
CONSULTATION PAPER

ON THE

RIGHTS AND DUTIES OF COHABITEES

(LRC CP 32-2004)

IRELAND

The Law Reform Commission
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THE LAW REFORM COMMISSION

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The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the 1975 Act.

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INTRODUCTION

1. This Consultation Paper examines the rights and duties of cohabitees. This project was undertaken pursuant to the Second Programme of Law Reform approved by the Government on 19th December 2000.

2. According to the 2002 Census there were 77,600 family units consisting of cohabiting couples in 2002, an increase of 46,300 from six years earlier. The 2002 Census also shows that the number of same-sex cohabiting couples increased from around 150 in 1996 to almost 1,300 in 2002. Not surprisingly, the increasing prevalence of extra-marital cohabitation in Ireland has led to calls to amend existing laws to recognise and regulate extra-marital cohabitation.

3. In Chapter 1 the Commission proposes a presumptive scheme, which would impose certain legal rights and duties on cohabitees who satisfy certain criteria. Such cohabitees are described as 'qualified cohabitees'. The Commission defines 'qualified cohabitees' as persons who, although they are not married to one another, live together in a 'marriage like' relationship for a continuous period of three years or where there is a child of the relationship for two years. The Commission acknowledges that 'marriage like' relationships exist between same-sex couples as well as opposite-sex couples. The Commission is of the view that other forms of domestic relationship such as that which exists between friends or family members who cohabit should be excluded from the definition. In addition, in order to qualify, a cohabitee must not be a party to an existing marriage. This exclusion is necessitated by Article 41 of the Constitution. In determining whether the parties have been living together in a 'marriage like' relationship, it is proposed that the court will consider a wide range of factors. In addition, the Commission is of the view that cohabitees should be entitled to regulate their financial and property affairs by means of co-ownership agreements.

4. In Chapter 2 the Commission examines the growth of extra-marital cohabitation in Ireland and considers the policy arguments in favour of and against recognising extra-marital cohabitation.

5. In Chapter 3 the Commission examines the property rights of cohabittees. It proposes that in exceptional circumstances qualified cohabittees should be entitled to apply for property adjustment orders on the break up of the relationship.

6. In Chapter 4 the Commission examines succession rights and proposes that qualified cohabittees be given the right to apply for relief where they feel that proper provision has not been made for them in the will of the deceased or under the intestacy rules.

7. In Chapter 5 the Commission considers the issue of maintenance rights and in Chapter 6 the Commission examines the position of cohabittees in the social welfare system and recommends that same-sex cohabittees should be treated as ‘cohabiting’ for the purposes of the cohabitation rule. In Chapter 7 the position of cohabittees under pension law is considered and in Chapter 8 the Commission considers the position of cohabittees under taxation law. Chapter 9 examines health care and other miscellaneous issues and Chapter 10 considers the domestic violence legislation. Chapter 11 contains a summary of the Commission’s recommendations.

8. The Commission usually publishes in two stages: first, a Consultation Paper and then a Report. This Consultation Paper is intended to form the basis for discussion and accordingly the recommendations, conclusions and suggestions contained herein are provisional. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation, including a colloquium, which we hope will be attended by a number of interested and expert people (details of the venue and date of which will be announced later). Submissions on the provisional recommendations included in this Consultation Paper are also welcome. The Report also gives us an opportunity, which is especially welcome with the present subject, not only for further thoughts on areas covered in the Paper, but also to treat topics which are not yet covered. In order that the Commission’s Report may be made available as soon as possible, those who wish to make their submissions are requested to do so in writing or by e-mail to the Commission by **30 September 2004**.

CHAPTER 1 LEGAL RECOGNITION OF COHABITEES

A Introduction

1.01 The Commission defines ‘cohabitees’ as persons who, although they are not married,¹ live together in a ‘marriage like’ relationship. The Commission acknowledges that ‘marriage like’ relationships exist between same-sex couples as well as opposite-sex couples. Therefore, for the purposes of the discussion in this Paper, same-sex couples are included within the definition of cohabitees.

1.02 The approach to the legal recognition of cohabitees, which has been taken in other jurisdictions, may be divided into three broad categories, namely, the registration approach, the presumptive approach and the contractual approach. The registration approach may be described as a formal, opt-in scheme of legal regulation. Cohabitees can only avail of the rights, duties and obligations conferred by such a scheme if they have registered their relationship.² Under the presumptive approach, it is not necessary to register the relationship.³ Cohabitees become entitled to the rights conferred by

¹ Either to each other or to a third party.

² A system of registration is available in Denmark, Norway, Sweden, Iceland, Greenland, the Netherlands, Belgium, Germany, France, the United States (Vermont, District of Columbia), Spain (the regions of Navarre, Catalonia, Aragon, Madrid, the Balearic Islands and Asturias), Switzerland (the canton of Geneva). On 30 March 2004, drawing on its Consultation Paper on Civil Partnerships, the British Government introduced a Civil Partnership Bill to enable same-sex couples to obtain legal recognition of their relationship. For further information on same sex legislation and the concept of registered partnership see the discussion in the Report of the Equality Authority *Implementing Equality for Lesbians, Gays and Bisexuals* (2002), Mee & Ronayne *Partnership Rights of Same Sex Couples* (Equality Authority 2001 and the International Gay and Lesbian Resource Centre at www.iglhrc.org). The Commission also notes that Senator David Norris is currently proposing the adoption of a scheme of registration in Ireland. See Irish Independent 29 March 2004.

³ The term “presumptive” is used because once the necessary facts are established the parties are presumed to be cohabiting.

such a scheme once they establish that they have been living together in circumstances resembling marriage for the requisite period.⁴ The contractual approach permits the parties to regulate their relationships by means of contract, which is governed by the law of contract and enforced in the courts.

1.03 This Paper does not deal with the issue of registration. The Commission is of the view that the question of registration involves major policy considerations, a detailed discussion of which would require a Paper of its own.⁵ Instead, this Consultation Paper proposes a presumptive scheme. This would impose certain legal rights and duties on cohabitees who satisfy certain criteria in a wide range of areas including property, succession, maintenance, social welfare, taxation, pensions and health care.⁶ Such cohabitees are described as ‘qualified cohabitees’. In addition, under the scheme proposed in this Paper, cohabitees would be free to regulate their property and financial affairs by means of co-ownership agreements.

1.04 *The Commission proposes a presumptive scheme, which would impose certain legal rights and duties on cohabitees who live together in a ‘marriage like’ relationship for a continuous period of three years or two years where there is a child of the relationship. Such cohabitees are described as ‘qualified cohabitees’. The Commission would welcome submissions as to the length of time necessary to give rise to qualified cohabitation.*

⁴ Presumptive schemes are in operation in Austria, Australia, Canada, France, Hungary, the Netherlands, Portugal, Spain, Sweden, the United Kingdom and the United States. A presumptive scheme operates in Ireland under the social welfare code whereby cohabitation operates as a bar to certain payments such as the one-parent family payment. See Department of Social, Community and Family Affairs, *Review of the One-Parent Family Payment* (September 2000) Chapter 9.

⁵ The Commission notes the recommendations contained in the Report of the Equality Authority *Implementing Equality for Lesbians, Gays and Bisexuals* (2002) which discussed the issue of partnership rights for same-sex couples. See also Mee & Ronayne *Partnership Rights of Same Sex Couples* (Equality Authority 2001). The Commission also notes that Senator David Norris is currently proposing the adoption of a scheme of registration in Ireland. See Irish Independent 29 March 2004.

⁶ These are among the topics discussed in the Report of the Equality Authority *Implementing Equality for Lesbians, Gays and Bisexuals* (2002) at 29.

B The Present Law

1.05 At present, cohabittees are treated less favourably than spouses in a wide range of areas. For example, cohabittees do not have the same property rights as spouses. In particular, the courts have no jurisdiction to make a property adjustment order in favour of a cohabitee on the termination of the relationship and cohabittees do not enjoy the protection of the *Family Home Protection Act 1976*. In addition, cohabittees do not have the same succession rights as spouses and they have no right to claim maintenance during or after the relationship. Similarly, cohabittees are unable to claim certain tax and social welfare benefits, which are available to spouses. Furthermore, State pensions and many older commercial pensions do not make provision for cohabittees. Cohabitees have no right to succeed to tenancies and cohabittees have no right to make decisions concerning the health of their partner, no matter how long they have lived together. In the few areas, where the law does recognise cohabittees, it generally recognises only heterosexual cohabitation. An example of this is section 47(1)(c) of the *Civil Liability Act 1961*, as amended, under which same-sex cohabittees are denied the possibility of claiming an action for wrongful death.⁷ Similarly, the ‘cohabitation rule’ in social welfare law whereby unmarried cohabittees are treated as if they were married for the purposes of determining their entitlement to welfare, recognises only heterosexual cohabitation.

1.06 This Consultation Paper will examine each of these areas of discrimination separately. In each case, it will consider whether the *status quo* is justified and if it concludes that it is not, it will try to determine to what extent cohabittees should be subject to the rights, duties and obligations that accrue to married couples.

C Domestic Relationships

1.07 As indicated above, the Commission defines ‘cohabittees’ as persons who, although they are not married to one another, live together in a ‘marriage like’ relationship.⁸ As such, this Paper is not concerned with the rights and duties of persons who live together in

⁷ See Chapter 9E.

⁸ Paragraph 1.01.

non-sexual ‘domestic’ relationships. The Commission is not concerned with such relationships because, in our view, it is not possible to devise a single scheme for the determination of legal rights and duties which can operate fairly and evenly across a spectrum of relationships ranging from on the one hand ‘marriage like’ relationships to familial or platonic relationships on the other.

1.08 The Commission is strengthened in this view by the conclusions reached by the Law Commission for England and Wales in its recent Discussion Paper *Sharing Homes*.⁹ In *Sharing Homes*, the Law Commission considered reforming the common intention constructive trust with a view to conferring rights on home sharers, whose contributions were not recognised. However, the Law Commission concluded that it was impossible to devise a statutory scheme for the determination of shares in the shared home, which could operate fairly across all the diverse circumstances, which are now encountered.¹⁰ It has been suggested that the main problem with the Discussion Paper was its failure to identify who should benefit under the scheme.¹¹ Paradoxically, in attempting to cover the interests of all home sharers the Discussion Paper ended up helping none. As a result, the Commission is of the view that if it is to learn anything from *Sharing Homes*, it is that the scheme proposed should not be too ambitious in its objectives.

1.09 In addition, the Commission is of the view that a discussion of the rights and duties of those in a domestic relationship would involve very different policy considerations from a discussion of ‘marriage like’ cohabitation, and therefore should be considered separately. Finally, the Commission is of the opinion, that since many of the rights and duties sought by cohabittees mirror those which arise on marriage and since many of the problems faced by cohabittees arise on the break up of ‘marriage like’ relationships, it makes sense to limit the scheme proposed by this Paper to such relationships.

⁹ Law Commission, *Sharing Homes: A Discussion Paper* (July 2002).

¹⁰ Law Commission, *Sharing Homes: A Discussion Paper* (July 2002) paragraph 15.

¹¹ Fox “Reforming Family Property: Comparisons, Compromises and Common Dimensions” Paper given to the Law Reform Commission, December 2002.

1.10 *The Commission is of the view that the parties to a domestic relationship should not be regarded as cohabittees for the purposes of this Paper.*

D The Constitution, the Family and Cohabitees

1.11 This Part will consider the impact of Article 41 of the Constitution. It will examine three issues. First, whether Article 41 of the Constitution prohibits the legislative recognition of extra-marital cohabitation. Secondly, if Article 41 does not prohibit the legislative recognition of extra-marital cohabitation *per se*, whether the Constitution imposes any limitation on who can become a ‘qualified cohabitee’? Finally, the impact of the equality guarantee in Article 40.1 will be considered.

(1) *Does the Constitutional Protection of the Family Based on Marriage preclude the Recognition of Extra-Marital Cohabitation?*

1.12 Article 41 is the main constitutional provision dealing with the family. In *State (Nicolaou) v An Bord Uchtála*,¹² Walsh J in the Supreme Court stated that it was quite clear “that the family referred to in [Article 41] is the family which is founded on the institution of marriage.” In addition, Article 41.3.1° requires the State “to guard with special care the institution of marriage, on which the Family is founded, and to protect it against attack.” The effect of this is that neither a non-marital family nor its members are entitled to any of the protections contained in Article 41.

1.13 The Constitution Review Group made a number of recommendations regarding Article 41 in its 1996 Report.¹³ The Review Group was of the view that the concept of the family in Irish society had undergone a significant change since 1937.¹⁴ The Review Group recommended that Article 41 should be amended to take this change in societal attitudes into account.¹⁵ In relation to non-marital relationships, it recommended that although the State’s obligation to protect marriage should be retained, the revised Article 41 should

¹² [1966] IR 567.

¹³ *Report of the Constitution Review Group* (Government Publications 1996).

¹⁴ *Ibid* at 339.

¹⁵ *Ibid* at 323.

explicitly state that this should not prevent the Oireachtas from legislating for the benefit of non-marital relationships and the individual members thereof.¹⁶

1.14 As the Commission is not concerned with the issue of registration, we are of the view that a detailed discussion of the Constitution Review Group's proposals in relation to Article 41 is not necessary for the purposes of this Consultation Paper. This is because the Commission is of the view that the law as it stands allows the Oireachtas to legislate in respect of the non-marital family insofar as it does not place such relationships in a more favourable position than the marital family. The Commission has reached this conclusion having considered a number of cases in which married couples have challenged some legal or administrative arrangement on the basis that it gives an advantage to cohabitantes as compared with married couples.

1.15 The seminal case here is *Murphy v Attorney General*.¹⁷ In this case, the Supreme Court held that a married couple, each of whom was working, could not be taxed more severely, in terms of tax bands and tax allowances, than two single persons living together. Likewise, in *Hyland v Minister for Social Welfare*,¹⁸ the Supreme Court held that a married couple could not be paid less social welfare benefit or assistance than a cohabiting couple. In addition, in *Green v Minister for Agriculture*,¹⁹ Murphy J in the High Court struck down an administrative scheme providing compensation to persons farming in disadvantaged areas because the means test provided for the aggregation of the income of the married couple, but not of the cohabiting couple. In *MacMathuna v Ireland*,²⁰ the plaintiffs, a married couple, challenged the constitutionality of legislation which gave a tax-free allowance to single parents in respect of the child or children living with them, on the basis that it treated single people more favourably than married people. Carroll J in the High Court rejected this claim on the basis that "the position of a single parent is

¹⁶ *Ibid* at 336.

¹⁷ [1982] IR 241. For a detailed discussion of this case, see paragraphs 8.14 - 8.16.

¹⁸ [1989] IR 624. For a detailed discussion of this case, see paragraphs 6.11 - 6.18.

¹⁹ [1990] 2 IR 17.

²⁰ [1989] IR 504.

different to the position of two parents living together. The parent on his or her own has a more difficult task in bringing the children up single handedly because two parents living together can give each other mutual support and assistance.” However, Carroll J stressed that the legislation would have been unconstitutional if the allowance was payable while the woman was cohabiting.

1.16 It seems probable that this line of authority would not prevent the legislature increasing the rights of cohabitees to bring them on a par with those of a married couple, as it only appears to prevent married couples being treated less favourably than cohabiting couples are.

1.17 *The Commission is of the view that Article 41 does not prevent the Oireachtas legislating in respect of cohabitees, so long as the legislation does not grant cohabitees more extensive rights than those enjoyed by married couples.*

(2) Does the Constitution impose any Limitations on who can become a ‘Qualified Cohabitee’?

1.18 Although neither the 1996 nor the 2002 Census provided any statistics on the marital status of those cohabiting in non-marital relationships, anecdotal evidence gleaned by the Commission from its consultations with various individuals and bodies would seem to suggest that many cohabitees are married to third parties. The inevitable question, which springs to mind, is whether these individuals can be regarded as ‘qualified cohabitees’ for the purposes of this Consultation Paper? The Commission is of the view that they cannot. While the Commission is aware of the potential hardship this may cause it is of the view that this result is consistent with the provisions of the Constitution.

1.19 Article 41.3 of the Constitution provides that: “The State pledges itself to guard with special care the institution of marriage, on which the Family is founded, and to protect it against attack.” The Commission is of the view that if the State by its laws were to recognise and improve the position of a cohabitee who is already married to someone else, those laws would undermine the institution of marriage.

1.20 Two arguments may be made against this view. The first is that, by ‘qualifying cohabitation’ we mean a state of affairs, which has lasted for a number of years. Given the existence of such

cohabitation, it is idle to think that any co-existing, rival marriage could be more than an empty shell. In view of this, why is it wrong to assist unmarried persons who are genuinely committed to each other, and who may have been living together for many years, by giving them certain minimal rights?

1.21 In response to this, the Commission makes three points. In the first place, the focus of the Constitution is on marriage “as an institution”: in other words, the primary concern is the concept and status of marriage, rather than that of any particular marriage. Secondly, the Constitution seems to take the view that a person is either married or not married; in other words, there is no constitutional concept of the “limping marriage.” Furthermore, since the mid 1990s it has been open to any married cohabitee to obtain a divorce and then re-marry or acquire the status of cohabitation.

1.22 The second objection to limiting the concept of ‘qualifying cohabitee’ to the situation where neither party is married, is because it may often be the case that only one of the parties is, and remains married to someone else. Thus, it could be argued that the unmarried partner should be given recognition even though the married partner would not be so recognised. Although this appears at first sight a plausible argument, the Commission has concluded that this is not a viable solution. In the first place, to go back to the earlier argument, there is still an attack on marriage. Secondly, the legal relationship between the two cohabitees would be lopsided. A major element in the status of qualifying cohabitation proposed in this Paper is the rights of the parties as against each other. However, where one party is married and the other is not, all the rights would be on the one side, and all the duties on the other. The relationship under discussion here would give rights to one party only, on a basis (which, as far as the parties themselves were concerned would be entirely random), namely whether or not there was a pre-existing marriage.

1.23 Another question, which arises, is whether the period during which a person is married to another party (though the parties may be awaiting a divorce) should be counted in calculating the cohabitation period. A sequence of events can be assumed as follows: first, the earlier marriage breaks down; then there is a period of cohabitation with a new partner; next, a formal divorce, whilst cohabitation continues. The question is whether the earlier period of cohabitation should be counted towards the period necessary to establish a

qualifying cohabitation. The basis for resolving the question goes back to our earlier analysis of the significance of an earlier marriage.²¹ The Constitution does not recognise the concept of a “limping marriage”. Consequently, it would seem that it would be a violation of the State’s duty to “guard...the institution of Marriage” if one were to regard a period spent in a relationship during which period a cohabitee was married to a third party, as generating rights under the legally established status of ‘recognised cohabitee’

1.24 *The Commission is of the view that, in order to qualify for the scheme proposed by this Paper, a cohabitee must not be a party to an existing marriage.*

(3) The Constitution and Same-Sex Cohabitees

1.25 Article 40.1 of the Constitution provides that “All citizens shall, as human persons, be held equal before the law.” This prohibits the State from discriminating between citizens in ways that are unjust, unreasonable or arbitrary. In *De Búrca v Attorney General*,²² Walsh J summarised the effect of Article 40.1 as follows:

“[it] does not require identical treatment of all persons without recognition of differences in relevant circumstances but it forbids arbitrary discrimination. It imports the Aristotelian concept that justice demands that we treat equals equally and unequals unequally.”²³

1.26 In determining whether a particular piece of legislation falls foul of Article 40.1, the court will look first at the purpose of the legislation and second at whether it creates an unjust, unreasonable or arbitrary discrimination.²⁴ It has been suggested that this test has proven notoriously difficult to apply in practice and that the courts have shown great deference to the judgement of the Oireachtas in such cases.²⁵ For example, it was argued in *Murphy v Ireland*²⁶ that

²¹ See paragraph 1.19.

²² [1976] IR 38.

²³ At 68.

²⁴ See the judgment of Walsh J in *O’B v S* [1984] IR 316 at 335.

²⁵ Casey *Constitutional Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 2000) at 453.

²⁶ [1982] IR 241. See 8.14 - 8.16.

taxing a married couple more severely, in terms of tax bands and tax allowances, than two single persons living together, violated Article 40.1. The Supreme Court rejected this argument. The Court stated that an inequality would not be set aside as repugnant to the Constitution “if any state of facts exists which may reasonably justify it”.²⁷ The Court held that the State was entitled to treat married couples and cohabitants differently and that the particular inequality complained of, when viewed against the many favourable discriminations made by the law in favour of married couples, did not violate Article 40.1.

1.27 Despite the limits to Article 40.1,²⁸ the recent enactment of the *Employment Equality Act 1998* and the *Equal Status Act 2000* indicates that discrimination on the grounds of sexual orientation would be difficult to justify.

E Equality and the European Convention for the Protection of Human Rights and Fundamental Freedoms

1.28 The impact of the European Convention of Human Rights should also be considered. This is particularly relevant in light of the enactment of the *European Convention on Human Rights Act 2003*, section 2 of which provides that in interpreting, and applying any statutory provision or rule of law, a court shall, insofar as it is possible, do so in a manner compatible with the State’s obligations under the Convention. As a result of the 2003 Act, there are now two complementary systems in place in Ireland for the protection of rights, with the Constitution taking precedence.

1.29 The enactment of the 2003 Act will heighten awareness of the current situation, exemplified by *Norris v Ireland*²⁹ and *Keegan v Ireland*,³⁰ whereby the constitutionality of a statute may be upheld by the Irish courts, but then be struck down as incompatible with the

²⁷ At 284.

²⁸ See Casey *Constitutional Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 2000) at 456 for a discussion of the marked reluctance of the Irish Courts to decide cases on the basis of Article 40.1.

²⁹ (1991) 13 EHRR 186.

³⁰ (1994) 18 EHRR 342.

European Convention, thus leading to the enactment of a statute, which is drafted to be in conformity with both the Constitution and the Convention.

1.30 Article 14 of the European Convention on Human Rights provides that:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

1.31 It should be noted that the European Court of Human Rights has been very reticent about whether Article 14 precludes discrimination on the grounds of sexual orientation. In both *Dudgeon v UK*³¹ and in *Lustig-Prean & Beckett v United Kingdom and Smith & Grady v United Kingdom*,³² the court, having decided that the applicants’ private lives had been interfered with in breach of Article 8, because of the treatment of their homosexuality by the Government, declined to consider whether this was also discrimination under Article 14. Likewise, in *Norris v Ireland*,³³ statutory provisions, which criminalized homosexual activity, were held by the court to be inconsistent with Article 8 of the European Convention on Human Rights. In *Sutherland v UK*,³⁴ the Commission report found that the higher age of consent for gay men was a breach under Article 8 read in conjunction with Article 14.

1.32 In a recent decision of the English Court of Appeal, *Ghaidan v Mendoza*,³⁵ it was held that Article 14 of the Convention, which had been incorporated into UK law by the *Human Rights Act 1998*, prohibited discrimination based on sexual orientation. The particular question before the court was whether a surviving same-sex partner was entitled to succeed to a deceased partner’s statutory tenancy in English law. Section 2(1) of the *Rent Act 1977* provides

³¹ (1982) 4 EHRR 149.

³² (1999) 29 EHRR 493.

³³ (1991) 13 EHRR 186.

³⁴ (1997) 24 EHRR CD 22.

³⁵ [2002] 4 All ER 1162. This case has been appealed to the House of Lords.

that the surviving spouse of the original tenant, if residing in the premises after the death of the original tenant, is entitled to succeed to the statutory tenancy, so long as he or she occupies the dwelling house as his or her residence. Section 2(2) provides that a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant. The court held that, in order to render section 2(2) of the *Rent Act 1977* compatible with Article 14 of the European Convention on Human Rights, it had to be construed as including persons in a same-sex relationship.

1.33 If the Irish Courts were to adopt an approach similar to that of the Court of Appeal in *Ghaidan v Mendoza* there is a possibility that a statutory scheme, which granted certain opposite-sex cohabitants rights but excluded same-sex cohabitants from its ambit, could be found to be in breach of Article 14 of the Convention.

1.34 *The Commission takes the view that 'marriage like' relationships may be between persons of the same-sex or of the opposite-sex.*

F The Non-Marital Family and the ECHR

1.35 In a series of Irish Supreme Court decisions, it has been held that the mother and father of a child born outside of marriage and their children are not a family for the purposes of Article 41 of the Constitution.³⁶ It can be argued that this interpretation is out of line with the interpretation of the term “family” given by the European Court of Human Rights. Article 8 of the European Convention on Human Rights (ECHR) provides that:

“(1) Everyone has the right to respect for his private and family life, his home and correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or

³⁶ See *State (Nicolaou) v An Bord Uchtala* [1966] IR 567, *G v An Bord Uchtala* [1980] IR 32, *JK v VW* [1990] 2 IR 437 and *WO'R v EH & An Bord Uchtala* [1996] 2 IR 248.

crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

1.36 The contrast in approach between the Supreme Court and the European Court of Human Rights is highlighted by the decision of *Keegan v Ireland*.³⁷ This application to the European Court followed the Irish Supreme Court decision in *JK v VW*.³⁸ The Supreme Court held that the natural father of a child had no constitutional right to guardianship of the child. It was noted that section 6(A) of the *Guardianship of Infants Act 1964* gave a natural father the right to apply to be appointed a guardian, but did not give him the automatic guardianship accorded to a natural mother or a father married to the mother of the child. The natural father had in this case applied for guardianship and custody of the child, which had been placed by the natural mother with adopters when the child was six weeks old. The father’s application failed, as the High Court ruled that the child’s welfare required that she remain with the adopters, with whom she had been living for 15 months at the date of the hearing.³⁹

1.37 Following this ruling, the father took an application to the European Court of Human Rights, claiming that Irish adoption procedures were in violation of Articles 6 and 8 of the European Convention on Human Rights.⁴⁰ The European Court ruled that the concept of the family in Article 8 is not confined exclusively to

³⁷ (1994) 18 EHRR 342.

³⁸ [1990] 2 IR 437.

³⁹ In this case, the father and mother had lived together for two years, though the father had virtually no contact with the daughter prior to the application. This can be contrasted with a situation where a natural father, who has been living with the children in a stable relationship for some time, applies for guardianship. In *WO’R v EH and An Bord Uchtála* [1996] 2 IR 248 Hamilton CJ stated that “where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a de facto family as opposed to a constitutional family, then the natural father, on application to the court under Section 6A of the Guardianship of Infants Act 1964 has extensive rights of interest and concern. However, they are subordinate to the paramount concern of the Court which is the welfare of the children.”

⁴⁰ Article 6 of the Convention states that: “in the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....”

marriage-based relationships, and may encompass other *de facto* family ties, where the parties are living together outside of marriage.⁴¹ The court found that the relationship between the applicant and the mother in this case had all the hallmarks of family life for the purposes of Article 8, given that they had lived together for two years. The fact that the relationship had subsequently broken down did not alter this conclusion any more than if the couple were lawfully married and in a similar situation.

1.38 The court held unanimously that the Irish Government, having applied a narrow and restrictive definition of family life, was in contravention of Article 8. It held that:

“the fact that Irish law permitted the secret placement of the child for adoption without the applicant’s knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of an adoption order amounted to an interference with his right to respect for family life.”

1.39 The Government was unsuccessful in its argument that to allow the father to apply for guardianship or custody was a sufficient safeguard of his rights. The court was also of the opinion that there had been a violation of Article 6 in that the applicant had no *locus standi* in the proceedings before the Irish Adoption Board.⁴² The Government responded to the decision of the ECHR by enacting the *Adoption Act 1998*.

1.40 In *WO’R v EH*⁴³ a father sought access and guardianship rights in respect of his son. The father was not married to the child’s mother. One of the questions the Supreme Court was faced with was whether the concept of the *de facto* family as referred to by the European Court of Human Rights in the *Keegan* case was recognised under the Constitution. In reply to this Hamilton CJ held that the ECtHR decision in *Keegan* did not form part of the domestic law of

⁴¹ *Johnston v Ireland* (1986) 9 EHRR 203.

⁴² Under the *Adoption Act 1998*, which was introduced by the Government in response to the *Keegan* decision, the natural father now has statutory rights during the course of the adoption and pursuant to section 5 of the Act, he has a right to be heard by the Adoption Board prior to the making of any adoption order.

⁴³ [1996] 2 IR 248.

the State and that the concept of the *de facto* family was one unknown to the Constitution.⁴⁴ He did however note that the Supreme Court in the case of *JK v VW*⁴⁵ did recognise that the members of a *de facto* family might possess certain rights in the context of guardianship applications.

1.41 Finally, in *Norris v Attorney General*⁴⁶ the Supreme Court had found that sections 61 and 62 of the *Offences Against the Person Act 1861* and section 11 of the *Criminal Law Amendment Act 1881*, which criminalised acts of buggery and gross indecency between males did not infringe the plaintiff's right to privacy under the Constitution. After the European Court of Human Rights found these provisions to be in breach of Article 8 of the Convention, in *Norris v Ireland*,⁴⁷ the State ultimately enacted the *Criminal Law (Sexual Offences) Act 1993*.⁴⁸ This repealed sections 61 and 62 of the 1861 Act.

1.42 The *Keegan* and *Norris* cases present an interesting scenario in that they show how the ECHR can in effect side step the Constitution. In these cases, the impugned legislation was constitutional but incompatible with the ECHR. This led to the enactment of legislation designed to conform with the ECHR, which was constitutional, just as the original legislation was compliant with the provisions of the Constitution.

G Summary

1.43 The views expressed by the Commission in this Chapter may be summarised as follows, that unmarried cohabitants who live together in a 'marriage like' relationship should be entitled to certain rights and duties. The Commission however takes the view that such rights and duties should not be extended to cover relationships other than 'marriage like' relationships, thus excluding non-sexual domestic relationships. In addition, the Commission is of the view

⁴⁴ At 270.

⁴⁵ [1990] 2 IR 437.

⁴⁶ [1984] IR 36.

⁴⁷ (1991) 13 EHRR 186.

⁴⁸ See Law Reform Commission *Consultation Paper on Child Sexual Abuse* (LRC 32-1990) at 70 -73 for a discussion of the *Norris* case.

that a scheme should be extended to same-sex as well as opposite sex cohabitants. Furthermore, the Commission is of the view that such an approach does not violate the Constitution and complies with the ECHR.

CHAPTER 2 POLICY CONSIDERATIONS

A Introduction

2.01 In Chapter 1 the Commission defined ‘cohabitees’ and outlined the legal background to the Paper. The Commission concluded that there was no legal barrier to granting rights to qualified cohabitees. In this Chapter, the Commission will describe the growth of extra-marital cohabitation in Ireland and will outline the policy arguments for and against the granting of rights and duties to qualified cohabitees.

B The Growth of Extra-Marital Cohabitation

2.02 According to the 2002 Census, there were 77,600 family units consisting of cohabiting couples in Ireland in 2002.¹ This represents an increase of 46,300 from the number recorded in the 1996 Census. The same figures show that the number of same-sex couples increased from around 150 in 1996 to almost 1,300 in 2002. Two thirds of these were male couples.

2.03 It has been suggested that the reason for the 125% increase in cohabitation recorded during this six-year period, has more to do with the way the census form was phrased, than with changing public attitudes to extra-marital cohabitation.² In 1996, when the census form asked the relationship of members of the household, one of the responses offered was "Living together as a couple". The Central Statistics Office accepted that this rather bluntly phrased question might have secured an incomplete response, as it did not provide any guidance to what a ‘couple’ was. For example, was it confined to ‘marriage like relationships’ or did it extend to siblings, carers or other forms of platonic relationship. As a result, a more precise

¹ Central Statistics Office *Census 2002 Principal Demographic Results* (Dublin 2003) at 20.

² FitzGerald “Hatching, Matching...And Divorcing” *The Irish Times* 5 July 2003.

question was contained in the 2002 census form, namely whether another member of the household was a "partner" of the Head of the Household.

2.04 In 1996, the Constitution Review Group viewed the increasing popularity of extra-marital cohabitation in light of the changes that have occurred in Irish life over the past six decades.³ They argued that the traditional concept of the family has been weakened by various influences including secularisation, urbanisation, changing attitudes to sexual behaviour, single parenthood, smaller families, the availability of divorce and judicial separation and the independence of women.⁴

2.05 A rising rate of extra-marital cohabitation is not an exclusively Irish phenomenon. Extra-marital cohabitation is on the increase throughout Western Europe. Kiernan, drawing on the Eurobarometer Surveys carried out across the European Union, notes that while there is a good deal of diversity across the Member States in the incidence of cohabitation, three broad categories or groupings can be seen.⁵ In the first group of countries, Denmark, Sweden, Finland and France, extra-marital cohabitation is quite high. In the second group, the Benelux countries, Great Britain, Germany and Austria there is an intermediate level of extra-marital cohabitation. In the third group, Italy, Spain, Portugal, Greece and Ireland there is a relatively low incidence of extra-marital cohabitation.⁶

C Recognising Cohabitation: Policy Arguments

(1) Arguments Against Recognising Cohabitation

2.06 It has been suggested that cohabittees simply do not wish their rights and obligations to be legally regulated. A substantial number of them have deliberately eschewed the institution of

³ Constitution Review Group *Report of the Constitution Review Group* (Government Publications 1996) at 319.

⁴ *Ibid.*

⁵ Kiernan *Cohabitation and Divorce Across Nations and Generations* (Centre for Analysis of Social Exclusion Discussion Paper 65, March 2003) at 4.

⁶ *Ibid* at 3.

marriage, as they did not intend their relationship to give rise to such a result. Deech argues, “[t]here ought to be a corner of freedom for such couples to which they can escape and avoid family law.”⁷

2.07 A variation of the same argument would be to say that opposite-sex couples could avail of all the rights available to married couples simply by getting married. Thus, any change in this area should be limited to equalising the position of same-sex couples, either by giving them the right to marry or to register their relationship to generate marriage-like rights and obligations. Applying this logic, there is no justification for extending cohabitation rights to the opposite-sex cohabitee, as the means to rectify their situation is entirely within their grasp. This was the view taken by the British Government in its *Civil Partnership Bill 2004*, where heterosexual couples were excluded from its ambit for that very reason.⁸

2.08 In response to this, it can be argued that many couples do not consciously consider the implications of failing to get married. Muller-Freienfels argues:

“The ‘intention of the couple’ which presupposes that cohabitants operate with one mind and one heart despite their conflicting interests, is in many cases a pure fiction. And even if there is ‘one heart’ in practice only very few couples have such a consciously legalistic attitude towards their cohabitation. The majority rely on general attitudes and social conventions, the examples of friends and neighbours and so on.”⁹

2.09 Next, it has even been suggested, that “the pressure for cohabitees to be given legal rights comes entirely from family law academics and the family law establishment. This commentator had

⁷ Deech “The Case against Legal Recognition of Cohabitation” 29 ICLQ (1980) 480 at 483.

⁸ For background to the 2004 Bill see the Consultation Paper *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (Women & Equality Unit, Department of Trade and Industry, June 2002) at 11.

⁹ Muller-Freienfels “Cohabitation and Marriage Law – A Comparative Study” IJFL 1 (1987) 259 at 261.

never seen any public demand.”¹⁰ Deech reiterates this point, stating that lawyers may be open to the accusation that they are trying to generate a new area of litigation to compensate for decreased profits, because of the introduction of simpler divorce procedures.¹¹

2.10 Supporting this view is the fact that, in countries where cohabitees are permitted to register their relationships to make their legal position closer to that of a married couple, the number of registrations has been quite low. It could be argued that this indicates that there is little demand for change. However, it is difficult to justify this viewpoint, especially in the context of the homosexual community, who have been particularly vociferous in their pleas for reform.¹² The low registration rate may be due to a number of reasons. Firstly, the schemes are often limited to same-sex couples. These couples may be reluctant to register their relationship for fear of a homophobic reaction. The figures suggest that, where registration is also made available to opposite-sex couples, for example in the Netherlands, a significant minority of the relationships registered are, in fact, opposite sex.¹³ What the low registration rate may also indicate perhaps is that a formal, ‘opt-in’ method of protecting the rights of cohabitees is not the best solution.

2.11 Regarding the equality argument, it could be argued that equal treatment does not require equal rights for cohabitees as “a unique commitment is made by those who marry and not ... by those who refrain from marrying and no amount of emphasis on the similarities between spouses and cohabitants can obscure the difference, one of the most fundamental in human existence.”¹⁴

¹⁰ Pellman, Letter to the Editors, (2001) Fam LJ 917.

¹¹ Deech “The Case against Legal Recognition of Cohabitation” 29 ICLQ (1980) 480 at 484.

¹² See Irish Council for Civil Liberties *Equality Now for Lesbians and Gay Men* (Dublin 1990) and Gay and Lesbian Rights Lobby, “The Bride wore Pink: Legal recognition of our relationships” (Sydney, 2nd ed 1994) EGALE: Equality for Gays and Lesbians everywhere, Same-Sex Marriage around the Globe, (website: www.marriageequality.com).

¹³ Of the 4237 registrations that took place in the eleven months from January to November 1998, about one third were between men and women.

¹⁴ Deech “The Case against Legal Recognition of Cohabitation” 29 ICLQ (1980) 480 at 484.

2.12 Throughout this Paper, it remains imperative to remember the variety of motives, which a couple may have in choosing to live together outside marriage. A number of different motives have been suggested:

- (a) The couple may decide to move in together because they find each other sexually attractive, but they may not intend the arrangement to have any degree of permanence.
- (b) The cohabitation may be viewed as a “trial marriage”. Barlow notes from her recent study that this is a key reason for cohabiting, and cohabitation in this regard seems to have replaced the role of engagement.¹⁵ Deech asks whether it is unfair to impose the penalties of a failed marriage on persons who were experimenting, precisely in order to avoid that sort of outcome.¹⁶
- (c) The cohabitation may be viewed as an alternative to marriage. This view may be adopted for a variety of reasons-
 - i) Marriage may not be an option: for example, the cohabittees may be persons of the same sex, or heterosexual persons who are already married;
 - ii) Both or one of the partners may be ideologically opposed to marriage;
 - iii) Both or one of the partners may be opposed to marriage for financial reasons. Perhaps they are already supporting a spouse, or an ex-spouse, or receiving support from a former partner, and do not want to jeopardise this;
 - iv) Another factor, which seems to trigger cohabitation, is unexpected pregnancy, and, as Barlow argues, this type of cohabitation seems to have replaced the so-called ‘shotgun wedding.’

