RIGHTS FOR COHABITEES – WHO SHOULD QUALIFY?

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The recent Irish census figures reflect a shift, apparent in many other jurisdictions, away from marriage as the basis of the family unit. In 2002 cohabiting couples made up 8.4% of all family units compared to 3.9% in 1996.[1] Many jurisdictions have already introduced legislation improving the rights of cohabitees so that their legal position is equated with or at least brought closer to that of a married couple. Other jurisdictions, including England and Ireland, are in the process of examining how this area of the law could be reformed.[2] The purpose of this paper is not to discuss directly the rights and obligations which such legislation should confer on cohabitees but to illustrate the difficulties faced by the Irish legislature in attempting to identify a "qualifying cohabitee" for the purposes of such a scheme.

The term "cohabitees" is frequently used to describe same-sex and opposite-sex couples who are not married to each other and are living together in a long-term sexual relationship. However, the term can also be used more broadly to include persons who are living together in more temporary sexual relationships as well as those who are living together in relationships which do not involve a sexual element such as interdependent friends or siblings or carer-type arrangements. The tendency, when using this term in a legal context, is not to include those involved in commercial agreements such as those who are living together as lodgers, boarders or in the context of an employment relationship. In jurisdictions where the legal position of cohabitees is recognised, the parties do not access the rights available by simply living together. They are required to satisfy other criteria before they qualify as "cohabitees" for the purposes of the scheme. The approaches taken by these jurisdictions in identifying which cohabitees qualify can be broadly divided into the registration approach, the presumptive approach, the contractual approach and the proprietary approach.

The registration approach can be described as a formal, opt-in scheme of legal regulation. Cohabitees can only avail of the protection conferred by the scheme if they have registered their relationship. Under the presumptive approach, it is not necessary to register the relationship to be covered by the scheme. Cohabitees have access to the rights conferred if they can prove that they have been living together in circumstances resembling marriage for the requisite period of time. The minimum required period of cohabitation varies between jurisdictions. It is worth noting that under both the

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[1] In 2002, 77,600 family units consisted of cohabiting couples compared to 31,300 in 1996 – see Census 2002, *Principal Demographic Results* at 20, 21.

[2] The Law Commission of England and Wales has published *Sharing Homes: A Discussion Paper* (July 2002) Law Com No 278 and the Government of England and Wales has recently published a consultation paper, *Civil Partnership – A Framework for the Legal Recognition of Same-Sex Couples* (June 2003). It is anticipated that the Irish Law Reform Commission will publish a consultation paper on the *Rights and Duties of Cohabitees* in the near future.

registration and the presumptive approaches, an applicant, who has proved that he or she qualifies as a cohabitee, is not guaranteed relief. The court is generally bound to take into account a number of discretionary factors in deciding what order, if any, to make.[3] The registration and the presumptive approaches frequently incorporate aspects of the contractual approach. The contractual approach permits the court to enforce cohabitation and termination agreements whereby cohabitees attempt to agree privately on their respective rights and obligations in the event of the breakdown of the relationship. Under the proprietary approach the court recognises that certain contributions to the acquisition of property made by the non-legal owner are capable of generating a beneficial interest in that property.[4]

Defining a "qualifying cohabitee" is a task which must be faced by any legislature considering this area of law reform.[5] Deech notes that "it may be that one can never satisfactorily and exhaustively define cohabitation."[6] There will always be a demand for justice for those unions which do not fall within the definition of legally recognised cohabitation. She gives the example of a scheme which confers rights on couples who satisfy the requirement of having lived together for one year and points out that the rejected partner of the nine-month union would feel harshly treated.[7] Although it would be difficult to devise a set of qualifying criteria which would be sufficiently inclusive to keep everybody happy, it is submitted that, with some effort, it is possible to devise a scheme which targets those who are most in need of recognition and protection. It is also important to bear in mind that the qualifying criteria need not remain static. Other jurisdictions

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[3] For example, in New South Wales when the court is considering an application for a property adjustment order by a qualifying cohabitee, s 20 of the Property (Relationships) Act 1984 directs the court to have 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 the contributions made in the capacity of homemaker or parent, 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 . . . "

[4] It is interesting to note that under the proprietary approach there is currently no requirement that the parties live together before a beneficial interest will be recognised.

[5] The Law Commission of England and Wales in its discussion paper on *Sharing Homes*, *supra* n 2, identified a need for the law to recognise and to respond to the increasing diversity of living arrangements and recommended that further consideration should be given to the registration and the presumptive approaches. These approaches were described as focusing on the nature of the parties' relationship and thus broadly based on "status." While the Law Commission pointed out that any status would have to be clearly and readily identifiable, it went on to state that the definition of such status involved broad questions of social policy which fell outside the present project and which were in any event more appropriate for political debate and decision, rather than for a law reform body – see Part V.

[6] Deech, "The Case against Legal Recognition of Cohabitation" (1980) 29 *ICLQ* 480 at 482.

[7] *Ibid.*

have demonstrated that the scope of the scheme can easily be expanded to include other beneficiaries as societal attitudes develop and change.[8]

The task of identifying who the most important targets of the scheme should be is complicated by the fact that cohabitation legislation is expected to satisfy a wide range of very different agendas: the eradication of discrimination on the basis of sexual orientation; the protection of vulnerable family members; the recognition of contributions towards the welfare of the family such as housework or caring for older relatives or young children; the recognition of interdependent platonic relationships, the encouragement of long-term exclusive relationships and the recognition of the right of cohabitees to privately order their own affairs. It has been argued that the scheme should not result in a situation where obligations are foisted on couples who may have deliberately chosen not to get married to avoid such a result and also that the qualifying criteria should be easily proved. No single approach can achieve all of these aims. This paper discusses the extent to which each approach attains these aims and attempts to devise a set of criteria which allows the most deserving cohabitees to qualify for protection.

The Registration Approach

The jurisdictions which adopt the registered partnership approach to the issue of cohabitees include Denmark, Norway, Sweden, Finland, Iceland, the Netherlands, Germany, certain municipalities in the USA and Canada and the Spanish regions of Catalonia and Aragon. England and Wales, with the exception of a recent prolonged flirt with the feasibility of an amended proprietary approach,[9] currently seem to be fixated on a registration approach. Jane Griffiths' Relationships (Civil Registration) Bill[10]and Lord Lester's Civil Registration Bill[11] were recently debated in Parliament and in June 2003 the Government published a consultation paper proposing an alternative civil partnership scheme.[12]

The advantages of a registration approach are obvious. Firstly, as a formal opt-in scheme, it neatly avoids a situation where obligations are foisted on couples who decided not to get married in order to avoid those obligations. Secondly, the qualifying criterion is easy to prove – the partnership is either registered or it is not. The registration approach avoids the difficulties of proof inherent in the presumptive approach. The main reason however, why the registration approach appears to be so popular is that it permits same-sex couples to formalise their relationships and receive the benefits of marriage. It would seem, therefore, to achieve the twin goals of eradicating discrimination against same-sex couples and encouraging long-term

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[8] Although the original New South Wales *De Facto* Relationships Act 1984 only permitted claims by opposite-sex couples, in 1999 the legislation was expanded so that under the renamed Property (Relationships) Act 1999 claims by same-sex couples and those living together where one provides the other with domestic support or personal care are also permitted.

[9] The amended proprietary approach was investigated and rejected as unworkable in the Law Commission's discussion paper on *Sharing Homes*, *supra* n 2.

[10] Bill 36, 2001–02.

[11] HL Bill 41, 2001–02.

[12] *Supra* n 2.

committed relationships amongst the same-sex population. Registration offers governments a substitute for gay marriage in a climate where there may be a fear that its introduction could "result in a major backlash from the political right and the fundamentalist and evangelical religious lobbies."[13] The consultation paper published by the Government for England and Wales refers to a recent survey[14] which found that marriage increases a person's life satisfaction and happiness by an amount equivalent to an additional annual income of £72,000. It was argued that civil partnership would therefore provide similar social and psychological benefits to same-sex couples equivalent to an increase in collective annual income of £6.1 billion to £62.2 billion depending on the take-up.

