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'Living in Sin': A Reform Proposal for Financial Relief Following Cohabitation Breakdown

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Abstract

The number of adults choosing to cohabit has increased by over 67% since 1991. Despite such a dramatic shift in social norms, the law governing financial relief upon relationship breakdown remains inept to handle the significant increase in cohabitants. This article examines how the current system of family trusts constitutes an archaic and inadequate means of dividing cohabitants' assets. The law of trusts fails to reflect the subtleties of personal relationships, often resulting in financial injustice. The author goes on to consider the notion of common law marriage, highlighting how despite attempts by both the government and policy makers to dispel the concept it nevertheless remains prevalent throughout the United Kingdom. The core counterargument to extending financial relief is that it would undermine the institution of marriage and obscure the boundaries between cohabitant and spouse. This article critically examines this claim, adopting cross-jurisdictional analysis by considering the experiences of Scotland, Ireland and Australia where cohabitants have greater financial rights before concluding that the argument fails to stand up to scrutiny. The author ends by advancing a series of reforms designed to vindicate cohabitants, resulting in a fairer distribution of assets and bringing legal recognition to the United Kingdom's largest growing family unit.

Keywords: cohabitation, financial relief, family trusts, common law marriage.

A Introduction

Cohabitation, defined for the purposes of this article as an unmarried couple sharing a property, has increased by 67% since 1991;[1] forecasts conservatively estimate that by 2030 25% of adults will be cohabiting.[2] Despite this, approximately 3.8 million[3] people currently cohabit with virtually no legal protection following relationship breakdown. The forthcoming analysis will critically evaluate the extent of the problem, posing options for reform. It will be structured into three sections: section (1) reviews the current law demonstrating how it provides

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1 Law Commission, *Cohabitation: The Consequences of Relationship Breakdown* (No. 307), 2007, 1.8.

2 *Ibid*., 1.10.

3 Cardiff & Bristol University, *A Failure of Trust: Property Disputes on Cohabitation Breakdown* (No. 1), 2007, p. 135.

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inadequate protection leaving cohabitants legally and economically vulnerable; section (2) addresses the counterarguments against financial relief and section (3) concludes with a series of reforms. The paper draws on, *inter alia*, comparative jurisdictional analysis, quantitative and qualitative research, reports, surveys and academic commentary in advancing a justifiable argument for change. By balancing competing policy interests, the author advocates for a cumulative package of reforms, utilizing legislation, public awareness campaigns and options for self-regulation – ultimately bringing legal recognition to one of the most underrepresented family forms in the United Kingdom.

I Problems with the Current Law

Society has come a long way since the words of Asquith LJ that those who "masquerade by living together as husband and wife are living in sin".[4] The social norms of England and Wales now reflect a far more diverse range of relationships with the Nuffield Foundation commenting that "cohabitation has moved from a minority to a dominant family-form".[5] The law's response to problems arising on relationship breakdown has therefore become a pivotal issue for family law and policy.

1 Family Trusts

Claims for financial relief following cohabitation breakdown are governed by the law of trusts, specifically trusts of the family home. However, this has proven highly problematic as the law is underpinned by property principles which map poorly onto the complexities of personal relationships; as the Law Commission noted "the rules were not designed for family circumstances, giving rise to unjust outcomes".[6]

To advance a claim, one must first establish a common intention to share the proprietary interest; if an intention is found, the court will then quantify what share each partner holds. Although the court in *Stack v. Dowden*[7] introduced a "family-centric framework for disputes over property",[8] the ruling only affects the quantification stage – it is still necessary to first demonstrate a common intention to share.

