

# **Cohabiting Relationships, Money and Property: The Legal Backdrop**

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## **1. Introduction**

The legal regulation of property and money within intimate couple relationships is subject to the frequent challenges posed by changing social norms. Family law has long been charged with resolving the disputes which the mixing of sex and money tend to provoke especially when relationships break down. However across the western world in recent times it has been trying to shake free from its patriarchal roots and react appropriately to the move away from marriage-centred and gender stereo-typed roles for men and women within families. A parallel development is its acceptance of same-sex relationships as a family form within our society. The conflicting themes within these debates are gender equality (e.g. Deech, 1996, Diduck and Orton, 1994), the protective function of family law (e.g. Maclean and Eekelaar 1997, Fineman, 1995) and the right to make autonomous choices (e.g. Freeman, 1984). These are explored below in the context of family law's search for the best way to regulate couples, their money and their property in England and Wales and whether there are lessons to be learned from Europe.

Let us first outline the legal and demographic context to the regulation of couple finances in Europe. Broadly speaking, Western Europe is experiencing a decline in marriage and rises in divorce, heterosexual cohabitation and births outside marriage (see e.g. Kiernan, 2004) yet legal regulation remains marriage-centred. At the same time, most West European states now recognise same-sex couples who, depending on the jurisdiction, can either marry and/or enter into registered partnerships giving them the

same or similar rights as married couples (see Boele-Woelki and Fuchs, 2003, Curry-Sumner, 2005). A minority of European states also allow heterosexual couples to register civil partnerships. Regulation of money and property within couple relationships tends to be concentrated on married and registered relationships in European jurisdictions. Informal cohabitation has nowhere in Europe achieved the presumptive marriage-equivalence found in Australia, Canada and New Zealand<sup>1</sup> although as explored below, English<sup>2</sup> law has adopted this presumptive and protective approach in some legal contexts but not, confusingly, in others.

In contrast to its European neighbours, in England and Wales marriage or registering a same-sex civil partnership has no direct effect on a couple's property which continues to be owned separately unless specifically purchased jointly. At the point of divorce (or civil partnership dissolution) though, the court has wide discretionary powers to redistribute income and capital assets to achieve a fair outcome between the parties. The rationale for this is to protect the weaker economic family members – typically women and children – and balance non-financial contributions to family life against financial contributions when things go wrong. In all European Union states other than the common law jurisdictions of the UK, Ireland and Malta, marriage and civil partnership registration do have an automatic effect on the property rights of the couple unless they opt out of the default community of property regime imposed by law. However, the wide variety of 'community of property' regimes within Europe together with the very different common law approach has led to consideration of harmonisation of family law including the

possibility of a generic European community of property regime by the European Commission (see McGlynn, 2001, European Commission, 2006). By way of contrast, the position of informal cohabiting couples has yet to be addressed at a European level despite the demographic drift away from marriage and into cohabitation. In Britain, though, this is a matter of live debate and one which is heightened by the fact that research has shown that many cohabiting couples falsely believe they have the same legal rights as married couples – the so-called ‘common law marriage myth’ (Barlow et al, 2001, 2005, Barlow, 2002). Legal reform has this year been enacted in Scotland (see Family Law (Scotland) Act 2006) and is currently under consideration by the Law Commission for England and Wales (the Law Commission) (see Law Commission, 2006).

So is community of property an attractive option in England and Wales in regulating the property of married and/or cohabiting couples? Or is it now outmoded and not suited to the diversity of 21<sup>st</sup> century family structures? Can family law in Britain in general and Europe in particular continue to restrict its regulation to married and registered partners ignoring the growing number of couples who partner and parent outside marriage or formally registered partnerships?

Drawing on data from an empirical study focusing on the law in England and Wales, France, The Netherlands and Sweden (Cooke et al, 2006), this article will compare the advantages and disadvantages of different legal approaches and help assess the need for legal reform within the European Union context. Let us begin with some legal history.

## **2. Separate Property versus Community of Property – An Historical Perspective**

Marriage has always been an economic as well as an emotional relationship often combined with the upbringing of children. When wives were the chattels of their husbands, all their property and income became owned by their husbands on marriage under the doctrine of unity of husband and wife (Cretney, 2003, 91). Legislative reform when it came in England and Wales in the Married Women's Property Acts of 1870 and 1882 opted to allow married women to own their property as *separate property*. This allowed them to retain control over their own income and capital assets and become liable for their own debts to the extent of their separate property (see Cretney, 2003, 99). Given that most married women at this time did not earn or have their own income, had few assets and were financially dependant on their husbands this was a reform brought about with the interests of the middle and upper class women at the forefront of the battle for women's equality in mind. In contrast, the nineteenth century approach in European jurisdictions such as France and The Netherlands was rather to create a default matrimonial regime which imposed on marriage an 'immediate community of property'. Indeed both jurisdictions still retain this model of immediate community which automatically applies unless the parties contract differently.<sup>3</sup> Put simply, this means that all of the husband and wife's separately-owned property (in the case of The Netherlands) or at least some of it (as is the case in France where only post-marriage acquired assets excluding inherited or gifted property are affected) as well as their post-marriage debts become jointly owned during the marriage and can only be dealt with by them acting

together. Both during and at the end of the marriage, unless specifically agreed otherwise, each spouse would be credited with an equal share in the community assets. This system has certainly been seen by some as better recognising the realities of the economic relationship within most marriages and as offering greater financial protection for the weaker economic spouse, most often the wife. Writing in the 1950s, Kahn-Freund, a German legal academic working in England, saw the married family as an economic entity with funds of money and property dedicated to common use. He expressed his concern with the English stance –