Most jurisdictions which operate a registration approach and the most recent proposals by the Government for England and Wales only permit same-sex couples to register their relationships.[15] The reason for the restriction is that opposite-sex couples already have the right to formalise their relationship through marriage. Although in its proposals, the Government for England and Wales acknowledged that some opposite-sex unmarried couples could be in a vulnerable position following the breakdown of the relationship, it was keen to differentiate them from the same-sex couples who want to formalise their relationship and cannot. The government stated that it did not believe that the solution for those vulnerable opposite-sex couples was to offer them another way of entering into an equally formal kind of legal commitment to each other.[16]

Under Lord Lester's Civil Partnerships Bill and Jane Griffith's Relationships (Civil Registration) Bill registration was to be open to both opposite and same-sex couples. In the Netherlands, registration has proved quite popular amongst opposite-sex couples.[17] Jurisdictions which permit opposite-sex couples to register their partnership may be attempting to cater for those who are ideologically opposed to marriage. Forder notes however that:

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[13] Bowley, "A Too Fragile Social Fabric?" (1995) 145 *NLJ* 1883. The Netherlands would appear to be exceptional in permitting same-sex couples the option of registered partnership and also marriage since 2001. Germany has also introduced a form of gay marriage. The consultation paper on civil partnership published by the Government of England and Wales specifically refers to the fact that it is a matter of public record that the Government has no plans to introduce same-sex marriage – *supra* n 2, at para 1.3.

[14] The Cabinet Office Life Satisfaction Survey available from <www.strategy.gov.uk/2001/futures/attachments/ls/paper.pdf>.

[15] In Denmark, Norway, Finland, Sweden, Iceland and Germany registration is only permissible in the case of same-sex couples while in the Netherlands registration is permissible in the case of both same-sex and opposite-sex couples. Of the municipalities in the USA which have domestic partnership registers, five of them allow only same-sex couples to register while thirty-five of them allow both same-sex and opposite-sex couples to register.

[16] *Supra* n 2, at para 2.8.

[17] Of the 4,237 registrations which took place in the eleven months from January to November 1998, 1,353 (one-third) were between a man and a woman – Scherf, *Registered Partnership in the Netherlands, A Quick Scan*. WODC, The Hague, March 1999.

> "the advantages to opposite-sex couples of entering partnership are obscure. The institution of partnership carries mostly the same rights and obligations as marriage. If opposite-sex couples are hoping to escape the symbolism of marriage it is difficult to appreciate that such is achieved by entering into an institutions which seeks to copy it."[18]

Alternatively, making registration available to opposite-sex couples may be designed to avoid the ghetto effect of a law which only applies to same-sex couples. It could be argued that allowing opposite-sex couples to avail of the same status would be of symbolic value to same-sex couples.

It is debatable whether the registration approach achieves its primary goal of eradicating discrimination against same-sex couples who wish to have their relationships recognised by the State. In Australia, the Gay and Lesbian Rights Lobby have repeatedly expressed concerns about registration arguing that while it purports to give legitimacy to relationships, it would in fact establish a hierarchy of legally recognised relationships and be seen as a second best option, i.e. it would be viewed less favourably than marriage.[19]

The most convincing indicator that the registration approach fails to meet its main objective is the fact that very few couples tend to register their partnerships. The consultation paper published by the Government of England and Wales puts forward two alternative take-up scenarios. The high take-up scenario was optimistically based on the marriage rate projections produced by the Government Actuary's Department and assumes that by 2050 the civil partnership rate among the same-sex population would be the same as the marriage rate among the opposite-sex population, i.e. 33%. The low take-up rate was based more realistically on the average rate of take-up for such schemes in Denmark, Sweden, Norway and the Netherlands. This evidence makes it reasonable to assume that the rate of civil partnership registration in the same-sex population is more likely to be 10% of the marriage rate i.e. about 3.3%.[20] The most likely reason for the low take-up is the reticence of same-sex couples to make a public affirmation of their sexual orientation. Inglis notes that in most societies:

> "gay men and lesbians are exposed to physical assault, verbal abuse and discrimination . . . It would be wrong therefore to make rights (for cohabitees) dependent upon a public declaration about sexuality."[21]

The Government of England and Wales acknowledged that some same-sex couples may want the fact of their registration to remain private for fear of homophobic attacks but felt that a public register was more appropriate where registration confers rights and responsibilities that flow between the couple and the state and between the couple and third parties such as employers. It pointed out that the implementation of the proposals in the Government's White Paper on Civil Registration: Vital Change would

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[18] Forder, "European Models of Domestic Partnership Laws: The Field of Choice" (2000) 17 *Can J Fam L* 371.
[19] Gay and Lesbian Rights Lobby, *The Bride Wore Pink* (2nd ed, 1994) ch 8.3.
[20] *Supra* n 2, Annex A(1).
[21] Inglis, "We are family (after all) – Inclusive Family Law" (2001) 31 *Fam LJ* 895.

restrict the public's access to certain information, for example, addresses and occupations. If civil partnership registration was delivered by the local registration service, the public record of such events would be subject to the same arrangements.[22] It remains to be seen if these safeguards will be sufficient to encourage a higher take-up amongst the same-sex community.

The main disadvantage with the registration approach stems from the fact that only joint applications are generally permissible.[23] Therefore, even if you do permit opposite-sex couples to register their relationship, it fails to protect many vulnerable cohabitees. It fails to protect the cohabitee who is involved in a relationship with someone who for financial or ideological reasons does not wish to formalise their relationship by marriage or registration. The need for a change in the law to protect the financially vulnerable partner in a non-marital relationship was highlighted as long ago as the decision in *Burns* v *Burns*.[24] The registration approach also fails to cater for the couple who, through inertia or ignorance of how the law treats their status, fail to register. Although common law marriage has been unknown in English law for nearly 250 years, a widespread faith in this non-existent legal status has led to collective inertia so far as the 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. It is interesting that the proposals by the Government for England and Wales make no reference to the fact that jurisdictions which restrict registration to same-sex couples generally extend certain other rights to opposite-sex couples or to same-sex couples who fail to register. A safety-net is in place creating tiers of rights. The Swedish Cohabitees Joint Homes Act 1987 and the Norwegian Right to a Common Residence and Household Chattels Act 1992 provide cohabitees who have not registered their relationship with certain rights in relation to the family home on the termination of the relationship by death or otherwise. In Denmark such cohabitees have a right to apply to the court for compensation from the partner who owns the majority of the assets. The Law Society for England and Wales in its recent proposals regarding reform of the law on cohabitation recommended the introduction of a registration system which would be limited to same-sex couples but also recommended that all couples should be permitted access to certain rights available under a presumptive approach.[25] The Law Commission of England and Wales in its recent discussion paper acknowledged that the legal recognition of registered partnerships would have a relatively limited impact and recommended consideration of the presumptive approach.[26]

Although it is not the norm, the registration approach can cater for those cohabitees, usually relatives, who are involved in platonic interdependent or caring relationships. Currently, most registered partnership systems prohibit the registration of a relationship between relatives. The Civil Partnership proposals for England and Wales reflect this trend prohibiting people from

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[22] *Supra* n 2, paras 4.13 – 4.17.
[23] Panama, Guatemala and Cuba seem to be exceptional in this regard in permitting only one partner to apply for registration of a 'union de hecho.'
[24] [1984] Ch 317.
[25] Law Society for England and Wales, *Cohabitation – The case for Clear Law* (July 2002).
[26] *Supra* n 2, at para 5.45.

registering a partnership if they are related by close blood or half-blood ties, adoption or degrees of affinity. The Catalan Mutual Assistance Act passed on 16 December 1998 allows persons who are involved in a relationship of mutual assistance or involving the care of the elderly to execute a notorial deed which gives them certain entitlements where one party dies or the union terminates. It is submitted that the need for this kind of legislation in Ireland is questionable. The myth of common law marriage does not exist amongst interdependent siblings or friends. They are under no illusions concerning the status of their relationship and do not in general need the protection of the law. While those caring for elderly relatives are perhaps slightly more vulnerable, any inadequacies in the current state of the law could be dealt with through reform of the social welfare system[27] and succession law.[28]

