Cohabitation: The long slow road to reform.

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Introduction: Briefing paper

Are we nearly there yet? The House of Commons Briefing Paper "Common Law Marriage and Cohabitation" published in February 2016 suggests that there is still a long way to go towards any meaningful reform to the recognition of rights of cohabitants. Indeed at present there seems to be little appetite for reform.

The briefing paper examines the current legal position under the law. The House of Commons has published several previous briefing papers on cohabitation most notably that of 2012 which addressed the misapprehension in so many people's minds that 'common law marriage' exists. The 2012 paper highlights the fact that little has changed since the Law Commission made recommendations for a statutory scheme of financial relief on separation in 2007 and later recommended in 2009 the introduction of some limited rights for cohabitants to inherit on death. The most notable feature noted is the considerable growth in in recent years of the number of cohabiting couples. The number of opposite sex cohabiting couples has risen from 1.5 million in 1996 to approximately 3.1 million in 2015 a rise from 10% to 20% of all opposite sex couples.

Even more spectacular is the rise in same sex cohabiting couples from 16,000 to 90,000 between 1996 and 2015 a figure which was acknowledged to be a sizable underestimate as same sex couples have not been recorded by the ONS since 2005 with the introduction of Civil Partnerships. In spite of this staggering rise there has been no attempt to introduce changes in property law for separating cohabiting couples. Nothing has been done at all. Any changes or developments have come from common law. We have seen a series of complex property law cases and Inheritance Act claims, several of which have been considered by the House of Lords and also the Supreme Court. Of course, as stated by Stuart Bridge in 2007 when he was a Law Commissioner the fact that more people are cohabiting and that many more are forecast to do so in the future is not itself a reason for law reform but as he acknowledged, and others would agree, the present law is inadequate. It is very difficult for practitioners as well as couples to predict how courts will adjudicate property rights on the breakdown of a relationship.

England and Wales lag some way behind Scotland and Northern Ireland and many jurisdictions around the world which protect the rights of cohabiting couples. Statutory schemes have been introduced which grant rights on separation or death to cohabitants, albeit far more limited than those available for married couples and those in a civil partnership. However it gives a statutory framework for the issues arising on the breakdown of these relationships and in that way acknowledges that cohabiting parties should be able to rely on such a framework rather than the vagaries of the general principles of property law and rights under the Inheritance Act 1975.

The 2016 House of Commons paper refers back to the 2002 discussion paper *Sharing Homes* published by the Law Commission which concluded that 'it is quite simply not possible to devise a statutory scheme for the ascertainment and quantification of beneficial interest in the shared home which can operate fairly and evenly across the diversity of domestic circumstances which are now encountered.' This statement was contradicted five years later when the Law Commission did make recommendations for a statutory scheme which overcomes the problems of the diversity of relationships by defining which relationships qualify. The briefing paper acknowledges that such recommendations were made in 2007 but in repeating this 2002 statement it does suggest that far from making progress towards reform the Government is reverting back to the 2002 position. The paper charts the reaction of subsequent Governments to the Law Commission 2007 recommendations showing the lack of enthusiasm for any reform. In 2008 the Labour Government announced that no action would be taken to implement the recommendations until research on cost and effectiveness of

the system in Scotland had been carried out. Then in 2011 Jonathan Djanogly announced on behalf of the Coalition Government that it had no intention of taking forward the Law Commission recommendations for reform of cohabitants' rights. The reasons given were the fact that the results of the research into the Scottish position were inconclusive and secondly that the family justice system was in a state of transition and major changes were already on the horizon referring to the discussion papers on reform of financial provision on divorce and the status of pre-nuptial agreements. Professor Elizabeth Cooke responding on behalf of the Law Commission commented '…We hope that implementation will not be delayed beyond the early days of the next parliament, in view of the hardship and injustice caused by the current law....the prevalence of cohabitation, and of the birth of children to couples who live together, means that the need for reform of the law can only become more pressing over time…' Currently there is little sign of the present Government even addressing the issues and we seem a long way from introducing any changes to the family justice system as referred to by Jonathan Djanogly; further postponement of reform of the law for cohabitants can no longer be justified. In spite of its post-referendum concerns the time has come for the Government to grasp this issue.

