



# (To) intimacy and beyond: rethinking the definition of ‘cohabitant’ in Ireland

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## ABSTRACT

The issue of cohabitants’ rights in Ireland has received limited attention in either public or academic discourse since the enactment of part 15 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 more than a decade ago. However, questions pertaining to the rights and entitlements of *de facto* families under Irish law are once again coming under the spotlight. This note considers one discrete feature of the Irish cohabitation scheme: namely, the requirement to prove intimacy to demonstrate the existence of a cohabiting relationship for the purposes of the 2010 Act. It investigates the importance of intimacy within the definition of ‘cohabitant’ and drawing on the most up-to-date case law highlights the deeply (in)sensitive investigations which are often undertaken to establish its existence.

**Keywords:** cohabitation; *de facto* couples; intimacy; relationship regulation; Irish family law.

## INTRODUCTION

Since the enactment of part 15 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, the issue of cohabitants’ rights in Ireland has largely taken a back seat in both public and academic discourse. However, questions pertaining to the rights and entitlements of *de facto* families under Irish law have recently come to the fore. In March 2024, an ultimately unsuccessful referendum seeking to change the constitutional definition of the ‘Family’ carried in article 41 of *Bunreacht na hÉireann*, to encompass, among others, cohabiting *de facto* families, generated considerable media attention.<sup>1</sup> So too did the Supreme Court’s judgment in *O’Meara & Ors v Minister for Social Protection, Ireland and Attorney General* wherein it held that in excluding cohabitants from the Widow’s, Widower’s or

1 The referendum sought to recognise families based on marriage or ‘other durable relationships’. It failed, however, by a significant majority (67.7% ‘No’ vote). Various factors contributed to the rejection of the proposed constitutional amendment, notably the ambiguity of the phrase proposed. See, for example, Michael McDowell, ‘A Yes vote on the family referendum is a vote for a foreseeable and avoidable mess’ *Irish Times* (Dublin 7 February 2024).

Surviving Civil Partner's (Contributory) Pension, the state was failing to give effect to the obligation in article 40.1 to treat all human persons equal before the law.<sup>2</sup> What impact these developments will, or ought to have, is likely to attract further attention in the months and years ahead.

Yet, while it is important to look to the future and the potential it may present, it is equally important to reflect on how the cohabitation scheme is currently operating. Some focus has recently been placed on the low level of litigation generated by the scheme, highlighting in particular the need to reconsider the requirement to establish 'financial dependency' to access relief on relationship breakdown.<sup>3</sup> Many other aspects, however, remain largely ignored.

This note seeks to shine a spotlight on one discrete feature of the Irish cohabitation scheme: namely, the requirement to prove intimacy to demonstrate the presence of a cohabiting relationship for the purposes of the 2010 Act. The note considers the importance of intimacy within the definition of 'cohabitant' and drawing on the most up-to-date case law highlights the deeply (in)sensitive investigations which are often undertaken to establish its existence. Having considered the difficulties this creates, it questions the necessity of adopting an intimacy requirement and reflects on the potential for reform.

### **INTIMACY UNDER PART 15 OF THE 2010 ACT**

Pursuant to section 172(1) of the 2010 Act, a 'cohabitant' is defined as one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.

Section 172(2) further provides that in concluding whether or not two adults are cohabitants, 'the court shall take into account all the circumstances of the relationship'. To guide the court, a non-exhaustive list of factors to which it shall, 'in particular', have regard is set out including the duration of the relationship, the basis on which the couple live together, the degree of financial dependence or nature of financial

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2 *O'Meara & Ors v Minister for Social Protection, Ireland and Attorney General* [2024] IESC 1 at [38] on an appeal from [2022] IEHC 552. See section 124(1) of the Social Welfare Consolidation Act 2005 as inserted by section 17(4) of the Social Welfare and Pensions Act 2010. The couple were in a cohabiting relationship for 20 years and shared three children.

