

# *The limits of marriage protection: in defence of property law*

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## The Limits of Marriage Protection: in Defence of Property Law

ROSEMARY AUCHMUTY\*

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### Abstract

This article takes issue with three assumptions commonly present in recent English family law scholarship: that unmarried couples would be 'better off' married; that the property law principles that presently apply to cohabitants' property arrangements are complex and confusing, not to say inadequate; and that cohabitants should instead be protected by a family law-style statutory regime such as that proposed by the Law Commission in 2007. It argues that both the legal explanations and the scaremongering tone of much of this scholarship have been unhelpful (and sometimes inaccurate) in misleading non-specialist lawyers, but also non-lawyers and the general public, as to the precise nature of the respective protections offered by property law and family law, and that the proposed solution is not the way to tackle the *real* problem, which is not the need to protect cohabitants, but how to tackle gendered inequality in relationships. Instead, it suggests that legal discussions should employ more accuracy and precision about the law in principle and a more critical approach to how it works in practice (especially considering recent developments in the family courts), and that better conveyancing practice and better public education would help to empower individuals to make informed decisions as to their property arrangements.

### Key words

Family law; marriage; United Kingdom; England; property; cohabitation

### Resumen

Este artículo rebate tres suposiciones presentes habitualmente en las investigaciones recientes sobre derecho de familia en Inglaterra: que las parejas no casadas estarían "mejor" casadas; que los principios del derecho de propiedad que se aplican actualmente a los acuerdos de propiedad de las personas que cohabitan son complejos y confusos, por no decir inadecuados; y que las personas que cohabitan deberían estar protegidas por un régimen estatutario similar al derecho de familia, como el propuesto por la Comisión de Derecho en 2007. Defiende que tanto las explicaciones legales como el tono alarmista de gran parte de las investigaciones han sido inútiles (ya veces inexactas), y han confundido sobre la naturaleza precisa de las protecciones ofrecidas respectivamente por el derecho de

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propiedad y el derecho de familia tanto a abogados no especializados, como a no abogados y al público en general. La solución propuesta no es cómo abordar el problema *real*, que no es la necesidad de proteger a las personas que cohabitan, sino cómo abordar la desigualdad de género en las relaciones. Por el contrario, sugiere que los debates legales en principio deben ser más exactos y precisos sobre el derecho y abordar de forma crítica cómo funciona en la práctica (especialmente teniendo en cuenta los recientes acontecimientos en los tribunales de familia), y que mejores prácticas en la transmisión de propiedades y una mejor educación pública ayudarían a capacitar a los individuos a tomar decisiones informadas sobre sus acuerdos de propiedad.

**Palabras clave**

Derecho de familia; matrimonio; Reino Unido; Inglaterra; propiedad; cohabitación

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## 1. Introduction

This article is driven by my reaction to three assumptions so commonly present in recent English family law scholarship as to seem axiomatic. First, that unmarried couples would be 'better off' married; second, that the property law principles that presently apply to cohabitants' property arrangements are too complex and confusing, not to say inadequate; and, third, that cohabitants should be protected by a family law-style statutory regime such as that proposed by the Law Commission in 2007. This article attempts a response, indeed a refutation of these assumptions, which have come to dominate all discussions, legal and non-legal, of cohabitation in England and Wales.

While cohabitation has been a topic of interest to both family and property lawyers since its demographic and legal significance were first recognised at the end of the 1970s (Eekelaar and Katz 1981, Bottomley *et al.* 1981), as we moved into the twenty-first century it became the focus of a number of proposals for legal intervention in the form of statutory protection of a family-law type (though not the same protection as that enjoyed by spouses). There were a number of drivers for this new approach, not least the introduction of similar protective regimes in other jurisdictions (eg Australia and Canada, see Wong 2001), but a significant one was a British Social Attitudes Survey of 2000 which revealed that many people believed in the 'myth of common-law marriage' – the idea that cohabitants enjoyed the same legal rights as married couples. It is true that there is no such thing as common-law marriage in England and Wales, but the question of whether cohabitants enjoy the same rights as married people, or not, is much more complex. My original title for this article was 'The Myth that Marriage Protects' in homage to the common-law marriage myth, but I changed it to the present title in acknowledgement of the fact that, while the protection provided by marriage has been exaggerated, there *are* certain situations in which it is clearly protective. The problem is that people – the general public but also academic scholars and lawyers outside family law – are rarely clear about the precise nature of the protection that marriage confers. While there may be a general feeling in some communities that marriage is 'better', research such as that undertaken by Anne Barlow and her associates show that many people think it makes little difference in terms of rights (Barlow *et al.* 2005).

The aim of this article is to examine and respond to the assumption that the law applicable to cohabitants is deficient for allocating shares in the family home at the end of a relationship, and the assumption that marriage is more protective in this situation. For example:

At first sight all this [the extent of cohabitation] seems like mass irrationality, as marriage in Britain gives *partners* substantial and automatic legal benefits which unmarried cohabitants do not possess. It is not that cohabitants do not have any legal rights, but for cohabitants the law is *confusing, complex, usually inferior, and hardly ever automatic* (my emphasis) (Barlow *et al.* 2005, p. 2).