Current position: property rights in jointly owned property

Currently unmarried couples have no right in law to claim ownership of each other's property on relationship breakdown. This should be well known but there are still misunderstandings amongst many couples. Cohabitants believe rights arise from long relationships which is incorrect. There are no statutory rights protecting cohabitants on the breakdown of a relationship. Instead of statutory rights cohabitants must rely on the complex rules of property law which are beset with technicalities. Their status as cohabitants has no effect on outcome and although the courts may take the length of relationship and other issues into account when quantifying shares, the claim to a share is a property law based claim. Couples cannot predict how the property rules and principles will apply to their individual circumstances. Unlike claims arising from the breakdown of a civil partnership or marriage there can be no general claim for a share in the total assets of the couple but only a claim in the family home. Much will depend on whether that family home is jointly owned or owned in the sole name of one party. Many of the most recent property cases such as *Stack v Dowden* [2007] 2 AC 43 and *Jones v Kernott* [2012] 1 AC 776 are cases where the family home is registered in joint names and the task for the court is to assess the size of the share of each of the parties. The court has adopted a number of approaches naturally favouring the parties own express intentions. The problem is that few couples discuss their intentions and rarely expressly state such intentions should the relationship run into difficulties. If no express intention has been stated the default position is to follow the principle restated by Baroness Hale in *Stack v Dowden* that 'equity follows the law' so if the legal title is owned jointly the beneficial interest should be shared equally; other factors such as contributions of the parties are then ignored. This has a refreshing simplicity but it is a blunt edged approach as shown in *Fowler v Barron* [2008] 2 FLR 831 which was decided on this principle. In this case the contributions of the parties were unequal with no capital contributions towards the purchase of the property from the woman but any income earned by them both was pooled. The case was decided soon after *Stack* and the court found that there were no exceptional circumstances which would then suggest a different approach to be adopted. It suggests that the very fact that a couple decide to jointly register title means that the court can conclude that the parties intended the beneficial interests in the property to be shared equally between them and it is only where there is evidence of exceptional circumstances to rebut this that the courts will enquire further into the circumstances of their purchase and life together.

Where exceptional circumstances are shown the courts must seek to find the intentions of the parties as to how the shares in the property are to be divided. If the parties have never discussed ownership of the family home and respective shares then the courts have nevertheless to try to find the intention from their behaviour and actions. It is a somewhat artificial exercise because the court must draw conclusions on behaviour of the parties and apply that to the quantification of the shares in the family home. Since the decision in *Jones v*

Kernott the courts can take two approaches to discover this intention: either inferring the parties' intention or alternatively imputing their intention. Neither approach is straightforward and both approaches involve drawing inferences about the parties from behaviour that was not necessarily intended by the parties to be linked to ownership of the family home. In retrospect the behaviour of Ms Jones and Mr Kernott in *Kernott v Jones* was linked in this way to the ownership of the property. The couple had jointly purchased a property which was registered in their joint names. After living together in the property for just over eight years, the relationship broke down and Mr Kernott moved out. He purchased a further property where he lived and from then on ceased to make contributions towards the outgoings of the jointly owned house. After fourteen and half years during which they lived quite separate lives he returned to claim a half share in the property. The courts were clearly troubled by the facts and the decisions of the higher courts were quite different. Much has been written about the contrasting decisions and the reasons for the 90:10 split favoured by the High Court and Supreme Court and the 50:50 split favoured by the Court of Appeal. (e.g. see Pawlowski and Greer 'Imputation, Fairness and the Family Home' Conv [2015] (6) 512; Sloan 'Keeping up with the Jones case: establishing constructive trusts in "sole legal owner" scenarios' Legal Studies [2015] 35 (2) and Mee 'Inferring and Imputing in Essex' Conv [2012] (2) 167). In justifying an award of 90% for Ms Jones the High Court Judge and the Supreme Court placed weight on the fact that after Mr Kernott left he cut any link with Ms Jones and the property ceasing to contribute towards the mortgage and outgoings holding that this could clearly be linked with the beneficial interest. However there continues to be discussion as to how the Supreme Court could quantify the shares 90% - 10% rather than some other division. The division had not been expressly discussed between the parties so it was for the courts to find their intentions as to shares from their conduct. It is the way the court sought to find the intentions of the parties that has provoked much discussion and also some uncertainty. The Supreme Court considered two approaches. The first approach was through 'inference' and if this was inconclusive the second rather more controversial approach was through 'imputation'. Both involve the courts examining the conduct of the parties during their relationship to divine some indication as to how they would wish to share the property. Few parties conveniently share their outgoings and income in as neat and constant proportions as the couple in *Midland Bank v Cook* [1995] 4 All ER 562 where the court were able to find a 50:50 split. This case of course concerned a married couple but the courts expressly used property law principles to decide on shares in the house because a third party, in this case the Midland Bank was involved and the question of priority was at issue. Inference is an objective exercise where the courts draw conclusions from the conduct of the parties in relation to matters of finance. By contrast imputing the intentions of the parties involves a process of deducing what the intentions of the parties " as reasonable and just people would have been had they thought about it at the time. As Greer and Pawlowski comment 'the function of imputation, therefore is not to disregard the parties' actual intentions (deduced objectively from their own words or conduct) by imposing the court's own sense of fairness, but to achieve a fair and just result by filling in the missing gaps where the court cannot deduce what shares were intended'. *Stack* had rejected the use of the 'fairness' introduced by Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211 but four years later it re-emerged in imputing the intentions of the parties. For cohabitants the use of such a highly subjective approach in the quantification of shares in the family home leads to an unacceptable level of uncertainty which in itself can lead to unnecessary expensive litigation. If such complex and uncertain principles are the main basis on which a cohabitant must rely in order to quantify a share in a jointly owned family home then there is an urgent need for a clearer basis on which such claims can be made.

