

Community of property

A regime for England and Wales?

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First published in Great Britain in November 2006 by

The Nuffield Foundation
28 Bedford Square
London
WC1B 3JS
UK

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ISBN-10: 0 904956 62 8

ISBN-13: 978 0 904956 62 7

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The **Nuffield Foundation** is a charitable trust established by Lord Nuffield. Its widest charitable object is 'the advancement of social well-being'. The Foundation has long had an interest in social welfare and has supported this project to stimulate public discussion and policy development. The views expressed are however those of the authors and not necessarily those of the Foundation.

Produced by The Policy Press
University of Bristol
Fourth Floor, Beacon House
Queen's Road
Bristol BS8 1QU
UK
www.policypress.org.uk

Cover design by Qube Design Associates, Bristol
Printed in Great Britain by Latimer Trend, Plymouth

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Preface

This report is the fruit of a research project, funded by the Nuffield Foundation and conducted at the Universities of Reading and Exeter from October 2004 to June 2006. It is also a product of the authors' many years of experience researching and teaching family law, and of their frustration with the inadequacies of the law relating to financial provision for divorcing couples and for separated cohabitants. We have tried to shed some European light on the problem, while recognising that perfect law in this area is impossible.

We would like to extend our warm thanks to the Nuffield Foundation for the funding they have provided, and for publishing this report; and to The Policy Press for producing this report. We would also like to thank the members of the project's Advisory Board, whose help has been invaluable: Professor Dr Katharina Boele-Woelki of the University of Utrecht; Dr Margareta Brattström of the University of Uppsala; Maître Olivier Herrnberger of GZH Notaires, Paris; Stuart Bridge, Law Commissioner for England and Wales; and Cheryl Morris of the Law Society when the project began and latterly of the Law Commission. Finally, we would like to make special and very grateful mention of the research assistants who worked with us, and without whom we would have no findings to write about. Augustina Akoto worked at the University of Reading from October 2004 to March 2006. She carried out the interviews for the European phase of our project.

From April to September 2005 the project had another assistant, Peter Petkoff, who was based at the University of Exeter; he and Augustina carried out the interviews in England and Wales during that period.

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Community of property: traditions and trends

Community of property is one example of a matrimonial regime: that is, the systematic organisation by the law of property rights that result as an automatic consequence of certain relationships – traditionally marriage and more recently registered partnerships. In its most traditional form, community of property provides for the automatic sharing of property and liabilities during the relationship; and all forms of community of property provide for a rule-based sharing of property when the community is dissolved by divorce or death.

It has been said that ‘a matrimonial property regime is an institution unknown to English law’.¹ It is not unknown in the common law world. A number of North American states have adopted a system of community property and in Scotland the concept of community is used for property allocation on the dissolution of marriage, although it is not so called. In England and Wales there has been a consistent refusal to impose any formal regime of property rights upon the entering into of a formalised relationship. A change in that position was considered on a number of occasions in the second half of the 20th century; but community of property has been rejected by law

reform commissions² as being ‘extremely complicated’ and ‘unjust’,³ although it has found favour with some academic commentators.⁴

Why, then, have we chosen to research community of property and to consider whether it might offer a regime for England and Wales? In this jurisdiction, marriage has no effect on the status of property of the spouses: each spouse holds their property separately. Of course, upon divorce or death, statutes provide a framework within which judges can redistribute property;⁵ equity too comes to the aid of hard-done-by spouses and

¹ Cretney, S., Masson, J. and Bailey-Harris R. (2002) *Principles of Family Law*, London: Sweet & Maxwell, para 4-002, p 102. Dicey felt that community of property in particular would be ‘radically opposed to English habits’: Dicey, A.V. (1962) *Lectures on the Relations between Law and Public Opinion in England during the Nineteenth Century* (2nd edition, preface E.C.S.Wade), p 387.

² For example, the Morton Commission rejected it as early as 1956: *Royal Commission on Marriage and Divorce*, Cmnd 9678, London: HMSO; in 1988, the English Law Commission again feared it would be too complex to adopt a matrimonial regime based on community: (1988) *Family Law: Matrimonial Property*, Law Com no 178, London: HMSO, para 3.6.

³ Morton Commission (1956) *Royal Commission on Marriage and Divorce*, Cmnd 9678, London: HMSO, note 2, para 651.

⁴ In the late 1980s a Working Group from the Institute of Fiscal Studies proposed a form of community of property for England and Wales, but the report was not acted upon: Freedman, J., Hammond, E., Masson, J. and Morris, N. (1988) *Property and Marriage: An Integrated Approach*, IFS Report Series no 29, London: Institute of Fiscal Studies.

The feasibility of adopting a community of property regime has also been discussed in Ireland: see Buckley, L. (2002) ‘Matrimonial Property and Irish Law: A Case for Community?’, *Northern Ireland Legal Quarterly*, vol 53, no 39.

⁵ Upon divorce, the Matrimonial Causes Act 1973; upon death, the Inheritance (Provision for Family and Dependents) Act 1975.

cohabitants through the use of trusts.⁶ One advantage of the English system may be said to be the scope to devise a bespoke solution for each couple, appropriate to their individual needs. However, the undesirable corollary to this is that the outcome of any one particular case is uncertain. Difficulties with the current discretionary system in England and Wales within the framework of the Matrimonial Causes Act 1973 are well known,⁷ as is the unsatisfactory position of cohabitants.⁸ The first reason for our investigation is the need to pursue any source of improvement to the law in England and Wales of financial provision on relationship breakdown.

The stimulus for this particular inquiry was the fact that the idea of community of property can be seen to be present in judicial reasoning, and in particular in the idea of the ‘yardstick of equality’ inaugurated in *White v White*⁹ in 2001 and seen in numerous decisions of the higher courts since then. The development of a community system by the courts rather than by the legislature is arguably causing considerable uncertainty;¹⁰ if this is the direction in which judicial thinking is going, is there scope for a more systematic approach? A further reason is the interest of the European Commission in the promotion of consistent family law, in the interests of the free movement of persons; the Green Paper *On Conflict of Laws in Matters Concerning*

*Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition*¹¹ was published too late to be discussed in detail in this Report, but its imminent publication seemed to us to be a reason why community of property should be better understood in this jurisdiction.

This chapter looks at the different forms of community of property regimes, and in particular the ones studied in this project. It considers the current trends in those regimes, and then explains our own research questions.

Introduction to community of property regimes

Community of property regimes are well established on the continent, where in a number of jurisdictions they represent (in one form or another) the default matrimonial property regime.¹² By ‘default’ regime, we mean the regime to which couples are subject unless they opt out by contract. Community regimes are situated at the crossroads of family and property law: on the one hand, the family structure created through the marriage union is promoted by way of protection for the family as a whole and its material needs, notably the need to protect the family home; and on the other hand, there is protection for the property of the individuals who make up the couple. Consequently, most matrimonial regimes provide for a primary, obligatory regime from which no derogation can be made. In most jurisdictions, this represents the minimal requirements flowing from the union itself: implicit in any marriage is the duty to be faithful and the

⁶ See, for example, *Lloyds Bank Plc v Rosset* [1991] 1 AC 107.

⁷ For a recent discussion, see Eekelaar, J., ‘Miller, the descent into chaos’ *Fam Law* [2005] 870. However, not all believe that reform of s 25 of the 1973 Act is necessary: see Solicitors Family Law Association submission to the Lord Chancellor’s Advisory Group on Ancillary Relief: *Proposals for Reform of Ancillary Relief Law*, July 1998, London: HMSO.

⁸ See, for example, the Law Society’s proposals for reform: (2002) *Cohabitation: The Case for Clear Law*, London: The Law Society; Barlow, A., Duncan, S., James, G. and Park, A. (2005) *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century*, Oxford: Hart Publishing.

⁹ A clear expression of this can be found in the House of Lords decision in *White v White* [2001] AC 596; see Chapter 4, at p 28.

¹⁰ In particular, following the decision in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24 and the lack of consensus about the nature of ‘non-matrimonial property’ seen in the judgments in that case.

¹¹ European Commission (2006) *On Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition*, COM (2006) 400 Final, 17 July, Brussels: European Commission.

¹² Such is the case, to varying degrees, in the Netherlands, France, Sweden and Germany; and further afield in South Africa and some North American states. For a socio-legal analysis (in French) of the French, Dutch and Swiss systems, see Braat, B. (2004) *Indépendance et interdépendance des époux dans le régime matrimonial légal des droits français, néerlandais et suisse*, European Family Law series, Antwerp: Belgium Intersentia.

obligation for both spouses to meet the everyday needs of the unit.¹³ Moreover, protection for the family home generally figures in the primary regime, requiring to a greater or lesser extent that disposition of the family home is possible only with the consent of both spouses, irrespective of who actually owns it.¹⁴ The primary regime is then supplemented by a secondary regime, which may take a number of forms. In some jurisdictions there is complete freedom to draw up marriage contracts detailing the division of property (such is the case in France), whereas in others, couples must choose from a selection of regimes proposed by the law (such is the case in South Africa). If a couple does not adopt an express contract, the law provides for a default regime to supplement the primary regime.

All matrimonial regimes, whether prescribed by law or freely chosen by the couples in their marriage contract, are concerned with three issues:

- (1) the division of power over property during the marriage (who can dispose of what);
- (2) the division of wealth at the end of the marriage (who gets what); and
- (3) in both instances, the division of debts (who pays what).

Although initially construed to be long lasting (for the duration of the marriage) the regime is nevertheless temporary and will end on the dissolution of the marriage. Moreover, it is generally possible for a couple to change regime during the marriage so as to adapt to the changing family structure and requirements.

Community can be immediate or deferred. Immediate community will create the community

¹³ In the Netherlands and France, the respective Civil Codes require mutual 'fidelity, assistance and support': Dutch Civil Code, Article 1:81, French *Code Civil*, Article 212.

¹⁴ Swedish Marriage Code, chapter 7, s 1; Dutch Civil Code, Article 1:88; French *Code Civil*, Article 215. Other European jurisdictions and those influenced by civil law (eg South Africa and some North American states) provide for similar limitations on disposition of the family home. In England, there is only very limited control of disposition of the family home for the non-owning spouse by virtue of s 30 of the Family Law Act 1996.

as soon as the marriage comes into existence; deferred community means that it will not exist until the relationship comes to an end. Immediate community not only provides entitlement for the non-earning spouse on divorce or death, but also grants rights in the community from the very beginning of the relationship. It creates an identifiable body of jointly owned property, alongside the property owned by the two spouses individually. It also provides a source upon which creditors of the couple may draw. In deferred community, ownership of property is unchanged during the relationship. However, upon dissolution of the relationship, the community will come into existence from the pooling of individual property and be shared between the spouses.

Community of property: origins and scope

Origins

In its most basic form, community of property originates in the ideology of the community of persons created through the marriage union. One text on French family law states that it is unthinkable that the union would be of anything other than both persons *and* property.¹⁵ On a more pragmatic level, considerations such as the joint enterprise that marriage represents, the sharing of breadwinner and homemaker roles and the care of children all suggest that marriage is a partnership not only of persons, but also of their contributions to the partnership, be they material or practical. Consequently, where the law deems it necessary to regulate the property rights of the parties by virtue of their formal relationship, community presents itself as a logical default position. The law provides an empty pot into which the parties will contribute for the benefit of both the union and their own individual interests. Yet the joint enterprise approach is a creature of modern-day thinking and the social desire to see legal

¹⁵ Chauveau, V. and Poivey-Leclercq, H. (2001) *Droit de la Famille, Guide Juridique*, Paris: Seuil, p 223. See too, Kahn-Freund, O. (1955) 'Matrimonial property in England', in W. Friedman (ed) *Matrimonial Property Law*, Toronto: Stevens & Sons, pp 267-8.

recognition not only of the marriage union, but also of a more informal, yet equally committed, relationship for cohabitants. The origins of community lie rather in the legal incapacity of the wife, the desire to keep property within the family (at a time when land was a major source of wealth) and on the basis that marriage was for life. All three elements are far removed from the reality of marriage (and other intimate relationships) at the beginning of the 21st century.

There are traditionally two ways of perceiving community: (i) within the context of unity of administration which vests all property in one spouse for the benefit of the couple (at least during the marriage); or (ii) as a form of joint ownership and management which recognises property rights of the two spouses over identified communal property (which may range from property acquired only after the marriage (excluding inheritance) to all property held by both spouses, regardless of when it was acquired and including inheritance). The former was the position in England and Wales until the Married Women's Property Act 1882 and translated the incapacity of the woman in legal matters and her subservient position to her husband. The 1882 Act, however, clearly enshrines the separate nature of property held by each spouse. As a result, the rejection of any community system went hand in hand with the emancipation and proclaimed equality of women with men. This necessarily requires individuals to keep control over their own property. The joint ownership approach, on the other hand, is also compatible with the need for equality between the spouses and also ensures protection for property, such as the family home, which is of importance to the family as a whole. It also entitles the non-earning spouse to some property by virtue of the marriage union. Consequently, the emancipation of women has been translated in some jurisdictions into the reform of community legislation, such as in Sweden¹⁶ and in France. In this context, the equality of the sexes is promoted through the recognition that in the traditional division of roles within a marriage, there may be one breadwinner

and one homemaker, but that both activities are of equal value to the marriage union and consequently any property of the union must be held in community for the benefit of both spouses. However, the scope of the community will vary.

The scope of community

The extent of the community, whether immediate or deferred, may be vast: at its most basic, it is limited to property acquired during the marriage but excludes inheritance, gifts and personal insurance proceeds even if acquired during the marriage; at its most extensive, it includes all property held by either or both spouses from before and during the marriage and includes inheritance. The idea of community means that whatever property falls into the pot it will be divided 50:50 between the spouses on the dissolution of the marriage. As we shall see below when we examine some concrete examples, the 50:50 rule may be rigid in some regimes, while in others there may be some flexibility for variation of the shares taking into account certain variables, such as the length of the relationship, or the gains made on property during the relationship. Interestingly (particularly from an English law perspective) immediate community does not only mean community of wealth, it also involves community of debts. There is joint liability for debts relating to the community, and the community can also be liable for individual debts. This is a dramatic expression of the 'for better, for worse' of the marriage ceremony! Once again, the extent to which the community will be liable varies according to the regime and also according to the nature of the relationship.

Because community of property *stricto sensu* is alien to English law, and because there is in general very little analysis of European matrimonial regimes in English,¹⁷ it is worth examining how different community regimes operate. Consequently, this project examines three European jurisdictions in detail: the Netherlands, France and Sweden. Of course, any choice is to a certain extent dictated by

¹⁶ For example, in the Swedish Marriage Code of 1920, where immediate community was abolished and deferred community adopted after women were first granted the right to vote.

¹⁷ But see Buckley, L. (2002) 'Matrimonial Property and Irish Law: A Case for Community?', *Northern Ireland Legal Quarterly*, vol 53, no 39, p 39, note 4 for a comparative analysis of the French and German systems.

practical considerations, but these three jurisdictions offer insights into the spectrum of community, namely: immediate universal community (the Netherlands), immediate community reduced to acquests (France), and deferred community for defined matrimonial property (Sweden). We conducted both doctrinal and empirical studies on the chosen jurisdictions.¹⁸

We noted above three elements to any matrimonial regime: (i) the division of power over property during the marriage; (ii) the division of wealth at the end of the marriage; and (iii) in both instances, the division of debts. The first (who can dispose of what) is generally independent of the type of regime in question as it belongs to the primary, obligatory facet of the regime. We found, therefore, that in all of our jurisdictions, disposition of the family home is restricted to where both spouses consent, irrespective of who owns it or whether it makes up part of the community or not. This option is something that merits further analysis from an English law perspective and will be dealt with in Chapter 5. More interesting from the perspective of our study into community of property per se are the remaining two issues: how the community impacts on the property allocation at the end of the relationship and to what extent the community is liable to satisfy debts incurred during the marriage (which may still be outstanding at its dissolution).

On the first question, we will begin by looking at the most inclusive form of community, as presently operated in the Netherlands, that is universal community. In brief, property owned before the marriage and that acquired during it will form part of the community pot. Inheritance will also enter into the pot unless the testator has expressly stated that it is to be for the individual benefit of the named spouse. So, into the community pot will fall pre- and post-marriage property, salaries and, if not expressly bequeathed to one spouse, inheritance. Pension rights do not fall into the community. Universal community is also available in other jurisdictions as a choice of regime. In some areas of France, there was traditionally a high take-up of

universal community,¹⁹ and it is often an advisable option for those marrying or changing regime at or near retirement age. There are, of course, advantages to universal community: not least the fact that it provides an ‘easy’ and clear solution – there is no calculation to be made of who owns what.²⁰ However, the Netherlands is almost unique insofar as universal community is the default regime. Elsewhere in Europe, the trend is for a move away from such extensive community and this has also manifested itself in the Netherlands in a proposed Bill to reduce the extent of the community. This reform is still under way and we will come back to it below.

Following on from the immediate universal community in the Netherlands, we examined the community of acquests which operates in France. France is perhaps unique in the contractual freedom that couples enjoy to opt out of this default regime,²¹ but empirical studies show that over 80% of the population do not contract out and are therefore subject to this regime.²² Briefly, community reduced to acquests provides, as its name implies, that property acquired after the marriage becomes part of the community. Property acquired before the marriage as well as inheritance and gifts are excluded. Consequently, if the family home was acquired before the marriage, it will not become part of the community, but it will nevertheless be protected for the duration of the marriage under the primary regime. It should be

¹⁹ Especially before reform of the succession laws in 2001 because before then, the tax position of the surviving spouse was less favourable under the default reduced community of acquests, whereas universal community ensures transfer to the surviving spouse. The 2001 reform has ameliorated the position of the survivor.

²⁰ One Dutch notary stated: ‘most people think well of community of property ... is [sic] an easy way of sharing everything in half – it’s easy’: Interview Holland 5.

²¹ See the translation at www.rdg.ac.uk/law/research/cooke-cctyprop.htm, of Bernard, J. (2002) *Choisir son contrat de mariage*, Paris: ADSN/PUBLI.NOT; one of the series: *Les memos: Conseils par des notaires*, which is a very helpful summary of some of the options available in France.

²² Barthez, A. and Laferrere, A. (1996) ‘Contrats de mariage et regimes matrimoniaux’, in INSEE, *Economie et Statistiques*, Paris: INSEE, pp 296-7.

¹⁸ See Chapter 2 on methodology.

noted that in both the Netherlands and France, the community is immediate from the day of the marriage and creates a third body of property – ‘ours’, which has the potential to benefit both the non-earning (homemaker) spouse and third party creditors.

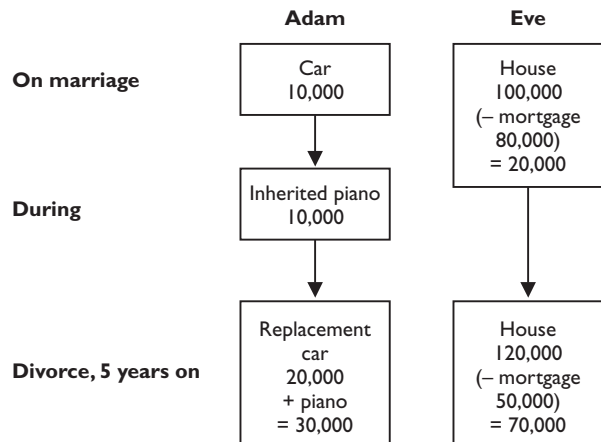
In contrast, Sweden operates a deferred community system, which means that during the marriage the spouses maintain their individual property – a concept with which we are familiar in England – but on dissolution a community of marital property is created. The Swedish Marriage Code²³ defines what constitutes separate property, with the remainder being classed as marital property, although the parties are free to contract out of this and make a different arrangement (but are not free to contract into immediate community).²⁴ All property, except inheritance, gifts, life insurance or compensation where it is stated to be for the exclusive benefit of one spouse, will be deemed to be marital property and will thus become part of the community, unless the parties stipulate otherwise. Income from the separate property identified above will become marital property. Moreover, the Swedish Code also allows for what we might term in English ‘hidden joint ownership’. This is where although one spouse may have purchased property in his or her own name, the intention is that the other would have a right of ownership.²⁵

²³ Swedish Marriage Code, chapter 7.