The article focuses on the frequently misleading presentation in family law literature of the property law principles that regulate co-ownership and the ways in which the virtues of family law are exaggerated and the drawbacks glossed over. It concludes that the effect of the 'marriage is good, cohabitation problematic' mantra is not only to cause misunderstanding of the legal position by non-specialists (other academic scholars and the general public) but also to perpetrate a notion of marriage as the *normal* and sensible way to live and cohabitation as an *abnormal* and irrational choice, deficient in rights. The article concludes with a plea for greater accuracy, balance and thought for the consequences of this approach to the subject and the reining in of calls for statutory protection for cohabitants on a family law model. The truth is that both property law and family law have tended to work in the interests of men, whatever the principles employed; and the problem, in my view, is not the lack of protection for cohabitants – rather, it is the need to tackle

gendered inequality in relationships. Offering further protection is not the way to achieve this.

Readers should bear in mind that this is an article about England and Wales, not marriage generally. Marriage laws, and rights associated with marriage, vary so much from jurisdiction to jurisdiction that it is not really possible to generalise across societies. One of the unfortunate consequences of the unbalanced presentation by family lawyers of the rights of cohabitants and spouses in England and Wales is that non-specialists, under the influence of other national contexts (represented, for example, in the media), are likely to make even more errors about the actual position because their frame of reference is so different.

One further word of caution. Not all family lawyers hold the views I criticise in this paper, nor, obviously, do all property lawyers agree with me. I have generalised to make my point, but I do want to acknowledge that, in the many opportunities I have had to present my ideas on this topic, I have been fortunate to have the most friendly and constructive feedback from a large number of family lawyers, including most of those named here. The article is therefore in part shaped by their engagement, for which I am grateful; for the rest, we have agreed to differ.

## 2. Background and context

In the patriarchal society of Victorian Britain, marriage was a social and economic imperative for most women. Yet in the fourth quarter of the nineteenth century, and right up to the first world war, the marriage rate sharply declined from (per 1000 adults) 55.2 for women and 64.9 for men in 1873 to 37.9 for women and 47.7 for men in 1917 (The Guardian 2010). The Victorian women's movement was inextricably linked to this demographic challenge. First-wave feminists were impelled, but also enabled, by the plight of the increasing numbers of middle-class women who failed to find a husband (and thus a means of support) to fight for improved educational and employment opportunities for women (eg Cobbe 1862b). But they also campaigned against the worst excesses of coverture, the common-law rights of husbands over their wives which, though always represented by male legal writers as 'privileges' and 'protections' for women (eg Barrett-Lennard 1883), deprived them of most civic rights once married (eg Cobbe 1862a). Over the course of the twentieth century most vestiges of coverture were dismantled, but for second-wave (late twentieth-century) feminists, marriage remained a site of women's oppression epitomised by the law's reluctance to interfere in the private sphere of the home (Smart 1984): husbands' immunity for prosecution for rape, for example, was not abolished until 1991 (*R v. R* [1991]).

The marriage rate reached a peak in 1972 (60.5 for women, 78.4 for men) and then, in spite or possibly because of divorce law reform in 1969, began to fall; it has been falling ever since (The Guardian 2010). By 2014, the Office for National Statistics reported that more than one-third of the population had never been married, a higher proportion than ever before in recorded history (Elgot 2015). Many factors have contributed to the decline of marriage, including the feminist critique – I have examined this in another article (Auchmuty 2012) – but it is usually ascribed to the rise in cohabitation, a circular argument if ever there was one. The shift was certainly dramatic: where cohabitation was virtually unknown up to the 1960s, today in excess of six million people cohabit (more than twice as many as twenty years ago) (Office for National Statistics 2012, p. 1). By 2004, observed Barlow and James, 'the social acceptance of heterosexual cohabitation as a parenting and partnering structure on a par with marriage has been achieved almost universally' (Barlow and James 2004, p. 143).

It is therefore curious that after four decades of steady decline in the rate and significance of marriage, marriage has now reappeared as a topic of fascination and concern in the academic world, with books and articles appearing on a regular basis (eg Brake 2012, Peterson and McLean 2013, Baker and Elizabeth 2014). It is ironic,

too, that at the very moment when whether you are married or not has mattered least, the primacy of marriage is being asserted with renewed vigour.

Three phenomena are to blame for this rehabilitation of marriage. The first was the movement for same-sex marriage which, led by campaigners in countries where marriage made a greater legal and financial difference to couples than it does here, nevertheless succeeded in convincing UK citizens that it was a *privileged* status from which lesbians and gay men were unfairly excluded. This came as a surprise to those homosexuals who had hitherto seen the institution as repugnant or irrelevant, and had the simultaneous effect of silencing objections to marriage *per se* when they might appear to be objections to equality for gays and lesbians. With the enactment of the Civil Partnership Act 2004, which offered same-sex couples a substantively equal status to marriage, we began to see the sweeping generalisations as to its legally transformative powers (Auchmuty 2007, p. 99). It seems that many lesbians and gay men, so long denied legitimacy and recognition, were projecting on to marriage all their hopes and dreams, not just of equality with heterosexuals but of protection in law – with unfortunate results for some, as it turned out (Auchmuty 2016). In the general liberal response, there was little attempt to clarify the exact differences that marriage (or civil partnership, which was the version we got first in the UK) would make to their relationships because no one wanted to burst their bubble. If any voices were raised in caution, they were silenced by the general rejoicing.