Current position: property rights in sole owned property

Where the family home is in the sole name of one party the issues become even more complex since the claimant party must first prove a beneficial share in the property before the court will quantify the size of the share. Since *Lloyd's Bank v Rosset* [1991] 1 AC 107 the courts have approached such claims as a two-stage process where first a common intention constructive trust must be proved and if proved then the second stage involves quantification of the share. The approach has been heavily criticised for many years. Kevin Gray

writing in *Elements of Land Law* in 2009 at p.876 highlighted the problems with this approach '...the structural principles of property law often sit badly beside the social phenomena which they attempt to regulate. The traditional law of trusts which assumes bargains and not gifts is ill-suited to deal with those who contribute towards the success of a domestic partnership without any anticipation of material reward or tangible pay-off...'

This criticism stems from the strict requirement that there must be evidence of common intention between the parties to share the beneficial ownership in the property either expressly or impliedly. It has always been highly artificial in the context of family life. In *Rosset* Lord Bridge spoke of the need to find an agreement or arrangement between the parties which must '…be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been….' Even with the qualification that the nature of the discussion may not be remembered and the terms may not be remembered precisely Lord Bridge failed to take into account the fact that in many cases the cohabitants may simply not have had such a discussion. Even where such a discussion has taken place the terms themselves may fall short of a common intention to share. In *James v Thomas* [2007] EWCA Civ 1212 the claimant relied on evidence that "…whenever the parties discussed carrying out improvements to the property and matters relating to the business, the Defendant would say to the Claimant 'this will benefit us both'…" taking that to mean that that it related to the property. Lord Chadwick concluded that such a comment was intended to mean — and was understood at the time to mean — that the improvements would have the effect that the property in which they were living as their home would be more comfortable and more convenient: or, to put the point another way, that the improvements to the property would be reflected in an improvement to the quality of their life together. It is in the context of these difficulties and uncertainties that it is clear that there needs to be a review of the current law on ownership of property by cohabitants. It contrasts so starkly with the framework in place for the breakdown of marriage and civil partnership. The surprising decision in *Wyatt v Vince* [2016] EWHC 1368 (Fam) shows that the courts may be prepared to accept an application for maintenance years later based on the years of marriage, in this case twenty years later. If the Government could revisit the definition of cohabitation and what relationships were acceptable then the applicants would at least have a statutory route for any claim and practitioners should be in a far stronger position to predict outcomes.

The effects of the decisions of *Stack* and *Jones* on claims in sole owned property.