All registered partnership schemes seem preoccupied with the encouragement of exclusive relationships. A person who is already in a registered partnership or who is married cannot register their new relationship until the previous relationship has been dissolved. The Government of England and Wales in its consultation paper explained the restriction as being designed to protect people from unwarily entering into relationships that are not exclusive and to prevent registered partners from finding themselves subject to various sets of competing legal obligations.[29] It would be difficult to justify the existence of bigamy laws and at the same time to tolerate contemporaneous registered partnerships and so it seems that this approach can only comfortably cater for cohabitees who are unmarried or who are not currently in a registered partnership. The arguments in favour and against protecting the rights of a cohabitee who is in a relationship with a person who has not yet divorced his or her spouse will be dealt with in the context of examining the presumptive approach.[30]

The Presumptive Approach

Australia, New Zealand and Canada have led the way in relation to the presumptive approach. The main advantage of this approach is that the couple do not have to register their relationship to benefit from the scheme. It therefore protects the most vulnerable cohabitees: those who are in a weaker bargaining position and so may not be in a position to insist on marriage or registration or those who assume they have rights or drift along in a relationship without thinking of the consequences. It may also be more effective in eradicating discrimination against same-sex couples in that it

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[27] The carer's allowance and the carer's benefit currently available are considered to be completely inadequate. Both could be increased substantially.

[28] The Succession Act 1965 could be amended to permit an application for provision to be made out of a deceased person's estate where the applicant provided domestic care or support for the deceased for a certain length of time before his/her death for which they will not be properly compensated if the order is not made.

[29] *Supra* n 2, at paras 3.3 – 3.5.

[30] This paper does not discuss the less contentious requirements that both parties are of an age at which they can legally marry and that at least one of them is domiciled in the relevant jurisdiction or at least habitually resident there before they can register their relationship. Similar requirements also apply in order to access the rights available under the presumptive approach.

does not require them to make a public affirmation of their sexuality. One disadvantage is its potential for imposing obligations on a couple who may have decided not to marry to avoid such a result. Couples who do not wish to be governed by a presumptive regime are generally permitted to opt out by making their own cohabitation or termination agreements which will be enforced by the courts provided that the agreement was freely entered into and certain other procedural matters are complied with. The danger that couples are not of aware of the need to opt out of the scheme could, it is submitted, be minimised by a widespread publicity campaign.

The main disadvantage is that the qualifying criteria are not as straightforward as under the registration approach. Couples must generally prove that they were living together in a 'marriage-like' or a '*de facto*' relationship for the requisite period of time. In New South Wales, section 4(2) of the Property (Relationships) Act 1984 provides a list of factors which the court is required to consider in determining whether two persons are in a *de facto* relationship:

- the duration of the relationship;
- the nature and extent of the common residence;
- whether or not a sexual relationship existed;
- the degree of financial dependence or interdependence and any arrangements for financial support between or by the parties;
- the ownership, use and acquisition of property;
- the care and support of children;
- the performance of household duties;
- the degree of mutual commitment and mutual support; and
- the reputation and public aspects of the relationship.[31]

These factors indicate the intrusive scrutiny that a relationship has to undergo before a claim can proceed. It is worth noting that courts are not in general unused to applying similar criteria to establish whether a couple are cohabiting or living apart in the area of social welfare law or divorce.[32]

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[31] Section 4(3) of the Property (Relationships) Act 1984 provides that "no finding in respect of any of the matters mentioned in subsection 2(a)(i) or in respect of any combination of them, is to be regarded as necessary for the existence of a *de facto* relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case."

[32] See *Foley* v *Minister for Social Welfare* [1989] ILRM 169 where Gannon J considered the meaning of the phrase "cohabiting as man and wife" for the purposes of social welfare law. Generally, a determination of cohabitation is made by a social welfare tribunal using guidelines issued by the Department for Social, Community and Family Affairs which include factors such as whether the individuals reside in the same house and household, whether they represent themselves to the outside world as husband and wife, the stability of their relationship and the existence of a sexual relationship between them. The 'living apart' caselaw in the area of judicial separation and divorce shows the courts

The second prerequisite is proof of cohabitation for a minimum period of time. The length of time varies from jurisdiction to jurisdiction. The disparity of approach seems very arbitrary. Some would argue that there should not be a minimum cohabitation period.[33] Others go even further and maintain that there should not be any cohabitation requirement. Gay lobbyists argue that many couples do not live together for fear of a homophobic reaction.[34] Not requiring a minimum cohabitation period would make the ambit of the legislation extremely broad but it is very important that the scheme makes adequate exceptions for certain applicants who cannot prove they lived with their partners for the requisite period of time. In New South Wales the Property (Relationships) Act 1984 recognises three exceptions to the minimum cohabitation requirement of two years. A couple may apply for relief even if they have not lived together for two years: if they have a child together; if the applicant has made substantial contributions for which she would not be adequately compensated if the order were not made; or if the applicant has the care and control of a child of the respondent. In these circumstances the court must also be satisfied that the failure to make the order would result in serious injustice to the applicant. [35]

Although the original New South Wales *de facto* relationship legislation[36] only permitted claims by opposite-sex *de facto* partners, the legislation was amended in 1999 so that claims can currently be made by persons in a "domestic relationship." A domestic relationship consists of either a "*de facto* relationship," which includes both opposite and same-sex cohabiting couples, or a "close personal relationship" which is defined as a relationship between two adults whether or not related by family, who are living together where one provides that other with domestic support or personal care.[37] The Standing Committee on Social Issues has since recommended that the definition of a "close personal relationship" should be broadened to encompass a wider range of interdependent personal relationships which do

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grappling with the issue of when a married couple cease to live in the same household – see *McA* v *McA* [2000] 2 ILRM 48.

33 "Whether or not there was in existence a *de facto* relationship between parties to the application should be a question of fact to be answered by a court in the individual case and it is submitted that the issue should not be determined merely by establishing that the parties cohabited for the statutorily prescribed period"– Sheehan, "'Til Death do us part?': The rights of Cohabitees – Is statutory reform the answer? Part II – Legislative Intervention – The Australian Approach." [2001] 1 *IJFL* 12.

34 See, for example, Hayley Katzen's seminar paper at "A Discussion Forum on Relationships and the Law" (Sydney, 7 July 2000). This argument is also particularly strong in the case of carer type arrangements which may exist where the parties do not live together.

35 The Law Society for England and Wales in its proposals has suggested that remedies should be limited to cohabitees who have cohabited for a continuous period of two years or more or who have cohabited and have a relevant child together. The Society took the view that if the parties are living together and have a child this is proof of commitment to the relationship, regardless of the length of time that the parties have lived together – *supra* n 25, at para 57.

36 The *De Facto* Relationships Act 1984.

37 Section 5(1)(b) of the Property (Relationships) Act 1984.

not involve an element of care.[38] It also recommended that those in a close personal relationship would not be required to cohabit. Cohabitation would be just one of a number of factors which would be considered in deciding whether a close personal relationship exists. As has already been mentioned in the context of the registration approach, the need for such an inclusive approach in Ireland, at the moment, is questionable.

