Witten evidence from The Family Law Bar Association (The FLBA) [HAB0333]

INTRODUCTION

This is a response on behalf of *The Family Law Bar Association* ('The FLBA') to the call for evidence by the Women and Equalities Committee regarding the rights of cohabiting partners.

The FLBA is the specialist Bar Association for barristers specialising in family law and it has over 1700 members. Within the National Committee of the FLBA there is a sub-committee which deals with the 'money' and 'property' aspects of family law, which includes financial remedies applications between divorcing spouses, claims for financial provision for the children of (usually) unmarried parents, and claims regarding property interests between cohabiting, but unmarried, couples pursuant to the Trusts of Land and Appointment of Trustees Act 1996.

The sub-committee that has drafted this report, including those FLBA members who have been co-opted to assist, is comprised as follows:

- Peter Newman (Chair) – Barrister at 1 King's Bench Walk
- John Wilson QC – Queen's Counsel at 1 Hare Court
- Michael Horton QC – Queen's Counsel at Coram Chambers
- Rhys Taylor – Barrister at 30 Park Place
- Andrzej Borjarski – Barrister at The 36 Group
- Zoe Saunders – Barrister at St. Johns Chambers
- Elizabeth Darlington - Barrister at Parklane Plowden chambers
- Gwyn Evans – Barrister at Tanfield Chambers
- Greg Williams – Barrister at Coram Chambers
- Gerald Wilson – Barrister at Tanfield Chambers
- Max Lewis - Barrister at 29 Bedford Row

In drafting this report, that sub-committee has enlisted the assistance of some highly regarded FLBA members who have an enormous amount of experience in this field, in particular regarding the rights of cohabiting partners, whether following a divorce or between unmarried couple and parents. We hope that the Parliamentary Committee will find this evidence useful, given it draws on the legal expertise and day-to-day experiences of practitioners who are at the cutting edge of this field of law.

We are aware that this document is very long – in excess of 26,000 words. We have therefore endeavoured to provide an Executive Summary at the beginning of the document. However, we do urge the Parliamentary Committee to read the entirety of the document to gain a full understanding of this often complex area of law.

EXECUTIVE SUMMARY

Limitation periods

1. There is an overarching issue that effects all the questions that have been posed and this relates to the question of limitation periods. Should there be a time limit on bringing a claim and, if so, what should it be? Almost always, where rights are created or engaged and corresponding obligations are acknowledged in others, there is a need for limitation periods. There is a need both for certainty and finality.

2. The rules and statutes as to limitation in other areas have been worked out over centuries and they vary depending upon the litigant and the subject matter of the litigation. The Limitation Act 1980 prescribes different time limits for different classes of action with six years for claims in contract and tort and three years, usually, for personal injury claims. Limitation periods do not run against minors until they reach their majority. Claims under the Inheritance (Provision for Family and Dependents) Act 1975 should ordinarily be brought within six months of the

grant of probate. With the Fatal Accidents Act one has three years from the date of the accident. There seems to be no time limit on bringing claims for financial remedies after divorce.

3. The time limit for actions to recover land is twelve years. Section 21 of the Limitation Act provides that **no** period of limitation prescribed by the Act shall apply to an action by a beneficiary under a trust being an action to recover from the trustee trust property. There are similar exemptions in the case of fraud.

4. Section 6(4) of Lord Marks' Cohabitation Rights Bill 2021 provides that:

> "In any case where this Part applies, it has effect in place of common law rules and equitable principles (including contract, estoppel and implied trusts)".

5. In other words, where a cohabitee can claim under the proposed statute he or she would **lose** his or her rights under trust law and would be bound by whatever limitation period is enacted by the statute. This would also place a cohabitee with a good trusts claim in a worse position that someone who did not cohabit who had a similar claim. Is that what is wanted?

6. We are of the view that any new laws should as closely as possible follow existing and established principles as to limitation periods. However, this does create a difficulty with those new claims established for cohabitees under the proposed statute whose claims arise after the end of cohabitation rather than on death. The following questions arise:

   (i) Should there be a time limit after the cessation of cohabitation?

   (ii) If so, should that time limit be three years or six years or some other period?

   (iii) If a claimant has claims as a cohabitant under the proposed legislation **and** a (perhaps greater) claim under existing principles of implied trusts:

      (a) Should the new legislation take away those existing claims; and

(b) Should the new legislation impose new limitation periods on existing claims.

SHOULD THERE BE A LEGAL DEFINITION OF COHABITATION AND WHAT SHOULD IT BE?

7. The law of England and Wales already gives cohabiting couples certain rights; particularly within the UK-wide Social Security legislation. The general marker in law is whether people are "Living Together as a Married Couple." We think that when defining who whether parties should acquire financial rights and responsibilities between themselves arising from cohabitation, any definitions we use must fit in with that existing idea.

8. However, if the law gives financial rights and responsibilities as between cohabiting couples, and particularly if this relates to finances generated or lost during the course of a relationship, it is very important to define with clarity when cohabitation begins (particularly if there is to be an ability to "opt out" of the financial effects) and when it ends. Our experience as practitioners who are daily arguing these matters already in the context of divorces and dissolutions of Civil Partnerships is clear that this timing issue, if not properly dealt with, will cause very significant problems.

9. There are various other issues to consider. Perhaps the most important is whether any law should differentiate between couples depending on *why* they are living together. We think the law needs to be focussed on people in emotionally committed and intimate relationships. Any two people who want to live together for any reason always have the right to formalise whatever agreements they want. But it seems to us that English law should protect those whose relationships are not simply matters of financial convenience. Most countries do this by excluding from their cohabiting rules people who could not marry or form Civil Partnerships (e.g.

elderly siblings who live together for companionship and convenience). We agree, but there may be many who might not.

10. Many common law jurisdictions have definitions of cohabitation which are very similar to each other, and to the laws that the UK as a whole uses for Social Security purposes. We have looked in particular at the relevant laws in Scotland, Ireland, Australia and New Zealand. We are fortunate enough to be able to pick and choose from phrasing and ideas which have proven successful in legal systems and societies similar to ours.

WHAT LEGISLATIVE CHANGES, IF ANY, ARE NEEDED TO BETTER PROTECT THE RIGHTS OF COHABITING PARTNERS IN THE EVENT OF DEATH?

Current position

11. A cohabitant may benefit on the death of their cohabitee by becoming automatically entitled to the deceased cohabitant's share of a property owned by the couple pursuant to a joint tenancy, but subject to any inheritance tax liability. However, under current law: -
    a. a surviving cohabitant may not be provided for, or may be insufficiently provided for, by the will of a deceased cohabitant partner; and
    b. further, unlike a surviving spouse or civil partner, a surviving cohabitant has no entitlement on intestacy.

12. In either of these two scenarios, the surviving cohabitant would need to resort to potentially costly litigation under the Inheritance (Provision for Family and Dependents) Act 1973 ("the Inheritance Act") in order to make a claim for financial provision, and any such claim would be limited to their maintenance.

Suggested change

13. The Law Commission has considered this and has made a number of recommendations for reform,[1] which we support. In summary, surviving cohabitants should have the same automatic entitlement as a surviving spouse or civil partner who dies intestate, subject to the provisos that: -

a) the deceased partner was not still married / civil partnered; and either
b) the couple had lived together for 5 years up to the death; or
c) the couple had lived together for 2 years and had had a child together who was also living with them at the date of death.

14. In addition, surviving cohabitants with children together should be entitled to make a claim for reasonable provision out of their late partner's estate under the Inheritance (Provision for Family and Dependants) Act 1973 ("the Inheritance Act") even if the couple were together for less than 2 years and the claimant cannot show any financial dependency in life.

15. In addition, we recommend:

    a. Claims by cohabitants under the Inheritance Act should no longer be limited to provision for their maintenance.
    b. Consideration should be given to extending the spousal exemption from Inheritance Tax to cohabitants, particularly in respect of the family home.

WHAT EQUALITIES ISSUES ARE RAISED BY THE LACK OF LEGAL PROTECTION FOR THOSE IN COHABITING RELATIONSHIPS?

16. The UK has no obligation, derived from the European Convention of Human Rights, to afford any greater recognition to cohabiting couples. There is no requirement to establish any special regime for any particular category of unmarried relationships. Human rights challenges have succeeded where pensions or allowances have been intended to benefit children, and refusing a widowed

[1] Report Law Com No 331 *Intestacy and Family Provision Claims on Death*

parent's allowance on the basis of marital status was therefore unlawful, or where there was a blanket refusal to pay survivor's benefits to unmarried couples unless the pensioner completed a nomination form. We consider any new regime ought to allow for a cast-iron 'opting out' - if not, there might be a valid human rights challenge.

SHOULD LEGAL CHANGES BE MADE BETTER TO PROVIDE FOR THE CHILDREN OF COHABITING PARTNERS?

Current Law

17. Income provision for the children of separated cohabiting partners is in almost all cases (except e.g. where the child is disabled) determined, as it is with the children of separated married or civil partnered parents, by the Child Maintenance Service scheme.

18. Non-income provision is via s 15 and Schedule 1 Children Act 1989 ("Schedule 1"), and has been largely limited by the courts to (outright) lump sums, and to settlements of property which revert to the paying parent after the end of the child's minority or tertiary education. The legislation has arisen following several attempts by the Law Commission and then Parliament to ensure that children should not be prejudiced just because their parents were unmarried. Despite this, children whose parents' relationship has been subject to divorce or dissolution still benefit further from the slipstream of the more generous outright capital provision available under MCA 1973 or Sch 5 Civil Partnership Act 2004.

19. Schedule 1 litigation (in the family court) often has to run alongside related trusts of land litigation (in the county court), is in any event costly and complicated, and is seldom a viable solution for families of ordinary means, or many families based outside of the South East of the country. Anti-avoidance provisions are inferior to

those available where the parents were married / civil partnered. Further, there are tax complexities in Schedule 1 cases resulting from entry, periodic and exit charges relating to capital settled into trusts. These complicate cases, add costs (the need for specialist tax advice) and disincentivise potential claimants.

Suggested changes to the law

20. The FLBA supports the proposed changes to the law that have been recommended by the Law Commission[2] and which have found their most recent incarnation in the financial settlement orders available as part of the Cohabitation Rights Bill, published on 6 February 2020[3] and propounded in Parliament by Lord Marks of Henley-on-Thames. The FLBA also supports the Law Commission's recommendation[4] that the court be empowered to order periodical payments (alongside, and supplementing, the existing child support legislation in the Child Support Act 1991) solely for the purpose of the meeting of child-care costs for the parties' children. Such orders would be capable of capitalisation.

21. We also support amendments to the Family Procedure Rules 2010 such that there should be no financial penalty in costs to an eligible applicant for their having had to bring legal proceedings for such a financial settlement order.

22. At least for so long as the Cohabitation Rights Bill is not enacted, and in any event in so far as it continues to be necessary to litigate both Schedule 1 and TOLATA 1996 proceedings at the same time, we recommend a rationalisation of case management, to include a single application form addressing both i) an application for financial provision for the benefit of a child and ii) any related claim for a declaration of an existing beneficial interest in property alleged to be already 'co-owned' with the other unmarried parent of a child. This would simplify and render

[2] LC 307, 31 July 2007 –"Cohabitation: the Financial Consequences of Relationship breakdown"
[3] https://bills.parliament.uk/bills/2639
[4] LC 307 § 4.99, 4.104 – 4.105

more accessible the legal remedies available to unmarried former cohabitants. Further, the granting of jurisdiction to the family court to hear TOLATA 1996 claims would lead to costs savings through de-duplication and rationalisation.

‘SHOULD COHABITING PARTNERS HAVE THE SAME RIGHTS AS THOSE WHO ARE MARRIED OR IN A CIVIL PARTNERSHIP?’

23. When a marriage ends there are a broad range of financial orders the court has power to make under ss.23-27 Matrimonial Causes Act 1973 (Sch. 5 Civil Partnerships Act 2004 for civil partnerships). These include the power to order the redistribution of parties’ savings, property and pensions, that their property be sold and the payment of maintenance.

24. The fundamental objective for the court in exercising these powers is to arrive at a distribution between the parties which meets the reasonable needs of both and to place parties as far as possible in a position of equality. When applying for these orders parties have a duty to give full and frank disclosure of their finances. The court then exercises a broad discretion in determining which orders to make, guided by various statutory factors, such as parties’ income, earning potential, ages, duration of the marriage, contributions to the marriage and child welfare.
25. Conversely, cohabitants *prima facie* have no legal rights to lay claim to an ex partner’s savings, income or chattels other than under the law of contract, such as by way of ‘Cohabitation Agreement’ setting out how their assets should be shared if they were to separate. Cohabitants are only able to bring a claim in respect of their ex-partner’s real property under the law of trusts. The law in this area is uncertain and complex and in order to be successful parties will require competent legal advice at an early stage. Importantly, the court only has the power to declare property to be held pursuant to a trust which already exists, it cannot re-apportion shares based on fairness.

26. If property is owned in the sole legal name of one party, the non-owner must either show they were promised a share of the property and that they subsequently relied to their detriment on the same, that they contributed financially to the purchase of the property or that, taken objectively, the parties' shared intention was that they would jointly own the property and the non-owner detrimentally relied on this intent. Proving these matters can give rise to significant evidential difficulties and often cases are one parties' word against the other such that outcomes can be difficult to predict accurately.

27. It is generally thought that there is particular potential for unfairness in practice in cases where property is owned in one partner's sole name but where the parties have lived together for many years and where there are often children of the relationship and each partner has contributed to the relationship, whether financially or otherwise. Additionally, the cost of pursuing a claim in civil court is expensive and the CPR costs rules can have severe consequences for litigants where generally the losing party pays the costs of the successful party.

ARE THERE ANY EXAMPLES OF GOOD PRACTICE IN RELATION TO THE RIGHTS OF COHABITING PARTNERS IN THE UK OR INTERNATIONALLY THAT THE GOVERNMENT SHOULD SEEK TO EMULATE IN ENGLAND AND WALES?

28. In the closest neighbouring jurisdictions to England and Wales, namely the jurisdictions of Scotland and Ireland, there is already a legislative framework which provides for the rights of cohabitants. In Scotland, the definition of a 'cohabiting relationship' is widely drafted and provides the Scottish Court with a wide discretion to decide whether a relationship triggers the jurisdiction to make financial orders, particularly to correct any economic disadvantage or advantage caused by the cohabiting relationship, with the concept of 'fairness' at its heart.

29. In Ireland there is a more prescribed definition, with a defined limitation period (2 years from the end of a relationship) for making a claim and a requirement that a couple must have lived together for 5 years (or 2 years if they had a dependent child). The financial awards that a court can make are discretionary and not dissimilar to the awards that can be made to former spouses following a divorce.

30. We believe that one of the considerations for Parliament will be whether, and to what extent, cohabitation is given a wide, or tightly prescribed, legal definition, the extent of the powers given to the court to make financial awards in those circumstances, and the aims of the court. Will the court be guided by overarching principles of 'fairness', of meeting 'needs' (and if so are these 'hard needs' or 'generously interpreted needs'), or will the court simply compensate for economic disadvantage which results from the cohabitation period.

31. Particular attention must be given to the fact that, unlike marriage, cohabiting parties do not necessarily accept or anticipate the legal framework applying to them when they begin to cohabit (and indeed if there is a minimum period of cohabitation, it will not apply to them for the first part of their cohabiting relationship)

32. In the rest of the world, there is much variance, but broadly speaking the majority of jurisdictions we have looked into fall into one of these categories:

    a. **Where no special provisions apply, save for the normal principles of property law.** England and Wales is currently in this category. In many cases, we feel that this can lead to unfairness and great disadvantage to the economically weaker party;

    b. **Where there is a full or partial community of property regime which applies to cohabiting parties.** This would be difficult to implement in England and Wales because we do not have a community of property regime; married couples enjoy separate property and the court redistributes it on a discretionary basis on divorce. It would be strange if cohabiting

couples were subject to community of property but married couples were not.

c. **Where there is an application of some form of 'partnership', 'unjust enrichment' principle, or some other adaptation of equitable or contractual civil law principles in the context of cohabitation.** It is difficult to see how this jurisdiction could develop a common law remedy, in light of the generally rejected concept of 'common law marriage and the slow pace with which the common law develops legal precedents.

d. **Where there is some form of statutory scheme or judge created law pursuant to which a court may divide or share assets, order lump sums and / or order maintenance to be paid by one former cohabiting partner to the other.** There is much variance between jurisdictions (see for example the differences between the Scottish and Irish law), but the overarching aim of these legislative frameworks is the same: to alleviate injustice or to meet a clear financial need arising from the termination of a cohabiting relationship

e. Where the legal system provides the same or broadly the same rights to some or all cohabiting couples as they do to married couples.