The second impetus was the series of cases in the last 30 years of the twentieth century, at first a trickle and then a flood, in which an unmarried cohabitant, usually a woman, found herself after separating from her partner without any share, or a niggardly one, in the proceeds of sale when the home was sold. It should be noted that, prior to 1970, the rules had also applied to married couples who were splitting up and selling the home. After 1970, property was re-allocated on divorce under a completely different set of principles (I will outline the relevant law later) and it was these that family lawyers preferred. The cases on family home disputes were critically examined at the time by property lawyers (eg Bottomley 1994, Auchmuty 2001) whose work, with the exception of some proposals that England should follow other Commonwealth jurisdictions in adopting a legislative regime for 'de facto' couples (eg Wong 2001), focused largely on judicial attitudes and approaches to the existing law rather than the legal and equitable rules themselves which, as subsequent decisions have demonstrated, are capable of more inclusive interpretation (Gardner 2013).

The third impetus for the rehabilitation of marriage came from the revelations of the British Social Attitudes Survey of 2000 about the extent of the common-law marriage myth, which led to an empirical study by family lawyer Anne Barlow and colleagues, funded by the Nuffield Foundation in 2000-2. This, and a follow-up British Social Attitudes Survey in 2006 (see Barlow *et al.* 2007), had extraordinary impact. From this point on, cohabitation was no longer treated as an interesting demographic development to which the society and law were rapidly adjusting but as a legal *problem* that needed a legal solution.

Two rationales were offered for this new approach. First,

It cannot be satisfactory, even just taking account of the numbers of people involved, for the issue of whether the law treats cohabitants as married, as similar but still inferior to married couples, or as unrelated individuals to be nothing other than a *legislative or judicial lottery* (my emphasis) (Barlow and James 2004, p. 156).

Second, the social attitudes research showed that people were clearly not 'legally rational'; that is, they did not make decisions about their lifestyle even on the clear evidence that marriage was better (Barlow *et al.* 2005, p. 97). Several potential remedies were identified. While never actually advocating that cohabitants should just get married, many of the publications that came out of this research were

normative in tone, asking (for instance) ‘why people in Britain are increasingly cohabiting outside marriage, despite all the legal disadvantages to doing so?’ (Barlow *et al.* 2005, p. 47) and setting out the dangers of cohabiting and protections offered by marriage.

These same critiques proposed, as an alternative, a separate property regime for cohabitants that would incorporate some of the matrimonial law principles on the ending of a relationship but would not challenge the primary status of marriage. This idea was taken up by the Law Commission which, following its failure to come up with a workable solution for co-ownership disputes that respected property law’s indifference to gender or marital status in co-ownership (Law Commission 2002), produced a more focused report in 2007 dealing specifically with *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Commission 2007). On the reasoning that law should keep up with social change and that cohabitation was now functionally similar to marriage, the Law Commission recommended a legislative scheme for cohabitants which, though clearly different from the one available to married, yet offered family law-style protection to vulnerable ex-partners. It was well received, but its recommendations were not taken up in England and Wales where the law remains unchanged. Recent case law on the Scottish legislation (the Family Law (Scotland) Act 2006) has prompted renewed calls from family lawyers for an English equivalent (eg Miles 2012), including one from Lady Hale in *Gow v. Grant* [2012], but these, too, have so far fallen on deaf ears.

Yet another line of attack was taken by the Labour government which in 2004 devoted £100,000 to a ‘Living Together’ campaign intended to alert cohabitants to their legal situation – in particular, to disabuse them of the common-law marriage myth. It aimed to do this by *presenting the legal facts* so that couples could *make an informed decision* about what they should do. But it, too, could not resist going beyond mere information to taking a normative role. As the director of the campaign said, ‘We aren’t encouraging people to get married but we want cohabiting couples to protect themselves’ (Womack 2004).

The latest mechanism to be urged on recalcitrant cohabitants is the ‘cohabitation agreement’, a template for which is attached to the Living Together campaign’s website, Advicenow. In a masterly critique of this new strategy, Helen Reece describes the mechanisms by which its authors hope to influence cohabitants’ behaviour. The site presents cohabitation agreements as *inevitably* good in the same way as marriage is presented as *inevitably* good.

Advice Now constructs this goodness in three ways: first, exaggerating how bad the legal position is in the absence of an agreement; second, using ‘atrocity tales’; and, third, emphasizing the beneficial practical effects of agreements (Reece 2015, p. 124).

I have adopted Reece’s organising principles here. First, I will show how much the family law research exaggerates the deficiencies of property law. Second, I will examine and debunk the ‘Atrocity tales’ that it invokes in support of the critique of property law. Third, I will set out the ways in which the benefits of marriage are not so much emphasised as taken for granted and the drawbacks ignored, while the myths that have grown up around the superior ‘rights’ of marriage go unchallenged. Finally, I will offer a discussion and proposals.

### 3. Exaggerating the deficiencies of property law

This article focuses on the merits (or lack of them) of property law, as opposed to a family-law approach, in respect of cohabitants’ disputes over the family home. Such a focus makes plain the fact that in England and Wales, unlike the United States, cohabitation is not particularly associated with class. In the US, poor, black and working-class couples have been found to be less likely to marry, with marriage unsurprisingly linked to higher income, access to health benefits and a desire to



protect assets (Cooke 2015). Perhaps because marriage offers fewer legal and financial advantages in the UK, as we shall see, the same link has not been documented here. The couples under discussion in the present article are all home-owners; so, given that in 2011, 64 per cent of households in England and Wales were home-owners, representing a fall from a high point of 69 per cent in 2001 (ONS 2013), it is clear that cohabitation can be found across the social spectrum, including the propertied classes.