3 Kathryn O'Sullivan, 'Cohabitant protection on relationship breakdown in Ireland: A lesson in illusory justice?' (2023) 37(1) *International Journal of Law Policy and the Family* ebad017.

arrangements between the parties, the presence of dependent children, the degree to which the adults present themselves as a couple et cetera. Although section 172(3) confirms that 'a relationship does not cease to be an intimate relationship ... merely because it is no longer sexual in nature', the need that a sexual relationship existed at one point is implicit.<sup>4</sup> As Baker J observed in *DC v DR*:

The Act offers no assistance as to what is meant by an intimate relationship, but ... it is clear that a relationship *must have been at some point in time a sexual relationship* for intimacy to be found. *The intimacy that is intended is a sexual intimacy and not merely the intimacy of close friendship.*<sup>5</sup>

Highlighting the importance of this qualifying criterion, in 2020, Allen J in *GR v Regan*, described the need for the relationship to be 'intimate and committed' as the 'overarching requirement' of the 2010 Act.<sup>6</sup> Cohabitant status is thus determined on a case-by-case basis having regard, in theory, to objectively verifiable evidence that a couple was in a sexually intimate and committed relationship.

However, securing cohabitant status is, of itself, of limited benefit under the 2010 Act.<sup>7</sup> To be eligible to apply for relief, an applicant must also meet the narrower definition of 'qualified cohabitant'. Section 172(5) defines a 'qualified cohabitant' as

... an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period –

- (a) of 2 years or more, in the case where they are the parents of one or more dependent children, and
- (b) of 5 years or more, in any other case.

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4 In *GR v Regan* [2020] IEHC 89 [36] it was observed that although a relationship does not cease to be intimate simply because it ceases to be sexual, 'the requirement that the relationship be committed remains, as does the requirement that the couple live together'.

5 *DC v DR* [2015] IEHC 309 [86] (emphasis added). Baker J suggested [107] that 'the test requires the court to determine whether a reasonable person who knew the couple would have regarded them as living together in a committed and intimate relationship'.

6 *GR v Regan* (n 4 above) [36].

7 Although the 2010 Act's definition of 'cohabitant' is used under the Social Welfare Acts and other miscellaneous legislative enactments, its main focus of protection arises on the termination of a cohabiting relationship.

## THE SEXUAL INTIMACY REQUIREMENT IN RECENT CASE LAW

Given the centrality of the (sexual) intimacy requirement within the definition of 'cohabitant', it is worthwhile to consider how this aspect of the definition is being applied in recent case law. Despite the limited amount of jurisprudence arising in relation to part 15 claims generally,<sup>8</sup> a number of reported decisions provide an interesting insight.

Available judgments pertaining to claims on relationship breakdown, though few and far between, show a varying level of focus being placed on the intimacy of the relationship shared by the couple. The unreported Circuit Court decision of *MO'S v EC*, concerned a successful application for relief on the breakdown of a 25-year cohabiting relationship which produced one child.<sup>9</sup> The former couple's sexual relationship, its nature and duration, was not investigated. Although counsel for the respondent did question whether the couple were still in an 'intimate and committed' relationship on 1 January 2011 when the 2010 Act was commenced,<sup>10</sup> the court found that the relationship endured until autumn 2011, albeit with little consideration of the intimacy (or commitment) of the parties in the final year(s).<sup>11</sup>

Similarly, in the 2019 judgment of *XY v ZW*, as the respondent 'did not even attempt to argue that the parties had not been cohabitants',<sup>12</sup> an investigation into whether the couple *prima facie* enjoyed a sexually intimate relationship was avoided. However, extensive oral and written evidence of the physical intimacy shared by the couple was nevertheless put before the court with a view to proving the endurance of the relationship and thus the applicant's status as a *qualifying* cohabitant under section 172(5). To support her claim that the seemingly 'on again/off again' relationship continued to be intimate and committed from when it began in January 2007 to when it ultimately ended in April 2016, the applicant submitted detailed diaries including entries 'suggesting intimacy' for 2007, 2011 and 2013.<sup>13</sup> Various specific dates beyond

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8 For example, a search for the term 'qualified cohabitant' within the judgment texts of the Courts Service of Ireland website produces just nine substantive results in August 2023. See the [Courts Service website](#). This number of written judgments is confirmed on Westlaw IE.