END OF EXECUTIVE SUMMARY

SUBSTANTIVE REPORT

SHOULD THERE BE A LEGAL DEFINITION OF COHABITATION AND WHAT SHOULD IT BE?

General observations

1. The relevant questions, as we see them, are:

    a. Whether there should be a "bespoke" definition of cohabitation, whether we should adopt the definitions that already exist in other areas of law or whether we should adopt those definitions and add on guidance to give signposts which help in the more borderline cases.

    b. How to determine accurately when cohabitation has begun (particularly if there is to be (i) any ability to "opt-out" of any consequences of cohabitation and/or (ii) a minimum length of cohabitation before any financial claims are possible).

    c. How to determine accurately when cohabitation has ended (particularly if there is to be a limitation period on bringing a post-cohabitation financial

claim). We note that the question of limitation periods is not covered by any specific brief in our group.

d. Whether the presence of children is a marker of status as cohabitant?

e. Does there need to be "exclusivity"?

f. Do we need rules on consanguinity / prohibited degrees / friends?

The current definition of cohabitation

2. In *Kimber v Kimber* [2000] 1 FLR 383, HHJ Tyrer noted at 387:

> It is both foolish and impossible to offer any definition that will cover all circumstances. In *Mummery v Mummery* [1942] P 108, a case on desertion, at 109 and 110, Lord Merriman P doubted that it were possible to 'give a completely exhaustive definition of cohabitation'. How much more true is that today when the modern complexities of inter-personal relationships are so diverse. None the less, Lord Merriman P did observe that it must mean 'setting up a matrimonial home together and that involves a bilateral intention on the part of both spouses to do so.

3. However, English law does already have a working definition of cohabitation. The Family Law Act 1996 s 62 says this:

> (1) For the purposes of this Part -
>
> (a) "cohabitants" are two persons who are neither married to each other nor civil partners of each other but are living together as if they were a married couple or civil partners; and
>
> (b) "cohabit" and "former cohabitants" are to be read accordingly, but the latter expression does not include cohabitants who have subsequently married each other or become civil partners of each other.

4. That is very broad, but the phrase "living together as if they were a married couple" ("LTAMC") is central to much of the Social Security legislation.

5. A related question, simply put, is: is there any need now for there to be reference to "living together as civil partners". This was necessary before same sex marriages made it onto the statute book but we do not think it is necessary now. The two analogies now overlap to such a degree that there is no need for repetition. However, it seems to us that this is a political question. Again, we would like to hear any opposing views.

6. There is a helpful document produced by the Benefits Agency directed at their internal "Decision Makers" (a link is included at the end of this note), which begins by saying:

> 11001 The general principle in SS legislation is that couples, be they married or unmarried, should be treated in a similar way.
> …
> 11002 "Couple" means
> 1. Two people who are married to, or civil partners of, each other **and** are members of the same household **or**
> 2. Two people who are not married to, or civil partners of, each other but are LTAMC.

7. The signposts given in that document are rather general. The *Kimber* "signposts", derived from earlier Social Security cases, are still helpful. Other jurisdictions (particularly Ireland, Australia and New Zealand) have very similar signposts.

8. We have set out an annex of comparative drafting which shows this quite neatly. Different countries seem to prioritise different things. By way of example:
    a. Australian law talks of "a relationship as a couple living together on a genuine domestic basis" and specifically mentions sexual relationships. Irish law talks of living together in "an intimate and committed

relationship" spells out that a relationship need not stop being intimate just because it is no longer sexual in nature.

b. New Zealand is unique in talking about "the performance of household duties".

c. *Kimber* talks about the perception of the relationship from the outside. Ireland talks about the degree to which a couple present themselves as a couple. Both Australia and New Zealand talk about "the reputation and public aspects of the relationship".

d. Scotland talks about "living together as if they were husband or wife" or as civil partners. It says nothing about children as an indication of cohabitation.

The start of cohabitation

9. In our experience, there are two particular issues.

10. First, it is increasingly rare for a couple to build a non-cohabiting relationship and then at an agreed-upon single moment definitively consider themselves to have "moved in". Rather, couples tend to "seep in" together. One night a week becomes two nights; a toothbrush in the bathroom becomes a space in a cupboard until moving out requires a removals van rather than the simple removal of a bag of toiletries.

11. We have found this is particularly so for younger couples. One might still be living at home with family or with friends, but where the other has their own separate home. This process of gradually seeping in together can make it difficult to ascertain an exact moment when cohabitation has begun.

12. Second, and related, are couples who increasingly share a daily life together without having given up their previous home. Assuming that any definition of cohabitation may require people actually to have occupied the same dwelling for at

least some period of time, we wonder whether an analogy with the Principal Private Residence rules for Capital Gains Tax might be useful.

13. Against that, are couples who build a valid and powerful emotional connection while not actually living together (discussed below). To that extent, it is necessary to consider how important it is for a couple to occupy the same physical home.

14. It would not make sense to say that cohabitation can only last until they occupy different homes (see the example of the prisoner and the hospital patient below), but we wonder if the same works the other way around – that is, can it be possible to cohabit *before* having actually ever occupied the same home.

15. Whatever the view about "cohabitation" only arising on the start of occupying the same physical space, our clear view is that there should be no formal step (e.g. registration) required before the principle of financial obligation kick in.

16. Some may find that controversial. But the whole problem with the lack of protection for cohabitants is that there have always been steps of some kind available to anyone in any sort of relationship. These might not always have been (or currently be) marriage, but some formal step (an agreement, a trust or anything else) has always been possible. And so introducing a formal requirement (such as the French PACS or even the more limited *declaration de concubinage*) in our view misses the point of the need for reform.

17. Some jurisdictions require cohabitation for a fixed period of time before financial obligations take effect. That is strictly a separate policy question from the definition of cohabitation, but it does lead to the possibility of differing degrees of protection available to (for example) the partner who is thrown out of their home 1 year and 364 days into a relationship as against one who is thrown out 2 years and a day into it.

18. If that is to be the position, the need to clarify exactly when it starts is more pressing.

The end of cohabitation

19. All of the points made above apply in reverse to the end of cohabitation. As people who will have to litigate these questions, we think it important to have signposts not just about when LTAMC starts, but also when it ends.

20. Just as cohabitation does not mean spending every waking moment together, separation need not require a couple to spend every moment apart. In a divorce context (under the 1969 Act), Sachs LJ memorably said in *Santos v Santos* [1972] 2 All ER 246 (a decision still relied upon by the Social Security Decision Makers), at 254:

> How, for instance, does a judge in practice discharge the unenviable task of determining at what time the wife of a man immured long-term in hospital or one serving a 15 year sentence changes from a wife who is standing by her husband (in the sense of genuinely keeping the marriage alive until he recovers or comes out) to one who realises the end has come but visits him merely from a sense of duty arising from the past?

21. And then, at 255-256 (in the context of living together in the same household), Sachs LJ gave some further useful concluding guidance which we think fully applies (*mutatis mutandis*) to the emotional borderlines of a cohabitating relationship:

> It follows that in our judgment there is nothing in the general scheme of the 1969 Act nor in any of its specific provisions which results in the words 'living apart' not having in that Act the standard – one might say settled – meaning which they normally have in statutes relating to matrimonial affairs. Therefore 'living apart'…is a state of affairs to establish which it is in the vast generality of cases arising under those heads necessary to prove something more than that the husband and wife are physically separated. For the purposes of that vast generality, it is sufficient to say that the relevant state of affairs does not exist while both parties recognise the marriage as subsisting. That involves considering

> attitudes of mind; and generally the difficulty of judicially determining that attitude in a particular case may on occasions be great.

22. Cohen J faced a similar task in *MB v EB* [2019] 2 FLR 899. At paragraph 54:

> In some rare cases the definition of when parties separated can be extremely difficult. This is one such case. In most cases It is clear when one, if not both parties, to a marriage emotionally and physically disconnect from it. What is so unusual about this case is that the emotional, and to some extent the physical, connection endured long after 2004, the last time at which I can find that the parties lived together.

23. The key (and this is difficult) is to draft any legislation in such a way that recognises that emotional commitment and physical proximity do not always go hand in hand.

Two subsidiary questions

24. There are two subsidiary questions which we set out for consideration.

25. First of all: should there be a threshold requirement (3 months / six months / a year / two years) before a period of cohabitation begins to generate the rights envisioned by the legislation that is being proposed? Or should rights accrue from the moment that cohabitation is established? Alternatively, should the extent of the rights to which a cohabitant is entitled (or the extent of quantification of those rights) be dependent upon the length of the cohabitation? Putting it another way should the qualifying criteria be more stringent if the benefits to accrue are greater? We recognise that these questions take us into areas of policy but they must nonetheless inform the drafting that we do.

26. Secondly, should there be a limitation period after cohabitation ends, whether by death or separation, after which any potential claims become statute barred? It can readily be seen that there are already in existence clearly defined time limits for bringing claims against the deceased's estate and we suspect that any legislation we

propose should have in mind those existing time limits. Limitation periods in relation to existing trust claims are far less well defined or understood. The question of limitation periods is not contained within any of our specific briefs but it does need to be considered when it comes to the drafting. These are matters of policy to some extent but the question brings us back to a consideration of the start and the end of cohabitation. We are of the view that any legislative changes should leave potential claimants and defendants knowing more clearly (rather than less clearly) where they stand. We would welcome any views that the group have on the question of limitation periods.

The role of children in the question of status as cohabitant

27. Australia and New Zealand require their courts to look at "the care and support of children" when determining whether there is a de facto relationship. Ireland asks its courts to look at whether there are dependent children and whether one of the adults supports a child of the other. Scotland says nothing about children as a signpost for cohabitation by adults.

28. As an indication of whether there is a single bonded unit occupying a particular physical space, the presence of a child for whom both adults care is obviously highly significant.

29. However, there are real problems in elevating the presence of children in a household to a higher condition which, by itself, would be sufficient to unlock the court's powers to make orders <u>for the benefit of the adults</u>.

30. Unlike the Children Act 1989 Sch 1, where the basic criteria for liability is biological parentage or adoption, where a couple have a very fluid relationship which is at the borderline of what might be considered cohabiting / LTAMC, it might be thought irrational to suggest that the presence of a child in that mix by itself radically alters the obligations as between the adults.

31. Therefore, our view is that the presence of children should be an indication of LTAMC, but should not be allowed to become a determining condition.

Exclusivity

32. The Australian Family Law Act 1975 s 4AA(5) says this:

> (5) For the purposes of this Act:
> …
> (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

33. We entirely agree that it should be possible to have the status of cohabitant even if one party is married to someone else. This frequently happens at the end of relationships when there is a blurring of lines between relationships. It also happens where someone has been separated for many years but not formalised the separation into a divorce. In those circumstances, we think that the rights and duties of cohabitation should arise.

34. The issue of multiple parallel cohabiting relationships is more complicated. If we are to retain the concept of "LTAMC" as set out above, it is difficult to see how this would operate in practice.

35. That said, if a person is moving from relationship X to relationship Y, might there be sufficient grey in that Venn diagram to enable a person to have two sets of rights (or obligations, or even rights against one person but obligations to another) for a period of time? We also bore in mind the fact someone may be a serial cohabitant. Does the fact of a subsequent cohabitation wipe out any accrued rights that the previous cohabitation would otherwise create? Does the accumulation of time in a relationship create quantifiable benefits that outlast the ending of the relationship and the commencement of another relationship? If quantification of rights is based

upon need (e.g. to be housed) does the fact of a new relationship act to nullify that need and any resultant claim? These are not easy questions.

Consanguinity / prohibited degrees / friends

36. Australia sets out a list of people who are "related by family" and so outside the scheme of LTAMC. Ireland specifically excludes people who are within the prohibited degrees of relationship and also speaks of "intimate and committed relationships". Australia speaks of people "having relationship as a couple living together on a genuine domestic basis".

37. This raises the question of relations and friends. Should someone who has lived with and made huge sacrifices to care for an elderly relative have rights as a cohabitant? Should friends with a long-lasting but wholly Platonic relationship be able to acquire rights as against each other?

38. This is a simple policy question. In our view, the fundamental criterion underlying all issues of cohabitation is that two people, who have no other obligation or ties to each other, have made the decision to form a home together as a form of personal commitment to each other. There needs to be an emotional element. Without being overly paternalistic, perhaps it could be said that protection should be afforded to people who are making choices from the heart; those who are acting out of more rational self-interest (by buying a home with a friend) should only have the levels of protection that they arrange for themselves.

Next steps

39. We think that the Irish, Australian and New Zealand legislation each ask the right questions and strike the right balance in their own ways. We should propose a set of draft clauses modelled on these but which fit better with the UK Social Security legislation.

40. We think that there should be no requirement for registration or other formal act before the rights and obligations take effect. There are obvious difficulties as to what happens with people who are, or who have previously been, in such relationships who may suddenly find that they have rights or obligations that they were not expecting. Those are wider policy concerns. So is the right to opt out of the effects as an act of joint personal autonomy, but that is not a matter for the definition of cohabitation.

41. Although questions of limitation periods strictly fall outside our brief and do not seem to fall into anyone else's we do think that any legislation will have to consider limitation periods even a decision is made as a matter of policy to reject them. The question is a difficult one but we think that it feeds inevitably into the consultation generally.

42. At this stage, we have not put together a draft, but we hope that this sets out the direction of our thinking. If the committee as a whole agree, we can set out some specimen clauses in due course.

Further reading

For those who wish to see the comparisons we have referred to:

Australia:
https://www.legislation.gov.au/Details/C2017C00385

New Zealand:
https://www.legislation.govt.nz/act/public/1976/0166/latest/DLM440945.html

Ireland:
https://revisedacts.lawreform.ie/eli/2010/act/24/revised/en/html

Scotland:

https://www.legislation.gov.uk/asp/2006/2/contents

The Social Security Decision Makers' document:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/658225/dmgch11.pdf

Appendix – comparative wording of "signposts" across similar jurisdictions

Kimber - "signposts"	Scotland[5] ("cohabitant")	Ireland[6] ("cohabitant")	Australia[7] ("de facto relationship")	New Zealand[8] ("de facto relationship")
Living together in the same household NB: Social Security: "Living together as a married couple".	Either (a) A man and a woman who are (or were) living together as if they were husband and wife; or (b) two persons of the same sex who are (or where) living together as if they were civil partners.	Live together in an intimate and committed relationship	Having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.	(Not defined)
The sharing of daily life.	The nature of their relationship during that period.	The basis on which the couple live together.	The degree of mutual commitment to a shared life.	The degree of mutual commitment to a shared life. The performance of household duties.
Stability and a degree of permanence in the	The length of the period during which A and B have been living together (or lived	The duration of the relationship	The duration of the relationship.	The duration of the relationship.

[5] Family Law (Scotland) Act 1985 s 25
[6] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 s 172.
[7] Family Law Act 1975 s 4AA.
[8] Property (Relationships) Act 1976 s 2D.

relationship	together).			
Finances	The nature and extent of any financial arrangements subsisting, or which subsisted, during that period.	The degree of financial dependence of either adult on the other and any agreements in respect of their finances The degree and nature of any financial arrangements between the adults including any joint purchase of an estate in land or joint acquisition of personal property.	The nature and extent of their common residence. The degree of financial dependence or interdependence. The ownership and acquisition of their property.	The nature and extent of common residence. The degree of financial dependence or interdependence, and any arrangements for financial support between the parties. The ownership, use and acquisition of property.
A sexual relationship	(Not included in the Act)	(Not included, but): For the avoidance of doubt a relationship does not cease to be an intimate relationship for the purpose of this section merely because it is not longer sexual in nature.)	Whether a sexual relationship exists.	Whether or not a sexual relationship exists.
Children	(Not included in the Act)	Whether there are one or more dependent children Whether one of the adults cares for and supports the children of the other.	The care and support of children.	The care and support of children.
Intention and motivation	(Not included in the Act)	The basis on which the couple live together		
The opinion of the reasonable person with normal perceptions.	(Not included in the Act)	The degree to which the adults present themselves to others as a couple.	The reputation and public aspects of the relationship.	The reputation and public aspects of the relationship.

WHAT LEGISLATIVE CHANGES, IF ANY, ARE NEEDED TO BETTER PROTECT THE RIGHTS OF COHABITING PARTNERS IN THE EVENT OF DEATH?

43. The Law Commission made a number of recommendations for reform in its report of 14.12.11 on Intestacy and Family Provision Claims on Death,[9] which we support:

a. Surviving cohabitants should have the same automatic entitlement as a surviving spouse of civil partner would have to inherit from a partner who dies intestate. This is subject to the provisos that the deceased partner was not still married / civil partnered; and either the couple had lived together for 5 years up to the death; or the couple had lived together for 2 years and have had a child together who was also living with them at the date of death.

b. In addition, cohabitants with children together should be entitled to make a claim for reasonable provision out of their late partner's estate under the Inheritance (Provision for Family and Dependents) Act 1973 ("the Inheritance Act") even if the couple were together for less than 2 years and the claimant cannot show any financial dependency in life.