Again in contrast to the US, where preferential measures for the married have proliferated in the hope of incentivising cohabiting couples to marry (Cooke 2015), the law's response in the UK, until recently, has been to do away with distinctions between married and unmarried people. Benefits have long been assessed on a 'household' (rather than marital) basis (this saves public money and removes an impediment to marriage), illegitimacy has been abolished for the sake of the children, and many legal protections (for instance, from domestic violence and undue influence) have been extended to unmarried partners. Next-of-kin arrangements, tenancy succession, pensions, one by one all came to accept unmarried heterosexual and then same-sex partners, though not always on such advantageous terms (for details, see Auchmuty 2012). As Rebecca Probert (2011, p. 285) points out in her study of the common-law marriage myth, it is easy to see why so many people believe in it when so many rights and responsibilities are similar. Socially, too, the historical pressure on women to marry and the economic necessity to do so were largely overcome in this period. The political rhetoric continued to be of commitment to marriage as the best foundation for moral life and children but, with illegitimacy gone and less and less significance attached to marital status, there was no continuing reason to penalise the unmarried.

So what differences are left? The first problem with the ways in which the 'marriage protects' argument has been presented in the literature on family home disputes is that, seeking to evidence the confusing state of 'Cohabitation Law', proponents bundle together a broad range of provisions from across the legal spectrum, some highly significant for a large number of people, like property division on the ending of a relationship, and some significant for only a small minority, like the spousal exemption from inheritance tax (eg Barlow *et al.* 2005, p. 7). While it might be true to say that, in many of these situations, a married person would fare better than a cohabitant, most would be of little relevance to a particular individual, while the really big differences do not *automatically* favour the married.

In the realm of property, tax privileges occupy a disproportionate space in assessments of the benefits of marriage, so I will say a brief word about them. Notwithstanding the government's recent introduction of a marriage credit and extension of the spousal exemption from inheritance tax, marital status has very little effect on tax in the UK. Unlike many other jurisdictions, married couples are not jointly taxed (separate taxation for married women, introduced in section 32 of the Finance Act 1988, was an important feminist victory), and the numbers affected by inheritance tax are small – about six per cent of estates (Blackmore 2014). Thus, while it is true that transfers on death between spouses attract no inheritance tax while transfers between unrelated persons such as cohabitants do, the 'nil-rated' band is still set so high (though frozen for years) that most people will not be liable at all. Nevertheless the threat of inheritance tax is so commonly directed at cohabitants that many think they will. This leads to a representation of the tax as unjust to cohabitants or a reason to get married, depending on your point of view. Barlow and Smithson, for example, interviewed a couple who were 'very worried about the fact that an inheritance tax bill would render their partner and their four children homeless, should either of them die' (Barlow and Smithson 2010, p. 336). But once the deceased's share of the property was valued and the outstanding mortgage deducted, it is quite probable that the amount would fall below the nil-rated band; even if it did not, the property might not have to be sold – other assets could cover the tax; and if it *did* have to be sold, the family could surely downsize,

or even rent. 'Homeless' is an emotive word and surely inappropriate in the context of property apparently worth so much it might be taxable. Nevertheless Barlow and Smithson express astonishment that this couple's 'ideological opposition to marriage was so strong ... that they were prepared to face financial disaster, rather than marry' (Barlow and Smithson 2010, p. 337). *Disaster!* Here is another emotive word. What is wrong with a tax that only affects the wealthy? The scandal perhaps is that so many people avoid it simply by marrying.

### 3.1. *The co-ownership rules in property law*

This leads us to the biggest area of contestation, and the one I want to focus on here: the family home. The co-ownership provisions in section 36 of the Law of Property Act 1925 are clear and certain, and apply to everyone, married or unmarried, family, friend or business partner. In England and Wales – note that Scotland and Northern Ireland are different – a couple (or anyone else for that matter) can decide how they wish to own their property by, for example, putting the shared home (whether owned or rented) in joint names. When purchasing a property, since 1998 transferees have been supposed to declare whether they wish to be joint tenants or tenants in common and, if the latter, in which proportions they wish to hold the property. If they choose to be joint tenants, if one party dies the property will pass automatically to the other, and if the property is sold, the proceeds will be divided between them in equal shares. If they choose to be tenants in common, they will have shares in the proportions chosen upon purchase; if one person dies, the property will pass according to their will or on intestacy; and, if sold, the proceeds will be divided in the agreed proportions.

That is all that cohabitants purchasing property together need to know; and a competent conveyancer should ensure that they understand so that they make an informed decision at this stage. If conveyancers sometimes do not so insist, a point to which I shall return, that it not the fault of the law but of standards of conveyancing. The solution is of course to make it mandatory, a far simpler legal intervention than introducing a new property regime for cohabitants.

Where the law of England and Wales is unusual, certainly, is that co-ownership takes place under a trust. Though odd (non-Common Law countries do not do it this way), this is not especially significant: in 99 cases out of 100, the legal owners will simply hold the property on trust for themselves. Where the co-owners are all legal co-owners, their names all appear on the proprietorship register of the Land Register. Where a person whose name is not on the register (i.e. is not a legal owner) claims a beneficial interest in the property, s/he must do so under an implied trust. This is more difficult, obviously, as s/he must demonstrate to a court that s/he has, in fact, acquired an interest, by meeting a set of now fairly settled criteria.

Single ownership of the family home used to be usual. Up to the 1980s homes were normally conveyed into the husband's name alone. Men were supposed to provide for their families, and lenders were reluctant to lend to women on the ground that they would leave the paid workforce (where in any case they were paid less than men) on marriage or maternity so would have no money to pay the mortgage instalments. So a woman whose cohabitation began before a contribution and who did want to claim a share on separation would have had to resort to implied trusts.