In establishing common intention, the courts look at the parties' intent at the time they decided to cohabit. However, people do not – even when buying a home – talk about joint shares or proprietary interests. As Douglas notes, "the law assumes a degree of legal knowledge and rationality which is in fact lacking at that crucial time".[9] Conveyancers, surveyed in a qualitative study of injustices suffered by cohabitants, expressed how "purchasers showed little interest in the significance of joint or sole ownership, they were more occupied with completing the

4 *Gammans v. Ekins* [1950] 2 KB 328, p. 330.
5 Nuffield Foundation, *Legal Perspectives on Cohabitation* (October 2010), p. 6.
6 Law Commission 2007, 2.60.
7 [2007] 2 AC 432.
8 A. Hayward, 'The Familialisation of Property Law', *Child and Family Law Quarterly*, Vol. 284, 2012, p. 292.
9 G. Douglas, 'Cohabitants: A Study of Injustice', *Modern Law Review*, Vol. 24, 2009, p. 36.

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purchase and other practical details".[10] Such is the reality that the Supreme Court of Canada described the concept of common intention as "highly artificial".[11] Couples, even with the advice of solicitors and conveyancers, do not bring a critical eye to bare on the division of legal interests. Baroness Deech explains "when I taught students at Oxford about property I used to warn them to conduct their relationships in silence"[12] offering a stark illustration of how trust principles fail to reflect the reality of family ownership. Ultimately, where a home is in only one partner's name the other will have no legal remedy despite significant contributions to the relationship.

Furthermore, the law's complexity leads to substantial problems in practice. A qualitative study interviewing 61 legal practitioners found that many solicitors feel uncomfortable advising clients:

> It's so complex and academic – very difficult to apply the principles to your situation. I think its an area you probably can't dabble in, you need to specialise.[13]

The main problem appears to be a lack of evidence regarding how couples intended to own the property; practitioners found it almost impossible to advise clients as they were going to trial on oral evidence alone. This led to barristers being instructed more frequently and at an earlier stage, increasing costs. A study examining 58 cohabitant cases found that the average cost was £10,500 with the largest being £23,000, cases took on average 14.5 months to conclude; however, six of the cases were still continuing after 33 months when the study ended.[14]

The current framework is without doubt unacceptable. Cohabitation has become a substantial family form with millions of citizens cohabiting. It is astonishing that the financial consequences of relationship breakdown for this group are governed by archaic trust principles which fail to reflect the subtleties of personal relationships. It has been evidenced above how parties do not conduct their affairs in a manner consonant with a common intention to own legal shares in property; and even when assisted by professionals give little or no thought to whether property should be owned in joint or sole title. The law proves so complex that solicitors feel uncomfortable advising clients to the extent that barristers are regularly drafted before trial. The reality that 25% of the adult population must instruct counsel to ascertain their basic rights on relationship breakdown is a bewildering state of affairs; the law fails to serve society when lawyers struggle to understand it.

While this paper, in section 3, calls for an end to cohabitation being governed by trusts – it nevertheless proves useful to reform conveyancing practices: requiring couples to critically consider how they wish to share the property, being

10 *Ibid.*, p. 39.
11 *Kerr v. Barranow* [2011] SCC 10.
12 R. Deech, 'Cohabitation', *Family Law*, Vol. 39, 2010, p. 45.
13 Douglas 2009, p. 42.
14 Cardiff & Bristol University 2007, p. 135.

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made aware of the legal consequences for joint and sole ownership. Such reform would buttress any system of financial relief as it would provide a clear indication as to how cohabitants wish to share their home.

2 *The Myth of Common Law Marriage*

A key reason why cohabitants are such a vulnerable group, legally speaking, is due to the prevalent myth of common law marriage; the notion that a couple living together as if man and wife will be treated by the law as if married. The Ministry of Justice has stated how "the increase in cohabitation has not been mirrored by an awareness of the legal implications".[15] The Nuffield foundation carried out a quantitative study exploring public awareness of cohabitation; they surveyed a sample of 3,197 people, 56%[16] of whom believed in common law marriage. Such a large focus group, containing people of different ages, ethnicities and educations, allows one to draw representative conclusions regarding the wider population. Indeed, a follow-up study analysing the results showed how "the belief in common-law marriage was common across *all* ages, social classes and educational levels, and for single, unmarried and married spouses alike".[17]