Although the present and previous Governments have shown no real appetite for reform there have been indications from the Judiciary that it would be prepared for a more realistic approach to claims in the context of the family home. Any such change would not be exclusively for cohabitants but it is this group that would stand to benefit the most. Obiter comments from case law such as *Stack* suggested that the strict principles of *Lloyds Bank v Rosset* and the strict proof of common intention as laid down by Lord Bridge should no longer be the main deciding factor. As Lady Hale commented in *Stack* the search is '..for the result which reflects what the parties must, in the light of their conduct, be taken to have intended…' Where property is in joint names the court concluded that it was always intended by the parties that the property should be shared between them equally. But it was the obiter comments in the context of property in sole ownership in *Stack* which were the most novel aspects of the decision. Lord Walker stated that in his view the law had 'moved on' since the case of *Rosset* and in his view the law lords '.. should move it on a little more in the same direction..' In his view an implied common intention could be proved by a wider range of contributions including contributions in kind such as contributions towards a shared household. Lady Hale commented that '…the hurdle had been set too high in certain respects..' by Lord Bridge in *Rosset.* This was interpreted as meaning that a range of non-capital contributions could at least be considered by the court when assessing whether the acquisition stage in sole ownership cases had been satisfied. This appeared to have transformed the principles of law applying to ownership of the family home. Sole ownership cases decided after *Stack* generally referred to this new approach and judging by judicial comments in those cases it seemed that the Judiciary had accepted that the law had indeed 'moved on' for those cohabitants claiming a share in sole ownership cases.

An example is the judgment of Lewison J in *Geary v Rankine* [2012] EWCA Civ 555 in which he refers to *Jones v Kernott* as the key authority governing his decision. This is a sole ownership case where Ms Geary made a claim for a share in property solely owned by Mr Rankine. As the property was in the sole name of Mr Rankine Ms Geary had first to show that there was a common intention to share. If there was indeed a change in approach from *Rosset* Ms Geary would be able to rely on showing that such an intention could be inferred from the conduct of the parties. She had not made capital contributions and she could not show an express agreement that the property was to be shared but on the facts her non-capital contributions were considerable. Ms Geary had made considerable non-capital contributions to a business owned by Mr Rankine. He had purchased a guest house in his sole name appointing a manager to run it. The manager was not a success and Mr Rankine decided to run it himself with the help of Ms Geary. She worked very hard for little reward and when their relationship broke down she claimed a share in the property. In spite of the role she had played in the business her contributions were not deemed to be relevant to this issue. So it does appear that the Judiciary seem to have an appetite for this new post-*Stack* and post-*Jones* approach which can allow the court to consider a wider variety of evidence but once applied the results of some of the cases look very much in line with the results one would have anticipated post-*Rosset.* Admittedly there are problems with inferring intention from conduct. Its application is difficult and it is not surprising that the judiciary falls back on focussing on the express agreement of the parties or drawing an inference from capital payments and this is very similar to the approach of Lord Bridge.

Lady Hale repeated her obiter comments from *Stack* that 'the law had moved on from *Rosset'* later in *Abbott v Abbott* [2007] UKPC 53 a Privy Council case which did not concern cohabitants but a married couple. In reviewing the decision of the Court of Appeal in Antigua and Barbuda '..The Court of Appeal appears to have attached undue significance to the dictum of Lord Bridge in *Rosset*, in particular as to what conduct is to be taken into account in quantifying an acknowledged beneficial interest. The law has indeed moved on since then. The parties' whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership..'

One can conclude that there was amongst the Judiciary an appetite for reform that was clearly missing from the Government but this has not yet been supported by a successful claim for a share in sole owned property by a cohabitant other than by proof of express discussion or capital contributions. Based on the decisions in the most recent case law on sole owned property it is unlikely that Mrs Rosset would have had any better chance of acquiring a share in the property owned by her husband today or more significantly Ms Burns would be just as unlikely to have grounds to claim a share in the family home through non-financial contributions. So in spite of criticism and calls for reform from academics and practitioners the tests set out in *Rosset* seem robustly to have survived.

