a single remedy. Moreover, the concept itself is susceptible to differing judicial interpretations, and can therefore be seen to increase the unpredictability of outcomes.¹⁸

¹⁰ See, eg, *Lipman v Lipman* (1989) 13 Fam LR 1; *Bryson v Bryant* above.

¹¹ See, eg, *Brown v Manuel* [1996] DFC 95.

¹² The criteria used to assess whether or not a constructive trust should be imposed or a non-proprietary remedy awarded are not yet clear. See J Mee, *The Property Rights of Cohabitees* (1st ed 1999) p 251.

¹³ See, eg, *Hibberson v George* (1989) 12 Fam LR 725 where the claimant's contributions to improvements were dealt with separately from other contributions that had been made - a charge being imposed to enable the recovery of the amount expended in relation to the former only. See also *Giumelli v Giumelli* (1999) 196 CLR 101. Cf *SEC, DSS v Agnew* (2000) 96 FCR 357

¹⁴ H A Finlay, R J Bailey-Harris and M F A Otlowski, *Family Law in Australia* (5th ed 1997) p 324, para 6.91.

¹⁵ *Ikeuchi v Liu* (2001) 160 FLR 94; [2001] QSC 54 (Queensland Supreme Court).

¹⁶ H A Finlay, R J Bailey-Harris and M F A Otlowski, *Family Law in Australia* (5th ed 1997) p 318, para 6.84.

¹⁷ See, eg, *Rasmussen v Rasmussen* [1995] 1 VR 613; *Stowe v Stowe* (No 1) (1995) 19 Fam LR 409, [1995] DFC 95; *Green v Green* (1989) 17 NSWLR 343. The two are often argued in the alternative: see eg *Bryson v Bryant* above; *Bell v Bell* (1995) 19 Fam LR 690.

¹⁸ Judicial opinion has been divided in this way in cases such as *Bryson v Bryant*; *Brown v Manuel* above.

Canada: unjust enrichment

- 4.10 The Canadian courts have developed the “remedial constructive trust” to deal with economic injustice in the family context.¹⁹ Unlike the English common intention constructive trust, the Canadian model is based on principles of unjust enrichment, and it may be imposed in circumstances where the claimant has not provided any direct financial contribution to the acquisition of the property but has, for example, raised children or carried out other services in the home.²⁰
- 4.11 In order for a remedial constructive trust to be imposed the court must be satisfied both that unjust enrichment has occurred and that a proprietary remedy is justified. To establish unjust enrichment a claimant must demonstrate—
- an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment.²¹
- 4.12 “Enrichment” is interpreted widely so as to include financial contributions,²² payment of household expenses,²³ domestic work,²⁴ and the carrying out of repairs and maintenance.²⁵ Insufficient are matters such as “willing assistance one might expect from a helpful friend”²⁶ or relative.²⁷ The contributions should be “sufficiently substantial and direct. The requirement of a “corresponding deprivation” is not difficult to satisfy, as once the claimant has demonstrated that they have conferred a benefit on the other party deprivation almost follows as a matter of course.²⁸

¹⁹ In *Pettkus v Becker* [1980] 2 SCR 423/ (1980) 117 DLR (3d) 257 a majority of the Supreme Court of Canada adopted the new remedial approach to property division in family cases.

²⁰ It has been suggested that the Supreme Court in *Peter v Beblow* (1993) 44 RFL (3d) 329/ 101 DLR (4th) 621 “effectively created a presumption that the performance of domestic services will give rise to a claim for unjust enrichment.”: J Mee, *The Property Rights of Cohabitees* (1st ed 1999) p 192.

²¹ *Pettkus v Becker* above at p 274, per Dickson J. The test was first stated in *Rathwell v Rathwell* [1978] 2 SCR 436, 454 - 456.

²² See, eg, *Wilcox v Wilcox* (2000) 190 DLR (4th) 324.

²³ In *Wilcox v Wilcox* above, the British Columbia Court of Appeal upheld a constructive trust in favour of the plaintiff, who had shared a house with her mother (then deceased), contributing towards its acquisition, housekeeping and maintenance.

²⁴ *Peter v Beblow* (1993) 44 RFL (3d) 329/ 101 DLR (4th) 621. See also *Sorochan v Sorochan* [1986] 5 WWR 289/ (1986) 29 DLR (4th) 1.

²⁵ *Riess v Riess* (1981) 22 RFL (2d) 152; *Peper v Peper* (1990) 38 ETR 212.

²⁶ *Dechenne v Sehne* (1986) 49 RFL (2d) 420, 427.

²⁷ *Naylor v Naylor* (1990) 37 ETR 274.

²⁸ The provision of services of significant benefit to the other party is a detriment to the claimant “by virtue of the use of [her] time and energy”: *Everson v Rich* (1988) 16 RFL (3d) 337, 342/ 53 DLR (4th) 470. See also *Sorochan v Sorochan* above; and *Thibert v Thibert* (1992) 39 RFL (3d) 376.

- 4.13 A more problematic criterion is the need to show the “absence of any juristic reason for the enrichment.” Obvious examples which would fail to meet this test include cases where the transfer of property is intended as a gift²⁹ or is transferred in accordance with the terms of a contract. However, in the case of services the point may turn on considerations as to whether they were requested or freely accepted and whether the defendant knew that the claimant would expect something in return.³⁰
- 4.14 The injustice in unjust enrichment is said to arise due to the claimant’s “reasonable expectation” of receiving an interest in property, and the defendant’s awareness thereof.³¹ It may be extremely difficult to discern the expectations of persons in close relationships, as the parties will rarely possess and communicate the sharply defined expectations associated with marketplace transactions. However, the courts have shown a fair degree of willingness to substitute the expectations of reasonable persons for those of the parties, even as they state the requirement that they exist in fact.
- 4.15 Where the various elements of unjust enrichment are present, the remedial constructive trust is applicable between friends, family, same-sex couples³² and married persons.³³ However the courts will only award a proprietary remedy where monetary compensation, the ordinary form of relief, is inappropriate or insufficient.³⁴ Moreover, the claimant must demonstrate a link between the enrichment and associated deprivation, and the property the ownership of which is in dispute.

New Zealand: “reasonable expectation”

- 4.16 The New Zealand Court of Appeal has adopted a broader approach to the constructive trust than the English courts, focusing on the “reasonable expectations” of the parties. In order to found a constructive trust a claimant must establish:

- (1) that they have contributed in some way to the property;

²⁹ See, eg, *Abraham-Sherman v Sherman* (1998) 37 RFL (4th) 26 (gift); *Peter v Beblow* above; *Crick v Ludwig* (1994) 117 DLR (4th) 228; *Berdette v Berdette* (1991) 3 OR (3d) 513/ 81 DLR (4th) 194.

³⁰ R L A Goff & G Jones, *The Law of Restitution* (5th ed 1998) pp 18 - 22.