44. In addition, we make the following further recommendations:

a. Claims by cohabitants under the Inheritance Act should no longer be limited to provision for their maintenance.
b. Consideration should be given to extending the spousal exemption from Inheritance Tax to cohabitants, particularly in respect of the family home.

Current provision on death

45. Provision for surviving spouses and partners currently comes in a number of forms: Within the deceased's estate (and subject to Inheritance Tax – "IHT"):

a. If the family home is held in joint names, the whole property will pass to the survivor outside the will. However, the deceased's interest in the home will

[9] Report Law Com No 331 *Intestacy and Family Provision Claims on Death*

be treated as part of the estate for the purposes of IHT and applications under the Inheritance Act;

b. By Will;

c. If the deceased died intestate, the surviving partner will be entitled to inherit automatically under the Intestacy Rules, but only if the couple were validly married or civil partners at the time of death;

d. The court has power to reallocate the estate (and the deceased's share in any jointly owned property which would otherwise pass to the survivor) in favour of a partner under the Inheritance Act if reasonable provision has not been made for them. There are also a number of other categories of applicant in whose favour such awards may be made, which may result in a reduction in the share which the partner is otherwise entitled to.

46. Outside the deceased's estate (and normally not subject to IHT):

a. The partners may have created an express trust or cohabitation agreement which sets out their shares in their assets (or specific assets such as the family home) and this may make provision for what should happen upon the death of one of them, although this would usually be limited to interim arrangements, such as occupation of the family home whilst the deceased partner's estate is being administered.

b. The surviving partner may have accrued a beneficial interest in specific assets under a constructive or resulting trust or by way of proprietory estoppel.

c. The deceased may have nominated their partner to receive benefits under a pension or death in service benefits (where the scheme allows a cohabitant to benefit)[10] or under a life policy.

[10] There have been significant changes in occupational pensions in recent years to extend survivor benefits to cohabitants, although spouses and civil partners often continue to have greater rights, particularly in respect of the length of service which is taken into account in calculating survivor benefits. An examination of the differences in treatment is beyond the scope of this submission.

d. Spouses and civil partners may also have rights to increased state pension which are not available to cohabitants.

47. These submissions will be restricted to claims on intestacy and claims under the Inheritance Act.

Prevalence of cohabitations ending in the death of a partner

48. The number of cohabiting couples in England & Wales has increased fairly steadily from about 2m in 2002 to 3m in 2019. The increase in cohabitation is particularly pronounced among older people: the number of 50-59 year-olds in a cohabiting relationship increased by a factor of 2.85x; for people in their sixties, 4.75x, albeit from a low base.[11] The generation which first made cohabitation normal is coming towards retirement. The number of cohabiting relationships where a partner dies is therefore likely substantially to increase.

Intestacy

49. It has been estimated that over 60% of adults in GB do not have a will, although this figure falls to about 22% of retired people.[12] The Law Commission in its report estimated that c. 4,000 cohabitants die intestate each year. This number is likely to have increased substantially since then, in accordance with the increase in the number of older couples cohabiting.

50. A surviving spouse is currently entitled to an automatic share of the estate under the Intestacy Rules. The share depends on whether the deceased had surviving children (which does not include foster or step-children). If they did not, the spouse is entitled to the whole estate upon intestacy[13]. If they did, the spouse is entitled to the

[11] ONS dataset Population estimates by marital status and living arrangements, England and Wales - Office for National Statistics (ons.gov.uk) Table 2: Living Arrangements by age group and sex, England and Wales, 2002 to 2019
[12] Will Writer Research (kctrust.co.uk)
[13] Administration of Estates Act 1925 s 46(1)(i)(1)

first £270,000[14] plus all the chattels[15] and half the rest of the estate by value[16]. The children are entitled to the remainder[17]. There are also ancillary provisions to facilitate them retaining the family home under the Intestate Estates Act 1952.

51. A surviving cohabitant currently has no entitlement upon intestacy. The Law Commission examined the position of cohabitants in its 2011 report[18] and made recommendations for reform, which have not yet been acted upon. It recommended[19] that a surviving cohabitant should have the same rights as a surviving spouse if:

    a. the deceased was not married or in a civil partnership at the time of death;
    b. the couple were living together as spouses (or civil partners) in the same household at the date of death;
    c. the cohabitation had lasted continuously for 5 years up to the date of death;
    d. or it had lasted for 2 years up to the date of death and the parties had a child together who was born before the death and living in the same household at the date of death.

52. The FLBA supports those recommendations.

53. It may be objected that cohabitation does not in itself demonstrate sufficient commitment within the relationship to merit automatic provision under the Intestacy Rules. In most cases, it would have been open to the parties to marry or for the deceased to make a will. The deceased may have failed to make a will because it would mean choosing between the competing claims of a partner and, say, the children of a previous relationship; the deceased may have refused to marry for fear of financial obligations. However, many couples simply assume

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[14] Administration of Estates Act 1925 s 46(2)(B) and Administration of Estates Act 1925 (Fixed Net Sum) Order 2020/33, s 2
[15] Administration of Estates Act 1925 s 46(2)(A)
[16] Administration of Estates Act 1925 s 46(2)(C)(a)
[17] Administration of Estates Act 1925 s 46(2)(C)(b)
[18] Intestacy and Family Provision Claims on Death (Law Com No 331)
[19] Law Com No. 331/8.166

they acquire rights by cohabitation and that the law will impose a fair outcome without the need for marriage or a will. Cohabitants claiming under the Inheritance Act will typically, in our experience, have shown complete commitment to the relationship, often giving up work or other opportunities to live with the deceased, have children with them or care for them through illness. They will often say the deceased promised to make sure they were provided for when they died.[20] The survivor will often say the deceased promised to make a will, but that when the deceased's final illness did strike, it was the last thing anyone thought of.

54. We consider that the Law Commission's proposals to limit claims to cases where the relationship has endured and/or produced children are sensible and fair. The qualifications proposed are likely to reflect a sufficient degree of commitment and interdependency within the relationship to merit automatic provision at a level equivalent to marriage.

55. The current definition of cohabitation works well in practice, so it should be reasonably straightforward to establish entitlement. It is very rare for two people to dispute whether they are cohabiting. It is less rare for their relatives to do so, particularly where the wider family would not approve of the relationship and it may have been kept secret from them.[21] However, there should be extensive corroborative evidence of the nature of the relationship unless it was transitory, and we are not aware of any cases where such evidence has not been accepted once produced. There is well-established case-law to deal with difficult cases of temporary involuntary separation, where the cohabitation may be treated as continuing.[22]

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[20] Provided such a promise relates to a specific interest in a specific asset and is expressed to be irrevocable (which is rare), it may be enforced by way of the law of proprietory estoppel, but such claims are particularly difficult, uncertain and expensive.

[21] Eg same-sex couples

[22] *Re Watson (Deceased)* [1999] 1 FLR 878 at 882 – 3: the deceased had been in hospital for 3 weeks by the time of death, *Gully v Dix* - [2004] EWCA Civ 139 where the surviving cohabitee left shortly before the death because of domestic violence perpetrated by the deceased (who was very unwell)

56. These changes would reduce the need for a surviving cohabitant to make an application to the court under the Inheritance Act and/or to establish an interest in the home in trust law. They are therefore likely to result in reduced legal costs, uncertainty and delay and in reduced use of court time and resources.

57. They will not affect the rights of a spouse or civil partner of the deceased. They will affect the rights of the deceased's children and more remote relatives (including elderly parents), but no more so than if the couple had been married. Where the couple have a minor child together, it is generally better that the surviving parent inherits in their own right, as any inheritance for the child will have to be held in trust, which may be costly and onerous to administer, and this may undermine the family's financial welfare. Where the deceased has other children, more of the deceased's estate will benefit those living with and directly dependent on the deceased.

58. In those cases where the operation of the Intestacy Rules creates unfairness, this can be remedied by an application under the Inheritance Act. But we consider these instances are likely to be far fewer than under the current Rules.

Inheritance Act

59. Where certain categories of person have not received reasonable provision out of the deceased's estate (whether by will or intestacy), they may apply to the court for further provision. The categories are:

- Spouses and civil partners (including where the union is void)

- Ex-spouses and ex-civil partners. In practice such claims are limited to those who have not yet obtained financial relief on divorce and those who remain dependent after divorce, eg because they are receiving maintenance.
- Children (including adult children and step-children treated as children of the family)
- Cohabitants living in the same household as the deceased up to the date of death
- Dependants of the deceased (which may include cohabitants who do not meet the 2-year test).

60. Spouses and civil partners are treated more favourably under the Act than cohabitants in a number of respects:

a. All claimants apart from spouses are limited to reasonable provision for their maintenance. In the past, this has been generously applied in relation to housing for cohabitants to allow them to own a property outright. However, In *Ilott vThe Blue Cross and Others,*[23] the Supreme Court held that such provision should normally be limited to a life interest. This is often unsuitable both for the cohabitant and for the other beneficiaries. The cohabitant remains beholden to the trustees of the estate for their housing. The other beneficiaries have to wait for their reversion (perhaps beyond their own lifetimes) and IHT may accrue a second time upon the same fund upon death of the cohabitant. For these reasons, it is common for the parties to settle such claims by way of outright provision for the cohabitant's housing, though often in much cheaper accommodation than their previous home. The decision in *Ilott* will not prevent such settlements, but will likely weaken the bargaining position of cohabitants and hence reduce the provision they receive still further.

b. Provision for spouses and civil partners is normally required to be comparable to what they would receive on divorce. As a result, the claims

[23] [2017] UKSC 17 at § 15 and 44

of other beneficiaries and claimants rarely affect the level of provision, unless the marriage was very short. The claims of cohabitants, however, must always be balanced against the beneficiaries and other claimants. There may not be enough to go round, especially after IHT. As a result, provision for cohabitants is commonly significantly below what they reasonably need, whether for housing or for income.

c. Cohabitants who do not meet the 2-year requirement can currently only claim as dependents. Provision may be limited by the extent and duration of dependency in life,[24] even if the couple's life choices during the relationship may have created a long-term dependency.

d. IHT (see below). The exemption for spouses tends to encourage settlement of their claims, as any award to a spouse will reduce the IHT payable by the estate. The exemption does not apply to cohabitants. This encourages cohabitants to bring claims in constructive trust alongside Inheritance Act claims, as the former, if successful, will reduce the amount of IHT due. However, it increases the complexity and cost of litigation.

61. The combined effect of these differences means that in practice it is unusual for cohabitants who have to resort to the Inheritance Act to retain their family home unless they already had a significant proprietary interest in it in their own right. If the law is changed to allow cohabitants to make financial claims on separation, consequential changes will need to be made to the Inheritance Act to allow provision to extend beyond maintenance and to reflect what would have been awarded upon separation. Alternatively, financial claims on separation should also apply upon death (which is not the case with financial applications on divorce).[25]

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[24] Inheritance Act, s.3(4)

[25] This is addressed in S 21 and Schedule 2 Part 3 (in particular paragraph 4(d) of Schedule 2) of the Cohabitation Rights Bill 2020 - https://bills.parliament.uk/bills/2639

62. Even if the law is not changed to allow cohabitants to make financial claims on separation, we consider it would be sensible and fair to end the limitation that cohabitants can only be awarded what is reasonably required for their maintenance. If this restriction is removed, awards for cohabitants could in appropriate cases be closer to those for spouses. It would allow, for example, the surviving cohabitant to receive a share of assets accruing during the relationship, even where that was not required to meet their needs. We consider that, just as with marriage, such assets should usually be considered the fruits of the partnership and fairly shared. It would also encourage outright provision for housing, particularly for younger cohabitants left with young children.

63. This reform would put cohabitants whose partner had died in a substantially better position than those whose relationship had broken down, but that is already the case under the Inheritance Act and would reflect a public consensus that a person whose partner has died has a greater financial claim on them than one whose relationship has broken down.

64. The Law Commission Report recommended that cohabitants should qualify if they have children together or if either the survivor or the deceased was pregnant at the date of death[26] even if they have not been together for 2 years. We support this proposal. The surviving parent may not qualify as a dependent, e.g. because they were the sole earner, but the death may have significantly impacted their ability to earn.

65. The proposal would not give a separated parent (or one who has never cohabited with the deceased) a claim. However, they would still be able to make a claim for the benefit of their child, just as they can under Schedule 1 to the Children Act 1989 whilst the other parent is still living.

IHT

[26] S 2(2)(c) and Sch 2 § 4 (b) (1A) Cohabitation Rights Bill 2020

66. Gifts to spouses and civil partners are exempt from IHT. However, the estate pays 40% of the value of the estate over £325,000. This exemption increases by a further £175,000 to £500,000 if the deceased's home is left to a child (including an adult child) or a grandchild (but not to a cohabitant). The taxable estate includes any interest under a joint tenancy (e.g. a jointly owned family home, which might commonly pass to a cohabitant by survivorship) which otherwise passes outside the estate. It also includes most lifetime gifts made less than 7 years before the death (subject to an exemption for gifts of up to £3,000 pa).[27] This will include gifts to a cohabitant (but not to a spouse)

67. Many family homes will be worth significantly more than £325,000 net, particularly those of elderly couples who may have paid off any mortgage. If the house is in the sole name of the deceased, the house may well have to be sold in order to pay the IHT even if it was left to the survivor by will or if sufficient provision might otherwise be made under the Inheritance Act. This would not happen to a surviving spouse, who would be able to retain the family home free of IHT. In most cases, of course, IHT will still be payable upon the death of the survivor, so the exemption for spouses tends to act as a deferral of the tax.

68. Cohabitants are therefore treated less favorably with respect to IHT, and also to some degree less favourably than children and grandchildren. Consideration should be given to providing an exemption from IHT for cohabitants, particularly in respect of the family home, perhaps limited to those cohabitants who would qualify under the Intestacy Rules under the Law Commission's proposals.[28]

WHAT EQUALITIES ISSUES ARE RAISED BY THE LACK OF LEGAL PROTECTION FOR THOSE IN COHABITING RELATIONSHIPS?

[27] Tapering for gifts made more than 3 years before the death makes no difference to the overall tax charged unless the value of the lifetime gifts exceeds £325,000. It only benefits richer estates.

[28] See s 19 – 20 and Sch 2(2) Cohabitation Rights Bill 2020

69. The law of England and Wales has responded in a piecemeal fashion to the emergence of greater numbers of cohabiting couples. In the context of domestic violence, there is little or no difference to the legal protection afforded to cohabiting couples as opposed to married couples. The areas where equalities or Human Rights Act challenges have been raised are:

a. lack of recognition to cohabiting couples generally;
b. lack of recognition in the context of pension rights.

Human Rights Act and cohabiting couples

70. Under the case law of the European Court of Human Rights, being in an unmarried relationship can amount to a relevant 'other status' for the purposes of Article 14, which prohibits discrimination in the enjoyment of the rights and freedoms contained in the Convention on the grounds of sex, race and a number of other grounds, including 'birth or other status'. However, Article 8, the right to respect for private and family life, does not require the State to recognise particular forms of relationship. In *Yigit v Turkey* (2011) 53 EHRR 25, a woman was not entitled to Turkish law to a widow's pension where they had no recognised civil ceremony but they had only undergone a religious ceremony of marriage. The court held that Article 8 did not require a State to recognise religious marriages as valid civil marriages. Nor does Article 8 require the State to establish a special regime for a particular category of unmarried relationships. The court also found no breach of A1P1 in conjunction with Article 14 – the state was entitled to set up a system of widow's pensions which distinguished between those who had a legally recognised marriage and those that did not. In *Shackell v UK*, the European Court held that the UK was justified in not providing widow's benefits to an unmarried partner.

Cohabitants and pension rights

71. More recently, in the UK, the Supreme Court held that the system of widowed parent's allowance under the law of Northern Ireland was incompatible with Article 14, read in conjunction with Article 8, in so far as it precluded any entitlement to a widowed parent's allowance by a surviving unmarried partner of a deceased parent. This was the decision in *Re McLaughlin* [2018] UKSC 48 [2018] 1 WLR 4250. The rationale for this decision was that the allowance was intended to benefit children, and entitlement depended primarily on the existence of children in the family of the claimant and the deceased. The court held that it was not a proportionate means of achieving the legitimate aim of providing a privileged status to marriage to deny the surviving partner and her children the benefit of the deceased's national insurance contributions because the partners had not been married to one another.