²⁴ In some jurisdictions where the default regime is deferred community it is possible to contract into immediate community (eg Greece: Hamilton, C. and Perry, A. (eds) (2002) *Family Law in Europe*, London: Butterworths LexisNexis, p 335.

²⁵ Three conditions are necessary: that there is joint intention that the property be jointly owned; that the non-purchasing spouse has contributed to the purchase price; and that the spouse who bought the property is aware that the other contributed with a view to acquiring ownership. See the Swedish report in the European Commission’s (2001) *Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law*, General Direction Justice and Home Affairs, JAI/A3/2001/03, Brussels: European Commission, para 1.1.4.7.

We can illustrate the consequences of each regime if we look at a very simplified example.²⁶



The outcome in our chosen jurisdictions would be as follows:

- **The Netherlands**

The community is worth the total of all the property (universal community includes inheritance unless expressly stipulated to the contrary) so 30,000 + 70,000 = 100,000 at the date of divorce. This is split equally on divorce:

Adam takes 50,000

Eve takes 50,000

- **France**

The immediate community is reduced to acquets during the marriage. Although disposition of the family home is protected under the primary regime, it remains the property of Eve, so it is excluded from the community. Likewise the piano inherited by Adam. Consequently, there is nothing in the communal pot except what would have been acquired, for example, in salaries and savings during the marriage. So Eve keeps her pre-acquired property worth 70,000 and Adam keeps his worth 30,000. It is interesting to note that the very concept of community as understood as the union of persons and property is sidelined where the major property is acquired before the marriage.

²⁶ This example, and the comparison of outcomes in the European systems under consideration, is adapted from Agell, A. (1998) ‘The division of property on divorce from a European perspective’, in J. Pousson-Petit (ed) *Liber Amicorum M-T Meulders-Klein, Droit Comparé des Personnes et de la Famille*, Brussels: Bruylant, p 1.

- **Sweden**

The deferred community will include all property which is not separate property as identified by the parties in any marital property agreement or the Marriage Code. The piano will be excluded from marital property only if expressly stated to be for Adam as his separate property. On the assumption that there was no such express exclusion, the community will be worth 100,000, and on divorce:

Adam takes 50,000

Eve takes 50,000

Because the community is deferred, here the result is that Eve effectively pays Adam 20,000 from her 70,000, so they both have a half share in the total community.

In France and the Netherlands the community pot will be split 50:50 between the spouses. Although the equal division also applies in Sweden, there is rather more scope for deviation from this, dependent upon a number of factors and notably the duration of the marriage,²⁷ because the Marriage Code provides for a deviation from the 50:50 split on a sliding scale for the first five years of the marriage. This serves to highlight the point made earlier that the existence of a default community regime does not in itself preclude the exercise of discretion by the court.

However, it is not only wealth that is shared but also, in an immediate community system, debts. As stated above, community of benefits implies community of liabilities. The union is one for better or for worse. Consequently, in the immediate universal community of the Netherlands, creditors for debts incurred by either spouse, individually or jointly, will be able to satisfy the debts by recourse to the community.²⁸ In

France, again, the community of enrichment is mirrored by a community of debts: creditors may seize communal property for debts incurred for the household or for the children's education by one or both spouses although there is some protection for the 'innocent' spouse insofar as the community will not be liable for debts incurred by one spouse and which are perceived to be 'manifestly excessive'.²⁹ However, for all other debts incurred during the marriage the community remains liable, although on dissolution, the spouse who incurred the debt must compensate the community for what it has paid out.³⁰ Consequently, there is protection both for creditors during the marriage, and for the non-debtor spouse at the dissolution (provided, of course, the debtor spouse has the capacity to satisfy his or her debt). In Sweden, the deferred nature of the community means that each spouse is solely liable for his debts from his separate property. Upon dissolution, before the marital property is shared, the individual debts must be paid. This means that the share of the non-debtor spouse cannot be used to pay off the other's debt. What is left will then go into the communal pot to be shared. Again, let us take Adam and Eve as an example.

In the Netherlands, the community was worth 100,000, but if Adam has a debt of 40,000 (ie 10,000 more than the value of what was originally 'his' property), the community will nevertheless be liable for the whole 40,000. The community would then be reduced to 60,000 and the shares upon dissolution would be 30,000 each.

In France, we have said that there is no large value to the community because it is reduced to what was acquired during the marriage. Adam's debt of 40,000 therefore must be satisfied by his own property which is worth 30,000 with 10,000 left outstanding. If there were in fact value in the community pot of salaries and savings, then the creditors would be able to call upon it.

In Sweden, Adam's debt of 40,000 must be deducted from his property before calculation of the community. But he only has 30,000 so 10,000 remains outstanding. Upon dissolution of the marriage, the community pot would be worth

²⁷ Marriage Code, chapter 12. For more details, see the Swedish report in the European Commission's (2001) *Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law*, General Direction Justice and Home Affairs, JAI/A3/2001/03, Brussels: European Commission.

²⁸ See Sumner, I. and Forder, C. (2004) 'Proposed revision of matrimonial property, a new inheritance law and the first translation of the Dutch Civil Code, Book I into English', in A. Bainham (ed) *The International Survey of Family Law 2004*, Bristol: Jordans, p 337.

²⁹ *Code Civil*, Article 220.

³⁰ *Code Civil*, Article 1413.

70,000 (the property held by Eve). Adam's share would be 35,000 and out of this he would then be able to pay the outstanding 10,000. However, even if Adam's debt exceeded the amount he received (say 50,000), the creditors would not have any call on Eve's share of the community.

It is important to note that the consequence of communal liability means that it is advisable for those running their own business to opt out of an immediate community regime in order to protect the other spouse from business creditors. Indeed, our interviews with notaries in our three jurisdictions revealed that those most likely to seek advice and to adopt a system of separation were those who could be classed as having an 'at risk' financial business status – for example, traditionally farmers in France but extended to all those self-employed. One French notary whom we interviewed stated that most of his clients are those who are notaries or who know of one (because a notary, like a barrister in England, is deemed to be self-employed).³¹ The same trend was echoed by notaries in the Netherlands. In Sweden, debts are not shared; but where one member of a couple runs a business, it is not unusual for the family home to be designated by contract as the other partner's separate property. Thus if the business partner has no assets on the dissolution of the community, the family home will be safeguarded for the other. However, within a system of separation of property as encapsulated by the approach in England and Wales, there is little scope for the sharing of debts. It is interesting to note that in the interviews we carried out with the English respondents, a small number thought that a wife's earnings should be available to her husband's creditors³² although far fewer thought the same for an unmarried partner.³³

By now, we have a clearer picture of what community of property can entail and how in practice the different nuances impact upon the financial position of the couple. This introduction to community must, however, be complemented by an examination of more recent trends, especially if we are to consider the relevance of community in

one form or another for introduction into the system in England and Wales.

Community in action: current trends

Although enshrined in the civil law jurisdictions we have studied, community of property is nevertheless experiencing a transitional period in Europe. This can be seen at both the national level with the introduction of formalised relationships other than marriage and at the European Union level insofar as the possible introduction of a regime governing cross-border marriages is concerned.

On the domestic plane, the organisation of family property during and at the end of relationships has been revisited since the early 1990s due mainly to the increased recognition of types of relationship other than traditional marriage, namely heterosexual and same-sex cohabitation and same-sex marriage. This project expressly excludes consideration of same-sex couples, mainly because of the vastly different levels of recognition in other countries and the relatively recent introduction of same-sex marriages in a small number of jurisdictions. We should note, however, that any proposals for married partners in England and Wales are likely to extend to same-sex registered partners under the Civil Partnership Act 2004, although we did not question our respondents as to their views on this. Another reason for the need to reconsider community is the fact that, at a time when reform of marital property is on the political agenda, the number of marriages actually taking place is declining. Informal partnerships may represent a rejection of the idea of community, and a desire to remain individual, with free choice as to whether to pool resources or not. There is less expectation of partnerships being for life and certainly less expectation that they should correspond to the homemaker–wage-earner dichotomy, in which community finds its natural justification. Analysis of how jurisdictions which traditionally have had community as the default matrimonial regime deal today with family property, not only for marriage but also for cohabitation, is instructive as we consider how

³¹ Interview France 7.

³² 13 out of 74 respondents who answered the question.

³³ Only four out of 74 respondents.

community may be modelled to better respond to the demands of formal and less formal unions.

In the course of our doctrinal study, three issues presented themselves for wider consideration: the treatment of cohabitants in such systems and, by way of example, the system adopted in the French registered partnership system, the PACS;³⁴ the proposed reform of the Dutch default matrimonial regime to a more reduced form of community; and the potential for a European regime for cross-border marriages within the European Union.

Cohabitation in community regimes

The extent to which cohabitants are granted legal status varies from jurisdiction to jurisdiction and is also dependent upon whether a formal system of registration of the partnership has been enshrined in law or not.³⁵ So, for example, in Sweden, unregistered cohabitation gives rise to deferred community in the family home and household goods only;³⁶ whereas registered partnership, which is available only to same-sex couples, enjoys the same deferred community as for married couples.³⁷ In the Netherlands, both same-sex married couples and registered partners are subject to the universal community, but again unregulated cohabitation does not have any direct consequence on property rights of the parties.

In France, by contrast, the PACS does not involve community as a default regime; instead it generates a rebuttable presumption of a more limited version of joint property – *indivision* (rather akin to the

English tenancy in common).³⁸ Again, unregistered cohabitants in France have very little legal recognition.³⁹ There are a number of interesting features of the PACS that are worth noting. First, the rejection of community *stricto sensu*, which may be said to stem from two different considerations. On the one hand, there was a clear political aim of distinguishing the PACS from marriage to satisfy right-wing conservatives that it did not aspire to being a marriage by the back door; on the other hand, there is a feeling that the very idea of community rooted in historical notions of the family and landed wealth has had its day and that it does not respond to the expectations of society in the 21st century,⁴⁰ even though other community jurisdictions have maintained community as the regime for registered partnerships. On the former point, the PACS acknowledges the joint enterprise but does not require fidelity of the parties, as does the primary matrimonial regime. Interestingly, however, on the question of solidarity of debts, the joint pot extends to *all* debts incurred by one or other of the partners in the everyday costs of the couple, without any regard as to whether one partner has accrued a ‘manifestly excessive debt’,⁴¹ as is the case for married couples.⁴² Liability for household debt in France is therefore greater for a registered partner than for a spouse; but, of course, PACSés couples do not share liability for other debts as do spouses married in community. On dissolution of the PACS, the property is split according to the owned shares, and the rebuttable presumption gives half shares to each unless the acquisition contract states the proportion of the property to be owned by each partner.

In general, therefore, European jurisdictions have not moved towards recognising a family property regime for informal cohabitants (irrespective of duration of the relationship, or existence of children), but where registered partnerships are possible, the default matrimonial regime of

³⁴ *Pacte civile de solidarité*, implemented by law no 99-944 of 15 November 1999, inserting Articles 515-1 *et seq* Code Civil.

³⁵ The overall trend in Europe appears to be one where partnerships may be formally registered although there is a split between those countries which allow registration of both heterosexual and same-sex partners (France, the Netherlands, Belgium and some areas of Spain) and those limited to same-sex couples only (the UK, Sweden and Germany).

³⁶ Act on the Mutual Home of Cohabitants 1987.

³⁷ Registered Partnership Act 1994, now consolidated by the Cohabitees Act 2003.

³⁸ *Code Civil*, Article 515-5.

³⁹ Although some welfare rights are granted to cohabitants, but in a very ad hoc, piecemeal way.

⁴⁰ See, for example, Beignier, B. (1994) *Les Régimes Matrimoniaux*, série Que sais-je?, Paris: Presses Universitaires de France.

⁴¹ *Code Civil*, Article 515-4, alinéa 2.

⁴² *Code Civil*, Article 220.

community will usually apply. The exception to this is the French PACS system. Community does, therefore, still seem to have a good life in front of it. This can also be seen from the recent debate for reform in the Netherlands.

Proposed reform of the Dutch universal communal property matrimonial regime

Universal community has been the default regime in the Netherlands since 1938. According to some commentators, it is perceived by some as a Dutch 'national monument' and by others as an old-fashioned system that should be done away with.⁴³ The fact that the Netherlands is the only country to have maintained universal community as the default system to date has figured in the arguments for change. Proposals to reform the law in 2001 resulted in a Bill before the Parliament but, as yet, there does not seem to be the political (and, we may query, professional?) desire to see it enacted. Essentially, the Bill does not go as far as some observers would have liked: it proposes a reduced community, but has rejected limiting it to a community of acquets. The proposed community would include pre-marital property but would exclude inheritance and gifts. Although the community would remain liable for the debts of either party, there would be a system of settlement due at the dissolution of the community, along the lines of the compensation we have seen operating in the French system where individual debts have been satisfied by the community during the marriage.

Perhaps surprising is the apparent reluctance to adopt the proposed reform. One explanation may be the perceived simplicity of the universal community with a 50:50 split upon dissolution and a reluctance to trade this for what appears to be a regime that will require complex calculation on dissolution. Nevertheless, statistics have shown that whereas in the 1960s only about 8% of the population contracted out of the immediate universal community, this percentage rose to 28%

⁴³ Cited by Antokolskaia, M. and Boele-Woelki, K. 'Dutch family law in the 21st century: trend-setting and straggling behind at the same time', (2002) 6:4 *Electronic Journal of Comparative Law*, available at: www.ejcl.org/64/art64-5.html

in 1996.⁴⁴ This suggests that universal community does not meet with the expectations and wishes of contemporary society and that reform is opportune.

Towards a European regime?

Plans may be under way to propose a property regime that may be adopted by couples who come from different member states within the European Union, or at least to allow such couples a choice of regime subject to factors connecting them with a particular state.⁴⁵ Given the differing systems of the member states, this is expected to facilitate the organisation of family property in cross-border marriages. If the advantages of such a reform are clear, the difficulties are no less apparent.⁴⁶ Given that any such reform will be accompanied by rules that give a couple the right to choose the forum for adjudication, together with a unification of conflict of laws rules,⁴⁷ English law and English courts may well be obliged to embrace the very idea of a community regime, at least for those nationals who marry a national of another member state.

Having examined the scope and evolution of community of property in a number of European jurisdictions, we can now place it into the context of our inquiry. Does community of property have the potential to provide a regime for all marriages and cohabiting couples in England and Wales ?

⁴⁴ See Sumner, I. and Forder, C. (2004) 'Proposed revision of matrimonial property, a new inheritance law and the first translation of the Dutch Civil Code, Book 1 into English', in A. Bainham (ed) *The International Survey of Family Law 2004*, Bristol: Jordans, p 337.

⁴⁵ European Commission (2006) *On Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition*, COM (2006) 400 Final, 17 July, Brussels: European Commission, para 2.2.2 and question 5.

⁴⁶ See, for example, Steenhoff, G. (2004) 'A matrimonial property system for the European Union?' and the response by Thomson, J., Papers presented to the UK-German Judicial Family Law Conference, Cardiff, 8-11 September, 2004.

⁴⁷ See the proposal for amendment of Regulation (EC) no. 2201/2003, published 17 July 2006, Brussels, European Commission.

Community options for England and Wales?

As we have detailed above, immediate community is of both wealth and debts. Moreover, all the legal systems we studied provide for the possibility to opt out of the regime. Marriage contracts are recognised in law, while at the same time a primary, obligatory regime protects the family home. These characteristics are at present truly alien to the English lawyer and it is clear that such a system would not be a feasible avenue of reform. It may be suggested that the rejection to date by the English legislature of anything resembling community of property (or any other default system) stems from an inherent misconception of a lack of flexibility of any formal regime; yet the imposition of a regime does not of itself deny the court's discretion. As the Swedish, the Scottish and most recently the New Zealand systems (among others) illustrate, a default community of property regime does not per se negate exercise of the court's discretion. The scope of the discretion may well vary, but that is something dependent upon each legal culture.

Nevertheless, there are certainly some aspects of community of property that *do* appeal to the English lawyer in search of inspiration for reform of the present, some would say untenable, state of the law. At its most basic level, consideration of the acquisition of property rights as a consequence of a relationship is of course possible and something that is intuitively believed to be a good thing, even if community of liability is rather less attractive.⁴⁸ Consequently, upon reflection our research questions were refined so as to become:

- Would it be appropriate for immediate community of property to be introduced for married and/or cohabiting couples?
- Would it be appropriate for there to be automatic joint ownership (of certain property) again for married and/or cohabiting couples?

⁴⁸ As we shall see, this is apparent from the interviews we carried out in England and Wales, but it has already been expressed in a public opinion study carried out for the Law Commission: Law Commission (1972) *First Report on Family Property*, Report no 52, London: HMSO.

- Would it be appropriate for deferred community of property to be introduced for married and/or cohabiting couples?

The inquiry for unmarried cohabitants is, of course, particularly problematic in view of the current limited provisions of the law for them. The Law Commission has now issued its Consultation Paper on cohabitation⁴⁹ and this study is intended to contribute to the debate. It is clearly unthinkable for reform to be adopted for married couples while ignoring cohabitants, the latter being as ripe for reform as the former but for different reasons.⁵⁰

In order to address the above questions, the project involved three main stages: (i) doctrinal research on European systems and analysis of existing empirical data; (ii) interviews with notaries in the chosen comparator jurisdictions; and (iii) semi-structured interviews in England and Wales to assess public attitudes to the current law and scope for reform. The next chapter sets out in more detail the chosen methodology; the subsequent chapters present an analysis of the findings in order to address the questions posed.

⁴⁹ Law Commission (2006) *Cohabitation: The Financial Consequences of Relationship Breakdown*, Law Commission Consultation Paper no 179, May, London: HMSO.

⁵⁰ For married couples, the uncertainty generated by the wide framework of the now dated Matrimonial Causes Act 1973 and the plethora of judicial announcements make reform desirable; for cohabitants, the lack of any real property provisions has generated calls for the introduction of legislation to govern property distribution between the parties.

A note on methodology¹

From the outset our aim has been to conduct a doctrinal and an empirical study, with doctrinal material informing our empirical survey, and the findings from both informing our conclusions. The doctrinal work is obviously open-ended, but initial research into matrimonial regimes in other jurisdictions introduced us to the range of options available for dealing with family property, and existing statistical data gave us an insight into practices in other countries.²

We wanted to carry out empirical work both in continental Europe and in England and Wales; the former to assess how community of property systems affect the ‘users’, practically and emotionally, and the latter to assess the views of the public in England and Wales as to the appropriateness of community, immediate or deferred. Empirical work has to balance the desirable and the possible; in an ideal situation with limitless resources, one would want to conduct a large-scale survey to assess the operation of community regimes in as many European jurisdictions as possible. However, this was not a realistic possibility for us, and the challenge was to find a way of assessing their practical effects on a much smaller scale. A first pragmatic step was to concentrate on three contrasting comparator jurisdictions: the Netherlands, France and Sweden.³

The Advisory Board

A further step in focusing our work was the appointment of an Advisory Board. This is a regular feature of research projects; our Board was composed of individuals with specific expertise that the research team did not have. We invited academic lawyers from Sweden and the Netherlands, as well as a practitioner from France; and from England and Wales, a member of the Law Commission and a former practitioner employed by the Law Society.⁴ This gave us access to expertise on the jurisdictions we were examining, as well as insight into the law reform process in England and Wales.