³¹ *Pettkus v Becker* above.

³² *Brunet v Davis* [1992] OJ No 1586 (Gen Div).

³³ The doctrine may apply to married couples notwithstanding any provincial statutory regime for the division of matrimonial property: see *Rawluck v Rawluck* (1990) 65 DLR (4th) 161.

³⁴ In *Shannon v Gidden* (2000) 178 DLR (4th) 395 the British Columbia Court of Appeal held that the trial judge had erred in awarding a proprietary remedy, as there were no concerns about the effectiveness or enforcement of a monetary award. See also *Soroohan v Soroohan* [1986] 5WWR 289; *Georg v Hassanali* (1989) 18 RFL (3d) 225; *Rawluk v Rawluk* (1990) 65 DLR (4th) 161; *Peter v Beblow* above.

- (2) that they had a reasonable expectation that they would acquire an interest in the property; and
- (3) that the defendant should have reasonably expected to have had to grant the claimant an interest in the property.

4.17 The contributions need not necessarily take the form of financial payments towards the acquisition of the house. Indirect contributions such as making improvements to the property,³⁵ the payment of general household expenses,³⁶ or child-rearing and general domestic work³⁷ will be sufficient to found an interest in the same way as the payment of a deposit, or mortgage instalments.³⁸

4.18 The flexibility of constructive trust doctrine in New Zealand is more advantageous to claimants without legal title than the current law in England and Wales, in that the courts no longer insist on contributions toward the acquisition of the property in the absence of a common intention between the parties that the beneficial interest is to be shared. Once a trust has been established, the court must in the first instance have regard to any common intention of the parties concerning the size of the shares in the beneficial interest. Any clearly expressed intention will be treated as paramount,³⁹ but if no intention can be found, the property will be divided according to the parties' respective contributions.⁴⁰

4.19 A clear distinction is drawn between the reasonable expectations of married and unmarried couples.⁴¹ The court may also grant a monetary award if a proprietary interest is inappropriate, and the claimant can show that the defendant would otherwise be unjustly enriched.⁴²

Summary

4.20 We should not be misled by the labels which different jurisdictions attach to legal doctrines. Although the concepts of "constructive trust" in the jurisdictions we have mentioned clearly differ from our own common intention constructive trust in a number of respects, they may be thought to bear very close similarities to the English law doctrine of proprietary estoppel. It is arguable that, in Canada,

³⁵ *Gillies v Keogh* [1989] 2 NZLR 327.

³⁶ *Lankow v Rose* [1995] 1 NZLR 277.

³⁷ *Lankow v Rose* above.

³⁸ *Fitness v Berridge* (1986) 4 NZFLR 243.

³⁹ *Cossey v Bach* [1992] 3 NZLR 612, 629, *per* Fisher J.

⁴⁰ *Gillies v Keogh* [1989] 2 NZLR 327, 334, *per* Cooke P (where the claimant's contributions were said to amount to "no more than fair payment for board and lodging and the advantages of a home for the time being").

⁴¹ "... a de facto union is not to be treated as the full equivalent of marriage." *Gillies v Keogh* [1989] 2 NZLR 327, 332, *per* Cooke P. See also *Lankow v Rose* above, at p 295.

⁴² *Gibb v MacDonnell* [1992] 3 NZLR 475, *Daly v Gilbert* [1993] 3 NZLR 731.

Australia and New Zealand, the essential elements which need to be present in order to found a constructive trust are recognisable as the basic requirements for an equity arising by estoppel under English law —

- (1) some act of encouragement or acquiescence by one party;
- (2) detrimental reliance by the other party; and
- (3) unconscionability or unjust enrichment.⁴³

4.21 The courts in Canada, Australia and New Zealand will not award a *proprietary* remedy as a matter of course once the circumstances justifying the imposition of a constructive trust have been established.⁴⁴ Indeed, the discretion which these jurisdictions exercise in this regard is reminiscent of that which is exercised by the courts in this country when giving effect to an equity arising by estoppel.⁴⁵ Yet in England and Wales a constructive trust will arise in appropriate circumstances irrespective of the “adequacy” of a non-proprietary remedy.⁴⁶

4.22 This distinction in terms of flexibility is also evident in terms of the contributions which are considered to be significant. All three Commonwealth jurisdictions have accepted, with possibly varying degrees of conviction, that “non-financial contributions” by way of domestic services, or expenditure on the joint household, may give rise to an interest by virtue of constructive trust.

4.23 There is no doubt that the broader approach of these jurisdictions tends to lead to greater uncertainty and unpredictability than the current English law, but this may be a necessary consequence of fairness. The view we have taken is that the principles set out by Lord Bridge in *Lloyds Bank plc v Rosset* are, on the whole, unduly restrictive, and that the courts should seek to be more flexible in their approach.

4.24 **While we realise that the application of “common intention” causes real difficulties to the courts and that it can lead to a highly artificial exercise, it is difficult to present a convincing case for any more effective criteria on which an assessment of beneficial entitlement could be based. Intention is clearly important, as it would be wholly unsatisfactory if a person were to obtain a beneficial interest where it was made extremely clear that a particular contribution, by financial or other contribution, would not be met this way.**

⁴³ See paras 2.88 *et seq* above.

⁴⁴ In each case, a proprietary remedy will only be granted if a personal remedy, such as financial compensation, would be inadequate in the circumstances.

⁴⁵ The courts may award a proprietary interest or some other form of relief in such cases but, either way, the intervention of the court will be required for the equity to be given effect.

⁴⁶ By definition, of course, a constructive trust in this country entitles the beneficiary to a proprietary interest.

- 4.25 **In our view, however, the courts have made it too difficult for a person to bring a claim to beneficial entitlement in the shared home in two respects.**
- 4.26 **The first is the requirement that the claimant make a direct financial contribution to the acquisition of the shared home. In many cases, a couple will not engage in discussion, but agree to an ordering of the household finances such that one pays off the mortgage while the other pays the household bills. In those circumstances, where the payment of those bills has enabled the other party to pay the mortgage instalments, we believe that the payer of the bills should be given due credit. In our view, an indirect contribution to the mortgage of this kind should be sufficient to enable the courts to infer that the parties had a common intention that the beneficial entitlement to the home be shared.⁴⁷**
- 4.27 **The second concerns the quantification of beneficial entitlement. We consider that there is a strong case for the courts to adopt a broad approach here as well. If the question really is one of the parties' "common intention", we believe that there is much to be said for adopting what has been called a "holistic approach" to quantification,⁴⁸ undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended.⁴⁹**
- 4.28 We realise the force of the argument that there is a need for certainty in property transactions and that it is essential for third parties dealing with the shared home to be able to discover the extent of beneficial interests in the property. For the most part, however, mortgagees and purchasers have ample means of ensuring that they take free of the interests of persons who are occupying the home. It may be more difficult to assess precisely the extent of a person's beneficial interest, but this is largely a question between the legal owner and the person sharing with him or her. There is of course, as we have already emphasised many times, a simple remedy for this problem: execute a declaration of trust.
- 4.29 We are aware of course that the more flexible approach to constructive trusts applied in Australia and New Zealand is now seldom invoked, as most of the jurisdictions have in place legislation to govern "de facto relationships"- in part to deal in a more satisfactory manner with the financial consequences of a breakdown in the relationship between those sharing a home. In Part V we shall see how such legislation operates as we consider more broadly status-based approaches to the problems faced by those sharing homes.