72. In addition, in the *Brewster* case [2017] UKSC 8 [2017] 1 WLR 519, the Northern Ireland local government pension scheme managers denied Ms Brewster a survivor's pension after the death of her unmarried partner. He had not completed the nomination form for Ms Brewster to receive the survivor's benefits, and the scheme managers viewed this as an absolute requirement in the case of unmarried partners. The court held that this requirement operated in a cumbersome and disproportionate manner, and the difference in treatment between unmarried couples, and married couples (where the surviving spouse received a survivor's pension whether or not any form had been completed) was not justified.

73. The courts have therefore made decisions in specific areas where the difference in treatment has been held not to be justified, without overturning the general principle that the State is free to distinguish between married and unmarried couples, provided there is a rational and proportionate justification for the difference in treatment.

Human Rights issues arising from proposed legislation for property adjustment on separation of unmarried couples

74. The legislative proposals so far published have all allowed only for a limited opt-out provision. So a cohabiting couple would be able to sign a 'pre-cohabitation agreement', but the court would be entitled to disregard its terms if there might be substantial unfairness, or words to that effect. The absence of a cast-iron opt out is bad social policy, and may also lead to a challenge under Article 1 of Protocol 1.

75. Pre-nuptial agreements are not binding on divorce or dissolution of civil partnership. The law states that they can be given effect unless giving effect to them would be unfair. The most likely source of unfairness is that one party will be left with unmet needs. The law requires spouses to maintain one another, and the law does not permit a spouse to contract out of this obligation. In contrast, the law imposes no such obligation on cohabiting couples. These individuals, who may have consciously rejected marriage or civil partnership and the legal consequences of such relationships, should be free to regulate their own affairs. They should be permitted a cast-iron opt out of any new legislative scheme. If the law does not permit such an opt-out, the imposition of legal obligations on those who have not consented to them, simply because they have lived together, might amount to a breach of A1P1 read in conjunction with Article 14.

SHOULD LEGAL CHANGES BE MADE BETTER TO PROVIDE FOR THE CHILDREN OF COHABITING PARTNERS?

76. As the law currently stands, S15 and Schedule 1 to the Children Act 1989 empower the Family Court to make financial provision for the children of unmarried parents who have separated.

77. If the child is under the age of 18, then either of the child's separated parents may make an application to the courts for a remedy (Sch 1, para 1(1)).

78. If the child is over the age of 18, then only the adult child is able to make an application (Sch 1, para 2), and that is on condition that: -

a. the adult child's parents are not living together (Sch 1 para 2(4)); and
b. there was in force no periodical payments order immediately before the adult child's 16th birthday (Sch 1, para 2(3), (6)); and
c. the adult child is, or will be, undergoing education or training, or there are special circumstances (Sch 1, para 2(1)(a), (b)). An example of special circumstances is disability.

79. The remedies available are orders for: -

a. periodical payments (Sch 1(1)(2)(a)) (subject to the provisions of the Child Support Act 1991 which in most scenarios remove the court's jurisdiction to make any such order – see below);
b. secured periodical payments (Sch 1(1)(2)(b)) (with a similar caveat to 4.1 above);
c. lump sum payments (Sch 1(1)(2)(e));
d. settlements of property (Sch 1(1)(2)(d));
e. transfers of property (Sch 1(1)(2)(e));

80. Sch 1 provides that periodical payments, secured periodical payments and lump sum payments may be made either to the applicant parent "for the benefit of the child", or directly to the child.

81. A settlement of property would be an arrangement in which property – such as a home in which to live – would be held on trust for the benefit of the child.

82. A transfer of property may be either to the applicant parent for the benefit of the child, or, pursuant to Sch 1(1)(2)(e)(ii), directly to the child. This is a provision which might be viewed as unusual. It is not possible for a person under the age of 18 to own real property (see S 1(6) Law of Property Act 1925) and therefore any property so transferred would in any event need to be held on trust until the child attained the age of 18.

83. However, the courts have consistently interpreted Sch 1 so as not to permit outright transfers of property to a parent, or to the child. See below for further discussion as to why.

84. The courts have held[29] (almost unanimously – but see the recent decision of Williams J in *DN v UD* [2020] EWHC 627 (Fam) discussed below) that a settlement of property, or transfer of property for the benefit of the child is to benefit the child during the child's dependency, and will be expressed as terminating upon the child's 18th birthday, unless:-

a. the child is to undergo tertiary education (to first degree level, to include a gap year); or
b. there are special or exceptional circumstances (such as disability)[30] . Such circumstances could not be said to extend to the generality of increasing numbers of adult children continuing to live at home with their parents without paying rent beyond the age of 18[31].

85. Ownership of property settled or transferred for the benefit of the child thereafter reverts to the paying party.

86. In considering whether or not to make an order under Sch 1 (which is a discretionary remedy), the court is, in summary, required to consider the matters set out in Sch 1 (4) which are: -

a. "all the circumstances" including
b. income, earning capacity, property, other financial resources, financial needs, obligations and responsibilities which each parent has or is likely to have in the foreseeable future, together with

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[29] See Munby J in *Re N (Payments for Benefit of Child)* [2009] EWHC 11 (Fam), [2009] 1 FLR 1442 at 78 – 81, concurring with Ward J in A v A (A Minor: Financial Provision) [1994] 1 FLR 657 at 663 and Johnson J in *Phillips v Peace* [1996] 2 FLR 230 at 238

[30] See e.g. *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865 at 37 and *J v C (Child: Financial Provision)* [1999] 1 FLR 152 at 155.

[31] See *Re N (Payments for Benefit of Child)* [2009] EWHC 11 (Fam), [2009] 1 FLR 1442 at 79

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

87. The child's welfare is not the "paramount" consideration[32], but has been referred to in the High Court as "one of the relevant circumstances"[33] and by the Court of Appeal, in the leading Schedule 1 case, [34] as "not just 'one of the relevant circumstances' but, in the generality of cases, a constant influence on the discretionary outcome".

88. The recent decision of Williams J in *DN v UD* (Sch 1 Children Act: Capital Provision) [35] is more strident than many of the earlier decisions, not least because (albeit in a "big money" case) the court adopted a broad definition of the "exceptional" or "special circumstances" required to lead it to make outright capital provision. In that case, the children were found to carry a vulnerability with them from their childhood, and a need for therapeutic support arising from abuse from the parent who was to be the paying parent. The court decided that the children needed a degree of financial independence, giving them the means to refuse any future financial control exerted by the paying parent, and that this qualified as an exceptional circumstance. Accordingly outright provision was made for each child of a sum of money, to be realised from eventual sale of a property which the court had settled upon trust as a home for the children and the other parent.

89. It is worth pausing there and examining the genesis of Sch 1 and the public policy underlying it.

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[32] See s 1(1)(a) and s 105(1) CA 1989 – maintenance is specifically excluded from "paramountcy" considerations
[33] Per Hale J (as she then was) in *J v C (Child: Financial Provision)* [1999] 1 FLR 152 at 156
[34] *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865 at 44
[35] [2021] 1 FLR 497

Legislative history of Schedule 1

90. As s 15 CA 1989 states, Schedule 1 "consists primarily of the re-enactment, with consequential amendments and minor modifications, of provisions of section 6 of the Family Law Reform Act 1969, the Guardianship of Minors Acts 1971 and 1973, the Children Act 1975 and of sections 15 and 16 of the Family Law Reform Act 1987".

Law Commission's comparison of provision for children of unmarried parents as compared to children of married parents

91. In its 118th report in 1982, the Law Commission[36] ("the LC") drew comparisons between the financial provision available for children of unmarried parents and those of married parents in the chapter entitled "Part VI - Financial Provision", and observed that "at present none of the provisions under which the parents of legitimate children may be ordered to contribute financially to their upkeep apply to the maintenance of illegitimate children by their fathers" (§ 6.1).

92. Jurisdiction for provision for children of married parents was then to be found in the Matrimonial Causes Act 1973, which applied (and still applies) exclusively to the "children of the family" of a married couple (although it is now, along with Sch 1 CA 1989, subject to the significant changes to the law brought about by the (later) Child Support Act 1991).

93. The LC observed that: -

a. It was "striking" that there was a "comparatively small and apparently decreasing number of applications being made" for financial provision[37];
b. financial proceedings (known as "affiliation proceedings") were heard in the lowest court in the judicial hierarchy, the magistrates' court, as compared to financial proceedings for legitimate children, where jurisdiction was also vested in the High Court and the county court[38];

[36] Law Commission Family Law, Illegitimacy (Law Com. No. 118), 20 December 1982
[37] Ibid., para 6.1 and FN 73 to para 3.24
[38] Ibid., 3.23

c. such "affiliation proceedings" were seen as "tainted with an aura of criminality because they, and most appeals, [were] heard in the courts most commonly associated in the public mind with the criminal law. Additionally the police play[ed] a significant role in serving the papers and in keeping the statistics."[39] Consequently, many parents found the proceedings "humiliating and distressing"[40].

94. The class of people who were entitled to make an application was restricted in that:

a. the applicant was required to be the child's mother (or custodian);
b. the child's mother must be single;
c. the application must be brought within 3 years of the child's birth, subject to certain exceptions; and
d. the evidence of the mother must be corroborated[41].

95. Further, the court's powers as to the provision available were limited: "an illegitimate child, unlike a legitimate child, can never benefit from any order for secured provision or property adjustment, or from a lump sum order exceeding £500"[42].

96. The LC observed that affiliation proceedings "*[were] not a particularly effective way of obtaining financial provision for the illegitimate… and comparatively few applications for orders seem[ed] to be made*" (although it also noted problems with the available statistics[43]). The LC suggested that: -

a. some mothers were already receiving adequate support from the child's father;
b. other mothers were being supported by a new partner;
c. various mothers "cannot and will not complain to the court"; and

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[39] Ibid., 3.23, FN
[40] Ibid., para 6.1
[41] Ibid., 3.23, FN 66 - 69
[42] Domestic Proceedings and Magistrates' Courts Act 1978, s. 50(5)
[43] Ibid., 3.24, FN 73

d. from a practical point of view "*in practice orders rarely exceed the level of the mother's supplementary benefit entitlement in respect of herself and her child. The result [was] that because in many cases the mother [was] receiving supplementary benefit any sum … awarded by the court [would] often merely go towards reducing the amount of that benefit*."

e. LC concluded that "*for many mothers, therefore, the prospect of being involved in perhaps unpleasant proceedings outweighs any advantage which may be derived from obtaining an affiliation order*"[44].

97. The LC saw "*no justification for retaining this distinctive procedure… [and] propose[d] that it be abolished and that orders for financial provision for a child should be obtainable (whatever the marital status of the parents) in proceedings under the Guardianship of Minors Act 1971. So far as the law is concerned, all children will have equal rights to financial provision from both their parents*". It commented that "*the law can and, in our view should…remove the wholly distinct procedure relating to illegitimate children, tainted as it is by its historical association with the Poor Law and its overtones of criminality*"[45].

98. The LC observed

> "[it] seems to us, however, that if unmarried parents separate it is only right that the court should be able to make any appropriate order in favour of a child of theirs, just as it could make an order if the child's parents were in the process of divorce or judicial separation. The parents' relationship may well have lasted as long as many marriages which end in divorce, and the child's financial position may equally need to be secured. Moreover, it could well be particularly desirable to give the court power to make what would often be intended to be a once-and-for-all settlement in those cases where the father intends to have no further relationship with the child. Just as courts lean against making substantial capital orders in favour of the children of a marriage, (FN 15) so we would not expect these additional powers to be frequently exercised; but they could be useful in some circumstances."[46]

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[44] Ibid., para 3.24
[45] Ibid., para 6.2
[46] Ibid., para 6.6

How the courts had treated children of married parents

99. The reference at footnote 15 was to the three – matrimonial – cases of *Chamberlain v. Chamberlain* [1973] 1 W.L.R. 1557; *Lilford v. Glynn* [1979] 1 W.L.R. 78; *Draskovic v. Draskovic* (1981) 11 Fam. Law 87 which demonstrated the approach of the courts to the making of financial provision for children and which are considered further below.

100. The LC considered a possible objection to the proposed reform at para 6.7: -

> "6.7 Our tentative proposal in the Working Paper for widening the courts' powers on these lines was widely supported on consultation, and very few commentators thought it to be a valid objection that the suggestion would be tantamount to giving the mother of a child born outside marriage a right to support for her own benefit merely because in practice the property which would be the subject of an order would often be the common home. It was pointed out that it is difficult to draw a rigid line between providing for the child and for his mother, since the needs of the two are interrelated.[47] Even under the old law a mother might for this reason indirectly benefit under an affiliation order;[48] and as Ormrod L. J. has recently pointed out, the fact that the court in exercising its affiliation jurisdiction[49] is now statutorily directed[50] to take account of the needs of the mother must already have affected the old principle that a man is under no obligation to provide for the mother of his illegitimate child.
>
> 6.8 Our proposal that the court should be empowered to make secured periodical payments orders and property adjustment orders under the guardianship legislation must entail the court also having the extended range of powers in cases where the child's parents are married, as well as in cases where they are unmarried. It is sometimes objected that the courts should not be given such wide powers in cases where there is no matrimonial dispute between the parents; but we do not believe this argument to be of much weight. The courts can be trusted not to exercise the powers save in cases where it is clearly appropriate to do so, and we do not think the courts would normally regard it as appropriate to make property adjustment orders save in cases where the relationship between the parents had clearly broken down, and it was for some reason appropriate to do so. (We have already drawn attention[51] to the cautious

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[47] *Northrop v. Northrop* [1968] P. 74, particularly per Diplock L. J. at pp. 117-8.
[48] *Haroutunian v. Jennings* (1977) 1 F.L.R. 62; *Osborn v. Sparks* (1981) 3 F.L.R. 90.
[49] Affiliation Proceedings Act 1957, s. 4(3), as substituted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 50(2)
[50] See also Guardianship of Minors Act 1971, s. 12A (as inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 43) which is expressed in similar terms
[51] A reference to para 6.6 of the LC Report, and to the cases referred to at FN 15 of this document

> approach of the divorce court to the making of property adjustment orders in favour of children.) We therefore propose that the Guardianship of Minors Act should be amended so as to give the High Court and the county court power to make appropriate property adjustment orders in all suitable cases, whether the child was born within marriage or outside marriage."

101. In *Chamberlain v Chamberlain*, [1973] 1 WLR 1557 Scarman LJ had said: -

> "I think the judge erred in settling the house so that the beneficial interest, at the end of the day, became that of the children in equal shares. The order the registrar made provided for the care and upbringing of the children in the house until they should finish full-time education. I think that was an appropriate order. There are no circumstances here to suggest that any of the children had special circumstances which required them to make demands on their parents after the completion of their full-time education. The capital asset (the house) was acquired by the work and by the resources of their parents, and provided that the parents meet their responsibilities to their children, so long as the children are dependent on them, this seems to me an asset which should then revert to the parents."

102. In *Lilford (Lord) v Glynn* [1979] 1 WLR 78, Orr LJ said, at p 85:-

> 'A father – even the richest father – ought not to be regarded as having "financial obligations [or] responsibilities" to provide funds for the purposes of such settlements as are envisaged in this case on children who are under no disability and whose maintenance and education is secure.'

103. Similarly in *Draskovic v Draskovic,* in the High Court (at first instance)[52] Balcombe J considered *Chamberlain v Chamberlain* (supra), reiterating that "in the ordinary case, in the absence of any special circumstances, one does not settle property on the children." The court's order was not overturned on appeal.[53]

104. The position in respect of financial provision for children of a marriage was further emphasised in the later case of *Kiely v Kiely* [1988] 1 FLR 248, CA, where Booth J stated that:

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extracted below

[52] [1980] Lexis Citation 344

[53] *Draskovic v Draskovic* (1981) 11 Fam. Law 87 1980 WL 148812

> ‘ . . the provisions of the 1973 Act make it clear that the statutory scheme is to enable the court to make proper financial provision for children as children or dependants . . .’

105. In the same 1982 report, at para 6.32 the LC considered the position with respect to adult children applying in their own right for financial provision, and recommended a limitation on any such application:

> “We also propose that the powers exercisable by the court should be limited to those currently available under the guardianship legislation - i.e. to make orders for periodical payments and lump sum payments. We can see that there might well be cases (particularly, perhaps, where a child is disabled) in which it might be appropriate for the court hearing an application by an adult child to have the full range of property adjustment powers at its disposal; but we have come to the conclusion that it would not be appropriate to bring forward legislation with such far-reaching implications in this present Report”[54]

Passage of the Family Law Reform Bill through Parliament

106. The Family Law Reform Bill of 1986 was set out in the Appendix to a second Law Commission Report, no 157, and dated 1986. This contained the legislation resulting from the recommendations in the 1982 report, and which Parliament enacted as sections 12 – 14 of the Family Law Reform Act 1987, being orders for financial relief on the application of either parent (s 12), in guardianship cases (s 13) and for persons over 18 (s 14), inserting into the Guardianship of Minors Act 1971 respectively sections 11B, 11C and 11D.