All this has changed. Not only are lenders unable to discriminate against women in this way but, since the landmark case of *Williams & Glyn's Bank v. Boland* [1981], they have *required* – for their own protection, it must be said, not the woman's – that homes bought by and for couples be conveyed into joint names. A significant movement in the 1960s and 1970s to introduce obligatory joint ownership of the matrimonial home failed precisely because, as Stephen Cretney recounts, joint conveyancing to husband and wife had become 'almost universal' by the time the Law Commission drafted a suitable Bill (Cretney 2003, p. 140). This means that the

problem of the sole legal owner has all but disappeared. Lersch and Vidal analysed British Household Panel Surveys from 1992 to 2008 and the UK Longitudinal Study of 2010-11 to see how many couples jointly owned the family home and how many lived in a home owned by one of the parties only. They found that the great majority of homes, especially of younger couples, were jointly owned. Only 13 per cent of couples' homes across the period 1992-2011 were in the sole ownership of one of the parties, and this was often the result of a conscious decision by someone who had children by a former partner and wished to preserve inheritance rights for them (Lersch and Vidal 2015, p. 13).

It remains true that a person who moves in with a partner who already owns his or her own home could end up in the event of relationship breakdown, even after many decades together and even raising a family, having to claim a share under an implied trust. These days, however, re-mortgaging or moving to a new property – common events in long-term relationships – will trigger conveyance into joint names (that this has long been normal practice among cohabitants, see Burgoyne 1984, p. 251), thus, again, reducing the incidence of sole ownership.

### 3.2. Co-ownership as represented in some family law accounts

The above section presents the law of co-ownership as understood by property lawyers. This is not, however, the way we find it presented in accounts by family lawyers. Here is an example:

The legal position of spouses and cohabitants diverges substantially, however, at the point of relationship breakdown. While both may apply for the court-based remedy of tenancy transfer, only spouses have access to a more general jurisdiction which enables the discretionary redistribution of income and capital resources, present and future. ... Cohabitants, by contrast, are *left with whatever the law of property and trust entitles them to ...* (my emphasis) (Miles and Probert 2009, p. 5).

The tone of this extract, no less than its content, presents a view of property law as both inadequate in itself and inferior to family law. Of course the authors are right that financial provision on divorce is more extensive than in property law, encompassing income, pensions and other capital assets as well as the home, while property law will only deal with the home. But the home is usually the couple's main asset so this statement creates a misleading impression if readers assume, as many will, that the separating cohabitant will get very little. In fact, as these authors point out three pages later, the chances are that the property will be jointly owned in law and equity; if so, the claimant will get half. But by the time the reader gets to this sentence, s/he will have absorbed the message that cohabitation is legally problematic and marriage is better.

In contrast, a wife's entitlement under divorce law is unclear. She might get half (or more) but then again, if her spouse has greater needs and fewer resources than she has, she might get *less*. Let us imagine the above statement rephrased to reflect this:

The legal position of spouses and cohabitants diverges substantially, however, at the point of relationship breakdown. Only cohabitants can be confident that their intentions, as embodied in an agreement at the point of purchase as to the extent and nature of their respective interests in property, will be honoured and cannot be challenged. Spouses, by contrast, will be left with the uncertainty of a remedy which is discretionary in nature, unclear in principle, and unpredictable in application. They might get what was agreed, or more, or less – it is impossible to predict.

Does this give a different impression? Yet this is just as true as the Miles and Probert (2009) account, only from a property lawyer's perspective – and just as misleading. Of course family law is not usually so arbitrary; in most financial remedy cases, where the available funds are small, the needs of the parties will

determine the outcome, with housing children the paramount consideration. My point is that, in the great majority of cohabitation situations, the parties will be joint tenants and will get half each on the sale of the family home. This might not be as much as they might get on divorce (but if one gets more, the other will obviously get *less*), but it is still a substantial and *certain* share.

A second way in which family lawyers convey the idea that property law is inadequate is by focusing, not on the normal, everyday co-ownership situations, but on the exceptional areas of reported case law. Such is the approach in *Cohabitation, Marriage and the Law* by Barlow *et al.*, perhaps the most influential work in this field. Instead of explaining co-ownership in terms of section 36 of the Law of Property Act, they launch straight into the situation '[w]here one or both cohabiting partners are (or claim to be) beneficial owners of the family home but no formal declaration of those interests has been made' (Barlow *et al.* 2005, p. 9). As we have seen, single ownership of the family home was once common but today is much less so; joint ownership without a record of shares persists, but the general rule is that equity follows the law, so joint ownership in law will give rise to joint ownership of the beneficial interest. But readers unfamiliar with the law will come away thinking that, while the homemaker wife will usually emerge from a divorce with 'at least half of the assets', 'the cohabitant will (always) have to prove an interest under a constructive trust' (Barlow *et al.* 2005, p. 10), the implication being that she may come away with *nothing*. In fact, the case law in this area is replete with examples of cohabitants who succeeded in winning their case, such as *Grant v. Edwards* [1986], where the claimant had made no financial contributions to the property at all, yet the court was able to develop established principles of equity to ensure she received justice.

An even more weighted statement appears in the section on 'Cohabitants and the law' in Barlow *et al.*'s (2007) article:

Rented tenancies of the family home aside, there is no divorce equivalent for cohabitants, who are dependent on *strict* and *complex* property law rather than family law based on principles of '*fairness*' to resolve their disputes concerning the owner-occupied family home or other property (my emphasis) (Barlow *et al.* 2007, p. 40).