9 Unreported, Circuit Court, 12 January 2015.

10 Ibid [30].

11 Ibid [37]. Given section 172(3), the presence or absence of physical intimacy in determining when the relationship ended appears understandably reduced. See also *DC v DR* (n 5 above) discussed below.

12 *XY v ZW* [2019] IEHC 25 [4].

13 Ibid [31].

those in the diary were also given in evidence as to when 'intimacy' took place.<sup>14</sup> However, notwithstanding the applicant's reliance on evidence of sexual intimacy as an apparent proxy for the continuation of the relationship throughout the period, Binchy J refused relief, concluding that the relationship could best be characterised as 'a ten/eleven year relationship with intermittent breaks'.<sup>15</sup> Although he accepted that '[f]or most of the period, the parties were indeed in an intimate and committed relationship, and lived together', he found that the evidence overwhelmingly established that the relationship 'broke down, at least three times, in the five years before it came to its final conclusion'.<sup>16</sup> As cohabiting periods cannot be aggregated,<sup>17</sup> the claim failed.

The intimacy criterion, and the need to establish at a base level whether a couple enjoyed a sexual relationship or not, has played a much more important and contentious role in the context of applications made under section 194 on the death of a purported cohabitant. Reflecting on the 'degree of lack of unanimity in the perception of the relationship' between the parties to the litigation in *DC v DR*,<sup>18</sup> Baker J observed that it was 'remarkable' that it was 'the intimate nature of the relationship, and whether the couple lived together', specifically, that was in dispute.<sup>19</sup> There, the applicant alleged that the relationship between himself and the deceased 'became intimate some months after they met and ... remained close and intimate until she died'.<sup>20</sup> However, as both he and the deceased 'were dutiful children ... neither felt free to fully and openly engage in an intimate relationship until their mothers had died'.<sup>21</sup> Having moved in with the deceased on the day his own mother died, the applicant explained that the couple 'shared a double bed and continued to do so until her illness came to interrupt her sleep to such an extent that both of them preferred to sleep in single beds, albeit ... in the same room'.<sup>22</sup> Despite this, he reiterated that 'the relationship was sexual until close to the end of the life of the deceased'.<sup>23</sup> This suggestion was, however, rejected outright by the deceased's respondent brother. He disputed the suggestion that the couple had ever been sexually intimate,

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14 See, for example, *ibid* [22].

15 *Ibid* [101].

16 *Ibid*.

17 *GR v Regan* (n 4 above) [48].

18 *DC v DR* (n 5 above).

19 *Ibid* [58].

20 *Ibid* [22].

21 *Ibid* [23].

22 *Ibid* [26].

23 *Ibid* [46].

asserting that the relationship was 'one of close friendship'.<sup>24</sup> Various witnesses on behalf of the respondent also noted their surprise that intimacy was being asserted.<sup>25</sup> Nevertheless, Baker J found for the applicant. Although noting that the applicant was not cross-examined as to when the relationship ceased to be sexual, she reflected

that was a sensitive and realistic approach to the question having regard to the fact that the Act *does not require intimacy to continue* through all of the vagrancies of a relationship, provided sexual intimacy *can be said to have been part of the relationship at some time* in the past.<sup>26</sup>

A similarly hostile reaction by surviving family members to an application by a purported surviving cohabitant under section 194 was observed in *D v B*.<sup>27</sup> Although the case did not involve a determination as to the applicant's status as 'cohabitant', the court noted that the children of the deceased rejected the truthfulness of the applicant's assertions that she had an intimate relationship with their father and noted how the children wanted to 'defend, what they regard as, their parent's honour as well as his finances'.<sup>28</sup>