Another advantage of the presumptive approach is that, although it is not the norm, it is capable of extending protection to a person who is living with someone who is separated but still married but to his/her former partner. For example, the Property (Relationships) Act 1984 does not restrict access to cohabitees who are unmarried. It could be argued that a scheme which restricts access to cohabitees who are unmarried is necessary to promote exclusive relationships and to prevent situations arising where there may be competing claims between a spouse and a cohabitee. It could be argued that in Ireland such a restriction is especially necessary because of Article 41.1.1 of the Constitution which imposes on our courts the duty to guard with special care the institution of marriage and to protect it against attack. However, limiting the scheme in this way would leave a substantial number of cohabitees in a very vulnerable position. The 2002 Irish census figures reveal that about one-quarter of cohabiting couples without children were unions in which one or both partners were divorced or separated while 41.2% of the cohabiting couples with children were in unions in which one or both partners were divorced or separated. Unfortunately, the statistics do not identify how many of these partners were separated but had not, as yet, obtained a divorce. It seems reasonable to assume, considering the low divorce rate in Ireland, that the majority were not, as yet, divorced.[39] There are many reasons why the separated party may not have applied for a divorce. Firstly, couples who wish to obtain a divorce must be able to prove, at the date of the institution of proceedings, that they have been living apart for a period of, or periods amounting to, at least four years during the previous five years.[40] In other jurisdictions it is much easier for couples to get a divorce which means that restricting access to cohabitation rights to single couples is not quite as harsh. Secondly, there is the cost in terms of time and money involved. Thirdly, there may be a reluctance to disturb the status quo and the feeling that an application will leave the financially stronger party open to being 'fleeced.' None of these reasons justify excluding the cohabitee living with a married but separated person from the scheme.

The strongest argument which can be made against allowing access to the scheme to a cohabitee who is living with someone who is still married to a former partner is that an order made in favour of such a cohabitee will reduce

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[38] "Domestic Relationships: Issues for Reform – Inquiry into *De Facto* Relationships Legislation", Report No 20, December 1999.

[39] Although the number of divorces obtained over the last few years has been steadily increasing, the figures are still relatively low. Up until 31st December 2001 a total of 12,051 divorce orders were granted in Ireland – see the Courts Service, "Family Law Statistics Bulletin on Judicial Separation, Divorce and Nullity" Vol 1, Issue 1, December 2002. See also Census 2002, *Principal Demographic Results* at 18.

[40] Section 5(1)(a) of the Family Law (Divorce) Act 1996.

the property available for distribution when the spouse applies for a divorce. The New South Wales Property (Relationships) Act 1984 provides the court, when hearing a claim from a cohabitee, with the power to adjourn proceedings to allow the Family Court to decide the spouse's claim.[41] It is submitted that it would be possible to include a cohabitee who is living with someone who is still married within the scope of the scheme and at the same time respect the rights of spouses. The rights of the spouse would, it is submitted, be adequately protected if there was a requirement to make any spouse of the cohabitee a notice party to any proceedings brought by a qualifying cohabitee. If, within a reasonable period of time following receipt of the notice, the spouse applies for a divorce, the court would be required to stay proceedings between the cohabitees until the divorce proceedings had been dealt with. These provisions would ensure that the spouse gets 'the first bite of the cherry.' However, as has already been mentioned, inertia is not the only reason why couples fail to divorce. The couple may not have lived apart for the requisite period of time. Serving notice on a spouse in this situation will not protect her rights as she will not be in a position to apply for a divorce. Such difficulties could avoided by making the required minimum period of cohabitation for the purposes of accessing the presumptive scheme the same length as the minimum period which a couple are required to live apart before one of them can apply for a divorce. This would mean that a married person could not become involved in a qualifying relationship under the presumptive scheme unless he or his spouse was also in a position to apply for a divorce.

The Contractual Approach

A contractual approach involves the enforcement of cohabitation and termination agreements. Termination agreements are entered into by a couple to organise their financial affairs and other matters if they are thinking of separating or have already separated.[42] A cohabitation agreement can be defined as an agreement to cohabit and to provide for the parties' rights and the division of assets in the event of a breakdown of the relationship. If a couple merely wish to set out their respective beneficial interests in the family home and their rights and obligations in relation to that property they may simply execute a declaration of trust.[43] A cohabitation agreement is more extensive and:

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[41] Section 22(1) of the Property (Relationships) Act 1984. Note that s 61(b) of the Wills Probate and Administration Act 1898 (as amended) which sets out the New South Wales intestacy rules contains detailed provisions to deal with competing claims between the spouse and the cohabitee. It provides that if the intestate dies leaving a spouse and a cohabitee, the cohabitee takes the share of the spouse if the intestate and the cohabitee were living together for at least two years prior to the death and during that time the intestate did not live with the spouse. In any other case, the spouse takes the share.

[42] If the couple were married it would be referred to as a separation agreement.

[43] The Law Commission for England and Wales in paras 2.42–2.52 of *Sharing Homes*, *supra* n 2, emphasised how important it was that a couple who intend to live together make express provision for their mutual rights and obligations in the shared property in a declaration of trust. See also the dicta of Ward LJ in *Carlton* v *Goodman* [2002] EWCA Civ 545 at para 44.

> "may deal with other issues which are likely to arise during the parties' relationship, some financial (such as responsibility for the upkeep of the house), others not (such as the performance of domestic tasks, the sharing of child care, the frequency of holidays, even the regularity of sexual intimacy)."[44]

In many jurisdictions there has been a question mark over the legality of cohabitation agreements. Unless very clear language is used, the court may question whether the parties intended to create legal relations. If the contract is not made by deed, it will be unenforceable unless it is supported by consideration.[45]

The most controversial issue however has been the tendency, especially, in older decisions,[46] to set aside such agreements as being contrary to public policy. In a recent High Court case, *Ennis* v *Butterly*,[47] Kelly J dismissed a claim based on the breach of a cohabitation contract. He held that such contracts were unenforceable because they were contrary to the public policy of the State as expressed in our Constitution and the common law. He was of the view that to enforce a contract of this nature would be to give it a similar status in law to that enjoyed by a marriage contract. This would be to disregard Article 41.1.1 of the Constitution where the State pledges to "guard with special care the institution of marriage on which the family is founded, and protect it from attack." Mee disagrees with Kelly J's approach and notes the constitutional and legislative protections which are triggered by entering into a marriage contract but which are not available to those who enter into a cohabitation contract.[48] Kelly J attempts to back up his constitutional argument by referring to the fact that there has not as yet been an attempt by the legislature to substantially enhance the legal position of cohabitees. He states that "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, certain rights for cohabitees have been introduced by that legislature[49] which would seem to considerably weaken this line of argument. Also, Kelly J fails to consider that the legislature may not have gone further in conferring rights on cohabitees, not because it accepted that it was unconstitutional to do so, but because up until recently the extent of cohabitation in this country seemed to lag behind the trend elsewhere. The demand for more rights for cohabitees may not have been sufficiently strong. In any event, other caselaw would seem to indicate that the constitutional

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[44] Bridge, "Private Ordering: Sharing Homes and the Role of Contractual Regulation" delivered at the Annual Seminar of the Centre for the Study of Family Law and Social Policy, University of Staffordshire, 1st February 2003.

[45] See Pawlowski, "Cohabitation Contracts – Are They Legal?" (1996) 146 *NLJ* 1125 for a discussion of the problems with enforcing cohabitation agreements.

[46] See for example *Walker* v *Perkins* (1764) 1 Wm Bl 517 and *Beaumont* v *Reeve* (1846) 8 QB 483.

[47] [1996] 2 IR 248.

[48] Mee, "Contract Law – Public Policy for the New Millennium" (1997) 19 *DULJ* 149 at 156.