The fact that they are husband and wife has no effect on their property. Nothing is by law 'theirs'; everything...is in the absence to the contrary, either 'his' or 'hers'. Sociologists must decide whether this rule reflects the *mores* and the ideas of the people.' (Kahn-Freund, 1952, 133)

In consequence it was unimaginable in his eyes for the law to ignore the effects of marriage on the property of the spouses and confine itself, as it did in England, to a system of separate property. Yet by this time the emancipation of women had prompted some community of property jurisdictions to modify their default matrimonial regimes to allow separate ownership of property during marriage but impose a community regime requiring an equal division of community assets between the spouses on divorce (e.g. Swedish Marriage Code 1920). This concept is known as '*deferred community of property*' and is a system which aims to strike a good balance between autonomy of the spouses during the marriage and protection for the weaker economic spouse at the end. It is a model now widely used throughout Scandinavia (see Martiny, 2004, Boel-Woelki et al, 2000).

In community of property jurisdictions, the matrimonial property regime also governs the divorce settlement of capital assets, with divorce law intervening only to provide maintenance for the weaker economic spouse (in addition to child support) and perhaps a right for them to remain with the children in occupation of the matrimonial home for a short period of time. The courts have little discretion and despite their protective aims, community regimes can in practice still operate harshly at the point of divorce, especially for the weaker economic spouse. Despite the ability to contract out of the default matrimonial regimes and to vary the regime according to changing circumstances, only a minority of couples (principally those with independent means or the self-employed with large business debt) actually seek legal advice and do so (Barlow et al, 2003, Cooke et al, 2005). However, divorcing dependant wives traditionally fared worse under the separate property system which offered them little protection and proposals for a liberalised divorce law provoked loud calls for matrimonial property reform in England and Wales in the latter half of the twentieth century.

### **3. Maintenance, separate property and divorce - the English perspective**

Until 1970, divorce law in England and Wales only allowed claims by wives for periodical maintenance (alimony), with each spouse retaining their own separate property. No transfer of capital or assets was possible on divorce other than by agreement, no matter how deserving the case. When divorce was rare and rented homes were the norm and readily available, arguably this could be justified. However rises in divorce, owner-occupation, property prices and shortages of rented accommodation in the second half of the

twentieth century brought the harsh effects of the doctrine of separate property into the political limelight (see further Cretney, 2003, 118 et seq). As Professor McGregor summarised it in a Parliamentary debate in 1979, it had unintentionally institutionalised inequality in the economic relations of husbands and wives. By preventing husbands getting their hands on their wives' money, the statute denied wives rights in their husbands' money. And in the real world it was mostly husbands who had the money.<sup>4</sup>

Between 1956 and 1979 the introduction of a system of community of property or at least of statutory co-ownership of the matrimonial home in England had some powerful supporters, although in the event neither was to materialise. Rather than interfere with separate property rights within marriage, English law came to adopt a system of discretionary redistribution of assets as well as income according to a list of statutory criteria which it still retains today (see now Part II Matrimonial Causes Act 1973, s25). Ironically, it is the flexible discretionary nature of financial provision on divorce making outcomes uncertain and often inconsistent which has become the focus of the problems discussed in relation to financial provision on divorce in England; a problem which the courts rather than Parliament have been attempting to address (see e.g. Eekelaar, 1998).

In property terms, limited reform granting a spouse a statutory right of occupation of the matrimonial home and the right for a wife to own housekeeping money equally with her husband were enacted (see Matrimonial Homes Act 1967 and Married Women's Property Act 1964 respectively). Later there was further pressure from the Church of England who took the view that 'the establishment of community of property in some

form would do much to prevent injustice' if divorce laws were to be liberalised (Archbishop of Canterbury's Group, 1966, para. 64). In fact the Matrimonial Proceedings and Property Act 1970 implementing quite minor recommendations made by the Law Commission (Law Commission, 1969), only extended the discretionary financial orders a court could make on divorce, although critically for women did provide for 'contributions to the welfare of the family' to be considered. It did not reform family property law which was still under consideration by the Commission and thus judicial discretion was established over family property at the point of divorce at the expense of spousal property rights. Yet it was property rights which as the Law Commission's Working Paper records women had demanded 'not possible discretionary benefits' (Law Com 1971, para. 0.22).