⁴⁷ See *Le Foe v Le Foe* [2001] 2 FLR 970, 982, per Nicholas Mostyn QC.

⁴⁸ *Le Foe v Le Foe*, above, at p 982.

⁴⁹ *Midland Bank plc v Cooke* [1995] 2 FLR 915, 926, per Waite LJ.

PART V

A RELATIONSHIP APPROACH

- 5.1 The Law Commission conducted an analysis of a property-based model which, it was hoped, might provide a workable alternative to the current law governing the ascertainment and quantification of property interests in the shared home where no express provision had been made by the parties themselves. We have concluded that we are unable to recommend the adoption of the property-based model, principally because we do not believe that such a scheme can be sufficiently flexible and sophisticated to deal with the diversity of the relationships between persons who may be sharing homes.
- 5.2 In Part IV, we made some suggestions for the future judicial development of the principles of implied trusts and proprietary estoppel. We do not consider, however, that judicial action can be expected to solve all the problems which exist. It cannot be expected, in particular, to deal with the broader financial consequences of the breakdown of the relationship between those who have been living together in a shared home.
- 5.3 In this Part, we outline the extent to which the legal nature of the relationship between those who are living together in a shared home affects their mutual rights and obligations. This is not intended to be a comprehensive survey of the existing law, and we shall give particular emphasis to the areas of the law which have been most closely related to the current project.
- 5.4 To focus on the nature of the parties' relationship, and to consider whether rights and obligations should be vested in the parties by virtue of that relationship, is to adopt an approach which is broadly based on "status". One status- that of marriage- is very clearly recognised, and given pre-eminence, in current law. The question whether other relationships, outside marriage, should carry rights and obligations has been recently stimulated by the introduction in Parliament of two private member's Bills on partnership registration. In this Part we intend to provide a brief outline of the extent to which relationships are currently regulated, with reference to developments in other jurisdictions and proposals for reform.
- 5.5 We should emphasise that we are not making any proposals ourselves in this Discussion Paper. We are drawing a line under the project as it has been conducted. But we are keen to contribute as far as we are able to the debate concerning the future legal regulation of personal relationships.

MARRIED COUPLES

- 5.6 Marriage is a status, in that parties to a marriage belong to a class "to which the law ascribes peculiar rights and duties, capacities and incapacities."¹ English law does not impose a regime of statutory co-ownership on husband and wife. Indeed, marriage has very little effect on the property rights of a couple, at least

¹ *The Amptill Peerage* [1977] AC 547, 577, per Lord Simon of Glaisdale.

while the marriage continues to subsist. In determining, for instance, whether a person has a beneficial interest in property the title to which is vested in the person with whom they are living, the legal principles to be applied are the same whether the couple is married or not.²

5.7 The following provisions should however be noted:

- (1) There is a summary procedure by which a spouse may apply to the court to determine the title to or right to possession of any property, whether real or personal.³ But it does not bring about any substantive change in the law of property as it applies to a husband and wife: its function is limited and its effect is purely procedural.⁴
- (2) Money derived from an allowance made by the husband for the expenses of the matrimonial home is treated as the property of a husband and wife as tenants in common in equal shares in the absence of any agreement to the contrary.⁵
- (3) Where one spouse contributes to the improvement of real or personal property in which either or both of them has or have a beneficial interest, that spouse thereby acquires a share (or an enlarged share) in the property where that contribution is of a substantial nature.⁶
- (4) Where property is transferred from a husband to his wife, the presumption of advancement may apply such that the transfer is intended to be a gift.⁷
- (5) When a spouse dies, the widow or widower has preferential treatment in the event of intestacy, being entitled to appropriate the deceased's interest in the dwelling-house in which the surviving spouse was resident at the date of death.⁸

² *Bernard v Josephs* [1982] Ch 391, 402, per Griffiths LJ.

³ Married Women's Property Act 1882, s 17.

⁴ See *Pettitt v Pettitt* [1970] AC 777. It also applies to engaged couples: Law Reform (Miscellaneous Provisions) Act 1970, s 2(2).

⁵ Married Women's Property Act 1964, s 1. In its Report, Family Law: Matrimonial Property (1988) Law Com No 175, the Law Commission both criticised and recommended the repeal of the 1964 Act. It is now recognised that in restricting its application to allowances made by the husband, it contravenes Art 5 of the Seventh Protocol of the European Convention on Human Rights and is required to be repealed in order to enable the UK to ratify the Seventh Protocol: Written Answer, *Hansard* (HL) 21 April 1998, vol 588, col 197 (Lord Williams of Mostyn). In Scotland, housekeeping allowances are treated as belonging to the spouses in equal shares irrespective of which spouse was responsible for the allowance: Family Law (Scotland) Act 1985, s 26. There is also a statutory presumption that household goods should be owned in equal shares: *ibid*, s 25.

⁶ Matrimonial Proceedings and Property Act 1970, s 37. This provision also applies to engaged couples: Law Reform (Miscellaneous Provisions) Act 1970, s 2(1).

⁷ See paras 2.59 - 2.60 above.

⁸ Intestates' Estates Act 1952; see D H Parry & J B Clark, *The Law of Succession* (10th ed 1995) pp 33 *et seq*. A spouse who claims family provision under the Inheritance (Provision

Financial provision and property adjustment on divorce

- 5.8 The one situation in which marriage *does* profoundly affect the property rights of the spouses is where it is brought to an end by a decree of divorce, nullity or judicial separation. The Matrimonial Causes Act 1973 (as amended) confers wide powers on the court to make orders both for financial provision⁹ and property adjustment.¹⁰ The court also has the power to order a sale of any specified property, but only where it has made a secured periodical payments order, a lump sum order¹¹ or a property adjustment order.¹² Financial provision or property adjustment orders (“ancillary relief”) can only be made after a decree nisi has been obtained in the divorce proceedings.¹³ The order takes effect once the decree nisi has been made absolute.
- 5.9 The essential characteristic of the divorce jurisdiction is that it requires the court to take into account all the relevant circumstances in each case (first consideration being given to the welfare while a minor of any child of the family),¹⁴ but does not provide any guiding thread of principle as to how the discretion should be exercised.¹⁵ Section 25 of the Matrimonial Causes Act 1973¹⁶ merely provides a “check-list” of matters to which the court should in particular have regard.
- 5.10 In *White v White*¹⁷ the House of Lords urged the courts hearing ancillary relief applications to avoid discrimination between husband and wife and their respective roles. In attempting to achieve this objective, it was important to take full account of two factors:
- (1) Full weight must be given to the contributions which each party has made to the welfare of the family, including any contribution by looking after the home and caring for the family. This principle, although contained in

for Family and Dependents) Act 1975 has a more generous standard applied to his or her claim: see Parry & Clark, p 126.