However, while respondents (often family members) representing the estate of deceased persons may dispute the intimate nature of the relationship enjoyed between the deceased and the applicant, where it is not seriously questioned, the courts may be willing to accept the presence of a sexual relationship much more readily. In *GR v Niamh Regan*,<sup>29</sup> although whether the applicant and the deceased had been physically intimate was doubted by the deceased's family, it was not contested.<sup>30</sup> Consequently, the court accepted that the couple had been intimate with little discussion.<sup>31</sup>

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24 Ibid [7].

25 See, for example, *ibid* [76].

26 Ibid [87]. Given that section 172(5) states the parties must have lived '*as a couple*' for the period in question, and mindful of section 172(3), it seems unlikely that sexual intimacy must continue throughout the qualifying period. Note, however, Binchy J's comments in *XY v ZW* (n 12 above) that to be eligible for relief as a 'qualified cohabitant' it was 'an essential requirement that they *must have lived together continuously in such an intimate and committed relationship* for the period of five years prior to the date on which the relationship ended' (emphasis added).

27 *D v B* [2021] IEHC 407.

28 Ibid [58]. The case itself concerned the application of the 'in camera' rule.

29 See n 4 above. The deceased died intestate and his siblings declined to take out a grant of administration resulting in Ms Niamh Regan, solicitor, being appointed administrator.

30 Ibid [40].

31 Ibid [53]. The court moreover clarified that '[n]either the fact that following the deterioration of the deceased's health the relationship ceased to be sexual, nor the deceased's lack of capacity from 2007, meant that the relationship ceased to be intimate.'

Finally, one further related context in which intimacy was previously directly relevant in an application for relief under the 2010 Act arose pursuant to section 172(6). There, a partial exception existed to the definition of 'qualified cohabitant' where 'one or both of the adults is or was, at any time during the relationship concerned, an adult who was married to someone else', and, at the time the relationship concerned ended, had not 'lived apart' from his or her spouse for four of the previous five years – the period of time formerly required to make an application for divorce.<sup>32</sup> Where a married couple live in the same house, section 5(1A) of the Family Law Act 1996 (as amended) provides that they 'shall be considered as living apart from one another if the court is satisfied that, while so living in the same dwelling, the spouses do not live together as a couple *in an intimate and committed relationship*'.<sup>33</sup>

These provisions were of central importance in the 2022 case of *Z v Y*.<sup>34</sup> There, the applicant, Ms Z, sought a declaration that she was a 'qualifying cohabitant' within the meaning of the Act, notwithstanding the deceased's concurrent marriage with his wife, Mrs Y. While evidence was advanced that Ms Z and the deceased had been intimate in an extra-marital relationship,<sup>35</sup> an even greater focus was placed on whether the deceased had 'lived apart' from Mrs Y and whether the latter couple had ceased to be intimate. Although Mrs Y accepted that applicant and the deceased were in a relationship and that it was intimate, she denied that she ceased to cohabit with the deceased as his wife.<sup>36</sup> Conscious of the intrusive nature of the enquiry, Barrett J sought to be 'as sensitive as possible and to avoid any indelicacy' in his judgment.<sup>37</sup>

Despite the applicant's arguments to the contrary, the court did not accept that Mr X and his wife had lived apart from one another for the required period<sup>38</sup> nor that the relationship between Mr X and Mrs Y, was 'to borrow from Mrs Y, "a celibate relationship"'.<sup>39</sup> Although the couple did not share a bedroom throughout their marriage, this,

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32 John Mee, 'Cohabitation law reform in Ireland' (2011) 23(3) CFLQ 323, 332 explained, the rationale of this provision was so that 'if an application for relief [was] made against a cohabitant who [was] married to a third party, it [would] be possible to adjourn the proceedings to allow the cohabitant's spouse to seek a divorce and apply for ancillary relief'.