Nonetheless, the Law Commission chose in the end to reject community of property, recommending instead a reinforcement of the court's existing discretionary powers on divorce combined with the introduction of a system of statutory co-ownership of the matrimonial home for spouses (Law Commission, 1978). In an era when marriage for life was the social norm and most matrimonial homes were still purchased in the sole name of the husband, for wives to automatically become co-owners of the family home, thereby giving them real property rights, was seen as an important protection both during the marriage itself as well on divorce. However even this more limited vision of a restricted form of community proved to be a step too far.<sup>5</sup> Indeed the financial plight of divorced men rather than divorced women became the political issue and whereas the Matrimonial Homes Bill 1979 containing the statutory co-ownership proposals fell at the general election,



the new Conservative administration was swift to introduce reform restricting a wife's right to life-long maintenance (Matrimonial and Family Proceedings Act 1984). By this stage, it had become common practice for husbands and wives to purchase the matrimonial home in their joint names and the community of property debate had become a dead letter.

Thus both community of property systems and the English separate property system have tried to adjust to the changing position of married women (and men) within society. Both claim to have replaced patriarchy with formal equality in the financial frameworks governing marriage and divorce. So confident are they of this, that they have now almost all extended their matrimonial financial provision regimes to same-sex couples and some (for example, Sweden and Scotland) have extended a less extensive version to informally cohabiting couples. Let us now consider how the current law in the studied jurisdictions of England and Wales, France, The Netherlands and Sweden regulates couple finances and then consider whether European harmonisation is desirable.

#### **4. Regulating Couple Finances – A Summary of the Current Law in England and Wales<sup>6</sup>**

The Civil Partnership Act 2004 which came into force in December 2005 has in effect imposed the legal consequences of marriage upon those registering their civil partnership under the terms of the Act. However only same-sex couples can register a partnership and only heterosexual couples can marry. Outside these formalised relationships there remains a growing band of informal cohabitants both same- and different-sex in respect of whom the law metes out different treatment in different contexts (see Table 1). However, a

recent decision under the Human Rights Act 1998 in the family law context has at least required the law to treat same and different sex cohabitants essentially the same. To do otherwise is to breach the right to private and family life and to non-discrimination protected by Articles 8 and 14 of the European Convention on Human Rights (*Ghaidan v Godin-Mendoza* [2004] UKHL 30).

Broadly, married or civil partners are governed by a family law framework which has developed to protect the more economically vulnerable family members – children and spouses (most typically wives) who reduce their earning capacity as a consequence of fulfilling the home-making and child-caring functions within the relationship, leaving the breadwinning or most of it to their partner.<sup>7</sup> Informal cohabitants, whilst able to claim financial support for the benefit of any children of the relationship (Child Support Act 1991, Schedule 1 Children Act 1989), have no right to any financial provision themselves and are governed by property law where any claim requires proof of shared ownership of a family asset such as the family home to establish a constructive trust.<sup>8</sup> In the light of this, it is worrying that the nationally representative British Social Attitudes Survey in 2000<sup>9</sup> established that 56 per cent of people in general and 59 per cent of different-sex cohabitants in particular believed couples who had lived together for some time had a common law marriage giving them the same legal rights as married couples (Barlow et al, 2001). Whilst census data reveals very low levels of self-declared same-sex cohabitants<sup>10</sup>, 35 per cent of men and women aged between 16 and 59 are in heterosexual cohabitation relationships and 25 per cent of all children are born into cohabitation relationships (Office for National

Statistics, 2005, Table 5.3, Office for National Statistics, 2005a,). In contrast, in 2001 the numbers marrying reached their lowest ebb since records began in 1897 and have risen only very marginally since (Office for National Statistics, 2005). Having funded an awareness campaign (The Living Together Campaign) to try and advise cohabiting couples of their true legal position and the (often complex) legal steps open to them (see <http://www.advicenow.org.uk/livingtogether>), the government has referred the legal issues surrounding cohabitation on relationship breakdown and death to the Law Commission to consider reform (<http://www.lawcom.gov.uk/192.htm>) and their report is awaited in 2007.

**Table 1: Comparison of legal treatment of property in couple relationships in England and Wales**

	<b>During Relationship</b>	<b>On relationship breakdown</b>	<b>On death of a partner</b>
<b>Spouses and Civil Partners</b>	Own property separately unless joint purchase agreed or proven  Have right to be maintained by partner and to claim enhanced pension for partner	Separate property can be redistributed between partners under family law to achieve 'fairness' and takes account of both financial and non-financial contributions to the welfare of the family. Any departure from an equal division must be justified  Have right to claim maintenance from partner	Where no will is made, partner automatically inherits all or (where there are children) part of the deceased partner's estate. Where a will unfavourable to partner is made, court has discretion to award a divorce-like settlement  No inheritance tax payable on gifts to spouse
<b>Informal Same and Different-Sex cohabitants</b>	Own property separately unless joint purchase agreed or proven  Have no legal right to be maintained by partner or to pension allowance	No family law redistribution between partners. Property law applies and redistribution can usually only occur where a financial contribution to purchase has been made by both partners or there is an agreement.  Have no right to claim maintenance from partner	Where there is no will, partner has no automatic inheritance rights. They can apply to the court but award is limited to 'reasonable maintenance' and is far less generous than a divorce-like settlement  Full inheritance tax payable