Mee sums up the problem as follows:

¹⁵ Barlow “Regulating Family Affairs: Marriage and Cohabitation Trends and Law Reform” SPTL/SLS Annual Conference 2002.

¹⁶ Deech “The Case against Legal Recognition of Cohabitation” 29 ICLQ (1980) 480 at 483.

“The whole question is a very difficult one, since people’s motives may change over time. Consider the case of a couple who move in together at an early stage in their relationship, seeing their cohabitation as a trial period before a possible marriage. If, for some reason (probably the reluctance of one partner) they never actually marry, they will not necessarily separate. Many of the cases in this area involve relationships which drift on for many years, even after it has become apparent that the originally envisaged marriage will never take place. Such a relationship begins as a “trial marriage” and ends, in effect, as an alternative to marriage.”¹⁷

(2) Arguments in Favour of Recognising Cohabitation

2.13 The Supreme Court has consistently affirmed that the term ‘family’ in Article 41 of the Constitution means the family based on marriage.¹⁸ Because of this, Irish family law deals mainly with the family unit as defined by the Constitution. However as we have seen, the popular perception of the ‘family’ as an institution has undergone a massive change in recent years.¹⁹ One manifestation of this change is the declining marriage rate and the corresponding rise in the rate of extra-marital cohabitation.²⁰

2.14 It could be argued, that the law should take into account this new reality and legislate accordingly, thereby recognising extra-marital cohabitation. This point was made by the Australian Law Reform Commission when it wrote:-

¹⁷ Mee, *The Property Rights of Cohabitees* (Hart, 1999) at 11.

¹⁸ See *State (Nicolaou) v An Bord Uachtala* [1996] IR 567; *Murphy v Attorney General* [1982] IR 241; *Hyland v Minister for Social Welfare* [1989] IR 624; *MacMathuna v Ireland* [1989] IR 504; *Ennis v Butterly* [1996] 1 IR 426; *G v An Bord Uachtala* [1980] IR 32; *JK v VW* [1990] 2 IR 437; and *WO’R v EH* [1996] 2 IR 248.

¹⁹ See paragraph 2.04. It should also be noted that the percentage of births which took place outside of marriage increased from 14.5% in 1990 to 31.2% in 2001. See *Treoir Births Outside Marriage 1990-2001* (October 2002) at 1. However, these figures contain no breakdown as to the precise relationship of the parents at the time of conception and birth.

²⁰ See paragraph 2.05.

“...generally speaking, the law should not inhibit the formation of family relationships and should recognise as valid the relationships people choose for themselves. Further, the law should support and protect those relationships. However, the law should restrict a person’s choice to the extent that it is necessary to protect the fundamental rights and freedoms of others and should not support relationships in which the fundamental rights and freedom of individuals are violated. Instead it should intervene to protect them.”²¹

2.15 This point was developed by Bowley, who said that the State bestows certain rights and duties on married couples, in an effort to encourage long-term committed relationships, which are important in maintaining the stability of both the State and Society.²² Therefore, there may be said to be a powerful sociological argument for extending those benefits to all long-term relationships.

2.16 In addition, it could be argued that as many cohabitees live together in relationships that resemble marriage in all but name, it is inequitable not to afford those in extra-marital relationships some, if not all of the rights, duties and obligations, which accrue to those in marital relationships. This may be described as the equality argument.

2.17 Furthermore, recognising extra-marital cohabitation would ensure the protection of vulnerable members in such relationships, who enjoy little if any legislative protection at present. It has frequently been maintained that one role of family law is to protect the vulnerable member of a relationship, and to remedy the inequalities which arise from the division of roles within a typical domestic partnership. Some Australian commentators have written:

“Why should there be a discretionary adjustment of property in the case of domestic couples? We think that the answer lies essentially in the need to respond to the economic consequences of the division of functions within

²¹ Australian Law Reform Commission Paper No 47 *Multiculturalism and Family Law* (1991) paragraph 24.

²² “A too fragile social fabric?” [1995] vol. 145 no. 6725 *New Law Journal* 1883. This echoes Article 41.1.1°, in which the State recognises the family “as the natural primary and fundamental unit group of Society”.

families. Commonly, one partner interrupts or fails to commence a career in order to carry out childcare and housekeeping work, allowing the other to advance in his or her career. During the relationship, the division of functions presumably suits both partners. At the end of the relationship, however, if no adjustment is made, the partner who has remained in full-time employment will normally be much better placed financially. In substance, the law's purpose is to make a property adjustment that will appropriately compensate for the economic effects of the relationship. The nature and extent of the adjustment will depend on the circumstances of the relationship.”²³

2.18 On this analysis, it may be argued that there is no justification for distinguishing between different categories of cohabitees according to their legal status, or even the sexual orientation of the parties.²⁴ As already mentioned, the scheme adopted to protect the rights of cohabitees should permit consideration of a wide range of factors, so that the outcome can be tailored to meet the justice of the particular case.

2.19 Given that it is the woman who usually makes the financial sacrifice, the protectionist argument is frequently reformulated to take a sex-discrimination slant. The argument is that property readjustment is necessary in order to accord women in relationships equality with men. As Deech notes, the reasons why a financial award is made to the female cohabitee include the notion that she was the weaker partner, and needs the protection of the court against exploitation; that, having once cohabited, she is unable to be self-supporting again; or, at best, her capacity for self-support has been harmed; and that she has earned a share of the man's wealth, for he could not have accumulated as much without her help.²⁵ Deech argues against this and maintains that maintenance and property awards to former cohabiting partners “reinforce the outmoded view,

²³ Chishom, Jessep and O’Ryan “De facto Property Decisions in NSW: Emerging Patterns and Policies” (1991) 5 *Australian Journal of Family Law* 241 at 264.

²⁴ Bailey-Harris, “Law and the Unmarried Couple – Oppression or Liberation?” (1996) *Child and Family Law Quarterly* 137 at 141.

²⁵ Deech “The Case against Legal Recognition of Cohabitation” 29 *ICLQ* (1980) 480 at 485.

upheld by the law, of the man as the head of the household and the woman under obligation to provide domestic services and child care, a view which is too unsatisfactory in its application to married persons to permit its extension to the unmarried.”²⁶

2.20 It is submitted that Deech’s approach is unrealistic. It fails to take into account the fact that one partner often sacrifices personal earning capacity for the benefit of the relationship. It is true that some cohabittees do not make any sacrifice. The challenge for the law is to identify them, and restrict their rights accordingly. Redistribution of work in the home may be an aspiration that society should strive for as a long-term goal, but it is arguable that it may not be a realistic suggestion to make to many couples at present. Some might refute this. Deech describes an assertive female cohabitee who deliberately chooses her lot. However, in some instances people are extremely vulnerable when it comes to relationships. They frequently do not consciously consider their role within the relationship, as they trust each other completely. They do not expect the relationship to end, even when they are not married.

2.21 The protectionist argument gains even more credence when one considers the prevalence of the myth of common law marriage amongst cohabittees. As Stuart Bridge has pointed out, writing in Britain, “many unmarried couples – the majority, according to some surveys – believe that, once they have lived together for some time, they are treated as if they are married, as they are “at common law” husband and wife.”²⁷ Barlow refers to a widespread myth that, after a couple have been living together for 6 months, everything is split down the middle.²⁸ Bridge maintains that, while common law marriage has been unknown in English law for nearly 250 years, this faith in a non-existent legal status has led to collective inertia as far as protection of legal rights is concerned: if people think that the law will look after them, then they will not do anything to look after themselves.²⁹

²⁶ *Ibid* at 486.

²⁷ Bridge, “Myth of the Common Law Marriage” *The Times* July 30 2002.

²⁸ Barlow “Regulating Family Affairs: Marriage and Cohabitation Trends and Law Reform” SPTL/SLS Annual Conference 2002 at 6.

²⁹ Bridge, “Myth of the Common Law Marriage” *The Times* July 30 2002.

D Conclusion

2.22 *The Commission is of the view that the policy arguments in favour of recognising extra-marital cohabitation outweigh those against and that accordingly, qualified cohabitees should be accorded certain rights and duties.*

CHAPTER 3 PROPERTY RIGHTS

A Introduction

3.01 A 'separate property system' governs the ownership of property in Ireland.¹ Under 'separate property systems' individuals have the right, subject to certain limited exceptions, to acquire and dispose of real or personal property as they see fit. One of the main disadvantages of this system, in relation to family property, is its inability to cater for the practical inequalities that arise whenever two people decide to live together as man and wife. In some circumstances, though by no means all, one party, usually the woman, sacrifices at least some of her earning capacity, in order to devote herself more fully to her family. Because of her work within the home, her ability to acquire property in her own right is impeded, while her partner's power of acquisition is increased. However, in many cases the woman receives no share in any property acquired by her partner during the relationship.² In recent years, the legislature has attempted, by means of the *Succession Act 1965*, the *Family Home Protection Act 1976*, the *Bankruptcy Act 1988*, the *Family Law Act 1995* and the *Family Law (Divorce) Act 1996* to alleviate the position of non-owning spouses in respect of the family home.

3.02 However, these provisions do not apply to non-marital cohabitants who are subject to the disadvantages of the separate property system. In this Chapter, the Commission will consider the extent to which, if any, the legislative protection afforded to spouses

¹ See generally, Wylie *Irish Land Law* (3rd ed Butterworths 1997); Lyall *Land Law in Ireland* (2nd ed Round Hall Sweet & Maxwell 2000); Coughlan *Property Law* (2nd ed Gill & Macmillan 1998).

² Dewar has observed that "the principle of separation of property, which accords ownership to the person providing the purchase money [acts] unfairly in the context of a typical domestic economy. It is also out of step with the partners' own views that marriage is a partnership involving a sharing of jointly-acquired and jointly used property." *Law and the Family* (2nd ed Butterworths 1992) at 177.

in respect of the family home should be extended to cohabitees. In addition, the Commission will consider the application of the purchase money resulting trust doctrine to cohabitees, as well as any other methods by which a cohabitee might acquire an interest in property, such as constructive trusts, cohabitation contracts, co-ownership agreements, contractual licences and the doctrine of proprietary estoppel. The Commission will also consider whether a qualified cohabitee should be entitled to apply for a property adjustment order following the breakdown of the relationship.

B Legislative Protection of the Family Home for Spouses

3.03 There are a number of ways in which the rights of the non-owning spouse *vis-à-vis* the family home are protected in legislation.³ The most obvious is the *Family Home Protection Act 1976*, section 3 of which requires, subject to limited exceptions, the written consent of both the spouses to any conveyance of the family home.⁴ In addition, section 61 of the *Bankruptcy Act 1988* provides that the family home of a bankrupt may not be disposed of without the sanction of the court. Moreover, the court may order the postponement of the sale of the family home having regard to the interests of the creditors, the spouse and dependants of the bankrupt, as well as all the circumstances of the case. Furthermore, if the owning spouse dies testate without leaving the family home to the surviving spouse, or intestate, the latter is entitled to the family home under section 56 of the *Succession Act 1965*. Where the relationship terminates, by either divorce or judicial separation, the court may make a property adjustment order in favour of the non-owning spouse under the *Family Law Act 1995* or the *Family Law (Divorce) Act 1996*. However, none of these rights or remedies are available to

³ See generally Lyall *Land Law in Ireland* (2nd ed Round Hall Sweet & Maxwell 2000) at 451 - 509; Shannon ed *Family Law Practitioner* (Round Hall Sweet & Maxwell 2001) at D-044 – D-057 and E-085 – E101; Shatter *Shatter's Family Law* (4th ed Butterworths 1997) at 719 – 841; Wylie *Irish Conveyancing Law* (2nd ed Butterworths 1996) at 569 – 592; Wylie *Irish Conveyancing Law* (Butterworths Irish Annotated Statutes 1999) at 333 – 353.

⁴ See paragraphs 3.58 - 3.62.

non-marital cohabitantes, who are left to arrange their own affairs as best they can, by means of contract or will.⁵

C The Purchase Money Resulting Trust

3.04 One of the most effective methods for a non-owning cohabitee to acquire an interest in property is to establish a beneficial interest in the property under a purchase money resulting trust.⁶ This is a type of presumed resulting trust, which arises when a person contributes to the purchase price of a property, which is then put in the name of another person. The latter then holds the property on resulting trust for the person who advanced the purchase price. The equitable share in the ownership will be proportionate to the amount contributed. The presumption of a resulting trust may be rebutted by adducing evidence of a contrary intention or by the presumption of advancement. The relationship between the parties is irrelevant because once the contribution has been made and the intention exists, it does not matter if the parties are spouses, cohabitantes, siblings or strangers, the donor of the contribution still acquires an interest in the property.

(1) Direct Contributions

3.05 In *C v C*,⁷ the High Court held that direct contributions to the purchase price or the payment of mortgage instalments would generate a beneficial interest in the property. In this case, the parties, a married couple, purchased a house in the husband's name. The wife

⁵ Norrie summed up the problem as follows “[c]ohabitants are left to arrange their own affairs amongst each other as best they can, through contract and testament.... Yet contractual and testamentary freedom is satisfactory only to the extent that the parties are on equal terms and in domestic relations, the hard reality is that parties seldom are. Women still give up jobs and careers in order to keep house and mind children for men, even when they are not offered the real security of marriage. Cohabitants, gay and un-gay, still fail to make wills, and the weak are still exploited by the strong.” Norrie “Proprietary rights of cohabitants” [1996] *Juridical Law Review* 209 at 209-210.

⁶ See generally Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thompson Round Hall 2003) at 131 - 194; Lyall *Land Law in Ireland* (2nd ed Round Hall Sweet & Maxwell 2000) at 451 - 471; Mee *The Property Rights of Cohabitantes* (Hart 1999) at 34 - 60; Shatter *Family Law* (4th ed Butterworths 1997) at 720.

⁷ [1976] IR 254.

made a direct contribution to the purchase price by paying the deposit and some of the mortgage repayments. When the marriage broke down, she claimed a beneficial share in the property. Kenny J held that she was entitled to a share in the property based on her direct contributions to its purchase and that the husband held her share of the property in trust for her.

(2) Indirect Contributions

3.06 In *McC v McC*,⁸ the Supreme Court dealt with the situation where one party makes an indirect contribution of a financial nature towards the purchase of the property, and that contribution relieves the other partner of a financial burden, which the partner would otherwise have had to bear, thus enabling the partner to repay the mortgage instalments. That indirect contribution will, in the absence of an express or implied agreement to the contrary, be recognised as generating a beneficial interest in the property in favour of the party making the indirect contribution.

3.07 However, the courts have held that, in the absence of an express or implied agreement to the contrary, paying for improvements to property will not be regarded as constituting an indirect contribution and therefore will not generate a beneficial share in it. In *W v W*,⁹ Finlay P held that a party who paid for improvements to the property would not be entitled to a share in the property by virtue of paying for those improvements. In addition, Finlay P stated that where that party could establish that it was specifically agreed between the parties that he or she would be compensated for the improvements, any claim the aggrieved party might have was limited to a claim for monetary compensation.

3.08 The courts have adopted a wide definition of what will be regarded as constituting an improvement. In *NAD v TD*,¹⁰ the husband bought a site in his own name. Both parties contributed to the cost of building the house, but the wife was refused a beneficial interest, as her contribution to the construction of the house was regarded as an improvement and not as a contribution towards the

⁸ [1986] ILRM 1.

⁹ [1981] ILRM 202.

¹⁰ [1985] ILRM 153.

acquisition of the property as the property was already in the name of her husband when the house was built.

3.09 In *EN v RN*,¹¹ the Supreme Court took a slightly less restrictive approach. In this case, the plaintiff widow claimed a beneficial interest in the family home. It was claimed *inter alia* that her indirect contributions to the repayment of a mortgage raised to finance improvements to the property gave rise to a beneficial interest in her favour. Finlay CJ rejected this argument citing his earlier decision in *W v W*.¹² He said that in the absence of an express or readily implied agreement, direct or indirect contributions to improvements would not give rise to a beneficial interest in the property.¹³ However, as one commentator has pointed out, where there is an agreement or one can be readily implied, contributions to improvements may give rise to a beneficial interest.¹⁴

3.10 Mee notes that a curious anomaly arises where the improvements are financed by means of a mortgage and the non-owning party contributes either directly or indirectly to the repayment of the mortgage, as it is likely that the courts will regard this contribution as one going towards the acquisition of the property, which creates a beneficial interest proportionate to the contribution.¹⁵ This result may be contrasted with what occurs where the non-owning spouse finances the improvements directly. In such a situation, the non-owning spouse is not regarded as having made an indirect contribution and as such, is not entitled to a beneficial interest in the property.

(3) Other Forms of Contribution

3.11 In *EN v RN*,¹⁶ part of the family home had been converted into bed-sitter apartments, which were managed by the wife. The court held that the wife's unpaid work in her husband's business generated a beneficial interest in the family home. In contrast, a

¹¹ [1992] 2 IR 116.

¹² [1981] ILRM 202.

¹³ [1992] 2 IR 116 at 122.

¹⁴ Delaney *Equity and the Law of Trusts In Ireland* (3rd ed Thompson Round Hall) at 187-188.

¹⁵ Mee "Trusts of the Family Home: The Irish Experience" (1993) Conv 359.

¹⁶ [1992] 2 IR 116.

wife's unpaid work in the home will not generate a beneficial interest. In *BL v ML*,¹⁷ Barr J held that, by virtue of her work within the home as a "devoted full-time homemaker and mother", the plaintiff wife was entitled, by virtue of Article 41.2 of the Constitution, to a 50% beneficial interest in the family home and its contents. However, the Supreme Court overruled the decision of the High Court on the basis that it amounted to judicial legislation. This approach may be said to be unjust in that it devalues unpaid work within the home. The legislature attempted to remedy this by means of the *Matrimonial Home Bill 1993*, which provided for automatic joint ownership of the family home. However, the Bill was struck down as unconstitutional by the Supreme Court in *Re the Matrimonial Home Bill 1993*¹⁸ on the basis that its retrospective effect infringed the authority of the family to make decisions concerning the ownership of property.¹⁹

(4) *The Application of the Purchase Money Resulting Trust to Cohabitees*

3.12 In the application of purchase money resulting trust principles, the relationship between the parties is irrelevant. Indeed, in *EN v RN*,²⁰ Finlay CJ stressed the need to confine "the rights to interests in the family home to the broad concept of resulting and constructive trust which would arise between persons other than husband and wife".

3.13 In *McGill v S*,²¹ the parties, who were not married to each other, lived together as man and wife for a number of years in the defendant's flat in Germany. In 1967, the plaintiff bought a holiday home in Ireland for their joint use. The plaintiff paid the entire purchase price and spent nearly £10,000 renovating the property. The defendant spent £1,000 of her own money renovating out-houses as a present for the plaintiff. In 1973, she came to reside in the house and

¹⁷ [1992] 2 IR 77.

¹⁸ [1994] 1 ILRM 241.

¹⁹ See Lyall *Land Law in Ireland* (2nd ed Round Hall Sweet & Maxwell 2000) at 507; Shatter *Shatter's Family Law* (4th ed Butterworths 1997) at 721; Hogan, *The Matrimonial Homes Bill Reference* (1994) DULJ 175; Woods "The Matrimonial Home Bill 1993 – Should the Government Try Again?" [2001] 4 IJFL 8.

²⁰ [1992] 2 IR 116.

²¹ [1979] IR 283.

later that year the relationship broke down. She claimed that she was entitled to an equitable interest in the house. Gannon J rejected this on the basis that “her indirect contributions all came after the purchase of the property had been completed (without continuing instalment payments)”.²²

3.14 In *Power v Conroy*,²³ the defendant purchased a house in his sole name for £10,760 and lived there with the plaintiff and their child. The plaintiff had contributed £1,000 to the payment of the deposit and a further £1,000 to the payment of the builders. The remainder was borrowed on a mortgage to the repayment of which the defendant had contributed £1,700 at the date of the hearing. In holding that the plaintiff was entitled to a 55% beneficial interest in the property, McWilliam J did not refer to the marital status of the parties. He said that the correct approach was:

“to try to ascertain what sums have been paid by the parties towards the acquisition of the house and that, in doing this I must take into account such contributions towards the household living expenses made by either party as enabled the other party to make such payments as were made by him or her. Having done this, I should treat the house as being held by the defendant on trust for the parties in the shares which they contributed either directly or indirectly towards its purchase.”²⁴

(5) *The Inadequacies of the Law Governing Purchase Money Resulting Trusts*

3.15 From its study of the purchase money resulting trust doctrine the Commission is of the view that there are three main problems with its operation. Firstly, its failure to recognise the value of unpaid work within the home as distinct from unpaid work outside the home is unjust. Secondly, there is the curious anomaly whereby paying for improvements in cash will not generate a beneficial interest but repaying a mortgage raised for the purposes of paying for improvements will create a beneficial interest. This is illogical and unfair. Thirdly, the proportionate interest test, whereby the beneficial

²² *McGill v S* [1979] IR 283 at 292.

²³ [1980] ILRM 31.

²⁴ *Ibid* at 32.

interest to be awarded must correspond more or less exactly to the proportion of the financial contribution to the purchase price, may create difficulties for the court where the contributions made are difficult to calculate.

3.16 Although these three inadequacies have the potential to cause injustice in a marital as well as a non-marital context, cohabitees are further disadvantaged because the presumption of advancement does not apply to them.²⁵ The presumption of advancement arises where, because of the relationship between the parties, the donor or purchaser is under an obligation to provide for the party to whom the property is given. The presumption of advancement arises where a husband transfers property to his wife or child or purchases it in the name of his wife or child.²⁶ In such a situation, the presumption of advancement will, in the absence of a contrary intention, prevent the property reverting to the donor by means of resulting trust. A cohabitee will only be able to avoid the presumption of a resulting trust where the cohabitee can show that the property was advanced as a gift.

D Other Methods of Acquiring an Interest

3.17 Other methods of acquiring an interest in property include the doctrine of constructive trusts, co-ownership agreements, contractual licences and interests obtained by means of the doctrine of proprietary estoppel.

(1) Constructive Trusts

3.18 A constructive trust “is one which arises by operation of law and which comes into being as a result of conduct and irrespective of the intention of the parties”.²⁷ In general terms, it arises where it

²⁵ See *Calvery v Green* (1984) 56 ALR 483. See generally Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thompson Round Hall 2003) at 161 – 177; Lyall *Land Law in Ireland* (2nd ed Round Hall Sweet & Maxwell 2000) at 466 - 469.

²⁶ The presumption of advancement does not apply to gifts made by a mother to her child or gifts made by a wife to her husband. See Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thompson Round Hall 1999) at 162 – 169.

²⁷ See Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thompson Round Hall 1999) at 196. See generally 195 – 271.

would be unconscionable for the legal owner of the property to deny a beneficial interest in the property to the other party.²⁸

3.19 The use of constructive trust principles in resolving disputes as to the beneficial ownership of family property was pioneered by Lord Denning in a series of cases in the early 1970s.²⁹ In *Eves v Eves*,³⁰ Lord Denning identified a new model constructive trust, which “would be imposed by law whenever justice and good conscience required it”.³¹ In *Hussey v Palmer*,³² the plaintiff went to live with her daughter and son-in-law. However, the house was not large enough to accommodate all of them. To finance an extension to the house she sold her own home. She quarrelled with her daughter and her husband and moved out. She asked for her money back but her son-in-law refused to pay her back. She sued claiming that the payment of the money created a constructive trust in her favour. She succeeded in her claim.

3.20 However, the English courts have moved away from the new model constructive trust. Summarising the current position, Oakley stated that:

“the proposition that a constructive trust may be imposed whenever the result of a case would, otherwise, be inequitable cannot be supported either as a matter of precedent or as a matter of principle and it is to be hoped that such authority as there is in support of this proposition will be overruled by the House of Lords when a suitable opportunity arises.”³³

3.21 Interestingly, despite this rejection of the new model constructive trust, the Irish High Court embraced it in *Murray v Murray*.³⁴ In this case, the defendant purchased a house. He paid the

²⁸ See Law Commission *Sharing Homes: A Discussion Paper* (2002) at 25.

²⁹ See Mee “Palm Trees in the Rain – New Model Constructive Trusts in Ireland” (1996) CPLJ 9.

³⁰ [1973] 3 All ER 769.

³¹ *Ibid* at 747.

³² [1972] 3 All ER 744.

³³ Oakley *Constructive Trusts* (2nd ed Sweet & Maxwell 1987) at 478.

³⁴ [1996] 3 IR 251.

initial deposit, the remainder, approximately three-quarters of the purchase price, was paid by means of a mortgage. The plaintiff, the defendant's nephew, lived in the house with his aunt, to whom the defendant had intended to transfer the house, and who had repaid the mortgage instalments and other outgoings on the property. Following the death of his aunt, the plaintiff, who was her heir, sought a declaration that the entire beneficial interest in the property was vested in his aunt at the date of her death, and so passed to him. Barron J referred to *Hussey v Palmer*,³⁵ and stated that it was "authority for the proposition that in certain circumstances, where equity so requires, a debt may well be secured by the device of a constructive trust on the property created by the money involved."³⁶ He held that the repayment of the mortgage created a constructive trust in favour of the aunt, under which she was entitled to three-quarters of the beneficial interest in the property. As a result, the plaintiff as her heir was entitled to that beneficial interest.

3.22 This judgment has been criticised. It has been suggested that constructive trust principles were used in *Murray* because the intention necessary to create a purchase money resulting trust was not present, as the aunt did not intend to take the legal ownership of the property.³⁷ According to this reasoning, the new model constructive trust was used in effect to "side-step" the existing law to achieve an equitable result. As such, it may be seen as a classic example of hard cases making bad law. In light of these criticisms and the rejection of the new model constructive trust in England, its country of origin, it has been suggested that future courts may have to look elsewhere for more acceptable solutions.³⁸

(2) Cohabitation Agreements

3.23 Cohabitation agreements have traditionally been regarded as contrary to public policy although it should be noted that the authorities are mainly from the nineteenth century and so the scope of the agreements thus stigmatised is imprecise. The only modern Irish

³⁵ [1972] 3 All ER 744.

³⁶ *Ibid* at 255.

³⁷ See Mee "Palm Trees in the Rain – New Model Constructive Trusts in Ireland" (1996) CPLJ 9 at 13.

³⁸ See Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thompson Round Hall 2003) at 193.

authority is the decision of the High Court in *Ennis v Butterly*³⁹ where it was held that ‘agreements, the consideration for which is cohabitation are incapable of being enforced’.⁴⁰ The conventional wisdom is that this decision places an insurmountable barrier in the way of the enforcement of cohabitation agreements.⁴¹ However, the Commission disagrees. We are of the view that as the facts of the case were unusual, not to say egregious, and that as the decision was directed only towards the rather extreme ‘home made’ cohabitation agreement concerned, the case should not be taken as support for the general proposition that all cohabitation agreements are necessarily void for public policy.

3.24 The facts of the case may be summarised as follows. The plaintiff and the defendant, both married persons estranged from their respective spouses, lived together as man and wife for a period of approximately nine years. There existed between the parties an agreement, under which the defendant promised to marry the plaintiff as soon as divorce was introduced. The agreement also provided that the plaintiff would be “loved, honoured and cherished by the defendant as his wife, that he would be loyal and faithful to her, and that she would be emotionally and financially secure for life”.⁴² Relying on these representations, the plaintiff terminated her employment in order to “live at home as a full-time housewife and homemaker”.⁴³ The relationship subsequently broke down when the plaintiff learned that the defendant had resumed his relationship with his wife. The defendant refused to honour his commitments under the contract and as a result, the plaintiff sued for breach of contract, negligent misrepresentation and fraudulent misrepresentation.

3.25 It is axiomatic that for there to be a breach of contract, there must be a valid contract. However, as we have seen, what the parties envisaged in *Ennis* was not merely a contract regulating their financial and property interests, but a contract, which purported to replicate in every way possible a marital contract.

³⁹ [1996] 1 IR 426.

⁴⁰ *Ibid* at 438.

⁴¹ See Shatter *Shatter’s Family Law* (4th ed Butterworths 1997) at 973.

⁴² [1996] 1 IR 426 at 433.

⁴³ *Ibid* at 434.

3.26 The alleged contract was a twofold one, composed of an agreement to marry and an agreement to cohabit. It is with the latter that we are concerned.⁴⁴ In considering the validity of the cohabitation agreement, Kelly J noted that at common law such contracts had always been regarded as void as a matter of public policy.⁴⁵ He stated that counsel for the defendant had repeatedly described the plaintiff's claim, as a claim for palimony, a concept that he said was unknown outside of the United States of America. He then proceeded to consider the position in a number of American jurisdictions. He noted that although the Supreme Court of California in the case of *Marvin v Marvin*⁴⁶ had held that the "courts should enforce express contracts between non-marital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services", other States, such as New York had refused to endorse such an approach.

3.27 Turning then to the position in England and Wales, Kelly J cited with approval the decision of Millet J in *Windeler v Whitehall*⁴⁷ where he stated, "If this were California, this would be a claim for palimony, but it is England and it is not. English law recognises neither the term nor the obligation to which it gives effect". Kelly J stated, "In my view, the law in this country is no different and, if anything, would lean more strongly against such a concept having regard to the special position of marriage under the Constitution".⁴⁸ Looking then at the special position of marriage under the

⁴⁴ Kelly J held that the first limb of this contract, the agreement to marry, failed because it violated section 2 of the *Family Law Act 1981*, which abolished the action for breach of promise of marriage. In any case, he noted that prior to the enactment of the 1981 Act an agreement to marry between two persons who were already married to other people was void for public policy under the common law. See generally The Law Reform Commission *The Law Relating to Breach of Promise of Marriage* (Working Paper No 4, November 1978) and The Law Reform Commission *First Report on Family Law* (March 1981).

⁴⁵ See *Beaumont v Reeve* (1846) 8 QB 483.

⁴⁶ (1976) 18 Cal 3d 660.

⁴⁷ [1990] 2 FLR 505.

⁴⁸ *Ibid* at 438.

Constitution, Kelly J referred to the decision of Henchy J in *State (Nicolaou) v An Bord Uchtála*,⁴⁹ in particular to where he stated that,

“for the State to award equal constitutional protection to the family founded on marriage and the ‘family’ founded on an extra-marital union would in effect be a disregard of the pledge which the State gives in Article 41, s.3, sub-s.1 to guard with special care the institution of marriage.”

3.28 Relying on this, Kelly J said that to allow an “express cohabitation contract (such as is pleaded here) to be enforced would give it a similar status in law as a marriage contract.” He also went on to hold that this was not permissible in light of Article 41 of the Constitution and that accordingly, “as a matter of public policy, such agreements cannot be enforced”.⁵⁰ Furthermore, he stated that the contract was void insofar as it was a contract “the consideration for which is wifely services being rendered on the part of a mistress”. Such contracts, he said, have “always [been] regarded as illegal and unenforceable and remain so.”⁵¹

3.29 When viewed in light of the extreme facts of the case, it is not surprising that the contract at issue in *Ennis* was held to be unenforceable, since it was intended to operate as an alternative marriage contract. However, the decision does not say that all

⁴⁹ [1966] IR 567.

⁵⁰ *Ibid* at 438. As against this, it could be argued that following on from the decisions of the Supreme Court in *Hyland v Minister for Social Welfare* [1989] IR 624, *Murphy v. Attorney General* [1982] IR 241 and *Muckley v Ireland* [1985] IR 472 what is unconstitutional is the penalisation of the married state rather than the granting of parity to the unmarried state.

⁵¹ In addition, Kelly J stated that he was strengthened in his view by the fact “that, notwithstanding the extensive reform of family law which has taken place in this country over the last 20 years, nowhere does one find any attempt on the part of the legislature to substantially enhance the legal position of, or to confer rights akin to those of unmarried persons upon the parties to non-marital unions e.g. a right to maintenance. This absence of intervention on the part of the legislature suggests to me that it accepts that it would be contrary to public policy, as enunciated by the Constitution, to confer legal rights akin to those who are married.” However, it should be noted that since this decision the legislature has given cohabittees rights akin to those of married persons. See sections 3 and 4 of the *Domestic Violence Act 1996* and the *Civil Liability (Amendment) Act 1996* and section 1 of the *Civil Liability (Amendment) Act 1996*.

cohabitation contracts are void in that what Kelly J stated was unenforceable was an “express cohabitation contract (such as is pleaded here)”.⁵² It is submitted that the phrase in brackets is the key to understanding the judgment as a whole, which is concerned not with cohabitation agreements in general, but with the particular homemade agreement that the parties had concluded between themselves.

3.30 In the Commission’s view, an agreement that is in no way premised on the parties cohabiting or engaging in sexual relations but which confines itself merely to regulating their financial and property arrangements would not be contrary to public policy. If the parties wish, the document may be executed by means of deed to remove all doubt that the parties’ cohabitation or consortium is intended to form part of the agreement. Similarly, if the parties wish, the agreement may refer to the parties’ cohabitation but care should be taken that this is expressed as a fact rather than as a condition of the contract. This has the added advantage of ensuring that the contract would not be struck down on the grounds of public policy on the basis that it restricts the ability of the parties to marry.

3.31 *The Commission is of the view that the decision of Ennis v Butterly does not operate as a bar to the enforceability of a cohabitation agreement that does not attempt to replicate the marriage contract, or does not have an immoral purpose but restricts itself merely to regulating the financial and property affairs of the parties.*

(3) Co-ownership Agreements

3.32 A co-ownership agreement arises when two or more persons agree to own property concurrently. Unlike cohabitation agreements, the legality of co-ownership agreements has never been in doubt.⁵³ A co-ownership agreement includes a declaration of trust, setting out the beneficial interests of the parties in the property. It thereby avoids the necessity of the parties resorting to the purchase money resulting trust

⁵² Ennis v Butterly [1996] 1 IR 426, at 439.

⁵³ See generally Twomey “Treatment of Co-Ownership Agreements under Partnership Law” and Murphy “A Practical Outline of Issues Relating to Co-Ownership Agreements” Papers delivered at the Law Society’s Continuing Legal Education Seminar on Co-Ownership Agreements, Cork 31st January 2003.

in order to determine their entitlements. It sets out the parties respective obligations to pay the mortgage and other outgoings on the property. It can provide for such unforeseen circumstances as one of the parties becoming unemployed. The necessity of clarifying the parties' intention in relation to the ownership of the property has long been recognised. In *Carlton v Goodman*,⁵⁴ Ward LJ stated:

“I ask in despair how often this court has to remind conveyancers that they would save their clients a great deal of later difficulty if only they would sit the purchasers down, explain the difference between a joint tenancy and a tenancy in common, ascertain what they want and then expressly declare in the conveyance of transfer how the beneficial interest is to be held because that will be conclusive and save all argument. When are conveyancers going to do this as a matter of invariable standard practice? This court has urged that time after time. Perhaps conveyancers do not read the law reports. I will try one more time: ALWAYS TRY TO AGREE ON AND THEN RECORD HOW THE BENEFICIAL INTEREST IS TO BE HELD. It is not very difficult to do.”⁵⁵

3.33 However, it should be noted that an express declaration of how the beneficial interest is held will not always mean a fair result for the parties. For example, when the property is purchased, the parties may be contributing equally to the mortgage and, therefore, they may agree to hold the beneficial interest in the property as tenants in common in equal shares. A few years later, one of the parties may receive an inheritance and decide to redeem the mortgage. Unless another declaration of trust is executed, the original one will operate, with the result that the person who paid most of the purchase price will only be entitled to a 50% share in the property. Of course, a co-ownership agreement may provide for such an eventuality, but agreeing the terms of such an agreement involves more forward planning than the average couple is usually prepared to undertake. In addition, the execution of a co-ownership agreement is only likely to be considered where both parties are purchasing the property together. Where the property is purchased in the name of

⁵⁴ [2002] EWCA Civ 545.

⁵⁵ At 44.

one party and the other party subsequently moves into the house, they are unlikely to visit a solicitor with a view to formalising the arrangements.

3.34 *Arising from its discussions with practitioners, the Commission is aware that the current practice is to advise cohabitees strongly to draw up co-ownership agreements. However, the Commission is of the view that there is a need to increase public awareness of the value of such agreements. In light of this, the Commission would encourage bodies such as the Family Mediation Service to increase public awareness of co-ownership agreements through education and training.*

(4) Doctrine of Proprietary Estoppel

3.35 The doctrine of proprietary estoppel is designed to stop a person insisting on their legal rights where to do so would be inequitable having regard to the dealings that have taken place between the parties. The doctrine of proprietary estoppel is composed of two limbs, namely the mistake and expectation limbs. Both limbs originate in the decision of the House of Lords in *Ramsden v Dyson*.⁵⁶

3.36 The expectation limb originates in the decision of Lord Kingstown. He explained the doctrine as follows:

“If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation.”⁵⁷

3.37 The mistake limb originates in the decision of Lord Cranworth. He explained the doctrine as follows:

“If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of

⁵⁶ (1866) LR 1 HL 129.

⁵⁷ At 170 – 171.

Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own.⁵⁸

3.38 The expectation limb has long been recognised by the Irish courts. There are three essential elements, which must be satisfied in order to ground a claim for proprietary estoppel on the expectation limb. (i) There must have been a representation or a promise. (ii) The claimant must have acted to his/her detriment. (iii) This detrimental conduct must have been undertaken in reliance on the representation or promise.

3.39 There must have been a representation or promise from the owner of the land that the claimant would become entitled to some interest in the land. Motive is not decisive. What is important is the effect that the representation would have on a reasonable person.

3.40 Turning now to detriment, a good example of the requirement of detriment in the context of cohabitation is the case of *Greasley v Cooke*.⁵⁹ In this case, the plaintiff was employed as a maid. She entered into an extra-marital relationship with a member of the household. For many years, she worked in the home and took care of her partner's mentally disabled sister. She was assured on a number of occasions that she would be allowed to remain living in the house for the rest of her life. However, her partner died without making provision for her in his will. The Court of Appeal held that she had acted to her detriment by caring for the family and failing to take steps to provide security for herself by leaving the house and obtaining alternative employment. An estoppel arose in her favour, and she was entitled to remain in the house, rent-free, for so long as she wished to do so.