While, once again, accurate, this statement is nonetheless misleading in that the criticism only applies to the 'owner-occupied' family home rather than to the more usual *jointly-owned* home. And here is a similar claim, this time concerning rights of occupation:

Whereas spouses on marriage automatically acquire occupation rights in the family home owned by their spouse, no such occupation rights are extended to cohabitants of either a rented or owner-occupied home (Barlow and James 2004, p. 147).

True again if you are not a co-owner, but you probably are!

The message non-specialists take from these pronouncements is that the rules applying to homes co-owned by cohabitants are both *complex* and *unfair*, unlike family law which (we are told) is explicitly 'fair'. In truth, however, it is the *formal* joint ownership rules of section 36 that are strict – which means they are *certain* – but they are not particularly complex, whereas the rules that apply in the situation described here, where a cohabitant is claiming a share in her partner's property, are indeed complex, but not strict; being based on equity, a jurisdiction whose very name *means* 'fairness', they are actually quite flexible.

In a fourth example, research undertaken by Douglas *et al.* (2008, 2009) looked at what happened to the property of 24 formerly cohabiting couples in the light of Lady Hale's list of factors to be taken into account in quantifying shares in the family home in the case of *Stack v. Dowden* [2007]. Because they were putting Hale's criteria to the test, the authors gave the impression that *all* joint ownership

cohabitation separations would be dealt with this way. *Stack v. Dowden* concerned a couple whose property was held in a joint tenancy but the beneficial shares had not been declared, which was the situation for some but not all of Douglas *et al.*'s interviewees. Since the introduction in 1998 of the form requiring declaration, however, and assuming that the requirement is complied with, there should be fewer and fewer couples in this position as the years go by. Moreover, the couples interviewed by Douglas *et al.* were all in dispute with each other; all had sought legal advice, and several had gone to court. The great majority of cohabitants will not have to seek legal advice or go to court; they will simply sell the property and take the share they expected and agreed at the outset and go their separate ways.

A fifth misleading statement is provided by Jo Miles in her article 'Property law v. family law' where she describes property law as having a 'backward-looking focus', while family law is 'forward-looking' (Miles 2003, p. 627). To the property lawyer, however, it is *property law* which is forward-looking. The perspectives are different because Miles, as a family lawyer, sees ownership rights as arising at the end of the relationship, as they do in family law in the sense that *new* property rights can be created on divorce. But one of the features of property law that I hope I have made clear is that property rights are acquired *upfront* – at the point of acquisition or on the occurrence of a particular event, such as the payment of contributions to the mortgage. This applies to everyone, married or unmarried, family or stranger. It is only on property *division*, that is when the property is sold or divided at the end of a co-ownership relationship, that the legal approach diverges. If you look back at that point, of course, for cohabitants what matters is the property rights you have already acquired. But these rights were acquired when their owners were looking *forward* to securing independent interests which, assuming that the beneficial ownership was properly declared, would endure whatever happened in the future. For spouses getting divorced, a different set of factors, which include the parties' resources and needs, will override the property law rules. This may be fairer in some circumstances, but it also means that agreements that the parties have made at the outset can be overturned in what might seem an arbitrary and unpredictable manner.

A sixth and final instance of misrepresentation of property law is an empirical one. In order to ascertain whether cohabitants took steps to protect their property interests, respondents to the 2006 British Social Attitudes Survey were asked whether 'those who own[ed] their own accommodation ha[d] a written agreement with their partner about their share in the ownership'. Fifteen per cent said they had, an increase from eight per cent in 2000 but still so small a proportion as to indicate that cohabitants were largely unprotected. Longer-term cohabitants were, however, more likely to claim such a written agreement (Barlow *et al.* 2007, p. 43). Once again, the question (if that is actually what was asked) is problematic because, with land registration, once conveyancing is complete there are no retained documents; indeed, since the Land Registration Act 2002 came into force there are no paper records at all, only the entry on the (electronic) Land Register. I venture to suggest that rather more cohabitants might have replied in the affirmative if the question had been, Did you buy the property jointly? If so, did you state your shares?

### 3.3. Discussion

The way in which these family lawyers represent property law prompts a number of reactions from the property law perspective. First, there are clearly drawbacks to the property law approach: decisions made at the start of a relationship may not reflect needs or indeed fairness at the end, which is the focus of family law; and property law is limited to *ownership of land*, so that only landowners and land are encompassed in its remit and it cannot deal with pensions and other assets. All this I freely admit. Within these limits, however, property law does not serve couples as ill as many family lawyers suggest.

The family lawyers I have cited make a great deal of the fact that the requirement for co-owners to declare shares in property at the outset is not enforced. Because the shares in cases like *Stack v. Dowden* [2007] and *Jones v. Kernott* [2011] were not declared (in both cases the property in question was bought before the requirement was introduced), and because Douglas and her colleagues (2008, 2009) found in their empirical study that it was still not being observed by many conveyancers, their critique appears to proceed from the notion that the rule does not exist. This must be why so many family lawyers give such prominence to the constructive trust. But not enforcing a rule is quite different from not *having* a rule; the rule that shares should be declared exists, and has existed since 1925, and the form TR1 was introduced to make it obligatory. If the rule is still not being complied with, that is not the fault of the property law rules, which work perfectly well for those who do observe it.