[49] Section 3 and s 4 of the Domestic Violence Act 1996 permit cohabiting couples to obtain barring or safety orders and s 151 of the Finance Act 2000 exempts cohabitees from capital acquisitions tax in respect of an inheritance or gift of property which comprises their principal private residence.

protection afforded to the institution of marriage does not prevent certain rights and protections being introduced for cohabitees, it just prevents such couples being treated more favourably than a married couple. In *Murphy* v *Attorney General*[50] 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. In *Hyland* v *Minister for Social Welfare*[51] the Supreme Court held that a married couple could not be paid less social welfare benefit or assistance than a cohabiting couple. Therefore, legislation which increases the rights of cohabitees to bring them closer to the position of a married couple is permissible as it does not result in the married couple being treated less favourably. Also, it should be noted that although currently non-marital families have no constitutional protection[52] it is unlikely that this will remain the position for very long.[53]

Kelly J also bases his decision on the fact that the cohabitation agreements are contrary to public policy at common law. His discussion of the case law on this point is completely inadequate. He mentions *Beaumont* v *Reeve*[54] although he is at pains to stress that this decision can only be regarded as representing public policy in England in 1846. He notes that cohabitation agreements would be enforceable in California due to the decision in *Marvin* v *Marvin* where the Californian Supreme Court held that "express contracts between non-marital partners should be enforced except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services."[55] However, his discussion of the Marvin decision is purely for the purposes of pointing out a divergence of approach between the State courts in relation to the enforceability of implied cohabitation contracts. The most startling aspect of the judgment of Kelly J is his failure to make any mention of Irish society's increased acceptance of cohabitees. A line of authority based on public policy must, given the very nature of public policy, be susceptible to development and change. As Bowen LJ noted in *Maxim Nordenfelt Guns and Ammunition Co* v *Nordenfelt*[56] "rules which rest upon the foundations of public policy, not being rules which belong to the fixed or

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[50] [1982] IR 241.
[51] [1989] IR 624.
[52] See *State (Nicolaou)* v *An Bord Uchtala* [1996] 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*, Supreme Court, unrep, July 1996.
[53] See the calls for a constitutional amendment to guarantee protection to the family not based on marriage in the *Report of the Constitution Review Group* (Dublin Stationary Office, May 1996) p 331. Also, the adoption of the European Convention on Human Rights by Ireland (operative since 31st December 2003) will have implications in this area because of the decision of the Court of Human Rights in *Keegan* v *Ireland* (1994) 18 EHRR 342 where it was held that the notion of family which is protected under Article 8 of the European Convention on Human Rights is not confined exclusively to marriage-based relationships and may encompass other *de facto* family ties, where the parties are living together outside of marriage.
[54] *Supra* n 46.
[55] (1976) 18 Cal (3d) 660 at 665, *per* Tobringer J.
[56] [1893] 1 Ch 630.

customary law, are capable, on proper occasion, of expansion or modification."[57]

Bearing in mind all of these considerations it is submitted that *Ennis* v *Butterly* is not as large an obstacle to the enforcement of cohabitation contracts as it may first appear.

It is interesting to note that as far back as 1988 the Committee of Ministers of the Council of Europe adopted a recommendation that national governments should take steps:

> "to ensure that contracts relating to property between persons living together as an unmarried couple, or which regulate matters concerning their property either during their relationship or when their relationship has ceased, should not be considered invalid solely because they have been concluded under these conditions."[58]

One advantage of a contractual approach to the difficulties faced by cohabitees is that the only pre-requisite to enforcing the rights conferred by the contract is compliance with certain procedural safeguards designed to ensure that the weaker party is not exploited. The parties are not required to prove that they are living in a *de facto* relationship, that they are interdependent or that one is providing the other with domestic support or personal care. This approach is therefore capable of extending a certain amount of protection to those involved in a very broad range of relationships. The New South Wales Law Reform Commission has listed certain other advantages of cohabitation contracts (referred to as "domestic relationship agreements") and termination agreements. They enable parties to:

- plan their future financial affairs with some degree of certainty;
- avoid the costs, time and emotional trauma of a court imposed decision;
- keep their personal affairs private, rather than airing them publicly in open court proceedings; and
- tailor the agreement to best suit their particular circumstances.[59]

Other points which are frequently made about such agreements are as follows:

> "Parties are more likely to be satisfied with agreements they negotiate themselves and are therefore more likely to comply with agreements made voluntarily. Some critics have argued that many of the perceived benefits of legally binding agreements are not realistic. For example, rather than reduce litigation, agreements may create more disputes, as parties argue over the validity of the agreement and the interpretation

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[57] *Ibid*, at 661.
[58] Recommendation (88) 3, adopted on 7th March 1988.
[59] Discussion Paper 44 (2002) – Review of the Property (Relationships) Act 1984 (NSW) Law Reform Commission Publications at para 4.20.

> of terms. They also point out that people may not have the means to bring a case challenging the validity of the agreement."[60]

The main criticism that is made of these types of agreements is that there is a large risk that the court will set them aside for duress, undue influence, unconscionability or misrepresentation. Frequently, the parties will not have equal bargaining power. It is submitted that the risk of such agreements being rendered unenforceable on these grounds could be reduced substantially if procedural safeguards were put in place to ensure that both parties fully understand and consent to the agreement. For example, in New South Wales the Property Relationships Act 1984 requires certain conditions to be satisfied in order for a cohabitation agreement or a termination agreement to be binding. Section 47(1) provides that both parties must obtain independent legal advice and the agreement must be accompanied by a certificate from a solicitor which certifies that he advised the party independently of the other as to the effect the agreement would have on his/her rights, whether it was to his/her advantage, whether it was prudent to sign it and whether it seemed fair and reasonable. If these conditions are not satisfied the court may however still have regard to the agreement when making an order if it is satisfied that the agreement was fully understood and freely entered into. This leads us on to another advantage of cohabitation agreements. Even cohabitation agreements which do not satisfy all necessary conditions to make them binding can be a useful tool if there is a dispute, as they can be used as evidence of what the parties intended with respect to their financial affairs. They can also be a useful register of the parties' assets and liabilities, so long as those assets and liabilities are fully disclosed.[61]

Where, in spite of compliance with the safeguards, inequality of bargaining power exists, there may be circumstances justifying the court in setting aside the agreement under the common law. The court may be able to set aside the contract for duress, undue influence, unconscionability and misrepresentation. Also, provisions in relation to custody, access and maintenance of children will not be binding as these matters are generally within the exclusive jurisdiction of the courts. In New South Wales, even if the procedural safeguards have been complied with, the court has a residual power to set aside or vary a cohabitation agreement where it is of the view that the circumstances between the parties have so changed since the agreement was made that to enforce it would lead to serious injustice.[62]

The Law Society for England and Wales has argued against giving legal force to cohabitation contracts and has pointed out that it would seem illogical to allow cohabitants to make enforceable cohabitation contracts when married couples cannot make enforceable prenuptial contracts. It seems fairer that the two groups should be treated alike. [63] If cohabitation

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[60] *Ibid*, at paras 4.36–4.37.
[61] *Ibid*, at paras 4.13–4.14.
[62] Section 49 of the Property (Relationships) Act 1984.
[63] *Supra* n 25, at paras 161–162. It is interesting to note that the Law Society appears to have changed its opinion in this respect as in 1999 the Family Law Committee of the Law Society for England and Wales recommended the introduction of legislation to make cohabitation contracts between unmarried

agreements and termination agreements were enforceable it could be argued that a discrepancy between the treatment of such contracts between cohabitees and their treatment when entered into between spouses would be introduced, with the contractual freedom of cohabitees being afforded more recognition.

Pre-nuptial agreements have traditionally been regarded as unenforceable because they anticipate the future demise of the marriage and so are contrary to the common good and public policy.[64] With the introduction of divorce in Ireland, it could be argued that since it is now legally permissible to dissolve a marriage, an agreement which envisages its possible dissolution can no longer be regarded as contrary to public policy and so should be enforceable. The difficulty, however, is that divorce is only constitutionally permissible in Ireland in circumstances where proper provision can be made for the spouses and for any children of either or both of them.[65] Section 14 of the Family Law (Divorce) Act 1996 makes an express reference to the power of the court to grant a property adjustment order providing, *inter alia*, for "the variation for the benefit of either of the spouses and of any dependent member of the family . . . of any ante-nuptial or post-nuptial settlement made on the spouses." While these provisions do inhibit the individual rights of two parties to contract freely, they were designed with the best interests of the family as a whole at heart and they ensure, in particular, that the vulnerable members of the family are adequately protected on divorce. It is submitted that where a pre-nuptial agreement succeeds in making proper provision for the dependant spouse or family there should be no legal difficulty in making ancillary orders which reflect its provisions. Although "the terms of any pre-nuptial agreement" are not specifically mentioned in section 20 of the 1996 Act as one of the discretionary factors which the court must have regard to in deciding what ancillary orders should be made, the list of discretionary factors is not exhaustive and the court is directed to have regard to all the circumstances.