3.41 Turning now to the reliance placed on the detrimental conduct. In *Pascoe v Turner*,⁶⁰ the man left the home, which belonged to him, after a relationship of eight years, repeatedly telling his partner that the house and its contents belonged to her, although no action was taken to formalise the position. In reliance on the man's statements and with his knowledge, the woman spent a

⁵⁸ *Ramsden v Dyson* (1866) LR 1 HL 129, 140 – 141.

⁵⁹ [1980] 1 WLR 1306.

⁶⁰ [1979] 2 All ER 945.

considerable amount of her savings on redecoration, improvements and repairs. In subsequent possession proceedings brought by the man, it was held that proprietary estoppel was established, and that the best way of protecting the woman would be to transfer the house into her name outright. The court granted an order to this effect.

3.42 The mistake limb has also long been recognised by the Irish courts. The trigger for the mistake limb is the dishonest conduct of the landlord in remaining silent in relation to the claimant's mistake so that he could profit by that mistake.⁶¹ In *McMahon v Kerry County Council*⁶² the plaintiff purchased a plot of land from the defendant with a view to building a school. This plan was abandoned and the site was left undeveloped. The plaintiff subsequently discovered that the defendant was preparing to build on the site. The plaintiff intervened and the building was stopped. The plaintiff subsequently discovered that the defendant had built two houses on the site and took action to recover the site. The defendant relied on the mistake limb of proprietary estoppel. Finlay P ruled in favour of the defendant council. He said that in order for the landowner to be able to recover the land it must be shown that the stranger was aware that he was building on the land of another.⁶³

3.43 In *Smyth v Halpin*,⁶⁴ the plaintiff built an extension onto his father's house on the faith of an assurance given by his father that he would be entitled to the house following his mother's death. However, the house was left to his mother for life and then to his sister. The plaintiff relied on the expectation limb of proprietary estoppel. The High Court held for the plaintiff and ordered a transfer of the reversionary interest.

3.44 In conclusion, it should be noted that while proprietary estoppel will sometimes be capable of providing a remedy in situations, which are not covered by the purchase money resulting trust, there are a number of formidable obstacles, which face a

⁶¹ See *Cullen v Cullen* [1962] IR 268.

⁶² [1981] ILRM 419.

⁶³ This decision has been heavily criticised by Mee "Lost in the Big House" (1998) *Irish Jurist* 187 at 208 – 211, who argues that it is an example of a hard case making bad law. He argues that Finlay P ignored the traditional rules of estoppel in the name of unconscionability.

⁶⁴ [1997] 2 ILRM 38.

claimant in such a situation. The most serious problems lie in proving that there was a representation (or a mistaken belief) and that the claimant acted to his or her detriment because of that representation or mistaken belief. Furthermore, even if the claimant succeeds in establishing an estoppel, the remedy may well be less extensive than a trust over property; for example, the court may only grant monetary compensation or an indefinite licence to occupy the family home.

(5) Contractual Licence

3.45 A cohabitee may attempt to claim that they have a contractual licence to reside in the property.⁶⁵ A contractual licence is a licence that arises from a term, either express or implied, in a contract. However, such claims have not been very successful in recent times, as the cohabitee will have to establish consideration and an intention to create legal relations. For example, in *McGill v S*,⁶⁶ Gannon J rejected the argument that the claimant had an irrevocable licence to continue to reside in the house. He regarded her as a licensee at will. The evidence did not support a licence by implied contract, which could continue against the will of the plaintiff, or even beyond the period of their mutual association. Furthermore, it should be noted that even if an irrevocable licence is established, it will only confer a personal right on the claimant, and does not give rise to a proprietary interest.

E The Basis for Reform

3.46 As we have seen, the purchase money resulting trust apart, a cohabitee whose name does not appear on the title deeds of a property is in a very vulnerable position. This position may be alleviated in a number of ways. Firstly, legislation could be enacted recognising housework, childcare and paying for improvements as indirect contributions for the purposes of the purchase money resulting trust. Secondly, a new 'Constitution proof' Matrimonial Homes Bill could be introduced, providing for an automatic joint tenancy in respect of the family home, its provisions applying to qualified cohabitees as well as spouses. Thirdly, the provisions of the *Family Home Protection Act 1976* could be extended to qualified cohabitees.

⁶⁵ See generally Coughlan *Property Law* (2nd ed Gill & Macmillan 1998) at 291 – 303.

⁶⁶ [1979] IR 283.

Finally, legislation could be introduced allowing cohabittees to apply for a property adjustment order following the termination of the relationship.

(1) Reform of the Purchase Money Resulting Trust

3.47 As indicated earlier,⁶⁷ the current system whereby unpaid work within the home does not generate a beneficial interest in the property but unpaid work outside the home does, is illogical and unfair. In *BL v ML*,⁶⁸ the Supreme Court stressed that it was for the legislature and not the courts to reform the law in this area. Shatter has proposed amending section 36 of the *Family Law Act 1995*, which allows spouses to apply to the court to determine issues relating to the ownership of property. He recommends that legislation be enacted adding an additional provision to section 36 requiring that “the contribution made by each spouse to the welfare of the family, including any contribution made by either of them by looking after the home or caring for the family is to be deemed a contribution in money or monies worth capable of conferring on the spouse so contributing a beneficial interest in the family home or in such other property as the other spouse acquired during the marriage”.⁶⁹ The ambit of this provision if enacted could be extended to include qualified cohabittees.

3.48 In addition, Shatter recommends that the artificial distinction as to the different effect in law of a contribution to the acquisition of property as compared with a contribution to the improvement of property be removed.⁷⁰ As indicated already,⁷¹ it is anomalous that paying for improvements by means of a mortgage raised for that purpose will generate a beneficial interest, but paying for the same improvements in cash will not. Shatter recommends that legislation be introduced which would allow, in the absence of an agreement to the contrary, a substantial financial contribution to the improvement of property to be capable of generating a beneficial

⁶⁷ At paragraph 3.15.

⁶⁸ [1992] 2 IR 77 at 115.

⁶⁹ Shatter *Shatter's Family Law* (4th ed Butterworths 1997) at 828.

⁷⁰ *Ibid* at 829.

⁷¹ At paragraph 3.15.

interest in the property.⁷² The range of the scheme could be widened to include qualified cohabittees.

3.49 Shatter's proposals are attractive in that they do not necessitate any radical change in the existing law. They also have the added advantage that third parties would not be unduly disadvantaged as it would be as difficult to predict whether an interest was acquired by means of unpaid work within the home as opposed to unpaid work outside the home. The interests of prospective purchasers or mortgagors could be protected by the creation of a new requisition on title dealing with the matter.

3.50 However, it could be argued that Shatter's scheme does not help a cohabitee whose contributions are made after the property has been acquired and fully paid for. While the rules governing the purchase money resulting trust could be amended to consider such contributions, the Commission is of the view that to do so would be to force property law to solve what is essentially a family law problem.

3.51 *The Commission does not recommend that legislation be enacted providing for a reformed version of the purchase money resulting trust as the Commission is of the view that to do so would be to force property law to solve what is essentially a family law problem.*

(2) A Community Property Regime

3.52 Another option would be to introduce a community property regime. This is a legal term of art. It is used to describe property regimes where any property acquired by either party is regarded as 'relationship property'. Such property would be held jointly by the parties, and divided equally between them in the case of death or the breakdown of the relationship. The parties would have the power to opt out of such a scheme if they wished. Community property schemes have proven popular in jurisdictions that have opted for the registration approach.⁷³

⁷² Shatter *Shatter's Family Law* (4th ed Butterworths 1997) at 829.

⁷³ In Denmark, under the *Registered Partnership Act 1989*, a community property regime applies unless the parties expressly opt out. The community fund consists of assets brought into the partnership by each partner, and property acquired during the marriage, including gifts and inheritances. However, the regime could be more accurately described as a deferred community property regime, as the community fund does not

3.53 In Northern Ireland, the Law Reform Advisory Committee recently recommended the introduction of a community property scheme in respect of the ‘joint residence’ of qualified cohabitants. Under the proposed scheme, ‘the joint residence’ would, if acquired after the parties became qualified, be held by them as joint tenants in equity.⁷⁴

3.54 A community property scheme has much to recommend it. It removes the need to prove the presence of a common intention where the contributions to the purchase of the family home are indirect in nature. It ensures that contributions to the family made after the property has been acquired and paid for generate an interest in the family home. However, community property schemes can be criticised as being over inclusive, in that they accord too great a share to cohabitants who do not contribute either directly or indirectly to the purchase of the property or family life. Community Property Regimes can also be criticised for conferring rights and duties on cohabitants, which were never intended by the parties to the cohabiting relationship.

3.55 For this reason, the Commission is not in favour of a community property regime, especially one that applies to cohabitants. It should be noted that the Law Commission, in their initial reports in 1971, 1973 and 1978 recommended statutory co-ownership for spouses in relation to the matrimonial home.⁷⁵ *The Matrimonial*

form until the partnership ends by dissolution or by death. Until then, a separate property regime operates, so a partner does not acquire any proprietary interest in the property of the other, and each partner may dispose, on his or her own behalf, of property, which is brought into the partnership or acquired during the partnership. However, a partner may not abuse this right of disposal to the detriment of the other party. Such abuse may lead to the division of the community, and to an award of damages in the case of the dissolution of the partnership. In addition, the family home may not be sold, leased or mortgaged without the consent of the other party. The dissolution of the partnership leads to the net community fund being divided equally between the parties. For a discussion of the Danish legislation, see Nielsen “Family rights and the ‘Registered Partnership’ in Denmark” *International Journal of Law and the Family* 4 (1990) 297-307.

⁷⁴ Law Reform Advisory Committee *Matrimonial Property* (Belfast 1999) at chapter 6.

⁷⁵ Law Commission Working Paper No 42, *Family Property Law* (1971) London HMSO; Law Com No 52 Law Commission Third Report on

Homes (Co-ownership) Bill 1980 was presented to the House of Lords and then withdrawn, following the decision in *Williams & Glyn's Bank Ltd v Boland*.⁷⁶ In its 1988 report,⁷⁷ the Law Commission restricted its proposals to personal property, as it was of the opinion that extending joint ownership to the family home would be controversial, and might attract opposition. Hale comments that:

“The Commission’s 1973 proposals for automatic joint ownership of the matrimonial home might have caught the same tide of public opinion which led to the *Sex Discrimination Act 1975* and the *Domestic Violence and Matrimonial Proceedings Act 1976*. But by the time that the Commission’s conveyancers had worked out a solution which satisfied them, that tide had been missed... Continued examination and reform of the discretionary remedies on marital or family breakdown is more likely to bear fruit than attempts to introduce new rules of substantive law which will affect [the] whole population – especially in the property law area.”⁷⁸

3.56 The main motivation behind the Northern Ireland proposals was that the imposition of automatic joint beneficial ownership reflects a sharing ideology of marriage. However, many would argue that a more individualist ideology currently exists in relation to marriage and cohabitation, and this ideology is best reflected by the separate property system.⁷⁹ The relationship is no longer viewed as being for life. Many people are coming to a relationship later in life, and may have substantial income to invest in property, and would be

Family Property (1973) London HMSO; Law Com No 86 *The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods*, (1978) London HMSO.

⁷⁶ [1981] AC 487. The provision of the Bill, which provided that the beneficial interest of a statutory co-owner would not bind third parties unless it was registered, was inconsistent with the protection afforded by the House of Lords in *Boland*.

⁷⁷ Law Commission *Matrimonial Property* (Law Com no 175) (1988).

⁷⁸ Hale “Family Law Reform: Wither or Whither” (1995) *Current Legal Problems* 217 at 228-229.

⁷⁹ See Glendon, “Is there a Future for Separate Property?” (1974) 8 *Fam LQ* 315 and Oldham, “Is the Concept of Marital Property Outdated?” (1983-1984) 22 *JFL* 263

appalled by the automatic imposition of a beneficial joint tenancy on the acquisition of a family home. The argument is even stronger in the case of cohabitees. They may have deliberately chosen not to marry in order to avoid triggering state imposed regulations with regard to their relationship.

3.57 *The Commission does not recommend the enactment of community property legislation for cohabitees.*

(3) *Extending the Provisions of the Family Home Protection Act 1976 to Qualified Cohabitees*

3.58 Another option would be to extend the provisions of the *Family Home Protection Act 1976* to qualified cohabitees. This would not confer a beneficial interest in the property on the cohabitee but it would ensure that the non-owning cohabitee would not be forced to leave the family home. This scheme would require the owner to obtain the qualified cohabitee's consent to any sale or disposition of the property, and envisages allowing the court to make any order it considers proper for the protection or disposal of the family home.

3.59 In England and Wales, an extension of matrimonial home rights of occupation to cohabitees was made under the *Family Law Act 1996*. A cohabitee now has the right to apply to the court for an order giving that cohabitee a right of occupation in the family home. Where one cohabitee owns the house, and the cohabitee lives, used to live or intended to live there with the other cohabitee as husband and wife, the non-owning cohabitee may apply for an order under section 36 of the 1996 Act. Such an order may permit the non-owning cohabitee to occupy the home, exclude the owning cohabitee from the home or regulate the occupation by either or both of them. In deciding whether to make an order, the court must have regard to the circumstances of the case, including: the housing needs and resources of each of the parties, and of any relevant child; the financial resources of each of the parties; the likely effect of any order on the health, safety or well-being of the parties and of any relevant child, and the conduct of the parties in relation to each other and the nature of the parties' relationship. Section 41 provides that, when considering the nature of the cohabitees' relationship, the court is obliged to have regard to the fact that they have not given each other the commitment involved in marriage.

3.60 The main disadvantage of the protection afforded to the cohabitee by the 1996 Act is that the right of occupation does not arise automatically, and is dependant on an application being made, and is subject to the discretion of the court. More importantly, however, the right of occupation of a cohabitee is not capable of protection against dealings with a third party. It could be described as conferring a very 'shallow' protection. Such a right is of limited benefit to a cohabitee, if it does not bind a purchaser/mortgagee, when the owning cohabitee sells or mortgages the home. By contrast, the spouse's right of occupation, which arises without the necessity of a court application, may be made enforceable against third parties by entry of a notice in the Land Registry in the case of registered land, and by registration of a Class F land charge in the case of unregistered land.⁸⁰ The requirement for registration in England means that the burden on the purchaser to make enquiries is less onerous than under the doctrine of notice in the Irish situation. However, the English approach can be criticised in that it does not look after the cohabitees who are in need of most protection, namely, the cohabitees who are unaware of their rights and the necessity for registration.

3.61 However, the main problem, which the adoption of such a scheme would create, is in the field of conveyancing. It is commonly acknowledged that the *Family Home Protection Act 1976* introduced a large amount of extra work for conveyancers. If this legislation were extended to cover qualifying cohabitees, it has to be acknowledged that even more conveyancing difficulties would be created. For example, if a person is selling or mortgaging a property, that person currently has to sign a family home declaration stating that they are either single or married and that the property does or does not constitute a family home. If the person is married, then the spouse is also required to sign the declaration, and they have to exhibit their marriage certificate. If the property is a family home, the prior consent of the spouse is required. Although a person is either married or they are not, and this fact can easily be proved by the production of a marriage certificate, in practice various difficulties have arisen. If the scheme were extended to include qualified

⁸⁰ The spouse may apply to the court for an order under section 33 to enforce his/her right to remain in occupation, to exclude the other spouse or to regulate the occupation of either or both of them. In *Wroth v Tyler* [1974] 2 WLR 1217 the statutory right of occupation was described as "a weapon of great power and flexibility."

cohabitees, it would create a nightmare for conveyancers, especially in light of the presumptive scheme being proposed by this Paper. For example, how is the purchaser supposed to know if the seller is a qualified cohabitee, if the latter does not know himself? This arises because under the presumptive scheme only the court can determine whether the parties are qualified cohabitees or not.

3.62 *The Commission is of the view that the provisions of the Family Home Protection Act 1976 should not be extended to qualified cohabitees.*

(4) Property Adjustment Orders

3.63 Another option would be to allow qualified cohabitees to apply for a property adjustment order on the break-up of the relationship. It has already been shown that property law alone cannot provide adequate protection for the financially weaker cohabitee, because with a purchase money resulting trust, post-acquisition contributions cannot generate a beneficial interest in property.⁸¹ In the absence of a written agreement, the financially weaker cohabitee cannot obtain a proprietary interest in a family home which was fully paid for by the legal owner prior to the commencement of the relationship, or which was inherited. In contrast, under Irish family law, a property adjustment order can be made in favour of a spouse, whether the property was purchased or inherited before or after the marriage, and the contribution made by the applicant spouse is only one of a series of factors that the court considers in deciding whether to grant an order.⁸²

⁸¹ See Chapter 3C.

⁸² The manner and time of the acquisition of the property is merely one indirect ingredient in a list of factors, which the court will consider in deciding whether to grant a property adjustment order. See section 16(2) of the *Family Law Act 1995*, and section 20(2) of the *Family Law (Divorce) Act 1996*. For example, if the husband acquired the family home before the marriage and met all the mortgage repayments in relation to it, the court may consider that a transfer of the entire asset to the wife gives no recognition to his contributions, and that a more equitable course would be to order a sale of the property, and the division of the proceeds between them to facilitate both of them acquiring alternative accommodation. See *O'L v O'L* [1996] 2 Fam LJ 63.

(a) *Approaches taken in other jurisdictions*

(I) *New South Wales*

3.64 In New South Wales, a separate property system operates. However, section 14 of the *Property (Relationships) (NSW) Act 1984* provides that, where the relationship between parties to a *de facto* relationship (this is the term used in Australia to describe cohabitation) has ceased, the parties have a right to make an application to the court for an adjustment of property interests in respect to the property of the parties to the relationship or either of them.

3.65 The rationale for this was a perceived failure on the part of the general law to recognise adequately two types of contributions to *de facto* relationships, namely that of indirect financial and non-financial contributions to the acquisition, conservation or improvement of assets, and financial and non-financial contributions to the welfare of the other partner or children.⁸³ The solution, set out in section 20 of the 1984 Act, enables the court, on the application by a person in a *de facto* relationship, to make such property adjustment orders as it considers “just and equitable,” having regard to:

- a. “the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them, and
- b. the contributions, including any contributions made by either of the parties to the relationship to the welfare of the other party to the relationship or to the welfare of the family constituted by the parties and one of the following, namely: a child of the parties, or a child accepted by the parties or either of them into the household of the parties, whether or not the child is a child of either of the parties.”

3.66 The main difference between this property adjustment provision and the similar provision in the *Family Law (NSW) Act*

⁸³ New South Wales Law Reform Commission *De Facto Relationships* (Report 36 1983) at paragraph 7.43.

1975 dealing with spouses is that, where the couple are unmarried, the future needs of the parties to a *de facto* relationship, and of any children, are irrelevant to the property adjustment process. In contrast, under the *Family Law Act 1975*, when the court is making a property adjustment order, it is obliged to take into account a wide range of matters listed in section 75(2), including the future needs and means of the parties.⁸⁴ The New South Wales Law Reform Commission, in its 1983 Report, did not favour including a consideration of the future needs of the parties when the court was making property adjustment orders in favour of *de facto* partners. It was of the opinion that the future needs of the parties should be catered for through maintenance orders.⁸⁵ When making property adjustment orders, it was felt that the sole emphasis should be on the contributions made by the parties.

3.67 The New South Wales Law Reform Commission also recommended that, in proceedings for property adjustment or maintenance, a court should make orders that finally determine the financial relationship between the parties, and avoid further proceedings between them. This principle of finality is set out in section 19 of the *Property Relationships Act 1984*, and is intended to allow the parties to make a clean break when their relationship ends.

3.68 Section 18(2) of the *Property Relationships Act 1984* provides that applications must be brought within two years of the relationship breaking down, unless the applicant can demonstrate that “greater hardship would be caused to him if that leave were not granted than would be caused to the respondent if leave were granted.” Sheehan argues that this provision perhaps affords too much discretion to a judiciary and that a less discretion-orientated test would be better suited in an Irish context.⁸⁶

3.69 The absence of an express reference to the future needs and means of the parties in the property adjustment provisions of the

⁸⁴ See Parkinson, “The Property Rights of Cohabitees- Is Statutory Reform the answer?” Chapter 21 in Bainham & Pearl (ed) *Frontiers of Family Law* (2nd ed 1995) 301 and Sheehan “Till Death do us part?” [2001] 1 *IJFL* 12 at 14-15.

⁸⁵ New South Wales Law Reform Commission *De Facto Relationships* (Report 36 1983) at paragraphs 9.31 – 9.34.

⁸⁶ Sheehan “Till Death do us part?” [2001] 1 *IJFL* 12 at 13. See further Gardner “Rethinking Family Property” (1993) 109 *LQR* 263 at 265.

Property Relationships Act 1984 has resulted in a number of divergent views as to whether the courts have the power to have regard to such issues. The main approaches have been described as the “adequate compensation approach,” the “reliance and expectation” approach and the “strict contributions” approach. Under all three approaches, the tendency of the court has been to regard the cohabitee who has the legal title to the property as the owner, and to make any adjustment very cautiously.⁸⁷

3.70 Under the “adequate compensation” approach, formulated by Powell J in *D v Mc A*,⁸⁸ the court requires the applicant to show that there is a need for redress, in other words that the applicant made contributions which were not adequately recognised, or for which there was no adequate compensation.⁸⁹ In *Dwyer v Kalijo*,⁹⁰ Handley JA, with whom Priestly JA agreed, accepted that section 20 laid down the “fundamental matters” which the court must consider, but he was also of the view that they were by no means the only matters the court could take into account in determining what was a “just and equitable” order. Other relevant factors, which a court could consider, included the length of the relationship and “the needs” of the parties. Priestly JA rejected the “adequate compensation approach,” and adopted what has come to be recognised as the “reliance and expectation approach.” He stated that section 20 authorised the court to make orders to:

“...remedy any injustice the applicant would otherwise suffer because of his or her reasonable reliance on the relationship (reliance interest) or his or her reasonable expectations from the relationship (an expectation interest). The section would also authorise orders which restored to

⁸⁷ In contrast, where the couple are married, there is a general community expectation (particularly since the introduction of the *Family Law Act 1975*) that shared property be divided equally between the partners, regardless of who has legal title at the end of the marriage.

⁸⁸ (1986) 11 Fam LR 214.

⁸⁹ This approach is often criticised, in that it undervalues contributions made by the homemaker, as applicants who rely on such domestic, rather than pecuniary contributions, are considered to have been adequately compensated by living rent-free in property belonging to the other partner.

⁹⁰ (1992) 27 NSWLR 728.

the applicant benefits rendered to the other partner during the relationship or their value (the restitution interest).”⁹¹

3.71 In contrast, Mahoney JA in *Wallace v Stanford*,⁹² held that the wording of section 20 constrained the court, so that it could only have regard to the two factors listed therein, namely the financial and non-financial contributions in paragraph (a), and the homemaker contributions in paragraph (b). The approach taken by the court in that case has been described as a “strict contributions approach.”

3.72 In *Evans v Marmont*,⁹³ a specially constituted five-member bench of the Court of Appeal was convened to clarify the correct approach to section 20. The joint majority judgment of Gleeson CJ and McLelland CJ (in equity) concluded that “the reliance and expectation approach” adopted in *Dwyer v Kalijo* should be overruled. They were of the opinion that the “focal points” of an order under section 20 are the contributions referred to in paragraphs (a) and (b). However, they also quoted with approval the judgment of Hodgson J at first instance in *Dwyer v Kalijo*, which suggests that, whilst contributions may be the focus, they are not the only relevant consideration, and other factors could be considered, including the length of the relationship, the needs of the parties and the loss of ‘opportunity costs’. On the other hand, Meagher J who also made up the majority, stated that “the court may have regard to each of the two [contribution] factors and not to any other factors.”⁹⁴ This decision has perpetuated the uncertainty, as some judges continue to believe that other factors can be taken into account, while others feel that the court is confined to the contribution factors.⁹⁵

3.73 In its recent Discussion Paper,⁹⁶ the New South Wales Law Reform Commission seems to suggest that a strict interpretation of section 20 is too narrow, as it does not allow the contributions made

⁹¹ *Ibid* at 744.

⁹² (1995) 37 NSWLR 1.

⁹³ (1997) 42 NSWLR 70.

⁹⁴ *Ibid* at 97.

⁹⁵ See *Stroud v Simpson-Philips* [1999] NSW 994, *Richardson v Hough* (1998) 24 Fam LR 94 and *Gazzard v Winders* (1998) 23 Fam LR 716.

⁹⁶ New South Wales Law Reform Commission *Review of the Property (Relationships) Act 1984* (Discussion Paper 44 2002) at paragraph 5.110.

by women to the welfare of the family, and its consequent impact on their future earning capacity to be given sufficient weight. The reason the future needs of the parties was not listed as a factor to be taken into account in making a property adjustment order was that the New South Wales Law Reform Commission felt that in 1983 a *de facto* relationship differed from marriage because marriage required a public commitment, and the law should reflect this difference. In its Discussion Paper, the present New South Wales Law Reform Commission makes the point that “the changed social, demographic and legal environment makes this rationale difficult to justify today.”⁹⁷

(b) *Queensland*

3.74 The Queensland Law Reform Commission recommended in 1993 that the current New South Wales model should not be adopted. They felt that this approach undervalued homemaker and parenting contributions, and did not provide enough support for the future needs of partners who had assumed those roles during the course of the relationship.⁹⁸ Under section 286(1) of the *Property Law (Queensland) Act 1974*, the court is required to make any order it considers “just and equitable” to adjust the property interests between the cohabiting parties. The matters which it must take into account in making its order, include contributions to the parties’ property and financial resources and to the family’s welfare; the effect which the order may have on the partners’ earning capacity; the partners’ age and health; their income, property and financial resources; their capacity for employment; whether one party has care of the children; their commitments to support themselves or another person; their eligibility for government assistance; what standard of living is reasonable for each of them; the contributions made by each partner to the other’s income and earning capacity; the length of the relationship; the effect of the relationship on each party’s earning capacity; whether either partner has entered into a new relationship, and whether child maintenance is paid by either partner.⁹⁹

⁹⁷ New South Wales Law Reform Commission *Review of the Property (Relationships) Act 1984* (Discussion Paper 44 2002) at paragraph 5.110.

⁹⁸ Queensland Law Reform Commission *De Facto Relationships* (Report 44, 1993) at 48-49.

⁹⁹ Sections 291-293 and sections 297-308 of the *Property Law Act 1974*.

(c) *New Zealand*

3.75 New Zealand adopts quite a different approach in relation to the distribution of property between cohabitants when their relationship breaks down, under the recently enacted *Property (Relationships) Amendment Act 2001*. This approach incorporates an element of community property.

3.76 Relationship property is defined as “property acquired during or in contemplation of the relationship by either of the parties.” The family home and family chattels, whether they were acquired before or after the relationship commenced, are also considered ‘relationship property’.¹⁰⁰ The starting point of equal sharing does not apply to *de facto* relationships that have lasted less than 3 years unless there is a child of the relationship, or the applicant has made a significant contribution to the relationship and the court is satisfied that the failure to make an order would result in serious injustice.¹⁰¹ The court can depart from equal sharing, if there are extraordinary circumstances that make equal sharing repugnant to justice, in which case each party’s share will be determined according to their contributions to the relationship. Section 15 allows the court to award a lump sum payment on top of the initial division of property, where it is satisfied that the income and living standards of one partner are likely to be significantly higher than the other partner, because of the effects of the division of functions within the relationship while the partners were living together. The factors that the court may consider when making a section 15 order include the parties’ earning capacity, whether they have ongoing daily care of a child of the relationship and any other relevant fact.¹⁰²

3.77 Separate property is defined as “any property that is not relationship property and includes property acquired by either party while they were not living as cohabitants and inheritances and gifts received during the relationship”. On the breakdown of the relationship, separate property is held by the party who acquired it, unless it has been transformed into relationship property. This occurs when contributions of the other party, or the application of relationship property, has resulted in an increase in the value of the

¹⁰⁰ Section 8 of the *Property (Relationships) Amendment Act 2001*.

¹⁰¹ Section 14A(2) of the *Property (Relationships) Amendment Act 2001*.

¹⁰² Section 15(2) of the *Property (Relationships) Amendment Act 2001*.

separate property, in which case the increase is treated as relationship property.¹⁰³

(d) *England*

(I) *The Law Society Proposals for Reform*¹⁰⁴

3.78 The Law Society in England favoured the introduction of property adjustment orders for cohabitees but was of the view that these should be more difficult to obtain than property adjustment orders for spouses. Under the proposed scheme, when making the order, “a fair account should be taken of any economic advantage derived by either party from contributions by the other and of any economic disadvantages suffered by either party in the interests of the other or of the family.”¹⁰⁵ This wording is based on the principle set out in section 9(1)(b) of the *Family Law (Scotland) Act 1985*.¹⁰⁶ “Contributions” are defined as “a contribution in money or in money’s worth”. This includes contributions such as those made by a parent, running the home or maintaining family.

3.79 This approach can be contrasted with the approach taken in relation to applications for ancillary relief on divorce, in that future needs and resources cannot be taken into account. A broader approach, the Society claimed, was not justified, on the basis that, in

¹⁰³ Section 9A of the *Property (Relationships) Amendment Act 2001*.

¹⁰⁴ The Law Society *Cohabitation – The Case for Clear Law* (July 2002).

¹⁰⁵ *Ibid* at paragraph 101.

¹⁰⁶ Part 16 of the Scottish Law Commission *Report on Family Law* (HMSO 1992) deals with cohabitation. The Commission recommended that the rebuttable presumption of equal shares in household goods and in money and property derived from a housekeeping allowance set out in section 25 and 26 of the *Family Law (Scotland) Act 1985* should be extended, with some modifications, to cohabitees. On divorce, a regime of property sharing applies in relation to matrimonial property as set out in section 9(1)(a) of the 1985 Act. However, the Commission felt that there was no adequate justification for extending this principle to cohabitees, and instead stated that the court should be permitted to make an award of a capital sum based on the principle set out in section 9(1)(b). It did not think it was necessary to provide for orders for the transfer of property, as an award of a capital sum ought to be sufficient to enable justice to be done. They also suggested that a claim should be made within a period of one year after the end of the cohabitation.

cohabitation cases, the main concern is protecting the disadvantaged.¹⁰⁷

3.80 The claim, which would be referred to as an application for “capital provision,” would include the possibility of a property adjustment order, or a lump sum payment. In making a property adjustment order, the court could transfer all or some of the property to one of the cohabitants; it could give directions as to the rights of occupation, or order a sale of the property if that is appropriate. Alternatively, or in addition to making a property adjustment order, the court would have jurisdiction to make a lump sum order to assist in re-housing. The Law Society suggested that the operation of these principles would be likely to result in much more modest adjustments than under the operation of the principles applying to spouses, and indeed, in many cases, no adjustment whatsoever would be necessary if neither party has been advantaged or disadvantaged by the relationship.

3.81 The court would also have the power to grant an injunction to restrain the disposal of assets by one cohabitee if the intention was to defeat a potential claim from the other cohabitee.¹⁰⁸ Another issue that was considered was the fact that when a marriage breaks down, it is possible for a party to delay making their application for ancillary relief for some years. The Law Society was of the view:

“[t]hat in the case of cohabitants, however, any claim for capital provision should be brought within one year of the breakdown of the relationship or when the couple separate whichever is later. This limits the uncertainty of claims being left unresolved for long periods. However, to avoid this rule causing injustice there should be leave for a cohabitant to make a late claim. Each such application would have to be looked at on its own merits.”¹⁰⁹

¹⁰⁷ The Law Society *Cohabitation – The Case for Clear Law* (July 2002) at paragraph 104.

¹⁰⁸ This is similar to the protection afforded to married couples under section 37 of the *Matrimonial Causes Act 1973*.

¹⁰⁹ The Law Society *Cohabitation – The Case for Clear Law* (July 2002) at paragraph 105.

(II) *Lord Lester's Bill*

3.82 Lord Lester's *Civil Partnerships Bill* envisaged the introduction of a deferred community property regime, which would only apply in the absence of an express property agreement between the registered partners, and which would operate in priority to the property adjustment jurisdiction. The community property regime would apply to any "communal property," which was defined as consisting of the family home and household assets (unless acquired by way of a gift or inheritance), regardless of whether they were acquired before or after the civil partnership was registered.

3.83 On the cessation of the partnership, the property of partners would be allocated between them in accordance with the final settlement arrangement agreed between them. If they did not agree on a final settlement arrangement, the allocation of the property would be governed by any property agreement noted in the register. If none was noted, any communal property is treated as being held jointly by the partners in equal shares, and any other property remains in the ownership of the partner to whom it belongs. However, where an application for a cessation order was made, the proposed Bill permitted the court to make intervention orders, taking into account certain factors if it considered it "just and equitable" to do so. The intervention orders permissible consisted of property or pension adjustment orders and maintenance orders.

(III) *Civil Partnership Bill 2004*¹¹⁰

3.84 This Government Bill, which supersedes Lord Lester's Private Members' Bill, proposes that registered partners should have the important legal protection of provisions for division of property on the dissolution of the partnership.¹¹¹ These provisions should take account of the needs of the partners, their children and any children who have been treated as dependants by the partners during the partnership. Such a scheme, it is proposed, would provide partners with the property rights appropriate to family relationships.

¹¹⁰ For background discussion to the 2004 Bill see the Consultation Paper *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (Women & Equality Unit, Department of Trade and Industry, June 2002).

¹¹¹ *Ibid* at paragraphs 8.10 - 8.11.

3.85 The Bill proposes that when, or after, the court grants an order for dissolution of a partnership or an order that a partnership is void or an order for separation, it should be able to exercise a new discretionary power to order that property should be transferred. This transfer could be made from one party to the other; to a child treated as a dependant by the partners; or to another person for the benefit of a child of the family. Under the proposed scheme, the court would also have the power to order the making of periodical payments, to order the sale of property, to make some orders in respect of pensions and so on. The court would have discretion as to what orders to make in any particular case in order to meet the demands of that case according to its particular circumstances.

(e) *Conclusions*

3.86 The Commission is of the view that the court should be permitted to make a property adjustment order in favour of a qualified cohabitee. However, the Commission is of the view that this power should only be invoked in exceptional circumstances. The Commission is of the view that the New South Wales model should be adopted, whereby the court is given the power to make such property adjustment orders as it considers “just and equitable,” having regard to:

- (i) the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them; and
- (ii) the contributions made by either of the parties to the relationship, to the welfare of the other party to the relationship, or to the welfare of the family.¹¹²

3.87 The Commission is of the view that such applications must be brought within one year of the relationship breaking down or the couple separating.

3.88 *The Commission recommends the enactment of legislation providing for property adjustment orders for qualified cohabitees in*

¹¹² For example a parent’s obligation to maintain his or her offspring. See generally Chapter 5.

exceptional circumstances where the court considers it just and equitable to do so having regard to:

- (i) the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them; and*
- (ii) the contributions made by either of the parties to the relationship, to the welfare of the other party to the relationship, or to the welfare of the family.*

The Commission recommends that such applications must be brought within one year of the relationship breaking down.

CHAPTER 4 SUCCESSION RIGHTS

A Introduction

4.01 Succession law the world over attempts to protect close family members by placing limits on a testator's testamentary freedom, and by ensuring that such family members take priority over other relatives where the testator dies intestate. In Ireland, the *Succession Act 1965* regulates succession law.¹ Part 9 of the Act sets out the succession rights of surviving spouses and children where the deceased dies testate. Part 6 outlines the succession rights of surviving spouses and children where the deceased dies intestate.

4.02 However, cohabitees have no succession rights under Part 9 or Part 6 of the *Succession Act 1965*. Whether the surviving cohabitee is disinherited by the deceased's will or whether the deceased dies intestate, the only possible legal avenue open to the surviving cohabitee would be to try to establish a beneficial interest in the deceased's property under the purchase money resulting trust, or to bring a proprietary estoppel claim.²

4.03 In this chapter, the Commission will consider the extent, if any, to which, cohabitees should be entitled to succession rights. In Part B, the succession rights of the surviving spouse or former spouse and the surviving children under the *Succession Act 1965* are outlined, whilst in Part C, we address the basic question of whether cohabitees should have any claim on each other's estate. In Part C, we also review the succession rights of the surviving spouse and children, and those of surviving cohabitees (where they exist) in other jurisdictions, as well as recent proposals to grant or extend those entitlements to cohabitees. This review of the law outside Ireland is

¹ See generally, Brady *Succession Law in Ireland* (2nd ed Butterworths 1995); Wylie *Irish Land Law* (3rd ed Butterworths 1997); Lyall *Land Law in Ireland* (2nd ed Round Hall Sweet & Maxwell 2000); Coughlan *Property Law* (2nd ed Gill & Macmillan 1998).

² See Chapter 1A.

limited to jurisdictions that operate a separate property regime. This is because jurisdictions that operate a community property system tend to look after the surviving spouse/cohabitee through this system, and as a result, their succession rights are not as extensive. Finally, in Part E, we discuss and advance recommendations for reform in this jurisdiction.

B Rights of Surviving Spouse and Marital Children

(1) *The Surviving Spouse: Testate Succession Rights*

4.04 The *Succession Act 1965* currently provides that if a testator dies leaving a spouse and no children, the spouse has a right to one-half of the estate.³ However, if a testator dies leaving a spouse and children, the spouse has a right to one third of the estate.⁴ This is known as the legal right share and has priority over any devises, bequests and shares on intestacy.⁵ It may be renounced in writing at any time during the lifetime of the testator.⁶

(2) *The Surviving Children: Testate Succession*

4.05 If a testator dies without making proper provision for the children, the latter may apply to the court to have such provision made for them out of the estate.⁷ In contrast to the legal right share of a surviving spouse, a surviving child is not entitled to a fixed share of the estate, the size of the award, if any, is at the discretion of the court. The test is whether the testator failed in his or her “moral duty” to make proper provision for the applicant and in considering this, the court will assume the role of “a just and prudent parent”.⁸ Where it is

³ Section 111(1).

⁴ Section 111(2).

⁵ Section 112.

⁶ Section 113.