⁹ Such as an order for one spouse to make periodical or lump sum payments to the other: see Matrimonial Causes Act 1973, s 23. See too *ibid*, s 21(1).

¹⁰ Such as an order that one party to the marriage transfers to the other property specified in the order: see *ibid*, ss 21(2), 24.

¹¹ For these, see *ibid*, s 23(1)(b), (c).

¹² *Ibid*, s 24A.

¹³ *Ibid*, ss 23(1), 24(1).

¹⁴ *Ibid*, s 25(1). The words “first consideration” do not mean “paramount consideration”. Instead, “this consideration is to be regarded as of first importance, to be borne in mind throughout consideration of all the circumstances including the particular circumstances specified in section 25(2)”: *Suter v Suter* [1987] Fam 111, 123, *per* Sir Roualeyn Cumming-Bruce.

¹⁵ “[S]ince 1984 the judicial task has lacked a primary objective”: Report to the Lord Chancellor by the Ancillary Relief Advisory Group (July 1998), para 4.4.

¹⁶ As substituted by the Matrimonial and Family Proceedings Act 1984, s 3.

¹⁷ [2001] 1 AC 596.

the statutory list of considerations,¹⁸ was in the view of the House of Lords not always fully applied. It was essential that “[t]here should be no bias in favour of the money-earner and against the home-maker and the child-carer.”¹⁹

(2) The judge should look at all the circumstances but then check his tentative views against “the yardstick of equality of division”.²⁰ In general equality should only be departed from if and to the extent that there is good reason for doing so, and the court should be encouraged to articulate reasons for departing from it where it does so.

5.11 The ancillary relief jurisdiction enables the court to dispense effective and expeditious justice in the circumstances of each individual case. The court is rarely concerned, when exercising its statutory jurisdiction, with the parties’ respective proprietary rights. Once it is satisfied that property is owned by one or other (or both) spouses, it has a broad discretion to adjust whatever individual rights each party might have. This does of course have considerable advantages in terms of saving both court time and legal costs.

Statutory co-ownership

5.12 The Law Commission proposed, in 1978, that statute should provide that the matrimonial home be jointly owned by the husband and wife (as beneficial joint tenants) save where the spouses had made express provision for their respective beneficial entitlements.²¹ This proposal was rejected by government. The Scottish Law Commission subsequently considered but rejected the imposition of statutory co-ownership of the matrimonial home in Scotland.²² However, the Law Reform Advisory Committee for Northern Ireland has recently revisited the issue and recommended reform along the lines of the Law Commission proposals in Northern Ireland.²³

UNMARRIED COUPLES

5.13 There is no such thing as “common law marriage” in English law.²⁴ It would also be inaccurate to refer to a recognised status of cohabitation. However, it is possible to identify certain statutory rights and obligations which may ensue from the fact of two persons living together. For the most part, these are conferred on those who live together “as husband and wife” which has been

¹⁸ Matrimonial Causes Act 1973, s 25(2)(f).

¹⁹ *White v White* [2001] 1 AC 596, 605, *per* Lord Nicholls of Birkenhead.

²⁰ *Ibid*, 605, *per* Lord Nicholls of Birkenhead.

²¹ Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods (1978) Law Com No 86.

²² Family Law: Report on Matrimonial Property (1984) Scot Law Com No 86.

²³ Matrimonial Property (2000) LRAC No 8. See further para 5.28 below.

²⁴ There is no such thing as “common law marriage”, whereby unmarried persons who live together and behave as if they were married are treated as man and wife. It has not been possible to enter into an informal marriage in this country since the passage of Lord Hardwicke’s Act in 1753. See J C Hall, “Common Law Marriage” [1987] CLJ 106.

judicially interpreted as referring to the fact that one of the couple is a man and one a woman.²⁵ Authority as to its further meaning is surprisingly scant. One possible reason for this, of course, is that the meaning of the expression is quite obvious, so that precise definition has not proved necessary.²⁶ However, in one recent case,²⁷ Neuberger J made the point that two people do not live together as man and wife simply because their relationship is one which a husband and wife could have. He said:

It seems to me that ... the court should ask itself whether, in the opinion of a reasonable person with normal perceptions, it could be said that the two people in question were living together as husband and wife; but, when considering that question, one should not ignore the multifarious nature of marital relationships.²⁸

5.14 Some of the most important rights and obligations conferred on persons living together as husband and wife are as follows:

- (1) Applications may be made for occupation orders, for non-molestation orders and for orders for the transfer of certain tenancies under Part IV of the Family Law Act 1996.²⁹ Such applications may be made by spouses and former spouses, but they may also be made by “cohabitants”,³⁰ defined as “a man and a woman who, although not married to each other, are living together as husband and wife”.³¹
- (2) A person who has been living with a protected or statutory tenant as his or her husband or wife may claim to succeed to a statutory tenancy of the dwelling-house on their death.³² Similarly, a person who has been living

²⁵ *Harrogate Borough Council v Simpson* (1984) 17 HLR 205; *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27. See also the comments of Lord Mackay of Clashfern LC, responding to a query raised by Lord Meston on Second Reading of the Bill which became the Law Reform (Succession) Act 1995: “‘living as husband and wife’ appears to us, as the law stands, to apply to partners of opposite sexes and not to partners of the same sex.” *Hansard* (HL) 13 February 1995, vol 561, col 511.

²⁶ See, eg, *R v South West London Appeal Tribunal, ex parte Barnett* (unreported), per Lord Widgery, cited by Woolf J in *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498, 502:

We have been invited to give some guidance on the phrase ‘cohabiting as man and wife’ but for my part it is so well known that nothing I could say about it could possibly assist its interpretation hereafter.

²⁷ *Re Watson* [1999] 1 FLR 878.

²⁸ *Ibid*, at p 883.

²⁹ Part IV and Sched 7.

³⁰ Or former cohabitants.

³¹ Family Law Act 1996, s 62(1).

³² Rent Act 1977, Sched 1, para 2, as amended by Housing Act 1988, Sched 4, para 2, applying to deaths on or after 15 January 1989.

with an assured periodic tenant may claim to succeed as an assured tenant by succession.³³

In neither of the above cases does the claimant have to prove that the parties have been living together for a particular length of time.