#### *4.1 Financial position during the relationship*

Currently, during any intimate couple relationship, each partner owns their own property unless they have specifically purchased it jointly. However, the law also divides ownership into legal ownership – which identifies the person in whose name property is bought; and equitable or beneficial ownership – which comprises all those legal and non-legal owners who contributed to the purchase or who commonly intended to share ownership (see further Law Commission, 2002, Barlow and Lind, 1999). Practical arrangements employed by couples often mean that the person in whose name property was legally purchased is not the sole *beneficial* owner because another has say contributed to its purchase or carried out improvements to it and the courts can make declarations as to the beneficial ownership of assets in dispute using trust law doctrines. However, ‘merely’ looking after children of the family and/or playing the role of homemaker for the benefit of your legal owner partner will not be sufficient to found a shared interest in the ownership of the property (Lloyds Bank v Rossett [1991] 1 AC 107, Burns v Burns [1984] 1 All ER 244, Law Commission, 2002, 2006). During marriage and civil partnership and at all stages of an informal cohabitation relationship (including relationship breakdown), disputes about beneficial ownership are governed by complex and shifting trust law and only those who can prove to the satisfaction of the court that a constructive or resulting trust has arisen will be declared to share ownership and have a beneficial interest in the property. Income during relationships also belongs to the person who earns it although there are duties on spouses and civil partners to maintain each other and

these can be enforced (s 27 Matrimonial Causes Act 1973, para. 39 to Schedule 5 Schedule Civil Partnership Act 2004). This however is not the case for those who cohabit informally despite the fact that for the purpose of assessing eligibility for means tested benefits and tax credits legislation assumes cohabiting couples maintain each other (s 137 Social Security Contributions and Benefits Act 1992). Conversely, for the purpose of contributory benefits such as pensions, those who are married or are civil partners can, unlike informally cohabiting couples, claim an allowance in respect of their partners.

Similarly, whilst the law gives rights of occupation to a spouse or civil partner in the family home owned (or rented) by a partner (Family Law Act 1996 s 30), this is not the case for same or different-sex cohabitants.

#### *4.3 Financial Position on Relationship breakdown*

On relationship breakdown the court both under divorce legislation and now the civil partnership legislation has a wide range of orders at its disposal including orders for periodical maintenance for a partner which adjusts income distribution and also lump sum orders, property transfer orders, pension sharing orders and settlement of property orders which adjust capital assets as between the parties. These are enforced with a power to order sale of an asset in the case of recalcitrance (see Part II MCA 1973 and Schedule 5 Civil Partnership Act 2004). Orders are awarded under the court's discretion to redistribute assets between the partners in accordance with statutory criteria (s25 Matrimonial Causes Act 1973 and para. 21 to Schedule 5 Civil Partnership Act 2004) with an overriding aim to achieve 'fairness'.<sup>11</sup> The criteria include all the circumstances of the case, the standard of living during

the marriage, the age of the parties and duration of the marriage, the parties' respective current and future income and assets, needs and resources as well as financial and (critically) non-financial contributions made and likely to be made to the welfare of the family by each of the parties and conduct it would be inequitable to ignore. The welfare of the children is the court's first consideration.

Thus in stark contrast to cohabiting couples, on divorce or dissolution of a civil partnership family assets may be redistributed whether or not there are minor children, and largely regardless of the original ownership of assets. Indeed, recent developments in the case law governing financial provision on divorce have served to widen the gulf between married and cohabiting couples on relationship breakdown. On divorce (and presumably now on dissolution of civil partnership), the division of assets between spouses – until quite recently limited to meeting only the 'reasonable requirements' of the weaker economic spouse (see *Dart v Dart* [1996] 2 FLR 286) - must now be measured against a 'yardstick of equality' where there has been a long marriage and the assets available exceed the parties' needs. Provided there is no 'stellar' contribution by one party to the marriage, an equal division of the assets should then be made and non-financial contributions to the welfare of the family such as caring for children are of equal weight to financial contributions.<sup>12</sup> More recently, they have confirmed that the weaker economic spouse should be compensated for what was termed 'relationship-generated disadvantage'.<sup>13</sup> As Lord Nicholls indicated in *White v White* [2001] 1 AC 596 at 605

'If, in their different spheres, each contributed equally to the family then in principle it matters not which of them earned the money and built up the

assets. There should be no bias in favour of the money earner as against the home-maker and the child-carer’.

This is a clear attempt by the House of Lords to strike a blow for gender equality and acknowledge the different but in their view equal roles played within family life. Their approach is addressing the reality of the situation of many women but can be criticised for doing this in a way which reinforces the patriarchal financial dependence of women childcarers upon breadwinning men (see e.g. Diduck, 2001).

Where there is no such surplus of assets or where the marriage has been relatively short, this is likely to justify a departure from equal division and the housing needs of the parties and especially those of the parent caring for any minor children should be met first.<sup>14</sup> Thus a divorcing home-maker spouse where the major assets including the home are in the name of the other spouse will usually receive at least half of the assets, whereas an equivalent home-maker cohabitant in a similar position must prove an interest under a constructive trust to retain any share of the home. This as Valerie Burns in *Burns v Burns*<sup>15</sup> found to her cost, is often a difficult and always an unpredictable prospect for the economically weaker cohabitant. Following an inconclusive Law Commission project looking at how to amend trust law to serve ‘homesharers’ including cohabitants better (Law Commission, 2002), the Law Commission are currently consulting on proposals to compensate cohabitants for economic disadvantage suffered on relationship breakdown or death where, as noted in Table 1 above, cohabitants have inferior claims against their deceased partner’s estate as compared with spouses (Law Commission, 2006).