⁷ Section 117(1). See Pilkington “Section 117 of The Succession Act, 1965” (1998) *Bar Review* 892; Monaghan “Recent developments in the Law of Succession” [1998] 2 *IJFL* 53; Hourican “Section 117 Claims: Practice and Procedure to Bear in Mind” (2001) 6 *CPLJ* 625; Wills “Section 117: Out of Step with the Times” (2001) 6 *CPLJ* 84.

⁸ See *Re GM; FM v TAM and Others* (1972) 106 *ILTR* 82. See generally Keating *Keating on Probate* (Round Hall Sweet & Maxwell 2002) at 198 – 225.

established that the applicant failed in his or her “moral duty”, the court in determining the size of the award will take into account the position in life of each of the testator’s children and any other relevant circumstances, such as prior provision or particular need.

(3) *The Rights of the Surviving Spouse and Children on Intestacy*

4.06 Where a person dies intestate leaving a spouse but no issue, the spouse inherits the whole estate.⁹ Where the intestate dies leaving both a surviving spouse and issue, the spouse takes two thirds of the estate, the remainder being distributed amongst the issue.¹⁰ Where the intestate dies leaving issue and no spouse, the estate will be divided as follows. If the issue are in equal degree of relationship to the deceased, the estate will be distributed in equal shares among them.¹¹ If they are not in an equal degree of relationship, then distribution is according to the relative’s relationship with the deceased.¹² For example, John dies intestate leaving issue but no spouse. He had two children, James and Janet. However, Janet predeceased him. She has three surviving children. James will take half the estate, the remainder being divided equally amongst Janet’s three children.

(4) *The Effect of a Decree of Judicial Separation or Divorce on the Succession Rights of a Surviving Spouse*

4.07 The court may, at the time of granting a decree of judicial separation, or at any time thereafter, make an order extinguishing the legal right share of the spouse.¹³ Before making such an order, the court will look at all the circumstances of the case,¹⁴ in particular whether adequate and reasonable provision has been made for the spouse whose succession rights are to be extinguished.¹⁵

⁹ Section 67(1).

¹⁰ Section 67(2).

¹¹ Section 67(4)

¹² Section 67(4).

¹³ Section 14 of the *Family Law Act 1995*.

¹⁴ Section 16(1) and (5).

¹⁵ Section 14.

4.08 There is no need for the court to make any such order where a decree of divorce is granted, as a spouse ceases to be a spouse from the date of the decree and is therefore no longer automatically entitled to a share in their former spouse's estate. However, unless what is termed a 'blocking order' was obtained under section 18(10) of the *Family Law (Divorce) Act 1996*,¹⁶ a former spouse retains a residual right to make an application to the court for provision to be made out of the former spouse's estate on his or her death. The court may make such an order only where it is satisfied, having regard to all the circumstances, and to any orders made and also to the rights of other interested parties, that proper provision was not made for the applicant during the deceased's lifetime.¹⁷

C Should Succession Rights be Extended to Cohabitees?

4.09 It might be thought that the issue of whether a cohabitee should be entitled to succession rights in respect of a deceased partner's estate should be dealt with in the same manner as claims for maintenance or property adjustment orders following the termination of the relationship. However, the Commission is of the view that there is a fundamental difference between the two situations. This difference lies not so much in the position of the claimant, who will be the same in either case, as in that of the parties who would be contesting the claim, in the two different types of claim. In the case of succession rights, a claim would be at the expense of the family, friends or others who would have inherited the property under the will or on intestacy if the cohabitee had not been entitled to claim.

¹⁶ Section 18(10) of the 1996 Act and section 15(a)(10) of the 1995 Act set out the jurisdiction of the court to make a blocking order. These provisions state that, on the grant of a divorce decree or a judicial separation, or at any time thereafter, the court, on application to it by either of the spouses concerned during the lifetime of the other spouse, may, if it considers it just to do so, make an order that either or both spouses shall not, on the death of either of them, be entitled to apply for an order under this section.

¹⁷ Section 52(g) of the 1996 Act has now inserted section 15(a) into the *Family Law Act 1995* to allow the same residual right to apply for provision out of the estate of the deceased spouse.

D The Law in other Jurisdictions

(1) England and Wales

(a) Present Law

4.10 In England and Wales, if a person dies without making “reasonable financial provision” for close family members, the latter may apply to the court to have such provision made for them out of the estate.¹⁸ This applies whether the person died testate or intestate. Under the original legislation, the following were entitled to apply, the deceased’s spouse, a former spouse who has not remarried, a child of the deceased, a person treated as a child of the family by the deceased, and any person who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased.¹⁹ In considering the application, the court will have regard to all the circumstances of the case, in particular the financial resources and needs of the applicant, or any other potential applicant and the financial resources and needs of the beneficiaries of the estate.

4.11 The *Law Reform (Succession) Act 1995* extended the category of persons entitled to make a claim for financial provision to include surviving cohabiters.²⁰ Although, a cohabitee was entitled to make a claim under the original legislation, it was necessary to establish that the cohabitee was dependant on the deceased. Under the amended legislation, it is not necessary to establish dependency, merely that the cohabitee lived with the deceased as man and wife for two years prior to the deceased’s death.²¹ In considering a surviving cohabitee’s application, the court will, in addition to the criteria listed

¹⁸ Section 1 of the *Inheritance (Provision for Family and Dependants) Act 1975*.

¹⁹ Section 1(1).

²⁰ Section 2 of the *Law Reform (Succession) Act 1995*. The amendment was intended to benefit heterosexual cohabiters as distinct from homosexual cohabiters (See Hansard HL Vol 561, col 511). However, Bailey–Harris & Wilson, argue that the provisions of the 1975 Act as amended should be regarded as applying to homosexuals as well following the decision of the Court of Appeal in *Mendoza v Ghaidan* [2002] 4 ALL ER 1162. See Bailey – Harris & Wilson “Mendoza v Ghaidan and the Rights of De Facto Spouses” [2003] Fam Law 575.

²¹ *Ibid.*

in the 1975 Act, have regard to the age of the applicant, the length of the cohabitation and any contributions, direct or indirect, made by the applicant to the household.

(b) *Proposed Changes*

(1) *Civil Partnership Bill*²²

4.12 In its Consultation Paper, the UK Government noted that heterosexual cohabitantes are already entitled to claim relief under the provisions of the *Inheritance (Provision for Family and Dependents) Act 1975*, as amended. Accordingly, the only change proposed by the document was that the 1975 Act should be amended to take into account the system of registration proposed in the Consultation Paper by adding registered partners and former registered partners to the categories of person entitled to make a claim under the Act.²³

4.13 The Bill was published in response to the submissions received to the Consultation Paper on Civil Partnerships which was itself published as a Governmental response to two Private Members Bills, the *Relationships (Civil Registration) Bill* (Jane Griffith's Bill) and the *Civil Partnerships Bill* (Lord Lester's Bill), tabled in the 2001-2002 session. The scheme proposed in the 2004 Bill differs in a number of respects from the schemes proposed in the earlier Bills.

4.14 The most obvious difference between the two is that the 2004 Bill is concerned only with same-sex couples whereas the benefits conferred by the Private Member's Bills would have extended to both same-sex and opposite-sex couples. However, the inheritance provisions of the two earlier Bills differ slightly. Under Jane Griffith's Bill, the surviving registered partner would have been treated in the same manner as a spouse for the purposes of section 46 of the *Administration of Estates Act 1925*. Therefore, the presence of any surviving parents, siblings or issue would have been taken into account when calculating the surviving cohabitee's share, where the deceased died intestate. In contrast, under Lord Lester's Bill,

²² See for background to the 2004 Bill the Consultation Paper *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (Women & Equality Unit, Department of Trade and Industry, June 2002).

²³ Schedule 4. For a discussion of the background to this, *Civil Partnership A Framework for the Legal Recognition of Same-Sex Couples* (Women & Equality Unit, Department of Trade and Industry, June 2002) at 63.

provision for the surviving cohabitee would have depended on whether the deceased had any issue.

4.15 The earlier two Bills also differed in their approach to the *Inheritance (Provision for Family and Dependants) Act 1975*. Under Jane Griffith's Bill, a surviving registered partner would have been treated in the same way as a spouse, receiving such financial provision, as the court considered reasonable in all the circumstances, regardless of whether such provision was necessary for maintenance. However, under Lord Lester's Bill, a surviving registered partner would only have been entitled to such financial provision as the court considered appropriate, having regard to all the circumstances of the case, for maintenance.

4.16 Aside from its restriction to same-sex couples, the 2004 Bill adopts a pragmatic approach to the issue of succession rights for cohabitees. Rather than bestow automatic rights on intestacy, the Bill places the onus on cohabitees to put their affairs in order by making a will, while giving cohabitees who feel that proper provision has not been made for them the right to apply to the court for relief. However, in effect there is nothing novel in this approach, as it is already in operation under the *Family Law (Maintenance of Spouses and Children) Act 1976* as amended.

(II) *The Law Society Proposals*²⁴

4.17 The Law Society of England and Wales made two recommendations in relation to the issue of succession rights in its recent paper *Cohabitation – The Case for Clear Law*. First, in relation to the *Inheritance (Provision for Family and Dependants) Act 1975* the Law Society felt that although it provided opposite-sex cohabitees with an appropriate remedy, its exclusion of same-sex cohabitees was inequitable. Accordingly, the Law Society recommended that the legislation be amended to include same-sex relationships. However, such a course of action is probably no longer necessary as the Court of Appeal in the case of *Mendoza v Ghaidan*,²⁵ held that it is not permissible to distinguish between same-sex and opposite-sex cohabitees. In light of this, the 1975 Act must now be regarded as applying to same-sex as well as opposite-sex couples.

²⁴ The Law Society *Cohabitation – The Case for Clear Law* (July 2002) at 35.

²⁵ [2002] 4 ALL ER 1162.

The Law Society also recommended that registered cohabitees should be treated as spouses for the purposes of intestacy law.

(2) **Scotland**²⁶

(a) *Present Law*

4.18 Succession law in Scotland is governed by the *Succession (Scotland) Act 1964*. If a testator dies leaving a spouse and no children, the spouse has a right to one-half of the deceased's movable estate. However, if a testator dies leaving a spouse and children, the spouse has a right to one-third of the deceased's movable estate. The children are collectively entitled to one-third of the deceased's movable estate if the deceased left a spouse or one-half of it if the deceased left no spouse. Each child has an equal claim, which is transferable to the child's issue if the child predeceases the parent. These entitlements are known as "legal rights", similar to the Irish concept of the legal right share, and apply regardless of whether the deceased died testate or intestate.

4.19 In addition to legal rights, where a deceased dies intestate, the surviving spouse is entitled to certain 'prior rights,' which must be satisfied before the legal rights can be met. The surviving spouse is entitled to the deceased's interest in the family home, in which he or she was ordinarily resident at the time of the intestate's death, up to the value of £110,000.²⁷ The surviving spouse is also entitled to the furniture and furnishings up to a maximum of £20,000.²⁸ In addition, the surviving spouse is entitled to financial provision to the value of £30,000 if there is surviving issue or £50,000 if there is not.²⁹ After all prior rights and legal rights have been satisfied, the remainder of the intestate estate devolves in the following order, on any surviving spouse, on the children, parents and siblings half to each, siblings take the whole, parents take the whole and so on.

(b) *Proposed Changes*

²⁶ See generally Hiram, *The Scots Law of Succession* (Butterworths 2002).

²⁷ Section 8 of the *Succession (Scotland) Act 1964*. (figures as of 1999).

²⁸ *Ibid* (figures as of 1999).

²⁹ Section 9 of the *Succession (Scotland) Act 1964*. (figures as of 1999).

4.20 The Scottish Law Commission, in its *Report on Family Law*,³⁰ considered what succession rights, if any, should be extended to cohabitees. It recommended the adoption of a discretionary scheme, somewhat similar to the English *Inheritance (Provision for Family and Dependants) Act 1975*, whereby a cohabitee who feels that proper provision has not been made for them out of the deceased's will could apply to the court for an order making such proper provision. In considering whether to grant the order sought, the Commission recommended that the court should have regard to, (a) the length of the cohabitation; (b) any children of the relationship; (c) the size and nature of the deceased's estate; (d) any benefit received by the applicant from that estate; (e) any contributions, direct or indirect, made by the applicant to the household; and (f) any economic hardship suffered by the applicant as a result of the relationship.

(3) New South Wales

(a) Present Law

4.21 In New South Wales, legislation has been enacted to extend succession rights to qualified cohabitees. The legislature has adopted a dual approach to the question of whether qualified cohabitees should be granted succession rights.

4.22 First, under the discretionary scheme, the *Family Law Provision Act 1982* provides that if a person dies without making proper financial provision for close family members, the latter may apply to the court to have such provision made for them out of the estate.³¹ The parties to a 'de facto relationship' (this is what qualified cohabitees are known as in New South Wales) are included within the category of close family members. The court may order such provision to be made as "in the opinion of the court, having regard to the circumstances at the time the order is made, to be made for maintenance, education or advancement in life of the eligible person".³² In considering whether to make an order under the Act, the court will look at all the circumstances of the case, in particular

³⁰ Scottish Law Commission *Report on Family Law* Part XVI Cohabitation (No. 135) (1992) paragraph 6.24 -16.37.

³¹ Section 7 of the *Family Provision Act 1982*.

³² *Ibid.*

whether any provision was made for the applicant during the deceased's lifetime. It will also consider any contributions made by the applicant to the household; the character and conduct of the eligible person before and after the death of the deceased person; and the circumstances existing before and after the death of the deceased person.

4.23 Secondly, under the *Wills, Probate and Administration Act 1898* as amended,³³ where a person dies intestate, a qualified cohabitee inherits on the same basis as a spouse. Where a person dies intestate leaving a spouse or a *de facto* partner, but no issue, the real and personal estate of that person will be held in trust for the spouse or *de facto* partner absolutely.³⁴ Where a person dies intestate leaving a spouse or *de facto* partner and issue, the spouse or qualified cohabitee is entitled to a fixed portion of the estate plus a half share of the residue.³⁵ Where a person dies leaving both a spouse and a qualified cohabitee, the latter takes in priority to the spouse provided that the *de facto* relationship lasted for two continuous years prior to the death of the intestate.³⁶

E Options for Reform

(1) Fixed Rights or a Discretionary Approach

4.24 At one extreme, the law could place a qualifying cohabitee in the same position as a surviving spouse as is the case in New South Wales.³⁷ Under such a scheme, a qualified cohabitee would possess the same rights as a spouse in relation to the legal right share, the automatic share on intestacy and the right of appropriation in relation to the family home. The personal representatives would be under a corresponding duty to notify a qualifying cohabitee of the right of election and appropriation, and these rights would not expire until 6

³³ By the *Wills, Probate, and Administration (De Facto Relationships) Amendment Act 1984*.

³⁴ Section 61(b).

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Under the *Wills, Probate and Administration Act 1898* as amended by the *Wills, Probate, and Administration (De Facto Relationships) Amendment Act 1984*.

months after receipt of the notification or one year after the extraction of the grant, whichever was later.

4.25 Proponents of such a scheme argue that it would introduce an element of certainty into succession law with everybody being aware of their rights and entitlements on death, thus avoiding complicated litigation implicit in a discretionary scheme. However, the Commission is not persuaded by such arguments, at least within the context of the mixed presumptive/contractual scheme being proposed in this Consultation Paper. While a fixed scheme makes sense in the context of the registration approach, in that a cohabitee by registering has entered into a certain relationship with certain rights and duties, the Commission feels that a discretionary approach would be more consistent with the overall theme of the Consultation Paper. Such a scheme would allow qualified cohabitees the right to apply to the court for relief and for the court, taking into account all the circumstances of the case, to decide what award, if any, is appropriate in those circumstances. The Commission is of the view that the main advantage of this scheme (which would operate where a person dies testate or intestate) is that it allows cohabitees to apply for relief where they feel that proper provision has not been made for them, without the need for the complete overhaul of succession law that the adoption of a fixed scheme would require, while at the same time achieving a more equitable result. Of course, such a scheme would not be necessary if cohabitees were encouraged to make proper provision for their partners in their wills. The Commission is of the view that family support groups and legal practitioners should draw attention to this when advising and drawing up wills.

4.26 The Commission is also of the view that a qualified cohabitee should, subject to the discretion of the Probate Office and on production of such proofs as may be required, be entitled to extract a grant of administration intestate or a grant of administration with will annexed to the estate of their deceased partner. This power would be subject to the discretion of the Probate Office on the production of such proofs as may be required. The Commission is of the view that a qualified cohabitee should be placed above siblings of the deceased in the list of persons entitled to extract the grant.

4.27 *Accordingly, the Commission recommends that a discretionary scheme be established whereby a qualified cohabitee can make an application to Court where the qualified cohabitee feels*

that proper provision has not been made for him or her in the deceased's will or under the rules relating to intestacy.

4.28 *The Commission recommends that as with section 117 of the Succession Act 1964, an application should have to be made within six months of the first taking out of representation to the deceased's estate.*

4.29 *The Commission is also of the view that Order 79 of the Rules of the Superior Courts should be amended to allow a qualified cohabitee to extract a grant of administration intestate or a grant of administration with will annexed to the estate of their deceased partner. This power would be subject to the discretion of the Probate Office on the production of such proofs as may be required. The Commission is of the view that a qualified cohabitee should be placed above siblings of the deceased in the list of persons entitled to extract the grant.*

CHAPTER 5 MAINTENANCE

A Introduction

5.01 Under Irish law, a cohabitee is not liable to support or maintain the other party to the relationship, and neither party is entitled to claim maintenance from the other, during the relationship or after it has ended. This is so even if the cohabitees have lived together as man and wife for many years.¹ Similarly, there is no legal basis on which a woman who has the custody of children born to the relationship can claim, from her partner or former partner, maintenance for herself, as distinct from maintenance for the child, to defray expenses incurred in rearing the child.² This contrasts sharply with the position of married couples. Married couples are under an obligation to maintain each other while the marriage subsists and this obligation may continue depending on the circumstances after the relationship has ended.³

5.02 In this chapter, the Commission will examine the origins and rationale of maintenance in respect of spouses and will consider the extent to which, if any, the maintenance rights enjoyed by married couples should be extended to cohabitees. In particular, the Commission will examine the law relating to maintenance for children. At present, a parent is under a statutory obligation to maintain his or her offspring whether they are marital or extra-marital.⁴ This chapter will consider whether the law should be

¹ *Ennis v Butterly* [1996] 1 IR 426.

² Section 5 of the *Family Law (Maintenance of Spouses and Children) Act 1976* places parents under a statutory duty to maintain their children. This applies to the children of marital and extra - marital relationships.

³ See Chapter 5B.

⁴ Section 5 of the *Family Law (Maintenance of Spouses and Children) Act 1976* deals with the maintenance rights of marital children, section 5(1)(a) deals with the maintenance rights of extra-marital children. This was inserted by the *Status of Children Act 1987*.

amended so that it specifically states that the court will take into account the costs incurred by the spouse charged with the care and control of the child while caring for the child, in other words whether the courts should award custodial maintenance.

B Maintenance for Spouses

(1) *Historical Development of the Law of Maintenance*

5.03 The law of maintenance has its origins in the common law duty of a husband to support and maintain his wife.⁵ However, the courts construed this obligation narrowly. A husband was required only to provide his wife with the ‘bare necessities of life’ and this duty lasted only as long as she was entitled to her husband’s consortium.⁶ The duty to maintain was satisfied so long as he provided a home for her.⁷ A wife had no right to separate maintenance in a separate home unless she could justify living apart from her husband. In addition, the duty to maintain ceased as soon as the behaviour of the wife warranted it,⁸ for example, if she deserted her husband,⁹ or committed adultery without his knowledge.¹⁰ However, a wife was never under a corresponding common law duty to support her husband.¹¹

5.04 Although the common law imposed a duty on a husband to support and maintain his wife, it provided no effective means of enforcing this obligation against a reluctant husband. In *Manby v*

⁵ See Martin, “Maintenance” in Shannon (ed) *Family Law Practitioner* (Round Hall Sweet & Maxwell 2000) at BA7; Lowe & Douglas *Bromley’s Family Law* (1998 Butterworths) at 715; Shatter *Shatter’s Family Law* (1998 4th ed Butterworths) at chapter 14.

⁶ Martin, “Maintenance” in Shannon (ed) *Family Law Practitioner* (Round Hall Sweet & Maxwell 2000) at BA-002.

⁷ See *Price v Price* [1954] 2 All ER 829.

⁸ See *Chilton v Chilton* [1952] 1 All ER 1322; *West v West* [1954] 2 All ER 505.

⁹ See *Jones v Newtown and Llandloes Guardians* [1920] 3 KB 381.

¹⁰ See *Wright and Webb v Annadale* [1930] 2 KB 8.

¹¹ See Martin, “Maintenance” in Shannon (ed) *Family Law Practitioner* (Round Hall Sweet & Maxwell 2000) at BA7.

Scott,¹² the common law courts refused to entertain a wife's claim for maintenance against her husband because this would amount to an invasion of the jurisdiction of the ecclesiastical courts, which had jurisdiction over all matters relating to marriage. However, as Parliament was the only body which could grant a decree of divorce *a vinculo* (that is divorce in the modern sense), the ecclesiastical courts could only award maintenance following a decree of divorce *a mensa et thoro* (judicial separation), an annulment or an action for the restitution of conjugal rights.

5.05 Although the jurisdiction of the ecclesiastical courts over matrimonial matters was transferred to the Court for Matrimonial Causes in 1871,¹³ the substantive law was not changed and it was still extremely difficult to get an award of maintenance. Concern about the failure of the law to protect poorer wives led to the enactment of the *Matrimonial Causes Act 1878*, which gave magistrates summary jurisdiction to grant separation orders and award maintenance to a wife whose husband had been convicted of an aggravated assault upon her. This was followed by the *Married Women (Maintenance in Cases of Desertion) Act 1886*, which remained the basis for spousal maintenance until the enactment of the *Family Law (Maintenance of Spouses and Children) Act 1976*.¹⁴ However even the 1886 Act was quite limited. A magistrate was only entitled to make an award of maintenance in favour of a deserted wife where her husband, being able to support her wholly or in part, had wilfully refused and neglected to do so.

(2) The Modern Law of Maintenance

5.06 Against this rather bleak background, the law of maintenance was reformed in three modern statutes. These are the *Family Law (Maintenance of Spouses and Children) Act 1976*, which deals with claims for spousal maintenance in cases where there is a valid subsisting marriage; the *Family Law Act 1995* and the *Family Law (Divorce) Act 1995*, which deal with claims for maintenance

¹² (1663) 83 ER 995.

¹³ This was established under the *Matrimonial Causes (Ireland) Act 1870*.

¹⁴ Duncan "Desertion and Cruelty in Irish Matrimonial Law" (1972) 7 *Irish Jurist* 213, described the law relating to matrimonial causes in Ireland as being one of the most neglected branches of the law. However, by 1980 a flood of family law cases had begun to inundate the Irish courts.

following a judicial separation or divorce respectively. It is proposed to look briefly at each in turn.

(a) *The Family Law (Maintenance of Spouses and Children) Act 1976*

5.07 The *Family Law (Maintenance of Spouses and Children) Act 1976* was enacted on foot of the recommendations contained in the Nineteenth Interim Report of the Committee on Court Practice and Procedure.¹⁵ Section 5(1) provides that the court may make an award of maintenance if it is of the view that the respondent spouse “has failed to provide such maintenance for the applicant spouse as is proper in the circumstances”. In determining what “proper” maintenance is, the court has a very wide discretion. Section 5(4) provides that in deciding whether any award should be made together with the amount of the award, the court is to take into account all the circumstances of the case and the financial position and responsibilities of the parties.¹⁶ An award of maintenance may take the form of a periodic payment or a lump sum. It is not possible to contract out of the provisions of the Act.¹⁷

5.08 The main difference between the 1976 Act and the previous legislation is that when deciding whether to grant relief, it looks mainly to financial need rather than marital misconduct. The wording of section 5(4) shows that the conduct of the parties may still be relevant in certain cases.¹⁸ For example, a court will not grant a

¹⁵ *Committee on Court Practice and Procedure Desertion and Maintenance: Nineteenth Interim Report of the Committee on Court Practice and Procedure* (Dublin: Stationery Office, 1969)

¹⁶ In order to aid the court in making this determination each of the spouses and any dependant member of the family are required to disclose the particulars of their income and property, which are reasonably required for the purpose of the proceedings.

¹⁷ Section 27 of the 1976 Act provides that “an agreement shall be void insofar as it would have the effect of excluding or limiting the operation of any provision of this Act (other than section 21)”. See also *HD v PD* Supreme Court May 8 1978; Shatter *Shatter’s Family Law* (4thed Butterworths 1998) at chapter 14; and McCann “Maintenance Agreements and the Family Law (Maintenance of Spouses and Children) Act 1976” (1979) 72 ILSI Gazette 115.

¹⁸ Section 5(4)(c) of the 1976 Act as inserted by section 38 of the *Judicial and Family Reform Act 1989*.

maintenance order where the applicant spouse has deserted and continues to desert the other spouse unless, having regard to all the circumstances of the case (including the conduct of the other spouse), the court is of the view that it would be repugnant to justice not to make the order.¹⁹

(b) *The Family Law Act 1995*

5.09 The *Family Law Act 1995* contains the law relating to judicial separation. Section 8 provides that following the granting of a decree of judicial separation the court may make an award of maintenance, in the form of either a lump sum or a periodic payment. As with awards of maintenance under the 1976 Act, the court has a very wide discretion in deciding whether to make an award. The 1995 Act contains a non-exhaustive list of the factors the court may take into account when deciding whether to make an order under section 8.²⁰ These relate mainly to the financial needs and responsibilities of the parties. As with the 1976 Act, the conduct of the spouses, in particular whether there was desertion, will be relevant.²¹

(c) *The Family Law (Divorce) Act 1996*

5.10 The *Family Law (Divorce) Act 1996* contains the law relating to divorce. Section 13 provides that following the granting of a decree of divorce the court may make an award of maintenance, in the form of either a lump sum or a periodic payment. As with the 1995 Act, the 1996 Act sets out a non-exhaustive list of the factors the court may take into account in deciding whether to make an order under section 13. If the applicant remarries then the court cannot make an award of maintenance.²² Similarly, any order made will cease on the remarriage of the applicant.²³

¹⁹ Section 5(2) of the 1976 Act as amended by section 38 of the *Judicial Separation and Family Law Reform Act 1989*. Prior to the 1989 Act desertion operated as an absolute bar to relief.

²⁰ See section 16(2) and (4) of the 1995 Act.

²¹ See section 16(3) of the 1995 Act.

²² See section 13(5)(b).

²³ See section 13(5)(a).

C Maintenance in Other Common Law Jurisdictions

(1) Australia

5.11 Under the Australian Constitution, only the Federal Parliament has the power to legislate with respect to “marriage” and “divorce and matrimonial causes”. Other areas of family law, such as the rights and duties of cohabitees, or *de facto* spouses as they are known in Australia, are governed by State law. The following paragraphs will examine the position in New South Wales, the Australian Capital Territory, the Northern Territory, Tasmania and Western Australia (Victoria and Queensland do not accord any maintenance rights to qualified cohabitees).

5.12 In New South Wales, *de facto* partners are under no obligation to maintain the other party to the relationship, and neither party is entitled to claim maintenance from the other, save as provided for in Division 3 of the *Property Relationships Act (NSW) 1984*. Division 3 provides that parties to a *de facto* relationship that has lasted for more than two years are eligible to make a claim for maintenance. An application for maintenance must be made within two years of the termination of the relationship. The court will only award maintenance in two limited circumstances. The first is where the applicant is unable to support himself or herself adequately because they have the care and control of a child of the relationship who is still under the age of 12 (this is known as custodial maintenance). The second is where the applicant’s earning capacity has been adversely affected by the relationship (this is known as retraining or rehabilitative maintenance).

5.13 The laws governing the maintenance entitlements of qualified cohabitees in the Australian Capital Territory and the Northern Territory mirror the law in New South Wales save in one respect. The legislation in the other two jurisdictions expressly provides that, in determining whether to grant maintenance on the rehabilitative ground, the court must satisfy itself, that in addition to whether the retraining would increase the applicants earning potential, it is reasonable to make the order “having regard to all the circumstances of the case”.

5.14 In Tasmania, cohabitees have been able to claim maintenance from their partners since 1837. There is an interesting historical explanation for this. It results more from the inability of the

colonial authorities in the early nineteenth century to determine whether people were married than a positive desire to recognise and protect those living in extra-marital relationships. Under the present law, the *Relationships Act 2003*, a qualified cohabitee is under no obligation to maintain the other party to the relationship, and neither party is entitled to claim maintenance from the other, save as provided for under the Act. The court may make an award of maintenance where the applicant is unable to support himself or herself adequately either because their earning potential has been adversely affected by the circumstances of the relationship, or any other reason arising “in whole or in part” from the relationship. Thus, the powers given to the court under the current legislation may be said to be wider and more liberal than the powers bestowed on the court under its counterpart in New South Wales.

5.15 In Western Australia, in contrast to the other Australian jurisdictions, which have given cohabitees maintenance rights, a *de facto* partner is under an obligation to maintain the other party to the extent that it is reasonable so to do. This obligation arises where the other party is unable to support himself or herself because the other party (a) has the care and control of a child under the age of 18, (b) is unable to work due to physical or mental incapacity, or (c) for any other adequate reason.

(2) New Zealand

5.16 Following the enactment of the *Family Proceedings Amendment Act 2001*, non-marital cohabiting couples have been accorded many of the same rights as married couples. This extends to maintenance claims. As with married couples, a qualified cohabitee is obliged to maintain the other party to the relationship, where the latter is for whatever reason, unable to do so.²⁴ Under the *Family Proceedings Act 1980* as amended by the 2001 Act, a qualified cohabitee is entitled to receive maintenance from the other party on the termination of the relationship where maintenance is necessary to meet the other party’s reasonable needs. Where the *de facto* relationship has lasted less than three years, the court’s ability to award maintenance is quite limited. Maintenance may be awarded only where the applicant has the care and control of a child of the

²⁴ This places *de facto* relationships on the same level as marriages for certain purposes including maintenance.

relationship; or where the applicant has made substantial contributions, direct or indirect, to the relationship; or where not to award maintenance would result in a serious injustice to the applicant.

(3) England And Wales

5.17 As in Ireland, a cohabitee in England and Wales is under no obligation to support his or her partner. The recent proposals contained in the Consultation Paper on Civil Partnerships²⁵ would see a change in this position at least for those in same-sex unions who opt to place their relationship on a more formal footing by becoming parties to a registered civil partnership. The Consultation Paper proposes that a partner to such a union should be able to apply to the magistrate's court for an order that their partner has not provided adequately for them. If the court finds that this is in fact the case, then it may make an order of maintenance in favour of the applicant. The Consultation Paper is silent however on whether this right applies during the relationship, after the relationship or both. It is also silent on what factors the court is to take into account in determining what 'adequate provision' means and whether the same standards will be applied that are used in relation to disputes between married persons.

D Should Cohabitees have a right to Maintenance?

5.18 Having briefly outlined the law relating to spousal maintenance in Ireland, and the approach taken to the issue of cohabitee maintenance in a number of other common law jurisdictions, it now falls to consider the extent to which, if any, Irish cohabitees should be entitled to claim maintenance from one another either during the relationship or after it has ended. In examining this, it is proposed to consider firstly, whether there should be a general right to maintenance for cohabitees and secondly, whether there should be a more limited right. In relation to the latter, it is proposed to differentiate between three types of maintenance, namely, rehabilitative maintenance, custodial maintenance and compensatory maintenance.

²⁵ Women & Equality Unit's Consultation Paper *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (June 2003).

(1) A General Right to Maintenance

5.19 As indicated above,²⁶ spouses have a general right to maintenance both during and after the relationship, but cohabitees do not. The question the Commission will address in this section is whether this general right should be extended to qualified cohabitees. In dealing with this it is proposed to differentiate firstly, between the right to be maintained during the relationship and secondly, the right to be maintained after the break-up of the relationship.

(a) Maintenance during the Relationship

5.20 Turning first to the question of whether a qualified cohabitee should be entitled to claim maintenance from their partner during the relationship, it is the Commission's view that this is a problem, which will not arise. After all, if the parties are living together it is axiomatic that they are maintaining each other either directly or indirectly. This is one of the things the court will look at in determining whether the applicant is a qualified cohabitee under a presumptive scheme such as the one proposed in this Consultation Paper. Secondly, unlike in a marriage, cohabitees are not in a formalised relationship. Therefore, if the parties are in dispute over maintenance it is not unreasonable to assume they are not 'living together as man and wife' so therefore what the applicant is claiming is not the right to be maintained while the relationship subsists, but rather the right to be maintained after the termination of the relationship.

5.21 *The Commission does not recommend that legislation be introduced to allow qualified cohabitees the right to claim maintenance while the relationship subsists.*

(b) Maintenance after the Relationship

5.22 The courts have a wide discretion to award maintenance to spouses after the granting of a decree of divorce or judicial separation. As the comparative study has shown, very few jurisdictions which operate a presumptive scheme allow qualified cohabitees a general right to claim maintenance after the break-up of the relationship. There are a number of reasons for this. However,

²⁶ Women & Equality Unit's Consultation Paper *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (June 2003) at paragraphs 5.06 - 5.10.

the main one is a public policy one based on marriage, namely that despite the recent introduction of divorce, marriage is still viewed as a life long commitment, whereby the parties undertake certain rights and responsibilities, such as the duty to maintain their spouse and children. Cohabitation on the other hand involves no such commitment.

5.23 The Commission is not persuaded by the argument that by refusing to allow qualified cohabittees to claim maintenance it is somehow being inconsistent with its proposals regarding property adjustment orders. With a property adjustment order, the court is dealing with property to which the applicant had indirectly contributed through his or her work in the home. With maintenance on the other hand, what the court is doing is forcing one party, the respondent, to pay out his or her own income for the upkeep of the other party, to whom he or she never made a formal public commitment and towards whom he or she had never undertaken any rights or responsibilities.

5.24 *The Commission does not recommend that legislation be introduced to allow qualified cohabittees a general right to maintenance.*

(2) A Limited Right to Maintenance

(a) Rehabilitative Maintenance

5.25 Rehabilitative maintenance refers to the provision of short-term support, provided for the specific purpose of enabling the applicant to retrain and gradually re-enter the workforce. The rationale for this is that the applicant has forgone career or training opportunities, which might otherwise have been available, in order to devote himself or herself to the running of the household. Therefore, to the extent that the respondent has acquiesced or encouraged this activity, he or she, within the limits of their available resources, ought to bear some responsibility for the cost of restoring financial independence to the applicant by contributing to the cost of any retraining necessary to enable that person to re-enter the work force.

5.26 The concept of rehabilitative maintenance has its origins in New South Wales. In its 1983 *Report on De Facto Relationships*, the Law Reform Commission of New South Wales (NSW Commission) came to the conclusion that, while a *de facto* partner should not possess a general right to maintenance on the break-up of the

relationship, nevertheless a needy *de facto* partner should be entitled to apply for maintenance in very limited circumstances.²⁷ One of the two grounds on which the NSW Commission felt that maintenance should be granted was the rehabilitative ground.²⁸

5.27 This recommendation was enacted into law in Division 3 of the *Property Relationships Act 1984*. However, there have been very few successful applications for maintenance under the 1984 Act. This can be attributed to a number of factors, including the low incidence of spousal maintenance in Australia generally,²⁹ the limitations implicit in the legislation and the restrictive approach adopted by the courts to the issue of rehabilitative maintenance.³⁰ For example, in the leading case of *Toderic v Toderic*³¹ Powell J construed the provisions of the 1984 Act quite narrowly. The court refused to grant the maintenance order sought as (a) the training course would take longer to complete than the period allowed for the payment of maintenance; (b) the course was not likely to lead to full-time employment; and (c) an award of maintenance would be inconsistent with section 19 of the 1984 Act, which requires the court to determine, as far as practicable, relations between the parties. In addition, the court held that it was not possible to seek rehabilitative and custodial maintenance simultaneously, as this was a contradiction in terms as one could not be in full-time education or training whilst acting as a full-time carer.

5.28 This restrictive approach has been criticised. One commentator felt that the minimalist approach adopted by the courts in New South Wales was completely at variance with the remedial nature of the legislation.³² However, the Commission is not

²⁷ See Law Reform Commission of New South Wales *Report on De Facto Relationships* (1983) at paragraph 8.25.

²⁸ The other ground is custodial maintenance. See paragraphs 5.25 - 5.29.

²⁹ See Finlay, Harris & Otowski *Family Law in Australia* (5th ed Butterworths 1997) Chapter 5.

³⁰ Jessep, "Financial Adjustment in Domestic Relationships in NSW: Some Problems of Interpretation" *Seminar Papers: A Discussion Forum on Relationships and the Law* (Sydney, 7 July 2000)

³¹ (1990) DFC 95-096.

³² Jessep, "Financial Adjustment in Domestic Relationships in NSW: Some Problems of Interpretation" *Seminar Papers: A Discussion Forum on Relationships and the Law* (Sydney, 7 July 2000)

persuaded by this line of argument. As indicated above,³³ both the Law Reform Commission and the Legislature of New South Wales in giving effect to the Commission's recommendations clearly expected the courts to take a narrow approach to the issue of rehabilitative maintenance. In any case, the Commission is not persuaded by either the theory or the practice of rehabilitative maintenance. It places the court in the unenviable position of firstly having to calculate what might have happened had the parties not entered into the relationship, and secondly having to determine whether a certain course of education or training will place them in the position they would have occupied had they not entered into the relationship.

5.29 *The Commission does not recommend that qualified cohabitants should be entitled to claim rehabilitative maintenance.*

(b) *Custodial Maintenance*

5.30 Custodial maintenance may be defined as the provision of support to the party with the primary care and control of a child or children of the relationship. As with rehabilitative maintenance, it owes its origins to the 1983 *Report on De Facto Relationships*, published by the NSW Commission.³⁴ The NSW Commission was of the view that maintenance should be paid where the applicant is unable to support himself or herself adequately because of having to assume the care and control of a child of the relationship who is under the age of 12 (or 16 where the child suffers from a disability). The justification advanced for this was that the childcare responsibilities accepted by the custodial partner relieve the other partner of commensurate responsibilities, thereby enabling that party to maintain or increase his or her wage earning potential. In addition, the childcare responsibilities limit the earning capacity of the custodial parent, who in the NSW Commission's view should not be penalised for undertaking such responsibilities.