- (3) A person is entitled to claim damages for wrongful death under the Fatal Accidents Act 1976 if, *inter alia*, he or she was living with the deceased in the same household, and as her or his husband or wife, for a period of **at least two years** immediately before the date of the death.³⁴
- (4) Such persons may also apply for financial provision out of the estate of the deceased pursuant to the Inheritance (Provision for Family and Dependents) Act 1975.³⁵
- (5) A person who has been living with a secure periodic tenant as his or her husband or wife may claim to succeed to the secure tenancy on their death. However, such a claimant is not treated in an identical fashion to that of a surviving spouse, and they must show that they resided with the deceased **for a period of twelve months**.³⁶
- (6) For the purposes of the Mental Health Act 1983, the definition of “relative” includes a person who has been living with the patient as his or her husband or wife **for at least six months**.³⁷
- (7) Various provisions of social security legislation refer to persons who are an “unmarried couple”, defined by reference to living together as husband and wife.³⁸

5.15 There are relatively few cases in current English law where rights and obligations are conferred on a same sex couple. An application for a non-molestation order may be made by a person who lives or has lived in the same household as the respondent, “otherwise than merely by reason of one of them being the other’s employee, tenant, lodger or boarder.”³⁹ This provision appears to permit lesbian and gay partners, as well as many living in non-familial relationships, to apply for protection from domestic violence under the 1996 Act.

³³ Housing Act 1988, s 17(1), (4).

³⁴ Fatal Accidents Act 1976, s 1(3) (as amended by the Administration of Justice Act 1982).

³⁵ Section 1(1)(ba) (inserted by the Law Reform (Succession) Act 1995, s 2). The new provision, which was enacted following a recommendation by the Law Commission in Family Law: Distribution on Intestacy (1989) Law Com No 187, applies in cases where the deceased died on or after 1 January 1996.

³⁶ Housing Act 1985, ss 87, 113. The claimant must have been occupying the dwelling-house as his only or principal home at the time of the tenant’s death, but it is not necessary that the same house was shared by tenant and successor for the twelve-month period: see *Waltham Forest LBC v Thomas* [1992] 2 AC 198.

³⁷ Mental Health Act 1983, s 26. See also Administration of Justice Act 1982, s 13.

³⁸ See, eg, Social Security and Contributions Act 1992, s 137(1).

³⁹ Family Law Act 1996, s 62(3).

No adjustive discretion

- 5.16 It should be noted that the court has no discretionary jurisdiction to order financial relief on the breakdown of a relationship outside marriage. This position is mitigated to some extent where the parties have children, as the parent with care will be able to claim child support from the absent parent irrespective of whether they were married. Moreover, application can be made for capital provision under Schedule 1 to the Children Act 1989. But such provision must be “for the benefit of” the child, thereby limiting the extent to which the economic disadvantage which the parent may have suffered can be compensated.⁴⁰
- 5.17 We referred in Part II to *Burns v Burns*.⁴¹ This decision highlighted the difficulties faced by a woman who has care of the children of the relationship following its breakdown. She could not establish a beneficial interest in the shared home as she could not prove that there had been a common intention that she should have such an interest nor that she had made a direct financial contribution to its acquisition. In truth, her grievance was more broadly based: she had no financial remedy for the loss she sustained as a result of the time and efforts she had devoted to the family.
- 5.18 In Part IV we explained how certain jurisdictions have attempted to develop a flexible approach to the ascertainment and quantification of beneficial entitlement to the shared home. In both Australia and New Zealand, the deficiencies of the trust law approach on the breakdown of relationships outside marriage have been ultimately addressed by legislative reform.

Australia

- 5.19 Most Australian states have introduced legislation regulating the rights and obligations of those who are in so-called “de facto” relationships.⁴² Such legislation typically confers a wide discretion on the court to make orders adjusting property rights in accordance with what is “just and equitable” having regard to the contributions (both financial and non-financial) made by the parties to the acquisition, conservation or improvement of the property, the financial resources and the contributions to the welfare of the other party or of the family.⁴³
- 5.20 A distinction is drawn between married and unmarried couples. The powers applicable on the breakdown of de facto relationships are less wide-ranging than those operative on divorce, as the court does not take account of the parties’ future needs. It is essentially involved in a retrospective evaluation of the parties’

⁴⁰ See, eg, *A v A* [1994] 1 FLR 657, *T v S* [1994] 2 FLR 883.

⁴¹ [1984] Ch 317. See paras 2.75 - 2.77 above.

⁴² New South Wales: Property (Relationships) Act 1984 (formerly De Facto Relationships Act 1984); Northern Territory: De Facto Relationships Act 1991; Australian Capital Territory: Domestic Relationships Act 1994; South Australia: De Facto Relationships Act 1994. Some of this legislation applies to a wider range of relationships than that of the unmarried couple of the opposite sex.

⁴³ Property (Relationships) Act 1984, s 20.

past contributions. Consistently with this policy, orders for future maintenance are tightly controlled and can only be made in limited circumstances.

- 5.21 The Australian relationships law is still developing. In 1999, New South Wales widened the scope of its de facto legislation so that it also applies to regulate “domestic relationships” between two unmarried adults where one or both provide domestic support and personal care for the other, but where there is no sexual intimacy. The New South Wales Law Reform Commission is currently conducting a review of the Property (Relationships) Act to determine whether it is necessary to respond further to changes in the social, legal and economic landscapes.⁴⁴

New Zealand

- 5.22 With effect from 1 February 2002, de facto relationships are treated on the same basis as married couples for the purposes of property division on separation or death.⁴⁵ In most cases, the relationship must have lasted for at least three years. While there is provision for parties to a de facto relationship to contract out of the statutory regime, where they do not, the legislation equates the rights and obligations of unmarried couples (both opposite sex and same sex) to those of married couples. The court may therefore make orders adjusting the property rights of the parties at its discretion whether or not the couple is married.

Proposals for reform

THE LAW SOCIETY

- 5.23 The Law Society of England and Wales has made detailed proposals for the conferment of rights and obligations on certain cohabitants where they have been living together as a couple for three years or have had a child by birth or have adopted.⁴⁶ In particular, it has recommended that there should be a right for cohabitants to apply to the court for capital provision, and in restricted circumstances, for maintenance within three years of separation.
- 5.24 The level of capital provision would be assessed by reference to the overall economic detriment suffered by the applicant on separation. However, there would be no general right to apply for maintenance. The distinction between capital and income provision is justified by reference to the different levels of commitment which can be implied by marriage and cohabitation as well as the reduced emphasis on maintenance between former spouses and the current focus on the clean break in the law of family property. Maintenance would therefore only be available for limited periods in order to provide resources for re-training or to reflect capital payments which cannot be paid by way of lump sum.

⁴⁴ Review of the Property (Relationships) Act 1984 (NSW) (2001) NSW Law Reform Commission Discussion Paper 44.

⁴⁵ Property (Relationships) Act 1976.

⁴⁶ Cohabitation: Proposals for Reform, Law Society’s Family Law Committee.