107. On its second reading in the House of Lords, the Lord Chancellor said

> “So far as possible we want to eliminate both discrimination and stigma so far as it affects children born out of wedlock. There are forms of legal discrimination under existing law. First, there is the legal discrimination which directly affects the position of these children. The maintenance of such a child is one example. It is subject to special restrictions affecting the jurisdiction of magistrates courts; for instance, no lump sum

[54] LC 1982/118 para 6.32

> exceeding the rather paltry figure – if I may use that expression – of £500 may be awarded"[55].

108. The Lord Chancellor continued

> "I turn now to the question of financial provision for these children. The Bill repeals the Affiliation Proceedings Act 1957. That Act remains a direct descendant of the old bastardy laws, whose object was to relieve the parish of the burden of child maintenance if that burden could be placed on the father. The repeal of this Act abolishes the separate and distinct procedure for enforcing provision for a child born out of wedlock by affiliation proceedings. The Bill provides that financial provision for all children, irrespective of their parents' marital status, [is] to be obtained by proceedings under the Guardianship of Minors Act 1971, as amended."[56]

109. The Lord Chancellor referred to the "enhanced range of financial provision orders enabling the High Court and the county court to order for the benefit of the child not only periodical payments, but also secured periodical payments, lump sums and transfer or settlements of property, without restriction as to amount"[57]. He also referred to the introduction of legislation making *"provision ...for applications by children over the age of 18 whose parents are separated and who are undergoing further education or training, or who have special needs, such as would arise from some form of physical handicap*". The Lord Chancellor concluded his introduction to the Bill by saying "*In conclusion, I shall only say that I regard the Bill as an important law reform which will help children born out of wedlock to have as normal a family life as possible. Because such children may be born in unstable family circumstances, it is of great importance that the law should not inflict any additional disadvantages on them. The Bill seeks as far as possible to remove the remaining legal disadvantages from which they suffer*".[58]

110. Neither House amended the drafting of clauses 12 – 14 of the Bill, and those clauses were approved without any further debate by Standing Committee F.

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[55] Hansard HL, 483, 15.1.87, 648
[56] Hansard HL, 483, 15.1.87, 650
[57] Hansard HL, 483, 15.1.87, 651
[58] Hansard HL, 483, 15.1.87, 652

Accordingly Parliament, through the mechanism of the Family Law Reform Act 1987 enacted, *inter alia*, the provisions for transfers and settlements of property which are now to be found in Schedule 1 to the Children Act 1989.

Consolidation of the existing law in s 15 and Schedule 1 CA 1989

111. The consolidation of the various acts of Parliament enabling financial provision for children began with the Law Commission Report No. 172 of 1988, entitled "Family Law: Review of Child Law Guardianship and Custody". Financial provision and property adjustment for children was addressed in 4.59 – 4.70, the LC considering that the "assimilation and merger of the current provisions" could be achieved "with little change in the substance of the existing law and with the benefit of considerable simplification."[59] Commenting again on the purpose of the reforms enacted by s 12 and 13 of the Family Law Reform Act 1987, the LC said at para 4.60 "The object was to enable all children to have the benefit of the same range of powers as is at present available to the children of married parents when their parents divorce", referring to paragraphs 6.5 – 6.11 of its 1982 Report (No. 118).

112. The LC further commented at 4.62: -

> "If it is right that parents should on occasions be liable to make capital provision for their children,[60] it must be right no matter where the children are to live. If custody of children is given to third parties in the course of divorce proceedings at present, then the full range of orders is available.[61] To restrict the range of orders available outside divorce proceedings is therefore to perpetuate the sort of discrimination against children whose parents have never been married to one another which it was the object of the 1987 Act to remove. We therefore recommend that the full range of orders be available on the application of parents, guardians or people with the benefit of a residence order." *(original footnotes)*

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[59] LC 1988/172 para 4.59

[60] The courts have held that in most cases this cannot be expected if the child's maintenance and education are properly provided for; see *Chamberlain v. Chamberlain* [1973] 1 W.L.R. 1557, *Lilford (Lord) v. Glynn* [1979] 1
W.LR78.

[61] 'See Matrimonial Causes Act 1973, ss. 23(1)(d), (e), (f) and 24(1).

113. Section 15 of The Children Act 1989 started its journey as Clause 13 of the Children Bill. Neither Clause 13 nor Schedule 1 were amended on the journey of the Children Bill through Parliament, and s 15 and Schedule 1 were part of the Children Act when it received Royal Assent on 16 November 1989.

Subsequent interpretation of Schedule 1 by the courts

114. In *A v A (A Minor: Financial Provision)* [1994] 1 FLR 657, Ward J (as he then was) traced the history of the courts' jurisdiction to make provision for the children of unmarried parents.

115. Notably, Ward J commented: "*The treatment of illegitimate children has gradually crept towards equality of treatment with legitimate children*." (at 659);

116. Hale J, as she then was, referred to Ward J's analysis in *J v C (Child: Financial Provision)* [1999] 1 FLR 152 at 155, commenting on the situation prior to the enactment of the Family Law Reform Act 1987, where she stated

> "jurisdiction was still solely within the magistrates' courts, lump sum provision was limited, and otherwise there were no powers to make capital settlements. Those limitations were removed and a wider range of orders was provided for in the Family Law Reform Act 1987. This implemented two Law Commission reports on illegitimacy[62]. The object of those reports was to remove the differences in the legal positions of children. The underlying principle was that children should not suffer just because their parents had, for whatever reason, not been married to one another. **Equally of course they should not get more**." (emphasis added);

117. Hale J continued

> "There is a long line of authority, beginning with *Chamberlain v Chamberlain* [1973] 1 WLR 1557, and continuing *with Lilford (Lord) v Glynn* [1979] 1 WLR 78, (1978) FLR Rep 427 and *Kiely v Kiely* [1988] 1 FLR 248, that children are entitled to provision during their dependency and for their education, but they are not entitled to a settlement beyond

[62] Being 1982/118 and 1986/157, extracted in part above

> that, unless there are exceptional circumstances such as a disability, however rich their parents may be."

118. In *T v S (Financial Provision for Children)* [1994] 2 FLR 883, Johnson J said

> "it does seem to me that there is a striking similarity between the terminology chosen by Parliament in the Children Act 1989, and that to be found in the previous matrimonial legislation upon which the Court of Appeal has given guidance. It does seem to me that in the ordinary case, in the striking words of Booth J, previously quoted[63], the statutory scheme should be construed as enabling the court to: '. . . make proper financial provision for children as children or dependants.'" The Judge added "'Whilst I do not think that the category of "special circumstances" should be necessarily always so limited, it does seem to me that in its reference to special circumstances in relation to the duration of periodical payments, Parliament was intending the court ordinarily to look at special circumstances related to the children – such, for example, as some physical or other handicap.' (at 889)

119. Since the three cases referred to above, all reported in 1994, the courts have continued to interpret the exceptional or special circumstances required for outright capital transfers very narrowly.

120. In *DN v UD* [2020] EWHC 627 Williams J set out the leading authorities on this point, which are briefly summarised below.

121. In *C v F (Disabled Child: Maintenance Orders)* [1998] 2 FLR 1, the Court of Appeal confirmed that the court has power to make orders under Sch 1 in relation to a child who is over 18 and that expenses in relation to a child's disability should be given a broad interpretation. The Court of Appeal confirmed that the relief available pursuant to Sch 1 (1) includes "but is not limited to" periodical payments and lump sums, and stated its conclusion that "whether the application is by a parent in relation to a child or whether the application is by a person over the age of 18, the court's jurisdiction, **provided there are special circumstance**s, may extend until terminated by either the death of the payer or the payee". (emphasis added)

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[63] In Kiely v Kiely [1988] 1 FLR 248

122. Williams J referred to *K v K (Minors: Property Transfer)* [1992] 1 WLR 530, [1992] 2 FLR 220. In this case a father was ordered at first instance to transfer to the mother 'for the benefit of the children' his interest in the joint tenancy of the family home, pursuant to the Guardianship of Minors Act 1971, s11B(2)(d) (Now Sch 1(1)(d)). The father's appeal to the Court of Appeal, whilst successful, did not succeed in so far as he claimed that the lower court did not have power to order the transfer (which had no time-limited long-stop, but which was nonetheless expressed to be for the benefit of the children). The court commented that there was

> "no special magic ... to be attached to the words 'for the benefit of the children of the family' which appears in the judge's order. Those words may simply have been included in order to indicate that the order was made pursuant to s 11B(2)(d) or in order to make clear the judge's view that the transfer was for the children's benefit. **They cannot have had the effect of giving the children a beneficial interest in the property**." (emphasis added).

123. The effect therefore was of an outright transfer of property to the mother. The court remarked that the provisions of (what is now) Sch 1 (1) (d), whilst in similar terms to s 24(1)(1) of the Matrimonial Causes Act 1973 do not in fact permit a transfer of property to be made to the applicant parent solely for the applicant parent's own benefit, an outcome which is permissible in s 24(1)(1) MCA 1973. In *DN v UD* (supra), this case was referred to as follows: -

> "[77] Whilst Sch 1 gives the court power to order the transfer of a house (or the payment of a lump sum for the purchase or provision of a home) to a child otherwise than on terms that the property reverts to the father at the end of the child's dependency, as far as the parties are aware, there has not yet been any reported case in which a court has done so although the mother's team refer to *K v K (Minors: Property Transfer)* [1992] 1 WLR 530, [1992] 2 FLR 220."

124. Charles J said in *MT v OT (Financial Provision: Costs)* [2007] EWHC 838 (Fam), [2008] 2 FLR 1311 (MT v OT)

> "[87] … if you look at the powers contained in Sch 1, para 1(2)(d) and (e) on their face they could be used to make an absolute transfer of property

> to a child or a settlement of property which gave a beneficial interest to a child when attaining a certain age. However, if one goes on to look at the provisions concerning the circumstances in which a person over 18 can make an application, and the duration of orders for financial relief and the definition of a child, the analogies between the provisions of the Matrimonial Causes Act 1973 and Sch 1 are so close that in my view there is effectively for present purposes a complete overlap. The cases concerning the Matrimonial Causes Act 1973 demonstrate that having regard to the scheme and purpose of the legislation – and thus as a matter of statutory construction – the powers in para 1(2)(d) and (e) should only be exercised so as to confer an absolute interest on the relevant children in special circumstances. As will appear from the cases under Sch 1, the court has held that those special circumstances are special circumstances relating to the children – and not, for example, the extreme wealth of a father. They include, for example, whether a child suffers from a disability and matters such as that." Charles J continued at [101] "'[101]… it is only in special circumstances that capital provision should be made for a child after dependency. Those special circumstances do not include the wealth of the child; nor do they include a point that the child might not benefit on the death of the father."

125. Macur J (as she then was) referred to an interest in property reverting to the paying party as being a "well-established practice" in *Re A (A Child) (Financial Provision: Wealthy Parent)* [2015] Fam 277, sub nom *Re A (A Child: Financial Provision)* [2015] 2 FLR 625, at para [9]. Macur J echoed Johnson J's concerns in *T v S* (supra) emphasising that

> "[19] The literal or purposive interpretation of Schedule 1 does not permit of the concept of sharing or compensation for the benefit of the child, nor, by the back door, financial provision and compensation for the carer beyond that element attributable to the care of the child during his minority, or other determined duration of dependency. There is no established authority to the contrary. The judgment of Baroness Hale of Richmond JSC in *Gow v Grant* 2013 SC (UKSC) 1 , paras 44–56, which urges reform of the law to re-balance the financial consequences of relationship breakdown in cohabitation, makes this clear, as does the prevailing case law on this point: see: *J v C (Child: Financial Provision)* [1999] 1 FLR 152 , 159H; *In re P* [2003] 2 FLR 865 , paras 40, 41, 49; *PG v TW (No 2)* [2014] 1 FLR 923 , para 105".

126. Finally, in *DN v UD* (supra) Williams J referred to *Re N (Payments for Benefit of Child)* [2009] EWHC 11 (Fam), [2009] 1 WLR 1621, [2009] 1 FLR 1442 (as discussed at para 9 above) with respect to Sch 1 orders enduring until the end of tertiary education.

127. Williams J concluded: -

> "[85] The net effect of all of the authorities is clear. Absent special or exceptional circumstances capital orders which provide a benefit beyond minority or the cessation of tertiary education should not be made. It is equally clear that what can amount to special or exceptional circumstances is restricted. Matters relating to changing societal attitudes, the wealth of a parent, or the like will not suffice. Disability creating an ongoing need for support might. The absence of a parent playing any supporting role for their child might. The appellate courts have recently eschewed glosses upon statutory language. In this case the identification of exceptional or special circumstances warranting the making of outright capital orders for the benefit of children does not seem to me to amount to a gloss but **rather is an application of the statutory powers based on principles which emerge from case-law. The power to make outright capital transfers exists but will only be deployed in limited circumstances and where the evidence justifies it**. It seems to me that what one is focusing on is the child and whether there is something about this child or this child's situation in particular vis-à-vis that parent that creates a situation which exceptionally (i.e. as an exception to the usual rule) generates a need for the child to be provided with capital which will be of benefit to them as an adult possibly for many years." (emphasis added)

Our observations on how Schedule 1 to the Children Act 1989 works in practice

Preliminary observations

128. We are not aware that there are any official statistics kept of how many Schedule 1 applications are made or what happens to them. This in itself is a failing. As we will describe, anecdotal evidence from practitioners within the FLBA is that Schedule 1 fails in the historic aim of equalising the outcomes for the children of married and unmarried parents.

129. It may be that, technically, the statutory provisions which relate purely to children look the same for married and unmarried children. However, in practice, it is our observation that the children of married parents get to enjoy the benefits of "slip streaming" a parent's generally more generous outright capital claims enjoyed under the Matrimonial Causes Act 1973.

130. It is one thing for the statutory provision for the children of married and unmarried children to look the same on the page, it is quite another matter when the children of married parents indirectly benefit from entirely separate legislation by virtue of their parents' marriage and generally do not rely on the children specific provision.

131. The real problem for the children of unmarried parents is in the different treatment of their parents on family breakdown.

132. We consider that statistics in respect of Schedule 1 should be kept as a separate category and that the "real life" outcomes for children of married and unmarried parents would merit in-depth empirical research. Our input in this document is via anecdotal observations, albeit drawn from a very experienced group of practitioners in this area.

133. When comparative international provisions are studied in this context, England and Wales is generally noted as making provision for the children of unmarried parents. Whilst this may be technically correct, as described above, we do not consider that the practical operation of the legislation is such for the children of most unmarried parents.

A law reserved for the rich?

134. A survey of a significant tranche of the formally reported cases in this area reveals that many of the cases are brought by mothers against wealthy fathers. A number of cases have complex international elements, involving sums of money beyond the wild imagining of the average family breakdown.

135. There is a school of thought that, outside of the South East of England, Schedule 1 applications are regarded as a rather exotic remedy and Schedule 1 is rarely invoked, other than perhaps to procure the payment of school fees or 'top up' periodical payments where the father's income exceeds the Child Maintenance Service threshold. We are unsure if, in practice, this is in fact the case.

136. Two reported cases in the last decade illustrate the operation of Schedule 1 involving "ordinary" money. In *DB v AB* [2011] EWHC 3792, [2012] 2 FLR 1396 the mother had property assets of £98,000 and debts of about £111,000. The father's income was found to be c. £100,000 and he had property assets of some £364,000. An outright lump sum of £40,000 was ordered to be paid to the mother for the benefit of the child and a housing fund of £250,000 was settled upon the usual terms for reversion (see introduction, above).

137. In *Re M-M* [2014] EWCA Civ 276 the mother owned a home but required capital provision. The father earned £6,400 pm and was in receipt of additional bonus payments. He had £137,000 in a bank account and £60,000 in a long-term investment. The mother asked for £180,000 to deal with disrepair to her home, the purchase of a car and the settling of credit card debts. She was awarded £44,600.

Absence of anti-avoidance provisions

138. At the moment there are no specific provisions available under Schedule 1 (cf. s.37 Matrimonial Causes Act 1973) to stop a paying party from disposing of assets in order to frustrate a potential application. Neither are there any specific provisions which enable a court, as it can in matrimonial finance proceedings, to set aside a disposition already made with the intention of frustrating a Schedule 1 application.

139. The LC recommended in its report "Cohabitation: The Financial Consequences of Relationship Breakdown" [64] that

> "[t]here would need to be statutory provision to restrain the respondent from disposing of assets in anticipation of a claim, and to set aside dispositions already made with the intention of preventing (or reducing) financial relief being awarded under the [Law Commission's proposed] scheme.113 In the [consultation paper] … we provisionally proposed that measures be introduced similar to those currently available in relation to ancillary relief, and nearly all consultees agreed.