5.31 The Commission does not feel that the New South Wales approach is the most efficient means of ensuring that carers are not penalised for undertaking the role they take. The introduction of a scheme akin to that currently operating in New South Wales would be limited in ambit to qualified cohabitants only; so for example, a former

³³ At paragraph 5.12 and paragraph 5.26.

³⁴ Law Reform Commission of New South Wales *Report on De Facto Relationships* (1983).

cohabitee who is still legally married to a third party would not be able to claim custodial maintenance from her former partner under such a scheme. The Commission is of the view that a better approach would be to make the scheme child-centred. As a result, the presence or absence of cohabitation would be immaterial. The Court would simply take into account the costs or potential costs incurred by the custodial parent when calculating the child's maintenance under the *Family Law (Maintenance of Spouses and Children) Act 1976*.

5.32 Section 5A of the *Family Law (Maintenance of Spouses and Children) Act 1976* as inserted by section 18 of the *Status of Children Act 1987*, allows the court, on the application of either parent of a dependant non-marital child or a third party, to make a maintenance order requiring the other parent to make proper provision for the child, where the court is of the view that proper provision has not been made. In considering whether to make an order the court will consider the financial resources and responsibilities of the parents. In addition, the court will not make an order unless it is proved "on the balance of probabilities" that the respondent is the father of the child.³⁵

5.33 *The Commission does not recommend that qualified cohabitees should be entitled to claim custodial maintenance. Rather, the Court should take into account the costs incurred by the custodial parent when making an order under the Family Law (Maintenance of Spouses and Children) Act 1976.*

(c) *Compensatory Maintenance*

5.34 Compensatory maintenance is designed to compensate the applicant for prior contributions made directly or indirectly following the break-up of the relationship. The rationale underpinning compensatory maintenance is the same as that for rehabilitative maintenance, namely that the applicant has forgone career or training opportunities, which might otherwise have been available, in order to concentrate on the running of the household. Therefore, the argument runs, to the extent that the respondent has acquiesced in or encouraged this activity, then, within the limits of their available resources, in recognition of this contribution, some responsibility should be undertaken by the respondent for the cost of restoring financial independence to the applicant by contributing to the cost of

³⁵ Section 15 of the *Status of Children Act 1987*.

any retraining necessary to enable that person to re-enter the work force. The NSW Commission in its Report on *De Facto Relationships* decided against recommending in favour of compensatory maintenance. It felt that this was too deep, or ‘marriage like’ a right to give to people living in uncertain relationships.³⁶

5.35 Although the Commission can see the merit in this approach, it is of the view that the court should be given a discretionary right to make an award of compensatory maintenance in exceptional circumstances where it considers it just and equitable to do so. An example what would constitute exceptional circumstances would be the situation of a woman in her 50’s who has lived in a “marriage like” relationship for most of her life; and who has missed out on her career opportunities as a result of her contributions to the family; and whose contributions to the *de facto* family are not capable of being compensated for by way of the property adjustment procedure outlined earlier in this Paper, because for instance the family home was not owned by the other party. The Commission is of the view that proceedings must be instituted within one year of the break-up of the relationship or the separation of the parties, whichever is sooner. An award of maintenance could take two forms, a lump sum or a periodic payment. The Commission is of the view that the maximum period for which a periodic payment should be payable is five years. Having satisfied itself that exceptional circumstances exist, which justify the making of an award in principle, the Commission is of the view that in considering whether it is just and equitable to make the award, the court should consider the following:

- (i) the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or to the financial resources of the parties; and
- (ii) the contributions made by either of the parties to the relationship, to the welfare of the other party to the relationship, or to the welfare of the family.

5.36 *The Commission recommends the court should be given a discretionary power to make an award of compensatory maintenance*

³⁶ See Chapter 5.

in exceptional circumstances where it considers it just and equitable to do so. The Commission recommends that a qualified cohabitee seeking such an order must issue proceedings within one year of the breakdown of the relationship.

5.37 The Commission would in particular welcome submissions relating to these provisional recommendations.

CHAPTER 6 SOCIAL WELFARE

A Introduction

6.01 This chapter will examine the position of cohabitants under the social welfare code. However, before doing so, it is first necessary, by way of background, to outline how the modern social welfare system operates.¹ The Irish social welfare system is governed by the *Social Welfare (Consolidation) Act 1993* as amended. There are three main types of payment available under this Act, namely: (i) social insurance (or contributory) benefits; (ii) social assistance (or means-tested) allowances and (iii) universal payments.

6.02 Social insurance is a scheme whereby employees, employers, the self-employed and the State pay a contribution known as Pay-Related Social Insurance (PRSI), into a central social insurance fund. Having contributed to the fund, an individual may become entitled to payments from the fund if certain contingencies, such as unemployment or sickness occur. Social Assistance, on the other hand, is a means-tested payment, which is funded entirely by the State. The assessment of means will determine the level of assistance to which a claimant is entitled. Universal payments are payable without reference to means or contribution record. An example of a universal scheme is child benefit.² This is payable in respect of all children under the age of 16 years or all children under the age of 18 provided that they are in full time education or are suffering from a physical or mental infirmity.³

¹ See generally Cousins *Social Welfare Law* (2nd ed Thompson Round Hall 2002); Whyte *Social Welfare Law in Ireland: A Guide to its Sources* (Round Hall Press 1987); Curry *Irish Social Services* (4th ed Institute of Public Administration 2003); Pellion *Welfare in Ireland* (Praeger 2001) Clarke *Annotated Guide to Social Welfare Law* (Sweet & Maxwell 1995); Callan *Reforming Tax and Welfare* (ERSI 2001).

² Part IV of the *Social Welfare (Consolidation) Act 1993*.

³ Section 192 of the 1993 Act.

6.03 The fact that a man and a woman are cohabiting as husband and wife may be relevant in a number of ways. First, a cohabiting couple may be entitled to avail of the many benefits, which the social welfare system provides to support their family. Secondly, claimants may be entitled to an increase in their social welfare payment in respect of the person with whom they are cohabiting. Thirdly, the means of a claimant's cohabiting partner may be taken into account when determining the level of social assistance, if any, to which the claimant is entitled. Fourthly, a cap may be placed on payments to cohabiting couples where they are both in receipt of social welfare benefits; so that they receive less than if they were two separate individuals.

6.04 The net effect of this is that a heterosexual cohabiting couple is treated in nearly the same way as a married couple for the purposes of social welfare. Therefore, in order to understand the treatment of cohabitants under the social welfare code, it is necessary to consider a number of questions in the remaining Parts of this Chapter. First, Part B discusses how married couples are treated under the social welfare code; secondly, Part C discusses to what extent cohabiting couples are afforded the same treatment as married couples. Thirdly, Part D discusses what criteria are used to determine whether two people are cohabiting. Finally, in Part E, we appraise the existing law.

B Treatment of Married Couples under the Social Welfare Code

6.05 The Irish social welfare system was constructed around the marital family. It is generally accepted that it is cheaper for two people to live together than for each to live separately.⁴ Consequently, the family, rather than individual assessment, is used as the basis of assessment for many social welfare payments. For example, for a means-tested payment, such as unemployment

⁴ The Economic and Social Research Unit have calculated that the income required by a couple to maintain themselves is 1.7 times that required by a single person. See the *Report of the Working Group Examining the Treatment of Married, Cohabiting and One-Parent Families under the Tax and Social Welfare Codes* (Government Publications 1999) at 90 - 91. The scale applied by the social welfare system for Unemployment Benefit or Unemployment Assistance is currently 1.6 times that required by a single person.

assistance, the income of both spouses will be taken into account when deciding whether a claimant is eligible for the assistance.⁵ Similarly, there is a cap or limit placed on many payments to married couples where both spouses are claiming benefits, on the basis that it is cheaper for a married couple to live together than for two single people to live separately.

6.06 A second relevant piece of background is that, when the modern social welfare system was being developed in the late nineteenth and early twentieth centuries, most families conformed to what Sainsbury⁶ calls the “breadwinner model” and Bolger and Kimber⁷ are of the view that this ‘breadwinner approach’ permeates the Irish social welfare system. It would probably be more correct to say that, while the social welfare system has its origins in the breadwinner model, the reason that married couples are still treated as one unit for the purposes of social welfare is economic rather than ideological.

6.07 One spouse, usually the husband, worked outside the family home in order to provide for the family, while the other spouse stayed at home to care for the family and to maintain the house.⁸ The social welfare system reflected this economic reality: higher rates of social welfare were paid to men on the basis that they were presumed to be supporting not only themselves but also a family, and lower rates were paid to women, as they were presumed to be supported by men, by either their husbands or their fathers. Consequently, married women only received full rates of entitlement where they could show that they were not dependent on their husbands, or where they were supporting their husbands.⁹

6.08 The social welfare system takes into account whether or not people are married by drawing up a comprehensive list of benefits

⁵ Third Schedule to the 1993 Act.

⁶ Sainsbury *Gender, Equality and Welfare States* (Cambridge 1996).

⁷ Bolger & Kimber *Sex Discrimination Law* (Round Hall Sweet & Maxwell 2000).

⁸ Many socio-legal writers have assumed that the breadwinner is always a man. This paper is not concerned with gender discrimination and so there is no need to discuss this.

⁹ Cousins *Social Welfare Law* (2nd ed Thompson Round Hall 2002) at paragraph 9-03.

reflecting a wide spectrum of actual living circumstances. For example: a married person will be entitled to an increase of payment in respect of their spouse in respect of disability benefit,¹⁰ unemployment benefit,¹¹ old-age (contributory) pension,¹² retirement pension,¹³ invalidity pension,¹⁴ pre-retirement allowance,¹⁵ old age (non-contributory) pension.¹⁶ This reflects the traditional practice whereby the husband received an additional payment in respect of his wife in order to maintain her. But on the other hand, where both spouses would, if single, have been entitled to separate social welfare payments, the total amount payable to the couple shall not exceed that which would be payable if one spouse was claiming a full social welfare entitlement plus an additional increase in respect of the spouse. Where a married person is claiming a means-tested allowance, such as Unemployment Assistance, Pre-retirement Allowance, Old Age (non-contributory) Pension, Blind Pension, Carer's Allowance or Supplementary Welfare Allowance, the means of their spouse will also be taken into account when determining whether the claimant satisfies the means test.¹⁷ In addition, a number of death benefits are available to the surviving members of married couples on the death of their spouse. These payments have their origins in the need to ensure that the surviving spouse, invariably the widow, was adequately provided for on the death of the breadwinner. These payments include Widow's/Widower's (contributory)

¹⁰ Section 34(3).

¹¹ Section 45(3).

¹² Section 87(3).

¹³ Section 91(3).

¹⁴ Section 99(3).

¹⁵ Section 128.

¹⁶ Section 137.

¹⁷ Third Schedule to the 1993 Act.

Pension,¹⁸ Widow's and Widower's (non-contributory) pension,¹⁹ Widowed Parent's grant²⁰ and the Bereavement Grant.²¹

C Treatment of Cohabitees under the Social Welfare Code

6.09 The law treats cohabitees as married couples for many social welfare purposes. This is known as "the cohabitation rule".²² The rationale for this rule is that an unmarried couple should not be treated more favourably than a married couple.²³ It has its origins in the 1930s.²⁴ Section 30(2) of the *Widows and Orphans Act 1935* provided that a person would not be entitled to a widow's pension, and would be disqualified from receiving a payment, 'if and so long as she and any person are cohabiting as man and wife'.

6.10 Originally, the cohabitation rule applied only to women, and operated only to disbar claimants from receiving certain payments.

¹⁸ Section 27 of the *Social Welfare Act 1996*.

¹⁹ Section 19 of the *Social Welfare Act 1997*.

²⁰ Section 116(A)(1) of the *Social Welfare Act 1993* as inserted by section 13 of the *Social Welfare Act 2000* as amended by section 4 of the *Social Welfare (Miscellaneous Provisions) Act 2002*.

²¹ Section 114 of the *Social Welfare Act 1993*.

²² See generally Cousins *The Irish Social Law* (Thompson Round Hall 2002) Chapter 11, Parry *The Law Relating to Cohabitation* (Sweet & Maxwell 1993) at 80, Harris "Unmarried cohabiting couples and Social Security in Great Britain" (1996) 18(2) *Journal of Social Welfare and Family Law* 123 at 125.

²³ This was seen in *Hyland v Minister for Social Welfare*, [1989] IR 624 where the Supreme Court held that a provision of the Social Welfare Code which operated to treat unmarried couples more favourably than married couples violated Article 41.3.1° of the Constitution. Article 41.3.1° obliges the State to guard with special care the institution of marriage, and protect it against attack.

²⁴ The cohabitation rule also exists in other jurisdictions. See Glendon *The Transformation of Family Law* (University of Chicago Press 1989) at 282 for an account of the operation of the rule in the United States; Carney and Hanks *Social Security in Australia* (Oxford University Press 1994) at 234 for an account of the operation of the rule in Australia, and Harris "Unmarried Cohabiting Couples and Social Security in Great Britain" (1996) 18(2) *Journal of Social Welfare and Family Law* 123 for an account of the operation of the rule in the United Kingdom.

Examples of this include: Deserted Wife's Benefit²⁵ and Allowance,²⁶ Prisoner's Wife's Allowance,²⁷ and the Single Woman's Allowance,²⁸ all of which were subject to the proviso that a person would not be entitled to payment where the claimant was cohabiting with another person as man and wife. Cousins²⁹ argues that the reason the cohabitation rule applied in such circumstances stemmed from the widely-held belief that support should only be given to a woman where a man was not supporting her. Therefore, when a woman was married, it was assumed that her husband supported her. It was only in situations where the woman was single or, if married, the husband was dead, in prison or incapacitated, that the State would provide financial support. If, in any of these situations, the woman either remarried or started cohabiting as man and wife, then the payments would cease.

(1) *Hyland v Minister for Social Welfare*

6.11 The ambit of the cohabitation rule was widened and it was given a constitutional underpinning following the Supreme Court decision in *Hyland v Minister for Social Welfare*.³⁰ This case concerned a challenge to section 12(4) of the *Social Welfare (No.2) Act 1985*³¹ on the grounds that it violated Article 41.3.1° of the Constitution and the Equality Directive.³² The background to the case was that the *Social Welfare (No.2) Act 1985* had been enacted in order

²⁵ Section 3 of the *Social Welfare (Deserted Wife's Benefit) Regulations, 1973*, S.I. No. 202/1973.

²⁶ Section 5 of the *Social Welfare (Deserted Wife's Allowance) Regulations 1970*, S.I. No. 227/1970.

²⁷ Section 7(1) of the *Social Welfare (Prisoner's Wife's) Regulations, 1974*, S.I. No. 220/1974.

²⁸ Section 7(1) of the *Social Welfare (Single Woman's Allowance) Regulations, 1974*, S.I. No. 209/1974.

²⁹ Cousins *Irish Social Welfare Law* (Thompson Round Hall 2003) at 222.

³⁰ [1989] IR 624; [1990] ILRM 213.

³¹ No. 12 of 1989.

³² Directive 79/7/EC. For an account of the impact of the directive in Irish Law see Whyte *Sex Equality, Community Rights and Irish Social Welfare Law: The Impact of the Third Equality Directive* (Irish Centre for European Law 1988).

to implement the 1979 Equality Directive in Ireland.³³ Article 1 of the Directive states that its purpose is the progressive implementation of the principle of equal treatment in matters of social security. Article 4 defines the principle of equal treatment as meaning there shall be no discrimination on the grounds of sex, either directly or indirectly in the scope of social security schemes, or the calculation of benefits under such schemes. Because there was widespread discrimination against women within the social welfare code the Directive had a major impact on Irish social welfare law. For example, prior to the implementation of the Directive, married women received lower rates of benefit than men or single women. They were treated as dependant adults for the purposes of social welfare if they were married and living with their husbands, regardless of whether or not they were employed in their own right. Similarly, married women were only entitled to unemployment assistance, where they could show that they were not dependent on their husbands.³⁴ Such discrimination was clearly contrary to the Equality Directive, which required that the social welfare system treat men and women equally. However, the cost of implementing the Directive was potentially huge. Therefore, in an effort to reduce the cost of implementing the Directive, section 12 of the 1985 Act was enacted to place a cap on the amount of money married couples could receive in benefits.³⁵ Section 12(1) provided that where both spouses

³³ Introducing the Bill the Minister for Social Welfare [as the Office was then known], Mr. Barry Desmond stated: “The purpose of the Bill, as Deputies will be aware, is to provide for equality of treatment for men and women in the social welfare code. This is required in accordance with the terms of an EC directive adopted by the Council of Ministers in 1978.” 359 Dáil Debates c. 1804.

³⁴ For a discussion of sex-based discrimination in the social welfare code see Bolger and Kimber *Sex Discrimination Law* (Round Hall Sweet & Maxwell, 2000) Chapter 7.

³⁵ Discussing section 12, the Minister for Social Welfare, Mr Desmond stated: “Section 12 also provides a mechanism to ensure that the unemployment assistance scheme is not used as a means of topping up family income. Because the personal rate of assistance is higher than the adult dependant's increase paid with this benefit an incentive could exist for non-working partners to apply for assistance in their own right when their spouses are on benefit. They would thus be seeking to exploit the social welfare system to secure for themselves a higher total entitlement than the social welfare system intends for a family in their particular

were in receipt of unemployment assistance, the total amount payable to the couple should not exceed the amount which would be payable if one spouse claimed and the other was dependent on the applicant. Section 12(4) provided that, where one spouse was in receipt of unemployment assistance and the other was in receipt of a social insurance payment or old age pension, the total amount payable to the couple should not exceed that which would be payable if one spouse claimed and the other was dependent on the applicant.

6.12 It was this last restriction, which formed the basis of the challenge in the *Hyland* case. The applicant was a married man whose wife was already in receipt of unemployment benefit when he too became entitled to unemployment assistance. In calculating his means, the Department of Social Welfare (now Social and Family Affairs) took into account the fact that he was married and reduced his entitlement accordingly. As a result, the total income of the couple was less than if they had simply been cohabiting. The applicant claimed that this infringed both Article 41.3.1° and also, as it happened, the Equality Directive, in that it treated unmarried cohabiting couples better than married couples. As to the second point the Court held that there was no discrimination on the basis of sex in section 12(4), as it applied equally to men and women so therefore the Equality Directive, which is confined to discrimination on the basis of sex, did not apply. The respondents argued that it was not unreasonable for the Oireachtas to take into account the fact that a couple were married for the purposes of social welfare, since it is cheaper for two people to live together as man and wife than for two people to live separately. They submitted that unmarried cohabiting couples claiming unemployment assistance in such circumstances were not treated any differently to married couples, since the Department could apply the ‘benefit or privilege’ clause of the means test to cohabitants. Alternatively, they argued that, even if section 12(4) were discriminatory, this discrimination should be viewed in light of the other advantages accorded to married couples under the social welfare code. They sought to distinguish the instant case from the earlier decision of the Supreme Court in *Murphy v Attorney General*,³⁶ where a similar defensive argument by the State had been

circumstances. Subsections (1) and (4) of section 12 provide the necessary safeguards against this.” 359 Dáil Debates c. 1812.

³⁶ [1982] IR 241.

rejected in the context of a challenge to section 192 of the *Income Tax Act 1967*. The respondents argued that *Murphy* could be distinguished as it was concerned with a different type of taxation which was potentially progressive (the tax payable increased or decreased with the level of income) whereas the tax at issue in *Hyland* was fixed.

6.13 In *Hyland*, Barrington J in the High Court found for the applicant on the constitutional point. While he acknowledged that it was not unreasonable for the Oireachtas to assume that it was cheaper for two individuals to live together as man and wife than for each to live separately, he held that to apply this only to married couples and not to cohabitants breached Article 41.3.1°. Barrington J rejected the argument that unmarried cohabitants could be treated in the same way as married couples under the ‘benefit or privilege’ clause of the means test since the evidence showed that this rule was rarely applied to cohabitants; whereas section 12(4) was invariably applied to married couples. As regards the Attorney General’s alternative submission, Barrington J rejected the argument that the discrimination contained in the subsection should be offset by the other advantages available to married couples in the Social Welfare Code. He cited with approval the decision of the Supreme Court in *Murphy v Attorney General*.³⁷ Here, the Court stated:

“The Court accepts the proposition that the State has conferred many revenue, social and other advantages and privileges on married couples and their children. Nevertheless, the nature and potentially progressive nature of the burden created by s. 192 of the Act of 1967 is such that, in the opinion of the Court, it is a breach of the pledge by the State to guard with special care the institution of marriage and to protect it against attack. Such a breach is, in the opinion of the Court, not compensated for or justified by such advantages and privileges.”³⁸

6.14 He rejected the State’s attempt to reinterpret the *ratio* of the Supreme Court in *Murphy*, so as to confine it to cases where the burden created was ‘potentially progressive’. In doing so, he referred

³⁷ [1982] IR 241.

³⁸ At 287.

to the decision of *Muckley v Ireland*,³⁹ where the Supreme Court held that the essence of the decision in *Murphy* was that section 192 of the *Income Tax Act 1967* had been unconstitutional, not because of its potentially progressive nature, but because it had penalised marriage.⁴⁰

6.15 The respondents appealed the decision, but the Supreme Court rejected the appeal, and confirmed the decision of the High Court so that the impugned provision was deemed to be invalid having regard to the provisions of the Constitution.

6.16 The most immediate effect of the decision in *Hyland* was that it meant that every person would have to be paid the full rate of entitlement regardless of his or her marital status. In an effort to avoid the huge financial strain which this would put on the Exchequer, the Government introduced the *Social Welfare (No.2) Act 1989*,⁴¹ which adopted a policy of levelling down, as distinct from levelling up, since the latter would be too expensive. Section 1 extended the restrictions on the total amount a married couple could obtain in social welfare payments under section 12 of the 1985 Act to unmarried cohabitants.

6.17 In consequence since 1989 the practice has invariably been, when drafting social welfare legislation, to define ‘couple’ as including both married and unmarried persons who live together as man and wife, thus avoiding the situation, which arose in *Hyland* where unmarried cohabitants received more favourable treatment than marital cohabitants. As a result, the *de facto* recognition of extra-marital cohabitation, which now exists in the social welfare code, should not be taken as implying a positive decision on the part of the legislature to afford protection to cohabiting couples for the purposes

³⁹ [1985] IR 472. See paragraph 3.28.

⁴⁰ At 484-485.

⁴¹ Introducing the Bill, the Minister for Social Welfare, Dr Woods stated: “The Government are concerned at the wider implications of the Supreme Court judgement which could have major budgetary repercussions. It is necessary to take immediate action to deal with the situation arising in the current financial year so as to ensure that expenditure remains within the existing budgetary allocation. The decision of the Supreme Court would otherwise result in an estimated additional expenditure this year of not less than £21 million and not less than £31 million in a full year. These are conservative estimates.” 390 Dáil Debates c. 973.

of social welfare, in circumstances where this would be to the advantage to cohabiters.⁴²

6.18 The current position of cohabiters under the social welfare code may be summarised as follows, persons who cohabit as man and wife will be treated as if they were married for most purposes under the social welfare code,⁴³ excepting those payments which may be said to be specific to marriage, such as the Widow's/Widower's contributory and non-contributory pensions and the Widowed Parent's grant.⁴⁴ In addition, cohabitation, like re-marriage continues

⁴² Mr J O'Keefe drew attention to this fact during the Dáil Debates on the second stage of the *Social Welfare (No.2) Bill, 1989*. He stated that: "It is clear to me that these amendments are court driven and not needs driven. What we are dealing with today is another anomaly in a long series of anomalies highlighted by the courts." 390 Dáil Debates cc. 983-984.

⁴³ (1) A cohabitee will be entitled to an increase in respect of the person with whom they cohabit in respect of the Disability Benefit (Section 34(3) of the 1993 Act), Unemployment Benefit (Section 45(3) of the 1993 Act), Old Age (Contributory) Pension (Section 87(3) of the 1993 Act), Retirement Pension (Section 91(3) of the 1993 Act), Invalidity Pension (Section 99(3) of the 1993 Act), Pre-Retirement Allowance (Section 128 of the 1993 Act), Old Age (Non-Contributory) Pension (Section 137 of the 1993 Act). (2) Where a person is claiming a means-tested allowance, such as Unemployment Assistance, Pre-Retirement Allowance, Old Age (non-contributory) Pension, Blind Pension, Carer's Allowance, or Supplementary Welfare Allowance, the means of the person with whom they are cohabiting as man and wife will be taken into account when determining whether or not the claimant satisfies the means test. (Third Schedule to the 1993 Act). (3) Where two people are living together as husband and wife and both are claiming social welfare payments, the amount payable to the couple shall not exceed that which would be payable if one person claimed and received an increase in respect of the other as an adult dependant.

⁴⁴ The question of whether 'living together as man and wife' for the purposes of the social welfare code includes those living in same-sex relationships has been thrown open following the Department of Social and Family Affairs decision to allow a same-sex partner a free travel pass, which allows him to accompany his elderly partner on public transport. Under the current travel scheme, a person aged 66 or over who is married or cohabiting is entitled to a free travel pass allowing a spouse or partner to accompany him or her on public transport. This decision was reached following the representations of the Equality Authority. See "Partner of gay pensioner given right to free travel" *The Irish Times* September 26 2003.

to operate as a bar to a number of payments, such as the various Widow/ Widower's pensions⁴⁵ and the one-family payment.⁴⁶

D Determining Whether There is 'Cohabitation'

(1) Introduction

6.19 As has been shown, the fact that a couple are 'cohabiting or living together as man and wife' may be relevant in two situations. Firstly, where a person is claiming an increase in their social welfare payment on the basis that they are cohabiting, and secondly, where the existence of cohabitation operates to deprive a claimant of their entitlement. Despite the importance of establishing the existence of cohabitation for these purposes, Irish social welfare law contains no statutory definition of the phrase "cohabiting as husband and wife". This is also the position in the United Kingdom, where cohabitation, which is described there as 'living together as man and wife', is not defined by social security law.⁴⁷ While the lack of a definition will not cause any problems where the issue of cohabitation arises in a positive context, since the parties will readily admit to cohabitation in order to claim the resulting benefit, it does create difficulties where cohabitation arises in a negative context. In such a situation, the parties will often strenuously deny that they are living together as husband and wife, and the onus rests on the Social Welfare Inspector to prove cohabitation.

6.20 *Foley v Minister for Social Welfare*⁴⁸ concerns a basic point which may arise in regard to cohabitation. Here, the applicant who

⁴⁵ Section 101 of the 1993 Act.

⁴⁶ Section 160 of the *Social Welfare (Consolidation) Act 1993* as amended by section 17 of the *Social Welfare Act 1996*.

⁴⁷ The phrase 'cohabiting as man and wife' was replaced with the phrase 'living together as husband and wife' in 1977. Parry *The Law Relating to Cohabitation* (London: Sweet & Maxwell 1993) at 82, notes that the change was proposed because: "The term 'cohabitation' has come to acquire a pejorative meaning in the public mind, and its use tends to perpetuate the mistaken assumption that the benefit rule is somehow intended to be a punishment for misconduct."

⁴⁸ [1989] ILRM 169. For a critique of this decision see Whyte "Social Welfare Law – The Cohabitation Rule" (1989) DULJ 187. See also the decision of Barron J in *State (Hoolahan) v Minister for Social Welfare and*

had two children was in receipt of a widow's contributory pension. She entered into a sexual relationship with a third party, a Mr McGill, who subsequently moved in with her. Following the birth of a child to the parties, the Department of Social Welfare became aware of this and stopped her widow's pension based on her cohabitation with Mr McGill. The applicant challenged this decision. She claimed that, although she was living with Mr McGill and had a sexual relationship with him, she was not 'cohabiting' with him, in the sense that he did not support her in any way, and that the pension was her sole source of income. She claimed that the cohabitation rule was based on the notion of dependency, namely that a wife is presumed to be dependent on her husband, and where her husband has died, the State stepped in to support her. Therefore, she argued, and this was the significant point in the case, this support should not be stopped unless it could be proven that the wife was being supported by the other man. Otherwise, she should continue to receive payment. In support of this argument, the applicant referred to the decision of the Divisional Court of Ontario in *Re Proc and the Minister of Community and Social Services*.⁴⁹ Here, a disabled woman in receipt of a disability payment had it withdrawn based on her cohabitation. The Court held that, as she did not receive any financial support from this man, her payment should be reinstated.

“We consider that, as a matter of law, the expression “lives with that person as if they are husband and wife” must be construed in the light of the over-all purpose of the statute, which is to prescribe the rules whereby persons are entitled to an allowance by reason of need. The expression ought therefore be applied by reference to the economic relationship of persons who are living together. ... The statute is not primarily concerned with the frequency of sexual relations, nor is it concerned with the attitude of the couple towards the outside world as a matter of social intercourse.”⁵⁰

the Attorney General, High Court, July 23, 1986. This case looked at the issue of cohabitation from a procedural perspective.

⁴⁹ [1975] 53 DLR 512

⁵⁰ Cited in Whyte “Social Welfare Law – The Cohabitation Rule” (1989) DULJ 187 at 191.

6.21 The High Court rejected this argument. Gannon J was of the view that the phrase ‘cohabiting as man and wife’ was one that was clear and unambiguous, and which should be read literally without any gloss. For cohabitation to exist, it is necessary to prove that the parties are living together as husband and wife. There are many different facets to this relationship. He referred to the decision of Lord Goddard CJ in *Thomas v Thomas*,⁵¹ in which he stated:

“‘Cohabitation’ does not necessarily depend on whether there is sexual intercourse between husband and wife. ‘Cohabitation’ means living together as husband and wife and as I endeavoured to point out in *Evans v. Evans* [1948] I KB 175 cohabitation consists of the man acting as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering housewifely duties to the husband and the husband cherishing and supporting his wife as a husband should. Of course, sexual intercourse usually takes place between parties of moderate age if they are cohabiting, and if there is sexual intercourse it is very strong evidence - in fact it may be conclusive evidence- that they are cohabiting; but it does not mean that because they do not have sexual intercourse they are not cohabiting. ‘Cohabiting’ as I have said, means the husband and wife living together as husband and wife.”

6.22 Gannon J was of the view that there was nothing in this, or the legislation, which implied that one spouse must be the sole or dominant provider for the couple or that a woman must be wholly or partially dependant on her husband or *vice versa*, before they will be held to be cohabiting. The High Court upheld the decision of the Department of Social Welfare.

(2) *Establishing the meaning of the phrase ‘cohabiting as husband and wife’*

6.23 When then will a man and a woman be determined to be “cohabiting,” or “living together as husband and wife” for the purposes of social welfare law? Statute contains no guidance on this matter, and in *R v South West London Supplementary Benefits Appeals Tribunal, ex parte Barnett*,⁵² the English High Court declined

⁵¹ [1948] 2 K.B. 294

⁵² (1973) SB Dec 28 (Decision SB4).

to outline the situations in which cohabitation will be deemed to occur on the grounds that the phrase cohabitation was so well known that nothing they could say about it could possibly assist in its interpretation. This may be criticised in that it presupposes that marital relationships are the same as cohabiting relationships, without taking into account that there are many degrees of cohabitation, from “one night stands” to long-term stable relationships. For this reason, the Fisher Committee Report on Abuse of Social Security Benefits⁵³ was critical of the failure to provide a more comprehensive definition. They argued that individuals should not be left in doubt as to what type of behaviour will lead to the loss of their benefits, and that this necessitated a more comprehensive definition of cohabitation.

6.24 It now falls to consider the cohabitation criteria themselves. These are issued by the Department for Social and Family Affairs in Ireland and the Department of Work and Pensions in Britain in order to assist their officers in determining whether the parties are cohabiting. Given the similarity between the Irish and British criteria, it is proposed to consider them together.

(a) Co-Residence

6.25 If a couple are cohabiting, they will usually reside in the same residence. In determining whether this is the case, the Social Welfare Inspector will consider a number of issues. Is the accommodation a single flat, caravan or other dwelling-place? If it is a house, is it officially a single unit, or is it subdivided into more than one unit? What type of accommodation is available, and how is it shared? Do either of the parties maintain or live in another home or use another address, and, if they do, which is the effective residence?

(b) Household Relationship

6.26 It is not enough to establish that the parties reside in the same house: it is also necessary to establish that they are living in the same household. The two terms are not synonymous: not all couples living in the same house will be cohabiting as man and wife. For example, one could be a lodger, or a housekeeper.

6.27 In determining whether the parties live in the same household, the guidelines provide that the Social Welfare Inspector should have regard to the following facts: Are the finances and

⁵³ (1973 London: HM Stationery Office)

expenses shared? Who owns the property? Was it purchased jointly or is it registered in joint names? Is there a mortgage, and if there is, are both parties named as mortgage holders? Is it rented property and, if so, is it rented in both names, and who pays the rent? Are the household duties shared? Do the couples share meals? Do they do the shopping together? Are there children, and if so, do they share babysitting responsibilities? Do they care for each other in times of illness?

(c) *Social*

6.28 Do the parties socialise together? Does the man act as father or the woman act as mother to each other's children? Do they use the same surname? Do they represent themselves as man and wife, and are they known locally as man and wife? Do they intend to marry, and would they do so if they were free to do so?

(d) *Stability*

6.29 Marriage is entered into as a stable relationship, and therefore, in deciding whether a couple are living together as husband and wife, regard should be had to the stability of the relationship. In determining this, the Social Welfare Inspector should consider the following. How long have the parties been living in the same household? What level of commitment have the parties expressed? This may be discerned by considering the following: whether or not they have any children, and if they have, whether or not they are raising, or intend to raise the children together? Whether they plan to get married, or would if they were free to do so? Do they use the same surname?

(e) *Sexual Relationship*

6.30 Sexual intercourse is a normal part of marriage, and so the fact that the couple has a sexual relationship is, in practice, important in showing that they are living together as husband and wife. However, the absence of a sexual relationship is not by itself a conclusive factor in determining that cohabitation does not exist. The guidelines provide that, where the couple have a child, there is a strong presumption that they are living together as husband and wife.

(3) Judicial Interpretation of the Cohabitation Criteria

6.31 With the exception of *Foley v Minister for Social Welfare*,⁵⁴ (and this only on a preliminary point) the Irish courts have not considered the meaning of cohabitation for the purposes of social welfare. This is not surprising, given the reluctance of the courts to interfere with the decisions of social welfare tribunals.⁵⁵ The English courts, on the other hand, have considered the cohabitation criteria on a number of occasions.

6.32 In *Crake v Supplementary Benefits Commission*; *Butterworth v Supplementary Benefits Commission*,⁵⁶ Woolf J considered the application of the criteria to two different cases.

6.33 In *Butterworth*, the applicant, a woman who was divorced from her husband, was seriously injured in a road accident. Her daughter arranged for a man who had known the applicant for several years to move into her home to look after her. He did so. There was no sexual relationship, but he cooked for her, and carried out all the other household tasks. The applicant did not expect this arrangement to continue once she had recovered, and was able to fend for herself. She claimed Supplementary Welfare Allowance. In determining her eligibility, the Supplementary Benefits Commission aggregated her requirements and resources with those of the man with whom she was living, on the ground that they were living as man and wife. As a result her allowance was withdrawn. The Appeals Tribunal upheld this decision. The applicant appealed successfully to the High Court, which held that the applicant and the man with whom she was living, while residing in the same house, were not living in the same household. In determining whether the parties were living in the same household, Woolf J applied a subjective approach, asking ‘what was the intention of the parties?’ As the intention was to care for the other person because of illness or incapacity, then they were not living as man and wife.

6.34 In the other case, *Crake*, the applicant was a married woman who had left her husband, and was residing with a third party. She

⁵⁴ [1989] ILRM 169. See paragraphs 6.20 - 6.22.

⁵⁵ See Hogan and Morgan *Administrative Law in Ireland* (3rd Round Hall Sweet & Maxwell 1998) at 275-283.

⁵⁶ [1982] 1 All ER 498.

claimed that she was his housekeeper. He did not pay her any wages; he gave her housekeeping money for the entire household, including her two children; he performed those household duties normally done by a husband for his wife; they took their meals together and they socialised together. When the applicant applied for Supplementary Welfare Allowance, the Supplementary Benefits Commission in determining her eligibility, aggregated her requirements and resources with those of the man with whom she was living because they were living as man and wife, and refused to grant her the allowance. This was upheld by the Appeals Commission. She appealed. This time Woolf J rejected the appeal. He described the criteria used by the Commission to assess cohabitation as ‘an admirable signpost’, and concluded that they formed part of the same household, as they were living together as husband and wife.⁵⁷

6.35 In *Robson v Secretary of State for Social Services*,⁵⁸ Webster J modified the subjective test laid down by Woolf J in *Crake & Butterworth* by introducing an objective element. He was of the view that, notwithstanding emphasis placed on the intention of the parties in *Crake*, it will usually be necessary to look at the relationship objectively, as their intention will not be ascertainable, or if it is, it will not be reliable. In this case, the applicant, a widow aged 45 was living with a widower, aged 65. They were both severely disabled. The applicant applied for Supplementary Benefit; her income was aggregated with the person with whom she was living,

⁵⁷ See also the case of *Campbell v Secretary of State for Social Services* (1983) FLR 138. Here, the applicant was married but separated from her husband. She was residing with a third party. She applied for Supplementary Welfare Benefit; her income was aggregated with the person with whom she was living, and she was refused the benefit. She appealed. She claimed that she was his housekeeper, and the Appeals Commission upheld her appeal. In May 1979, she left the household and moved to a council house. She did not like the area, and so moved back in with the man on the same basis as before. In July 1980, her benefit was withdrawn, on the same basis as before. The Appeals Commission were of the view that it was a very difficult case for them to decide, but what tipped the scales in favour of cohabitation was the fact that she had sold her furniture before moving back in with the man, and intended to apply for a joint tenancy. She appealed. Woolf J rejected the appeal. He held that the tribunal was not unreasonable in coming to the decision that the parties lived together as man and wife.