More recently in *Capehorn v Harris* [2015] EWCA Civ 955 the Court of Appeal once again endorsed the two-stage process as being necessary in cases of sole ownership. Lord Justice Sales commented '…in relation to assets acquired by unmarried co-habitees or partners, where an asset is owned by one person but another claims to share a beneficial interest in it a two-stage analysis is called for to determine whether a common intention constructive trust arises...' He then discussed the nature of the two-stage process where firstly, the claimant must show an agreement that he should have a beneficial interest in the property owned by his partner and secondly, if such an agreement can be shown to have been made, then the court is free to impute an intention that the person was to have a fair beneficial share in the asset and may assess the quantum of the fair share in the light of all the circumstances. He showed that in the first stage such an agreement can only arise on inference from the parties' conduct and he held that at this stage the courts cannot impute such an agreement. His interpretation of what could be inferred from conduct was very conservative and appeared again to echo what Lord Bridge had set down some twenty-four years earlier. He repeated that the claimant must show that there was an agreement that he was to have a beneficial share in the property.

One could argue that this case and *Geary v Rankine* and other post-*Stack* sole ownership cases such as *Aspden v Elvy* [2012] EWHC 1387; *re Ali* [2012] EWHC 2302 and more recently *Graham-York v York* [2015] EWCA Civ 72 were all lost opportunities for the higher courts to demonstrate that the law had indeed changed. In *Graham-York v York* the Court of Appeal reviewed a relationship of over 33 years where the claimant Miss Graham-York relied on contributions to household expenses, care for the child of the relationship and a small capital contribution towards a debt on the property. She had no evidence of an agreement or a substantial capital contribution. This was an ideal opportunity for the courts to demonstrate a change in approach but instead the courts relied on the more traditional Bridge dicta. This resulted in a very modest share in the property of 25% being awarded to the claimant. It is difficult not to conclude that in spite of the judicial statements made in *Stack* and later in *Kernott v Jones* as far as sole ownership cases are concerned the law is in largely the same place as it was in 1991 when *Rosset* was decided. Certainly views may have changed with regard to quantification of a share but in looking to whether a party has acquired a share the courts still concentrate on finding common ownership from the implied and express evidence test laid down by Lord Bridge and the evidence deemed to satisfy this common intention test does not appear to have 'moved on' at all. Capital contributions and express agreements still seem to be the key to the acquisition of a share in the family home. So in spite of considerable and sustained criticism the judgment of Lord Bridge in *Lloyd's Bank v Rosset* has remained the key principle in deciding whether or not a constructive trust has arisen thereby giving the claimant cohabitant a valid claim to a beneficial interest in the family home. This may account for the comment in the 2016 paper that there is little appetite within the Judiciary for reform which appears to contrast with the comments made by Lady Hale and Lord Walker in *Stack* and other cases. Perhaps what we see is an appetite for reform but a reluctance to put this into effect once presented with a claim by a cohabitant who has not made capital contributions.

Looking again at the House of Commons paper it states clearly that each case is decided on its own facts and quotes a comment from Lord Walker that there was a 'good deal of uncertainty and the high possibility of high litigation costs'. It also refers to those comments by Lady Hale in *Stack* that '..in family disputes, strong feelings are aroused when couples split up…they... lead people to spend far more on the legal battle than is warranted by the sums actually at stake..' If there was more certainty in the law perhaps the parties would not advance on this course of costly and emotional litigation with so much uncertainty surrounding the outcome.

Opponents of the grant of rights to cohabitants highlight the problems in the introduction of a statutory scheme. These are well known and include the problems of defining such relationships and setting up a scheme that is fair to both parties and that does not undermine civil partnerships and marriage. But these are issues that could be addressed and have been addressed in other jurisdictions.

Other jurisdictions have been able to introduce statutory provisions for cohabitants with relative ease. The key feature is the strict limitations that have been placed on the applicant who cannot claim maintenance in the same way as a married person or civil partner but must instead prove that contributions made to the relationship have caused them disadvantage or loss. This puts the claim firmly on financial grounds and less on the grounds of status and so distinguishes the claim made in marriage or civil partnership.