It follows that what these family lawyers see as the essential property law rules is quite different from what property lawyers see. *We are talking about different things*. This realisation came to me when one of my family lawyer readers objected, having reached this point in the article, that I had not actually summarised property law. Yet this was precisely what I thought I had done when outlining the rules in section 36 of the Law of Property Act (I have inserted a sub-heading now to make the point). For property lawyers, then, the co-ownership rules are contained in section 36 (together with the Trusts of Land and Appointment of Trustees Act 1996, dealing with the powers of trustees and beneficiaries and procedures for sale), whereas for these family lawyers the constructive trust determines shares.

It is true that I have not set out the constructive trust rules. This is not just because they are the exception, not the norm, which is why they have been litigated so much, but because they are a *remedy*, for use in exceptional circumstances, whereas section 36 establishes *rights*. Thousands of co-ownership transactions take place every week, of which only a tiny proportion will ever require the intervention of a court upon subsequent sale. Given that couples living in sole-owned homes are now such a small percentage of home-owners, if the TR1 form were always filled out upon purchase we would hardly ever see a constructive case.

Family lawyers are practical people and some of them (it is clear) have much less faith than I have in people's abilities to make rational decisions when obliged to do so. They will (and do) point to changing and unforeseeable circumstances and to the foolish decisions that individuals (especially in domestic relationships) do sometimes make. As a property lawyer, I see the solution as making the declaration of shares at the point of purchase mandatory, informed, and documented. I am aware, as the family lawyers are, that many individuals are not equally empowered within the relationship to make a free rational choice. The difference is that I view the ordinary property law rules and procedures as automatically beneficial to such individuals, since the starting point in statutory co-ownership is the joint tenancy, which gives rise to equal shares on sale. This is the central principle of formal co-ownership law, and the constructive trust is really only an exception invoked to deal with the difficulties caused by the historically specific practice of conveying the family home into the husband's sole name, and later with the errors and omissions of conveyancers who failed to explain the ramifications of a joint tenancy or to declare beneficial shares. The former practice has long ended and the latter is a practical, not a legal, problem.

My final reaction to the family law accounts detailed above is that their misunderstanding (as I see it) of the property law approach to co-ownership is underpinned by a widely-held perception that English property law (land law and trusts) is difficult, dry and inaccessible. Whenever I see yet another dismissal of the 'ordinary principles of property law' (summarised by Pleasance and Balmer 2012, p. 303), I wonder if the writer has simply gone along with the accepted view that these principles are too complex and confusing to be bothered with. Carnwith LJ

famously described the law of implied trusts and estoppel as a ‘witch’s brew’ – the Law Commission were so taken with this image that they repeated it in their Consultation Paper on Cohabitation (Law Commission 2006, para. 4.48) – and added, ‘These ideas are likely to mean nothing to laymen, and often little more to the lawyers who use them’ (*Stack v. Dowden* [2005], para. 75). If this is true, it is a disgrace. Partly, perhaps, because of these blanket condemnations by our colleagues, property law – a compulsory subject on the LLB – has become the bogeyman of English legal studies. If so many graduates emerge from their law degree this ignorant about its provisions (not a sensible idea considering that most of them will one day have to deal with it in their lives), we cannot expect non-legal scholars who read their work to be any the wiser. I suggest that it is time to take property law seriously. As I have demonstrated, it is really not so difficult.

A further problem for non-property lawyers, and even more for non-lawyers, is that there is something *masculine* about property law that jars with those who sympathise with the women in the cases. Not only is property law viewed as mechanical and technical, the whole idea of property is identified with men (realistically, perhaps, when you consider its history). The very characteristics that property lawyers appreciate about the subject – its clarity, its certainty, its (these days) indifference to gender or relationship status – are subject to criticism because these have always worked to men’s advantage. In contrast, family law – whose principles, as a matter of fact, have generally worked to men’s advantage too – is perceived as a *feminine* subject (and widely disdained by male law students as a result). Its discretionary nature, no less than its formal recognition of the homemaker’s contribution to the family, makes it seem more attuned to the realities of women’s lives – even if it, too, has generally worked to men’s advantage.

What is curious about these attacks on property law is that the worst scorn is reserved for the equitable jurisdiction (as opposed to the formal land law rules, which are generally ignored) which has traditionally, like family law, been viewed as *feminine* and represented as saviour of women (Auchmuty 2001). Equity entered the English legal system through property law and has repeatedly been used to play the same role in co-ownership disputes as sections 24 and 25 of the Matrimonial Causes Act 1973 (see below) play in family law. If its actual assistance to women has been exaggerated and sporadic, it has nevertheless enabled many claimants, mostly women, to acquire an interest in the family home through informal means. Today, as Simon Gardner has observed, ‘The trust rules display a commitment to taking material communality, where it exists, seriously: that is, to following the parties’ own choice to pool their resources, rather than keep separate accounts’ (Gardner 2013, p. 311). *Exactly like family law.*

#### 4. Atrocity tales

In its efforts to persuade unmarried couples to draw up cohabitation agreements, the Advicenow site (Advicenow 2016) offered a series of imaginary case studies of unfortunate individuals who, believing they had rights as cohabitants, or simply trusting to luck or their partner, were sadly disillusioned when the relationship ended. The family law critics of property law have never had to invent such case studies as they had the ideal atrocity tale to hand in that of Mrs Burns, the claimant in *Burns v. Burns* [1984], who walked away with nothing after 19 years of being an ideal common-law wife and mother. Mrs Burns pops up everywhere in family law descriptions of the way cohabitants are treated in property law. In their book *Cohabitation, Marriage and the Law* (Barlow *et al.* 2005), for example, Barlow *et al.* illustrate their account of co-ownership law by reference to ‘the classic case of *Burns v. Burns*’. So does the Law Commission Report on *Cohabitation*, using the very same words (Law Commission 2007, p. 21 footnote 27). In an article of 2012, Jo Miles was still referring to ‘the totemic Mrs Burns’ (Miles 2012, p. 492). Yet the facts of this case took place four decades ago and, as Anne Bottomley (2006, p.