Thanks to our Swedish Advisory Board member, a visit to Sweden to carry out interviews there⁵ was combined with a seminar at the University of Uppsala,⁶ to which both academics and practitioners were invited. Participants included Professor Anders Agells and Professor Maarit Jantera-Jaareborg, both of whom have written widely in this area and whose discussion of our project was invaluable. This is activity which, in an academic world dominated by outputs and metrics, is hard to measure or to assess but whose value should be recognised.

¹ This chapter was written with Augustina Akoto.

² For example, in France, Champenois-Marmier, M. P. and Fauchoux, M. (1979) *Les Régimes Matrimoniaux*, Paris, Centre d’Étude de Recherche en Sociologie Juridique. However, of the existing studies, very little is in English and most is rather dated.

³ See Chapter 1, pp 6-7.

⁴ Acknowledged on p iv.

⁵ See p 13.

⁶ On 28 February 2005.

Empirical work in Europe

Even within our three chosen jurisdictions, there would have been considerable difficulties in organising interview work with individuals. The compromise solution we adopted was to make use of notaries and family lawyers as a focused source of client experience. In most jurisdictions (although not in Sweden) a pre-nuptial contract, and any contract to change a regime, has to be notarised; so notaries will be familiar with the views and experience of a section of the public, albeit a rather specialised and self-selecting one. Family lawyers⁷ are consulted in the course of divorce and see the practical consequences of community on relationship breakdown.

We accessed lawyers through professional organisations and recommendations of members of the Advisory Board, and were able to reach (with one exception) our target of interviewing 10 professionals in each jurisdiction. The interviews were carried out during the winter of 2004–05; the interview schedule is presented in Appendix A.⁸ We asked questions about the type of clientele seen by our respondents and focused particularly upon reasons for contracting out of the community regimes. The information given by our interviewees is reflected in Chapters 1 and 3 of this report.

Evaluation of the European interviews

The interviews took the form of semi-structured discussion so that there was considerable opportunity for the interviewee's own views and experience to emerge.

The most obvious criticisms that might be levelled at this aspect of our work are, for one, the very small sample size; and for another, the geographical limitations of our work. We would have liked to interview lawyers in a number of different regions, particularly in France and the Netherlands where there is considerable regional variation in the type

of contracts used. These would be valid criticisms. Our answer would be that we were not, of course, aiming for statistical significance, only for a range of views; and that despite the limited number of interviews carried out we reached something approaching saturation relatively early on. Reasons for contracting out are standardised, relating particularly to ownership of a business and to inherited wealth. The idea of ring-fencing assets is beginning to have increasing relevance in England and Wales⁹ and we find it very much part of the thinking that goes with community of property regimes; our interviewees spoke for the most part with one voice about the advice they would give about contracting out. One valuable gleaming from the interviews was an impression of rather different views of community in France and the Netherlands;¹⁰ and on this point it would certainly have been useful to have a wider sample.

A more serious difficulty was that we planned to ask our interviewees to describe to us cases they had dealt with in the recent past, on an anonymised basis. This was designed to ground our data in real life rather than eliciting textbook responses. Our interviewees were universally reluctant to do this. It may be that further preparatory work with them to explain the method would have been helpful; certainly the development of a means of enabling practitioners to assist researchers in this way would be a challenge for a future project.

One of our objectives, in our funding application, was 'Consideration of any need for further, much larger-scale research in Europe, making use of the Eurobarometer survey and/or national statistical organisations'. There would certainly be a place for a much wider survey, both to generate statistically significant data about views and practices and also to produce more attitudinal material from an interview programme. The persistence of community of property regimes in Europe is largely the product of history and tradition; law reform and societal development would benefit from reliable data about its effect throughout Europe.

⁷ Not the same as notaries; the distinction is between *notaires* and *avocats* in France.

⁸ See p 46.

⁹ Particularly following the judgments given by the members of the House of Lords in *Miller v Miller*, *McFarlane v McFarlane* [2006] UKHL 24.

¹⁰ See p 19.

Empirical work in England and Wales

The second practical phase of our survey took the form of an attitudinal survey of individuals in England and Wales. Rather than provide a statistically representative analysis of attitudes, the project sought to map and analyse a range of views, leading to an understanding of people's perceptions and experiences of family property ownership in general and community-like concepts. This was, therefore, not a study suited to incorporation into a British omnibus survey, where only limited explanation is possible and a respondent's understanding of the issues involved cannot be judged. It seemed best undertaken using qualitative methods, combining purposive rather than random sample selection of respondents so as to elucidate the views of a small stratified cross-section of the public.

Our interviews in England and Wales took place in the early summer of 2005. We used a random sample obtained for us by a market research company. We spoke to a range of interviewees, 74 in total, of whom 50 were either married or divorced and 24 were cohabiting or former cohabitants. The respondents differed not only according to marital status, but also to gender, age, socioeconomic group, housing tenure and presence or absence of children. Interviews were conducted in three areas – Reading, Liverpool and Swansea – selected because house prices were respectively above, below and on a par with the national average for England and Wales. This also provided a regional mix of data from which to try to pinpoint any regional differences. The interviews were recorded, on an anonymous basis. In no case did we interview both members of a couple.¹¹

The interview schedule is presented in Appendix B.¹² We were interested in how our interviewees managed their own finances; in the differences between married couples and cohabitants in that context; and in the views they held about how financial matters *ought* to be regulated on divorce. With regard to the last area of interest, we asked

some of our questions in the abstract; and some based on vignettes featuring both married and cohabiting couples, with and without children. We wanted, of course, to test out consistency by asking the same questions in both abstract and vignette form.

The interviews were conducted by our research assistants, after piloting in Reading and Swansea. Interviews lasted between one and one-and-a-half hours; that proved to be quite a short time for a full exploration of the issues, but any longer would have seemed an imposition. The interviews were transcribed for us, and our research assistants then spent the autumn of 2005 coding the interviews using the qualitative data analysis software N6.

Evaluation of the interview programme in England and Wales

Using a 'grounded theory' approach,¹³ we analysed the interviews with genuinely open minds about what we would find. The interviews yielded rich data, which have informed Chapters 3, 4 and 5 of this report; some of our findings were a surprise to us.¹⁴

In retrospect, we would perhaps have devoted less of the interview to consideration of the way people organised their own finances, since data on this were less useful than we expected.¹⁵ There were perhaps two issues on which we would have liked to spend more time. First, we would have liked to explore in more depth with our respondents the differences, if any, between their views on married couples and on cohabiting couples. Similarly, we could have probed further for differences in attitudes towards family property in first as opposed to subsequent marriages, but our interview schedule was already long.

¹³ Glasyer, B. G. and Strauss, A. L. (1967) *The Discovery of Grounded Theory*, Chicago, IL: Aldine de Gruyter.

¹⁴ See, for example, p 33.

¹⁵ See, for example, comments at p 24. Useful data on personal financial organisation would need to be the subject of a more detailed project by itself.

¹¹ There are ethical reasons for avoiding this.

¹² See p 48.

Second, we would have liked to analyse more closely our respondents' perceptions of how things 'ought' to be. We asked a number of questions about what the law should do; for example, should it treat a couple's home or earnings as jointly owned in all cases?¹⁶ Should it be possible for the sole owner of the family home to sell it without his or her partner's consent?¹⁷ Hidden behind answers to the latter question might be various conceptions of what it means to 'own' something; and many shades of opinion about moral and legal obligation. Other examples are easy to find within the interview schedule.

These brief comments are intended as a preliminary to a fuller analysis of our methodology in another forum. For now, we turn to the findings generated by our data.

¹⁶ See questions 18 and 19 in Appendix B.

¹⁷ Questions 18b and 19b in Appendix B.

Immediate community and joint ownership

A simple way to describe the focus of our research is to reduce it to two questions. First, do we wish to retain the principle of separation of property for couples in this jurisdiction, or is there still scope for a move to some form of immediate community? Second, do we wish to retain the judicial discretion to adjust property rights on divorce, or would we prefer a rule-based system akin to deferred community of property?¹

This chapter looks at the first of those questions, and therefore starts from the idea of immediate community.

Immediate community of property

Community of property is, of course, a way of owning property jointly. In England and Wales

there are two forms of co-ownership: joint tenancy and tenancy in common. It is trite law that both forms give the owners freedom of disposition of a share of the joint property during their lifetime; a joint tenancy is severable, by deliberate act of the parties, or even involuntarily. If a married couple own the family home as joint tenants, and the husband contracts a debt and fails to pay, his creditor may obtain a charging order, which will sever the joint tenancy of the family home and attach to his share only of the house. Ultimately the house can be sold in order to realise his share of its value;² but his wife's share cannot be touched by the creditors.

Equally familiar is the fact that when a house is deliberately used as security for a debt, all the legal owners must join in the execution of a legal mortgage.³ Where a house is solely owned and offered as security, the lender will require all the adult occupiers to waive their rights and their priority, so that the entire equity is available as security.

Take that scenario to France, and imagine a couple who own the family home in community of property. They own it together. But that ownership has three features unknown in this jurisdiction.

¹ When we began our project, civil partnership did not yet exist in England and Wales. Moreover, we were advised by the Nuffield Foundation not to include same-sex couples in our research, because it would not be possible to give them adequate coverage in a project of this scale. Accordingly, we have done no research explicitly on the issue of the suitability of community regimes for same-sex couples. The advent of civil partnership, and the fact that it is so very nearly identical, in legal consequences, to marriage, means that in fact all our references to marriage should be taken to include civil partnership; but we make no assumption that our interviewees would recognise this equivalence, and there is no intention to beg the question as to whether or not anything we say about couples, married or unmarried, would in fact be appropriate to same-sex couples.

² The provisions of the Trusts of Land and Appointment of Trustees Act 1996 will determine whether or not the creditor can proceed to a sale of the house in order to realise the debtor's share. If the debtor becomes bankrupt, sale will readily be ordered under s 335A of the Insolvency Act 1986.

³ Except in the unlikely event that the creditor is deliberately taking an equitable mortgage only of one joint owner's share.

One is that the individual's share is unseverable. Neither individual can sell it or mortgage it, unless he or she chooses to end the community, or modify it so as to exclude this property; and unless there is a divorce, neither can end the community without a court order (*Code Civil*, Article 1397).

Second, when the community is brought to an end by death, it is divided 50:50 between the survivor and the estate of the deceased. But the deceased has only partial freedom to dispose of his share. As is well known, in France and in most European jurisdictions there is only limited testamentary freedom, and the greater part of the deceased's share will be earmarked either for the surviving spouse⁴ or for the couple's children.

Third, and most dramatically, the community property is available in full to the creditors of either party. So, if the French husband contracts a debt and fails to pay, the entire community is engaged: the family home in its entirety,⁵ the husband's earnings and (subject to some limitations) his wife's earnings.⁶

Immediate community affects debt in two ways. On the one hand, it gives the non-earning spouse access to credit that she (assuming the traditional housewife!) could not otherwise call upon. On the other hand, the creditors of both spouses are able to access the whole community to meet the debts of either spouse. Thus, in some jurisdictions, if a couple have contracted out of community, the existence of the contract is recorded on the

marriage register or land register, in order to warn creditors.⁷ Another consequence of the implications of immediate community is that anyone running their own business or doing anything financially risky will contract out of it, in order to protect their spouse's earnings and share of the family home, from their own debts.⁸

The research questions revisited

Immediate community of property is therefore a community of property and liability. It is not the same as joint ownership, in the form known in England and Wales.

This means that our research questions, originally formulated as an examination of immediate and deferred community of property, have had to be reformulated, as explained in Chapter 1.⁹ There are two relevant questions to ask about property rights during the currency of a relationship: would immediate community of property be appropriate? If not, would statutory (ie automatic) joint ownership, of some or all of a couple's assets, be a worthwhile reform?

Joint ownership, without community of liability, does not form part of any community of property system. It does form part of the structure of the French PACS; property acquired by either party to a PACS is presumed to be owned in *indivision*, that is, jointly, unless the contrary is established either in the PACS contract itself or in the purchase deed.¹⁰ Not surprisingly there are no data to demonstrate the extent to which automatic joint ownership actually occurs among PACSés couples.

⁴ The entitlement of a surviving spouse in France has recently been extended: *Loi du 3 Décembre 2001*.

⁵ Assuming that it is community property. In France, property acquired before the marriage does not fall into the community.

⁶ A spouse's earnings are liable only for debts contracted 'pour l'entretien du ménage ou l'éducation des enfants' [for the upkeep of the household or the education of the children] (*Code Civil*, Article 1418); but there is no such protection for the family home, savings and other assets.

⁷ So, protection of creditors works differently in a community jurisdiction. In England and Wales, the legal system strives to protect creditors from unexpected joint owners (the *Boland* trap); where immediate community of property is the default regime, the legal system needs to protect creditors from its absence.

⁸ Conversely, many business folk contract back in after their retirement, when there is no longer any reason to maintain the separation regime: Interviews France 1, France 2, Holland 3 and Holland 4 in our study.

⁹ See p 11.

¹⁰ *Code Civil*, Article 515-5.

So, whereas our original research questions looked like this, reduced rather crudely to a grid and ignoring all the subtleties of the extent of the community property, the level of discretion on distribution and so on:

| | ... for married couples? | ... for cohabitants? |
|--|--------------------------|----------------------|
| Is immediate community a good idea ... | | |
| Is deferred community a good idea ... | | |

... our eventual understanding of the research questions simply adds a further dimension, as follows:

| | ... for married couples? | ... for cohabitants? |
|--|--------------------------|----------------------|
| Is immediate community a good idea ... | | |
| Is automatic joint ownership a good idea ... | | |
| Is deferred community a good idea ... | | |

Immediate community of property: our findings

This is well-trodden ground. In 1956 the Morton Commission rejected the introduction of an immediate community of property system between spouses,¹¹ as did the Scottish Law Commission in 1983.¹² The latter gave several reasons for rejecting immediate community, among them complexity

and the fact that it would be inappropriate to introduce the idea of community of liability.^{13, 14}

We did, of course, hear a lot about immediate community of property from our interviewees in the Netherlands and in France, for whom it is the default regime. The impression gained from notaries and family lawyers in the Netherlands is one of broad satisfaction with the system, and of a feeling that its all-embracing nature has the tremendous advantage of simplicity.

'Most people think well of the community of property [it] is an easy way of sharing everything in half – it's easy.'¹⁵

Reform of the Dutch system has been a live possibility for some time now, with a Bill introduced in Parliament (but still not enacted) to amend the system so as to exclude inheritances and gifts.¹⁶ The lawyers we spoke to were unenthusiastic about this change, despite the fact that the Netherlands stands almost alone now in having an all-embracing community system.

'I think that the advantage of the system is that it's so clear that everybody knows, so I do think that everybody is aware and when they come in here, when there is a very rich man but he knows he doesn't have a contract, he already knows he is having a problem – we don't have to say that to him – he already knows. Sometimes they dare to ask "Isn't there any way?" and we will say "No". It's so simple, it is, and that's why everybody knows, everybody is aware, because it's as simple as that, except if you want something differently then you have to have a

¹¹ (1956) *Royal Commission on Marriage and Divorce*, Cmnd 9678, London: HMSO, paras 643-53. The Commission rejected community on the grounds that there was no general desire for it and that its introduction would therefore put a majority to the trouble of contracting out; that it would be too complex; and that it would cause injustice in some cases.

¹² Consultative Memorandum no 57, *Matrimonial Property*, 1983.

¹³ Consultative Memorandum no. 57, *Matrimonial Property*, 1983, paras 5.1 to 5.11.

¹⁴ The English Law Commission, in its 1971 Working Paper no 42, *Family Property Law*, London: HMSO, examined a number of community systems, immediate and deferred, but did not consider recommending the introduction of an immediate community system.

¹⁵ Interview Holland 5 in our study.

¹⁶ See Sumner, I. and Forder, C. 'Proposed revision of matrimonial property, a new inheritance law, and the first translation of the Dutch Civil Code, Book I (family law) into English', in A. Bainham (ed) (2004) *The International Survey of Family Law*, 2004 edition, Bristol: Jordans, p 337.

contract and they sign their own contract but they usually don't know what exactly the consequences are but the legal system can't be clearer, it can't be easier, everybody understands it.¹⁷

The clientele of the Dutch and French notaries are, of course, largely those who wish to contract out of the community regime because either they have inherited wealth¹⁸ or they have a business and need to protect the family home from the business debts. So the limitations of the system, and the compelling arguments for contracting out in these circumstances, were a prominent feature of all our interviews with these notaries. We heard little from the Dutch notaries of any general dissatisfaction with the system, although they accepted that the majority of 'ordinary' people, if we may so call them, might be unaware of the community regime until they came to divorce:

'And often they are not interested if there is a community of property or not. They don't realise that when they split up there can be problems.'¹⁹

Even so, the Dutch lawyers were prepared to admit that the system has its downsides, particularly for foreigners marrying in the Netherlands:

'We had a couple, our clients, they came together and she was English and her mother was in England and her mother gave her large amounts of money to buy a very, very expensive violin, she was a musician, she had a very good job here and they also had some other properties and the mother gave her a loan, money and the wife was quite really shocked to know that it was not her money any more because she had to divide it with her husband.'²⁰

When we come to the French notaries, a rather more negative picture can be seen. As in the Netherlands, there is widespread ignorance about the community regime:

'They know that the French regime is *communauté réduite aux acquets* [community restricted to

acquets] but they don't really know what it means really ... That's what we see when we see them, we see that it's not clear in their minds.'²¹

'Most of the French young couples are not only not aware of it but are not interested by the matrimonial relationship, except having children and being in love with their wife or husband!'²²

But the following comment is rather telling:

'All my friends are married under the regime of separation of property, for example, but people who don't have friends who are notaries are more likely to have a community of property marriage....'²³

The Scandinavian countries no longer operate immediate community of property. They ceased to do so in the 1920s alongside the political emancipation of women;²⁴ and this points to the ideological problem with immediate community of property. Its original rationale was to protect women, by giving them an automatic share in the family's wealth, without which they would have little or nothing. But this sits uneasily nowadays with the independence of women. It is one thing for France, the Netherlands and others to continue to operate immediate community, while offering opt-outs to those who are aware of it and unhappy with it. It would be quite another thing for a jurisdiction such as England and Wales to introduce it and impose it as an opt-out regime – and, indeed, while many European jurisdictions have moved away from immediate community, or made it less comprehensive, there is no evidence of any jurisdiction reintroducing it or making it broader in scope. The notion of a compulsory sharing of each other's liabilities, as well as of each other's wealth, is unlikely to be publicly acceptable. It would expose to considerable risk the spouse of anyone running a business, and there is no guarantee that such folk would contract out.

¹⁷ Interview Holland 2.

¹⁸ This falls within the community in the Netherlands but not in France.

¹⁹ Interview Holland 5.

²⁰ Interview Holland 1.

²¹ Interview France 1.

²² Interview France 4

²³ Interview France 7.