England has chosen a presumptive approach to regulating informal cohabitation outside marriage or civil partnership, but as has been seen the legal treatment of this group is far from cohesive and is often complex and confusing for the growing number of couples it affects.

## **5. Lessons from Europe?**

With the exception of Sweden, few presumptive rights are extended to informal cohabitants in Europe. However, in jurisdictions where there is a community of property regime this has generally been extended to registered partners (Boele-Woelki and Fuchs, 2003).

Even leaving aside Britain and Ireland, the effects of marriage and registered partnerships on money and property still vary considerably from one European state to another. Given the interests of the European Commission in harmonising family property law across the European Union, an empirical study funded by the Nuffield Foundation was undertaken to find out more about how community of property regimes operate in practice in the married and registered partnership context and to explore whether it would be appropriate for a community of property regime to be introduced in England and Wales either for married couples and, if so, in what form; and/or for unmarried cohabitants and, if so, in what form?<sup>16</sup>

The first stage of the research which is fully reported elsewhere (Cooke et al, 2006) involved a series of semi-structured interviews with 60 family law notaries and lawyers in France, The Netherlands and Sweden, selected for their specialisation either in matrimonial regime advice or divorce law.

### 5.1 *The European research*

These three jurisdictions were chosen as they broadly represent the range of community systems in Europe and each has different approaches to cohabitants. The Netherlands operates a full immediate community system, embracing all assets whether acquired before or after the marriage or registered partnership (both of which are open to same- and different-sex couples), and thus subject to contracting out, all assets, effectively become jointly owned. However, there is no legislation in place to offering presumptive financial protection during or after an informal cohabitation relationship. The overall impression gained from notaries and family lawyers in The Netherlands was one of broad satisfaction with the system, and of a feeling that its all-embracing nature has the tremendous advantage of simplicity. The sharing of post-marriage debt was viewed as an acceptable *quid pro quo* for the sharing of assets. The position of informal cohabitants was acknowledged to be unprotected but considered justifiable where both marriage and partnership registration was available to all.

France on the other hand operates a different form of immediate community on marriage, embracing only after-acquired property. In the registered partnership context, France has not extended a form of marriage to same-sex couples. Rather its Pacte Civile de Solidarité (PaCS) allows same- and different-sex cohabitants to register an agreement in which they can agree their own property ownership, although in default of declaring anything different, a form of equal joint ownership (*indivision*) will be imposed. The French PaCS is interesting in that it is available to same- and different-sex

cohabitants and is not a marriage-mirror model form of partnership. In this regard stands unique (see Barlow, 2004, Probert and Barlow, 2000). Once again, what is available to unmarried couples is mainly achieved through registration. Although it is possible to make a declaration that a couple are cohabiting without registering a PaCS, this has little legal effect as there is hardly any presumptive legislation. In France we gained a rather more negative view of the practicalities of community of property from our sample of notaries and lawyers. In particular, while post-marriage debt-sharing was a fully accepted part of the immediate community regime, people in general were reported to be unaware of the need to take advice about opting-out of the default regime in appropriate situations.

Sweden, though, in common with the other Scandinavian jurisdictions, offers deferred community, and it is not possible to contract into an immediate regime. Only on divorce or death does the equal sharing of community assets take effect and there is provision in short marriages of less than five years to depart from equal division where it appears unjust to the owner of the majority of assets.<sup>17</sup> In the cohabitation context, Sweden alone operates a limited form of presumptive (as opposed to opt-in) deferred community, extending only to the family home, for unregistered cohabitants.<sup>18</sup> Here the highest level of perceived client satisfaction among lawyers was found, although the position of informal cohabitants was acknowledged to be no more than a safety-net.

In considering the suitability of an immediate community of property regime for England and Wales, it was concluded from this first phase of the study that

the automatic sharing of debt under such a system was unlikely to be appropriate and there might well be an ideological problem with an immediate community system. Whilst its original rationale was to protect women, by giving them an automatic share in the family's wealth to compensate for their inability to feather the nest because they were sitting on it, this sits uneasily nowadays with the independence of women. This has led Scandinavian jurisdictions to move to deferred community systems.

The Swedish system of deferred community of property on the other hand had perhaps more resonance with the English system, already described as a judicially created system of deferred community of property (Cretney, 2003). and perhaps even more apt after the recent suggested distinction between 'matrimonial assets' automatically shared on divorce and 'non-matrimonial assets' which are less likely to be redistributed on divorce (see *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24 ). Sweden's presumptive approach to the protection of cohabitants was also thought to chime with our own presumptive if chaotic approach in this field.