SCOTLAND

- 5.25 In its 1992 Report on Family Law,⁴⁷ the Scottish Law Commission considered whether a system of financial provision operative on the breakdown of a relationship of cohabitation⁴⁸ should be introduced. While it rejected the introduction of a system analogous to financial provision on divorce, the Commission considered that it was nevertheless often unfair to allow economic gains and losses arising out of contributions or sacrifices made in the course of a relationship of cohabitation to lie where they fall.
- 5.26 Accordingly, it recommended⁴⁹ that, where cohabitation terminates (otherwise than by death), a former cohabitant should be able to apply to court for financial provision on the basis of the principle in section 9(1)(b) of the Family Law (Scotland) Act 1985 — namely, that fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of any child of the family.⁵⁰
- 5.27 The Commission argued that the proposed solution⁵¹ would give cohabitants the benefit of a principle designed to correct imbalances arising out of the circumstances of a non-commercial relationship where the parties are quite likely to have made contributions and sacrifices without counting the cost or bargaining for a return.

NORTHERN IRELAND

- 5.28 The Law Reform Advisory Committee for Northern Ireland has recommended that in the absence of express written agreement to the contrary, the joint residence of “qualifying cohabitants”,⁵² acquired after the parties become “qualifying cohabitants”, should be held jointly (as joint tenants in equity).⁵³ In

⁴⁷ (1992) Scot Law Com 135.

⁴⁸ By “cohabitation” in this context the Scottish Law Commission meant the relationship of a man and a woman who are not legally married to each other but who are living together as husband and wife, whether or not they pretend to others that they are married to each other.

⁴⁹ *Ibid*, para 16.23.

⁵⁰ As we noted in paras 5.23 - 5.24 above, this principle also underlies recommendations for reform of the law in England and Wales made by the Law Society.

⁵¹ Which had been endorsed by a majority of those who commented on the question in response to the Scottish Law Commission’s earlier discussion paper and public opinion survey: *The Effects of Cohabitation in Private Law* (1990) Scot Law Com No 86.

⁵² “Qualifying cohabitants” must have been living together in the same household for at least a total of two years within the period of three years preceding the acquisition of the property or have been living together in the same household and have had a child by the relationship. In either case, they must have been living together “effectively as husband and wife though not being married”.

⁵³ *Matrimonial Property* (2000) LRAC No 8.

this respect the Committee seeks to give such cohabitants the same rights as married couples.

The policy questions

5.29 The broad questions of policy which require to be addressed are as follows:

- (1) Whether rights and obligations (in addition to those currently enjoyed or imposed) should be vested in persons who are or have been involved in a relationship although they have not married each other (or registered a “civil partnership”⁵⁴).
- (2) If so, how such relationships should be defined, with particular focus on the possibility of formulating a single comprehensive definition.
- (3) What rights and obligations should vest in such individuals as a result of their relationship.
- (4) The extent to which those rights and obligations should be equated to, or be distinct from, the rights and obligations imposed on married couples.
- (5) Whether parties should be free to contract out of any provision of this nature, and if so what should be done to ensure that such contracting out is clear, fair and effective.

REGISTERED PARTNERSHIPS

5.30 Some jurisdictions have permitted unmarried couples⁵⁵ to register their relationships as a form of “partnership”, thereby obtaining rights and incurring obligations similar to, although not usually identical with, those who are married. This concept of “registered partnership” was developed in Scandinavia in the late 1980s and has since been adopted by a number of other Western European countries.⁵⁶ We shall consider the Danish and French regimes, which represent two different approaches, prior to examining the recent proposals for legislation providing for the registration of civil partnerships in England and Wales.

Denmark

5.31 Denmark was the first country in the world to enact a Registered Partnership Act, in 1989. This legislation permits same-sex partners to register their relationship,⁵⁷ upon which the Danish matrimonial property regime will apply⁵⁸ as

⁵⁴ See paras 5.30 *et seq* below.

⁵⁵ In some jurisdictions, the relevant provisions are restricted in their application to same sex couples.

⁵⁶ Including Belgium, France, Iceland, The Netherlands, Norway, Sweden and two of the autonomous regions of Spain (Catalonia and Aragon). See R Wintemute and M Andenaes (eds), *Legal Recognition of Same-sex Partnerships* (1st ed 2001) Appendix 1.

⁵⁷ L Nielsen, “Family Rights and the Registered Partnership in Denmark” (1990) 4 IJLF 297, 299; D M Henson, “Analysis of same-sex partnership protections: recommendations

if the partners were married.⁵⁹ Each partner may dispose of, or otherwise deal with, any property that they bring into the relationship. However, both parties' consent is required in relation to any dealing with the shared home. On the breakdown of the relationship any property which the couple have acquired subsequent to registration is deemed to be owned equally.⁶⁰ Nevertheless, the partners are not treated as a married couple for all purposes.⁶¹ The Danish legislation has provided an important precedent for other countries.⁶²

France

- 5.32 The Danish model may be contrasted with the French regime known as the *Pacte civil de solidarite* (PaCS).⁶³ Although the PaCS system involves registration of unmarried relationships, it is applicable to both same-sex and opposite-sex couples.⁶⁴ The scheme is complex, with some benefits only accruing after a qualifying period,⁶⁵ and others being available only to opposite-sex partners.⁶⁶

for American reform" (1993) 7 IJLF 282, 285. With certain exceptions, all references in Danish law to "spouse" or "marriage" are now applied equally to those in registered partnerships as they are to married couples. The partnership can be brought to an end by de-registration.

⁵⁸ Unless the parties contract out.

⁵⁹ M D Dupuis, "The impact of culture, society and history on the legal process: an analysis of the legal status of same-sex relationships in the United States and Denmark" (1995) 9 IJLF 86, 104.

⁶⁰ The court has a discretion to ignore the presumption of equality where the relationship has been registered for less than five years and the parties' contributions to the financial side of their partnership were markedly unequal. See L Nielsen, above, at p 303.

⁶¹ For example, registered partners are not permitted to adopt together or have joint custody of a child. However, since 1 June 1999 a registered partner has been permitted to adopt the other partner's child, unless the child is adopted from a foreign country: Law No 360 of 2 June 1999, s 2, amending Registered Partnership Act 1989, s 4(1).

⁶² D Bradley, *Family Law and Political Culture: Scandinavian Laws in Comparative Perspective* (1st ed 1996) pp 151 - 155.

⁶³ Loi no 99-944 du 15 novembre 1999 relative au pacte civil de solidarité - roughly translated as "law relating to civil solidarity pacts", inserting Art 515 into the French Civil Code. Couples have been able to register their partnerships since 17 November 1999. There are 2.5 million French couples cohabiting outside marriage, the highest rate in Europe outside the Nordic countries: see C Martin & I Théry, "The PaCS and marriage and cohabitation in France" (2001) *International Journal of Law, Policy and the Family* 135.