[64] LC 307, 31.7.2007, At para 4.128, p 96

140. Footnote 113 in that quotation drew attention to an observation from the Association of District Judges that the absence of anti-avoidance provisions in Schedule 1 cases was "extremely inconvenient"[65] and that the current practice of transferring cases to the High Court caused delay and additional cost to the parties

141. It is our view that this lacuna needs to be addressed.

Tax complexities and funding tax charges

142. A significant overlaying of complexity in Schedule 1 claims is occasioned by Schedule 20 to the Finance Act 2006. Schedule 20 introduced entry, periodic and exit charges on capital settled into trusts and was seen at the time as the then Labour government "cracking down" on middle class tax avoidance through the medium of trust vehicles. However, in the context of Schedule 1, the "settlement of property" order, most commonly deployed for meeting a housing need for an unmarried carer, risks being caught by these provisions if the settlement is above the nil rate band for inheritance tax purposes (in tax year 21/22 this is still £325,000). Given property prices in the South-East, the effect of this is that parties to Schedule 1 litigation frequently require specialist tax advice and may need to consider some creative solutions in order to minimise tax liabilities..[66] These include the use of licences, tenancy agreements, offshore trusts or long leases (with the risk of leasehold enfranchisement problems for any term granted for a period of 21 years or more).

143. It would be our observations that the complex interaction between Schedule 1 to the Children Act and Schedule 20 to the Finance Act 2006 is a disincentive to many "high street" solicitors to venture down the path of advising their clients to seek Schedule 1 relief.

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[65] FN 113, page 97

[66] The definitive article in this respect is probably "Tax implications: Schedule 1 Trusts." [2007] Fam Law 703.

144. The case of *G v A (No 3)* [2011] EWHC 2377 (Fam), [2012] 1 FLR 415 is a good illustration of the recurring litigation that can take place years after the court's supposedly "final" judgment, in trying to finalise the terms of a trust. In that case the court (trying to avoid a repeat of the years of wrangling occasioned in that instance) endorsed the suggestion that the settlement instrument could be conveniently made part of the order of the court, by deploying the standard Resolution Precedent which is commonly deployed when capital is settled by way of a *Mesher* order following divorce. Whilst superficially attractive, this approach risks overlooking the Schedule 20 tax charges which may potentially apply. It seems to us that any settlement which is not devised so as (lawfully) to avoid the effect of Schedule 20 should have built into it an additional cash fund which can meet the tax obligations which will arise during the lifetime, and upon exit, of the settlement. This is further complexity and expense which tends to make such provision the preserve of the rich.

Procedural complexities

145. There are fiendish procedural complexities when an applicant is seeking relief under Schedule 1 to the Children Act whilst simultaneously seeking to assert a share of equity in a property which is owned by, usually, the father.

146. Schedule 1 claims are heard in the Family Court. Claims for a declaration as to beneficial ownership and sale of a property are conventionally brought under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA), which is heard in the County Court. In central London the Family Court does not exercise any civil jurisdiction and the County Court does not exercise any family jurisdiction. This leads to a messy situation where two sets of proceedings are necessary in different courts at either end of Chancery Lane.

147. The workarounds are for the matter to be transferred to the High Court, where Family Court judges can exercise both jurisdictions at the same time. However, in practice, this rarely seems to happen. Alternatively, and more commonly, each matter should be transferred away from the Family Court at Central London and the County Court at Central London to an "outlying court" where civil and family proceedings are heard in the same building. By this device the two matters can be listed at the same time for case management and for trial. They remain separate sets of proceedings but can be dealt with by one judge at the same time.

148. This is a more common solution but it is not without drawbacks. In particular, the standing practice is for complex TOLATA matters to be transferred to the County Court at Central London from outlying courts so that judges with the appropriate level of expertise hear the case. There are also problems with case management and the dovetailing of proceedings that have of necessity had to be issued in two separate courts. Everything from timings to practicalities can be complicated and haphazard.

149. There are other procedures for the determination of beneficial interests in the Family Court, such as the Married Women's Property Act 1881, but they are not commonly deployed if it would be possible to bring a TOLATA claim.

150. We take the view that it would, in fact, be possible for the Family Court exercising its jurisdiction under Schedule 1, when considering paragraph 4(1)(a) to determine what "property" each party actually owns. This would mirror the similar exercise that takes places under Matrimonial Causes Act 1973 when, for example, an intervener asserts that property in matrimonial finance proceedings is in fact owned by neither spouse but by the intervener. However, to our knowledge this is not ever done, and we can find no reported case supporting this approach. If we are correct that paragraph 4(1)(a) could be so deployed, there is still the difficulty caused by the absence of any analogous "order for sale" provisions in Schedule 1. That leaves a gap in the legislation that can only be plugged by a claim in the county or High courts under the provisions of TOLATA.

Maintenance

151. With the advent of the Child Support Act 1991 the court's jurisdiction to deal with child maintenance was largely abrogated, for both married and unmarried parents, in favour of the Child Support Agency (now the Child Maintenance Service), save in specific circumstances.

152. These are: -

    a. that the paying party has a gross income, after legitimate pension contributions, in excess of the CMS maximum assessment (now £156,000 gross per annum) in which case a "top up" can be ordered. In the context of Schedule 1 the "top up" must still be "for the benefit of the child" and there has developed a somewhat Byzantine analysis in case-law about what may be properly considered part of the "carer's allowance" for the benefit of the child and what may not be.

    b. School fees.

    c. Costs associated with disability.

    d. Further, the court may exercise jurisdiction if the parties agree in writing and if no previous CMS assessment has been made. In this fourth instance, either party is free to seek a CMS assessment upon the expiration of 12 months from the making of the order.

153. Since the case of *Phillips v Peace* [1996] 2 FLR 230 it has been a fundamental tenet that a Family Court exercising its Schedule 1 jurisdiction should not seek to circumnavigate the CSA 1991 arrangements by ordering lump sum payment for what should in reality be expenditure covered by income. For example, it would be permissible for a piano to be ordered "for the benefit of the child" as a lump sum, but not the piano lessons.

154. The line to be drawn between an income item and a capital item can sometimes be a blurred one. Whilst *Phillips v Peace* is often cited as being the narrow gate

through which only capital claims can pass, there are numerous instances within the case law of courts making lump sum orders pursuant to Schedule 1 for a receiving party to pay off credit card debts. Of course, nearly all credit cards debts arise as a result of expenditure which would usually be regarded as having met expenses which are best expressed as "income items". This is a curious anomaly, but no doubt the skilful advocate is ready to explain to a court how a consolidated credit debt has assumed the character of a capital obligation.

155. Divorcing spouses may benefit from a further "workaround" in respect of the court making, in effect, a child maintenance order. If there has been no application by either parent for a CMS assessment, then a "global order" may be made[67], provided that a substantial element of the order is in respect of spousal maintenance only. Any element in respect of "child maintenance" is expressed to be subject to any CMS assessment (for which either parent may be tempted to apply) and as reducing pound for pound with respect to any such assessment. This has the practical effect of removing the incentive in many instances for either party to apply to the CMS, and a second practical effect of minimising litigation and providing certainty for what may be a number of years.

Funding of legal costs to bring a claim

156. Since the loss of legal aid in many private law family cases in 2012, s.22ZA – s.22ZB Matrimonial Causes Act 1973 has provided a statutory mechanism by which a financially weaker spouse can claim legal funding costs from the financially stronger party.

157. There is no comparable provision within Schedule 1, albeit a workaround has developed in case law as Schedule 1 enables parties to claim an unlimited number of lump sum payments (cf: under MCA 1973 which is a one-off payment, but payments made be staged) to include interim payments, and the High Court has determined that such interim payments may include a fighting fund[68].

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[67] Known for many years as a "Segal" order, following the practice of District Judge Segal in (what was) the Principal Registry of the Family Division

Difference in treatment of risks of costs order

158. There is also an anomalous difference in the treatment of orders as to costs in proceedings brought under Schedule 1 to the Children Act.

159. Married parties benefit from the "no order as to costs" presumption which applies in nearly all types of financial remedy claim (with limited exceptions) [69]. The court may make another order, largely based on how the litigation has been conducted, but this is very much an exception to the rule.

160. Under Schedule 1 the ordinary costs rules of family proceedings apply.

161. These are imported directly from the Civil Procedure Rules, albeit with the "Costs shall follow the event" (i.e. loser pays the winner's cost) presumption expressly disapplied. This is said to result in a position of "clean sheet" costs i.e. with neither a presumption for or against the making of a costs order. It is down to the court's discretion.

162. However, in this context case law speaks of "there having to be some starting point" and that this is usually that the loser pays.[70] The "clean sheet" position has also been described as a "soft presumption" in favour of the loser pays principle. This is a complex area which could be developed in a lot more detail, but the fact remains that applicants under Schedule 1 to the Children Act bear a costs' risk about which their married counterparts generally do not need to be concerned.

163. The Law Commission, in its report "Cohabitation: The Financial Consequences of Relationship Breakdown"[71] considered[72] the different costs rules in TOLATA proceedings (which are the normal civil rules that costs are awarded to the 'winner') as compared to Schedule 1 proceedings (as set out above) but made no

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[68] e.g. *G v G (Child Maintenance: Interim Costs Provision)* [2009] EWHC 2080 (Fam), [2010] 2 FLR 1264.
[69] The effect of FPR 2010 r 28.3
[70] See Gojkovic No. 2, per Butler-Sloss LJ [1991] 2 FLR 233, Court of Appeal
[71] LC 307, 31.7.2007
[72] A 4.120 – 4.124

positive recommendation, stating at 4.123 "we understand that there may be difficulties currently where proceedings under TOLATA are joined with proceedings under Schedule 1 to the Children Act 1989, to which quite different costs regimes apply. We sense from recent discussion of this point with practitioners that there may be some uncertainty about how these rules should operate together."

164. Our support for the Cohabitation Rights Bill, as propounded by Lord Marks of Henley-on-Thames, is set out below, but alongside that Bill, consideration will need to be given as to liability for costs of any such litigation, such that, in particular, there is no disadvantage to an eligible receiving party for having had to bring legal proceedings in order to receive a remedy in the form of a settlement of property for the benefit of a child.

Financial provision: how does the legal treatment of children of separated unmarried parents differ from that of children of separated married parents?

165. It can be seen from: -

a. the approach taken in the Law Commission's 118th report in 1982,
b. the Lord Chancellor's introduction to the Family Law Reform Bill in Parliament; and
c. the comments made by Hale J (as she then was) in in *J v C (Child: Financial Provision)* [1999] 1 FLR 152 (supra), subsequently repeatedly approved and upheld by the courts,

that both Parliament and then the courts were anxious that there be no prejudice to children whose parents had separated just because they had not been born to parents who were married. In fact Hale J gave a prescient warning in *J v C* (supra): "Equally of course they should not get more".

166. However there are still differences.

167. One key difference is that children whose parents were married will likely benefit from any capital awarded to their parent. Whilst hugely simplifying the law for married couples, it is clear that, given the 'yardstick of equality' which has applied since *White v White* [2001] 1 AC 596 in matrimonial finance cases, and the 'first consideration of the court' in s 25(1) being the children, there is a much more likely prospect of a child benefitting directly or indirectly from the income and capital awarded to their parents. The 'sharing' principle applies (*Miller / McFarlane* [2006] UKHL 24) and so it is far more likely in cases involving even moderately wealthy couples that the capital settlement achieved by the receiving party will be better than that achievable under Schedule 1.

168. The Law Commissions proposals, in their latest incarnation as presented to Parliament most recently by Lord Marks in 2019, are an attempt to redress that remaining imbalance.

169. However, the question of whether or not such an imbalance should remain is essentially a political one – a question for Parliament, rather than one for the courts, as it involves a consideration of the related question: if there was provision made for enhancement of capital awards to separated unmarried parents, why should an unmarried parent be placed in a position either approaching that of, or the same as that of, a married parent?

Suggestions for the future

170. In its report "Cohabitation: The Financial Consequences of Relationship breakdown"[73] in 2007, the Law Commission made recommendations with which the authors of this document would agree. The recommendations are set out in summary form in Part 8 of that report at 8.2 – 8.33 (p141 – 146), in more detail at paragraphs 4.26 – 4.42 (p 73 – 76), and (in still more detail) at 4.43 – 4.108 (p 76 – 92).

[73] LC 307, 31 July 2007

171. The most recent incarnation of those recommendations is the Cohabitation Rights Bill, published on 6 February 2020 at the instigation of Lord Marks of Henley-on-Thames, although the recommendations of the Law Commission from July 2007 have still not been acted upon by Parliament.

172. The authors of this document would agree with the content of the Cohabitation Rights Bill and the provisions therein relating to the possibility of applications for a financial settlement order. As set out above, a concomitant amendment to the Family Procedure Rules 2010 would be required in order to clarify the costs position. The Law Commission in 2007 made no specific recommendation as to what it should be [74], but our view is that there should be no costs disincentive for an eligible applicant with a prima facie reasonable claim to litigate for the benefit of the child.

173. Further, the FLBA also supports the Law Commission's recommendation that the court be empowered to order periodical payments (alongside, and supplementing, the existing child support legislation in the Child Support Act 1991) solely for the purpose of the meeting of child care costs for the children of separated parents. As noted by the Law Commission at §102 of their Cohabitation report[75], "[p]ayments made under the Child Support Act are intended to cover half the cost of raising a child", and "the basic cost of bringing up a child is therefore already shared by way of the existing child support legislation"[76]. The lacuna is where the parent with whom the child lives is in paid employment, as that individual is likely to incur child-care costs, and as the Law Commission observe, such payments for child-care may be necessary to enable that parent to work at all and so to mitigate any economic disadvantage[77]. In so far as tax credits are unavailable to assist with child-care costs, such costs should be viewed as a form of economic disadvantage

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[74] See para 85 above, and paragraph 4.124 on page 96 of the Law Commission report LC 307
[75] LC 307, 31 July 2007
[76] Child Support Act 1991, as amended and supplemented by many statutory instruments of some (often criticised) complexity
[77] LC 307, §4.103

arising from the cohabitants' shared lives and, subject to the discretionary factors set out in s 9 of the Cohabitation Rights Bill, they should be shared.

174. The Law Commission did also highlight a potential complication here, in that the sharing of child-care costs should be available also to non-former-cohabitant parents of children[78], and hence made available either in addition to the measures in the Cohabitation Rights Bill or instead of them in an amendment to Schedule 1 Children Act 1989.

175. Care should clearly be taken so as to ensure clarity in the courts' jurisdiction and parity as between former cohabitant and non-former-cohabitant parents of children.

176. As the Law Commission has suggested[79], it would be convenient for there to be power for such orders to be capable of capitalisation, and hence payable either as a capitalised lump sum, or as periodical payments (which would be supplementary to the child maintenance payments to which the parent-with-care is entitled, pursuant to the child support legislation).

177. The power for the court when exercising a Schedule 1 jurisdiction to make an order for child-care costs as periodical payments (or a capitalised sum) will, in our view, go some way towards assisting those carers who are confronted with a non-resident parent who is using irregular or self-employed income / company dividends to evade the intended consequences of the child support scheme.

178. If the Cohabitation Rights Bill is not to be implemented by Parliament, then it remains the case that a significant barrier to the current necessity of having two sets of proceedings (TOLATA and Schedule 1) running in tandem, is the need for completion of two application / claim forms – one in the Family Court and the other in the County Court. That also in any event remains the case where there is a

[78] LC 307, §4.105
[79] LC 307, §4.104

need for Schedule 1 and TOLATA litigation where there has been no cohabitation (not an uncommon scenario). Clearly the Cohabitation Rights Bill supplements, as opposed to supersedes, Schedule 1, as the remedies in Schedule 1 will continue to be be relevant to non-cohabiting, unmarried and separated parents.

179. If Parliament were to refuse to enact some incarnation of the Cohabitation Rights Bill in the near future, our view is that one form, with one court fee payable, addressing both: -

a. an application for financial provision for the benefit of the child and
b. any related claim for a declaration of a beneficial interest in allegedly already 'co-owned' property with the other unmarried parent of a child;

would simplify and render more accessible the legal remedies available to unmarried former cohabitants and discussed throughout this document.

180. In so far as the Family Court remains in a position where it has no jurisdiction under TOLATA, then the best that could be hoped for is a rationalisation of existing proceedings: with case management hearings in both Schedule 1 and TOLATA claims to be automatically listed at the same time before the same judge.

181. But if the Family Court were to be given jurisdiction over TOLATA proceedings, then the scope for amendment of the rules specifically to provide for a rationalisation of case management processes of TOLATA and Schedule 1 proceedings to be heard together, and for clarity when it comes to costs orders and interim orders would be of considerable benefit to litigants.