Separation agreements appear to have a slightly more elevated status in Irish family law and it could be argued that this is justified given that such an agreement is designed to take into account the circumstances as they exist at the date of the separation. It will therefore be more recent than a pre-nuptial agreement and, as such, the circumstances of the parties are less likely to have changed significantly and so its terms are more likely to be fair. Separation agreements are enforceable except in so far as their terms relate to the custody and access to a child where the provision is contrary to the child's welfare or where they seek to prevent a spouse for applying for

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couples enforceable – see "Cohabitation: Proposals for Reform of the Law," Family Law Committee of the Law Society (September 1999) paras 70 *et seq*. The Law Society advocated a number of procedural safeguards, including requirements that full financial disclosure by both parties should have taken place and that each party should have received independent legal advice before signing the agreement.

64 See *Re Hope Johnstone; Hope Johnstone* v *Hope Johnstone* [1904] 1 Ch 470 and *Marlborough* v *Marlborough* [1901] 1 Ch 165.

65 Article 41.3.2 (iii). A very similar condition is also set out in s 5(c) of the Family Law (Divorce) Act 1996. See Crowley, "Pre-Nuptial Agreements – Have They Any Place in Irish Family Law" [2002] 1 *IJFL* 3.

maintenance. If the spouses obtain a divorce, the court in deciding to make ancillary orders is required to have regard to the terms of any separation agreement which was entered into between the spouses and is still in force.[66] If the court is satisfied that the terms of the agreement ensure proper provision for the spouses and any dependent child of the family[67] then it may deem it unnecessary to make any ancillary orders or it may make ancillary orders reflecting the terms of the agreement. If the court is satisfied that the terms of the separation agreement do not make such proper provision, it may order new ancillary arrangements. In this situation, the court is required to determine whether it would be in the interests of justice, having regard to the circumstances of the particular case, to order ancillary relief which is at variance with previously agreed arrangements.[68]

It would appear that the New South Wales rules governing the enforceability of termination agreements seem to confer the courts with less scope to set aside or vary the terms of such agreements. The court may only set aside or vary the terms of cohabitation agreements where it is of the view that the circumstances between the parties have so changed since the agreement was made, that to enforce it would lead to serious injustice. Termination agreements will be fully enforced by the courts unless the procedural prerequisites are not complied with. In contrast, the Irish courts when granting a divorce are constitutionally obliged to ensure that proper provision is made for spouses and dependent children, and can therefore ignore a separation agreement unless this would case injustice.

In summary, a scheme which enforces cohabitation and termination agreements would seem to result in more recognition being given to the contractual freedom of cohabitees. However this would seem to be unavoidable as the Constitution requires the retention of the current judicial powers to intervene where necessary to protect the marital family in the context of a divorce.[69]

It could be argued that the only reform which is necessary is legislative clarification of the fact that cohabitation agreements and termination agreements will be recognised and enforced by the courts. It could be maintained that there is no need to introduce a legislative scheme, registered

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[66] Section 20(3) of the Family Law (Divorce) Act 1996. See *K(M)* v *P(J)(orse. K (s))* SC unrep 6th November 2001.

[67] See Article 41.3.2 of the Constitution and s 5(1)(c) of the Family Law (Divorce) Act 1996.

[68] Section 20(5) of the Family Law (Divorce) Act 1996.

[69] See also Cretney, "Private Ordering or Not? How far can we go: Private Ordering and Divorce" delivered at the annual seminar at the Centre for the Study of the Family, Law and Policy, Staffordshire University, 1st February 2003. It is perhaps worth noting in this context that the limited recognition afforded to separation agreements in applications for ancillary relief on the grant of a judicial separation/divorce has been identified as a flaw in the legislation which prevents "couples resolving the financial and proprietary consequences of marital breakdown on a 'full and final' or 'clean break' settlement basis and …preserves an open gate to adversarial court proceedings, irrespective of what a couple agree"– Shatter, *Family Law* (4th ed, 1997) para 7.76.3. It could be argued that this 'flaw' should not be replicated in the context of the provisions applicable to cohabitees.

or presumptive, to protect cohabitees; that a contractual approach will provide sufficient protection. It is clear however, that the enforcement of cohabitation and termination agreements will only protect a minority of couples. People are less likely to enter into a cohabitation agreement, which involves the hammering out of numerous issues, than they are to register their relationship. Cohabitation agreements are often perceived as unromantic. The New South Wales Law Reform Commission found little evidence documenting how often cohabitation agreements are entered into, but what little there was, suggests that few cohabiting couples make cohabitation agreements.[70]

It is submitted that cohabitation and termination agreements have an important role to play in any regime which gives increased protection to cohabitees. The major disadvantage of a system limited to private regulation between the parties themselves is that if no agreement is made or the agreement made is set aside due to undue influence or duress, the parties are left with no legal protection. It is clear therefore that a contractual approach should only play a subsidiary role within a comprehensive scheme of protection. Both registered and presumptive cohabitation regimes usually permit the enforcement of private cohabitation agreements or termination agreements regarding the couples' mutual rights and obligations. These agreements operate in priority to the court's jurisdiction to adjudicate disputes between qualifying cohabitees. Therefore, where the agreement is not binding or no agreement was entered into, the financially weaker cohabitee is still entitled to the protection of the law.

The Proprietary Approach

Australia, Canada and New Zealand relied solely on a proprietary approach to the issue of cohabitees until legislative schemes for the protection of cohabitees were introduced.[71] In England and Ireland the only possible remedies available to a cohabitee on the breakdown of the relationship continue to be proprietary ones: the trust and the doctrine of proprietary estoppel. In Ireland, these are also the only remedies available where a cohabitee dies intestate or without making adequate provision for the surviving cohabitee in his or her will.[72]

Although the doctrine of proprietary estoppel has the potential to provide a remedy in circumstances where an interest would not be generated under the

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[70] *Supra* n 59, at para 4.13.

[71] Australia, Canada and New Zealand use the concepts of unconscionability, unjust enrichment and reasonable expectations respectively in order to justify the imposition of a constructive trust where there is a dispute over the ownership of a shared home. These more flexible approaches permit the courts to recognise that non-financial contributions such as work in the family home may give rise to an interest under the constructive trust but they also tend to lead to greater uncertainty and unpredictability – see Mee, *The Property Rights of Cohabitees* (1999).

[72] In England and Wales a cohabitee may qualify as a person who can apply for family provision under s 1(1)(ba)(a) or s 1(1)(ba)(e) of the Inheritance (Provision for Family and Dependants) Act 1975. Under s 2 of the 1975 Act the court is permitted to modify either the will of the deceased or the rules of distribution on intestacy if it is satisfied that reasonable financial provision has not been made for the applicant.

purchase money resulting trust (for example, where the claimant carries out work in the home[73] or makes improvements to the property),[74] it is generally regarded as ill-equipped to provide a solution in the case of cohabitees. This is because of the tendency in an intimate relationship to avoid discussion of separate property rights which means that a claimant will have difficulty proving that there was a representation by the defendant that the claimant would be entitled to some interest in the disputed property. Also, judicial assumptions concerning appropriate gender roles in these relationships may make it difficult for a claimant to prove that the detriment was incurred in reliance upon the relevant representation.[75]

In Ireland disputes between cohabitees over the ownership of the family home are sometimes resolved using the purchase money resulting trust.[76] The caselaw clearly establishes that unless there is an express or an implied agreement to the contrary, a direct or indirect contribution to the purchase price of a property will generate a beneficial interest in the property on the part of the contributor proportionate to the extent of the contribution.[77] This approach focuses solely on the fact of a contribution to the purchase price of property. The relationship between the parties or even the fact of cohabitation seem to be completely irrelevant.[78] The disadvantages associated with the purchase money resulting trust doctrine are well documented. The main criticism is that although unpaid work in the legal owner's business while the mortgage is being repaid is regarded as an indirect contribution to the purchase price capable of generating a beneficial interest,[79] unpaid work in the family home is not regarded in the same light.[80]

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[73] In *Greasly* v *Cooke* [1980] 1 WLR 1306 the claimant had, as a young woman, entered the household as a maid. Over the years, her position changed and she became the lover of one of the sons of the family. For many years she worked in the home and took care of her lover'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. When her lover died without making provision for her in his will, the Court of Appeal held that she had acted to her detriment by continuing to care for the family and failing to take steps to obtain alternative employment. An estoppel arose in her favour and she was permitted to live rent free in the house for as long as she wished to do so.