## **5.2 England and Wales Study**

These issues were probed in the second phase of our study, involving 75 interviews with a purposive sample of men and women drawn in equal measure from our three study areas Reading, Swansea and Liverpool. These represented high-cost, mid-range and low-cost housing markets in England and Wales as it was felt that the value of the family home and the ability to rehouse both partners following divorce may affect people's views. Whilst this was not a nationally representative sample, the sample was selected to reflect

a whole spectrum of respondents balanced between different socio-economic groups, age, gender, relationship status/experience in order to access a wide range of views. Using a “grounded theory”,<sup>19</sup> approach we were interested in particular in how our respondents considered financial matters *ought* to be regulated on divorce.

Views relating to the desirability or otherwise of immediate and deferred community of property and of automatic joint ownership of the family home for married and cohabiting partners were tested mainly using vignettes focused on first a married couple and then a cohabiting couple with some direct attitudinal questions where this seemed appropriate. In order to find out what triggered the respondents’ views, they were asked to consider the same vignettes first where the couples had no children and then where children were involved.

#### *5.2.1 Immediate community*

This was tested in the married context alone as it is not a practical option for informal cohabitants as compared with registered partners as it would be impossible to pinpoint with clarity when the community came into effect.

We used vignettes in order to probe the idea of sharing liability and then of automatic joint ownership of the family home, looking at a married couple, Rosie and Jim, and a pair of cohabitants, Bob and Wendy.

We set the scene as follows:

Rosie and Jim/ Wendy and Bob have been married/cohabiting for seven years. Jim and Rosie/Bob and Wendy both work full-time. They live in a house which Jim/Bob bought before they were married/lived together; he has paid all the mortgage instalments and pays some of the utility bills. Rosie/Wendy earns significantly less than Jim/Bob but pays for their joint holidays, her clothes and some of the utility bills. 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.

And asked them to consider different events which have different outcomes in community of property and separate property jurisdictions during the relationship:

- i. Rosie and Jim/Wendy and Bob pay their salaries into separate bank accounts (in their own names?); 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 the marriage each of them has an equal share of all the family’s earnings?
- ii. Jim/Bob wants to sell the house. As the law stands here, he can do so without Rosie/Wendy’s knowledge or consent. What do you think about this? (*Explain your thinking*) (If yes, What if Rosie/Wendy died before Jim/Bob, should she be able to leave

her share of the home to anyone she chose in her will or just to Jim/Bob?)

iii. Should the law automatically make Jim/Bob share ownership of the house with Rosie/Wendy on their marriage/because they have lived together for a number of years? (*Explain your thinking*)

iv. Jim/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(take charge of) any of the following to satisfy the debt?

- The house
- Jim/Bob's earnings
- Both the house and Jim/Bob's earnings
- Rosie/Wendy's earnings

*(Explain your thinking)*

v. Unfortunately the marriage/relationship breaks down and they decide to get divorced/live apart. What should happen to their home? (*Given options here as prompt, Jim/Bob should keep it and Rosie/Wendy gets nothing, house is sold and the proceeds divided - equally, or most to Jim/Bob and some to Rosie/Wendy or most to Rosie/Wendy some to Jim/Bob and ask why do you think this way?*)

We first looked at identical situations in which 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 satisfy the debt using the whole of the equity of the shared family home which was jointly owned and whether or not they should be able to access his wife's earnings.

Where the scenario couples had no children, only, thirteen of the 73 respondents who answered this question thought that Rosie's earnings should be available to Jim's creditors, as they would 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 Wendy should share Bob's debt.

There was therefore a clear rejection of the liability consequences of an immediate community system. We then went on to consider views on automatic joint ownership of the home along the lines suggested by the Law Commission in 1978 (Law Commission, 1978).

### *5.2.2 Automatic joint ownership*

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 with 50 agreeing but 21 of whom had conditions or reservations such as the non-owning spouse making a contribution, or relating to the length of the marriage. A very similar majority (49 to 22) was in favour of automatic joint ownership of earnings, and a smaller one (45 to 28 with some qualified



agreement) in favour of automatic joint ownership of the family home. Views were evenly divided as to whether or not an inheritance should be automatically (that is, by law rather than by choice) shared with one's spouse.

Responses to the matching scenario for cohabitants revealed a different pattern. A smaller majority was in favour of the automatic sharing of earnings (36 to 34); and a majority (43 to 29) was against the automatic joint ownership of the shared home. Interestingly, there was some unprompted suggestion by a few respondents that over time, cohabitants could 'earn' a share in each other's property, but this was not explored systematically.