Stuart Bridge, previously Law Commissioner, expressed concerns that the public are "dangerously naive about the legal consequences of cohabitation and that there is a strong case for a public awareness campaign".[18] Thus, the Department of Constitutional Affairs implemented the Living Together Campaign to educate the public and dispel the myth of common law marriage. However, 11 years on and the myth is still prevalent. Rebecca Probert conducted research into the use of common law marriage in the media; she found that despite the government's efforts "the number of articles rebutting the myth are considerably outnumbered by those referring to common-law marriage without qualification".[19] Her research found, between 1985 and 2006, 250 references in *The Times* and 243 references in *The Daily Telegraph*. Equally, there were 102 references in *The Sun* with one columnist stating:

> You're his common-law wife – if you feel strongly you should talk to your lawyer about what rights you have, I feel you will be surprised by how many rights you do actually have![20]

It is salient to note that although there are many articles rebutting the myth of common law marriage, these are almost exclusively in the legal sections of newspapers which fail to attract the same readership.

15 Ministry of Justice, *An investigation of Legally Aware Cohabitants*, 2007, p. 11.
16 S. Duncan, 'Cohabitation: Why Don't They Marry?' *Child and Family Law Quarterly*, Vol. 17, No. 3, 2005, p. 383.
17 *Ibid*., p. 388.
18 S. Bridge, 'The Property Rights of Cohabitants – Where Do We Go from Here?', *Family Law*, Vol. 743, 2002, p. 747.
19 R. Probert, 'Why Couples Still Believe in Common-Law Marriage', *Family Law*, Vol. 37, 2007, p. 403.
20 *Ibid*., p. 405.

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However, it is not sufficient to blame the lack of legal awareness solely on journalists – we must also examine how effective the government's Living Together Campaign has been. Barlow, Burgoyne and Smithson conducted a study into the impact of the campaign three years after its enactment. They performed quantitative research, surveying 202 respondents, to gather a broadly representative view and followed up with 30 face-to-face interviews allowing for in-depth qualitative analysis. Ninety percent of respondents felt that they had become "more informed about their rights" with 41% feeling "very well informed".[21] However, the salient point is that by the end of the study 87% had *not* taken legal action despite learning they had, in practice, no rights except for claims under trusts of the family home, which, as noted above, are heavily dependent on joint ownership of property.[22]

A further problem persists, not highlighted by the research: there have been numerous large-scale reform efforts regarding cohabitation. Indeed, the Cohabitation Rights Bill 2015 is currently at the Committee Stage.[23] However, if the media reports on such efforts, their reports may be absorbed by the general public believing that reform is underway and thus thinking that cohabitants do, or will very soon, have legal protection when the reality is that all reform has thus far fallen on "deaf legislative ears".[24]

To conclude, the author believes that cohabitants are dangerously unaware of their legal position which is made all the worse when one considers the lack of remedies available. It is clear that the government's Living Together Campaign has not gone far enough – greater efforts must be made to utilize mainstream media, such as celebrity endorsed campaign videos, TV documentaries and papers using celebrity cohabitants' separation as a spring board on which to educate the public. One government website, lost in a sea of tabloid journalism, will never be effective in achieving public awareness; the means must be relative to the aims.

II Counterarguments to Offering Financial Relief

1 Cohabitation Undermines the Institution of Marriage

There are those who believe that extending financial relief to cohabitants will result in fewer marriages, undermining the institution.[25] However, this paper suggests that the law should focus on the function of relationships, favouring stability and commitment, rather than conceding to legal formalism. If it can be shown that offering cohabitants financial relief does not result in fewer marriages then one of the strongest counterarguments, which has proven a repeated barrier to reform, will be removed.

Marriage is more than merely a gateway to access financial relief; many would no doubt claim that financial remedies on separation are at best peripheral to

21 A. Barlow, 'The Living Together Campaign – Impact on Cohabitants', *Family Law*, Vol. 166, 2007, p. 187.

22 *Ibid*., p. 189.