⁶⁴ The French traditions of equality and universality of legal rules preclude special legislation applying only to minority groups: see D Borrillo, "The 'Pacte Civil de Solidarité' in France" in *Legal Recognition of Same-Sex Partnerships: A study of National, European and International Laws* (2001) 475, 476.

⁶⁵ Loi no 99-944 du 15 novembre 1999, Arts 4 and 5 provide that joint income tax will apply to parties to a PaCS only after their relationship has been registered for three years, and joint taxation in relation to lifetime gifts and legacies after two years.

⁶⁶ As is the case with unregistered cohabitants, only opposite-sex couples can apply for joint parental authority over a partner's child (Code civil, Arts 371 - 387), or access to medically assisted procreation (*Code de la sante publique*, Art L152-2).

- 5.33 A PaCS is a ‘contract concluded between two adult individuals...to organise their life in common (*vie commune*).’ Once the PaCS is registered,⁶⁷ the parties have more extensive rights and obligations than unregistered cohabitants, but fewer than married couples. Subject to any alternative arrangements made by the parties, all property acquired after the registration of their PaCS is presumed to be jointly owned in equal shares,⁶⁸ but unlike married couples, the parties to a PaCS enjoy no right of survivorship.⁶⁹ Like married couples, partners joined by a PaCS have mutual support obligations, are liable to third parties for each other’s debts,⁷⁰ and are entitled to the transfer of the lease of their common residence if the official tenant leaves or dies.⁷¹ However, like unregistered cohabitants, parties to a PaCS have no automatic inheritance rights, no survivor’s pension and there is no provision for the joint adoption of an unrelated child⁷² or the second-parent adoption of the partner’s child.⁷³
- 5.34 A PaCS will dissolve with immediate effect on the death of one of the parties, if one partner marries, or when a mutual declaration to that effect is registered at the county court.⁷⁴ A PaCS may also be brought to an end unilaterally by giving notice to the other party and to the registrar of the court. In the latter case the termination will take effect after three months. If the PaCS is silent as to property rights and financial support, and the parties are unable to agree on these matters, a court may determine the proprietary and financial consequences of their PaCS.⁷⁵

Proposals for reform

- 5.35 The introduction of any system of registered partnerships in this country would clearly represent a radical departure from the principles which have traditionally governed family law. However, it is a subject that has received a large degree of attention in recent months.

⁶⁷ Registration takes place at the *Tribunal d’instance* (county court). Copies of the agreement entered into and certificates evidencing that the parties are not already married or party to a PaCS must be lodged: Code civil, Art 515-3.

⁶⁸ Property owned by either party prior to registration will remain in the relevant party’s ownership.

⁶⁹ Code civil, Art 515-5. See also A Barlow and R Probert, “Addressing the Legal Status of Cohabitation in Britain and France: Plus ça change...?” Web Journal of Current Legal Issues, 1999 <http://webjcli.ncl.ac.uk/1999/issue3/barlow3.htm>, p 6.

⁷⁰ When incurred for the “necessities of their daily life and for expenses relating to their common residence”: Code civil, Art 515-4.

⁷¹ Art 14. They also enjoy the same rights to the public health and maternity insurance of the other (Code de la securite sociale, Art L 161-14), the right to joint job transfers if working in the civil service (Loi no 99-944 du 15 novembre 1999, Art 13), simultaneous vacations (if working in the same company), and bereavement leave (Art 8).

⁷² Code civil, Art 343.

⁷³ Code civil, Arts 371 - 387.

⁷⁴ Code civil, Art 515-7.

⁷⁵ Code civil, Art 515-7.

Bills before Parliament

- 5.36 Two Bills proposing registered partnerships legislation have been recently debated in Parliament. The Relationships (Civil Registration) Bill was introduced into the House of Commons on 24 October 2001 by Jane Griffiths MP under the Ten Minute Rule. The Bill proposed the creation of a Civil Partnership Register which, upon entry, would extend to registered partners rights and obligations relating to tax, pensions, social security, housing succession and property.⁷⁶
- 5.37 Lord Lester of Herne Hill introduced the Civil Partnerships Bill into the House of Lords on 9 January 2002. This Bill, very similar in purpose to the Relationships (Civil Registration) Bill, was more detailed, and was the subject of extensive debate at Second Reading on 25 January. However, Lord Lester withdrew his Bill on Wednesday 6 February, following further assurances that the Government was conducting a cross-departmental review of civil partnerships.⁷⁷ This review has been co-ordinated by the Civil Partnerships and Sexual Orientation Team at the Women and Equality Unit of the Cabinet Office.
- 5.38 Lord Lester's Bill proposed to permit unrelated couples of the same or opposite sex who had been living together in the same household for a minimum period of six months to register their partnership with the Registrar-General of Births, Deaths and Marriages. On registration, the civil partners would enjoy many, although not all, of the rights and obligations of a married couple. Included in the Bill were provisions concerning taxation, provision of health and welfare where one partner was no longer capable to act, mental health, certain social benefits, domestic violence, life assurance, death registration, succession to residential tenancies, intestacy, family provision, pension schemes and rights of action in respect of fatal accidents.
- 5.39 Save where the partners had made an express "property agreement" which was noted in the register, the Bill sought to impose a form of statutory co-ownership on the registered partners' "communal property", essentially comprising the shared home⁷⁸ and its major contents. Such property was to be treated for all purposes as held jointly by the parties in equal shares. In the event of relationship breakdown, either party could apply to the court for a "cessation order" (the equivalent of divorce) and for a form of ancillary relief, an "intervention order". The court would have been able to make orders for the transfer of property from

⁷⁶ The Second Reading of the Bill was adjourned on 23 November 2001.

⁷⁷ The review was first announced in November 2001: see *Written Answer*, Hansard (HC) 28 November 2001, vol 375, col 903W (Written Answer No 19567); *Written Answer*, Hansard (HC) 30 January 2002, vol 378, col 2502 (Written Answer No 30814).

⁷⁸ "Any dwelling-house which either or both of them are entitled to occupy by virtue of a beneficial estate or interest and which the partners occupy (or have at any time occupied) jointly as their principal or only home": Civil Partnerships Bill, cl 9(1)(a).

one partner to another, orders for financial provision by way of periodical payments,⁷⁹ and orders requiring the sharing of pension rights.

- 5.40 The proposals for registration of civil partnerships do not involve the imposition of status on certain relationships against the parties' wishes. On the contrary, the provisions of the Bill would have no effect unless and until the parties registered their civil partnership.