A majority of those who were initially against shared ownership changed their view when asked, in the abstract, whether or not their views would differ if the couple had children. Most said yes and of those who were opposed to automatic joint ownership in general terms, only 8 did not change their view. In doing so, most seemed to refer to the family 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. However, neither of these is actually particularly relevant in assessing whether or not automatic joint ownership is an appropriate reform of English law. Keeping a roof over the children's heads is achieved in English law by other means;<sup>20</sup> and its commitment to freedom of testamentary disposition makes safe-guarding inheritance for children a matter of individual choice. Added to this are the practical difficulties allied to our conveyancing

and Land Registration system that make it very difficult to effectively introduce legal joint ownership at the point of marriage or civil partnership registration without some great technological advances in successfully joining up computerised public record systems. As for cohabitants, this would pose even greater problems as there is no point at which a cohabitation status becomes formally recognised and could thus trigger registration of joint legal ownership. Automatic beneficial joint ownership is a possibility but would only protect an interest in the proceeds of sale of the home against third parties, not in the bricks and mortar. Thus it would not actually give the protection that members of the public might suppose and would shroud home ownership in uncertainty, a matter likely to be viewed negatively by mortgagees and other interested third parties if not by the parties themselves. On balance, it was felt that whilst it would have been a very useful reform in the 1960s or 1970s, it is not one where the gains outweigh the drawbacks at this moment in time. Would deferred community of property be more attractive?

### *5.2.3 Deferred community*

First, a general question was about a deferred redistribution of assets for cohabiting couples. Later vignettes were developed to involve divorce and cohabitation breakdown, asking respondents for views on whether or not family assets should at that point be divided equally between the parties as is the norm under a deferred community of property regime.

A general question was really aimed at testing views on the Swedish system which uniquely imposes deferred community of specified property on cohabitants. The Swedish law aims to protect unregistered cohabitants where

no cohabitation contract has been made. It applies to the joint home and household goods acquired after the relationship for all cohabitants. We asked

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.

a) What do you think about this and why?

b) 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 73 answering this question) thought this was a good idea; 19 of them suggested an automatic equal division of the pooled assets on relationship breakdown regardless of whether there were children. A theme which came through the answers was that this was appropriate if both partners were working and were contributing to the couple's shared life. 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." (AR49 married male 31 – 40)

A number of respondents (7) were sure that this system was appropriate where there were children but were more equivocal in other cases and others (a further 8), whilst certain that assets should be shared, were unsure of the appropriateness of equal division which they felt would depend on the merits

of each case. Of the remainder broadly in favour (4), some felt that only the home should be shared or that inherited assets or assets acquired before the relationship should be excluded.

However, a significant minority (32) rejected outright such a system 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.

Thus there seems to be some support for community of property for informal cohabitants and this is strongest where the relationship is a joint enterprise, a matter which may not be easy to judge. However there was also a keen awareness of the possibility of abuse of such a system, which is perhaps an argument in favour of retaining court discretion but extending it to cohabitation breakdown.

Deferred community of property was further explored by developing the vignettes for the married and unmarried couples (Rosie and Jim and Wendy and Bob respectively) who had each been together for seven years. We asked what the outcome should be with regard to the family home owned by Jim/Bob if the relationship broke down, first where the couple had no children, and second where they had two children aged 6 and 4 and we specified four options reflecting possible legal outcomes:

In the married context where there were no children, just under half (34) thought that the house should be sold and the proceeds divided equally in line

with the idea of deferred community of property. Interestingly, though, even though this was a marriage, 37 thought the home should be divided according to contribution. Not surprisingly, in the cohabitation context deferred community of the home or even a lesser share in it for Wendy was less popular. Although over half the sample were in favour of the same treatment of Rosie and Wendy, whatever their views were on that, over a quarter (20) of the respondents who felt that Rosie should get some sort of share of the home thought Wendy wasn't entitled to anything at all because she was not married.

“Because to my mind marriage is a partnership. When you're co-habiting, although it is a partnership, there is still something missing, a certificate to show that you are married. It's just the way I feel about it.”

11PL, Female, Married, 51-60, Retired, Liverpool, C2

“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.” 21PL,

Male, Married. 51-60, Liverpool, C2, Car Engineer

Thus whilst deferred community was thought more appropriate in the marriage context than the cohabitation context, views were divergent about the extent to which marriage itself should trigger an equal division.

However, in exploring views where our couples had children, a marked consensus in favour of deferred community with an equal sharing of assets was identified. Our analysis here points towards three clear findings:

- First there is undoubted support in principle for a deferred community approach, with an equal sharing of the equity of the home 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 75 respondents gave different views relating to the outcomes for Rosie and Jim (the married couple) compared with the cohabiting Wendy and Bob.
- 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.

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 co-habiting 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." (L23, female married 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. Rather, a purely contribution-based approach was felt more appropriate whether 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”  
(32AR divorced man, age 31 – 40)

## **6. Conclusion**

The findings from this study indicate that if it were felt appropriate by English policy makers, a Scandinavian-style deferred community of property regime where couples own their property separately during the relationship but are subject to a presumed equal division on relationship breakdown could be an acceptable way forward in the public imagination. However, whatever option is chosen, these data certainly have resonance with earlier research in this field that there is support for a ‘functional approach’ to the legal treatment of both married and cohabiting partners. Marriage as a trigger for legal rights had less appeal than we anticipated. Rather the presence of children was felt by many to be the appropriate moment for family-style regulation of family property to intervene in a protective manner traditionally only extended to married couples. Of course this makes perfect sense. In an age of greater gender equality in the economic sphere, it is rather the presence of children and their effect on the formerly dual-earner couple where that effect is not borne equally by both partners that make protection necessary.