²⁴ Thus, in Sweden, deferred community became the default regime in the 1920 Marriage Code, when women were given the vote: Tottie, L. (1988) 'Family law', in S. Strömholm (ed) *An Introduction to Swedish Law* (2nd edition), Stockholm: Norstedts, p 208.

However, we did probe views about immediate community in our interviews in England and Wales. This was not straightforward in view of the fact that this form of joint ownership – unseverable, and involving a shared liability for debts – is unknown in this jurisdiction. We used vignettes in order to explore the idea of sharing liability, looking at a married couple, Rosie and Jim, and cohabitants, Bob and Wendy, in a situation where Jim/Bob contracted a large debt for the purchase of a yacht. We asked our interviewees whether or not his creditors should be able to access the shared home in its entirety (assuming it to be jointly owned) and whether or not they should be able to access his wife’s/cohabitant’s earnings.²⁵

Thirteen of the 73 respondents who answered this question thought that Rosie’s earnings should be available to Jim’s creditors, as they would be in an immediate community system. Just four of our respondents thought that Wendy, the cohabitant, should share Bob’s debt; all those respondents were married or divorced. No cohabitant (or former cohabitant) respondents thought that Wendy should share Bob’s debt.²⁶

Any spouse or cohabitant may share liability, voluntarily, for their partner’s debt. But clearly the finding that we can put forward with the most confidence is that immediate community of property as an opt-out regime – a *régime légal*, as the French would put it – would not be welcome in England and Wales, even for married couples only. Nor would it be responsible to advocate such a reform.

This is not a surprise. But it leaves as a very live option the notion of automatic joint ownership of some or all of the family assets, for married people or for cohabitants. This is *not* technically community of property, just an aspect of it. Would it be publicly acceptable? Would it work, technically?

²⁵ Questions 18(d) and 19(d) in Appendix B.

²⁶ A number of our respondents thought that the creditors should not be able to access the house *at all*, which is an interesting insight into how people think the law should be.

Automatic joint ownership

‘...with all my worldly goods I thee endow...’?

Automatic joint ownership seems to have been really what Otto Kahn-Freund had in mind in the 1950s when he said:

Since in our societies, marriage is the basis for the normal family, it follows that marriage must have a profound effect on the property of the spouse.... It is difficult to imagine any system of law which in its regulation of the impact of marriage on property could completely ignore these elementary social facts, i.e. confine itself to a strict rule of ‘separation of property’ in the sense that marriage has no effect on the property of the spouses at all.²⁷

He was writing a description of English matrimonial property, in a volume describing European systems and which therefore gave prominence to community of property.²⁸ He was very attracted to this, arguing that it is impossible not to see the family as a unit of consumption. But his argument makes no mention of any idea of community of liability; nor did Lord Denning in his frequent aspirations towards some form of family property; nor did Sir Jocelyn Simon in his discussion in the Holdsworth Club lecture in 1964.²⁹

Simon’s Holdsworth Club lecture is still a tremendously good read. It was an impassioned attempt to draw attention to the virtues of immediate community of property, encapsulated in the famous aphorism:

... the cock bird can feather the nest precisely because he does not have to spend most of his time sitting on it.³⁰

²⁷ Kahn-Freund, O. (1955) ‘Matrimonial property law in England’, in W. Friedmann (ed) *Matrimonial Property Law*, Toronto: Stevens & Sons, pp 267-8.

²⁸ The volume seems to have been a major influence behind the Morton Commission’s consideration of community of property. See (1956) *Royal Commission on Marriage and Divorce*, Cmnd 9678, London: HMSO, paras 643-53.

²⁹ Simon, J., Sir (1964) ‘With all my worldly goods ...’, Holdsworth Club lecture, 20 March, Birmingham: Holdsworth Club, University of Birmingham.

³⁰ Simon, J., Sir (1964) ‘With all my worldly goods ...’, Holdsworth Club lecture, 20 March, Birmingham: Holdsworth Club, University of Birmingham, p 14.

The lecture explained why community of property was not considered as a live option around the time of the Married Women's Property Act 1882. This was partly a matter of ignorance of the law in Europe at the time; but in any event the administrative powers typically vested by community systems in that era in the husband³¹ would have meant that community could not satisfy either the pressing demands for equality or the prevailing philosophy of individualism.³² Simon's thesis was that separation of property was acceptable for the wealthy but damaging for the rest: '... any law of matrimonial property which does not recognise and make allowance for the difference in economic function of husband and wife is likely to operate with great unfairness to married women'.³³ He went on to identify features in the law, as it then stood, that amounted to a move towards community of property. He did not mention community of liability.

Simon's argument has to be set in its context. He and Kahn-Freund were writing before the Divorce Reform Act 1969, at a time when there was tremendous pressure for divorce reform and, linked with that, reform of the law of matrimonial property so as to improve the position of married women. Hence their enthusiasm for the judicial developments in creating a form of 'family property' during the 1950s and 1960s;³⁴ hence their encouragement of the developing 'deserted wife's equity';³⁵ and even of the development of s 17 of

the Married Women's Property Act 1882 as a discretionary jurisdiction.³⁶ Stephen Cretney's account in *Family Law in the Twentieth Century* tells the story,³⁷ and explains how a widespread enthusiasm for community of property never found its way into law, and was instead defused by the introduction in the Divorce Reform Act 1969 of a discretionary jurisdiction to adjust property on divorce.

Despite this, the arguments of Kahn-Freund and of Sir Jocelyn Simon struck a tremendously intuitive chord – perhaps all the more loud and clear for their failure to discuss the idea of community of liability. The idea of marriage as an economic community, at least to the extent of generating joint ownership, is immensely attractive and has deep roots in popular culture, even if it has no legal reality. The English Law Commission took up the theme, arguing in its 1971 Working Paper³⁸ not for immediate community of property, but for automatic joint ownership of the family home. It did so not only on theoretical grounds, but also on the basis of empirical research carried out for it.³⁹ In reports in 1973 and 1978 the Law Commission developed its proposal for statutory

³¹ This aspect of immediate community has given way to equal management powers in all the systems we have looked at – surprisingly recently in some cases (South Africa made the change in the Matrimonial Property Act 1988).

³² Simon, J., Sir (1964) 'With all my worldly goods ...', Holdsworth Club lecture, 20 March, Birmingham: Holdsworth Club, University of Birmingham, p 16.

³³ Simon, J., Sir (1964) 'With all my worldly goods ...', Holdsworth Club lecture, 20 March, Birmingham: Holdsworth Club, University of Birmingham, p 18.

³⁴ *Jones v Maynard* [1951] Ch 572, *Rimmer v Rimmer* [1953] 1 QB 63, *Tunstall v Tunstall* [1953] 1 WLR 770, cited by Kahn-Freund, O. (1955) 'Matrimonial property law in England', in W. Friedmann (ed) *Matrimonial Property Law*, Toronto: Stevens & Sons – all pretty much forgotten nowadays.

³⁵ Simon was writing after the Court of Appeal decision in *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] 1 All ER 688, before the idea was squashed in the House of Lords.

³⁶ Simon, J., Sir (1964) 'With all my worldly goods ...', Holdsworth Club lecture, 20 March, Birmingham: Holdsworth Club, University of Birmingham, pp 23 and 24; a few years later this idea was decisively put to an end by the House of Lords in *Pettit v Pettit* [1970] AC 777.

³⁷ Cretney, S. (2003) *Family Law in the Twentieth Century*, Oxford: Oxford University Press, pp 132-41.

³⁸ Law Commission (1971) *Family Property Law*, Working Paper no 42, London: HMSO. It also recommended the introduction of a form of deferred community of property, which we discuss in Chapter 4.

³⁹ Details are given in Law Commission (1973) *First Report on Family Property: A New Approach*, Report no. 52, London: HMSO, paras 3-7. A national survey of married couples and divorced people, carried out by the Office of Population, Censuses and Surveys (Todd, J. E. and Jones, L. M. [1972] *Matrimonial Property*, London: HMSO), found that, of a sample of 1,877 people, 94% of respondents agreed that, 'the home and its contents should legally be jointly owned by the husband and wife irrespective of who paid for it' (para 22).

co-ownership, in equity, embodying protection for a spouse whose interest was not registered.⁴⁰ Perhaps its most significant contribution to the issue is in its 1982 report, *The Implications of Williams & Glyn's Bank Ltd v Boland*,⁴¹ which explored the technical possibilities of statutory equitable joint ownership in the context of a modern understanding of the Land Registration Act 1925.⁴² Similarly, in 1983 the Scottish Law Commission's Consultative Memorandum on Matrimonial Property considered the possibility of statutory joint ownership of the family home, acknowledging its attraction and intuitiveness. The Memorandum includes an appendix describing in some detail how this might work. The Scottish Law Commission did not in fact recommend the reform; its misgivings were such that it left the matter open for consultation, and the suggestion was never enacted.⁴³ Much more recently the Irish Law Commission suggested statutory joint ownership of the family home for married couples and for cohabitants (the latter where there had been more than two years' cohabitation, or where the couple had children); but the suggestion has not been pursued.⁴⁴

Our own research confirms the continued vitality of the idea of automatic joint ownership. When asked in the abstract whether or not married couples should, as a matter of law, automatically own their property jointly,⁴⁵ 43 of our interviewees thought they should, seven gave a qualified assent, while 21 thought not.⁴⁶

Moreover, intuition has a profound effect on real life. We asked our interviewees a number of questions about how they organised their finances (in their current relationships or, if they were divorced or were former cohabitants, in their past ones). We found that although very few indeed held *all* their property jointly (10 claimed to do so or to have done so, and of these two were cohabitants or former cohabitants), most carried on a 'mixed economy' where a number of their assets, which might or might not include the home, were held jointly. As to the couple's home, of our 50 married and divorced respondents, 37 owned or rented it jointly (or had done so); of our 24 cohabitant respondents, eight did so. Thus, for the married couples in our sample, joint ownership of the home was the majority choice,⁴⁷ and for the cohabitants it was popular, although not a majority choice.

So, given those powerful calls for reform in the second half of the 20th century, and the extent to

⁴⁰ Law Commission (1973) *First Report on Family Property: A New Approach*, Report no 52, London: HMSO, in particular pp 18 and 19; Law Commission (1978) *Third Report on Family Property: The Matrimonial Home (Co-ownership and occupation rights) and Household Goods*, Report no 86, London: HMSO, which included detailed consideration of the proposal and a draft Matrimonial Homes (Co-ownership) Bill.

⁴¹ Law Commission (1982) *The Implications of Williams & Glyn's Bank Ltd v Boland*, Report no 115, London, HMSO.

⁴² The scheme recommended in 1973 and elaborated upon in 1978 assumed – as was reasonable at that time – that a spouse with beneficial co-ownership could only not have an overriding interest by virtue of actual occupation under s 70(1)(g) of the Act.

⁴³ In its 1984 *Report on Matrimonial Property* (Scottish Law Commission no 86, Edinburgh: HMSO), the Scottish Law Commission reported that, following consultation, there was little support for the idea of statutory co-ownership of the matrimonial home. So the idea was not pursued. The arguments for and against are given at paras 3.9-3.14.

⁴⁴ Irish Law Commission (1999) *Matrimonial Property*, Discussion Paper no 5, Dublin: Irish Law Commission; Irish Law Commission (2000) *Matrimonial Property*, Report no 8, Dublin: Irish Law Commission; in neither document were the land law/land registration implications of the proposed reform explored.

⁴⁵ We did try to be clear that we were referring to legal compulsion.

⁴⁶ The numbers do not add up to 74 because some respondents did not answer this question.

⁴⁷ In Scotland, home ownership is less widespread than it is south of the border, and renting correspondingly more frequent. In their 1983 Memorandum (see note 12 above) the Scottish Law Commission drew on research carried out for them, Manners, A.J. and Rauta, I. (1981) *Family Property in Scotland*, London: HMSO, which had found that 57% of married couples who owned their home at that date did so jointly. However, when this was broken down by time of acquisition it was found that while 37% of couples buying a house in between 1930 and 1959 bought it in joint names, 78% did so between 1977 and 1979, leading the Commission to suppose that in 1983 more than 80% of married couples would buy in joint names. Similar statistics were found in the research carried out in 1972 for the English Law Commission (see Report no 52, note 39 above, at 23).

which they chime in with culture and intuitions in England and Wales, we might ask why reform was never enacted.⁴⁸ Whom would it actually offend, provided there was freedom to contract out? We have found that the intuitive appeal of automatic joint ownership remains very strong for married couples and commands some support for unmarried cohabitants. However, we have concluded that the intuition has to be regarded with some caution. The caution arises both from our findings and from some reflections about the structure of land law in this jurisdiction.

Interview design

To test out some views on automatic joint ownership, our interview schedule used a mix of questions, both abstract and based on vignettes. Our abstract question was about marriage, and pointed out that in some jurisdictions the property of the parties to a marriage automatically belongs to both. We asked our respondents if they thought this was a good idea; and whether or not their views would change if the couple had children.⁴⁹

We then used our married couple, Rosie and Jim, and our cohabitants, Bob and Wendy, in a matching pair of vignettes.⁵⁰ In both scenarios one of the partners – as it happens, the woman – is earning significantly less than the man, and the couple's home was acquired by the man before the relationship began. The aim was to get our interviewees to think about joint ownership arising *from the relationship* rather than from contribution or from any deliberate joint acquisition. In the vignette about Rosie and Jim, we asked:

- Do you think the law should automatically assume that because they are married their earnings belong to both of them and that during their marriage each of them has an equal share of all the family's earnings?
- Should the law automatically make Jim share ownership of the house with Rosie on their marriage? Please explain your thinking.

⁴⁸ Aside from the usual sad old 'lack of parliamentary time'.

⁴⁹ Question 15 in Appendix B.

⁵⁰ Questions 18 and 19 in Appendix B.

Thus we have a general question about joint ownership for married couples,⁵¹ and about the ownership of inheritance; our vignettes then probe these abstract views by asking for views about the automatic joint ownership of earnings, and, separately, of the family home.⁵² The abstract questions go on to ask whether or not the respondent's views would change if the couple had children.⁵³

Automatic joint ownership: some findings from the interviews

As already mentioned, we found support, in a small rather than an overwhelming majority, for the idea in the abstract that marriage should entail automatic joint ownership of property.⁵⁴ Looking at the scenario, a very similar majority⁵⁵ was in favour of automatic joint ownership of earnings, and a smaller one⁵⁶ in favour of automatic joint ownership of the family home. Views were evenly divided as to whether or not an inheritance should

⁵¹ We did not ask an abstract question about joint ownership for cohabitants; we felt that in the abstract this was perhaps not an entirely plausible question. After all, no European jurisdiction imposes automatic joint ownership of any asset for cohabitants outside the registered partnership or PACS regimes.

⁵² The vignette questions thus do not exactly match the abstract questions; Wendy and Rosie do not acquire an inheritance, for example. We were concerned to ensure that the interviews did not get too long; and to avoid too much very obvious repetition. As it was, a lot of our interviewees found our fictional couples interesting.

⁵³ This question was not precisely matched in the scenarios; again, we were mindful of time economy and of the danger of boredom if our questions were too repetitive. We *did* ask, again in matched scenarios for the married and the cohabiting couple, how our interviewees felt about ownership of the home when the couples had children and were in the course of divorce/separation; this is in effect a question about deferred community of property, and is discussed in Chapter 4.

⁵⁴ We did try to be clear that we were referring to legal compulsion.

⁵⁵ 48 in favour, 24 against; four of the affirmative replies were conditional.

⁵⁶ 44 in favour, 27 against; again, some of the affirmative replies were qualified.

be automatically (that is, by law rather than by choice) shared with one's spouse.

Responses to the matching scenario for cohabitants⁵⁷ revealed a different pattern. A smaller majority was in favour of the automatic sharing of earnings;⁵⁸ and a majority⁵⁹ was against the automatic joint ownership of the shared home.

We were interested to know whether or not people's views were consistent with their own behaviour. As already indicated, very few couples seem to hold each and every asset in joint names; but a majority of married couples in our sample held a substantial set of assets jointly. Not all were clear about the distinction between an account being in a single name or in joint names, and their views of the money as 'ours', 'mine' or 'his', and so it is difficult to be sure that our findings are exact.

Consistency was, frankly, impossible to find. The largest identifiable group was made up of the 23 respondents who held a mixed range of assets, some joint, some separate, and whose response to our questions was so mixed that we could not identify an overall view.

Of the rest, we found a number of patterns. Only five respondents held (or had held) all their assets jointly and supported automatic joint ownership of all, or of at least some, assets. Nine held, or had held, all their assets jointly but were opposed to most or all automatic joint ownership possibilities. One interviewee (married) claimed to hold all assets jointly with his wife and supported automatic joint ownership for married couples but not for cohabitants.

Eleven held a mixture of solely owned and jointly owned property, but appeared keen on automatic

joint ownership of all or most assets. Eight held mixed assets and liked automatic joint ownership for married couples but were wholly or partly opposed to it for cohabitants.

Among the 18 whose finances were or had been wholly separated, there was a wide range of views. Four were wholly or mostly opposed to automatic joint ownership; three were in favour of all automatic joint ownership options; the rest gave a mixed response. A couple of this group had been unhappy about the financial separation in their (now ended) relationships, and were in favour of joint ownership. An example is a divorced lady from Liverpool. She and her husband had had separate finances. Her answers were focused on the protection of the wife, and so her response to the general question about ownership for married couples was: 'I'd rather buy it myself ... because of what I went through last time'. She said no to most of the scenario questions relating to automatic joint ownership, save for the third question in the Rosie and Jim scenario: 'I think it should be classed as her home and she should have equal rights'. This lady is a good illustration of the widespread inconsistency we found in our interviewees, not only between views and practice, but also within the views each person expressed. We might pause to think *why* this is so. People are chaotic; they are often mistaken about property ownership, or they do not give it any thought; and couples, some of those we interviewed among them, do not always agree about how their finances should be operated.

A majority of those who were initially against shared ownership of property changed their view when asked, in the abstract, whether or not their views would differ if the couple had children. Most said yes; indeed, of those who were initially opposed to automatic joint ownership, only eight did not change their view once the couple (married in this particular hypothesis⁶⁰) were supposed to have children. We find this very interesting as an indication of a widespread functional, rather than formal, view of the family.

Most of those who were in favour of statutory joint ownership seemed to refer to the family

⁵⁷ Questions 18 and 19 in Appendix B; the question is rather more plausible when asked in the context of a cohabiting couple whose situation is exactly like that of the married couple just considered. The weakness in this approach is that some interviewees responded to the matching scenario by saying 'it's just the same', or words to that effect, and were unwilling to give answers to the detailed questions.

⁵⁸ 36 in favour, to 34 against.

⁵⁹ 43 against, 29 in favour.

⁶⁰ We did try to be clear that we were referring to legal compulsion.

home rather than to earnings, and many gave one or both of two reasons for their change of view. One common reason was in order to safeguard a home for the children; and the other was to ensure that the children would eventually inherit some or all of the family home. The point to notice is that both of these reasons are actually not particularly relevant in assessing whether or not automatic joint ownership is appropriate. Keeping a roof over the children's heads is achieved in the law of England and Wales law by other means;⁶¹ and the courts have set their faces against any settlement of property that forces parents to pass on capital assets to the next generation.⁶²

So we can perhaps extract a number of conclusions from our findings:

- Joint ownership remains popular.
- The idea of statutory joint ownership remains popular.
- When it is seen as a potential product of the partnership relationship alone, our respondents were more likely to advocate it for married couples than for cohabitants.
- We have to be very wary of the reasons given for favouring automatic joint ownership. Intuition often does not go along with legal knowledge. If there is support for a proposed reform, on the grounds that it will achieve X, when in fact it will not achieve X, is it responsible for an academic or a politician to advocate that reform?