⁵⁸ [1982] 3 FLR 232.

and she was refused the benefit. She appealed on the basis that they were not living in the same household, and so were not “cohabiting”. Webster J upheld the appeal. He held that the parties were not living together as husband and wife; there was no sexual relationship; they moved in together at the suggestion of a social worker; they were free to marry and had not done so; they did not regard each other, and were not regarded, by others, as “living together as husband and wife.”⁵⁹

E ‘Living apart’

6.36 Given the paucity of case law on the cohabitation criteria and the reliance placed by the cohabitation guidelines on the need to consider the general relationship, it is suggested that some help in determining whether or not the parties are cohabiting may be derived from matrimonial law, in particular the “two households test,” which

⁵⁹ See also the more recent decision of Rowland J in the case of *Re J (Income Support: Cohabitation)* [1995] 1 FLR 660, [1995] Fam Law 300. Here, the applicant, who was disabled, lived in the same house as Mrs B. Mrs B was in receipt of Income Support, both in respect of herself and the applicant. The applicant sought to claim benefits independently of those claimed by Mrs B. This claim was rejected by the adjudication officer. The applicant appealed to the Social Security Appeals Tribunal. This appeal was rejected on the grounds that the applicant and Mrs B were living together as husband and wife and that their relationship was not, as the applicant had maintained, that of “patient and carer”. The applicant appealed. Rowland J upheld the appeal. He noted that the general criteria, while admirable ‘signposts’ were not wholly determinative, and regard had to be had to the parties’ general relationship. He was of the view that, where somebody moves in with another party in order to care for them because that person is ill or unable to manage their affairs, then, in ordinary parlance, they should not be regarded as “living together as husband and wife”. He noted that it was standard practice not to ask the parties whether or not they were engaged in a sexual relationship. He felt that this was incompatible with the inquisitorial system, and that officers should be allowed to ask such questions. On the facts of the case, he held that the tribunal had erred, as it had not referred to the general relationship between the couple. Nonetheless, there was sufficient evidence upon which a properly directed tribunal could find that a relationship akin to that which subsists between a husband and wife existed, and so he referred the matter back to a differently-constituted tribunal for reconsideration.

is currently used to establish whether or not a couple are 'living apart', for the purposes of divorce or judicial separation.⁶⁰

6.37 Although 'living apart' cases are concerned with the ending of domestic relationships, they are often contested, and so the courts have, in many cases, had to examine domestic relationships in detail in order to ascertain whether or not a couple are living in the same household. However, it must be stressed that in 'living apart' cases, the couples are married, and so in almost all cases at some point they have undoubtedly been living together. There is, therefore, something like a presumption that they are already living in the same household, whereas, in cohabiting cases, there is no such presumption. Consequently, as the cases described below show, there is more often likely to be a dispute regarding the mental attitude of the parties rather than their physical presence in the home. Despite this qualification, it is suggested that the 'living apart' doctrine applied, as it were "in reverse," will still be of some use in determining the general relationship of the parties, and whether or not they are cohabiting.

6.38 The doctrine of 'living apart' was first introduced into Irish law by the *Judicial Separation and Family Law Reform Act 1989* as a ground for judicial separation. With the introduction of divorce in 1995, the doctrine was applied to applications for divorce. Both Article 41.3.1° of the Constitution and section 5 of the *Family Law (Divorce) Act 1996* provide, *inter alia*, that a court may grant a dissolution of marriage where the parties have been 'living apart' for four out of the previous five years.

6.39 The only definition of "living apart" in Irish law is contained in the 1989 Act; section 2(3) of which, defines it as follows:

"Spouses shall be treated as living apart from each other unless they are living with each other in the same household, and references to spouses living with each other shall be construed as references to their living with each other in the same household."

⁶⁰ This is the corollary of the concept of 'living together' for the purposes of claiming tax relief. See Corrigan *Revenue Law*, Volume One (Round Hall Sweet & Maxwell 2000) at 641-645.

6.40 Therefore, whether a couple will be regarded as “living apart” will hinge on whether they live in the same household. Martin suggests that there are three elements to establishing ‘living apart’, namely: physical separation; an intention to separate, and the necessity to communicate that intention.⁶¹ In considering this issue, the Irish courts have had recourse to England and Wales, where ‘living apart’ has been a “no fault” ground for divorce since the enactment of the *Divorce Reform Act 1969*. Prior to this, the courts considered the issue in the context of desertion as a ground for divorce.

6.41 In *Pulford v Pulford*,⁶² the court emphasised that living apart did not necessarily require a change of address, but rather a change in the parties’ relationship. In *Hopes v Hopes*,⁶³ the court reiterated this point: it held that spouses will be considered to be living apart, when, although each is living in the same home, they have ceased to be one household and become two households. In *Bartram v Bartram*,⁶⁴ the Court of Appeal considered the “house/household” distinction. Here, the husband was seeking a divorce because the requisite three years desertion had been established. The parties had lived apart for eighteen months, at which time the wife, unable to find alternative accommodation, moved in with her husband who was now living with his mother. She moved into a separate bedroom, and avoided her husband at all times except meals. The Court of Appeal held that, although she was living in the same house as her husband, she was no longer living in the same household, and so her original desertion had continued, and her husband was entitled to a divorce on the grounds of desertion. Bucknill LJ said that the key question was:

“Do the facts proved establish that it [the desertion] was brought to an end? In my view, it can only be shown to be brought to an end if the facts show an intention on the part of the wife to set up a matrimonial home [household] with the husband. If the facts do not establish any intention on

⁶¹ Martin, “To Live Apart or Not to Live Apart: That is the Divorce Question” (2000) 2 IJFL.

⁶² [1923] All ER 10.

⁶³ [1949] 2 All ER 920.

⁶⁴ [1949] 2 All ER 270.

the part of the wife to set up a matrimonial home, the mere fact that, as a lodger, she went to live under the same roof as her husband, because she had nowhere else to go, does not remove the desertion which she had already started and continued to run.”⁶⁵

6.42 In *Mouncer v Mouncer*,⁶⁶ the court adopted a strict “physicality” test. The husband and wife had married in 1966. By August 1969 they were on very bad terms, and from November 1969, they slept in separate bedrooms. They continued to eat together as a family, eating meals prepared by the wife in the company of their children. They did not divide the house into ‘spheres of influence,’ but the wife stopped washing her husband’s clothes. The only reason they continued to live together was for the sake of the children. In 1971, the husband left the family home and petitioned for divorce based on two years’ living apart. Worthing J laid particular emphasis on the physical nature of the relationship, and rejected the petition. He held that, although the parties had stayed together only for the sake of the children, they had not ceased to form part of the same household. The fact that they ate together, did not allocate rooms to each other and continued to share household responsibilities meant that they did not live in separate households.

6.43 In *Santos v Santos*,⁶⁷ which was a tax case, the Court of Appeal took a very different approach to the meaning of ‘living apart’. In this case, the parties were not residing in the same house, and the issue, which fell to be determined, was whether this in itself was sufficient to determine that the parties were living apart. The Court reviewed the previous cases on living apart, and rejected the ‘total physicality’ test, holding that something more was required. Delivering the judgement of the court, Sachs LJ held:

“[It] is 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 whilst both parties recognise the marriage as subsisting as they did here. This involves considering attitudes of mind; and naturally the

⁶⁵ *Bartram v Bartram* [1949] 2 All ER 270, at 272.

⁶⁶ [1972] 1 WLR 321.

⁶⁷ [1972] 2 All ER 246

difficulty of judicially determining that attitude may on occasions be great”.

6.44 In *Holmes v Mitchell (HM Inspector of Taxes)*,⁶⁸ the taxpayer and his wife lived in the same house, but the arrangements were such that they, in fact, lived separately and apart in different “households” in the same house. For income tax purposes, the wife contributed by way of a pension to the couple’s joint income. They maintained themselves out of their own incomes and paid their own tax, save that the taxpayer paid all the outgoings on the house. The wife had the benefit of living in the matrimonial home, which the taxpayer claimed was his absolute property, together with the furniture. In December 1982, the taxpayer made a declaration that he was seeking a divorce. Subsequently, he filed a divorce petition, which was not proceeded with, and the parties went on living as before. In February 1986, he filed a second petition based on two years separation by consent. The separation was stated as having commenced in December 1982. The marriage was dissolved in 1987. During the tax years 1983-84 up to and including the tax years 1986-87 the taxpayer claimed his entitlement to deduct personal allowances at the higher rate appropriate to a married man living with and maintaining his wife. Section 8(1)(a) of the *Income and Corporation Taxes Act 1970* provided that a taxpayer was entitled to the higher allowance if he could prove that for the year of assessment his wife was living with him or that his wife was fully maintained by him. Section 42(1) provided that a married woman shall not be treated for as living with her husband for income tax purposes unless they are separated, and such separation is likely to be permanent. The Inspector of Taxes issued the following guidelines to determine whether a couple is living apart for the purposes of tax.

- (i) How is the house divided up and what are the arrangements for using the bathroom and kitchen?
- (ii) What services do the couple provide for each other? Do they cook, clean, etc?
- (iii) What financial arrangements have been made in relation to the alleged separation?

⁶⁸ [1991] STC 25.

(iv) What do the husband and wife do to avoid each other in the house?

6.45 On the application of this test, the Inspector of Taxes held that the couple had been separated, that they had been living in two “households,” even though they resided in the same house, and that consequently the husband was not entitled to the Married Man’s Allowance. The husband appealed but Vinelott J rejected the appeal on essentially the same grounds as the Inspector of Taxes.

6.46 The Irish Courts first considered the issue of living apart as a ‘no fault’ ground for divorce in the case of *McA v McA*.⁶⁹ In this case, the applicant and the respondent were married in 1968. In 1988, the respondent left the family home, because he was conducting an affair with another woman. In 1991, the affair ended, and he returned to the family home. The respondent contended that he returned in order to develop a better relationship with his children and not to resume a matrimonial relationship with the applicant. From 1991 until 1997, when the respondent finally left the family home, the parties slept in separate bedrooms, and never resumed sexual relations. The respondent, when he was home, stayed in his bedroom, which he regarded as his ‘apartment’. He viewed himself as a lodger. At this time, his business was developing, and the applicant wife was involved in the running of the business. In 1995 and 1996, both parties entered into relationships with other parties, whilst both remaining in the family home. The applicant sought a decree of judicial separation, and the respondent counterclaimed, seeking a decree of divorce. Both parties accepted that there was no prospect of reconciliation, but the applicant claimed that the respondent was not entitled to a decree of divorce, on the basis that the parties had not lived apart for the requisite four out of the past five year period. The respondent argued that, once the parties had lived apart, they continued to live apart even after the respondent returned to the family home, at which time the parties had started to live as two “households”, rather than one.

6.47 In delivering the judgement of the High Court, McCracken J considered the English case law on the doctrine of “living apart.” He rejected the “total physicality” test propounded by Wrangham J in *Mouncer v Mouncer*. Instead, he followed *Santos v Santos*, where the

⁶⁹ [2000] 2 ILRM 48.

Court of Appeal held that the intention of the parties is also a relevant matter in determining whether the parties are living apart. He formulated the test as follows:

“Clearly there must be something more than mere physical separation and the mental or intellectual attitude of the parties is also of considerable relevance. I do not think one can look solely either at where the parties physically reside, or at their mental or intellectual attitude to the marriage. Both of these elements must be considered, and in conjunction with each other... Applying this test, I have no doubt that, just as parties who are physically separated may in fact maintain their full matrimonial relationship, equally parties who live under the same roof may be living apart from one another. Whether this is so is a matter which can only be determined in the light of the facts of the particular case.”⁷⁰

6.48 Applying this test to the facts of the case, McCracken J concluded that the parties had lived apart for the requisite period. He held that the husband had returned to the family home only to develop his relationship with his children, and not to resume matrimonial relations with his wife. As such, he did not have the requisite mental element necessary to maintain the marriage; he regarded the marriage as being at an end. This was supported by the fact that he slept in a separate bedroom, and did not resume sexual relations with his wife.

6.49 It is suggested that the hybrid physical and mental test adopted by McCracken J in the *McA* case mirrors the approach of the English courts to the issue of cohabitation. In *Crake*, Woolf J was of the view that, while the cohabitation criteria provided an “admirable signpost” for the court, it was necessary to look at the general relationship, rather than one individual criterion or set of criteria in order to determine whether there was cohabitation. He adopted a subjective test, asking what was the intention of the parties, in order to determine whether they formed part of the same household. In *Robson*, Webster J modified this test, introducing an objective element. He was of the view that it may sometimes be necessary to apply an objective test to the relationship, as the intention of the parties may be either unascertainable or unreliable. Given that in

⁷⁰ *McA v McA* [2000] 2 ILRM 48 at 55.

both “living apart” and cohabitation cases, the courts are faced with the task of determining whether or not relationships exist or subsist, it is suggested that the jurisprudence of the courts in “living apart” cases may be utilised by the Irish courts, if faced with the question of whether or not the parties are living in the same household.

F Recommendation

6.50 *The Commission recommends the retention of the current arrangements for cohabittees under the social welfare code. The only change the Commission would recommend is that same-sex cohabittees be regarded as being capable of cohabiting for the purposes of social welfare.*

CHAPTER 7 PENSIONS

A Introduction

7.01 Ireland has seen an enormous growth in personal and occupational pension provision over the past few decades. According to Census 2002, 50.7% of those in employment have a private pension scheme at present.¹ The Pensions Board aims to increase this figure to 70%.² The expansion of pension schemes has had an enormous effect on family finances.³ In recent years, there has been a growing realisation that savings accumulated in pension schemes represent an increasingly significant portion of family wealth, often second only to the family home. In fact, in some cases, the pension is the only notable family asset in existence at the end of a relationship, for example on death.⁴ Many personal and occupational pension schemes allow benefits to be paid to spouses and dependants on the death of the member of the scheme. In addition, the courts are empowered to take into account the value of the spouse's pension schemes in the calculation and apportionment of assets in family proceedings.⁵

7.02 This chapter will examine the position of cohabitants under pension law. At present, many pension schemes allow for the payment of benefits to the "partners" of its members provided, of course, that they come within the class of beneficiaries or dependants

¹ Central Statistics Office *Quarterly National Household Survey (Pensions) First Quarter 2002* (5 September 2002, Dublin) at 1.

² The Pensions Board *Annual Report 2002* (Dublin 2003) at 13.

³ See generally McLoughlin *Pensions, Revenue Law and Practice* (Institute of Taxation 2002).

⁴ *Ibid* at 459.

⁵ Section 12 of the *Family Law Act 1995*; section 17 of the *Family Law (Divorce) Act 1996*. See also the *Pensions Schemes (Family Law) Regulations 1997*. See paragraphs 7.21 - 7.22 for a discussion of these provisions.

(depending on the type of benefit payable) defined by the scheme. This class of beneficiaries or dependants must comply with revenue guidelines.⁶ However, many pension schemes, particularly the older or public service schemes, do not allow the payment of benefits to cohabitants even though they may have been dependent on the member at the time of his death.⁷ Furthermore, pension adjustment orders are not available to cohabitants.

7.03 In this chapter, the Commission will consider whether existing pension law and practice should be amended to recognise non-marital cohabiting relationships. However, before doing so we will give a brief overview of current pension law and practice. It should be noted that this is not intended to operate as a comprehensive statement of the law (which would be beyond the scope of the present work) but rather as a backdrop against which the Commission can discuss the merits and demerits of extending spouses' pension rights and entitlements to cohabitants.

B An Overview of Pensions

7.04 A pension scheme is an arrangement designed to provide benefits for a person after their retirement from work and/or to provide benefits for their dependants on their death before or after the deceased's retirement. There are three main types of pension, namely social welfare pensions, occupational pensions and personal pensions.⁸

⁶ See McLoughlin *Pensions, Revenue Law and Practice* (Institute of Taxation 2002) at paragraph 9.3.5 for a discussion of the meaning of dependant and Irish revenue practice. In practice the class of potential dependants include (1) the spouse of the deceased; (2) the children of the deceased under the age of 18; (3) the children of the deceased over the age of 18 who are in full time education or vocational training; (4) a child of whatever age who is permanently incapacitated; and (5) any other person who is financially dependent on the deceased at the time of death.

⁷ See Commission on Public Service Pensions *Final Report* (Dublin Official Publications 2000) at 474.

⁸ See McLoughlin *Pensions, Revenue Law and Practice* (Institute of Taxation 2002) at Chapter 1.

(1) Social Welfare Pensions

7.05 There are a number of pensions available under the social welfare system.⁹ Qualified PRSI contributors will be entitled to a contributory retirement pension if they retire at 65 or an old age contributory pension if they retire at 66. A surviving spouse's pension is payable if a qualified contributor dies, either before or after retirement. Certain means tested allowances, such as dependants' allowances, may also be available. A means tested non-contributory pension is also available for those who are not entitled to a contributory pension. The means test takes into account the income and assets of both the claimant and the claimant's spouse. A means tested surviving spouse's pension is also available. Both the contributory and non-contributory pension is subject to budgetary change.¹⁰

(2) Occupational Pensions

(a) Introduction

7.06 Occupational pension schemes are established to provide those covered by the scheme with a regular income to replace earnings in the event of their retirement, or perhaps early retirement through ill-health. Such schemes will often additionally provide a lump sum benefit for surviving dependants in the event of the death of the person covered, and may also provide an income for those dependants. Occupational pension schemes are governed by the *Pensions Acts 1990 to 2003*. Occupational pension schemes may be divided into public sector schemes and private sector schemes.

7.07 Private sector schemes must have been approved, or be in the process of being considered for approval, by the Revenue Commissioners.¹¹ Private sector schemes are generally established by a trust under which the sponsoring employer appoints trustees to manage the trust in accordance with the provisions laid down in the trust deed and the rules governing the scheme. The trust fund is a

⁹ See *Social Welfare (Consolidation) Act 1993*. See also Cousins *Social Welfare Law* (2nd ed Thompson Round Hall 2002), part III.

¹⁰ For example, with effect from January 2 2004 the various rates of old age pension were increased by €10. For example, the maximum old age pension increased from €163.70 to €173.70.

¹¹ *Ibid.*

separate fund and its assets are not part of the assets of the sponsoring employer.¹² As a result, the trust's assets may not be taken by a liquidator for the benefit of the business creditors in the event of its liquidation.¹³

7.08 Public sector schemes can be either funded or unfunded. Where the scheme is unfunded, pensions are paid out of current resources as they fall due. Where the scheme is funded, it is governed and operated in a similar manner to private sector schemes.

(b) *Defined Benefit and Defined Contribution Schemes*¹⁴

7.09 There are two basic types of occupational pension schemes, namely defined benefit schemes, and defined contribution schemes.¹⁵ A defined benefit scheme is one in which the pension and other benefits payable are clearly defined in the scheme rules. These benefits are often based on salary at or close to retirement and on pensionable service. As well as defining the scheme benefits, the rules of defined benefit schemes provide for the manner in which the employer rate of contribution is determined and, if contributory, the rate at which the employees will contribute to the scheme. The issue of funding is dealt with in Part IV of the *Pensions Act 1990*. As the value of the fund may fluctuate, this section requires trustees to submit an Actuarial Funding Certificate to the Pensions Board at 3.5 yearly intervals wherein the actuary has certified whether the assets of the scheme would have been sufficient to meet the liabilities of the scheme if the scheme were wound up at the specified date.¹⁶

7.10 A defined contribution scheme is one in which the member's benefit is determined solely by reference to the contributions paid into the scheme by the employer, and if contributory, by the member, and the investment returns earned on

¹² See Finucane & Buggy *Irish Pension Law & Practice* (Oak Tree Press 1996) at paragraph 3.2.

¹³ *Ibid.*

¹⁴ According to the Trustee Training Survey 2002 published by the Pensions Board 72% of trustees operated Defined Benefit Schemes, 22% operated defined contribution schemes and 5% operated both. See http://www.pensionsboard.ie/_fileupload/members/Bulletin2_2003.pdf

¹⁵ See generally the Pensions Board *A Brief Guide to Pensions* www.pensionsboard.ie/information/booklet02

¹⁶ See http://www.pensionsboard.ie/_fileupload/members/Bulletin2_2003.pdf

these contributions. What is fixed in this case is the rate of the employer and employee contributions. Nothing else is guaranteed and the outcome for each member will depend on the return achieved by this fund.

7.11 Both types of scheme usually permit the member to “top up” the fund by the payment of Additional Voluntary Contributions (AVCs).¹⁷ AVCs can be made under the trust deed and rules of the main scheme or under a separately constituted scheme. The total annual contribution that a member can make to a scheme is 15% of the member’s gross pay where the member is under 30, 20% where the member is between 30-39, 25% where the member is between 40-49 and 30% where the member is over 50. The additional benefits secured by the AVCs must be within the approvable limits set by the Revenue Commissioners.

(c) *Benefits*

(I) *Benefits on Retirement*¹⁸

7.12 The most common benefit derived from an occupational pension scheme is a pension payable by regular instalments after the member’s retirement. Individual schemes may differ in the type of pension they provide but the maximum pension payable under Revenue rules is 2/3^{rds} of the employee’s final remuneration. Pensions are paid subject to the PAYE system and taxed accordingly.

7.13 Where a scheme provides for a spouses’ pension and a dependant’s pension on the death in retirement of a member the maximum amount payable under any individual such pension is two-thirds of the maximum pension which was payable to the deceased member. The maximum aggregate amount payable under all such pensions is 100% of the maximum pension which was payable to the deceased member. However, anecdotal evidence would suggest that in practice this figure is closer to 50%. A spouse’s pension can continue for life. However, the scheme may expressly provide that it will cease on re-marriage or co-habitation. A pension payable to a child of the deceased may continue until the child reaches the age of 18, the child completes his or her education, or ceases to be regarded as a

¹⁷ See McLoughlin *Pensions, Revenue Law and Practice* (Institute of Taxation 2002) at 282.

¹⁸ See McLoughlin *Pensions, Revenue Law and Practice* (Institute of Taxation 2002) at Chapter 8 and 239 - 244.

dependant. Where a pension is payable to a dependant, that pension can continue to be paid for as long as that person may be regarded as a dependant.

7.14 In addition, many schemes allow a tax-free sum to be taken in the form of a lump sum on retirement.¹⁹ Where the employee dies after retirement, a lump sum may be payable to any surviving spouse or dependants where a sum falls due under a life policy or scheme that gave continued cover on death after retirement; or where a payment falls due under a guarantee for five years or less. In certain circumstances, employees can allocate a portion of their pension to their spouses or dependants to be paid after their death.

(II) Benefits before Retirement

7.15 Where the employee dies before retirement and while still in the employment of the sponsoring employer (or an associated employer), the employee may be said to have “died in service. Individual schemes differ in the type of benefits provided. Where a scheme provides for a spouses’ pension and a dependant’s pension on the death in service of a member each such individual pension cannot exceed two-thirds of the maximum pension, which could have been provided for the member on his ill-health retirement on the date of his death. The aggregate of any spouses’ pension and/or dependants’ pensions may not exceed 100% of the maximum pension, which could have been provided for the deceased member on his ill health retirement at the date of death. The maximum lump sum payable is the greater of €6,350 or four times the employee’s final remuneration.²⁰

(III) Spouses and Dependants

7.16 The pension benefits available on death may be payable to either the deceased’s spouse or dependants. A dependant is somebody who can establish that they were financially dependent on the deceased at the time of his or her death.²¹ Under a discretionary trust, the trustees decide to whom the pension will be payable within the class of dependents. Under some schemes, employees may

¹⁹ The lump sum payable in individual cases will depend on the circumstances of the employee and the scheme design.

²⁰ See McLoughlin *Pensions, Revenue Law and Practice* (Institute of Taxation 2002) at 230 - 239.

²¹ See McLoughlin *Pensions, Revenue Law and Practice* (Institute of Taxation 2002) at 233 – 234 and 240.

nominate by way of letters of wishes specifying those whom, within the class of dependents, they wish to receive the pension following the employee's death. This may include a financially dependent cohabitee of either sex if the rules of the scheme so provide.

(3) Personal Pensions²²

7.17 Individuals may also make provision for their retirement by means of personal pension contracts. Self-employed persons usually make pension provision for themselves by this method. The key features of personal pension contracts, known as retirement annuity contracts, are as follows. A personal pension plan is usually a private contract between the individual concerned and a life office. Contributions are paid directly to the life office. The maximum aggregate annual tax-deductible contribution that may be paid is 15% of income up to the age of 30, increasing to 20% of income from the age of 30 – 39, 25% of income from age 40 - 49 and 30% from age 50 upwards.²³ The maximum income that may be taken into account at present for tax-deductible pension contributions is €254,000.

7.18 On retirement, an individual may take a tax-free lump sum of 25% of the retirement fund. The remainder can be applied in two alternative ways. First, to purchase an annuity with a life office. An annuity is an income payable during the life of the policyholder. A contract may provide that an annuity be paid to the individual's spouse or dependants on death. Secondly, since the enactment of the *Finance Act 1999*, an individual can transfer the retirement fund to the individual or to an "approved retirement fund" (ARF) and in either case may be required to transfer part of the fund to an "approved minimum retirement fund" (AMRF).²⁴ Any amount transferred to the individual in excess of the tax-free lump sum previously mentioned will be subject to income tax at the individual's

²² See McLoughlin *Pensions, Revenue Law and Practice* (Institute of Taxation 2002) Chapter 3.

²³ The *Finance Act 1999* inserted a new schedule 23A into the *Taxes Consolidation Act 1997*. This contains a list of specified occupations that can fund into personal pension at a rate of 30% of their net earnings regardless of age. Most sportspersons come within this exemption.

²⁴ ARF's are governed by section 784 of the *Taxes Consolidation Act 1997* as amended. For a detailed account of the operation of this Act, see McLoughlin *Pensions, Revenue Law and Practice* (Institute of Taxation 2002) at Chapter 6.

marginal rate. Both an ARF and AMRF must be managed by a “qualified fund manager” as defined in the legislation²⁵ but the beneficial ownership of the funds remain at all times with the individual. An AMRF is similar to an ARF save that capital cannot be withdrawn from an AMRF prior to the age of 75, although any interest earned may be paid out. Funds placed in an ARF can be withdrawn at any time. A minimum of €63,487 must be placed in an AMRF before any remaining funds can be placed in an ARF or transferred to the individual, unless the individual already has a guaranteed annual pension income worth €12,700. Investment income generated by ARFs is free from income and capital gains tax. Tax is payable on any withdrawals from the fund under the PAYE system. On death, any funds held in an ARF or AMRF form part of the deceased’s estate, and will be distributed and taxed accordingly.²⁶

(4) Personal Retirement Savings Accounts (PRSA)²⁷

7.19 A PRSA is a contract between an individual and an authorised PRSA provider in the form of an investment account that can be used to save for retirement. Employers who do not provide an occupational pension scheme for their employees are obliged to allow their employees to contribute to a PRSA by means of a salary deduction. Employers can also contribute to PRSAs on behalf of their employees. These contributions are tax deductible for corporation tax purposes. They are treated as benefits in kind but the employee is entitled to tax relief. The investment return under a PRSA is exempt from tax while it remains in the fund. There are two

²⁵ Section 784 of the *Taxes Consolidation Act 1997*.

²⁶ Where the assets held in an ARF are transferred to the deceased’s spouse’s ARF, no tax is payable on the transfer. Any future withdrawals from the spouse’s ARF will be treated as that spouse’s income and will be taxed in the normal way. Where the funds are transferred to a child of the deceased, if the child is under 21 no income tax is payable but the normal capital acquisitions tax threshold applies. Where the child is over 21 it is subject to income tax in the normal manner but is not liable to Capital Acquisitions Tax. See *Revenue New Pension Options for the Self-Employed and Directors of Family Companies* (Booklet IT14). See also McLoughlin *Pensions, Revenue Law and Practice* (Institute of Taxation 2002) at 126.

²⁷ PRSAs are governed by the *Pensions (Amendment) Act 2002*. For a discussion of the operation of this Act see also McLoughlin *Pensions, Revenue Law and Practice* (Institute of Taxation 2002) at Chapter 4.

types of PRSA, a standard PRSA and a non-standard PRSA. A standard PRSA is a contract that has a maximum charge of 5% on the contributions paid and 1% on the assets under management. It may not be marketed or sold if the purchase of the PRSA was conditional on some other product, for example a life assurance policy being bought at the same time. A non-standard PRSA does not have any maximum limits on charges and allows investment in funds other than pooled funds.

7.20 On retirement, an individual may take a tax-free lump sum of 25% of the PRSA fund. The remainder can be used to purchase an annuity for life or transferred to an AMRF or ARF. The PRSA fund will be an asset in an individual's estate where the person dies prior to retirement and will be distributed accordingly. If the individual dies after retirement, the funds will be distributed in accordance with the AMRF/ARF/annuity rules.

C Pensions and Marital Breakdown²⁸

7.21 As indicated above, pensions are increasingly seen as family assets.²⁹ Because of this, matrimonial law now allows the courts to take into account the value of the spouse's pension schemes in the calculation and apportionment of family assets in ancillary relief proceedings on foot of a divorce or judicial separation by making pension adjustment orders.³⁰ A pension adjustment order may provide a non-member spouse with a percentage of the retirement benefits payable under a pension arrangement. A separate pension adjustment

²⁸ See generally Finucane & Buggy *Irish Pension Law & Practice* (Oak Tree Press 1996) at 459 – 502; Walls & Bergin *The Law of Divorce in Ireland* (Jordans 1997) at 193 – 214; Shatter *Family Law* (4 ed Butterworths 1997) at 885 - 966.

²⁹ Introducing the Bill which subsequently became the *Family Law Act 1995* into the Seanad, the Minister for Equality and Law Reform, Mr Mervyn Taylor stated: "I am sure the Senators will agree that for too long pension rights in the marital breakdown situation have been neglected and, at worst, ignored...In my view the assignability and valuation of pensions should not be foreign territory. If necessary, spouses must be compensated in one form or another for loss of pensions or they must be assigned an interest to enable justice to be done". 141 *Seanad Éireann* 1828 (9 February 1995).

³⁰ Section 12 of the *Family Law Act 1995* and section 17 of the *Family Law (Divorce) Act 1996*.

order is required in respect of death in service benefits. In considering whether to make a pension adjustment order, the court will consider a wide range of factors. These include information about the spouses as to: (a) financial resources; (b) financial needs; (c) ages; (d) standard of living; (e) physical or mental disabilities; (f) conduct; (g) contribution to the relationship; (h) the length of the marriage; and (i) the rights of any third parties.³¹

7.22 In considering whether to make a pension adjustment order the court is required to have regard to whether adequate and reasonable financial provision exists or can be made for the spouse by means of a property adjustment order, financial compensation order, periodical payment or lump sum order or other specified ancillary orders.³² The court will not grant a pension adjustment order if the applicant spouse has remarried. If the order has already been made in respect of a contingent benefit, a benefit payable following the occurrence of a specific event, it will cease to be effective on the re-marriage of the non-member spouse. There is no automatic cessation of payment in the case of a retirement benefit, although the member spouse may be able to apply to the court to have the order reversed or varied.

D Pensions and Qualified Cohabitees

7.23 The Commission will examine this under two headings, namely, death benefits generally and relationship breakdown.

(1) Death Benefits

7.24 Turning first to private sector schemes, under current Revenue rules, the definition of dependant includes 'cohabitees' who can establish that they were financially dependent on the deceased at the date of death. As such, the trustees of individual schemes that allow for the payment of benefits to dependants already have a discretion to pay benefits to such financially dependant cohabitees. The Commission is of the view that as this Paper is not equating cohabitation with marriage it would be inappropriate to place qualified cohabitation in the same position as marriage with regard to pensions. Because of this and the potentially huge cost of allowing

³¹ Section 16 of the *Family Law Act 1995* and section 20 of the *Family Law (Divorce) Act 1996*.

³² Section 12 of the *Family Law Act 1995* and section 17 of the *Family Law (Divorce) Act 1996*.

non-dependent qualified cohabitants to receive death benefits the Commission recommends no change to the existing law.³³ In any event under the Commission's scheme a qualified cohabitee who feels that proper provision has not been made for them out of the deceased's estate can apply to the court for an order making proper provision for them.³⁴

7.25 However, the Commission is of the view that private schemes, which do not already allow dependant cohabitants to be included within the class of potential beneficiaries, should amend their rules and allow them to do this. The Commission is strengthened in its view by the recently published *Social Welfare (Miscellaneous Provisions) Bill 2004*. Although this Bill proposes no changes in relation to the notion of dependency, the Bill proposes to insert a new part into the *Pensions Act 1990*, which will give effect to Council Directive 2000/43/EC (Race Directive) and 2000/78/EC (Employment Directive) as they apply to occupational pensions. This will prohibit discrimination based on the grounds of sexual orientation, religion, age, race, disability, marital and family status.

7.26 *The Commission recommends no change to the current law regarding private sector pensions.*

7.27 Turning now to public sector schemes, currently a statutory spouses and children's scheme applies to many public sector schemes. The Commission on Public Service Pensions considered the question of whether this should be extended to extra-marital cohabitation in its recent report. The Commission came to the conclusion that the existing provisions of the public service spouses and children's schemes should be amended to allow for the payment of a survivor's pension to a financially dependent partner in circumstances where there is no legal spouse and where a valid nomination has been made. Such a scheme would be discretionary in nature.³⁵

³³ See Pollard & Heath "Government Proposals for Civil Partnerships: The Impact on Pensions" 17(4) *Tolleys Trust Law International* 176 for a brief analysis of the costing issues involved in the recent British proposals.

³⁴ See paragraphs 4.27 - 4.29.

³⁵ See *Commission on Public Service Pensions Final Report* (Government Publications 2000) at paragraph 6.90.

7.28 *The Commission agrees with the recommendations of the Commission on Public Service Pensions. The Commission is of the view that the provisions of the public service spouses and children's schemes should be amended to allow for the payment of a survivor's pension to a financially dependent partner in circumstances where there is no legal spouse and where a valid nomination has been made.*

(2) Relationship Breakdown

7.29 Under current law, following the breakdown of the marriage the court can make pension adjustment orders. The Commission is of the view that these provisions should not be replicated when cohabiting relationships break down. The Commission has reached this conclusion for the following reasons. First, since the Commission is not equating cohabitation with marriage, the Commission is of the view that the ancillary relief provisions relating to pensions are too deep a right to accord to qualified cohabitees. Second, the scheme proposed by this Paper already allows the court to grant maintenance and property adjustment orders in exceptional cases where it considers it just and equitable to do so.³⁶ The Commission is of the view that this provides qualified cohabitees with adequate relief at the end of the relationship.

7.30 *The Commission is not in favour of extending pension adjustment orders to qualified cohabitees on the break up of their relationships.*

³⁶ See Chapters 3 and 5.

CHAPTER 8 TAXATION

A Introduction

8.01 This chapter will examine the position of cohabittees under the Irish taxation system. In general, the taxation code does not recognise cohabitation.¹ Consequently, cohabittees are treated as separate individuals for the purposes of tax. This contrasts sharply with the position under social welfare law, where heterosexual cohabitation is expressly recognised for a number of purposes.² This disparity in treatment has been repeatedly criticised on the basis that it is inequitable to treat unmarried heterosexual couples as if they are married, where it is to their disadvantage to be treated as such (as is normally the case under the social welfare system), but not where it is to their advantage to be treated as if they are married (as would usually be the case under the taxation system).³

8.02 However, the Commission takes the view that this comparison is flawed. In the Commission's view, the aim of the welfare code is that married couples should not be treated less favourably than unmarried couples. This is why the welfare code recognises heterosexual cohabitation. Viewed in this light, the privileged position accorded to married couples in the taxation code is readily explicable and is also compatible with the recognition of

¹ Exceptions to this general principle arise where cohabitation acts as a bar to tax relief. For example, the single parent tax credit is not available where the claimant is cohabiting with another person as husband and wife. Similarly, cohabittees are not entitled to widowed parent tax credit.

² For a discussion of the treatment of cohabittees under the Social Welfare Code, see Chapter 6.

³ Many examples of such criticisms are to be found in the Dáil Debates. They follow the same basic formula ie "what steps, if any, is the Minister taking to recognise cohabiting couples as spouses for the purposes of tax, in light of the fact that they are recognised as such for the purposes of social welfare". See, for example, 507 *Dáil Debates* col 130 – 132 (24th June 1999), 508 *Dáil Debates* col 295 – 296 (6th October 1999).

cohabitation for the purposes of social welfare. It results not only from a desire to promote the institution of marriage, but also from the need to ensure that unmarried couples are not treated better than married couples for the purposes of taxation.

8.03 However, in the Commission's view, the Constitution does not prevent the unmarried couple being treated as favourably as the married couple for tax purposes. In this Chapter, we consider, from a policy perspective, whether this should be done.

(1) Policy Approach to the Taxation of Cohabitees

8.04 As Walpole⁴ notes, a couple who are legally married and living together as husband and wife attract a number of tax advantages, which are not available to other types of domestic relationship, such as cohabitation. While these will be dealt with in greater detail later in this chapter, they may be briefly summarised as follows: entitlement to married tax credit,⁵ entitlement to be treated jointly for the purposes of income tax, to a married couple's tax entitlement the amount of which will vary according to whether one or both spouses is in employment and the entitlement to be assessed jointly or separately. In addition, married couples may be entitled to a home carer's tax credit, a widowed parent tax credit and a higher income exemption limit than single persons. For the purposes of capital gains tax, the advantages conferred on a married couple living together include: entitlement to be assessed jointly; capital losses available to one spouse can be used by the other spouse; entitlement to dispose of assets to each other without being subject to capital gains tax.⁶ Spouses are exempt from CAT in respect of all gifts and inheritances given by one spouse to another. Similarly, spouses are exempt from stamp duty in respect of transfers of assets between them.

⁴ Walpole, "Taxation" in Shannon *Family Law Practitioner* (Round Hall Sweet & Maxwell 2000).

⁵ Section 461, *Taxes Consolidation Act 1997*.

⁶ However, this exemption does not apply if the disposal of the asset formed part of the trading stock of a trade carried on by the spouse making the disposal, or if the asset is acquired as trading stock for the purposes of a trade carried on by the spouse acquiring the asset. (section 1028(5), *Taxes Consolidation Act 1997*).