33 Emphasis added. This was carried into the 2010 Act though section 4(2)(b) of the Family Law Act 2019.

34 *Z v Y* [2022] IEHC 583.

35 *Ibid* [15].

36 *Ibid* [8].

37 *Ibid* [1].

38 *Ibid* [11].

39 *Ibid* .

the wife explained, was attributable to the deceased's shift work over 30 years and his 'totally irregular' sleep patterns, compounded by his problematic drinking.<sup>40</sup> Reflecting on the evidence, Barrett J observed that it was 'entirely convincing that a husband and wife who are living together might occasionally or regularly have intimate relations notwithstanding that their marital relationship on the whole may be floundering'.<sup>41</sup> He thus concluded that although the marriage 'cooled over time', it did not do so to such an 'extent that they never enjoyed intimate relations with each other'.<sup>42</sup> In addition, while the applicant was not capable of being a qualified cohabitant given the continued marital relationship, Barrett J further held that Mr X and Ms Z were in any event not 'living together' in the manner contemplated, 'as opposed to spending time together and enjoying occasional intimate relations with each other'.<sup>43</sup>

The exclusion carried in section 172(6) was removed going forward with the commencement of the Family Law Act 2019 which reduced the wait period for divorce to two years, thereby aligning it with the shorter qualifying period under the cohabitation legislation. However, the potential need for the courts to determine the relationship status of spouses, when faced with an application under part 15 from a purported qualified cohabitant, ensures that where there is a concurrent marriage, the intimacy and commitment of spouses may still need to be investigated in the future.

### **IS AN INTIMACY REQUIREMENT ... REQUIRED?**

Notwithstanding the application of an 'in camera' rule and the broad understanding that cohabitation claims are 'highly sensitive proceedings',<sup>44</sup> the apparent invasion of privacy prompted by the definition of what constitutes a cohabiting relationship under the 2010 Act can be significant. While the requirement to prove that a couple were 'living together' has seen disputes arising as to the number of possessions held in the alleged shared home,<sup>45</sup> nowhere is the intrusiveness of the Irish scheme more pronounced than in relation to the requirement to prove intimacy. As well as having to share deeply private evidence in court as to the sexual relationship enjoyed,

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40 Ibid [8].

41 Ibid [11].

42 Ibid [12].

43 Ibid [15].

44 *D v B* (n 27 above) [52].

45 Considerable evidence has been provided in a number of cases as to the amount of possessions held in the homes in question. See *DC v DR* (n 5 above); *XY v ZW* (n 12 above); *Z v Y* (n 34 above).



applicants have also been required to produce highly personal items to bolster their claims as to the intimacy of the union. This is particularly evident in cases pursued under section 194 with Christmas cards, birthday cards and Valentine day cards, received from the deceased, advanced as physical proof of the genuinely emotional, if not sexual, relationship shared by the couple.<sup>46</sup> That such evidence is demanded of applicants in the Ireland of 2024 arguably seems at odds with modern sensibilities.

The potentially intrusive nature of the enquiries liable to be required under part 15 was well flagged by Alan Shatter TD prior to the introduction of the 2010 Act. Noting the need to establish that there were some 'intimate relations', he reflected on the potential for a court being required to 'examine the minutiae of the intimacy' that a couple engaged in:

Will we have judges being asked to examine the number of occasions per week, month or year in which people engaged in sexual intercourse? Will men and women have to give explicit detail under cross-examination of the nature of their sexual interactions? Will they be put through this sort of degradation? Will we leave it to the subjective assessment of judges to determine what level of sexual interaction amounts to sufficient intimacy ... ?<sup>47</sup>

While in the absence of more reported judgments it is impossible to say whether, or to what extent, such deeply personal enquiries are being undertaken in Irish courts, the potential is tacit. Anecdotal evidence from practitioners suggesting that a desire to avoid such investigations has emerged as an important incentive to settle, further speaks to the impact that the threat of such investigations is having at grassroots level.