The land law perspective

Another note of caution has to be sounded. Unlike our European neighbours, our law of real property operates both at law and in equity. Any proposal for

automatic joint ownership has to take this on board and work out exactly how it might work technically. And there is a problem.

Most titles in England and Wales are registered; those that are not will be within at most a generation.⁶³ Legal ownership of a registrable estate is not possible without registration;⁶⁴ and so automatic legal joint ownership is not possible, unless by some computer wizardry it were possible for registration of marriage or of civil partnership to trigger re-registration of any estates in land held by the parties.⁶⁵ This is currently implausible.

The only practicable option is therefore equitable joint ownership, producing a situation like that of Mr and Mrs Boland, where one spouse owns the legal title and both are joint owners in equity.⁶⁶ The difficulty faced here is the law's settled policy of ensuring that equitable joint owners are invisible to, and powerless to prevail against, a purchaser of the land, including a mortgagee. This is much clearer now than it was in the immediate aftermath of the *Boland* decision when the Law Commission produced Report no 115.⁶⁷ *Boland* was unexpected; but the Law Commission's own proposed solution to the *Boland* problem⁶⁸ was not in fact adopted.

⁶³ Land Registration Act 2002, s 4.

⁶⁴ The combined effect of ss 6 and 7, 27 and 58 of the Land Registration Act 2002.

⁶⁵ Sir Jocelyn Simon (Simon, J., Sir [1964] 'With all my worldly goods ...', Holdsworth Club lecture, 20 March, Birmingham: Holdsworth Club, University of Birmingham) was proposing automatic legal joint ownership; this was plausible in a world where the vast majority of titles were unregistered.

⁶⁶ *Williams & Glyn's Bank v Boland* [1981] AC 487.

⁶⁷ Law Commission (1982) *The Implications of Williams & Glyn's Bank Ltd v Boland*, Report no 115, London: HMSO.

⁶⁸ Namely, that beneficial co-owners should be able to protect their rights by registration and should have the rights protected against a purchaser *only* if they were registered (Law Commission (1982) *The Implications of Williams & Glyn's Bank Ltd v Boland*, Report no 115, London: HMSO, p 83). The Commission reiterated, alongside this proposal, its call for statutory co-ownership of the family home; p 111 ff.

⁶¹ Matrimonial Causes Act 1973, s 25; and Children Act 1989, Schedule 1. Both give ample scope for the settlement of property, typically until children leave home, as in *Mesher v Mesher & Hall* (1973) [1980] 1 All ER 126, CA. Some decisions demonstrate a wonderful flexibility in the terms of the settlement so as to ensure maximum freedom and security for the children: see *A v A (A Minor: Capital Provision)* [1994] 1 FLR 657.

⁶² *Chamberlain v Chamberlain* [1973] 1 WLR 1557, CA; the principle has been consistently followed.

Boland has now become normality, old hat, trite law. Conveyancers have coped, and reform has not been found necessary. And a purchaser of land, including a mortgagee, will almost certainly take the land free of the interest of any equitable owner, thanks to the conveyancing practice of seeking waivers from adult occupiers of premises so as to nullify the protection given by paragraph 2 of Schedule 3 of the Land Registration Act 2002. In short, the proprietary effect of equitable joint ownership is almost nil. Imposing it as a default option, even just on married couples, would not command universal support (our interview data indicate that the idea is popular – but not universally so) and would not actually give the proprietary protection that members of the public might suppose that it would give. It cannot keep roofs over heads.

There is another side to this coin too. Automatic joint ownership would probably be unwelcome to banks and to other commercial and financial interests – who would have to have a voice in any consultation about a proposed change to automatic joint ownership. Automatic joint equitable ownership of the matrimonial home would increase the risk for creditors in two ways. First, the waiver system for property with a sole legal owner does not always work; the borrower may not tell the truth about the occupiers. Automatic joint ownership would increase the chances of this system going wrong.⁶⁹ Second, an unsecured creditor may be put at risk. He may, however unwisely, have relied upon the fact that the debtor was a homeowner, knowing that if the debt was not met he would be able potentially to resort to the value of the house through a charging order. A spouse or cohabitant with automatic but invisible joint ownership is a substantial prejudice to such creditors.

⁶⁹ If the waiver system fails in this way, the creditor would then have a remedy in misrepresentation against the debtor, which would probably be useless in the circumstances. The waiver system is a horribly imprecise tool. It is therefore used here both as an argument that joint equitable owners have very little protection against third parties (because the system usually works) and that creditors are at risk from unexpected equitable interests (because it sometimes doesn't).

So, automatic joint ownership has to be equitable rather than legal, and as such does not really give the proprietary protection that it might be supposed to give to a non-earning spouse or partner.⁷⁰ It might, however, be an unwelcome reform as far as financial institutions are concerned. And when we look at the reasons given by our respondents for favouring automatic joint ownership, we have to say that such a reform would not in fact meet our respondents' concerns; automatic joint ownership does not safeguard a home for children, nor does it ensure an inheritance for them.

Conclusions

This chapter has focused, not on community of property but on statutory joint ownership; the notion that England and Wales might adopt immediate community of property in any form has been thoroughly explored over the years and, although we think that it was worth re-opening the question, we would like to think that we have closed it decisively. European jurisdictions are moving away from, rather than towards, community of property and liability, and we have not found reasons to move against that trend.

Statutory joint ownership, by contrast, is not implausible. In our examination of the idea, we have focused on the family home, because of its value and because of the strength of the popular intuition that it *should* (in some sense of that word) be jointly owned. It is a strange tale. Lots of people have wanted it; it has the backing of highly persuasive Law Commission reports from the 1970s and 1980s. But it has never been enacted and, since the 1970s and 1980s, land law has become even more hard-edged and purchaser-focused. Accordingly, statutory equitable joint ownership for married couples or for, say,

⁷⁰ Technical difficulty seems to have been one of the reasons why the Law Commission's calls for statutory joint ownership in the 1970s came to nothing; Cretney, S. (2003) *Family Law in the Twentieth Century*, Oxford: Oxford University Press, p 139: 'It soon became clear that the task of putting even the restricted form of co-ownership favoured by the Commission into statutory form was more complex than anyone had anticipated'.

cohabitants with children would have little or no proprietary effect. Nor would it do what our respondents thought it would, namely to secure a home or an inheritance for children, although there might be other ways to achieve this, as we explore in Chapter 5.

There are therefore serious difficulties in effecting any proposal for statutory joint ownership of the family home for couples, married or unmarried, with or without children, despite the strength of the intuitions and ideologies that support it. We think that those intuitions and ideas are more likely to be served by a proposal for some form of deferred community of property, and so we turn in the next chapter to evaluate that possibility.

Deferred community of property: tales of equality, fairness and certainty

Introduction

This chapter turns its attention to our next line of inquiry, which focused on attitudes to the possibility of a *deferred* community of property regime. Even prior to the recent House of Lords judgments in the cases of *Miller* and *McFarlane*,¹ developments in the case law relating to ancillary relief on divorce – notably the House of Lords decision in *White v White*² and that of the Court of Appeal in *Lambert v Lambert*³ – had already given rise to claims that England and Wales has in practice adopted a system of deferred community of property.⁴ As noted in Chapter 1, this involves the parties retaining separate ownership of their property during the relationship (unless of course property has been jointly acquired) with typically (although not necessarily) an equal division of community assets (however legislatively defined) on relationship breakdown. It cannot then be denied that the post-*White* approach to claims for financial provision on divorce in England and Wales does already bear some but by no means all of the hallmarks of a deferred community scheme.

¹ *Miller v Miller: McFarlane v McFarlane* [2006] UKHL 24.

² *White v White* [2001] 1 AC 596.

³ *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] 1 FLR 139.

⁴ Cretney, S. (2003) 'Community of property introduced by judicial decision', 119 LQR 349. It should be noted that this claim was recently rejected by dicta in the High Court in *Sorrell v Sorrell* [2005] EWHC 1717 (Fam), per Bennett J. at para 96. Baroness Hale in *Miller v Miller: McFarlane v McFarlane* [2006] UKHL 24 also stated at para 151 that: 'We do not yet have a system of community of property, whether full or deferred'.

In particular, England and Wales has separate property for spouses during marriage followed by a requirement to measure the division of the parties' assets on divorce against a 'yardstick of equality', departure from which must be justified.

At the outset of this project in 2004, it seemed that the application of the English law on ancillary relief as contained in s 25 of the Matrimonial Causes Act 1973, combined with the yardstick of equality and principle of fairness, was so discretionary that all sense of certainty had been lost. At the same time, the gulf between the legal treatment of divorcing couples and the position of heterosexual cohabitants on relationship breakdown had in the post-*White* era widened considerably despite cohabitation having become an accepted and significant site for partnering and parenting within society.

At the conclusion of our project, there were important developments in both these spheres. The Law Commission's Consultation Paper put forward proposals to provide cohabitants with a claim for financial provision on relationship breakdown yet on a wholly different basis to that available on divorce.⁵ The House of Lords in *Miller* and *McFarlane* offered further guidance on the principles to be applied in claims for ancillary relief on divorce, but how much legal certainty has been gained is a matter for debate. Many issues (which would be predetermined in a community system

⁵ Law Commission (2006) *Cohabitation: The Financial Consequences of Relationship Breakdown: A Consultation Paper*, Law Commission Consultation Paper no 179, London: Law Commission for England and Wales.

and legally presumed to be ‘fair’ where the parties have not contracted out) are still left to the court’s discretion in England and Wales in order to achieve ‘fairness’ as between the parties. These include:

- Whether to apply the yardstick of equality before or after the resources required to meet the needs of the parties have been determined.⁶ Although this did not really affect the outcomes in *Miller* or *McFarlane*, the order in which you meet the needs and divide the excess of assets can bring about very different outcomes. To leave parties unsure which approach will be taken by the courts may be taking flexibility too far.
- The extent of the ‘community’ itself. Pre-acquired assets, inherited assets and farmland may justify departure from equality⁷ but not necessarily. What is or is not included may depend on the duration of the marriage and the extent of the assets following *Miller* and *McFarlane*, where the nature of ‘matrimonial assets’ was discussed but not resolved.
- To what extent certain factors may justify departure from an equal division of assets in order to achieve ‘fairness’. These require clarification. Examples considered by the courts are:
 - a ‘special contribution’, as acknowledged in *Cowan v Cowan*.⁸ Following *Lambert*⁹ this should only be found in exceptional circumstances; but the door to such arguments seemed to open wider following the High Court’s deliberations on this point in *Sorrell v Sorrell*.¹⁰ The issue remains unresolved; the judgments of Lord Nicholls and of Baroness Hale in *Miller* and *McFarlane*¹¹ do not speak with one voice;

- the appropriateness of applying the yardstick of equality in cases where assets do not exceed needs, in the short term or the longer term;¹²
- the appropriateness of applying the yardstick of equality following a short childless marriage, particularly if division is not restricted just to assets acquired post-marriage;¹³
- the appropriateness of applying the yardstick of equality following a short marriage where there are young children and the non-financial contribution to the welfare of the family is a continuing one.¹⁴

Our research questions aimed to find out whether a system of community of property had anything to offer the jurisdiction of England and Wales. Bearing in mind the problems a discretionary system brings and having considered our findings on immediate community of property and automatic joint ownership of the family home, we shall now turn to what we learned about views on a deferred community of property system for England and Wales. We shall then consider them in the context of recent developments affecting married and cohabiting couples.

⁶ Per Baroness Hale, in *Miller v Miller: McFarlane v McFarlane* [2006] UKHL 24, para. 14.

⁷ See *White v White* [2001] 1 AC 596 and *P v P* [2005] 1 FLR 576.

⁸ *Cowan v Cowan* [2001] EWCA Civ 679, [2001] 2 FLR 192.

⁹ *Lambert v Lambert* [2002] EWCA Civ 1685 [2003] 1 FLR 139, per Thorpe LJ, para 46.

¹⁰ *Sorrell v Sorrell* [2005] EWHC 1717 (Fam).

¹¹ See Lord Nicholls, *Miller v Miller: McFarlane v McFarlane* [2006] UKHL 24, para 67 and Baroness Hale, at para 150 et seq.

¹² See, for example, *Cordle v Cordle* [2002] 1 FCR 97, when the housing of the parties and particularly any children of the family took priority over equality under the English discretionary system.

¹³ A four-year marriage in *Foster v Foster* [2003] EWCA Civ 565, [2003] 2 FLR 299 justified the application of the yardstick in the view of Hale LJ (as she then was) where both parties had made financial contributions in a ‘joint enterprise’ marriage. The *Miller* decision did not apply equality but rejected the idea of putting the claimant back into her pre-marriage financial position after a very short marriage with no children. It did confine the division of assets to ‘matrimonial assets’ acquired ‘for the benefit of the family’ and other post-marriage acquired assets (per Baroness Hale, *Miller v Miller: McFarlane v McFarlane* [2006] UKHL 24, paras 157-8).

¹⁴ See *B v B (Mesher Order)* [2002] EWHC 3106 (Fam), [2003] 2 FLR 285.

Our empirical research

As a counterpoint to the general questions in the married context on automatic joint ownership of assets,¹⁵ we first used a general question to investigate deferred community of all assets in the cohabitation context where there were no children.¹⁶ Scenario questions were also developed in the married and cohabiting contexts, to look at attitudes to deferred community of the family home¹⁷ – usually a separating couple’s biggest asset – and the effect the presence of children of the relationship may have on such attitudes.¹⁸ Interestingly, it was here that our strongest findings emerged.

Deferred community of the family home

Using our scenarios for Rosie and Jim who had been married for seven years and Wendy and Bob who had cohabited for seven years, we asked what the outcome should be with regard to the family home if the relationship broke down, first where the couple had no children. We proffered a relationship where the financial contributions were unequal. The men had purchased the home prior to the relationship, earned much more and had paid the mortgage while the women earned much less and paid utility bills and for clothes. Second, we asked for views where they had two children aged four and six and the women worked part time and undertook most of the childcare. We gave them some options:

- Jim/Bob keeps the house, and Rosie/Wendy gets nothing.
- The house is sold and the proceeds are divided equally.
- The house is sold and most of the proceeds go to Jim/Bob and some to Rosie/Wendy.
- The house is sold and most of the proceeds go to Rosie/Wendy and some to Jim/Bob.

In the married context where there were no children, just under half (34) thought that the

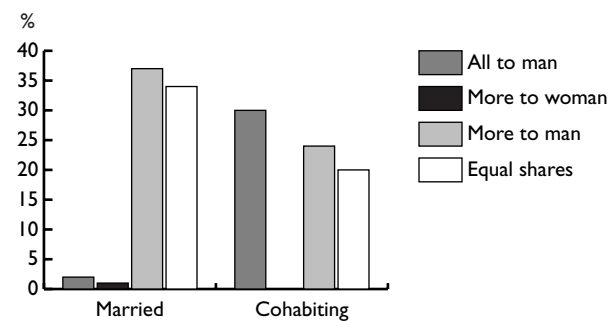
¹⁵ See Appendix B, question 15, discussed in Chapter 3.

¹⁶ See Appendix B, question 16.

¹⁷ See Appendix B, questions 18(e) and 19(e).

¹⁸ See Appendix B, questions, 20 and 21.

Figure 1: Shares in home – no children



house should be sold and the proceeds divided equally in line with the idea of deferred community of property (see Figure 1). Interestingly, even though this was a marriage, 37 thought that the home should be divided according to contribution and not equally. Thus there was by no means overwhelming support for the home to be divided equally on the basis of the standard of living enjoyed by the couple during a relatively short childless marriage. Rather, the issue of contribution to the family budget was raised as a better measure of a fair division by those respondents who opposed equal sharing. Since this is a seven-year marriage, under the Swedish model of deferred community (where equality is departed from in marriages of less than five years¹⁹) this case would have resulted in Rosie being awarded an equal share of the home in a system which takes no account of contribution and where equal division is the maximum point reached after five years. Thus here the support for automatic deferred community of the home by virtue of marriage was somewhat lukewarm. This is interesting in the light of the controversy surrounding the *Miller* decision, which involved a far shorter marriage but with far greater assets than Rosie and Jim’s.²⁰

¹⁹ Twenty per cent is deducted for each year less than five that the marriage lasted. See *Travaux Préparatoires, 1987 Swedish Marriage Code, Proposition 1986/87:1, pp 184-90.*

²⁰ In *Miller* an automatic entitlement to a share (unspecified) of the matrimonial assets including the parties’ two homes, the luxurious standard of living of the couple during the marriage and the high amount of wealth generated (albeit by the husband alone) during the marriage itself combined to justify the wife’s award of £5 million.

Not surprisingly, in the context of childless cohabitation, deferred community of the home was less popular. Twenty respondents were in favour of an equal split and all of these respondents felt that Wendy, like Rosie, should have an equal share of the home. A further 24 felt that Wendy should have a share but not an equal share. Views on this ranged from a 60:40 split down to a careful calculation of what each had contributed to their joint lives over the period of the relationship. A few (five) of the remaining 30 respondents who thought that Bob should keep the whole house did indicate that perhaps he should compensate Wendy to some extent but not by means of a share in the equity of the home. Over half the sample were in favour of the same treatment of Rosie and Wendy, whatever their views were on that; but over a quarter (23) of the respondents who felt that Rosie should get some sort of share of the home thought that Wendy was not entitled to anything at all because she was not married.

'Well, Bob had the home. It was his home before Wendy moved in. I know I'm repeating myself here but there's no legal binding with them. I'm a strong believer that people should get married because it stops one of the partners from walking away any time they want.' (Interview 21, male, married, aged 51-60)

Thus, while deferred community of the family home was thought more appropriate in the marriage context than the cohabitation context, views were divergent about the extent to which a childless marriage itself should trigger an equal division, at least where the purchase of the home pre-dated the marriage.

However, in exploring views where our couples had children, we found a marked consensus in favour of deferred community with an equal sharing of assets. Here we gave the further option of a *Mesher* order²¹ in respect of the home with a postponed division of the equity. We asked:

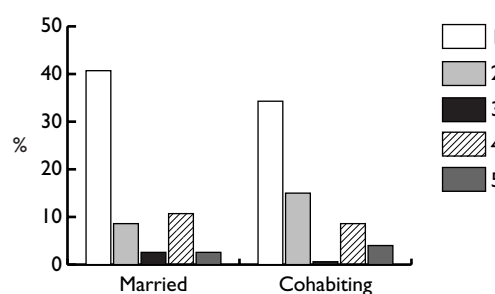
Jim/Bob and Rosie/Wendy now have two children aged four and six. Jim/Bob continues to work full time but Rosie/Wendy now works only four mornings a week as she looks after the children. They live in the house which Jim/Bob bought before they were married/lived together; he pays all the mortgage instalments and now pays most of the utility bills. Rosie/Wendy contributes to some of the utility bills and pays for all her own and the children's clothes. The house is an average three-bedroom semi-detached house and the mortgage amounts to two thirds of its value.

While respondents were free to suggest other outcomes, our prompted options were:

- Rosie/Wendy stays in the house till the children leave home. Jim/Bob will continue to pay the mortgage. When the children leave home the house goes back to him.
- Rosie/Wendy stays in the house until the children leave home. Jim/Bob will continue to pay the mortgage till the children leave. When the children leave, the house is sold and the proceeds split. How should this be divided?
- Jim/Bob gets the house immediately.
- The house is sold and the proceeds split. How should they be split? Equally? Most to Jim/Bob? Most to Rosie/Wendy?