8.05 In recent years, there has been growing support for the view that cohabitees who form part of stable, long-term heterosexual relationships but who, for whatever reason are unable to marry, should be entitled to some, if not all, of the tax advantages accorded to married couples.⁷ It is argued that this would not violate the constitutional guarantee to protect the family as what is prohibited is according cohabitees preferential treatment over married couples rather than parity of status. While successive administrations have been sympathetic to this argument, they have declined to implement these proposals on the basis that tax law should follow the general law, and not the other way round.⁸

(2) *Report of the Working Group on the Treatment of Married, Cohabiting and One-Parent Families*

8.06 In May 1997, the Minister for Social Welfare, Mr Proinsias De Rossa established a working group to examine the “Treatment of Married, Cohabiting and One-Parent Families under the Taxation and Social Welfare Codes.” This Group, which reported in August 1999, was sympathetic, in principle to changes designed to address the tax issues relating to cohabiting couples, and recommended that the Government consider the various options proposed by the Group in the context of Budget 2000.⁹ However, they stressed that this would

⁷ Amendments granting heterosexual cohabitees the same tax treatment as married couples were proposed in the 1990, 1991, 1994, 1998 *Finance Bills*. See 398 *Dáil Debates* col 2493 – 2510, 408 *Dáil Debates* col 1822-1831, 408 *Dáil Debates* col 2256 - 2263, 442 *Dáil Debates* col 1393 – 1399, 488 *Dáil Debates* col 719 – 720.

⁸ In response a question on the tax treatment of cohabitees during the *Dáil Debates*, the Minister for Finance, Mr. Charles McCreevy said:- “The working group acknowledged that a key issue in relation to the tax treatment of cohabiting couples is whether tax law should proceed ahead of changes in the general law on the matter. For that reason, while I am cognisant of the issues faced by cohabiting couples, I have no plans to extend the married person’s tax credit to such couples at present.” 542 *Dáil Debates* col. 667 – 668.

⁹ The *Report of the Working Group Examining the Treatment of Married, Cohabiting and One-Parent Families under the Tax and Social Welfare Codes* (Government Publications 1999) at 154. See *infra* for a discussion of these proposals.

best be done as part of a general re-evaluation of the position of cohabitees under the law as a whole.¹⁰

(3) Finance Act 2000

8.07 Indeed, the Oireachtas considered the 1999 Report in alleviating the tax burden of cohabitees, most notably in the *Finance Act 2000*. Section 151 of the Act¹¹ exempts from capital acquisitions tax any person who has received a gift or inheritance of property that has been their principal private residence for three years prior to the date of the gift or inheritance.¹² Previously the same exemption only existed in respect of siblings over the age of 55 who had lived with the disponent continuously for a period of not less than five years ending prior to the date of death of the disponent, and who were not beneficially entitled in possession to any other house.¹³ While section 151 is not directly aimed at cohabitees, they are clearly encompassed within the ambit of the provision, thus solving what the Working Group on the Treatment of Married, Cohabiting and One Parent Families described as “the most pressing issue” in relation to the capital taxation of unmarried couples.¹⁴

8.08 This chapter will consider to what extent cohabitees should be entitled to further tax relief because of their cohabitation. In doing so, it is not necessary to examine substantive tax law but rather to appraise the manner in which married couples are treated by the tax code at present, then to contrast this with the position of cohabiting couples and to consider whether the law should be changed.

¹⁰ The Report of the Working Group Examining the Treatment of Married, Cohabiting and One-Parent Families under the Tax and Social Welfare Codes (Government Publications 1999) at 154.

¹¹ Now section 86 of the *Capital Acquisitions Tax Consolidation Act 2003*.

¹² See paragraph 8.33 for the conditions to which this relief is subject.

¹³ Section 117 of the *Finance Act 1991*, section 144 of the *Finance Act 1994*, section 138 of the *Finance Act 1997* and section 126 of the *Finance Act 1998*.

¹⁴ The Report of the Working Group Examining the Treatment of Married, Cohabiting and One-Parent Families under the Tax and Social Welfare Codes (Government Publications 1999) at 150.

B Taxing a Married Couple and Cohabitees

8.09 The Commission reiterates its overall approach that cohabitation is not to be equated with marriage. A tax regime, which equated cohabitation with marriage, would cause massive administrative problems because of ‘serial cohabitation’ and the potential desire of many people to have themselves regarded as qualified cohabitees for taxation purposes. Apart from the administrative costs involved, the potential cost to the Exchequer would be enormous and such a general change would in the Commission’s view, be more appropriately undertaken by the Government. As a result, the Commission has proposed a scheme whereby a qualified cohabitee would be entitled to apply for limited relief only.

(1) Income Tax

8.10 Income tax is a tax on income, which is governed by the *Taxes Consolidation Act 1997*, as amended by subsequent *Finance Acts*. Special provisions apply to the taxation of income earned by married couples.¹⁵

8.11 The present system for the taxation of married couples is contained in sections 1015 – 1024 of the *Taxes Consolidation Act 1997*. A couple must be both legally married and “living together” as husband and wife in order to attract the income tax benefits which accrue to married couples under the tax code. Section 1015(2) of the 1997 Act provides that a married couple are presumed to be living together as husband and wife unless they are separated by a court order or they are separated in such circumstances that the separation is likely to be permanent.

8.12 Establishing whether or not a married couple are living together as husband and wife has proven difficult, and the courts have had recourse to the concept of “living apart” in family law in order to

¹⁵ A very different approach is followed in the United Kingdom, where, as Barlow notes, with the introduction of separate taxation for married persons and the abolition of the married couples allowance (other than for people over 65 and born before 6 April 1965), there are now very few differences between married and unmarried cohabitees. Barlow *Cohabitants and the Law* (3rd ed) (Butterworths 2001) at 79. See also, Wood, Lush & Bishop *Cohabitation, Law Practice and Precedents* (2nd Family Law 2001) Chapter 3.

assist them in determining whether or not a couple are living together as husband and wife.¹⁶ In *Rignell (Inspector of Taxes) v Andrews*¹⁷ it was held that unmarried cohabiting couples living together as husband and wife receive none of the income tax advantages of marriage. Thus, the members of a cohabiting couple are treated as separate individuals for the purposes of income tax. On the other hand, where the establishment of cohabitation can increase the tax liability of cohabitants, as is the case with the one-parent family tax credit,¹⁸ the tax code recognises cohabitation.

8.13 The modern system for the taxation of married couples was first introduced in the *Finance Act 1980*. This was enacted as a direct response to the decision of the Supreme Court in *Murphy v Attorney General*.¹⁹ Prior to 1980, a married woman's income was treated as if it formed part of her husband's income, and was taxed accordingly. Although the married couple received higher tax allowances than single persons, the aggregated income of the married couple was subject to exactly the same tax bands as a single person. The net effect of this was that a married couple paid more tax than their unmarried cohabiting counterparts did. Even where a wife opted for separate assessment, the result remained the same, since the Revenue Commissioners would adjust the tax returns of the couple received under separate assessment to ensure that their tax liability would not be less than if they had not opted for separate assessment.

8.14 In *Murphy v Attorney General*,²⁰ the plaintiffs, a married couple who both had salaries, challenged the constitutionality of section 138 and sections 192 to 198 of the *Income Tax Act 1967* as amended. They claimed that these sections penalised marriage by placing unmarried couples in a better position than married couples. It was argued in particular that this violated Article 40.1, the equality guarantee and Article 41, which recognises the family as the fundamental unit group of society possessing certain inalienable

¹⁶ For a brief account of the meaning of 'living apart' for the purposes of family law, see Chapter 6E.

¹⁷ [1990] STC 410.

¹⁸ Section 462 of the *Taxes Consolidation Act 1997* as substituted by Schedule 1 of the *Finance Act 2001*.

¹⁹ [1982] IR 241.

²⁰ [1982] IR 241.

rights and obliges the State to protect it against attack. In the High Court, Hamilton J held that sections 192 and 198(1)(b) were contrary to Article 41, in that they rendered married couples liable to a higher rate of tax than two single cohabiting persons. He also held that sections 192 and 198(1)(b) violated Article 40.1, because they discriminated against married couples and the husband in particular.

8.15 The Supreme Court affirmed Hamilton J's decision, but for different reasons. It held that the 1967 Act did not violate Article 40.1 by treating married couples and unmarried couples differently, as this treatment could be justified by the difference in social function between married and unmarried persons, and because the unfavourable discriminations wrought by these sections could be justified by the discriminations that the law makes in favour of married couples.²¹ However, they were of the view that the imposition, in certain circumstances, of a higher rate of tax on married couples than that which would be imposed on two single persons living together constituted a breach of Article 41.1.3°, which requires the State to guard with particular care the institution of marriage, and protect it against unjust attack. Thus, the provisions of sections 192 to 197 were repugnant to the Constitution, and therefore invalid.

8.16 The State responded to *Murphy* by changing the law to allow married couples to have double the single person's allowance, regardless of whether or not both the parties were actually earning income. In addition, married couples were allowed the option of being assessed jointly, separately or singly for the purposes of income tax. Where the married couple opt for joint or separate assessment, they are allowed to transfer any unused tax reliefs or allowances to the other spouse. Some commentators were critical of the State's approach, arguing that the response went further than required by *Murphy*. Corrigan argues that this response "was clearly formulated with the adage in mind that one is better off safe than sorry."²² He argues that all *Murphy* required the State to do was to ensure that a

²¹ Corrigan *Revenue Law* Volume 1 (Round Hall Sweet & Maxwell 2000) at 84, argues that this argument is questionable as in the case at issue the supposedly more favourable provisions, which were said to justify the discrimination, were evident in only two of the 37 parts of the Act.

²² Corrigan *Revenue Law* Volume 1 (Round Hall Sweet & Maxwell 2000) at 85.

married couple would be treated similarly to an unmarried couple in respect of their income. As such, he argues that giving married couples twice the tax bands of single people regardless of whether or not they both work went too far and resulted in the “costs of the administration of the State being borne disproportionately by single persons.”²³

8.17 The fact that section 18 of the *Finance Act 1980*, which introduced the new scheme, went much further than was required by the Supreme Court in *Murphy* was not lost on the Government of the day. Even a cursory reading of the Dáil Debates makes clear that what the Government was trying to achieve was not only the elimination of the unconstitutional measures identified by the Supreme Court but also to remove a large number of taxpayers from the higher rates of income tax. The Minister for Finance, Mr O’Kennedy made this quite clear when responding to criticisms that all the government was doing was attempting to mitigate the effect of *Murphy* during the debate on the 1980 Act:

“It is important to note the broadening of the tax band. This has been causing concern among a wide section of PAYE taxpayers for some time, because as I said today, they moved too quickly from one band to another. The tax bands have been broadened to ensure that this will not happen now. As a result, a considerable number of taxpayers will move from the higher bands even into the lowest band. That is not making a virtue out of necessity and will have a very real impact on the actual take-home pay of workers.”²⁴

8.18 However, the benefit of the automatic double standard rate band for married couples was reversed with the introduction of ‘individualisation’ in the *Finance Act 2000*. During the second reading of the *Finance Bill 2000*, the Minister for Finance, Mr McCreevy outlined the aims of individualisation. He said that: “the Bill takes the first step in putting in place a single standard rate tax band so that taxpayers will be taxed on what they earn as individuals rather than on their marital status as is the case now.”²⁵ To illustrate

²³ Corrigan *Revenue Law* Volume 1 (Round Hall Sweet & Maxwell 2000).

²⁴ 318 *Dáil Debates* col 918.

²⁵ 514 *Dáil Debates* col 1291.

the effect of individualisation, it will be helpful to look at the standard rate bands for the tax year 2004:

- (i) The band is set at €28,000 for a single person
- (ii) Where only one spouse has an income, the band is €37,000
- (iii) Where each spouse has an income in his or her own right, the band is set at €56,000. The increase in the standard rate band is the lower of €19,000 or the specified income of the lower earning spouse.²⁶

8.19 Given the loss in income that accrues to a one-earner married family with the onset of individualisation, it is not surprising that the process has been highly controversial. It could be argued that individualisation is unconstitutional in that it disadvantages married couples where one partner chooses to remain in the family home. This would violate Article 41.3.1° (which requires the State to protect the family from unjust attack) and Article 41.2.2° (which requires the State to endeavour to ensure that mothers should not be obliged by economic necessity to engage in labour to the neglect of their duties in the home). However, Corrigan argues that individualisation does not act as a disincentive to double-income individuals getting married, as was the case in *Murphy*; rather it ensures that individuals would be taxed on what they earn rather than on their individual status.²⁷

8.20 As has been noted, married couples can opt for joint, separate or single assessment. Because it is normally beneficial for a married couple to be assessed jointly for income tax, section 1018 of the *Taxes Consolidation Act 1997* deems an election to have been made for joint assessment unless before the end of the year either member of the couple gives written notice that they wish to be assessed as a single person or under separate treatment rules. Where a married couple are deemed to opt for joint assessment, either spouse may be assessed on either his or her income, together with that of his or her spouse for any part of the year during which both spouses are living together. The couple will continue to be jointly assessed until

²⁶ Where both spouses have income, the standard rate can be transferred between the spouses, with a minimum of €19,000 and a maximum of €37,000 available to either spouse, depending on their income.

²⁷ Corrigan, *Revenue Law Volume 1* (Round Hall Sweet & Maxwell 2000) at 86.

either spouse requests otherwise. Under joint assessment, the married couple will be entitled to a married tax credit, which is twice the single personal credit. They will also be entitled to double the maximum interest relief which is available to a single person (which two unmarried persons living together would receive), increased rate bands (depending on the income levels of the spouses), and, in certain circumstances, a home carer's grant.

8.21 An alternative to joint assessment is separate assessment. Under separate assessment, income tax is assessed, charged and recovered separately from each spouse. Where spouses elect for separate assessment, they can retain the tax saving, if any, of joint assessment while at the same time they can have their income tax assessments and returns of income dealt with separately. The personal credits and reliefs available to both spouses will be the same as in the case of joint assessment, and the total tax payable cannot be greater than would have been payable had the parties not opted for separate assessment. The tax credits and reliefs will be divided equally between the parties, and any unused credits or bands may be transferred between the spouses.

8.22 The spouses can also elect to be treated as if they were not married for the purposes of tax. As such, there are no provisions whereby one spouse can transfer any unused tax credits, reliefs or unused bands to the other spouse. As such, single assessment is generally less advantageous than joint or separate assessment.

8.23 Unmarried cohabitation does not attract any of the specific income tax advantages that accrue to married couples. Consequently, cohabitees are treated as separate individuals for income tax purposes. As indicated above,²⁸ in recent years there has been growing support for the view that cohabitees who form part of stable, long-term relationships should be entitled to some, if not all, of the tax breaks associated with marriage. The 1999 Report of the Working Group on the Treatment of Married, Cohabiting and One-Parent Families under the Tax and Social Welfare Codes was broadly sympathetic to proposals to extend the marital income tax regime to cohabiting couples with children where the children are mainly resident with and wholly maintained by the cohabiting couple. The Report outlined three possible options for reform.

²⁸ At paragraph 8.05.

- (i) Allow cohabiting couples to avail of married couple's allowances but not the tax bands.
- (ii) Allow cohabiting couples a proportion of both the allowances and bands available to a married couple.
- (iii) Allow cohabiting couples to avail of the exact same treatment as married couples.

8.24 These proposals may be divided into two basic categories. The first two proposals recognise that it is in the public interest for the Government to promote the institution of marriage, and accepts that it is necessary for the Government to provide incentives for marriage through the taxation system. As such, while recognising cohabitation for the purposes of income tax, and according such couples some of the advantages that accrue to married couples, it does not give cohabiting couples all of the advantages that accrue to married couples. The third proposal is based on the view that, since many cohabitees are in a relationship closely akin to marriage, they should be afforded the same tax allowances as married couples. However, this approach is at variance with the Commission's view that cohabitation should not be equated with marriage.

8.25 *In light of the current policy of individualisation, the Commission does not recommend any change to the income tax treatment of cohabiting couples.*

(2) Capital Taxes

8.26 This section considers the position of married couples and unmarried couples for the purposes of Capital Acquisitions Tax, Capital Gains Tax and Stamp Duty. As Probate Tax and Residential Property Tax have been abolished, and as a person's liability to Value Added Tax is not affected by marriage, these will not be examined.²⁹

²⁹ Although probate tax has been abolished, it may have some residual effect. Part VI of the *Finance Act 1993* imposed a probate tax of 2% on the estates of individuals dying on or after 18 June 1993. This tax was abolished by section 225 of the *Finance Act 2001* in respect of deaths occurring on or after 6 December 2000. Section 140 of the *Finance Act 1994* provided that the share in the estate passing to a surviving spouse was exempt from probate tax from its inception. There was no such exemption for cohabitees.

(a) *Capital Acquisitions Tax*

8.27 Capital Acquisitions Tax (CAT) is a tax on gifts and inheritances. CAT is governed by the *Capital Acquisitions Tax Consolidation Act 2003*. Kenny³⁰ is of the view that, broadly speaking, the CAT code is supportive of the family and the institution of marriage in that it provides a range of exemptions for transactions between spouses and family members. The following paragraphs will outline briefly the current operation of the CAT code, the position of married couples, the position of cohabitees and the question of whether or not cohabitees should be accorded the same status as married couples.

8.28 CAT is payable where, because of a disposition, a person becomes beneficially entitled in possession to any benefit otherwise than for full consideration in money or money's worth.³¹ A person will be deemed to take a gift where this disposition takes place within the lifetime of the disponer, or an inheritance where the disposition takes place after, or two years before a death.³²

8.29 Every individual has a cumulative lifetime exemption to CAT arising on gifts or inheritances taken on or after 5 December 1991, which, once used, renders all subsequent gifts and inheritances

³⁰ Kenny, "Constitutionality, Proportionality and Certainty" (1996) 9 *Irish Tax Review* 8.

³¹ Section 5(1) (Gifts), and section 10(1) (inheritances) of the *Capital Acquisitions Tax Consolidation Act 2003*.

³² Section 3 of the 2003 Act provides that "on a death" in relation to a person becoming beneficially entitled in possession, means— (a) on the death of a person or at a time ascertainable only by reference to the death of a person, (b) under a disposition where the date of the disposition is the date of the death of the disponer, (c) under a disposition where the date of the disposition is on or after 1 April 1975 and within 2 years prior to the death of the disponer, or (d) on the happening, after the cesser of an intervening life interest, of any such event as is referred to in subsection (2). Subsection (2) provides that the events referred to in subsection (1)(d) are any of the following— (a) the determination or failure of any charge, estate, interest or trust, (b) the exercise of a special power of appointment, (c) in the case where a benefit was given under a disposition in such terms that the amount or value of the benefit could only be ascertained from time to time by the actual payment or application of property for the purpose of giving effect to the benefit, the making of any payment or the application of the property, or (d) any other event which, under a disposition, affects the right to property, or to the enjoyment of that property.

fully liable to tax. The amount of this exemption will depend on the relationship between the parties to the transaction. These relationships are divided into three thresholds or classes.³³ These are for the 2004 tax year as follows:

- (i) Where the beneficiary is a child, or a minor child of a deceased child, of the disponer; or niece or nephew of the disponer and the former has worked full-time for the disponer for five years prior to the date of the disposition, and the property disposed consists of property connected with that business; or where the successor is the parent of the disponer and the interest is not a limited interest and the inheritance is taken on the death of the disponer, an exemption of €456,438 will apply;
- (ii) Where the beneficiary is a lineal ancestor or a lineal descendant (other than a child, or a minor child of a deceased child), a brother, sister, a child of a brother or sister of the disponer, an exemption of €45,644 will apply;
- (iii) Where the beneficiary does not come within categories (a) or (b) an exemption of €22,822 will apply.

8.30 Sections 70 and 71 of the *Capital Acquisitions Tax Consolidation Act 2003* provide for an inter-spousal exemption from CAT in respect of inheritance and gift tax respectively. While cohabittees, like any other person, are entitled to take advantage of the generous relief available in respect of agricultural³⁴ and business³⁵ property, they do not enjoy an absolute exemption from CAT in respect of inter-cohabitee gifts or inheritances. Cohabiting couples would normally come within the third category of beneficiary, and, as

³³ These thresholds are outlined in Schedule 2 of the *Capital Acquisitions Tax Consolidation Act 2003*. The threshold figures are indexed linked, and so increase each year in line with inflation.

³⁴ Section 89 of the *Capital Acquisitions Tax Consolidation Act 2003* provides that where the donee or successor is a farmer within the meaning of the Act, the market value of the agricultural property passing between the parties is reduced by 90% of its value.

³⁵ Section 92 of the *Capital Acquisitions Tax Consolidation Act 2003* provides that where the whole or part of the taxable value of any taxable gift or taxable inheritance is attributable to the value of any relevant business property, the whole or part of the taxable value is subject to the provisions of the Act, reduced by 90%.

such, are entitled to an exemption of only €22,822 on inter-cohabitee gifts or inheritances.

8.31 It was generally recognised that the lack of a CAT exemption for cohabitees similar to that of married couples caused a considerable degree of hardship, particularly in cases where one cohabitee died and left the family home to the other cohabitee.³⁶ Given the rise in house prices, the €22,822 exemption would result in a high CAT liability, and many cohabiting couples would be forced to sell the family home in order to pay the CAT bill. The Working Group on the Treatment of Married, Cohabiting and One-Parent Families under the Tax and Social Welfare Code described this problem as “the most pressing issue in relation to the capital taxation of cohabiting couples”. To deal with the problem, it recommended three possible options for reform:

- (i) Provide relief for heterosexual cohabiting couples where the children are mainly resident with and wholly maintained by the cohabiting couple;
- (ii) Provide relief for couples living together as husband and wife for a period of five years or more;
- (iii) Provide relief for two joint tenants living together for the past five years.

8.32 They outlined three forms this relief could take in the case of the first two categories:

- (i) Provide relief from inheritance tax similar to that available to elderly siblings living together;

³⁶ See 504 *Dáil Debates* col 295 (29th September 1999). Here the Minister for Finance was asked whether his attention had been drawn to the fact that cohabiting couples are penalised if they choose not to get married, and that, if one partner dies, they cannot leave the home to the surviving cohabitee without incurring a massive tax liability. Responding to this, the Minister for Finance, Mr Charles McCreevy said: - “On the specific issue of the treatment of cohabiting couples within the Capital Acquisitions Code, I indicated to the Dáil earlier in the year in the course of the Finance Bill debate, that I appreciate the concerns which have been raised. I am aware of the tax burden facing certain individuals, particularly on the inheritance of the family home. At that stage, I undertook in the Dáil that prior to the next budget, I would examine the capital acquisitions code in some detail. This examination is currently taking place.”

- (ii) Provide relief from gift tax similar to that available to elderly siblings living together;
- (iii) Exempt the principal private residence from gift or inheritance tax in respect of all forms of relationship where the cohabitees have resided in the property continuously for a period of five years. The Working Group suggested that this would be easier to administer than a scheme catering solely for cohabitees living together as husband and wife.

8.33 The Oireachtas opted for the last option with regard to gifts or inheritances of the family home in the *Finance Act 2000*. Section 151³⁷ provides relief from CAT in respect of dispositions of a dwelling house taken on or after December 1 1999. Section 151 does not require any blood relationship between the parties, and so a gift or inheritance taken by a cohabiting partner would qualify for the exemption provided the following criteria are all met:

- (i) The beneficiary must have occupied the dwelling continuously as his or her main residence for three years prior to the date of the gift or inheritance;
- (ii) The beneficiary must not at the date of the inheritance or gift be beneficially entitled to any interest in any other dwelling house;
- (iii) The beneficiary must continue, except where he or she is aged 55 years at the date of the disposition, to retain and continue to occupy the dwelling house as his or her only main residence for a period of six years. This does not apply where the house is sold to finance medical care or where the beneficiary ceases to reside in the house because he or she is residing in a nursing home or is obliged because of work to live elsewhere.

8.34 While this solves the major problem of cohabitees being forced to sell the family home in order to pay the inheritance tax, it does not solve the wider gift and inheritance tax problems faced by cohabitees. However, there are a number of ways in which the CAT liability of cohabitees could be minimised, namely:

³⁷ Now section 86 of the *Capital Acquisitions Tax Consolidation Act 2003*.

- (i) Provide cohabitees with a total exemption to CAT on inter-cohabitee gifts and inheritances;
- (ii) Provide cohabitees with a similar exemption to that enjoyed by children of the disponent at present, that is, an exemption of €456,438;
- (iii) Provide cohabitees with a similar exemption to that enjoyed by lineal ancestors or descendants (other than a child, or a minor child of a deceased child) of the disponent at present, that is, an exemption of €45,644.

8.35 It should be noted that, in respect of the second and third proposals, the exemption would be an aggregate amount within the group thresholds. For example if CAT threshold (1) were to apply, a qualified cohabitee would be entitled to receive aggregated benefits from a qualified cohabitee and a parent up to a maximum amount of €456,438.

8.36 Discretionary trust tax is also relevant to this debate and is governed by the *Capital Acquisitions Tax Consolidation Act 2003*.³⁸ Section 15 of the Act provides that where, on or after 25 January 1984 assets are transferred to a discretionary trust and the disponent dies, or the principal object of the trust is over or attains the age of 25 (where the property became subject to the trust on or after 25 January 1984 and before 31 January 1993) or 21 (where the property became subject to the trust on or after 31 January 1993), the trust will be deemed to have taken an inheritance. As we have seen,³⁹ section 71 of the 2003 Act provides for a spousal exemption from inheritance tax. However, as we have also seen, cohabitees would not qualify for this exemption.

8.37 The Commission is of the view that, as we are not equating qualified cohabitation with marriage, it would be illogical to give qualified cohabitees a total exemption from CAT, as this would be to equate the two relationships. The Commission feels that in light of this it would be more appropriate to place qualified cohabitees in group threshold (1) for the purposes of CAT.⁴⁰

³⁸ Sections 14 – 25.

³⁹ At paragraph 8.30.

⁴⁰ It should be noted as pointed out earlier at Chapter 1C that those in domestic relationships are not included within the definition of qualified

8.38 *The Commission recommends that qualified cohabitees should be placed in group threshold (1) for the purposes of Capital Acquisitions Tax.*

(b) *Capital Gains Tax*

8.39 Capital Gains Tax (CGT) is, as the name suggests, a tax payable on gains arising from the disposal of capital assets after 5 April 1974. CGT is payable by the person making the disposal. A disposal takes place whenever the ownership of an asset changes, and includes a part-disposal. A disposal occurs even where no capital sum is derived from the change in ownership, as is the case with a gift or exchange. CGT is governed by the *Taxes Consolidation Act 1997*, as amended by subsequent *Finance Acts*. Kenny⁴¹ is of the view that the CGT code is generally supportive of the family and the institution of marriage, providing a range of exemptions for transactions between spouses. The following paragraphs will outline briefly the current operation of the CGT code; the position of married couples; the position of cohabitees; and the question of whether or not qualified cohabitees should be entitled to relief because of their cohabitation.

8.40 A married couple enjoy a number of advantages under the CGT code. However, as with income tax, a marriage ceremony does not in and of itself give rise to any CGT advantage. As Walpole notes, the advantages obtained by a married couple living together⁴² include:

- (i) Entitlement to be assessed jointly or separately;
- (ii) Capital losses available to one spouse can transfer to the other spouse;

cohabitee for the purposes of this proposal. This creates a curious anomaly insofar as persons who cohabit, no matter what their relationship are entitled to CAT relief in respect of transfers of the family home in certain situations, but only qualified cohabitees will be entitled to CAT relief in respect of other gifts or inheritances.

⁴¹ Kenny, "Constitutionality, Proportionality and Certainty" (1996) 9 *Irish Tax Review* 8.

⁴² Walpole, "Taxation" in Shannon (ed) *Family Law Practitioner* (Round Hall Sweet & Maxwell 2001).

- (iii) A total exemption from CGT in respect of inter-spousal transfers.⁴³

8.41 The Commission is of the view that as we are not equating cohabitation with marriage it would be inappropriate to place cohabitees in the same position as married persons. In light of this, the Commission does not recommend any change to the current position of qualified cohabitees' *vis-à-vis* CGT.

8.42 *The Commission does not recommend any change to the current law governing Capital Gains Tax.*

(c) *Stamp Duty*

8.43 Stamp Duty is charged on written or e-documents, or instruments. It is governed by the *Stamp Duties Consolidation Act 1999*. Stamp Duty may be divided into two categories, namely, “*ad valorem*” duty, that is duty based on the value of the transaction, and fixed duty, which does not vary regardless of the size of the transaction.

8.44 The following exemptions to liability for stamp duty are relevant here. First, a married couple is entitled to relief from the normal rates of stamp duty on the transfer of assets between them.⁴⁴ In certain circumstances, a reduced rate of 50% stamp duty will apply to transactions between related persons. A person is related to another person if he or she is the lineal descendant, parent, grandparent, stepparent, brother or sister, uncle or aunt, or a lineal descendant of a parent, husband, wife or brother.⁴⁵ Similarly, the transfer of a site or a lease of a site to a child, the purpose of which is to allow the child to build his or her own home, will be exempt from Stamp Duty, if there is compliance with the relevant condition.

8.45 The stamp duty provisions exempting transfers of property between spouses and the relief available to related persons are not available to extra-marital cohabitees. Two options for reform are

⁴³ However, this exemption does not apply if the disposal the of asset formed part of the trading stock of a trade carried on by the spouse making the disposal, or if the asset is acquired as trading stock for the purposes of a trade carried on by the spouse acquiring the asset. (section 1028(5), *Taxes Consolidation Act 1997*).

⁴⁴ Section 96(1) of the *Stamp Duties Consolidation Act 1999*.

⁴⁵ *Ibid* Schedule 1, section 14.

available with respect to stamp duty. Firstly, ‘qualifying cohabittees’ could be placed in the same position as married couples and be given a full exemption. Secondly, they could be treated similarly to related persons and, as such, have a 50% reduction in their Stamp Duty liability.⁴⁶

8.46 The Commission is of the view that as we are not equating cohabitation with marriage, it would not be appropriate to extend to cohabittees the spousal exemption from stamp duty. However, in light of the proposals for recognition contained within this Paper, the Commission feels that qualified cohabittees should be placed in the same position as related persons for the purposes of stamp duty.

8.47 *The Commission recommends that qualified cohabittees should be entitled to the same relief as related persons in respect of stamp duty (being a deduced rate of 50% stamp duty at present).*

⁴⁶ (This is the 2004 figure).

CHAPTER 9 HEALTH AND OTHER MISCELLANEOUS ISSUES

A Introduction

9.01 In this chapter, the Commission will examine a number of miscellaneous issues relating to cohabittees. These may be summed up under five headings, namely, health, domestic violence, nationality and immigration, adoption and recognition of foreign cohabitation.

B Health

9.02 In this Part, the Commission examines to what extent, if any, qualified cohabittees should be involved in health care decisions. We discuss, first, to what extent qualified cohabittees should be consulted in connection with decisions concerning the medical treatment of a partner. This is particularly relevant where the patient is unable to give consent due to illness. Secondly, we examine to what extent a qualified cohabitee should be entitled to have access to their partner's medical records.

(1) Consent

9.03 In general, neither a patient's spouse nor the next of kin have any right to an involvement in any decisions concerning the treatment of the patient's condition.¹ In *Re A Ward of Court (No 2)*² Denham J outlined the law of consent as follows:

“Medical treatment may not be given to an adult person of full capacity without his or her consent. There are a few rare exceptions to this e.g., in regard to contagious diseases or in a medical emergency where the patient is unable to communicate. This right arises out of civil, criminal and

¹ See generally Tomkin & Hanafin *Irish Medical Law* (Round Hall Press, 1995) Chapter 3.

² [1996] 2 IR 79.

constitutional law. If medical treatment is given without consent, it may be trespass against the person in civil law, a battery in criminal law, and a breach of the individual's constitutional rights. The consent, which is given by an adult of full capacity, is a matter of choice. It is not necessarily a decision based on medical considerations. Thus, medical treatment may be refused for other than medical reasons, or reasons most citizens would regard as rational, but the person of full age and capacity may make the decision for their own reasons. If the patient is a minor then consent may be given on their behalf by parents or guardians."³

9.04 As to the situation where the patient is incapable of communicating consent to medical treatment there does not seem to be any reported case in Ireland. However in the English case of *In Re MB*⁴ Butler Sloss LJ outlined the general principles for assessing capacity to consent to medical treatment:

“A person lacks capacity if some impairment or disturbance of mental functioning renders the person unable to make a decision whether to consent to or refuse treatment. That inability to make a decision will occur when:

- i. the patient is unable to comprehend and retain the information which is material to the decision, especially as to the likely consequences of having, or not having, the treatment in question;
- ii. the patient is unable to use the information and weigh it in the balance as part of the process of arriving at the decision”⁵

9.05 It is a frequently held misconception that the patient's next of kin have a legal right to be consulted or to give consent on behalf of an incapacitated adult. There is no such right. Indeed a doctor will only be justified in approving medical treatment in relation to an incapacitated adult where this treatment is justified by the doctrine of necessity. However, the Irish Medical Council has recommended that

³ *Re A Ward of Court (No 2)* [1996] 2 IR 79, at 156.

⁴ [1997] 2 FLR 426.

⁵ [1997] 2 FLR at 437.

a doctor treating a seriously ill patient who is unable to communicate or understand should confer with the patient's family before reaching a decision on "the use or non use of treatments which will not contribute to recovery from primary illness".⁶

9.06 *In line with this, the Commission suggests that consideration be given to including cohabitants within the category of persons with whom a doctor treating a seriously ill patient, who is unable to communicate or understand, should confer.*

9.07 There is no obligation to confer with the patient's non-marital partner unless that person has been granted an enduring power of attorney under the *Powers of Attorney Act 1996*. A power of attorney is defined in the Act as an instrument signed by or by direction of a person (the donor), or a provision contained in such an instrument, giving the donee (the attorney) the power to act on behalf of the donor in accordance with the terms of the instrument.⁷ There are two types of powers of attorney, namely an enduring power of attorney and a general power of attorney. A power of attorney is an enduring power if the instrument creating the power contains a statement by the donor to the effect that the donor intends the power to be effective during any subsequent mental incapacity of the donor, and if it complies with the procedural requirements for its creation.⁸ The essential difference between an enduring power of attorney (EPA) and a general power of attorney is that the general power ceases to have effect if the donor becomes mentally incapable.

9.08 The 1996 Act provides that the appointed attorney under an enduring power may have power over the property, financial, business affairs, and personal care decisions of the donor. Personal care decisions made by the attorney must be made in the donor's best interests. The definition of 'personal care' does not include authority to make decisions on medical treatment or surgery. However, it does include decisions that may have health care implications, for example, the decision as to where the donor should live. In its *Consultation*

⁶ Irish Medical Council *A Guide to Ethical Conduct and Behaviour* (5th ed 1998) at 38.

⁷ Section 2(1) of the 1996 Act.

⁸ Section 5(1) of the 1996 Act.

Paper on Law and the Elderly,⁹ the Commission recommended that the attorney should have the power to take minor or emergency healthcare decisions on behalf of the patient where the EPA gives them specific authority to do so.¹⁰ It also commended the usefulness of the power of attorney facility and emphasised the need for further publicising its value. The Commission notes that at present cohobitees cannot be notice parties for the purposes of an EPA. The Commission is of the view that as cohabitation is being recognised in the proposals outlined in this Paper, a qualified cohobitee should be a notice party for the purposes of an EPA.

9.09 *The Commission reiterates its view in the Consultation Paper on Law and the Elderly that enduring powers of attorney be extended to include decisions about minor or emergency health care decisions and commends its utility for qualified cohobitees. The Commission recommends that paragraph 3(1) of the First Schedule of the Powers of Attorney Act 1996 be amended to include qualified cohobitees as notice parties for the purposes of an EPA.*

(2) Access to Medical Information

9.10 Individual patients in Ireland may be entitled to get access to their medical records in a number of different ways. These include access by virtue of a contract between the patient and the medical practitioner or hospital under the *Data Protection Acts 1988 to 2003*, under the *Freedom of Information Acts 1997 and 2003* or by discovery in the course of court proceedings.

9.11 The need for confidentiality is the paramount consideration when considering the issue of access to medical information. Doctors

⁹ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23 – 2003) at paragraph 3.14.

¹⁰ In addition to this, the Commission recommended a radical overhaul of the current system of protection for vulnerable adults. The new system would replace the current wards of court system, and put in its place a system of guardianship. When a Guardianship Order is made, a Personal Guardian would be appointed to the vulnerable person who would have overall responsibility for the day-to-day care of the vulnerable adult. A Public Guardian would also be appointed, who would have the responsibility to protect and vindicate the rights of vulnerable people by providing certain services, having overall responsibility for attorneys registered under EPAs, and supervising Personal Guardians. See Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23 – 2003) Chapter 3.

and other medical personnel and health institutions have a common law duty to maintain patients' records in confidence. The Irish Medical Council has stated, "While the concern of relatives and close friends is understandable, the doctor must not disclose information to any person without the consent of the patient."¹¹ There are some circumstances in which medical personnel (or a hospital) may disclose confidential medical records to others - for example, if the patient consents to such disclosure or when it is required by a court. It seems that it may also be lawful to disclose medical records if it would be in the patient's best interests or, if necessary, to protect another person or society generally such as under the public health legislation.

9.12 Where the patient has died the hospital or medical establishment may give access to the deceased's medical records to the personal representative of the estate, the spouse, partner, next of kin or whatever person is appropriate.¹²

9.13 *The Commission recommends no change to the current law and practice regarding access to medical records.*

C Adoption

9.14 Adoption is the legal process by which a parent-child relationship is established usually between persons unrelated by birth, whereby the child assumes the same rights and duties as children in "birth families."¹³ It is governed by the *Adoption Acts 1952 to 1998*. In general, adoption is effected by married couples. Section 10(2) of the *Adoption Act 1991* permits adoption by single parents only where the Adoption Board is satisfied that "it is desirable" to effect such an order in the particular circumstances of the case. The 1991 Act allows for a single person, a married person acting alone, or (by implication) a divorced or separated person to adopt, even where the adopter is not related to the child. Although an individual in a stable

¹¹ Irish Medical Council *A Guide to Ethical Conduct and Behaviour* (5th ed 1998) at 32.

¹² See Tomkin & Hanafin *Irish Medical Law* (Round Hall Press, 1995) Chapter 4. See also:
http://www.oasis.gov.ie/health/access_to_medical_records.html.