[74] In *Pascoe* v *Turner* [1979] 2 All ER 945 the man left the home which belonged to him after a relationship lasting eight years, repeatedly telling the woman that the house and its contents belonged to her, although no action was taken to formalise the position. In reliance on his statements and with his knowledge, she spent a 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 the court ordered that the house be transferred into her name.

[75] See Mee, *supra* n 71, p 102.

[76] See *McGill* v *S* [1979] IR 283 and *Power* v *Conroy* [1980] ILRM 31.

[77] See *C* v *C* [1976] IR 254 and *McC* v *McC* [1986] ILRM 1.

[78] Gannon J in *McGill* v *S* [1979] IR 283 referred with approval to the dictum of Lowry J in *McFarlane* v *McFarlane* [1972] NI 59 at 78, which pointed out that the claims of a wife depended "not on her deserts as a wife but on legal principles which are equally applicable between strangers." Note however that the presumption of advancement may apply in the case of a married couple.

[79] See *EN* v *RN* [1992] 2 IR 116 where the wife managed bed-sitter flats into which part of the house had been converted.

In addition, paying for improvements to the property in cash will not generate a beneficial interest[81] but repaying a mortgage obtained for such a purpose will generate a beneficial interest.[82] An impractical effect of the proportionate interest principle is that it requires a couple to keep track of their contributions. The common intention constructive trust which is the device preferred by the English courts to resolve the same problems has also received its fair share of criticism. To establish an interest under this device the courts must be satisfied that an express or implied common intention existed between the parties that the claimant was to get a share and that the claimant relied on this intention and suffered a detriment as a result.[83] The search for a common intention between the parties concerning the beneficial ownership of the home is frequently criticised because in reality couples rarely discuss such issues.[84] The main disadvantage with the English approach is that there seems to be some confusion over whether the courts will imply a common intention to share the beneficial ownership where the contribution to the purchase price is indirect.[85] The extent of the beneficial interest depends not on the amount of contributions but on the common intention between the parties as to how the beneficial interest was to be shared and there has also been some criticism of the arbitrary results which this method of quantification can lead to.[86] A disadvantage common to both the purchase money resulting trust and the common intention constructive trust is that post acquisition contributions will not generate an interest in the property.

The Law Commission of England and Wales in its discussion paper on Sharing Homes[87] attempted to devise a scheme which would deal with the problems of home-sharers but which would not suffer from the disadvantages associated with the common intention constructive trust.

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[80] See *BL* v *ML* [1992] 2 IR 77 where the Supreme Court refused to award a beneficial interest to the wife on the basis of her redecoration and refurbishment of the family home.

[81] *W* v *W* [1981] ILRM 202, *NAD* v *TD* [1985] 5 ILRM 153.

[82] See *EN* v *RN* [1992] 2 IR 116. This anomaly was pointed out by Mee in "Trusts of the Family Home: The Irish Experience" [1993] *Conv* 359 at 363.

[83] *Per* Lord Diplock in *Gissing* v *Gissing* [1971] AC 886.

[84] See Gardner, "Rethinking Family Property" (1993) 109 *LQR* 263 at 265 and Glover & Todd "The Myth of Common Intention" (1996) 16 *LS* 325.

[85] According to Lord Bridge in *Lloyds Bank plc* v *Rosset* [1991] 1 AC 107 a common intention will only be inferred where there is a direct financial contribution to the purchase price of the property by means of an initial capital payment or payment of mortgage instalments. He felt that "it is at least extremely doubtful whether anything less will do" – *ibid*, at 133. However in *Le Foe* v *Le Foe* [2001] 2 FLR 970 the court awarded the wife a beneficial interest on the basis of her indirect contribution where no direct contributions had been made and no express common intention could be identified.

[86] The Law Commission, *supra* n 2, at paras 2.83–2.87, has contrasted the result reached in *Midland Bank Plc* v *Cooke* [1995] 4 All ER 562 with that reached in *Drake* v *Whipp* [1996] 1 FLR 826. In the former case Mrs Cooke, whose financial contribution to acquisition of the property amounted to 6.47% of the total cost, received a half share in the equity while in the latter case Mrs Drake, who made a financial contribution amounting to 19.4% of the total expenditure on the property, received only a third share in the equity.

[87] *Supra* n 2.

Property would come within the scope of the scheme where it constituted a shared home and one person had a legal or beneficial interest in it. The scheme would not apply where there was a valid express arrangement dealing with the beneficial ownership of the property. The Commission wished, in so far as possible, to pay no regard to the nature of the relationship between the persons who were sharing the home. It was of the opinion that such an approach was central to a property-based scheme in which contributions were to be objectively assessed. However, minors and people who were sharing a home as part of a commercial arrangement, such as boarders or lodgers, were to be excluded from the scheme. Under the scheme a relevant contribution by a home-sharer would give rise to a presumption of a beneficial interest proportionate to the amount of the contribution and this interest would arise at the date the contribution was made. The relevant contributions would include both direct and indirect financial contributions to the acquisition, retention or improvement of the shared home. The Commission also proposed that post-acquisition contributions and home-making and caring contributions would be capable of generating an interest under the scheme but the court would not have regard to non-financial contributions unless the parties could prove that they shared a house for a minimum of two years. In assessing the economic value of the contributions made by each party the courts would be directed to take a broad brush approach which would neither be arbitrary or over precise. A deduction could be made for any countervailing benefits e.g. free accommodation received by the claimant.

One advantage of the scheme examined by the Law Commission was its broad scope. Only minors and those who were home sharing as part of a commercial relationship would be excluded. It provided a remedy for friends or siblings who had made contributions as part of a platonic interdependent home-sharing arrangement. It also allowed for the recognition of contributions to the welfare of the family such as housework or caring for children or elderly relatives. In spite of its apparent broad scope the Commission acknowledged however that the scheme would still exclude certain people who seemed deserving, for example carers who were not living with the elderly person they were caring for. In order to qualify for protection under the scheme the home must be shared, one party must have a legal and beneficial interest in it and a relevant contribution must have been made. In the case of a claim based on non-financial contributions the additional criterion of proving that the parties had been sharing the home for a minimum period of two years must be satisfied. Not having to prove the existence of a *de facto* relationship between the parties means that the qualifying criteria under the proprietary approach are considerably easier to prove than under the presumptive approach.

Using two worked examples the Commission concluded that it was not possible to devise a statutory scheme for the determination of shares in the shared home which would operate fairly and evenly across all the diverse circumstances which are now to be encountered. The first example concerned a couple in their sixties whose son, aged 22, comes to live with them having dropped out of college. He lives there for ten years, during which he does not make any financial contribution towards the acquisition of the home as the mortgage has already been paid off. However, he does make significant contributions to the household budget and pays for some

improvements to the home and helps his parents with their shopping and around the home. He does not pay anything by way of board and lodging. The second example concerned a man who is the owner of a house over which there is a mortgage. His partner who is expecting his child, comes to live with him and they live together for ten years. She makes no direct financial contribution to the house but during that time she assumes primary responsibility for the day-to-day care of their child and does almost all of the necessary housework. The Commission was of the opinion that the scheme did not allow any flexibility to take account of the different nature of the relationship between the parties in the two different situations. For example, it seemed fair to make a deduction for the countervailing benefit received by the son in living rent free in the house but not for the partner. The conclusion reached was that, in determining which person should be able to claim beneficial entitlement under the scheme, the nature of the relationship between the legal owner and the claimant would be impossible to disregard. Indeed, it is the nature of that relationship which would dictate the answer to the problem.