There was strong support for deferred community in the family home where there are children of the family, and, as Figure 2 illustrates, this divided into two main groupings:

Figure 2: Views on the disposition of the family home on the breakdown of the relationship where there are no children



Key:

- 1 Defer sale and then divide the proceeds equally
- 2 Defer sale and then give a greater share to the man
- 3 Defer sale and then give a greater share to the woman
- 4 The house should be sold immediately and the proceeds divided equally
- 5 The man should retain the house

²¹ That is, an order that the house remains unsold until the children have all finished full-time education: *Mesher v Mesher & Hall* (1973) [1980] 1 All ER 126, CA.

- those who favoured a *Mesher* order providing the children with a home until the youngest was 18 before the equity was divided equally between the adult parties; and
- those who preferred an immediate sale of the home with an equal division of the net proceeds of the sale.

The first group was by far the largest in both the married and cohabiting contexts. Well over half (41 of 74) thought that married Rosie should remain in the home with the children before the proceeds were divided equally. Similarly, almost half (36) thought that cohabiting Wendy should be treated in exactly the same way.

This typifies the responses:

'I think she should be allowed to stay in the house until the children are older and then the property sold.

Q: And in what sort of shares?

A: Again, I think it should be an equal split.

Q: And why do you feel that?

A: Because she's had the major responsibility of bringing up the children.

Q: Now what if it was Wendy and Bob, the cohabiting couple whose relationship breaks down? Would you feel differently if it was Wendy and Bob who went through that?

A: No, no.

Q: Why not?

A: Because they've both still got the same responsibilities to each other and to their children.' (Interview, 23, female, married, aged 51-60)

However, when we broke down the respondents into different categories, fewer of the divorced men and former cohabiting men were in favour of this as compared with other groups. This group of respondents felt that a purely contribution-based approach to the home was felt more appropriate, whether the couple was married or not and despite

the presence of children, with Jim/Bob supporting the family in other ways:

'The house was still Jim's before marriage, before the children. The house was his alone. If Jim wishes to pass that property over to his wife to live in until the children are of an age ... that's down to him and he's obliged to financially reward his wife because she has to bring up two children to the standard he would like.... [S]o the house would belong to him and he could pay a percentage of that per year to support his children, keep his children and wife to a proper standard.' (Interview, 32, male, divorced, aged 31-40)

Those who agreed there should be a *Mesher* order, but not equal division, were in favour of a contribution-based division of the proceeds of the sale in favour of Jim (nine) and Bob (15). The vulnerability of Rosie/Wendy after their years of childcare was recognised by only a few respondents and indeed was not pointed out to them directly. However, in developing any policy response to these findings, we would argue that the impact of this must be assessed and taken into account. Only three respondents suggested that Rosie should get more than 50%, and one felt that this should apply to Wendy too. Where an immediate sale of the home was advocated, a few more (five) were willing to suggest that Rosie/Wendy should take a larger share.

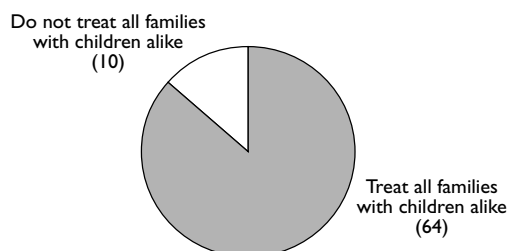
Some respondents felt that immediate sale followed by a 50:50 split was appropriate for Rosie and Jim (11) and Wendy and Bob (nine). Interestingly, although a few felt that Jim/Bob should retain the house without any capital sum being paid to Rosie (three)/Wendy (four), no one here suggested that where the home was sold Jim or Bob should get a larger share of the proceeds.

Overall, where there were children, there was strong support for a functional approach towards the legal treatment of cohabitants and a keen desire for the law to provide children with a home, a theme also noted in the context of our interrogation of automatic joint ownership of the home.

Our analysis here points towards three clear findings:

- First, there is undoubted support in principle for a deferred community approach in respect of the family home, with an equal sharing of the equity being favoured in the vast majority of cases in both the married and cohabitation scenarios *where there are children*.
- Second, regardless of the preferred outcome there is little support for treating cohabitants differently to married couples, *where there are children*. Indeed, only 10 of our 74 respondents gave different views relating to the outcomes for Rosie and Jim (the married couple) compared to the cohabiting Wendy and Bob (see Figure 3).
- Third, there was a reassuring near-consensus that the provision of a home for the children and their carer should take precedence over all other considerations. In some cases, this led to a challenge of the orthodoxy in the jurisprudence that children should not be given a share of the equity of the home.²²

Figure 3: Views on the disposition of the family home where there are children of the relationship



Let us now look at the findings from our general question about a deferred redistribution of assets for cohabiting couples.

Cohabitation without children as a trigger for deferred community

Our general question was based loosely on the Swedish approach,²³ which uniquely within Europe imposes deferred community of specified

property on cohabitants. The Swedish law affects unregistered cohabitants where no cohabitation contract has been made but is far more limited than the system applying to married couples and registered partners. It applies to the joint home²⁴ and household goods acquired after the relationship for all cohabitants.

Our question was:

In some countries, when couples have lived together for a number of years, for example three, and then split up, the law pools their property and shares it between them.

- What do you think about this and why?
- If you think this is a good idea, what sort of shares do you think would be appropriate and why?

Perhaps surprisingly, a majority of our respondents (38 of the 70 answering this question) thought this was a good idea; 19 of them (eight men and 11 women) suggested an unconditional, automatic equal division of the pooled assets on relationship breakdown regardless of whether there were children. This is in line with our findings with respect to deferred community of the home despite the fact that this question suggested that a larger range of assets could be included in the community. A theme that came through the answers was that this was appropriate if both partners were working and were contributing to the couple's shared life. Here, equality of outcome was clearly identified with fairness where there had been equality of effort in respect of the joint enterprise of the relationship and regardless of whether there had been equal financial contributions. As one respondent expressed it:

'50:50, yes it's a partnership isn't it? It can't be attributed to simply judging what you're putting into it. It's a relationship that has many assets, not just financial.' (Interview 49, male, married, aged 31-40)

²² See *Chamberlain v Chamberlain* [1973] 1 WLR 1557 and *Kieley v Kieley* [1988] 1 FLR 248.

²³ This is now contained in the Swedish Cohabitees Act 2003. There is no time qualification period in Sweden, but our scenario wanted to test the position in relation to a fairly short-term cohabitation relationship.

²⁴ Even if the joint home is purchased with funds derived from the sale of a property originally bought by one party prior to cohabitation, but later used as a joint home: Cohabitees Act 2003.

A small number of respondents (four) indicated that they were sure this system was appropriate where there were children but were more equivocal in other cases. Others (a further nine) thought that the assets should be shared, but not equally; their predominant view was that it should be shared according to contribution (broadly interpreted). Another view among this group was that while certain that assets should be shared, they were unsure of the appropriate division, which they felt would depend on the merits of each case. Of the remainder broadly but conditionally in favour (six), some felt that only the home should be shared, or that inherited assets or assets acquired before the relationship should be excluded.

In terms of the types of respondents who held these views, we did not find any marked differences in terms of age, socioeconomic group, housing tenure or marital status. However, with the caveat that the numbers were small, we did find some indications of a gendered division of views among the cohabitant sample (that is, those who were or had been cohabitants) although not for the sample as a whole. Over a third of the women (11 out of 32), but around a quarter of the men (eight out of 32) who answered this question²⁵ were in favour of unconditional deferred community with an equal division of assets; whereas just under a half of the women (15) compared to just over the half of the men (17) supported the idea with conditions. Roughly equal proportions of men and women rejected the idea outright. However, among current and former cohabitants, 30% of the women (four out of 13) compared to just 10% of the men (one out of nine) were in favour of unconditional deferred community with equal division. Almost half the men (four out of nine) but less than a quarter of the women (three out of 13) rejected automatic deferred community outright.

Furthermore, 32 of our 70 respondents answering this question completely rejected such a system for cohabitants on the basis that it was inappropriate, open to abuse by 'gold-diggers' and unfair in the short-term cohabitation context where there were

no children. Here the overwhelming view was that financial contribution should directly govern the post-relationship outcome.

'A: I don't agree with that.

Q: OK, why's that?

A: Perhaps the property was wholly owned by one or other of the persons and I don't think that they should be fully entitled to a share of that home.

Q: What do you think they should be entitled to in that kind of situation?

A: Well, if they've contributed to the home, then I think they should have a percentage of it, but not half.

Q: So that contribution should be dependent on how much they've ...?

A: How much they've contributed.'

(Interview 69, female, divorced, aged 51-60)

Even so, eight of this group indicated that equal sharing would be appropriate if the cohabitation had lasted longer, and a further two would have changed their position if a couple had children. There was also an unprompted suggestion by three respondents that a sliding scale of community not fixed by financial contribution might be appropriate:

'If both of the couple were earning and they were earning a similar amount of money, they've paid in 50:50 then the share would be 50:50 and that would be quite straightforward, and if one is putting more in, then 60:40, but once you have children, then it should even out. After five years whether you have children or not ..., it should bring it down on a percentage line, slowly, slowly until a certain time when it just occurs 50:50.' (Interview 50, male, divorced, aged 51-60)

While this was not a view specifically tested, the fact that it was raised unprompted by more than one respondent is interesting. First of all, the Swedish system of deferred community of property in the married context has just such a sliding scale of entitlement at its disposal where equal division of community property on divorce is normally

²⁵ A number of people mistakenly answered this aspect of the question as if it referred to married couples rather than cohabitants and we have discounted them.

only achieved after five years of marriage.²⁶ Second, this is a possibility which has been mooted in the English married context by Eekelaar,²⁷ in his observations about the move from a welfare-based to entitlement-based approach to financial provision on divorce. It was also a mechanism suggested as a means of avoiding the constructive trust lottery in family home disputes in the cohabitation context by Barlow and Lind.²⁸ Both envisage the possibility of a system of 'temporal accretion' whereby the weaker economic spouse's/non-owner's share in his or her partner's financial assets increases over the duration of the relationship – for example, 20% a year until equality is reached. Commentators such as Bailey-Harris consider that it might be 'discriminatory to require the spouse whose contributions are domestic to earn their deemed equal valuation over a lengthy period of time'.²⁹ While for these reasons Eekelaar's suggested accrual formula did not find favour in *Miller and McFarlane*,³⁰ his arguments for a temporal accretion approach have resonance with our data and may still be a useful tool in addressing the conflation that is sometimes made of equality with fairness. A durational approach would indeed find favour with some of our respondents, particularly where there are no children of the family, as would a system encompassing some but not all the family assets, with a broad consensus on the inclusion of the family home.

The range of views we encountered here definitely points towards deferred community as an acceptable option in terms of public perceptions of fairness on cohabitation breakdown. They also gave

some insight into the way cohabitation is generally perceived to be more of a marriage-like joint enterprise as mutual commitment manifests itself over time and/or through joint responsibility for children. These are also themes that echo the responses to our scenario questions discussed above.

So what does this lead us to conclude about deferred community as an option for England and Wales?

Conclusions about deferred community

In the light of the findings discussed above, might a formal system of deferred community of property have anything to offer us which our ad hoc system after *White, Miller and McFarlane* does not offer, bearing in mind the resemblance to deferred community of the decisions in those cases? What might we lose if we went down this route and how appropriate is it?

As we examine this question of principle, we bear in mind that a large proportion of our interviewees supported the equal treatment of married and cohabiting couples where there are children. Accordingly, we approach the issue initially from a functional point of view: would it work for families with children?

The attractions of equal sharing

Deferred community of property has its attractions. Such a regime would reflect the approach in *Miller and McFarlane* of identifying 'matrimonial assets', which in all cases would include the home but on a statutory footing. This could incorporate the principle of automatic equal division of the net equity of the home, reflecting the instinctive appeal this has to the popular imagination as a 'fair' solution where the relationship has been seen as an equal joint-enterprise partnership. The rule would have the benefit of certainty; and lack of certainty is one of the major disadvantages of the current discretionary system. People in our sample found the principled egalitarian approach which equal

²⁶ See Bradley, D. (1996) *Family Law and Political Culture: Scandinavian Laws in Comparative Perspective*, London: Sweet & Maxwell, p 78. This scale was not incorporated into the Marriage Code but in the report accompanying the legislation and acts as guidance as to when equal division may be departed from. See *Travaux Préparatoires*, 1987 Swedish Marriage Code, Proposition 1986/87:1, pp 184-90.

²⁷ Eekelaar, J., 'Asset distribution on divorce: time and property' [2003] *Fam Law* 828.

²⁸ Barlow, A. and Lind, C. (1999) 'A Matter of Trust', *Legal Studies*, vol 19, no 4, 468.

²⁹ Bailey-Harris, R. comment on *GW* [2003] *Fam Law* 386, cited in Eekelaar, J., 'Asset distribution on divorce: time and property' [2003] *Fam Law* 828.

³⁰ Per Baroness Hale, *Miller v Miller: McFarlane v McFarlane* [2006] UKHL 24, para 152.

sharing on divorce/relationship breakdown offers very attractive, particularly when combined with a *Mesher* order, which keeps the children in their own home during their childhood. Equality in the public mind does seem to be equivalent to fairness, which of course is not necessarily the case in practice. However, it is a principle that is certain and has public approval. The broad discretion conferred by the Matrimonial Causes Act 1973 aims to achieve true fairness. We appreciate that a system that incorporates any form of rule has a cost;³¹ but so has discretion. It makes for uncertainty, making negotiated settlements hard to achieve and litigated ones expensive. Greater predictability, we suggest, would be valuable in itself.

The difficulties of equal sharing for families with children

However, we know that a rigid immediate or postponed equal division rule may cause hardship to one or other of the parties in the housing market in England and Wales. Particularly where assets do not exceed needs, an immediate sale of the home and equal division of the equity is likely to cause hardship not only to the primary carer parent but also to the children of the family who are currently the court's first consideration. Postponement of the equal division could be achieved by postponing sale until the youngest child finishes full-time education to enable the children to be housed and could operate in a similar way to a *Mesher* order. However, this also replicates the difficulties experienced with a *Mesher* order followed by equal division as it perhaps falsely assumes that the primary carer can get herself into a position, when the youngest child leaves home, to purchase a home for herself with just 50% of the net equity and limited mortgage capacity. Thus, while automatic equal division is a solution which sounds simple and fair, it may just delay injustice if childcare responsibilities have seriously impaired the earning capacity of just one parent.

³¹ As the Law Commission comments: Law Commission (2006) *Cohabitation: The Financial Consequences of Relationship Breakdown: A Consultation Paper*, Law Commission Consultation Paper no 179, London: The Stationery Office, para 3.70.

The dicta in *Miller* and *McFarlane*, which identify a 'compensation' award to the weaker economic spouse, may address this issue in future and justify departure from equality, permitting a larger award to be made to that spouse. Similarly, the Law Commission's recent proposals³² for reforming the law on cohabitation breakdown talk of addressing 'economic advantage' and 'economic disadvantage' occasioned by a cohabiting relationship and judged at the point of separation but only in so far as it affects the future position of the cohabitants.³³ So might it be just as possible to depart from an equal division using a compensation-based idea within a deferred community scheme in appropriate cases? What, if anything, would we gain from such a system?

We should perhaps heed Eekelaar's warning to beware the 'quick fix' and explore the need to address the delayed poverty trap in lower asset cases.³⁴ It is often suggested that the poverty trap issue would be more appropriately addressed through greater redistribution of income rather than capital. However, that, of course, goes against the clean break principle,³⁵ and the current benefit and tax credit system in England and Wales does not encourage parties dependent on benefits and tax credits to pay or indeed ask for greater income distribution, as it does not in practice improve the living standard of either family. Some form of compensation (as suggested in *Miller* and *McFarlane*) or capitalisation in lieu of future maintenance, both of which are added to the weaker economic partner's share of the community where he or she is also the primary carer, may be a way forward. However, it would be important to set firm ground rules on how this would be applied in any deferred community scheme.

³² Law Commission (2006) *Cohabitation: The Financial Consequences of Relationship Breakdown: A Consultation Paper*, Law Commission Consultation Paper no 179, London: The Stationery Office.

³³ Law Commission (2006) *Cohabitation: The Financial Consequences of Relationship Breakdown: A Consultation Paper*, Law Commission Consultation Paper no 179, London: The Stationery Office, para 3.91.

³⁴ Eekelaar, J., 'Asset distribution on divorce: time and property' [2003] Fam Law 828.

³⁵ Matrimonial Causes Act 1973, s 25A.

New Zealand has attempted to put in place just such a scheme, whereby the normal rule is that all 'relationship property' (which is statutorily defined) is to be divided between the parties equally on relationship breakdown 'unless extraordinary circumstances make equal sharing repugnant to justice'.³⁶ This is combined with a power for the court to order a lump-sum payment from one person's share of the relationship property to the other to address economic disparities, particularly where the income and living standards of the parties are likely to be significantly different because of their different roles during the relationship.³⁷ In view of our findings, such an approach may well be a way forward and is certainly worthy of further serious consideration.

Issues in deferred community

We have also been giving some careful consideration to some linked ideas.

One is the scope of any possible deferred community. Should it go beyond the family home and contents? We suggest that it should, in line with the practice in most deferred community systems, and in line with the current principle in England and Wales of regarding all or most of the couple's assets as available for sharing; all or most will be needed, in most cases, to ensure that everyone's housing needs are at least partially met.

One possibility would be to take the Swedish approach and have a more limited community in the case of cohabitants. Our data certainly do not support this where cohabitants have children, but may well justify a distinction between the position of childless married and cohabiting couples. Here the community could be limited to the family home and its contents. The Swedish approach is to exclude family homes purchased by one party before the relationship; in practice, this seems to offer little protection, and is considered disappointing. It seems it may also have had the effect of fuelling the belief that there is equality between formal and informal cohabiting

partnerships whereas in truth there is not.³⁸ Given the already widespread nature of the common law marriage myth,³⁹ to go down this route in England and Wales may prove to be unhelpful, and perhaps any distinctions drawn between married and cohabiting couples would be better drawn in terms of the triggers or qualifications for a deferred community rather than its scope.

The question of pre-acquired property and inherited property is difficult. How far should we focus on the idea – prominent in the French and German systems – of sharing only wealth acquired after the start of a relationship? There was some support for this approach among our respondents, and this chimes with the dicta in *Miller* in approaching financial provision following short marriages.

Yet another issue is time. How far should the length of a relationship matter? Should it matter at all where there are children and the non-financial and financial contributions to the welfare of the family continue beyond the ending of the relationship? Our respondents tended to think not. Should we go with the idea of temporal accretion for those without children or as a means of departing from equal division in short childless relationships?

Our data seem to endorse a more unified approach towards financial provision following co-parenting rather than leaving this just as a privilege of marriage and there is agreement among the majority of our respondents that children should as a minimum be provided with a secure home on divorce or separation of their parents.

³⁸ Comment was made at a seminar at Uppsala University on 28 February 2005. As one contributor stated, 'The Swedish provisions for cohabitants (2003 Cohabitees Act) were presented by the politicians as being almost like marriage. This was not true. The statute gave the impression of protection and now that the reform is in effect there is a feeling that the new law is not what people were led to expect'.

³⁹ See further Barlow, A., Duncan, S., James, C. and Park, A. (2005) *Cohabitants, Marriage and the Law*, Oxford: Hart Publishing.