Yet, although Ireland is by no means the only jurisdiction applying a definition focusing on the need to establish physical intimacy,<sup>48</sup> not all jurisdictions adopt approaches requiring such (in)sensitive examinations of parties' private lives. Some jurisdictions have chosen to remove the focus on intimacy in their cohabitation regimes, opening up their schemes to include non-intimate relationships where

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46 *DC v DR* (n 5 above) [32].

47 *Dáil Deb* 21 January 2010, vol 699, no 3.

48 Such an approach is adopted in many common law jurisdictions including across Canada and the United States of America. However, its appropriateness is increasingly being questioned. See, for example, Lisa Young, 'Australia' in Jens Scherpe and Andy Hayward (eds), *De Facto Relationships: A Comparative Guide* (Edward Elgar 2024) (forthcoming). See also Michelle Fernando and Olivia Rundle, 'The Family Court's approach to the "circumstances" of a de facto relationship' (2021) 34 *Australian Journal of Family Law* 181.

appropriate.<sup>49</sup> Such an approach is, for example, adopted in Alberta, Canada. There, pursuant to its Adult Interdependent Relationships Act 2002 (as amended), adult interdependent partners are defined as two people who live in a 'relationship of interdependence'. A relationship of interdependence is defined in section 1(1)(f) as

a relationship outside marriage in which any 2 persons

- (i) share one another's lives,
- (ii) are emotionally committed to one another, and
- (iii) function as an economic and domestic unit.

In determining whether two persons function as an economic and domestic unit all the circumstances of the relationship must be taken into account, including, where relevant, 'whether or not the persons have a conjugal relationship'; 'the degree of exclusivity of the relationship'; 'the conduct and habits of the persons in respect of household activities and living arrangements'; 'the degree to which the persons hold themselves out to others as an economic and domestic unit' et cetera.<sup>50</sup> Thus, although it may be a relevant factor to which the court may have regard, 'it does not require partners to have a conjugal relationship to be adult interdependent partners'.<sup>51</sup>

The potential for introducing a scheme not premised on the need for a sexual relationship was considered in *Seanad Éireann* almost 20 years ago.<sup>52</sup> The discussion arose in the context of an ultimately

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49 Note, while requiring couples to register their relationship would *reduce* the need for an investigation into the nature of the union in a court of law, it would not *eliminate* the need for such enquiries unless coupled with an extension of the cohabitation scheme to non-intimate couples. For example, in Belgium the *cohabitation légale*, a form of registered cohabiting partnership, is available to both those in intimate and non-intimate relationships, See Geoffrey Willems, 'Registered partnerships in Belgium' in Jens Scherpe and Andy Hayward (eds), *The Future of Registered Partnerships* (Intersentia 2017). See also Bérénice Delahaye, Fabienne Tainmont and Viviane Lebe-Dessard, *La cohabitation légale* (Larcier 2013). However, a core weakness of such an approach, as the Law Reform Commission *Rights and Duties of Cohabitants* (LRC 82, 2006) para 1.21 highlighted, is that it would be 'unlikely to benefit vulnerable couples since they are the least likely to formalise their relationship'.

50 S 1(2).

51 Alberta Law Reform Institute, *Property Division: Common Law Couples and Adult Interdependent Partners* (Final Report No-112, 2018) para 193. Note also the consideration given to the term 'conjugal relationship' in *Molodowich v Penttinen* (1980), 17 RFL (2d) 376 [16] (Ont Dist Ct) where the court found it was more than a synonym for sexual relationship. The 2018 report noted at para 4 that adult interdependent partners enjoy 'many of the same rights, benefits and obligations as spouses'. Since 2020, this includes in relation to the division of assets on relationship breakdown, see Family Property Act 2000 (as amended).