23 House of Lords Debate, 12 December 2014, Column 2069.

24 J. Smithson, 'The Rocky Road to Reform', *Child and Family Law Quarterly*, Vol. 328, 2010, p. 332.

25 Deech 2010, p. 45.

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marriage. Quantitative studies indicate that the law is "low down on the list of reasons why people marry"[26] – almost all respondents found it "difficult to think of marriage as primarily a legal contract…they married for emotional or ideological reasons".[27] The research is strengthened when situated alongside the experiences of Australia where cohabitants have had financial relief since the 1980s. The Law Commission carried out studies to examine whether there was a correlation between the rise in cohabitants rights and the decrease in people marrying, concluding that there was "no statistical evidence of a relationship between falling marriage rates and the introduction of remedies for cohabitants".[28]

In order to provide a reasoned and defensible argument, the paper will now look at the reverse; a society in which marriage has been protected via regulation. In Ireland pro-marriage policy forms, a key tenet of family law with restrictive divorce laws, celebration of the union between man and wife and no legal acknowledgement of cohabiting relationships. Despite this, Ireland has experienced a four-fold[29] increase in unmarried heterosexual cohabitation, suggesting that the law, regardless of whether pro-marriage or cohabitation, has a negligible impact upon the *de facto* practices of citizens – further weakening the counterargument to reform.

The current government believes that "strong and stable families are the bedrock of a strong and stable society";[30] however, this is not reflected in the law. Currently, those who have solidified their relationship by way of marriage are given legal protection while cohabiting relationships that function in much the same way are denied financial relief. A journalist for *The Sunday Times* stated that "cohabitation is fundamentally adolescent – it's not what grown-ups do";[31] however, a quantitative study found that 71% of respondents disagreed that married couples should be treated as a "special family unit".[32] In follow-up interviews, the general consensus was that the "lack of a formal union demanded greater commitment on the part of couples and more attention to their relationship".[33] Equally, research carried out by the Institute of Fiscal Studies found that there is no benefit for young children in parents marrying as opposed to cohabiting, provided the relationship is stable.[34]

Based on the research cited above, it can be shown, by studying the experiences of Ireland and Australia, that neither giving legal rights to cohabitants nor fortifying the institution of marriage impacts upon the declining rate of marriage or the increasing rate of cohabitation. Therefore, extending financial relief to cohabitants poses no threat to the institution of marriage. Indeed, the author goes further suggesting that many cohabiting relationships possess the same core

26 Law Commission 2007, 2.27.
27 Ministry of Justice 2007, p. 32.
28 Law Commission 2007, 2.43.
29 Smithson 2010, p. 338.
30 Cabinet Office, *The Coalition: Our Programme for Government* (September, 2010).
31 I. Knight, 'Give Marriage an Expiry Date', *Sunday Times* (7 October, 2007).
32 Ministry of Justice 2007, p. 22.
33 *Ibid*., p. 56.
34 IFS, *Cohabitation, Marriage and Child Outcomes* (C114, 2010).

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features which warrant promoting marriage as beneficial to society. The law needs to recognize, and respond to, the increasing diversity of living arrangements in the United Kingdom – accepting that cohabitation is not an inferior family form but is instead worthy of legal recognition.

III Reform Proposals

In order to fully engage with the reform debate, the following will be structured into four parts, chiefly: (1) who should qualify for financial relief? (2) the appropriate time bar for bringing claims; (3) the principles underpinning relief and (4) remedies.

1 Who Should Qualify for Financial Relief?

Cohabitation covers a broad range of relationships exhibiting different levels of commitment and interdependence. In determining who should qualify for financial relief, the paper will look at past reform efforts and alternative jurisdictions in formulating a policy designed to adequately address the current lacuna of legal rights.