³⁶ See Property (Relationships) Act 1976, s 11 and s 13.

³⁷ Property (Relationships) Act 1976, s 15.

We raise for discussion the possibility that relationship breakdown could trigger something more, and something more permanent, for the children involved, although this would obviously mean a reduction in the assets allotted to each parent, which itself could cause hardship.

Tentative suggestions

There are a number of ways forward from our study, which require further consideration. A central issue with any proposed reform would be: to whom should it apply?

There was support for marriage itself to be a basis for entitlement although the lukewarm response to equal division in our examples might well justify guidance similar to that in Sweden whereby equality would normally be departed from during the first five years of marriage.

With regard to cohabitants without children, deferred community should be triggered by a time qualification period – perhaps three years might be appropriate as in New Zealand. Instead, or in addition, the regime could provide that equality would normally be departed from during the first five years following ‘qualification’ for the scheme. In the context of childless relationships, our observations (below) about contracting out have particular force.

We are attracted to the view, supported by nearly all our interviewees, that the presence of children should be the decisive factor in the availability of financial relief. As this and previous studies have shown, there is no problem from the perspective of general social attitudes with taking a functional approach to cohabitants with children. People as a whole tend to see little justification for different legal treatment where cohabitation has taken on the traditional functions of marriage, although there may be some suggestion that cohabiting and formerly cohabiting men are less enthusiastic towards this approach. Given that a quarter of all children are now born to cohabiting couples, we suggest that while contracting out should be permitted, any community of property scheme

should include cohabitants who have or have had one or more child of the relationship.

With regard to a rule on equal division, there are social factors to which our interviewees did not give a great deal of thought, but which we feel should be taken into account in shaping any community scheme. Most notable is the unequal impact that family relationships can have on the respective economic positions of the parties, and the fact that equal division of assets in lower asset cases can impact harshly on the party with primary care of the children. If deferred community of property is a way forward, we have to have this factor in mind and we have to look closely at the range of property to be included and at related issues of maintenance and of social security (which plays a big role, for example, in the success of the Swedish system). The formulation of more detailed proposals will require much greater reflection.

One possibility that might be worth further thought and discussion is to combine discretion with deferred community. Our thinking here is triggered by an article in *Family Law* some while ago by District Judge Roger Bird⁴⁰ in which he described his approach in the exercise of his discretion under the Matrimonial Causes Act 1973. He explained that he aimed to make an order that would house the children as a priority, with the housing needs of their primary carer coming second (and, no doubt, often solved in the same way). Where assets permitted he would then look at the housing needs of the other parent; then at the future income needs of all. Finally, he would leave ownership of the remaining assets, if any, undisturbed.

Now, that approach has no doubt had to be modified following *White*. The expectation would be that any remaining assets, after the meeting of current and future needs where possible, would be shared equally.

What we wonder is: might it be possible to put this ‘unofficial’ approach on a statutory footing, by:

- (a) specifying these needs as priorities for a court order or negotiated settlement, in order of priority;

⁴⁰ [2000] Fam Law 831.

- (b) stating the extent of the deferred community;
- (c) providing that the priority needs were to be met first, and that any surplus community assets would be divided equally;
- (d) providing that where community assets are not sufficient to meet the priority needs stated, the parties' separate property, if any, should be applied proportionately.

Point (a) aims to meet the criticism of equal sharing, namely that for many primary carer parents half the equity of a house is not enough. There is a lot of anecdotal evidence that the decision in *White* has exacerbated this problem, and we would like to see priorities clearly set by statute. An order that a mother who has spent years at home caring for the children should receive half a house at the far end of a *Mesher* order is often going to be unsatisfactory, and we would like to see a setting of priorities that made such an outcome unlikely.

Point (a) needs careful thought. How is 'need' to be defined? What is the role of the parties' current standard of living? What should be their relative standards of living in the future? Should priorities include the capitalisation of future income needs? Where, in such a list of priorities, should we place provision for compensation for a party who has given up work to look after the children, given the evidence we have of the massive long-term cost of this?⁴¹

Point (b) meets one of the concerns arising from recent case law, namely that the extent of divisible property is unclear. A statutory ruling on the availability of inherited funds must be preferable to the current uncertainty.

Point (c) meets another of the concerns arising from the judgments in *Miller* and *McFarlane*, namely the uncertainty as to whether needs are to be met before or after the yardstick of equality is applied. Consider a couple owning, between them, assets worth £1 million. If the mother 'needs' a

house worth £650,000 and the father a flat worth £250,000, then assets exceed needs, but the question just posed is a crucial one.

Point (d) may often be irrelevant; one suspects that in those cases where there is a large amount of property, such as inheritance, which under a true deferred community scheme would be classed as separate, community capital would often exceed needs. However, a very crude example may be useful to illustrate what we have in mind:

Example

Married couple with two children. The wife is the primary carer, the husband the main breadwinner.

Assets

Community (joint savings, net equity of family home/ contents) = £200,000

Her separate property (recent inheritance) = £400,000

His separate property (shares) = £100,000

Needs

House for her and children: £120,000

This comes from the community

Flat for him: £100,000

£80,000 comes from the community, and

$1/5 \times £20,000$ comes from his separate assets (£4,000)

$4/5 \times £20,000$ comes from her separate assets (£16,000)

The community is exhausted; but the wife gets to keep £384,000 of her separate property. Depending on her earning capacity or lack of it, she may apply for maintenance and will get child support for the children.

⁴¹ See *Miller v Miller: McFarlane v McFarlane* [2006] UKHL 24, per Baroness Hale, paras 137 et seq.

This is a very tentative idea, not generated by our data, and requiring considerable further work. We

do not pretend that it is a worked-out scheme.⁴² We put it forward as one that occurred to us after reflection on our data, on the aspects of community that appealed to our respondents, and on the aspects of community that risk sacrificing some of the benefits of the current discretionary scheme in England and Wales.

Contracting out

All community of property regimes permit contracting out. Given recent developments in this jurisdiction it seems that the case for permitting married and cohabiting partners to reach their own agreements is becoming overwhelming. In particular, the public reaction to the *Miller* decision concerning a short, childless marriage indicates that there are strong feelings that people should be able to reach agreements protecting at least certain assets acquired prior to marriage.⁴³ The case is even stronger in the cohabitation context where there are no children. This has been endorsed both by the persuasive case made for cohabitation contracts in the Law Commission's recent consultation

paper⁴⁴ and by the increased willingness of the courts to take pre-marital agreements into account at least where the marriage is short.⁴⁵ Where there are children, the considerations are more testing, but the court would retain the ability to award maintenance to the primary carer (which as in Sweden could be capitalised) to provide redress where needs are left uncatered for. This is an approach also taken in the New Zealand context, in addition to the ability to adjust the shares of relationship property.⁴⁶

Overall, the ability to make an enforceable contract would focus people's minds, prior to marriage or near the beginning of a cohabitation relationship, on what might eventually happen to their assets. While we did not specifically ask our respondents about pre-nuptial or cohabitation agreements, we did ask about the desirability and availability of legal advice at the outset of relationships. While 18 felt it inappropriate, because it might have negative effects on the relationship, the majority – 52 of our 74 respondents – were enthusiastic, with only five feeling that people already took enough advice. Taking these factors in the round, we have come to a view that this is definitely one area where we should now adopt a more European approach.

⁴² One aspect that we would find very difficult is the treatment, under such a scheme, of capital generated after divorce. Imagine a family whose only asset is a house, which is needed as a home for the mother and children. The entire equity (and therefore the entire community) is awarded to the mother, to meet her current and future needs. But there is also an award of periodical payments, equivalent to the mortgage repayments. Once the children leave home, the house must be sold, and the father must get some capital return. This is actually a case where an equal division of the additional equity generated after divorce might fairly be split 50:50. Suppose, for example, that the equity in the house on divorce was £100,000, and has grown to £200,000 at the point of sale; on sale, the combination of the award from the community on divorce and a half share in the equity accrued since would mean that the mother gets three quarters of the accrued equity, while the father gets a quarter. However, it is easy to imagine cases where this does not work, and a lot of work would need to be done to devise a robust system.

⁴³ For a strong endorsement of this, see Todd, R. (2006) 'The inevitable triumph of the ante-nuptial contract' [2006] Fam Law 539.

Concluding thoughts

Given the topical and timely nature of the issues examined in this study, we suggest that our findings and suggestions should be taken seriously by those looking at law reform in this area in both the married and cohabitation contexts.

The current law does not provide certainty and while it is clearly striving for 'fairness' in the married context, it treads many paths on this quest.

It seems to us that we are already journeying towards a system of deferred community of property for divorcing couples. Since the House of Lords'

⁴⁴ Law Commission (2006) *Cohabitation: The Financial Consequences of Relationship Breakdown: A Consultation Paper*, Law Commission Consultation Paper no 179, London: The Stationery Office, chapter 6.

⁴⁵ See *K v K (Ancillary Relief: Pre-Nuptial Agreement)* [2002] FLR 877.

⁴⁶ Family Proceedings Amendment Act 2001.

decision in *Miller* and *McFarlane* there is the need to define and distinguish ‘matrimonial assets’ (which will include the matrimonial home irrespective of ownership, it seems)⁴⁷ from other property owned by parties to a marriage, which has resonance with community regimes that designate specific assets to be held in the community. Yet because we now have a community of property approach judicially developed from inside a statutory discretion-based framework, and not a statutorily prescribed community of property regime, many questions require clarification. It could be argued that we have ended up with the worst of all worlds.

Equally applicable in the English context is Buckley’s view of the Irish system: ‘The present law offers neither certainty nor finality.... Although the equitable redistribution approach offers flexibility ... the price of this alleged responsiveness in terms of anxiety, strain and litigation, is too high’.⁴⁸ A properly worked-out statutory regime, taking account of the public attraction of equal sharing and of its dangers, merits serious consideration.

For cohabitants, fairness as between the adult parties is not currently part of the equation, although the Law Commission’s Consultation Paper⁴⁹ is addressing this albeit on a different (and more structured) footing to the divorce context. Our data and those of other surveys show, however, that people are intuitively in favour of equal treatment of married and cohabiting couples with children. In addition, they feel that equal sharing of assets at the end of a relationship is a ‘fair’ principle to start from.

We certainly think that if we are moving towards a community of property system – and even if we are not there already, in the longer term there may be European pressure to go down that route – this should not be done only in the married context. There is scope for the scheme to include only ‘committed’ cohabitants and also to avoid the perceived

inequities arising from asset transfer after short childless relationships.

Deferred community with equal division after needs have been met may have much to offer us if it is combined both with a structured application of discretion to assess needs and with contracting out. It would bring greater certainty as regards the division of capital assets on relationship breakdown, without ruling out discretion (as the Swedish⁵⁰ and indeed the New Zealand⁵¹ models show). It could also be combined with the provision of a home for the children of the relationship by postponing sale of the home or settling some relationship property on children. Indeed, New Zealand has combined both these common law remedies with a deferred community regime, in order to provide for the housing needs of children, and so it might well be possible to achieve this in England and Wales.⁵²

Maintenance plays a role in all the other jurisdictions we have studied (France, the Netherlands and Sweden), and is another means of compensating the weaker economic spouse. We suggest that any deferred community of property system in England and Wales would have to work alongside a discretionary maintenance system, where maintenance can be capitalised where appropriate. By providing more concrete rules about the division of capital, it is suggested that the areas of dispute would be more limited and could be focused on more clearly by both the parties and the court.

As Buckley concludes, ‘A community regime is limited as regards flexibility, but it offers a measure of security, certainty and transparency which, it is contended, is likely to increase both justice and emotional well-being during and after marriage’.⁵³ We think, following analysis of our data, that she is right and that, with the caveats set out above, deferred community could have much to offer the jurisdiction of England and Wales.

⁴⁷ Per Lord Nicholls and per Baroness Hale in *Miller v Miller: McFarlane v McFarlane* [2006] UKHL 24.

⁴⁸ Buckley, A. (2002) ‘Matrimonial property and Irish law: A case for community?’, *Northern Ireland Legal Quarterly*, vol 53, no 1, p 76.

⁴⁹ Law Commission (2006) *Cohabitation: The Financial Consequences of Relationship Breakdown: A Consultation Paper*, Law Commission Consultation Paper no 179, London: The Stationery Office.

⁵⁰ See Chapter 1. See also Bradley, D. (1996) *Family Law and Political Culture: Scandinavian Laws in Comparative Perspective*, London, Sweet & Maxwell; and more specifically Marriage Code, chapter 12, §1.

⁵¹ See Property (Relationships) Act 1976, s 15 and s 15A.

⁵² Property (Relationships) Act 1976, s 26 and s 26A.

⁵³ Buckley, A. (2002) ‘Matrimonial property and Irish law: A case for community?’, *Northern Ireland Legal Quarterly*, vol 53, no 1, p 76.

The control of dispositions of family property

Community of property, as we have seen, is a broad spectrum of legal regimes. This chapter looks at one feature found in many of them, but not inextricably linked to joint ownership of property, nor to division of property on divorce. It is the protection enacted in many jurisdictions which enables a partner who does *not* own the family home to prevent its being disposed of without his or her consent.¹

As is well known, England and Wales has a weak version of this protection. It seems to be found in a more effective form in many community of property jurisdictions. This may arise from a stronger view, in those jurisdictions, of collegiality between those who share a home as partners. What follows leads to a tentative suggestion for reform of the law in England and Wales so as to strengthen the protection offered, whether or not an introduction of any form of community of property is contemplated.

Protection from unilateral dispositions

One partner owns the family home, the other has no proprietary right in it; how can the latter prevent the house being sold, or mortgaged, without his or her knowledge and consent?

The vulnerability of a spouse in this position led to Lord Denning's attempts to create the 'deserted wife's equity', so famously squashed in *National Provincial Bank Ltd v Ainsworth*,² and to the Matrimonial Homes Act 1967. The usual criticism made of statutory protection – now found in section 30 of the Family Law Act 1996 – is that it is available only to those spouses who choose to register it; that many will fail to do so through ignorance; that others will be deterred from doing so by the wish not to do something overtly hostile; and that often when the need to register is appreciated, it is already too late.

Because of these factors, many of those who need the protection will not have it. We might add a further criticism: that it is available only to spouses. Today, when so many couples cohabit without being married, often failing to perceive that they do not have the same rights as married couples, this can be seen to be unacceptable.

However, Mrs Ainsworth's problem – her inability to prevent her husband mortgaging the home without her consent – is nowadays far less likely to occur. For one thing, the majority of married homeowners own their home jointly; Mrs Ainsworth is a much rarer bird than she was. For another, purchasers – buyers or mortgagees – will always ask the owner about the other adult occupiers of the property.³ This does not eliminate the possibility of the owner lying; but the fact that

¹ Those regimes that identify a primary and a secondary regime would place this aspect in the primary regime; see p 2.

² *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.

³ See above, p 26.

the question is now asked must make the problem a little less likely to occur.⁴

So, the protection the law offers in this jurisdiction is weak; the danger against which it guards is not as serious as it used to be, but by no means eliminated.

Unilateral dispositions: some research findings

Our empirical research touched on the issue of dispositions carried out by a sole owner of the family home. One of our scenarios posited that Jim, the husband, or Bob, the cohabitant, was the legal owner of the property; we asked in each case whether or not our respondents thought that he should be able to sell the house without his partner's knowledge or consent.

Opinions on this were strong. Sixty-one of our 74 respondents thought that Jim should not be able to sell without Rosie's consent; seven thought that he could do so but must inform her; six thought that he should have an unqualified right to sell. For Bob, the corresponding figures were 41, 13 and 18. Thus, more were prepared to assert the cohabitant's independence, but even so a large majority would deny Bob the right to sell 'over Wendy's head'.

Of course, Rosie (who is married to Jim) has the option of protecting herself from this disaster. She probably will not do so, because she almost certainly does not know that she can; if she does, she will probably feel that she does not need to. Wendy (who lives with Bob) has no option of protecting herself. She has set up home with Bob, and the security of her occupation, like Bob's love, is something she has to take on trust.

We pushed this one a little further with a separate scenario at the end of the interviews. In question 22,⁵ a married couple, Simon and Jane, live in a

house acquired by the wife before the marriage; we ask if she should be able to use it as security for her business venture. And we asked if the respondent's views would differ if the house had been acquired after the marriage. Fifty-one of our respondents felt that she should be able to do this only with the husband's consent. Eight would support her unqualified right to dispose of the property. Where the house was bought after the marriage, the figures turn to 49 and 13. Interestingly, 12 of our respondents thought that the house should not be used as security in this way at all.⁶

Again, Simon could protect himself using s 30 of the Family Law Act 1996, but probably will not do so; if he were a cohabitant, he would have no protection.

So, there is a strong groundswell of opinion that spouses should not have the house sold or mortgaged 'over their heads'; and that view is still widespread when a cohabitant rather than a spouse is postulated.

Prevention of unilateral dispositions in Europe

We found that provisions to give partners control of dispositions were a common feature in the regimes we studied. This is a feature of legal systems which operate community of property, without being a necessary feature of the community regime itself.

Sweden has a deferred community system, but neither spouse can dispose of the family home, their household goods, or any real property forming part of the community during the marriage without the other's consent;⁷ the same is true in France whether or not the family home falls within the community, and a sale without the spouse's consent is voidable at the instance of that

⁴ The sole owner of the property in such cases may not initially have any intention of depriving (usually) his wife of her home. At the time of the mortgage, he may have no reason not to reveal her presence.

⁵ See Appendix B.

⁶ It would be interesting to explore this. Did our interviewees feel that the couple should not, morally, mortgage the house as security for a business loan, or did they really feel that the law should prevent them doing so even if they both wanted to?

⁷ Marriage Code, chapter 7, s 5.

spouse for a year.⁸ In the Netherlands, dispositions of the matrimonial home require the consent of the other spouse; as does guaranteeing a third party's debt or making large gifts.⁹ A sale made without consent is voidable for three months.¹⁰

None of these regimes provides protection, in the form of the ability to veto dispositions, to unregistered cohabitants. Nor does France provide this protection for the PACSé couple.

In Ireland, s 3 of the Family Home Protection Act 1976 states:

3(1) Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2) and (3) and section 4, the purported conveyance shall be void.

Strong stuff. But it is not so strong as it would appear, because subsection (3) reads:

3(3) No conveyance shall be void by reason only of subsection (1)–

(a) if it is made to a purchaser for full value.

What looked like a draconian right turns out to be unenforceable against a purchaser for value – so the protection is only for gifts, or for dispositions at an undervalue. The term 'purchaser' is defined in subsection (6) to mean one 'who in good faith acquires an estate or interest in the property', and in accordance with usual principles 'good faith' would encompass a knowledge component. Thus, a buyer or mortgagee who knows that the disponor

is married would have to ensure that consent is given.¹¹

Similarly in Scotland, the Matrimonial Homes (Family Protection) Scotland Act 1981 offers protection that does *not* depend on registration.¹² The statute gives occupancy rights to spouses, as section 30 of the Family Law Act 1996 does for England and Wales, and provides that if a spouse disposes of the property without the other's consent the other's occupancy rights are not prejudiced, so that the purchaser in effect cannot get vacant possession.¹³ Again, there is a good faith exemption,¹⁴ with specific provision for the purchaser to be protected if he or she obtains from the seller an affidavit stating that there are no occupancy rights in the home. The statutory protection for spouses has been criticised on the basis that, because it does not depend on registration, it imposes inordinate trouble on purchasers; but this provision of a specific mechanism whereby a purchaser in good faith can obtain protection does seem a good way to satisfy all parties. Note – and this is very important for land registration technicalities – that the affidavit procedure is *not* a way of ensuring that one is a purchaser in good faith; but a way for a purchaser in good faith to obtain protection. The meaning of 'in good faith' is not defined in the 1981 Act.