Perhaps this is the solution to the age-old debate between feminists as to whether extension of patriarchal marriage-rights to cohabitants is ‘liberating or oppressive’ (Bailey-Harris, 1996, Carbone 1996 Fineman, 1995 and cf Deech, 1996, Diduck, 2001). Where there are no children of the family, it is perhaps in the main oppressive to the married, to civil partners and to cohabiting couples to impose the patriarchal baggage of marriage upon them and assume dependency of a weaker economic partner on the stronger, although



there are bound to be exceptions. They should be free to make their own agreements and exert their autonomous choices.

However, the presence of children does in most cases throw Kahn-Freund's vision of economic family reality back into the frame with the need to operate an economic joint enterprise either exclusively or alongside economic individual enterprises of the adult partners. At this point some concrete property rights become attractive to the partner who gives up an economic life of their own in favour of child care, and where decision-making about family finances become something less than autonomous. It also provides a clear point at which any community of property regime is triggered.

The retention of choice for those wishing to opt-out and agree a different economic settlement is another important element to include and perhaps some judicial discretion for cases of manifest injustice for those without children could also be retained alongside the new clear framework. Diversity in living arrangements perhaps demands a plurality of responses, but perhaps some useful themes are emerging from this and other research.

There is still some blue-sky thinking to be done by the Law Commission and the European Commission before family law can properly adapt to 21<sup>st</sup> century family diversity but it is hoped that in framing new legal norms, the reality of the new social norms will not be overlooked.

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<sup>1</sup> See for example the New South Wales De Facto Relationships Act 1984 used as a model in many other Australian states; for Canada see constitutional challenges in *Miron v Trudel* (1995 marital status) and cf *Walsh v Bona* (2000) 5 RFL (5<sup>th</sup>) 188 and in trust law, *Peter v Beblow* (1993) 1 SCR 980; in New Zealand see *Property Relationships Act 1976*.

<sup>2</sup> Note that within the UK there are three separate family law jurisdictions –Scotland, Northern Ireland and England and Wales.

<sup>3</sup> See French Civil Code Title V and Dutch Civil Code, Title 7 respectively.

<sup>4</sup> Official Report (House of Lords) 18 July 1979, vol. 401 col. 1437. For an example of how harshly this operated see *Gissing v Gissing* [1971] A.C. 886.

<sup>5</sup> There was delay in working out the practical conveyancing issues and when in 1978 a draft Bill was produced (Law Com, 1978) there was less than universal acknowledgement that it was needed in addition to what had become a fairly generously operated judicial discretion on divorce.

<sup>6</sup> For further details of the legal framework on this broad and complex topic for married and cohabiting couples see Douglas and Lowe, 2006 and for civil partners see Harper et al, 2004.

<sup>7</sup> *Matrimonial Causes Act 1973 Part II* and see *White v White* [2001] 1 AC 596, *Lambert v Lambert* [2002] EWCA Civ 1685 and *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24.

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<sup>8</sup> For a fuller discussion of this see Barlow and Lind, 1999 and Barlow and James, 2004.

<sup>9</sup> A module of questions on marriage' cohabitation and the law was asked of nationally representative sample of 3,101 respondents in England and Wales as part of the British Social Attitudes Survey (BSA) 2000 and of 1,663 respondents in Scotland as part of the separate Scottish Social Attitudes Survey (SSA) 2000 in a project funded by the Nuffield Foundation and led by Anne Barlow. Its findings are published in Barlow et al, 2001. A follow-up in-depth study of 48 current and former cohabitants drawn from the national sample in England and Wales was then undertaken. The in-depth study was later extended to two 'snowball' samples of Afro-Caribbean and South Asian respondents who were under-represented in the initial in-depth study. The findings of the combined extensive and intensive studies are published in and Barlow et al, 2005.

<sup>10</sup> 2001 UK census figures show 0.3 per cent of the population nationally is living in a same-sex cohabitation relationship.

<sup>11</sup> White v White [2001] 1 AC 596, Miller v Miller; McFarlane v McFarlane [2006] UKHL 24.

<sup>12</sup> See White v White [2001] 1 AC 596, Cowan v Cowan [2001] EWCA Civ 679, Lambert v Lambert [2002] EWCA Civ 1685.

<sup>13</sup> See Miller v Miller; McFarlane v McFarlane [2006] UKHL 24.

<sup>14</sup> Cordle v Cordle [2002] 1 WLR 1441.

<sup>15</sup> [1984] 1 All ER 244

<sup>16</sup> The research proposal was formulated prior to the Civil Partnership Act 2004 and thus did not specifically consider civil partners in England and Wales.

<sup>17</sup> Swedish Marriage Code, chapter 12 and guidance in the Codes *Travaux Préparatoires*, 1986/87: I pp. 184-190.

<sup>18</sup> Swedish Cohabitees Act 2003.

<sup>19</sup> Glasyer, BG and Strauss, AL (1967) *The Discovery of Grounded Theory*, Chicago; Aldine de Gruyter.

<sup>20</sup> Section 25 of the Matrimonial Causes Act 1973, and Schedule 1 of the Children Act 1989, 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..