Firstly, one must consider whether a presumptive scheme, covering all cohabitants who meet certain criteria, or an opt-in scheme, requiring cohabitants to form legal relations, is more appropriate. A current problem is the lack of legal awareness following relationship breakdown; furthermore, a study showed how 87% of those who are aware took no legal action,[35] suggesting that an opt-in scheme is unlikely to provide a sufficient remedy to the majority of cohabiting couples. The author therefore recommends a presumptive scheme available to all 'eligible' cohabitants on relationship breakdown; the scheme would have an opt-out clause allowing couples to negotiate their legal affairs independently. However, it would operate analogously to pre-nuptial agreements in that only contracts not resulting in 'manifestly unfair' outcomes are enforceable.[36]

How long must couples cohabit to be eligible? The Law Commission recognized that this is a politically sensitive question and thus suggested two to five years – with the actual period being set by the legislature.[37] Lord Lester's Private Member's Bill similarly set the eligibility at two years.[38] Interestingly however, Scotland – which gave cohabitants financial relief in 2006 – has no minimum period; any couple who have lived in the same household may apply to access the scheme.[39] This is a unique approach and one which has attracted criticism from commentators and law reform bodies throughout England suggesting it would lead to a "flood of cases".[40] The Scottish government predicted 2,000 cases a year, however, studies analysing the first three years of the Act found less than 1,000 instances; this is significant when one appreciates that the study in question was counting *all* legal activity – not just court cases – *i.e.* meetings with solicitors

35 Barlow 2007, p. 187.
36 *Radmacher v. Granatino* [2010] UKSC 42.
37 Law Commission 2007, 3.42.
38 Cohabitation Bill 2008, s2.
39 Scotland Act 2006, s5.
40 J. Miles, 'Research North of the Border', *Child and Family Law Quarterly*, Vol. 302, 2011, p. 302.

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which went no further were also counted.[41] Of the cases which were taken to court, research found that cohabitants were "older and their relationships were of longer durations".[42] Such empirical evidence suggests that concerns that the scheme would be abused by short-term cohabitants are unfounded.

The author therefore suggests that in order to prevent arbitrary cut-off periods, causing injustice to those who fail to meet the threshold, a presumptive scheme should be established encompassing *all* cohabiting relationships of *all* durations in-line with the Scottish experience. Although this sounds radical, analysis of such a scheme shows that in practice it works; the courts do not receive countless applications simply because the number of people protected is greater. It is better that the courts filter claims on an *ad hoc* basis, sensitive to circumstance, than for meritorious claims to go unheard.

2 *Time Bar*

How long should cohabitants have to bring claims? Too short a period and one risks claims not being brought due to hopes of reconciliation or failing to seek legal advice. However, too long and the law impedes cohabitants' ability to make financial decisions for fear that claims may be brought against them for remuneration.

The Law Commission recommended a period of two years,[43] whereas the Scotland Act allows claimants one year.[44] Qualitative research, interviewing Scottish practitioners, found that a one-year period "gives rise to undesirable consequences as applicants rush to commence proceedings protecting their position".[45] It impedes the use of alternative dispute resolution as negotiations may be going well but as the time limit approaches – claimants launch an action antagonizing negotiations and resulting in trial; this is counterintuitive to the trend in family law of favouring out-of-court settlements. Therefore, the author recommends a period of two years from cohabitation breakdown, with a provision allowing the court to extend the restriction in meritorious cases, decided in view of all the facts.

3 *The Principles Underpinning Relief*

The following will set out the different rationales underpinning each system of relief, assessing which most adequately addresses the problems experienced in England and Wales. Firstly, Lord Lester's Private Members Bill mirrors the provisions of the Matrimonial Causes Act governing divorce law – utilizing a discretionary scheme. The court when making orders should "have regard to all the circumstances" in attempting to reach a "just and equitable outcome";[46] noting that orders should facilitate couples becoming self-sufficient and not exceed their rea-

41 *Ibid*., p. 305.
42 *Ibid*., p. 307.
43 Law Commission 2007, 4.24.
44 Scotland Act 2006 s25.
45 Miles 2011, p. 311.
46 PMB, s6.

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sonable need.[47] The Bill arguably creates excessive scope to litigate over what is "just and equitable" leading Baroness Deech to argue that it poses a "bonanza for lawyers".[48]

In contrast, the Law Commission's reform proposals suggest a system based on "retained benefit" and "economic disadvantage";[49] chiefly trying to share any gains and losses made as a result of cohabitation – resulting in a state of economic equilibrium. The scheme is more precise than Lord Lester's Bill as it sets out a list, albeit non-exhaustive, of "qualifying contributions",[50] which might trigger an order *vis-à-vis* equalizing the parties' positions.