The policy questions

- 5.41 The broad questions of policy which require to be addressed appear to us to be as follows:

- (1) Should it be possible for persons to register their relationships as "civil partnerships"?
- (2) If so, should registration be limited to couples of the same sex (who by definition cannot marry each other) or should it also be open to couples of the opposite sex?
- (3) If so, should registration be limited to couples at all- or should other personal relationships be capable of registration?⁸⁰
- (4) What should the legal consequences of registration be?
- (5) Should such consequences be identical to those which flow from marriage- or should they differ, and if so, in what respects?
- (6) Should parties to a civil partnership be able to contract out of the rights and obligations conferred on them by statute- and if so, to what extent?

SUMMARY

A tiered approach to rights and obligations

- 5.42 We accept that there is a very strong case for singling marriage out as a status deserving of special treatment. Not only does government consider that marriage provides the surest foundation for the raising of children,⁸¹ Parliament has itself recognised that the institution of marriage is deserving of protection and respect

⁷⁹ Limited in duration to a period of two years from the date of the order: *ibid*, cl 38(2).

⁸⁰ The Civil Partnerships Bill concentrated on those who are involved in a relationship which could be termed as "equivalent to marriage", in that to outward appearances the couple are considered as if they were married. It did not, therefore, attempt to deal with the legal rights and obligations pertaining to those living together as siblings, members of a family, or as friends. This may be because it is not felt appropriate that such relationships should be dealt with by the imposition, voluntary or involuntary, of a legal status conferring, possibly, the power on the court to reallocate the parties' property by the exercise of discretion- or it may be that it was thought that the definition of such a status would itself be too difficult.

⁸¹ Supporting Families: A Consultation Document (1998) Cm 3968, para 8 (Home Office).

by the courts.⁸² The European Convention on Human Rights also accords to marriage special privileges.

5.43 In all cases- married couples, registered partners, unmarried couples and so forth, any imposition of legal consequences requires justification and rationalisation, and the extent to which the parties can come to their own arrangements must also be clarified. It is obvious that the invocation of status as the basis of any future exercise in law reform requires the utmost care and consideration and that a full assessment of the impact of any such legislation would in every case be necessary. There are two central problems which we have identified:

(1) The definition of any status must be clear and effective such that those who qualify are aware that they do, and so that interested third parties are able readily to ascertain whether any such status has been acquired. Marriage is clearly and readily identifiable. Any new status which may be created must satisfy similar criteria and must not discriminate against individuals or groups.

(2) The consequences of any status must be prescribed so that those who qualify, or who are considering the acquisition of the status, are fully aware of the legal implications of their actions. In particular, it will be necessary to decide whether the status confers any form of statutory co-ownership and/or gives the parties the right to claim capital provision or maintenance in the event of breakdown of the relationship.

5.44 If Parliament were to decide upon the introduction of a system of “registered partnerships” for those couples who were unable (or unwilling) to marry, it would be necessary to determine whether the rights and obligations conferred on such a partnership should be equated to those conferred on married couples.

5.45 Registered partnerships would not solve the problem of those who fail to make any formal provision concerning their relationship. It must be realised, therefore, that the legal recognition of registered partnerships would have a relatively limited impact. There remains a strong case for consideration of further reform beyond the introduction of a system of registered partnerships, in particular the adoption of new legal approaches to personal relationships outside marriage following the lead given by other jurisdictions (such as Australia and New Zealand).

⁸² Family Law Act 1996, s 1(a).

PART VI

CONCLUSIONS

In this Discussion Paper, which concludes the present project, we are not making specific proposals for legislation. It is therefore not a Consultation Paper in the usual format, nor are we seeking responses. The purpose is to provide a legal framework for future public debate and consideration by Government. The main points emerging from the Paper are as follows.

- (1) Greater numbers of people are living together in circumstances which are characterised by informality.¹ The present law does not deal adequately with these changing conditions.**
- (2) Although the trust of land offers a machinery for the establishment of beneficial interests in the shared home which is both coherent and flexible, the current requirements for proving the existence of an interest under a trust are not ideally suited to the typical informality of those sharing a home. To demand proof of an intention to share the beneficial interest can be unrealistic, as people do not tend to think about their home in such legalistic terms. The emphasis on financial input towards the acquisition of the home fails to recognise the realities of most cohabiting relationships. Finally, the uncertainties in the present law can cause lengthy and costly litigation, wasting court time, public funding and the parties' own resources.²**
- (3) It is not possible, however, to devise a statutory scheme for the ascertainment and quantification of beneficial interests in the shared home which can operate fairly and evenly across the diversity of domestic circumstances which are now to be encountered.³**
- (4) It is essential that those who are living together are positively encouraged to investigate the legal consequences of doing so and to make express written arrangements setting out clearly their intentions. Where they purchase property jointly, they will be required to stipulate their beneficial entitlements by HM Land Registry. In these and other circumstances, it is essential that the**

¹ Para 1.7, Part I generally.

² Para 2.112, Part II generally.

³ Para 1.31(1), Part III generally.

courts continue rigorously to enforce express declarations of trust.

⁴

- (5) It is difficult to present a convincing case for any more effective criteria than “common intention” on which an assessment of beneficial entitlement could be based. Intention is clearly important, as it would be wholly unsatisfactory if a person were to obtain a beneficial interest where it was made extremely clear that a particular contribution, by financial or other means, would not be met this way.⁵**
- (6) In our view, however, the courts have made it too difficult for a person to bring a claim to beneficial entitlement in two respects:**
- (a) The first is the requirement that the claimant make a direct financial contribution to the acquisition of the shared home. In our view, an indirect contribution to the mortgage (by means of paying the household bills and thereby enabling the other party to pay the mortgage instalments) should be sufficient to enable the courts to infer a common intention that the beneficial entitlement be shared.⁶**
- (b) The second concerns the quantification of beneficial entitlement. We believe that there is much to be said for adopting a broader approach to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended.⁷**

Recent reported decisions have indicated that the courts are capable of the flexibility of approach which will be necessary to move the law in the desired direction.

- (7) We have however identified, in the course of this project, 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).⁸**

⁴ Para 2.52.

⁵ Para 4.24.

⁶ Para 4.26.

⁷ Para 4.27.

⁸ Part IV.

- (8) 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.⁹ Any status must be clearly and readily identifiable such that all can ascertain whether any such status has been acquired. The consequences of any status must be prescribed so that those involved are fully aware of its legal implications.¹⁰**
- (9) The definition of any status conferring legal rights or imposing legal obligations involves broad questions of social policy which fall outside the present project, and which are in any event more appropriate for political debate and decision, rather than for a law-reform body. However, the Law Commission would be prepared, if asked, to contribute to any further work in this area which is appropriate given its role as a body concerned with law reform.**

(Signed) ROBERT CARNWATH, *Chairman*¹¹
HUGH BEALE
STUART BRIDGE
MARTIN PARTINGTON
ALAN WILKIE

MICHAEL SAYERS, *Secretary*
18 July 2002

⁹ Part V.

¹⁰ Para 5.43.

¹¹ At the date this report was signed, the Chairman of the Law Commission was the Right Honourable Lord Justice Carnwath CVO.