The second major difficulty with the proprietary approach is that only one remedy is available – a beneficial interest in the shared home. If the home is rented the vulnerable cohabitee is left 'high and dry.' The presumptive and registration approaches generally allow a qualifying cohabitee access to a wide range of ancillary relief such as maintenance orders and property adjustment orders on the breakdown of the relationship or succession rights on the death of the other cohabitee. Such remedies will frequently be more appropriate than a beneficial interest in the family home. Also, under the proprietary approach the court may only take into account relevant contributions in assessing the level of the beneficial interest, but under the presumptive and registration approaches, in deciding whether to grant relief or its extent, the court may be permitted to take a number of other relevant factors into account – for example, the present and future income and earning capacity of both cohabitees; the financial needs, obligations and responsibilities which each of the cohabitees has or is likely to have in the future; and the effect which the relationship has had on the claimant's future earning capacity.

Despite these difficulties it is submitted that an improved proprietary approach has a role to play within the context of a presumptive scheme which also allows qualifying cohabitees access to other rights, such as ancillary orders on the breakdown of the relationship and succession rights on the death of the other cohabitee. The English experience demonstrates that it may be more workable to restrict access to the improved proprietary scheme to a narrower range of homesharers. Contributions which are not recognised under the current law, such as contributions to the welfare of the family or to the improvement of the property, made by spouses or cohabitees who qualify under the presumptive approach would generate a beneficial interest in the family home. Countervailing benefits could be ignored as platonic interdependent or carer type relationships would not be included within the scope of such a scheme. Such a legislative change would only amount to a slight doctrinal extension of the existing law on the purchase money resulting trust. It would eliminate the anomalies in relation to the treatment of improvements to property and the current judicial discriminatory treatment of 'female type' contributions. Allowing post

acquisition contributions to generate a beneficial interest would, it is submitted, be stretching the "purchase" money resulting trust too far. Such contributions are not in reality contributions to the acquisition of the home but are contributions to the couple's joint lives and it would be more appropriate to consider them in the context of obtaining ancillary relief on the breakdown of the relationship.

The advantage of acquiring a beneficial interest under the purchase money resulting trust is that it accrues at the moment of the contribution and not at the moment of a court order. Therefore, it has the potential to bind a third party where the legal owner attempts to sell or mortgage the property without the knowledge or consent of the other cohabitee. It would also be useful in the event of the legal owner being declared bankrupt as the beneficial interest in the property would not form part of the bankrupt's estate. A qualifying cohabitee who has made a recognised contribution may be able to prevent the registration of a judgment mortgage against any beneficial interest he/she has in the family home and if one has already been registered, the cohabitee may succeed in preventing any steps being taken by the judgment mortgagee to sell it.[88]

A criticism which is frequently made of an approach which recognises a contribution in the form of work in the home is the difficulty in assessing its value. Those involved in the cleaning or child care business do not seem to have any problems in assessing the value of their work so it is unclear why the courts should have excessive difficulties. One inconvenience of the approach is the requirement to keep track of contributions under the proportionate interest principle. Obviously keeping track of contributions is a difficulty but the only way to get around such a requirement would be to impose on spouses or qualifying cohabitees an automatic beneficial joint tenancy or a presumption of a beneficial joint tenancy over the family home. Such an approach has the advantages of certainty and would reduce the need for litigation in this area. Such a change was attempted in Ireland in the Matrimonial Home Bill 1993 which was struck down as unconstitutional in that it infringed the authority of the family to make decisions concerning ownership of property.[89] Recent Northern Irish proposals in relation to matrimonial property have made such an approach topical again.[90] It is

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[88] Where a judgment mortgage is being registered against the family home, recognising the new types of contributions will also provide additional protection to spouses as s 3 of the Family Home Protection Act 1976 does not apply in such circumstances. See *Containercare (Irl) Limited* v *Wycherley* [1982] IR 143.

[89] *In the matter of Article 26 of the Constitution and in the matter of the Matrimonial Home Bill 1993* [1994] 1 ILRM 241

[90] Law Reform Advisory Committee for Northern Ireland, *Matrimonial Property* LRAC No 8 (2000). These proposals involve the introduction of legislation which would provide that a presumption of a beneficial joint tenancy would apply in relation to the joint residence of spouses and qualifying cohabitants. In order to qualify, cohabitees would be required to have been living together for at least two years in the previous three years or have a child as a result of the relationship. The presumption of a beneficial joint tenancy over the joint residence would be triggered where the spouses or qualifying cohabitees are living together and one transferred the property to the other, or one transferred it to both of them or where one purchased it or both of them purchased it unless the parties expressly agreed otherwise in writing.

submitted that such an approach is over-inclusive in failing to take into account the manner in which the property was acquired and the contributions made by both spouses to its acquisition. Also, it seems reasonable to suggest that the impetus for such a radical change in the law is simply not in existence in Irish society, especially given the almost paranoid concern of the Irish with property rights in general. It is perhaps worth noting that the Law Commission for England and Wales in their initial reports in 1971, 1973 and 1978 recommended statutory co-ownership for spouses in relation to the matrimonial home[91] but in its 1988 report[92] the 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 inappropriate 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."[93]

One of the main reasons for the introduction of legislation which provides for the automatic imposition of joint beneficial ownership over the family home is that it reflects a sharing ideology of marriage. 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.[94] Relationships are 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 appalled by the automatic imposition of a beneficial joint tenancy on the acquisition of a family home.

CONCLUSION

When devising the qualifying criteria which cohabitees must satisfy in order to access a scheme conferring improved rights an attempt must be made to target those most in need of protection. Currently society's sympathies seem to rest primarily with the cohabitee in a long-term same-sex relationship and the cohabitee in a long-term opposite-sex relationship who has sacrificed his /her earning capacity to look after the children of the relationship. Despite

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[91] *Family Property Law* (1971) Law Com No 42; *First Report on Family Property: A New Approach* (1973) Law Com No 52; *Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods* (1978) Law Com No 86.

[92] *Family Law, Matrimonial Property* (1988) Law Com No 175.

[93] Hale, "Family Law Reform: Wither or Whither" (1995) *CLP* 217 at 228–229.

[94] 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.

the difficulties in proving the existence of a *de facto* relationship, it is submitted that the flexibility of the presumptive approach and its capacity to protect the most vulnerable makes it superior to the registration approach. The low take-up rate amongst the same-sex population in jurisdictions which operate a registration approach indicates that such an approach is not as successful at targeting this group of cohabitees as legislatures anticipated. If the contractual approach and the improved proprietary approach were incorporated into the presumptive approach it would be possible to satisfy many of the agendas, mentioned at the beginning of this paper, which underlie the demand for reform of the law in this area. Where a valid cohabitation or termination agreement complying with certain procedural safeguards is in existence this would govern the rights of the parties. In the absence of such an agreement or where the agreement has been set aside, a cohabitee would access the rights available under the scheme if he/she can prove that he/she lived in a *de facto* (opposite-sex or same sex) relationship for a period or periods amounting to four years during the previous five years. The judiciary would have the power to dispense with the need to satisfy the minimum cohabitation requirement in certain circumstances where the interests of justice required it. In order to acquire a beneficial interest in the family home under the improved proprietary approach, a cohabitee who qualifies under the presumptive approach would also have to prove that he/she made a contribution to its acquisition in the form of work in the home or paying for improvements. Access to the scheme would not be restricted to unmarried cohabitees but where a spouse is involved, the applicant would be required to make the spouse a notice party to the proceedings between the cohabitees. If this gave rise to an application by the spouse for a divorce, the proceedings between the cohabitees would have to be stayed pending the resolution of the divorce proceedings. Those involved in platonic interdependent and carer type relationships would not qualify as cohabitees for the purposes of accessing the rights available under the scheme. However, as the parties to a cohabitation or termination agreement would not be required to prove the existence of a *de facto* relationship or cohabitation for a minimum period in order to enforce the agreement, those involved in these types of relationships would at least be permitted to privately order their affairs.[95]

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[95] As has already been mentioned, it would also be possible to cater for those in carer type arrangements by increasing the carer's allowance/benefit and by amending the Succession Act 1965 – see *supra* n 27 and n 28.