'SHOULD COHABITING PARTNERS HAVE THE SAME RIGHTS AS THOSE WHO ARE MARRIED OR IN A CIVIL PARTNERSHIP?'

182. At the outset of a marriage, civil partnership or cohabiting relationship the position in respect of the parties' property and finances is equivalent; there being no community of property on marriage in England and Wales, however during the

lifetime of a marriage or civil partnership there is a duty upon each spouse to maintain the other.[80]

183. On separation the distinctions become notably more stark. The below reviews the distinctive approaches taken in the law of England and Wales in respect of 1) movable property, cash/capital and income, 2) child maintenance and 3) real property. Whilst not drawing any particular conclusions it is hoped that setting out the clear distinctions between the matrimonial/civil partnership regimes against the largely common law regime applicable to cohabiting couples may aid policy makers' decision making as respects future attempts at law reform in this area.

Movable property, capital and income

Divorce

184. Legislation provides a raft of potential orders which a court is permitted to make to redistribute parties' wealth, both current and future, on divorce or dissolution. For married couples these are provided by s23-27 Matrimonial Causes Act 1973 and for civil partners by Schedule 5 Civil Partnership Act 2004.

185. The fundamental objective in this context is to review the parties' whole financial assets, earning potential and liabilities, and arrive at a distribution between the parties which meets both parties' reasonable needs,[81] ensures they leave the marriage as far as possible in a position of equality and that neither party is discriminated against for decisions made within the context of the marriage or for any other reason (*White v White* [2001] 1 AC 596).

[80] S. 27 MCA 1973 and Schedule 5, Part 9 CPA 2004
[81] *Miller v Miller* [2006] 1 AC 596

186. There is a statutory duty on the court to consider whether it would be appropriate to arrive at an award which provided for a 'clean break' between the parties, such that both can move on with their lives apart as soon as is just and fair.[82]

187. In seeking to achieve these overarching objectives the courts have at their disposal a variety of specific powers to order:

a. Periodical payments, for example by way of ongoing spousal maintenance [s. 23(1)(a) MCA 1973 and sch 5 para 2(1)(a) CPA 2004], albeit that these have tended to operate as relatively short-term provision in light of the 'clean break' objective and will not be provided on the basis of an ongoing share of an ex-spouses future earnings,[83] only on the basis of needs.
b. Payment of a lump sum for the benefit of the spouse or any children of the marriage [s. 23(1)(c) and (f) MCA, sched 5 para 1(c) and (f) CPA]
c. This can be ordered as single or multiple instalments [s23(3)(c)] or deferred (s23 (6)(b) MCA and sch 5 para 3(3)(a) and (5)(b)(i)]
d. Child maintenance (s. 23(1)(d) MCA and sch 5 para 2(1)(d) and (f))
e. Pension sharing orders (s. 21A and 24B-G MCA and sched 5 para 15-19 CPA)

188. In making any of the above orders the court must consider the welfare of any minor child (s. 25(1) and sch 5 para 20) and the various factors outlined by s25(2) (and sch 5 para 21(2)) including the parties' income, earning potential, financial needs and obligations, the standard of living during the marriage, the parties' ages and duration of the marriage, disability, contributions to the marriage and conduct of the parties if 'inequitable to disregard'.

189. This breadth of factors ensures that any order arrived at is done so mindful of the particular circumstances, needs and vulnerabilities of each couple.

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[82] S. 25A MCA 1973 and Sched 5 para 23 CPA 2004
[83] *Waggott v Waggott* [2018] EWCA Civ 727

190. This is complemented by the obligation incumbent on both parties to engage in full and frank financial disclosure at the outset of proceedings and prior to any order being made.[84]

191. Whilst parties are generally encouraged to arrive at arrangements through negotiation these will not become binding or enforceable without being formalised in consent order. There is a further safeguard built into the financial remedies regime here in that such order will only be approved by a court where the terms are deemed fair.[85]

Cohabitation

192. Conversely, cohabitants *prima facie* have no legal rights to lay claim against an ex-partner's savings, income or chattels other than under the law of contract. A cohabitant who agrees to give up a lucrative, or potentially lucrative, career in order to stay at home and care for the children places themselves in a position of significant financial jeopardy. They may find their own income generation capacity vastly reduced after time away from the job market but without the safety-net of any legal claim upon the savings, income, or future earning potential generated during this time by their partner.[86]

193. This may be particularly damaging in the context of significant length relationships where the parties decided to pool pension savings in one person's name or operated as a sole-income, and consequently sole-saver, household. There may well have been conversations to the effect that the future pension pot would be for the use of both in their retirement but it remains a question of significant uncertainty as to

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[84] FPR PD 9A para 7

[85] FPR Pt 9.26

[86] Of course, divorce does not provide applicants with a right to *share* in their ex-spouse's future earnings either (confirmed in *Waggott v Waggott*), but the absence of personal future earning potential is nevertheless a considerable loss to a party who has by mutual decision placed themselves out of work for a period within the relationship.

whether such assurances would be specific enough to provide a foundation on which to raise arguments of estoppel.

194. The sole available routes for a cohabitant seeking financial remedy lie where a) there is a minor child of the relationship and b) where the facts are such as to provide for a claim in trusts law with respect to real property. Each of which are dealt with below.

Child maintenance and additional claims

Property/home

Divorce

195. On divorce the court has the power to grant a Property Adjustment Order under s. 24 MCA 1973 or sched 5 para 6-9 CPA 2004, altering the beneficial or legal ownership of property owned beneficially by one or both of the parties to the marriage and to order sale of the property (s. 24A MCA 1973) if necessary. Divorcing couples may claim an interest in any property owned by one or other spouse provided it falls within the matrimonial property, and even if it does not where the party's claim is based on needs. In seeking this remedy the court again will give consideration to the s. 25(2) factors discussed above. Generally, provision for housing for both parties, particularly where there are children, will be the primary concern of the court on making a financial remedy order with consideration given to each parties' ability to obtain a mortgage, and seeking to ensure both can as far as possible maintain a standard of living comparable to that enjoyed within the marriage.

Cohabitants

196. By contrast the law in relation to cohabitants is uncertain and complex. In order to be successful parties will require competent legal advice at an early stage.

197. The court's power in respect of claims by way of implied trusts are declaratory not distributive (s. 14 TOLATA 1996) and there is no power to re-apportion shares based on fairness, as exists in the jurisdiction on divorce.

198. The exception to this is in respect of claims for proprietary estoppel wherein if a party can demonstrate a sufficiently clear promise by an owner of property that the promisee is to have a share in the same, and in consequence the promisee has detrimentally relied on that promise the court has a broad discretion to satisfy the equity which the broken promise gives rise to.[87] However, this discretion is not guided by the factors relating to the nature of family relationships as set out in s. 25 and applicable on divorce, rather their focus is on providing the minimum to do justice and will look to make an award which is proportionate to the promisee's expectation and detriment suffered. The breadth of the discretion makes it very difficult to predict outcomes accurately even where an equity is simple to prove. In addition to which often assurances made in loving relationships are of a vague nature and sentiments such as 'I'll look after you' would not satisfy the requirements for a proprietary estoppel, the promise must be one of an acquisition of a property right.[88]

199. In order to claim a trust has arisen in respect of the former shared home a party must either show that they were a joint legal owner, in which case they will be presumed to own 50% of the beneficial interest (*Stack v Dowden* [2007] UKHL 17) or provide evidence that despite not being joint owners the parties jointly intended that both parties should have a beneficial share in the property. This can be demonstrated in 3 ways either by showing there was firstly an express agreement to share the equity such as by declaration of trust, or an oral agreement on which the

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[87] *Thorner* v *Major [2009] 1 WLR 776; Habberfield v Habberfield* [2019] EWCA Civ 890
[88] *West End Commercial v Trocadero* [2017] EWHC 2175 (Ch)

claimant party has detrimentally relied, or secondly by contributions directly to the purchase price including by way of mortgage payments[89] or, thirdly and with greater difficulty, through other substantial contributions such as to the renovation or extension of the property.[90]

200. The share which the parties each hold is then determined by the starting point of 50:50, where they were joint legal owners, or 100:0 where the non-legal owner has managed to establish some share by one of the above methods. The court then looks to ascertain what the parties' objectively intended their shares to be, as can be inferred from the evidence, or where there was no such intent can be divined the court may impute to the parties the shares which it deems fair in all the circumstances.[91]

201. Whilst no divorce proceedings come without litigation cost the outcomes in applications under the Trusts of Land and Appointment of Trustees Act 1996 are considerably less certain than under the s. 25 MCA 1973 jurisdiction. The search for the parties' joint intentions often requires considerable evidence to be gathered and reviewed by the court, and the fact that in many cases objective contemporaneous evidence is scant, outcomes can be hard to predict with any great accuracy. In addition, the cost of pursuing a claim in civil court is expensive, the arguments and law complex and the fact these applications fall under the Civil Procedure Rules brings added financial implications. The CPR costs rules demand that parties to obtain early advice as to costs rules and especially the making of offers. In this jurisdiction, poorly considered offers or the absence of offers can have considerable effects on a judge's position on costs regardless of outcome, and in the event a claim is brought and lost the claimant could find themselves liable for their own and the respondents costs in full.[92]

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[89] *Lloyds Bank v Rossett* [1991] 1AC 107 per Lord Bridge still provides the general approach applicable in 'sole-name' cases
[90] Eg as in *Aspden v Elvy* [2012] EWHC 1387 (Ch)
[91] *Jones v Kernott* [2011] UKSC 53
[92] CPR 44.2(2)(a) and Pt36 in particular requires consideration.

202. Baroness Hale warned of the costs of pursuing such cases and the caution is no less well-advised today:

> "In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs. In joint names cases it is also unlikely to lead to a different result unless the facts are very unusual."[93]

Other considerations

203. It will be evident from the above that there is a considerable difference between the two regimes.

204. The Law Commission in 2007 published its report '*Cohabitation: The Financial Consequences of Relationship Breakdown'*, having undertaken a comprehensive review of the respective positions as at that time, which remain much the same today. They noted that the lack of provision for cohabitants was problematic as many people were choosing not to marry in the belief there was some provision available by way of the 'common law marriage myth'. They proposed in conclusion that a statutory scheme be implemented providing "financial relief on separation" to cohabitants.[94] To qualify for financial relief couples would have to have been living together for 2-5 years (leaving the timeframe for the government to arrive at) or have a child together. The provision itself would be dictated by the Qualifying Contributions each partner had made during the relationship, financial or otherwise, provided those had given rise to enduring economic consequences at the point of separation. Having considered whether to suggest an automatic entitlement scheme or one which parties must 'opt into' the Law Commission

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[93] *Stack v Dowden* [2007] UKHL 17, paragraph 68

[94] Page 43, Law Commission, Cohabitation: The Financial Consequences of Relationship Breakdown Executive Summary, Law Com No 307, 31 July 2007

suggested the former on the basis that an 'opt in' scheme too closely resembled marriage or Civil Partnership and therefore brought with it all the same problems the reforms sought to circumvent. However, they did suggest that the rights could be opted-out from by written agreement between the parties.

205. They justified their proposed scheme as follows:

> "We consider that a scheme based on these principles would provide a sound basis on which to address the hardship and other economic unfairness that can arise when a cohabiting relationship ends. It would respond, more comprehensively than the current law can, to the economic impact of the contributions made by parties to their relationship, and so to needs which arise in consequence." [Executive Summary at para 1.20]

206. The Law Commission's proposal therefore sought to invoke a type of universal automatic Cohabitation Agreement, from which couples could opt-out by agreement.

207. A Cohabitation Agreement is a method by which unmarried couples may regulate their financial position and rights on separation under the law of contract. In order to ensure these are binding, particularly where there is property being shared or transferred, they should be executed by deed.

208. Whilst on the face of it these appear to provide a simple solution for cohabitants, couples would be well advised to ensure they seek assistance from solicitors early on. Particularly in light of the approach taken in *Radmacher v Granatino* [2010] UKSC 42 in respect of pre-nuptial agreements, it would be prudent also to obtain separate and independent legal advice and undertake a sharing of financial information before concluding any agreement to avoid potential claims of undue influence or fraud undermining the agreement on separation.

209. As a result, this is unlikely to prove an inexpensive option for most people and for couples with a modest asset base people may well feel this step disproportionate during the happy throes of a functioning relationship. Indeed in their 2007 Research

Paper 'A Failure of Trust' (Douglas et al) found such agreements (which they referred to as 'living together agreements') to be rare and much more common amongst mature couples who themselves had previously been through divorce or difficult separations.[95]

210. It is considered that an "opt-out" agreement would also bring with it similar considerations in terms of expense and effort and may therefore not be considered attractive.

211. Fundamentally the question posed is one of policy which the independent Bar does not express a view upon, but it is hoped that the above assists by setting out the differences between them and highlighting areas of perceived unfairness.

ARE THERE ANY EXAMPLES OF GOOD PRACTICE IN RELATION TO THE RIGHTS OF COHABITING PARTNERS IN THE UK OR INTERNATIONALLY THAT THE GOVERNMENT SHOULD SEEK TO EMULATE IN ENGLAND AND WALES?

212. The authors are English lawyers, without direct expertise in the law of any other jurisdiction. However, through research (albeit at a relatively superficial level) it is evident that the law applied to the rights of cohabitants to seek orders dividing their assets or making financial provision varies significantly from jurisdiction to jurisdiction around the world, including very large differences even within parts of the United Kingdom.

[95] Para 53-54, 'A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown Report of a Research Study funded by the ESRC' by Gillian Douglas, Julia Pearce and Hilary Woodward [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/Cohabitation_Cardiff_Research.pdf]

213. We begin by consideration of the rights of cohabiting parties to being financial claims against the other upon the breakdown of their relationship (excluding claims which they can bring for the benefit of their children) in our nearest neighbouring common law jurisdictions.

Scotland and Ireland

214. In Scotland, there is legislation governing the rights of cohabitants to seek financial provision from each other upon the breakdown of a relationship, set out in ss.25-28 of the Family Law (Scotland) Act 2006. The simple existence of a legislative framework at all sets it far apart from the jurisdiction of England and Wales. In particular there is statutory definition (at s.25 of the Act) of what a 'cohabitant' is for the purposes of the legislation.

215. It seems to us that the definition of 'cohabitant' in Scottish law is drafted very broadly – in essence two people who live together 'as if they were' spouses or civil partners. The statute provides very little flesh to that definition, and gives the Scottish courts a wide and largely unfettered discretion to determine the issue. Section 25(2) merely states that the courts shall have regard to (i) the length that parties have lived together, (ii) the nature of the relationship during this period and (iii) the nature and extent of their financial arrangements subsisting during that period.

216. This appears to be a short, widely drafted and non-exhaustive list of considerations. A minimum 'length' of the relationship is not specified, and the 'nature' of a relationship is not further defined at all; neither is the 'nature and extent' of financial arrangements. This does seem to us to be a slightly unsatisfactory footing upon which to rest any statute which potentially enables applications for financial provision between individuals; we can well imagine litigation in many cases as to

whether the court even has jurisdiction (e.g.: whether the relationship falls within s.25 at all).

217. Section 26 of the Act deals with disputes as to the ownership rights over household goods, and sets forth a rebuttable presumption of equal ownership of any household goods acquired during the period of cohabitation, other than by gift or third party succession. The Act provides no guidance as to the circumstances in which such a presumption can be rebutted.

218. Section 27 of the Act states that, absent agreement, money derived from any allowance for joint household expenses or property acquired from such money (save for the home in which they lived) will be considered to be owned in equal shares.

219. Section 28 provides that, upon the end of a cohabitation relationship (as defined by s.25), applications can be made for a capital sum, or payments in respect of the ongoing 'economic burden' of caring for any children of the relationship. Section 28(3) obliges the court to consider the economic advantage derived by one party as a result of the contributions of the other party, and the economic disadvantages suffered by the other party or any relevant child. The section (subsections 5 and 6) also obliges the court to offset competing economic advantages and disadvantages against each other.

220. Therefore in Scotland, the concept of 'common law marriage' is not a myth, but has a statutory footing, albeit (as we contend above) defined somewhat loosely. The Act was modelled on one of the principles for awarding financial provision on divorce. Where a "defender" has derived an economic advantage from the contributions of the "applicant", or the "applicant" has suffered an economic disadvantage in the interests of the "defender" or "any relevant child" there can be a claim for a capital sum, provided this is made within **one year** of the date of the cessation of cohabitation.

221. The definitions of "economic advantage", "economic disadvantage" and "contributions" are very similar to those contained within the Law Commission's 2007 Report. If a cohabitant is making a claim for himself or herself based on economic advantage, then there must be a net gain to the other. If the economic advantage to the defender is offset by an economic disadvantage suffered in the interest of the applicant or a relevant child this should be taken into account. Likewise, if the applicant's economic disadvantage is offset by an economic advantage derived from the defender's contributions that too must be taken into account.