¹³ See O'Halloran *Adoption Law and Practice* (Dublin Butterworth Ireland 1992).

non-marital relationship may adopt under the Acts, an unmarried couple may not.

9.15 The Department of Health and Children is currently conducting a review of adoption legislation in Ireland. In its consultation paper the Department posed the question “who should be eligible to be assessed for adoption?”¹⁴ The Adoption Board are of the opinion that the statutory bar on non-marital couples adopting should be removed and that the sole question should be one of suitability.¹⁵ In light of this on going process of review, the Commission does not consider it would be appropriate to express a view as to whether qualified cohabitants should be eligible to adopt.

9.16 *In light of the Department of Health and Children’s current consultation process the Commission does not consider it appropriate to express a view as to whether qualified cohabitants or cohabitants generally should be eligible to adopt.*

D Nationality, Citizenship and Immigration

9.17 The issue of immigration and citizenship raise difficult questions in relation to cohabitants who reside outside Ireland and the European Economic Area.

9.18 Turning to the issue of immigration the current position may be summarised as follows. At present when an Irish national marries a non-EEA national and returns to Ireland in order to settle and work, the following documents must be presented to the Immigration Officer at the point of entry: an entry visa, a marriage certificate, the birth certificate of the non-EEA national and both parties’ passports. The Immigration Officer can stamp the passport to allow the non-EEA national to remain in the State for a maximum of three months, during which the non-EEA national must report to either a local Garda Station, or the Immigration Office in Dublin, and present them with the same documents and the Irish national’s birth certificate. Based on these documents, the non-national can apply for residency, which is generally granted after 12 months. In contrast, the non-EEA unmarried partner of an Irish citizen who wishes to reside in the State

¹⁴ Department of Health and Children *Adoption Legislation Consultation Discussion Paper* (June 2003) at 27.

¹⁵ An Bord Úchtála *Response to the Minister’s Discussion Document on Adoption Legislation* (2003) at paragraph 10.

must apply for an extension every three months and prove that he or she can support himself or herself without being a burden on the State in order to remain in the country.

9.19 When considering whether this position should be changed, it is important to bear in mind a number of practical problems. First, if it were sought to allow a person's cohabiting partner entry into the State based on their cohabitation with an Irish or EEA national, it would be difficult to prove that the parties have in fact cohabited. The issue arises as to whether one would use the proposed Irish presumptive scheme test or a less rigorous foreign test. In any event, it would be extremely difficult and costly for the State to verify the existence or non-existence of the cohabitation. A partial solution to this would be to allow the State to recognise foreign registered partnerships or cohabitations. However, this is potentially discriminatory, as it would involve the State recognising an institution that is not currently recognised in this jurisdiction. For reasons outlined in our discussion of the recognition of foreign cohabitation in the context of private international law,¹⁶ the Commission does not consider that such a solution would be appropriate.

9.20 *The Commission does not recommend any change to immigration law insofar as it applies to cohabittees at present.*

9.21 Turning now to the question of citizenship, this is governed by Article 2 of the Constitution and the *Irish Nationality and Citizenship Acts 1956 to 2001*. Article 2 provides that "every person born in the island of Ireland, its islands and its seas, has an entitlement and birthright to be part of the Irish nation." A non-national, who married an Irish citizen on or after 30 November 2002, can only apply for citizenship through the naturalisation process. The naturalisation process for spouses of Irish citizens is set out in section 5 of the *Irish Nationality and Citizenship Acts 2001*. To qualify, the applicant must have resided in the State for at least two years out of the previous four, and have been married to an Irish citizen for three years, that marriage being one recognised as valid and subsisting within the State.

9.22 Extending this law to include those in cohabiting arrangements who have resided in the State for less than the three-year period prescribed in the presumptive scheme proposed in this

¹⁶ See Chapter 9G.

Paper presents us with the same evidential problems that arose in the context of immigration law.

9.23 *The Commission does not recommend any change to the Irish Nationality and Citizenship Acts to allow for the extension of the arrangements for the naturalisation of married partners to cohabiting partners.*

E Wrongful Death

9.24 Section 47(1)(c) of the *Civil Liability Act 1961* enables the dependants of a deceased to recover damages where the deceased's death is caused by the wrongful act of another, and where the deceased, but for his death, could have taken an action and recovered damages from the other party. The *Civil Liability (Amendment) Act 1996* extended the definition of dependants to include spouses and persons who at the date of death had been living with the deceased as "man and wife" for a continuous period of not less than three years.¹⁷ If "man and wife" is read as meaning heterosexual cohabitation only, then same-sex couples are excluded from eligibility under the Act. The Commission is of the view that this is an unjustifiable discrimination between same-sex and opposite sex couples. Even if "man and wife" includes those in same-sex relationships, the Commission is of the view that in order to promote consistency and to avoid confusion the phrase "man and wife" be deleted and replaced with "qualified cohabittees."

9.25 *The Commission recommends that section 47(1)(c) of the Civil Liability Act 1961 as amended, which deals with civil actions for wrongful death, be extended to include spouses and qualified cohabittees within the definition of dependants.*

F The Law of Evidence: Marital Privilege¹⁸

9.26 Section 3 of the *Evidence (Amendment) Act 1853* provides that a spouse cannot be compelled to give evidence in a civil case of any communication made to the other spouse during the course of

¹⁷ Section 47(1)(c) of the *Civil Liability Act 1961* as inserted by section 1 of the *Civil Liability (Amendment) Act 1996*.

¹⁸ See generally Fennell *The Law of Evidence in Ireland* (2nd ed Lexis Nexis Butterworths) Chapter 5.

their marriage. Section 22 of the *Criminal Evidence Act 1992* provides that the spouse of an accused is generally not compellable to give evidence in a criminal case at the suit of the prosecution. However, there are a number of exceptions to this general rule. These exceptions are as follows: if the offence is a sexual one, or involves violence or the threat of violence, and is perpetrated against the spouse, the child of the spouse or the accused, or any person under the age of 17.

9.27 Thus, qualified cohabittees do not come within either the ambit of the 1853 or the 1992 Acts. The Commission does not recommend any change to this position. This is for two reasons. Firstly, in this Paper, the Commission is not seeking to equate cohabitation with marriage. Therefore, it would be incorrect to extend marital privilege to qualified cohabittees because the privilege developed in the context of and is specific to the relationship of marriage. Secondly, the restriction of marital privilege in the context of serious crime by the 1992 Act may be seen as a move away from marital privilege generally. As such, it seems to the Commission that it would be a retrograde step to recommend the extension of marital privilege to another type of relationship when the law generally is beginning to restrict this privilege.

9.28 *The Commission does not recommend any change to the law on marital privilege.*

G Recognition of Cohabitation Outside Ireland

9.29 In this section, the Commission discusses the extent to which cohabitation outside the State should be recognised in Irish law. From a practical perspective, the free movement of workers within the European Union and increased rates of immigration has led to an increase in the number of non-nationals residing in Ireland.¹⁹ In recent years, many jurisdictions have given legal recognition to extra-marital cohabitation.²⁰ This recognition has taken many forms. Some jurisdictions have opted for a scheme of registration,²¹ others for a

¹⁹ According to the 2002 Census 5.8% of the population are non-nationals. See CSO *Census 2002: Principal Demographic Results* (2003) at 73.

²⁰ See the International Gay and Lesbian Resource Centre at www.iglhrc.org.

²¹ *Ibid.*

presumptive scheme²² while many jurisdictions have left it to the parties to organise their relationships by means of contract.²³ Two main issues arise here: first, whether the courts should be permitted to take into account time spent abroad when deciding whether the parties have satisfied the three year time-period necessary for cohabitation and, secondly, to what extent, if any, Irish courts should recognise cohabitation outside the State.

(1) Taking into Account Time Spent Outside the State

9.30 This is simply an issue of proof. If the parties can establish that they have lived together as ‘man and wife’ for the requisite three year period then the Commission is of the view that it is immaterial whether some or all of that period was spent outside the jurisdiction. This issue should be dealt with using well-established principles of evidence and proof in civil proceedings.

9.31 *The Commission recommends that the Court should be able to take into account time spent outside the State in determining whether the parties have lived together as ‘man and wife’ for the requisite three year period.*

(2) Recognising Foreign Cohabitation

9.32 The question of the extent to which the State should recognise foreign cohabitation is a difficult one, which raises novel issues of conflicts of law, or private international law.²⁴ Twenty years ago this would rarely have been a problem since few states accorded legal recognition to those in extra-marital relationships. Therefore, the State was unlikely to be faced with this problem. If it had been faced with the issue, the State would probably have declined to recognise the status of cohabitation on public policy grounds and would have proceeded to resolve any disputes between the parties within the context of property law, contract and equity. However, today there are now a number of states that either provide for formal

²² See the International Gay and Lesbian Resource Centre at www.iglhrc.org.

²³ *Ibid.*

²⁴ See generally Binchy *Irish Conflicts of Law* (Butterworths 1988); North & Fawcett *Cheshire & North's Private International Law* (13th ed Butterworths 1999); McClean *Morris: The Conflict of Laws* (5th ed Sweet & Maxwell); Collins *Dacey & Morris The Conflict of Laws* (13th ed Sweet & Maxwell).

recognition of the status of cohabitation or otherwise regulate extra-marital cohabitation. As a result, there is a very real need to address the question of whether such relationships are to be recognised by private international law.

9.33 One approach when faced with this issue is to reason by analogy with marriage. Ireland has developed well-established private international principles to deal with the recognition of foreign marriages and foreign divorces. For a foreign marriage to be recognised it must satisfy the legal requirements of the *lex loci celebrationis*, the law of the place where the marriage was celebrated, and the *lex domicilii*, the law of the place where the parties are domiciled.

9.34 It could be argued that as cohabitation is somewhat akin to marriage, in that it shares many of its characteristics, those principles of private international law should be extended to cover cohabittees. Therefore, the argument runs, the State should recognise relationships which satisfy the requirements of the *lex loci contractus* and the *lex domicilii*, subject of course to the dictates of public policy, for example, the State would not recognise a cohabitation relationship where one or both of the parties was party to a valid and subsisting marriage.

9.35 However, while this reasoning appears at first sight to be attractive, it is flawed. It fails to recognise that there is a major problem of characterisation here, namely what category does cohabitation fall into for the purposes of private international law. In this respect, there is no universal form of cohabitation; the type of cohabitation that will give rise to legal obligations varies from state to state. We have seen that some states favour the presumptive approach, others rely on the contractual approach, while others still allow cohabittees to register their relationship. In this Paper, the Commission has postponed discussion of the issue of registration. Instead, we are recommending a presumptive approach, which is remedial in nature and does not concern itself with status *per se*. Therefore, it would seem premature to introduce a status of cohabitation into Irish private international law. This is reinforced by the fact that cohabitation is not yet a concept with recognised parameters in private international law generally.

9.36 This leaves the question of what happens in disputes where the parties' cohabitation is recognised abroad but not in Ireland, and

the parties separate and then seek relief in the Irish courts. The Commission is of the view that this presents no difficulty as the Irish courts can resolve any difficulties, which may arise by using traditional private international law principles of property, contract, and equity.²⁵

9.37 The Commission considers that it would be premature for Irish law to recognise the status of cohabitation for purposes of conflicts of law (private international law), and that disputes between foreign cohabitants whose status is recognised in their own state but not in Ireland may be resolved using traditional private international law principles.

²⁵ And possibly restitution.

CHAPTER 10 DOMESTIC VIOLENCE

A Introduction

10.01 In this chapter, we will examine how the law of domestic violence impinges on cohabittees. This issue has been dealt with in a separate chapter because it concerns not only ‘qualified cohabittees’ but cohabittees generally.

10.02 Historically, the victim of domestic misconduct had two remedies; the victim could make a complaint of assault to the Gardaí in the hope that they would initiate criminal proceedings or alternatively the victim could seek a civil injunction to exclude the malefactor from the family home.

10.03 By the mid-Seventies, it became apparent that neither of these remedies was particularly effective. The criminal law remedy was only useful after the assault had taken place and provided no protection whatsoever to spouses who were ill-treated by their husbands but who were not physically assaulted by them. Similarly, the civil injunction, while ultimately effective in achieving the result sought, namely the exclusion of the offender from the family home, was and still is cumbersome. Injunctions could only be granted by the Circuit Court or the High Court and the breach of the injunction, of itself, did not render the offending party liable to arrest or criminal prosecution.¹

10.04 In light of the law’s relative inadequacy to provide expeditious protection for the victims of domestic violence, the Committee on Court Practice and Procedure² recommended the enactment of legislation allowing the courts to make orders barring the offending spouse from entering the family home. Acting on foot of this recommendation the Oireachtas enacted the *Family Law*

¹ See Shatter *Shatter’s Family Law* (4 ed Butterworths 1996) at 875 – 880.

² *Report on Desertion and Maintenance* (Dublin, Stationary Office 1974) at 15.

(Maintenance of Spouses and Children) Act 1976, section 22 of which conferred jurisdiction on the District, Circuit and High Court to bar the offending spouse from entering the family home for up to three months where the welfare of the other spouse and/ or dependant children requires it.

10.05 Following a detailed review of its operation, section 22 of the 1976 Act was repealed and replaced by the *Family Law (Protection of Spouses and Children) Act 1981*. Introducing the Bill, the Minister for Justice outlined its rationale as follows:

“Since the passing of the 1976 Act, there has been an opportunity of reviewing its operation. I have received various representations, mainly from some women's organisations, that their experience suggested that the system needed strengthening. Initially, it was thought the problems might be solved by a more active involvement of the Garda Síochána in the issuing of summonses for breaches of barring orders, and instructions on those lines were issued to the Force by the Garda authorities. Unfortunately, while an improvement was achieved in this way, it has been found not to be enough and that is why we have this Bill now.”³

10.06 Section 2 of the Act extended the length of the barring order period to up to 12 months. Section 3 introduced a new order called a protection order. This order could be made in favour of a spouse who had applied for a barring order where the court was of opinion that the safety or welfare of the applicant or of any child of the family required it. The protection order itself was an order akin to an interim injunction, directing the other spouse not to molest, use, or threaten to use violence, or otherwise put the applicant spouse or a child in fear. The court could make the order at the time of the application for the barring order, or at any time before the case is heard regardless of whether or not the summons in relation to the application had been served on the other spouse. Once the application for the barring order was disposed of, the protection order ceased to have effect.

10.07 While the 1981 Act went a long way to easing the plight of the victims of domestic misconduct, it was severely criticised for being confined to domestic violence occurring within the marital

³ 328 *Dáil Debates* col 2384 – 2385 (7 May 1981)

family. Surely, it was argued, especially by the Second Commission on the Status of Women,⁴ the victims of domestic violence were not just husbands and wives, but also boyfriends and girlfriends, parents and children as well as brothers and sisters. No protection was afforded to these persons under the 1981 Act so they were forced, like married persons prior to the 1976 Act, to seek redress through the criminal law or civil injunction, the disadvantages of which have been outlined earlier.

B Domestic Violence Act 1996

10.08 In an effort to redress these problems, the *Domestic Violence Act 1996* was enacted. This repealed the 1981 Act. The Act provides for the making of 4 types of preventative order, namely, a safety, barring, interim barring and protection order. Section 6 allows the Health Board in certain circumstances to apply for an order under the Act. It is now proposed to deal with each of these orders in turn.

(1) Safety Orders

10.09 The safety order is a new remedy introduced on foot of the recommendations of the Second Commission on the Status of Women.⁵ It is governed by section 2 of the 1996 Act. A safety order is an order which obliges the offending party not to use, or threaten to use violence against the applicant or a dependant person; not to molest or put the applicant or dependant person in fear; or if the parties do not reside together not to watch or beset the applicant's residence.⁶ As such, it protects a partner or dependent child from the risk of violence but does not have the additional effect of barring the respondent from the family home. As Horgan notes, this was a major improvement on the 1981 Act, in that a victim is no longer faced with the stark choice of barring his/her partner from the house and possibly breaking up the family or on the other hand continuing to endure a violent relationship.⁷ In addition, it should be noted that safety orders and barring orders are mutually exclusive and one cannot be granted

⁴ Second Commission on the Status of Women *Report to the Government* (Dublin Stationary Office 1993) at 46.

⁵ *Ibid.*

⁶ Section 2(2).

⁷ Horgan, "Domestic Violence – A Case for Reform?" (1998) 2 *IJFL* 9 at 11.

in place of the other unless the applicant seeks both remedies in the alternative.⁸

10.10 A safety order may be granted for a maximum of five years or such shorter time, as the court deems appropriate.⁹ The court will not grant a safety order unless it is of the opinion that there are reasonable grounds for believing that the safety or welfare of the applicant or any other dependant person requires it.¹⁰ The following persons may apply for a safety order; a spouse; a person who has cohabited with the respondent for six out of the previous twelve months; the respondent's parent; an adult residing with the respondent in a mainly non-contractual relationship.¹¹ In addition, a Health Board may apply on behalf of an aggrieved person.¹² An application to vary a safety order may be made by the respondent, the applicant or dependant person or where appropriate by the Health Board.¹³

(2) Barring Orders

10.11 Section 3(2) of the 1996 Act provides that the Court may grant a barring order where it is of the opinion that there are reasonable grounds for believing that the safety or welfare of the applicant or any other dependent person requires it. A barring order directs the respondent, if residing at a place where the applicant or dependent person resides, to leave that place and prohibits the respondent, whether resident or not, from entering that place for three years or a lesser period if the court so directs.¹⁴ The court may also, if it thinks it necessary restrict the respondent from using, or threatening to use violence against the applicant or a dependent person, direct the respondent not to molest or put the applicant or dependent person in fear; or watch or beset the applicant's residence.¹⁵ The following persons may apply for a barring order; a spouse; a person who has

⁸ Section 2(8) and section 3(11).

⁹ Section 2(6)(a).

¹⁰ Section 2(2).

¹¹ Section 2(1)(a).

¹² Section 6(1).

¹³ Section 2(3).

¹⁴ Section 3(2)(a) and section 3(8).

¹⁵ Section 3(3).

cohabited with the respondent for six out of the previous nine months; the respondent's parent; an adult residing with the respondent in a mainly non-contractual relationship.¹⁶ However, because of the draconian nature of a barring order (Horgan describes it as an "occupation order"),¹⁷ the court will not grant such an order in respect of a person other than a spouse unless that person can satisfy the court that they have an equal or greater interest in the property.¹⁸ In addition, a Health Board may apply on behalf of an aggrieved person.¹⁹ Once granted, an application to vary a barring order may be made by the respondent, the applicant, a dependent person or where appropriate by the Health Board.²⁰

(3) Interim Barring Order

10.12 The interim barring order is a new remedy introduced on foot of the recommendations of the Law Reform Commission in its *Report on Child Sexual Abuse*.²¹ It is governed by section 4 of the 1996 Act as amended by section 1 of the *Domestic Violence (Amendment) Act 2002*. This amendment was necessitated by the decision of the Supreme Court in *DK v Crowley*.²² Section 4(1) provides that the court may grant such an order only where it is satisfied that there is an immediate risk of significant harm to the applicant or any dependant child if the order is not made immediately, and that the granting of a protection order would not be sufficient to protect the applicant or dependant child.

10.13 Section 4(3) as inserted by section 1 of the 2002 Act, provides that an interim barring order may be made *ex parte* "where having regard to the circumstances of the particular case, the court considers it necessary or expedient to do so in the interests of justice." If an interim barring order is made *ex parte* a note of the evidence

¹⁶ Section 2(1)(a).

¹⁷ Horgan, "Domestic Violence and Civil Harassment" in Shannon ed, *Family Law Practitioner* (Round Hall Sweet & Maxwell, 2002).

¹⁸ Section 2(4).

¹⁹ Section 6(1).

²⁰ Section 2(3).

²¹ (LRC 32 – 1990) paragraph 3.35.

²² [2002] 2 IR 744. For a discussion of this case see Shatter "Interim Measures" (2003) (97)(1) *Law Society Gazette* 24.

given by the applicant shall be prepared and a copy of the order and the note shall be served on the respondent as soon as practicable. The interim order shall have effect for a period not exceeding 8 working days. In *DK v Crowley*²³ the Court held that the failure of the old section 4(3) to impose any time limit on the operation of an interim barring order was unconstitutional in that it “deprived the respondents to such applications of the protection of the principle of *audi alteram partem* in a manner and to an extent, which was disproportionate, unreasonable and unnecessary.”

(4) Protection Orders

10.14 The protection order was first made available in the *Family Law (Protection of Spouses and Children) Act 1981* and is now governed by section 5 of the *Domestic Violence Act 1996*. The court may grant the order sought if it is of the opinion that there are reasonable grounds for believing that the safety or welfare of the applicant or any dependant child requires it. The order is like a safety order in that it obliges the offending party not to use, or threaten to use violence against the applicant or a dependant person; not to molest or put the applicant or dependant person in fear; or if the parties do not reside together not to watch or beset the applicant’s residence.²⁴ The order may be made prior to the granting of a safety order or a barring order.

10.15 The importance of the order has diminished since the introduction of the interim barring order. However, it is still a useful remedy for those who are not eligible to apply for the other orders because either they do not have the relevant property interest or they have not cohabited for the necessary period.

C Problems with the Domestic Violence Act

10.16 While the *Domestic Violence Act 1996* goes a long way towards addressing the difficulties faced by the victims of domestic violence, there are still a number of barriers in the way of those seeking relief, most notably the property requirements and the time limits. The Commission can see three potential solutions to these

²³ [2002] 2 IR 744. For a discussion of this case see Shatter “Interim Measures” (2003) (97)(1) *Law Society Gazette* 24.

²⁴ Section 2(2).

difficulties. Firstly, the requirement in respect of a barring order, that the applicant have an equal or greater share in the property could be removed. Secondly, the present time limits in respect of cohabitation could be reduced or removed. Thirdly, couples who have a child in common, but who do not cohabit, could be included. The Commission will examine each of these possibilities in turn.

(1) *Should the Requirement, in respect of a Barring Order, that the Applicant have an Equal or Greater Share in the Property than the Respondent be Removed?*

10.17 Section 3(4) of the *Domestic Violence Act 1996* provides that the court may not grant a barring order in respect of an unmarried applicant where the respondent has a greater interest in the property. This is a significant limitation. It means that in most cases the order is available only if the applicant is the sole owner or tenant. It was felt that to allow unmarried applicants with a lesser interest in property to expel those with a greater interest in property from their own property would be a violation of the respondents' property rights. Introducing the Bill, the Minister for Justice Equality and Law Reform stated:

“Except where the applicant and respondent are spouses, the court will not be able to bar a respondent with an ownership interest in the property unless the applicant also has an equivalent ownership interest. I am advised that a proposal to bar a respondent with an ownership interest on the application of a person with any less interest could be open to serious constitutional challenge on the basis that it may infringe that person's property rights, which the State in its laws must respect under Article 40.3 of the Constitution. The position is different where the parties are married – an infringement of a spouse's property rights is presumed to be justified on the basis that the rights of the family founded on marriage are protected by the Constitution and take precedence over property rights”.²⁵

10.18 As against this it could be argued that the State has an obligation to vindicate the applicant's constitutional right to bodily integrity and that the 1996 Act fails to vindicate that right by preventing applicants who do not have the requisite interest in the

²⁵ 455 *Dail Debates* col 1105.

property from applying for a barring order. However, the Commission does not accept this because there is usually nothing to prevent an unmarried applicant who does not possess the requisite interest in the property from leaving the property or if he or she does not wish to do so, from applying for a safety order.

10.19 *The Commission does not recommend that the requirement, in respect of a barring order, that the applicant have an equal or greater share in the property, be removed.*

(2) Reducing or Abolishing the Time Limits

(a) Barring Orders

10.20 Section 3(1)(b) of the 1996 Act provides that a non-marital applicant must have resided with the respondent for at least six out of the previous nine months in order to apply for a barring order. There are two potential difficulties with this. First, it denies relief to a cohabitee who falls short of the six-month period. Secondly, it denies relief to a cohabitee in whom the sole ownership of the property is vested or who is the sole tenant, where the couple have been living together for less than six months.

10.21 It has been argued that the six-month period is unduly restrictive.²⁶ It could be argued that it is unnecessary to impose a time period at all as a cohabitee with a lesser interest in the property will not be able to apply for relief in any case. However, the view taken by the Government, on the advice of the Attorney General, during the Oireachtas debates seems to have been that a cautious approach was necessary in order to prevent the legislation being struck down as an unconstitutional attack on the property rights of respondents where the respondent has a greater or equal share in the property. Although the Commission recognises that it could be argued that it is unnecessary to have a time limit at all, the time limit should be retained albeit in a modified form as the Commission is of the view that where safety and bodily integrity are at risk protective legislation should be drafted as widely and inclusively as practicable.

10.22 *The Commission recommends that the residency requirement in respect of barring orders for cohabiting couples of 6-*

²⁶ O’Herlihy “An Overview of the Strengths and Weaknesses of the Domestic Violence Act 1996” [2002] COLR V111.

months out of the previous 9 should be reduced to 3 months out of the previous 12.

10.23 At present, the requirement of a minimum period of cohabitation denies relief to a cohabitee who is the sole owner of the property or who is the sole tenant where the period of cohabitation falls below the specified period. The Law Society is of the view that “there can be no constitutional justification for any residence requirement for a cohabitee seeking a barring order” in such circumstances.²⁷ The Commission is of a similar view. We fail to see why, in an effort to protect the interests of the property holder, it is necessary to deny them relief where the period of cohabitation falls below the specified period.

10.24 *The Commission recommends that the residency requirement be removed for a cohabitee seeking a barring order where the cohabitee has the sole ownership or tenancy in the property.*

(b) *Safety Orders*

10.25 Section 2(1)(a)(iii) of the *Domestic Violence Act 1996* provides that in the case of a safety order an unmarried cohabitee must have lived with the respondent as husband or wife for a period of at least six months in aggregate during the period of twelve months immediately prior to the application for the order. The Law Society was of the view that the residency requirement in respect of a safety order “cannot be justified” as a safety order does not impinge on anyone’s property rights.²⁸ The Commission agrees.

10.26 The Commission is of the view that the current situation is contradictory as the requirement of a residency requirement in respect of cohabitees may be contrasted with the complete absence of a residency requirement for those persons residing in a mainly non-contractual relationship with the respondent. This can be interpreted in two ways. Firstly, that by “cohabitee” the legislation may be said to be speaking of heterosexual cohabitees, which means that these are treated less favourably than homosexual cohabitees who fall within the catch-all category. It could be argued that this is a breach of the equality provisions contained in Article 40.1 of the Constitution and

²⁷ Law Society Domestic Violence: The Case for Reform (May 1999) at 16.

²⁸ *Ibid.*

Article 14 of the European Convention on Human Rights. Secondly, it could be interpreted as applying to all forms of cohabitee, in which case there is no point in having a residency requirement at all since a cohabitee who fails to satisfy it will be entitled to relief under the catch-all category anyway.

10.27 In addition, the Commission is of the view that, while a residency requirement is necessary from a constitutional point of view in the context of a barring order, it is unjustified in the context of a safety order. This is because the former involves expelling somebody from his or her residence, whereas the latter involves them being ordered merely to refrain from inflicting harm on the other party and does not have the potential to infringe property rights in the way in which a barring order can.

10.28 *The Commission is of the view that the residency requirement in respect of safety orders should be abolished.*

(3) *Should a Special Regime apply where there is a Child in Common?*

10.29 It has been argued that a special regime should apply in respect of the time limits where the parties have never cohabited as man and wife but they have a child in common.²⁹ During the Oireachtas debates on the 1996 Act, a number of amendments were proposed which would have allowed any person who had a child in common with a person who is abusing her to apply for either a safety or a barring order. The amendment would have allowed a co-parent of a child to apply in his or her own right, regardless of whether the parties have lived together at all and it would have entitled a co-parent to seek an order on behalf of their child. The amendment was rejected, on the basis that “[an] effect of the amendment...is that it would allow all persons who have a child in common, even where they do not reside together, to apply for a safety order. This would depart from the main purpose of the Bill which is to protect persons residing together.”³⁰ The Commission agrees. It is of the view that domestic violence legislation should be concerned with domestic

²⁹ Patricia Kelleher and Monica O’Connor *Safety and Sanctions: Domestic Violence and the Enforcement of Law in Ireland* (Women’s Aid Dublin 1999) at 14.

³⁰ *Domestic Violence Bill, 1995: Report and Final Stages*, Dail Debate, Vol 459, December 6th, 1995, cols. 594 – 595.

violence and that the criminal law is appropriate to deal with other breaches of the criminal law. Nonetheless, the Commission is also persuaded that a dependant child should be entitled to apply for an order under the 1996 Act.

10.30 *The Commission does not recommend that a special regime should apply where there is a child in common. However, the Commission is of the view that the category of persons entitled to apply for an order under the 1996 Act be extended to include a dependant child.*

CHAPTER 11 SUMMARY OF RECOMMENDATIONS

A Chapter 1 – Legal Recognition of Cohabitees

11.01 The Commission proposes a presumptive scheme, which would impose certain legal rights and duties on cohabitees who satisfy certain criteria. Such cohabitees are described as ‘qualified cohabitees’. (paragraph 1.04)

11.02 The Commission is of the view that the parties to a domestic relationship should not be regarded as cohabitees for the purposes of this Paper. (paragraph 1.10)

11.03 The Commission is of the view that Article 41 does not prevent the Oireachtas legislating in respect of cohabitees, so long as the legislation does not grant cohabitees more extensive rights than those enjoyed by married couples. (paragraph 1.17)

11.04 The Commission is of the view that, in order to qualify for the scheme proposed by this Paper, a cohabitee must not be a party to an existing marriage. (paragraph 1.24)

11.05 The Commission takes the view that ‘marriage like’ relationships may be between persons of the same-sex or of the opposite-sex. (paragraph 1.34)

B Chapter 2 – Policy Considerations

11.06 The Commission is of the view that the policy arguments in favour of recognising extra-marital cohabitation outweigh those against and that accordingly, qualified cohabitees should be accorded certain rights and duties. (paragraph 2.22)

C Chapter 3 – Property Rights

11.07 The Commission is of the view that the decision of *Ennis v Butterly* does not operate as a bar to the enforceability of a cohabitation agreement that does not attempt to replicate the marriage contract, or does not have an immoral purpose but restricts itself

merely to regulating the financial and property affairs of the parties. (paragraph 3.31)

11.08 The Commission is of the view that there is a need to increase public awareness of the value of such agreements. In light of this, the Commission would suggest that bodies such as the Family Mediation Service increase public awareness of co-ownership agreements through education and training. (paragraph 3.34)

11.09 The Commission is of the view that cohabitees should be encouraged to regulate their relationships by means of co-ownership agreements. (paragraph 3.34)

11.10 The Commission does not recommend that legislation be enacted providing for a reformed version of the purchase money resulting trust as the Commission is of the view that to do so would be to force property law to solve what is essentially a family law problem. (paragraph 3.51)

11.11 The Commission does not recommend the enactment of community property legislation for cohabitees (paragraph 3.57).

11.12 The Commission is of the view that the provisions of the *Family Home Protection Act 1976* should not be extended to qualified cohabitees. (paragraph 3.62)

11.13 The Commission recommends the enactment of legislation providing for property adjustment orders for qualified cohabitees in exceptional circumstances where the court considers it just and equitable to do so having regard to:

- (i) the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them; and
- (ii) the contributions made by either of the parties to the relationship, to the welfare of the other party to the relationship, or to the welfare of the family.

The Commission recommends that such applications must be brought within one year of the relationship breaking down. (paragraph 3.87)

D Chapter 4 – Succession Rights

11.14 The Commission recommends that a discretionary scheme be established whereby a qualified cohabitee can make an application to Court where the qualified cohabitee feels that proper provision has not been made for him or her in the deceased's will or under the rules relating to intestacy. (paragraph 4.27)

11.15 The Commission recommends that, as with section 117 of the *Succession Act 1964*, an application should have to be made within six months of the first taking out of representation to the deceased's estate. (paragraph 4.28)

11.16 The Commission is also of the view that Order 79 of the *Rules of the Superior Courts* should be amended to allow a qualified cohabitee to extract a grant of administration intestate or a grant of administration with will annexed to the estate of their deceased partner. This power would be subject to the discretion of the Probate Office on the production of such proofs as may be required. The Commission is of the view that a qualified cohabitee should be placed above siblings of the deceased in the list of persons entitled to extract the grant. (paragraph 4.29)

E Chapter 5 – Maintenance

11.17 The Commission does not recommend that legislation be introduced to allow qualified cohabitees the right to claim maintenance while the relationship subsists. (paragraph 5.21)

11.18 The Commission does not recommend that legislation be introduced to allow qualified cohabitees a general right to maintenance. (paragraph 5.24)

11.19 The Commission does not recommend that qualified cohabitees should be entitled to claim rehabilitative maintenance. (paragraph 5.29)

11.20 The Commission does not recommend that qualified cohabitees should be entitled to claim custodial maintenance. Rather, the Court should take into account the costs incurred by the custodial parent when making an order under the *Family Law (Maintenance of Spouses and Children) Act 1976*. (paragraph 5.33)

11.21 The Commission recommends the court should be given a discretionary power to make an award of compensatory maintenance in exceptional circumstances where it considers it just and equitable to do so. The Commission recommends that a qualified cohabitee seeking such an order must issue proceedings within one year of the breakdown. (paragraph 5.36)

F Chapter 6 – Social Welfare

11.22 The Commission recommends the retention of the current arrangements for cohabitees under the social welfare code. The only change the Commission would recommend is that same-sex cohabitees be regarded as being capable of ‘cohabiting’ for the purposes of social welfare. (paragraph 6.50)

G Chapter 7 – Pensions

11.23 The Commission recommends no change to the current law regarding private sector pensions. (paragraph 7.25)

11.24 The Commission agrees with the recommendations of the Commission on Public Service Pensions. The Commission is of the view that the provisions of the public service spouses and children’s schemes should be amended to allow for the payment of a survivor’s pension to a financially dependent partner in circumstances where there is no legal spouse and where a valid nomination has been made. (paragraph 7.27)

11.25 The Commission is not in favour of extending pension adjustment and splitting orders to qualified cohabitees on the break up of their relationships. (paragraph 7.29)

H Chapter 8 – Taxation

11.26 In light of the current policy of individualisation, the Commission does not recommend any change to the income tax treatment of cohabiting couples. (paragraph 8.25)

11.27 The Commission recommends that qualified cohabitees should be placed in group threshold (1) for the purposes of CAT. (paragraph 8.37)

11.28 The Commission does not recommend any change to the current law governing Capital Gains Tax. (paragraph 8.41)

11.29 The Commission recommends that qualified cohabittees should be entitled to the same relief as related persons from stamp duty. (paragraph 8.46)

I Chapter 9 – Health And Other Miscellaneous Issues

11.30 The Commission suggests that consideration be given to including cohabittees within the category of persons with whom a doctor treating a seriously ill patient who is unable to communicate or understand should confer. (paragraph 9.06)

11.31 The Commission reiterates its view in the *Consultation Paper on Law and the Elderly* that enduring powers of attorney be extended to include decisions about minor or emergency health care decisions and commends its utility for qualified cohabittees. The Commission recommends that paragraph 3(1) of the First Schedule of the *Powers of Attorney Act 1996* be amended to include qualified cohabittees as notice parties for the purposes of an Enduring Power of Attorney. (paragraph 9.09)

11.32 The Commission recommends no change to the current law and practice regarding access to medical records. (paragraph 9.13)

11.33 In light of the Department of Health and Children's current consultation process, the Commission does not consider it appropriate to express a view as to whether qualified cohabittees or cohabittees generally should be eligible to adopt. (paragraph 9.16)

11.34 The Commission does not recommend any change to immigration law insofar as it applies to cohabittees at present. (paragraph 9.20)

11.35 The Commission does not recommend any change to the *Irish Nationality and Citizenship Acts* to allow for the extension of the arrangements for the naturalisation of married partners to cohabiting partners. (paragraph 9.23)

11.36 The Commission recommends that section 47(1)(c) of the *Civil Liability Act 1961* as amended, which deals with civil actions for wrongful death, be extended to include spouses and qualified cohabittees within the definition of dependants. (paragraph 9.25)

11.37 The Commission recommends no change to the law on marital privilege. (paragraph 9.29)

11.38 The Commission recommends that the Court should be able to take into account time spent outside the State in determining whether the parties have lived together as ‘man and wife’ for the requisite three year period. (paragraph 9.32)

11.39 The Commission considers that it would be premature for Irish law to recognise the status of cohabitation for purposes of conflicts of law (private international law), and that disputes between foreign cohabitants whose status is recognised in their own state but not in Ireland may be resolved using traditional private international law principles. (paragraph 9.38)

J Chapter 10 Domestic Violence

11.40 The Commission does not recommend that the requirement, in respect of a barring order, that the applicant have an equal or greater share in the property be removed. (paragraph 10.19)

11.41 The Commission recommends that the residency requirement in respect of barring orders for cohabiting couples of 6-months out of the previous 9 should be reduced to 3 months out of the previous 12. (paragraph 10.22)

11.42 The Commission recommends that the residency requirement be removed for cohabitants seeking a barring order where they have the sole ownership or tenancy in the property. (paragraph 10.24)

11.43 The Commission is of the view that the residency requirement in respect of safety orders should be abolished. (paragraph 10.28)

11.44 The Commission does not recommend that a special regime should apply where there is a child in common. However, the Commission is of the view that the category of persons entitled to apply for an order under the 1996 Act be extended to include a dependant child. (paragraph 10.30)

**APPENDIX LIST OF LAW REFORM COMMISSION
PUBLICATIONS**

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl 5984)	€0.13
Working Paper No 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)	€1.40
Working Paper No 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977)	€1.27
Working Paper No 3-1977, Civil Liability for Animals (November 1977)	€3.17
First (Annual) Report (1977) (Prl 6961)	€0.51
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Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboring of a Spouse (December 1978)	€1.27
Working Paper No 6-1979, The Law	

Relating to Seduction and the Enticement and Harbours of a Child (February 1979)	€1.90
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Working Paper No 9-1980, The Rule Against Hearsay (April 1980)	€2.54
Third (Annual) Report (1980) (Prl 9733)	€0.95
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Seventh (Annual) Report (1984) (PI	

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