52 *Seanad* Deb 16 February 2005, vol 179, no 6.

unsuccessful Private Members Bill, the Civil Partnership Bill 2004, introduced by Senator David Norris. The then Minister for Justice, Michael McDowell, reflected on the question of '[e]xtending some State recognition to partnerships between persons who decide to create a relationship of mutual dependence, care and love between themselves, whether the relationship is heterosexual, homosexual or non-sexual'.<sup>53</sup> In particular, he recognised the need to 'consider the position of people whose relationship has no sexual element and who may need legal protection and recognition for what is de facto a relationship based on a community of property or income, which flows from a caring relationship between them'.<sup>54</sup> He suggested his support for recognising the needs of 'non-sexual people in a relationship of caring and dependency',<sup>55</sup> with backing for such recognition also evident soon after in the Law Reform Commission's 2006 *Report on the Rights and Duties of Cohabitants*.<sup>56</sup> However, influenced by the failure of the Law Commission for England and Wales' broad proposals for 'home sharers' in its Discussion Paper, *Sharing Homes*, the Irish Commission concluded that a scheme encompassing all cohabiting relationships had 'the potential to fail to address the underlying vulnerabilities and difficulties faced by those in an intimate relationship' and was thus taken no further.<sup>57</sup> Since then, the issue has fallen off the legislative agenda.

Despite this, while it would potentially be problematic to seek to include *all* cohabiting relationships, the inclusion of a definition akin to that adopted in Alberta could have the dual advantage of addressing the definitional and evidential difficulties associated with the need to establish sexual intimacy to prove the existence of a cohabiting

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53 Ibid.

54 Ibid. Note, a remedy may be available in equity in such cases under the doctrine of proprietary estoppel. However, whether such a claim would succeed would be highly fact-dependent and require proof of detrimental reliance by the applicant on a promise or an assurance made by the deceased.

55 Ibid.

56 See Law Reform Commission (n 49 above) para 1.02. The issue of non-conjugal relationships was also considered in the *Options Paper by the Working Group on Domestic Partnership* (2006). It noted at para 9.01.2 that 'individuals in other nonconjugal cohabiting relationships may also need legal protection and recognition for what is de facto a relationship based on a community of property or income, in other words, an interdependent relationship'. It declined to make recommendations, highlighting the need for further legislative review and reform.

57 Law Reform Commission (n 49 above) para 1.02 referring to the Law Commission for England and Wales, *Sharing Homes: A Discussion Paper* (Law Com No 278-2002). Deputy Charlie Flanagan TD stated that Fine Gael's Civil Partnership Policy Paper had also included reliefs for cohabiting couples in non-intimate relations. See *Dáil Deb* 3 December 2009, vol 697, no 1.

relationship for the purposes of the 2010 Act while simultaneously remedying the vulnerability of non-conjugal couples in situations of interdependency as identified by McDowell and recognised by the Law Reform Commission. As we re-imagine the recognition due to cohabiting *de facto* families under Irish law, the potential inherent in such reform would also seem particularly ripe for further investigation.<sup>58</sup>

## CONCLUSION

Given the shortfall in jurisprudence from the Superior Courts, it is impossible to draw any firm conclusions on how the threshold intimacy requirement is being applied in practice. While it appears that the evidential burden may vary case to case depending on the nature or duration of the relationship, as well as the strategy pursued by the respondent(s),<sup>59</sup> it is difficult to make concrete findings in this regard. What is clear, however, is just how intrusive and voyeuristic the enquiries into the sexual relationship enjoyed by a couple can be, particularly in the context of applications for relief under section 194.

Yet, notwithstanding that the Irish scheme places 'undue weight upon whether or not the parties enjoyed a sexual relationship',<sup>60</sup> reform with a view to redirecting this focus would require a considerable shift in both Irish law and policy. Whether legislation along the lines adopted in Alberta will thus be forthcoming seems somewhat unlikely in the near future. Despite strong arguments within academic discourse since the turn of the millennium on the

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58 While it is outside the scope of this note to fully interrogate the vulnerabilities of those in non-conjugal relationships, given the rise of assisted reproductive technologies and the increasingly heterogeneous nature of families, it is not difficult to imagine a scenario where an unmarried couple who have never shared a sexual relationship enjoy a caring and interdependent family life together with children of the relationship. Why the absence of physical intimacy should exclude a vulnerable party to such a relationship from accessing relief where appropriate under the 2010 Act is hard to explain and raises questions as to the purpose and function of relationship recognition under Irish law.