222. There was much discussion as to the operation of this part of the Family Law (Scotland) Act 2006 in the case of *Gow v Grant* [2012] UKSC 29. We are quite sure that the framers of this consultation will already refer themselves to that judgment and so we do not intend to rehearse the facts here. Particular attention might be paid to Lady Hale's judgment at §45 as to the lessons to be learnt from the case in England and Wales.

223. In terms of the key issues in that case, Lord Hope of Craighead held as follows:

a. Taking fairness into account, it was more important to look at the effect of the transaction rather than the intention behind it. Therefore a specific intention to benefit a cohabitant was not a requirement of s.28(3)(b) and (6);
b. It was necessary for the applicant to establish that the defender derived actual economic benefit as a result of the economic disadvantage suffered by the applicant;
c. Provided that the disadvantage has been suffered in the interests of the defender to some extent, a capital sum could be ordered, even if the applicant also derived some benefit from her own disadvantage;
d. Where economic benefit is not offset by relevant economic disadvantage, s.28 leave the making of an award, and its extent, to the discretion of the

court. The court must strive to achieve fairness when assessing compensation for contributions and/or disadvantages – which cannot be reduced to purely economic factors. The overarching principle is one of fairness, taking into account where the parties were at the beginning of their relationship and where they were at the end.

224. Whilst principles of 'fairness' and a discretion given to the court already underpin the Matrimonial Causes Act 1973 in England and Wales, there is a wealth of case-law in this jurisdiction which guides the court as to how that discretion ought to be applied – not least the concepts of 'sharing', 'needs' and (perhaps more rarely) 'compensation' , combined with the 'yardstick of equality'. The considerations in s.25 of the Matrimonial Causes Act 1973 (and the similar provisions of the Civil Partnership Act 2004) also provide a helpful framework.

225. Moreover – and we suggest crucially – parties are on notice as to the operation of the law when they decide to take the relevant step (getting married or entering into a Civil Partnership) which triggers the statute which will then apply to them if they separate. In contrast, cohabiting couples in Scotland (and Ireland – see below) do not know, at the point they decide to cohabit, whether their relationship will ultimately fall within the jurisdiction of any statute for the making of financial provision.

226. It does seem to us that the principles of 'fairness' with the Scottish legislation do not have the same definition as they do in the matrimonial law of England and Wales, and it appears that if the concepts of 'disadvantage' and 'advantage' do not need to be economic – and can be offset against each other at the wide discretion of a court – there is much scope for inconsistency and uncertainty in the operation of the Scottish law, depending on the subjective view of the first instance tribunal.

227. The law in Ireland has also moved on to assist cohabitants. The *Civil Partnership and Rights and Certain Rights and Duties of Cohabitants Act 2010* introduced

entirely new rights for cohabitants when it came into force on 1st January 2011. Couples who met the criteria were automatically cohabitants but in order to seek relief arising from those rights the cohabitant must apply to the court and prove:

- That they were in an intimate and committed relationship;
- That they were qualified cohabitants;
- Financial dependency on the other cohabitant and that financial dependence arises from the relationship or the ending of the relationship (financial dependency is not required when seeking provision from the estate of a deceased cohabitant where the relationship lasted to the death of the cohabitant)
- It would be just and equitable for the court to make an order for redress in all circumstances.

228. An application must be made within 2 years of the end of the relationship where both cohabitants are alive or 6 months from the grant of representation where one of them has died.

229. The reliefs available for "qualified cohabitants" are:
- Maintenance;
- Both periodic and lump sum orders;
- Property adjustment orders (but not an order for sale);
- Pension adjustment orders and provision from the estate of a deceased cohabitant.

230. A cohabitant is defined as "*one of 2 adults (whether or the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other*". In deciding whether the couple were cohabitants the court must take into account all the circumstances of the relationship and must have regard to:

- The duration of the relationship;
- The basis upon which the couple live together;
- The degree of financial dependence of either adult on the other;
- Any agreements in respect of their finances,
- The degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property;
- Whether there are one or more dependent children;
- Whether one of the adults cares for and supports the children of the other; and
- The degree to which the adults present themselves to others as a couple.

231. To qualify the couple must have been living together for five years if there are no children and two years or more where they are the parents of at least one dependent child.

232. In determining whether it is just and equitable to make an order in all the circumstances, the court must take into account the following factors:

a. The financial circumstances, needs and obligations of each qualified cohabitant existing as at the date of the application or which are likely to arise in the future;
b. The rights and entitlements of any spouse or former spouse
c. The rights and entitlements of any civil partner or former civil partner
d. The rights and entitlements of any dependent child or any child of a previous relationship of either cohabitant
e. The duration of the relationship, the basis on which the parties entered into the relationship and the degree of commitment of the parties to one another;
f. The contributions that each of the cohabitants made or is likely to make I the foreseeable future to the welfare of the cohabitants or either of them including any contribution made by each of them to the income, earning capacity or property and financial resources of the other

g. Any contributions made by either of them in looking after the home
h. The effect on the earning capacity of each of the cohabitants of the responsibilities assumed by each of them during the period they lived together as a couple and the degree to which the future earning capacity of a qualified cohabitant having relinquished or foregone the opportunity of remunerative activity in order to look after the home
i. Any physical or mental disability of the qualified cohabitant
j. The conduct of each of the cohabitants, if the conduct is such that in the opinion of the court it would be unjust to disregard it.

233. It seems to us that the position in Ireland benefits from tighter and more detailed definition that in Scotland, in particular as to what qualifies a relationship to fall within the statute. Indeed the factors which the court must take into account when considering to make financial provision are very similar to those factors which are found in s.25 of the Matrimonial Causes Act 1973 (echoed in the Civil Partnership Act 2004) in this jurisdiction.

234. This probably triggers a central question, which is whether it is desirable or intended that cohabiting partners, assuming they fall within a well-defined description of a 'cohabitation' relationship for the purposes of enabling applications for financial relief, ought to have very similar rights to make financial claims against each other as those who have chosen, much more proactively, to give instant and unarguable legal definition to their relationship by entering into a marriage or a civil partnership. In contrast a cohabitation relationship in Ireland (and Scotland) can slip quietly, through the effluxion of time and a gradual/unconscious intertwining of finances and obligations, into something which provides the parties with rights to make applications for financial relief against each other. It might not be what either party ever intended.

235. If, as both the Scottish and Irish statutes support, the making of any financial provision between cohabitants must be at the discretion of the court, taking into account a number of considerations – with concepts such as 'fairness' and 'just and equitable' at the heart of the decision, the statutes must allow for this, whilst providing enough guidance such that inconsistency and uncertainty is avoided. Moreover, it seems to us that a careful decision must be made as to whether that discretionary process is to ape, precisely or closely, the considerations within (for example) the Matrimonial Causes Act 1973, or, if there is to be a qualitative difference, where that difference will lie.

The Rest of the World

236. We have also considered the provisions which apply to cohabiting couples upon the breakdown of their relationship in states beyond Scotland and Ireland. The Appendix to this section sets out in summary form the rules which we understand to apply in 44 other jurisdictions[96].

237. Very broadly speaking, with variations as to the specific rules which apply in different states within each category, jurisdictions around the world fall into one of the following categories as to the rules which are applied for financial claims which a cohabitant is able to make in his or her own right (rather than for the benefit of children of the relationship):

I. **No special provisions applied to the property of cohabiting parties.** These systems instead leave cohabitants subject to normal principles of property law (with a starting point of separate property), and with no scope to claim further capital provision or maintenance on the basis of needs or compensation for contributions to the 'partnership'. Countries in this category include (as well as England and Wales): Argentina,

[96] We are heavily indebted to the summary of the law in each of these jurisdictions appearing in *Family Law* edited by James Stewart (Sweet & Maxwell, 5th edition, 2021).

Bermuda, France and Germany (but with some scope to claim compensation in a limited number of cases), Gibraltar, Hong Kong, Indonesia, Jersey, Luxembourg (unless the parties enter a civil partnership), Malaysia, Mexico, Nigeria, Norway, Russian Federation, Singapore, Spain, Turkey, several US states.

II. **Application of either full or partial community of property regime to cohabiting parties**. Under this approach property acquired by either or both cohabitants during the relationship is deemed to be jointly owned and therefore divided equally after separation (although in many states there is scope for a party to prove that property is their sole property based either on their contribution to the acquisition of the property or due to agreement between the parties). In some systems the community of property regime is applied *de facto* but in others the community of property regime applies only where the parties have first either registered their cohabitation or entered into a formal agreement to apply community of property. Countries within this category include: Belgium, Brazil, Chile, Dominican Republic, Hungary (but only in the same proportions as any contributions made), Italy (upon notarised agreement), Netherlands (upon entering into cohabitation agreement), Ukraine.

III. **Application of some form of 'partnership', 'unjust enrichment' principle, or some other adaptation of equitable or contractual civil law principles in the context of cohabitation.** Such adaptation of civil law rules allows one cohabiting party to either claim a share of the property built up within the 'partnership' or to obtain financial compensation from the other party where the other party has acquired and retained a disproportionate share of the assets to which both parties have contributed or which are the fruits of their relationship. The remedy is easier to achieve under some systems than others. States in

this category include: Ontario (Canada), Denmark (but difficult to achieve), Finland (after 5 years cohabitation), Poland, South Africa, Switzerland, California (USA), Tennessee (USA).

IV. **Some form of statutory scheme or judge created law pursuant to which a court may divide or share assets, order lump sums and / or order maintenance to be paid by one former cohabiting partner to the other**. These are rights which are more limited than the rights which would be available to a spouse. Examples in this category include: China, Ireland, New Zealand (after 3 years cohabitation or less if a child), Scotland, Sweden (but parties may agree to opt out).

V. **Legal systems which provide the same or broadly the same rights to some or all cohabiting couples as they do to married couples**. Such rights usually arise only after a qualifying period of living together, once there is a child, or as a result of a formal living together agreement having been entered into or the cohabiting relationship having been officially registered). The rights may either arise pursuant to statute or through common law rules applicable to 'common law marriage', or as a result of other judge made rules which are applied to unmarried couples living together as if they were married. Countries in this category include: Australia, Greece, India, Israel, Japan, some US states (e.g. Texas).

238. Although we are not in a position to provide examples of how well the provisions within each of the above categories work in practice, we have the following comments:

a. Legal systems in category I, which includes England and Wales, provide very limited rights for those in relationships (sometimes of very long duration indeed) and regularly result in scope for real unfairness and

injustice in many cases. Often one party is left in an economically much weaker position than the other, perhaps homeless and without an income, despite substantial wealth having been acquired during the relationship, albeit in the name of only one party.

b. The application of a 'community of property' regime to cohabitees, as in category II, would be difficult in England and Wales given than this is a concept which, although familiar within many Civil Codes of law, is not a concept generally applied in English law. Married couples enjoy a separate property regime in England, although subject to the discretionary powers of the court to divide property between them on divorce. It would be strange if community of property were to be applied to unmarried couples if it is not applied as a matter of law to married couples. It seems to us that the application of such rules to cohabiting couples in England would also require consideration as to the application of the same rules to married couples.

c. It is difficult to see how English law could now develop a common law remedy within the scope of category III in view of the existing case law on the property rights of cohabiting couples and the general rejection of a concept of a legally recognised common law marriage in English law. Certainly the very slow and incremental rate of change in the common law will not help the present generation of cohabiting couples even if the law were to develop in this direction in the more distant future.

d. While there is considerable variation as to the application and scope of the systems within category IV, those which exist in Scotland and in Ireland are designed to alleviate injustice or to meet clear financial need upon the termination of a cohabiting relationship and provide a useful model for application in England and Wales (being largely in line with the English Law Commission's recommendations for the law in this area.

Appendix 1

State	Is there a statutory definition of cohabitation?	Are there special statutory or judge made provisions relating to property and financial claims between unmarried cohabiting couples.
Argentina		No
Australia	Yes	Broadly equivalent to married couples once relationship qualifies either because it has lasted 2 years, there is a child or there has been a substantial contribution and a failure to make an order would result in serious injustice.
Austria		No
Belgium		No, but if signed declaration of legal cohabitation properties of each legal cohabitant will be shared unless one of them can prove sole ownership
Bermuda		No - law similar to UK
Brazil		Unmarried couples are subject to partial community of property regime (unless agreed otherwise) so that all property acquired during relationship is shared equally even if acquired by only one of the parties.
Canada: Ontario		Property law applies but there is a concept of 'unjust enrichment' where there is a retention by one party of a disproportionate share of the assets during the course of a 'joint family venture' to which both parties

		have contributed.
Chile		Unmarried couples may enter into a Domestic Partnership Arrangement through which they can agree to common property regime to which the same rules on separation would apply as to breakdown of a marriage
China		If division of property not agreed the courts apply a discretionary regime for diving the property gained during the period of cohabitation.
Denmark		Compensation may be claimed on breakdown of relationship but this is difficult to achieve.
Dominican Republic		Community of property regime applies. Each partner is entitled to equal share of community property created during the relationship
Finland	Yes - based on 5 years of living together	Claim for compensation possible if one partner through contributions for the benefit of the shared household has assisted the other in accumulating or retaining property which would result in unjust enrichment if retained at the end of the relationship.

France	Yes	Separate property regime applies during cohabitation. Normal property law applies. In some cases a claim for financial compensation may be made but in very limited cases.
Germany		Only very limited rights to compensation where there has been a direct contribution to a particular project.
Gibraltar		Normal property law applies
Greece		Where cohabitation agreement signed and registered parties will be subject to property regime similar to that for married couples.
Hong Kong		Trusts and property law applies
Hungary		Separation of assets regime applies, but assets acquired during the cohabitation can be claimed in proportion to contributions made
India		No legislation for cohabitant rights but a relationship "in the nature of marriage" treated akin to common law marriage and leading to some scope for maintenance to be claimed upon the breakdown of a long relationship
Indonesia		No property or financial claims recognised
Ireland	Yes - 5 years of living together (or 2 if they have a child)	Statutory scheme providing scope for financial relief upon proof of financial dependency on the economically stronger party. Relief more limited than for married couples.

Israel		Common law marriage is recognised and various statuary rights applicable to married parties are extended to common law marriages.
Italy	Yes - two parties who are bound by a stable "link" of affection and reciprocal assistance, but who are not married or civil partners.	Cohabiting couples have some of the rights of married couples while the relationship subsists. However, unless they opt into a community of property regime by way of a notarised agreement separate property will apply.
Japan		No statutory provisions by case law has applied the same rules to unmarried couples as to married couples.
Jersey		Normal property law applies.
Luxembourg		No special provisions unless the parties agree to enter into a civil partnership
Malaysia		No special rules. Normal property law applies.
Mexico		Normal separate property rules apply.
Monaco		Since 2019 parties may enter into cohabitation agreement or living together contract which provide some limited social protections and social rights to partners.
Netherlands		Normal property law applies unless parties enter into cohabitation agreement providing for community of property.
New Zealand	Yes - 3 years together in a de facto relationship (or less if	Once the relationship qualifies claims to sharing can be made.

	a child) (which can include relationships where the parties do not live together)	
Nigeria		None
Norway		Starting point for division of property is to divide the assets according to that which each party has acquired and there is no mutual duty to pay maintenance.
Poland		No statutory rules but court apply unjust enrichment principles to compensate for the value of the enrichment of the other party. No maintenance obligations.
Russian Federation	No	No special recognition of cohabitation. Normal separate property rules apply.
Singapore		General property law applies
South Africa		No special legal relationship arising from cohabitation, but in some cases parties have been found to have formed a universal partnership pursuant to which they have shared ownership of assets acquired during the cohabiting relationship.
Spain		No reference to cohabitation in the Spanish constitution or Civil Code but some autonomous communities have some limited rights for cohabitants (but none extend to distribution of assets of unmarried couples)

Sweden		Cohabitation Act 2003 provided some protection for weaker party of couple living together in a household as part of a relationship. Claims are restricted to the home and household good acquired for common use. Parties can agree to opt of the Act.
Switzerland		No specific legislation for cohabitation but the rules of simple partnership are sometimes applied to cohabitants so as to recover what each provided and to share profits / losses.
Turkey		No special rules.
Ukraine		The Family Code provides that a man and woman live as a family but are not married to each other property acquired by them during the period of cohabitation is their joint property. Parties can agree to disapply the community of property regime.
United Arab Emirates		Living together outside marriage is a criminal offence (although there have been recent changes in the law to relax this).
US: California		No specific legislation but some causes of action under civil and contract law provide remedies adapted to apply to cohabitation (known as *Marvin* actions).

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