Claims by cohabitants in Scotland

In a rather understated piece of legislation Scotland introduced limited rights for cohabitants in 2006. The Family Law (Scotland) Act 2006 now allows a court to make an order for payment of a capital sum by one cohabitant to the other. Under s. 28 the court takes into account whether the defender (the respondent) has derived an economic advantage from the contributions made by the applicant (the claimant) and secondly whether the applicant has suffered economic disadvantage. Further the court has to consider the extent to which any economic advantage derived by the defender from contributions by the applicant is offset by any economic disadvantage suffered by the defender in the interests of the applicant or any child and alternatively

whether the economic disadvantage suffered by the applicant in the interests of the defender or any child is offset by an economic advantage the applicant has derived from contributions made by the defender. What these provisions mean in practice is that the court must carry out a delicate balancing act looking at contributions of both cohabitants and seeing if one has made contributions which have led to a disadvantage for the applicant. As shown in *Gow v Grant (Scotland)* [2012] UKSC 29 the courts were fairly conservative in the way they applied the legislation. The case concerned a couple Ms Gow and Mr Grant who met late in their lives and decided to move in together. He encouraged her to sell her Edinburgh home and to move in with him. The proceeds were then spent on them both in living expenses which included investment in timeshare weeks for holidays. When the relationship broke down it was found that her property had increased in value by nearly £40000. Ms Gow had nowhere to live and had no job as she had not sought further employment after her job had come to an end. In a wide ranging judgment the Supreme Court held that Ms Gow had been economically disadvantaged by the sale of her house which prevented her from taking advantage of the rise in value and she had also been disadvantaged by her investment in the timeshare properties. The court awarded her the sum of £38,000.

The judgment was interesting for several reasons. Firstly, it showed an appetite amongst the highest judiciary for a similar piece of legislation to be passed in England and Wales. Lady Hale stated that 'the main lesson from this case…is that a remedy such as this is both practicable and fair. It does not impose upon unmarried couples the responsibilities of marriage but redresses the gains and losses flowing from their relationship.' She then added 'as researchers comment "the Act has undoubtedly achieved a lot for Scottish cohabitants and their children English and Welsh cohabitants deserve no less" '. Another call for action from the senior Judiciary has been resolutely ignored by the Westminster Government as shown by the comments in the February briefing paper.

A second interesting point arose in Lord Hope's judgment. This was a comment on the way this Act should be applied by the courts. He commented that it was wrong to approach it simply as a legislative provision allowing the court to correct any clear and quantifiable economic imbalance that may have resulted from the cohabitation. In his view that was too narrow and having considered the report of the Law Commission he observed that a claim based on contributions or sacrifices in non-commercial relationships of the kind in the context of family law cannot be valued precisely. This suggests that when the courts considers claims by one cohabitant against another under the Scottish legislation the quantification by the court should be approached in a way that combines the flexibility of family law claims after divorce with the strict financial calculation of commercial cases. This is a welcome and sensible compromise but its application does of course involve the key problem of knowing how far the court should be flexible in its approach to the non-financial disadvantages suffered. This flexibity does seem to have been adopted by the courts in their approach to the quantification of shares

A key point to observe from *Gow v Grant* is that had Ms Gow brought her case in the English courts she would have failed as she had no statutory or common law right to make such a claim. Lady Hale made a number of general comments in her judgement on the proposals by the Law Commission that a similar remedy for cohabitants should be provided in England and Wales and there was palpable frustration in their lack of financial protection. In her view the Scottish approach under s.28 although welcome did not perhaps go far enough to protect all cohabitants on the breakdown of their relationship. The key fact here was that Ms Gow had her own property which she sold and then spent the proceeds on living expenses of them both. Lady Hale also considered the position of the claimant who had made non-financial contributions but had suffered financial disadvantage because she had not been working. Her suggestion which is still a practical and sensible approach is to ask the question when cohabitation breaks down 'where were the parties financially at the beginning of the relationship and where were they at the end and then to ask whether either the defender has

derived a net economic advantage from the contributions of the applicant or the applicant has suffered a net economic disadvantage in the interest of the defender or any relevant child'.

As she pointed out there is nothing in the Scottish legislation to preclude such an approach.