59 See above. Robert Leckey, 'Cohabitation, law reform, and the litigants' (2017) 31(2) *International Journal of Law Policy and the Family* 131, 139, highlights how litigation strategy has shifted its focus towards increasingly disputing the conjugal nature of relationships in Canada.

60 Brian Sloan, 'The concept of coupledness in succession law' (2011) 70(3) *Cambridge Law Journal* 623, 624.

need to look beyond conjugality in family law,<sup>61</sup> few legislatures have taken the plunge to date. An intermediate step forward could perhaps see the amendment of the Succession Act 1965 to facilitate applications for discretionary financial relief from a broader range of survivors, including, for example, surviving interdependent partners, irrespective of the sexual nature of the relationship.<sup>62</sup> Although such reform would not eliminate the focus on intimacy for all purposes, it would at least reduce its (questionable) role in the context of applications on death<sup>63</sup> and would mirror developments elsewhere.<sup>64</sup>

Ireland has come a long way since its characterisation in Brinsley McNamara's *The Valley of the Squinting Windows*. However, developments in Irish family law, particularly part 15 of the 2010 Act, though welcome in introducing potentially important protections for non-marital families, have the potential to re-introduce the need for intrusive enquiries into the private lives' of cohabiting couples. As this note has highlighted, such investigations are not inevitably required. Let us hope that the potential for the reform of this aspect of Irish family law receives the investigation that *it* deserves.

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- 61 See the Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Adult Relationships* (Public Works and Government Services Canada 2001) and Brenda Cossman and Bruce Ryder, 'Beyond *Beyond Conjugality*' (2017) 30(2) *Canadian Journal of Family Law* 227. Closer to home, see Jonathan Herring, 'Making family law less sexy ... and more careful' in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2014) 25–41. He argues at 40 that '[t]he way ahead is to focus on care, rather than sex'. See also Nicola Barker, 'Rethinking conjugality as the basis for family recognition: a feminist rewriting of the judgment in *Burden v United Kingdom*' (2016) 6(6) *Oñati Socio-legal Series* 1249–1275; Nausica Palazzo, *Legal Recognition of Non-conjugal Families: New Frontiers in Family Law in the US, Canada and Europe* (Hart 2021).
- 62 It might be appropriate to shift all provisions relating to applications on death from the 2010 Act and resituate them in the 1965 Act. Although it is beyond the scope of this note to tease out all the implications of such reform, amendments on these lines could be taken as part of a broader reform, widening the access to discretionary relief under the 1965 Act as advocated for by Kathryn O'Sullivan, 'Til death do us part': surviving spouses, civil partners and provision on intestacy in Ireland' (2016) 38(2) *Journal of Social Welfare and Family Law* 118–139.
- 63 Insisting on an intimacy requirement on death appears somewhat futile since only the parties to the relationship can usually speak to its sexual nature and thus the only other person, besides the applicant, to know the truth may be deceased.
- 64 Various Australian states and territories have introduced broader reforms facilitating access to discretionary provision for non-conjugal relationships in the context of succession while closer to home, in England and Wales, a 'dependant' may be eligible for provision in limited circumstances pursuant to its Inheritance (Provision for Family and Dependants) Act 1975. See section 1(1) (e). Note also the decision in *Re Watson (deceased)* [1999] 1 FLR 878 discussed in Daniel Monk, 'Sexuality and succession law: beyond formal equality' (2011) 19 *Feminist Legal Studies* 231. However, see further Sloan (n 60 above) 638.