So, all these jurisdictions operate stronger protection than does England and Wales, because none of them requires that the control right be registered in order to be enforceable. England and

⁸ Code Civil, Article 215.

⁹ Civil Code, Article 1.88. See Sumner, I. and Warendorf, H. (2003) *Family Law Legislation of the Netherlands: A Translation Including Book 1 of the Dutch Civil Code, Procedural and Transitional Provisions and Private International Law Legislation*, Antwerp: Intersentia, p 57.

¹⁰ Civil Code, Article 1.89; see also Reinhartz, B. (2002) 'The Netherlands', in C. Hamilton and A. Perry (eds) *Family Law in Europe* (2nd edition), London: Butterworths, p 450.

¹¹ And inevitably disputes arise as to whether or not consent has been given freely, just as England and Wales has experienced in the context of spouses giving surety for loans (the *Boland/Etridge* scenario): see cases such as *Bank of Ireland v Smyth* [1995] 2 IR 459, *ICC Bank v Gorman* High Court, 1996 No 469 Sp (Transcript), 10 March 1997.

¹² The Scottish Law Commission recommended that it should (Scottish Law Commission (1978) *Occupancy Rights in the Matrimonial Home and Domestic Violence*, Consultative Memorandum no 41, Edinburgh: HMSO).

¹³ Matrimonial Homes (Family Protection) Scotland Act 1981, s 6; and see generally Sutherland, E. (1999) *Child and Family Law*, Edinburgh: Butterworths LexisNexis, pp 54 ff.

¹⁴ Matrimonial Homes (Family Protection) Scotland Act 1981, s 6(3)(e).

Wales would appear to have missed a trick; and we would like to consider further the option of reforming the law there so as to provide stronger protection for non-owning spouses and, perhaps, for non-owning cohabitants too.

The structure of protection

As soon as we turn our attention to the possibility of reform, we have to look at the other side of the coin: the protection of purchasers, which is such a very high priority in English land law.¹⁵ And what we find when we compare the regimes considered above is this: that

- either protection is dependent on registration;
- or the spouse is protected without registration, but the system also embodies protection for a purchaser – either by a good faith mechanism, or because the disponor's status is checkable.

Thus, in France, the Netherlands and Sweden protection does not depend on registration; but the purchaser can check in the marriage and partnership registers, and such checks are part of normal conveyancing procedure. In Scotland and Ireland there is no registration requirement, and no standardised means to check status, but there is good faith protection. By contrast, in England, protection depends on registration in the land register¹⁶ because s 30 of the Family Law Act 1996 does not embody good faith protection,¹⁷ and conveyancing procedure does not include a check on status.

That, therefore, is a kind of explanation as to *why* the protection offered in England and Wales is so weak. It is also an explanation as to why no

jurisdiction offers disposition veto to unregistered cohabitants – it is just too risky for purchasers.

It can be seen from our empirical research that disposition protection is important to people. We can also see that England is unique in requiring registration in order for protection to be activated. We suggest that this is an area in which England and Wales has fallen short of something like a Europe-wide procedure for protection. England and Wales could provide additional protection for spouses and cohabitants, while building in a mechanism for the purchaser to obtain protection as has been done in Scotland, without adding very much at all to the conveyancing process.

Sole disponors are already asked whether or not there are other adult occupiers of the building. The only extra detail that would be added if England and Wales followed the Scottish model would be that the disponor would have to provide an affidavit rather than merely replying to preliminary inquiries; and that the disponor would be asked specifically about the presence of a spouse rather than generally about adult occupiers. The benefit of this would be that the disponor would be alerted to, and asked to think about, the spouse's rights; and we think that this could be a useful reform in both sending a message and, in some cases, providing an extra layer of protection without undue inconvenience to anyone. It would be easy to make this a further required item in the Home Information Pack.

Could this protection also be extended to cohabitants? We suspect that it could, in view of the way in which it could be integrated into the conveyancing process, provided that 'cohabitant' was defined with sufficient clarity. A definition by reference to time or to the presence of children might well be acceptable. Set against this, we have to ask whether or not such a restriction is justifiable from a human rights point of view (is it an interference with the peaceful enjoyment of one's possessions?), and indeed whether or not it would be acceptable to the public or to lenders. We suggest that this is an area that has not been properly explored in England and Wales in recent years and that it would merit further examination and, indeed, consultation.

¹⁵ It is interesting that in its report following *Williams & Glyn's Bank Ltd v Boland*, Law Comm I 15, 1982, the Law Commission stressed the importance of not putting purchasers at risk of undiscoverable equitable interests. The membership of the Law Commission at the time was as pro-family as can be imagined.

¹⁶ Or the Land Charges Register where the title is unregistered – the good old Class F land charge.

¹⁷ Anathema to English land registration theory since the debacle in *Peffer v Rigg* [1977] 1 WLR 285.

A

Appendix A: The interview schedule for Europe

The following is an amalgamated version of the interview schedule used in the Netherlands, France and Sweden.

Our research project asks whether it would be desirable to introduce a community of property regime in England and Wales. We are interested in finding out how community of property operates in the Netherlands/France/Sweden. All the questions refer to both spouses and registered partnerships unless otherwise stated.¹

1. How do people here in the Netherlands/ France/Sweden find out about community of property regimes?

Examples which you may or may not find relevant:

- Information in schools
- Leaflets in public places
- Family and friends
- Websites
- Information available before marriage/ registered partnership
- Others

2. (a) Approximately how many people seek your advice on community of property each year?²

¹ This last sentence was omitted in France, where the PACS takes the place of, but is not quite equivalent to, the registered partnership.

² Intended to ascertain to what extent the interviewee was a specialist in this area of law.

- (b) Of those who seek your advice on a community of property regime before marriage, approximately what percentage choose the default regime?³
- (c) [The Netherlands and Sweden] Of those who seek your advice on a community of property regime before registered partnership, approximately what percentage choose the default regime?
- (d) [France only] Do you also advise couples considering a PACs?
- (e) [The Netherlands only, where reform is probable] Do you think these figures will change at all when the new legislation alters the default regime? Please give reasons for your view.

3. What sort of people seek your advice on matrimonial property regimes

- (a) before marriage or registered partnership?
- (b) during marriage or registered partnership when thinking about/considering a change of regime?

Do any of the factors listed below make people more (or less) likely to seek advice?

- Wealth
- Age
- Children
- Second marriage/partnership

³ The intention here was to discover to what extent people chose the default regime after taking advice. The responses indicated that those who seek advice do so with the intention of contracting out, and carry out their intention.

- Gender
- Sexual orientation
- Religion
- Other

4. What sort of people do you advise to contract out of the default regime⁴

- (a) before marriage or registered partnership?
- (b) during marriage or registered partnership when considering a change of regime?

Are any of the following factors relevant?

- Wealth
- Age
- Children
- Second marriage/partnership
- Gender
- Sexual orientation
- Religion
- Other

5. (a) What regime would you advise such people to make in the light of the following life events?
 - Birth of a child
 - Stopping paid employment
 - Becoming self-employed
 - Retirement
 - Death
 - Divorce/separation
- (b) In your experience do clients who come to seek advice normally complete the agreement you have advised them to make?
- (c) Is it common for people to change regime more than once?

- (d) Do you have any experience of discussion of regimes causing disagreement or unhappiness between couples?

In order for us to get an idea of how the community works in practice, we would like to know what type of advice you would give in the following situations:

6. For example:⁵

A married couple with four pre-school children own a house worth Euro 120,000 [SEK 1,500,000], subject to a mortgage of Euro 100,000 [SEK 1,300,000].⁶ They have adopted (by choice or by default) the default community regime. They have no other assets. They are in the process of divorce. The father has recently lost his job, and although he may obtain another he is unskilled and will have little to spare after supporting and housing himself; the mother looks after the children at home and has very little chance of obtaining a job. In this situation:

- Does the house have to be sold?
 - Is it possible to change regimes immediately before divorce? Would there be a reason for doing so?
 - What arrangements can be made to ensure an income for the mother and the children?
 - What arrangement might be made for the support of the wife if there were no children?
 - What, if any, is the impact of social security on this situation?
7. Can you give us some examples of recent cases where you have advised on the divorce of a wealthy couple with substantial assets?
 8. Can you give us some examples of recent cases where you have advised same-sex partners in low/middle/high asset brackets?

⁴ Questions 3 and 4 are intended to demonstrate any contrast between those who *should* seek legal advice and contract out, and those who *actually* do so. Only in Sweden did anything significant emerge from that contrast: in a deferred community regime, people seek advice in the belief that running their own business puts the community of property at risk, but of course it does not do so to the same extent as in France and the Netherlands because in Sweden there is no community of property before dissolution.

⁵ Our example is intended to illustrate a scenario where the parties are almost without means save for a small equity in the house. In England, receipt of half the equity would be disastrous for the wife, as it would deprive her of social security benefits.

⁶ Quite a small house.

B

Appendix B: The interview schedule for England and Wales

The following is a copy of the interview schedule used with our respondents in England and Wales. An adapted version was used for respondents who had formerly been married or cohabiting but were not in a relationship at the time of the interview, with questions 1 to 14 expressed in the past tense ('how did you and your partner' and so on).

SECTION A

Relationship history and current circumstances

1. (a) How long have you been married/living together with your current spouse/partner? *If married:* Did you live with your spouse before you got married? *If yes:* For how long?
(b) Is this your first relationship or have you been married or lived with someone before? *Please give details.*
(c) *If had previous relationships:* How long were you together?
2. Do you and your current partner have any children together? *If yes:*
 - (a) How many?
 - (b) What are their ages?
3. Do either of you have children from a previous relationship? *If yes:*
 - (a) How many?
 - (b) What are their ages?
4. Do you and/or your partner own your home? *If no, go to Q5, if yes:*
 - (a) As far as you know, is your home owned solely by you or is it owned by both of you?
 - (b) Did you contribute financially to the purchase of the family home?
 - *If yes, ask for details, capital contribution, mortgage repayments (how divided, roughly).*
 - *If no, what is the reason for this?*
 - (c) Can you tell us roughly how much your home is worth on the open market?
 - (d) Do you/your partner have a mortgage/loan on your home? How much for in total, roughly?
 - (e) Do you/your partner have any other debts besides the mortgage? How much for, roughly? *Ask details for both partners if known. Go to Q6.*
5. (a) If your home is rented, whose name(s) is/are on the tenancy?
(b) Do you and/or your partner have a right to buy your home?
(c) Do you and/or your partner have any debts (*rough details*)?
6. Do you and your partner have any other assets besides the house? (*Get details, for example: car, other property, stocks and shares.*) Are they owned jointly or are they owned separately?

SECTION B

Management of household, assets and finances – how couples manage their household and finances

7. How do you and your partner divide up the roles of earning money, caring for children (if any) and looking after the home? By that we mean who does what and in what proportions, roughly?
8. Could you tell us what bank and/or building society accounts you have/your partner has?
- Whose names are they in? (*For instance, get details of the accounts and whether they are held jointly or separately for each of them.*)
9. We would now like to ask about how you and your partner manage your household finances.
- What money goes into your accounts (*whose earnings, child benefit etc*)?
 - What is that money used for?
 - Who can make decisions about spending from these various accounts?
 - How much do you each contribute to joint expenses and is that an equal amount or proportional to what you each earn?
 - Whose money is it in these accounts as far as you are concerned (*eg some people may say that it's 'our' money in the joint account but 'mine' in the personal account, whereas others will say it's all 'ours' regardless of the names on the accounts*).
- What would best describe the way you and your partner regard your money:
- Joint enterprise? We share all our finances with each other and regard everything as jointly owned.
 - Do you consider yourselves as stakeholders with different shares? *By this we mean that each of you has a share in some of the jointly acquired assets but each of you has your own separate property as well as that which you each control with reference to the other.*
- Do you like to keep everything separate? *You may each contribute, but you don't pool your money regarding it to be used jointly.*
 - Would your partner share your views on this, do you think?
10. How do you divide the responsibility for paying the bills such as the mortgage (if any), rent, food and the utility bills in your household? *Who makes the payments and whose money do you use for these?*
11. In general, how do you regard your and your partner's assets other than money? Which of the following would you say best describes your situation?
- Joint enterprise? *You consider that you each pool all you have with the other and regard everything as jointly owned.*
 - Do you consider you are stakeholders with different shares? *You may each contribute, but you don't pool your money.*
 - Would you say your partner shares the same view as you on this?
12. How did you end up doing things this way? *Some of the reasons could be: convenience, historical, previous experience, different views on money in relationships, discussed the situation and agreed that this suited us best.*
13.
 - Can you describe how you make decisions regarding household purchases?
 - Does one person have the final say for certain kinds of spending?
 - For example, who takes the decisions to take out hire purchase agreements, or buy items such as a washing machine or car?
- Owner occupiers only**
14.
 - Is your home used as security for your business or your partner's business?
 - How do you feel about this?
 - Did you/your partner consent to this?
 - How did you/they feel about it?

SECTION C

General questions on property, relationships and the law in modern-day society

15. In some countries, when people get married all their property becomes automatically jointly owned with their spouse.
- What do you think about this?
 - Do you think this is a good idea? Why?
 - Why not?
 - Say they later have children, does this make a difference to your view?
 - What about if one or both have inherited money from their families?
 - What if one or both of them are remarrying, does this affect your view? Can you explain why you feel like this?
16. In some countries when couples have lived together for a number of years, for example three, and then split up, the law pools their property and shares it between them. What do you think about this?
- If you think this is a good idea, what sort of shares do you think would be appropriate?
17. (a) People often seek advice when a relationship goes wrong, do you think it would be a good idea to encourage or even make people consider the financial implications of marrying/cohabiting when they marry and/or set up home together?
- Why do you like/don't you like this idea?
 - If people were encouraged to take advice, how do you think this idea should be given to people? *Ask for suggestions how this might be done (for example: television, advertisements, websites, encourage pre-nuptial contracts, advice available at Register Offices, cohabitation contracts, advice on relationships from conveyancing solicitors, housing associations, CABx).*

SECTION D – SCENARIOS

Scenario one

Rosie and Jim have been married for seven years. They both work full time. They live in a house which Jim bought before they were married; he has paid all the mortgage instalments. Rosie earns significantly less than Jim but has paid the utility bills and pays for their joint holidays and her clothes. The house is an average three-bedroom semi-detached house and the mortgage amounts to two thirds of its value. They each have a separate bank account for their earnings.

18. (a) Rosie and Jim pay their salaries into their separate bank accounts; they speak of 'your money' and 'my money', and sometimes of 'our money'. Do you think the law should automatically assume that because they are married their earnings belong to both of them and that during their marriage each of them has an equal share of all the family's earnings?
- Jim wants to sell the house. As the law stands here, he can do so without Rosie's knowledge or consent. What do you think about this? Please explain your thinking.
 - Should the law automatically make Jim share ownership of the house with Rosie on their marriage? Please explain your thinking.
- If yes, what if Rosie died before Jim, should she be able to leave her share of the home to anyone she chose in her will or just to Jim?
- Jim's hobby is sailing. He recently bought a boat worth £40,000. He has not paid for it, and the supplier of the boat is suing him. Do you think that the supplier should be able to seize any of the following to satisfy the debt?
 - the house
 - Jim's earnings
 - both the house and Jim's earnings
 - Rosie's earnings.

Why?

- (e) Unfortunately, the marriage breaks down and they decide to get divorced. What should happen to their home? (*Only give prompts if there is no immediate answer.*)
- Jim keeps the house, and Rosie gets nothing.
 - The house is sold and the proceeds are divided equally.
 - The house is sold and most of the proceeds go to Jim and some to Rosie.
 - The house is sold and most of the proceeds go to Rosie and some to Jim.

Scenario two

Wendy and Bob have been cohabiting for seven years. They both work full time. They live in a house which Bob bought before they were living together. Bob has paid all the mortgage instalments. Wendy earns a little less than Bob but has paid the utility bills and pays for their joint holidays and her clothes. The house is an average three-bedroom semi-detached house and the mortgage amounts to two thirds of its value. They each have a separate account for their earnings.

19. (a) Wendy and Bob pay their salaries into separate bank accounts; they speak of 'your money' and 'my money', and sometimes of 'our money'. Do you think the law should automatically assume that because they have cohabited for some time that during the relationship each of them has an equal share of all the family's earnings?
- (b) Bob wants to sell the house. As the law stands, he can do so without Wendy's knowledge or consent. What do you think about this? Please explain your thinking.
- (c) Should the law automatically make Bob share ownership of the house with Wendy because they have cohabited for a number of years?
- If yes, what if Wendy died before Bob, should she be able to leave her share of the home to anyone she chose in her will or just to Bob?
- (d) Bob's hobby is sailing. He recently bought a boat worth £40,000. He has not paid for it, and the supplier of the boat is suing him. Do you think that the supplier should

be able to seize any of the following to satisfy the debt?

- the house
- Bob's earnings
- both the house and Bob's earnings
- Wendy's earnings.

Why?

- (e) Unfortunately, the relationship breaks down and they decide to separate. What should happen to their home? (*Only give prompts if there is no immediate answer.*)
- Bob keeps the house, and Wendy gets nothing.
 - The house is sold and the proceeds are divided equally.
 - The house is sold and most of the proceeds go to Bob and some to Wendy.
 - The house is sold and most of the proceeds go to Wendy and some to Bob.
- (f) Explain why you feel this should/should not be any different if they were a married couple?

Scenario three

Jim and Rosie now have two children aged four and six. Jim continues to work full time but Rosie now works only four mornings a week as she looks after the children. They live in the house which Jim bought before they were married; he pays all the mortgage instalments and now pays most of the utility bills. Rosie contributes to some of the utility bills and pays for all her own and the children's clothes. The house is an average three-bedroom semi-detached house and the mortgage amounts to two thirds of its value.

20. (a) Rosie and Jim have decided to get divorced. The children will live with Rosie, and Jim will pay child support for the children. He will see the children every other weekend and more often in the school holidays. What, in your view, should happen to the house?

Possible suggestions:

- Rosie stays in the house till the children leave home. Jim will continue to pay the mortgage. When the children leave home the house goes back to him.
- Rosie stays in the house until the children leave home. Jim will continue to pay the mortgage till the children leave. When the children leave, the house is sold and the proceeds split. How should this be divided?
- Jim gets the house immediately.
- The house is sold and the proceeds split. How should they be split? Equally? Most to Jim? Most to Rosie?

Why do you think this?

Scenario four

Wendy and Bob have been cohabiting for seven years and now have two children aged four and six. Bob continues to work full time but Wendy now works only four mornings a week as she looks after the children. They live in the house which Bob bought before they were living together; he pays all the mortgage instalments and now pays most of the utility bills. Wendy contributes to some of the utility bills and pays for all her own and the children's clothes. The house is an average three-bedroom semi-detached house and the mortgage amounts to two thirds of its value.

21. (a) Would you feel differently if it was Wendy and Bob – the cohabiting couple? Why is this?

Scenario five

Simon and Jane have been married for seven years. Jane is a businesswoman and owns a beauty salon. Two years ago she used the family home which she bought before they were married as a security for a business loan. Simon is a househusband and looks after their two children.

22. (a) Is it acceptable for the family home to be used as security for a business owned by one partner?
- (b) Does it make a difference if the house was bought *after* the marriage?