Of course the Scottish approach is by no means perfect. Morven Douglas highlighted many of the current problems in her recent article in the Family Law Bulletin in 2016 *Quantification of claims under section 28(2)(a) and (b) of the Family Law (Scotland) Act 2006 – Where are we now?* She shows that the courts have struggled in quantifying claims under the Act. The legislation does not specify what property was covered by cohabitation claims and as a number of claims coming before the courts grow this needs clarification. She describes several cases decided post- *Gow* including *Whigham v Owen* [2013] CSOH 29. This is a very significant case which demonstrates well the contrast between cohabitants in Scotland and those in England and Wales. A couple had cohabited for over twenty seven years and had three children. Although the court held that awards in cohabitation cases should be less than those in divorce cases because marriage is a more significant commitment it was possible for the claimant [pursuer] Ms Whigham to rely on non-economic contributions to the care of the family and the running of the family and household. The court also held that there was no necessity for the claimant to prove that there was a causal link between her contributions and the defender's wealth at the breakdown of cohabitation. This approach is not restricted to the family home and covers the family assets. Had Ms Whigham bought her claim in the English courts it is unlikely that she would have been awarded anything by the courts. The plight of Ms Burns in *Burns v Burns* [1984] Ch 317 who was left with nothing after a similar length relationship having stayed at home to care for a family and the household could be seen as very similar to that of Ms Whigham.

The Scottish approach has much to recommend it and the UK government could learn much from problems encountered with definitions within the 2006 Act and adapt any legislation accordingly. The focus shifts away from the relationship and the status of the parties and concentrates on the question of economic advantage and disadvantage. It has similarities with approaches in Commonwealth countries in particular those of Australia and New Zealand courts.

The inheritance rights of cohabitants

Although there has been little progress towards rights for cohabitants on relationship breakdown there has been some progress in rights arising after death. The Inheritance (Provision for Family & Dependants) Act 1975 as amended by the Law Reform (Succession) Act 1995 has for many years allowed a number of categories of claimants to bring a claim against an estate where 'reasonable financial provision' has not been made for them under the will of the deceased person. Such a claim is not restricted to civil partners and spouses and includes a claim by a cohabitant. The Act allows any person living in the same household as the deceased, as a spouse or civil partner of the deceased, during the two years immediately preceding the death of the deceased to make an application. In *Williams v Martin* [2016] W.T.L.R. 1075 a claim was made by Joy Williams against the estate of her deceased partner's estate. She had lived with Norman Martin for over eighteen years in what the judge described as 'a committed and loving relationship' but Mr Martin had never divorced his wife and at his death he had not made adequate provision for his partner Joy Williams in his will. The couple had purchased property jointly as tenants in common. Had they been joint tenants then under the rules of property law Joy Williams would have become sole owner but since they were tenants in common his share passed to his long estranged wife Maureen. Joy Williams made a claim for financial provision under the 1975 Act based on the fact that they had lived together in the same household as husband and wife for a period of over two years which ended with the death of Mr Martin. Although Mrs Martin contested this claim Joy Williams was successful. Perhaps most interesting of all were the comments of Judge Nigel Gerald who reflected that it was quite plain that Mrs Williams and Mr Martin had in all material respects lived as husband and wife in a way in which they expected to spend the rest of their lives. Her rights depended on proof of the relationship or

dependency. Joy Williams reflected the views of many when she reflected later that 'this level of serious relationship is not currently recognised by the law' and as a result she had to bring an action in court in order to claim a remedy. The comments from the judge suggest that it would be far better to move towards an automatic claim for a cohabitant. The Law Commission recommended this change five years ago and drafted the Inheritance (Cohabitants) Bill in 2011 which intended to give some unmarried partners who had lived together for five years or more the right to inherit on each other's death under the intestacy rules. This has not been brought into law. Under this Bill a surviving partner should have automatic rights in their partner's estate without having to make a formal 1975 application. In order to qualify the Law Commission recommended that a claimant must have been cohabiting for at least five years at the date of death or have a child living in the same household at the date of death in which case the qualifying period is reduced to two years. If these periods are satisfied then the cohabitant has an automatic claim on the estate of the deceased. The 1975 Act will still be relevant for some claims where the claimant does not automatically come within either of the two periods.

Conclusion

So are we nearly there? There is evidence of an appetite for reform amongst the Judiciary, there are strong recommendations from the Law Commission and academics but there has been little progress along the long slow route to reform. Where cohabitation breaks down the law offers no specific protection even when it has been very long, even where there are children and even with strong evidence of commitment. Instead parties must resort to the complex and uncertain world of property law where claimants must rely on the difficulties posed by proof of an implied trust which at best will give rights to the family home but no more. In a world where couples are now far more likely to live together, buy houses and have children outside marriage the failure to recognise this fact suggest a Government with its head firmly in the sand.

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