The Scotland Act, in contrast to both of the above, works on the basis that each partner leaves with what they 'legally own' and that any subsequent disadvantage is shared.[51] However, the author suggests that this approach focuses too heavily on material possessions and fails to take account of contributions to the family, such as loss of earnings or remortgaging a house – neither of which would be covered under the scheme. Equally, the Act does not expand on what qualifies as disadvantage; leaving judges to develop the law as they see fit. The author believes that if legislation were to be enacted in England and Wales it would require a far clearer policy rationale, accompanied by legislative guidance notes.

Both Lord Lester's highly discretionary scheme and Scotland's ownership-orientated approach are unsuited to tackle the problems facing cohabitants. The law should recognize that individuals are able to prosper *independently of their partner* and thus orders should only concern factors which have arisen *as a result of cohabitation*. The author is keen to emphasize that welfare contributions, such as child care, should be seen as equal to financial contributions in order to ensure a 'yardstick of equality'. This paper therefore proposes a scheme based on the principle of returning parties to the financial position they were in directly prior to cohabitation, ensuring, pursuant to the Law Commission's recommendations, that any retained benefit or loss *as a result of cohabitation* is shared equally.

4 *Remedies*

Rather than offering specific remedies, Lord Lester's Bill attempts to achieve a 'just and equitable outcome'. While this allows for catering to the circumstances of each case, it gives judges broad discretionary powers – offering counsel little insight when advising clients – resulting in legal uncertainty.

However, of the schemes reviewed, Scotland arguably has the most inadequate remedy offering only lump-sum payments. Practitioners have commented that it "seriously undermines the ability to achieve economically sound results"[52] with assets such as businesses and homes having to be sold to meet payments. This raises a practical concern: when such assets are sold, profits first go to credi-

47 *Ibid*., s9.
48 Deech 2010, p. 47.
49 Law Commission 2007, 4.28.
50 *Ibid*., 4.30.
51 Scotland Act 2006, s27.
52 Miles 2011, p. 318.

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tors, mortgagees and banks – severely depleting the individual's financial resources after the order.

The author therefore recommends a compromise between the two extremes cited above. If a *broad array* of *predetermined orders* were available, it would allow the judiciary to cater the order to the factual matrices of each case while allowing lawyers scope to target their submissions at specific remedies, advising clients accordingly. Thus lump-sum orders payable by instalments, property transfer (either wholly or in part), orders for sale and trust reallocation should all be available to the court, as is the case in divorce law.

B Conclusion

The author aimed to highlight how the law of trusts is wholly inadequate to cater to the realities of 21st century cohabitation. Couples do not articulate their intent in a manner consonant with proprietary interests, thus conveyancing practices need reforming so as to stress the legal consequences of joint and sole ownerships on separation. Equally, the public are dangerously uninformed of their lack of legal rights – creating a need for multimedia awareness campaigns utilizing documentaries and celebrity cohabitation to rectify the problem. It was further shown how the main counterargument, that to give cohabitants rights would undermine marriage, was not borne out on the evidence thereby mitigating one of the main impediments to reform.

A new scheme was proposed in which *all cohabitants* are eligible to bring claims ensuring that arbitrary criteria do not result in meritorious cases going unheard. The principles underpinning financial relief need to be clearly articulated so as to give the law coherency; this paper suggests a system where only benefit and loss accrued *as a result of cohabitation* can be taken into account, ultimately attempting to restore couples to their financial position prior to cohabiting. The paper advocates for a broad array of remedies, noting that they must be clearly promulgated – enabling lawyers to advise clients with greater precision. Such a cumulative package of reforms covering conveyancing, public education and top-down legislative efforts will bring legal vindication to what is without doubt one of the most underrepresented family forms of our age.

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