194) pointed out some ten years ago, neither the law as applied to Mrs Burns nor the woman herself represents the norm today. Even if some Mrs Burnses remain, this is hardly sufficient rationale for such a wholesale revision of the law, especially as the problem is clearly on the decline.

Barlow and Miles contend that *Burns v. Burns* is still 'good law'. This is only true in a narrow sense: contributions to housework and childcare *per se* still do not entitle a person to a share in the home. But it is very unlikely that the case would be decided 'the same today as it was 30 years ago', as Miles (2012, p. 492) claims. The law has moved on, as Lord Walker remarked in *Stack v. Dowden* ([2007], para. 26). Intention to co-own, he explained, is now established by taking 'account of all significant contributions, direct or indirect, in cash or in kind' (*Stack v. Dowden* [2007], para. 31). And in quantifying the shares, attention will be given to 'the whole course of dealings between the parties in relation to the property' (*Oxley v. Hiscock* [2005], para. 69). Thus, intention could today be established by an arrangement whereby Mr Burns paid the mortgage and Mrs Burns bought other necessities, or perhaps an excuse by Mr Burns as to why the property had not been held jointly (*Grant v. Edwards* [1986]). Using the modern tests, Mrs Burns would almost certainly get *something*; indeed, Simon Gardner thinks she might be entitled to as much as 50 per cent in a court today (Gardner 2013, p. 305). This is not to deny that she might have fared better in the family court. My point is simply that it is wrong to suggest she would still get nothing.

The family law accounts also, as Bottomley (2006) pointed out, misrepresent the actual *sociological* situation by focusing on a stereotype (of which Mrs Burns is the exemplar) who, even ten years ago when Bottomley's critique appeared, was no longer typical of female cohabitants, and is now almost unknown: the homemaker dependant who brings no financial contribution to the property. Most cohabitants, as Deech observes, will have put some money into the home because practically all propertied women are or have been in paid work; they will thereby acquire an interest (Deech 2009, p. 1141). Bottomley instances Mrs Oxley of *Oxley v. Hiscock* as a more modern female cohabitant; I would point to Ms Dowden of *Stack v. Dowden* [2007]. Unlike Mrs Burns, who came into the relationship and the shared home with nothing, both Mrs Oxley and Ms Dowden already had *more* property and were in a stronger financial position than their male partners. If Ms Dowden needed the law's protection, it was to stop her greedy ex-partner from taking more than his fair share of the proceeds of sale. The same was true of Ms Jones in *Jones v. Kernott* [2011]. And let's not forget: both Ms Dowden and Ms Jones *got* the court's protection; they were awarded the share they deserved, and might not have fared so well in a divorce court.

Atrocity tales (especially if drawn from real life) are powerful persuaders; there are few tools so useful for getting your message across, since they stick in the mind even when the actual legal details have slipped away. This means that, although by their nature exceptional, they can be generalised across every cohabiting situation and thus strike fear into the hearts of all cohabitants who read about them – which is, of course, the purpose for which they are being used in these accounts. As Bottomley observed, the image of Mrs Burns 'stands as a strong warning to women of the dangers of cohabitation' (Bottomley 2006, p. 187).

But the truth is that this atrocity tale, and the law that it is based on, are yesterday's problem. Property lawyers stopped writing about single-owner implied trust cases a good decade ago when the constructive trust rules became settled. We seem only to re-enter the arena when we have to respond to yet another outmoded representation of the law by family lawyers, as was the case with Gardner's (2013) article cited above, a response to Jo Miles's article also cited above. I respectfully suggest that it is time family lawyers stopped recycling the tale of Mrs Burns and started stating the law as it is experienced by the great majority of property-owning cohabitants.



## 5. Exaggerating the benefits of marriage

'The benevolent model of extending the protection of family law to cohabitants,' wrote Anne Bottomley in her 2006 article, 'is premised on an assumption that not only does property law fail women, but that *family law does not*' (my emphasis) (Bottomley 2006, p. 207). Let us consider the exact nature of the family law protection offered to spouses on the ending of a relationship (i.e. on divorce). The court has an unlimited discretion under section 24 of the Matrimonial Causes Act (MCA) 1973 to re-allocate property between parties on divorce. This now extends to same-sex marriages under section 11 of the Marriage (Same Sex Couples) Act 2013 and similar provisions apply to civil partners under section 66 and Schedule 5 Part 5 of the Civil Partnership Act 2004. Property adjustment orders include the court's ability to transfer the property to the other partner or to order the sale of the property and division of the proceeds. (Other orders are also available concerning spousal maintenance, share of pension benefits, etc., which are not available to cohabitants.) Section 25 MCA 1973 gives guidance to the court as to how and whether to exercise its discretion. First consideration is given to the welfare of any children. After that, what is noteworthy about the list is that it includes factors which are not taken into account in assessing interests under an implied trust, such as the parties' needs and resources and contributions to the welfare of the family, including housework and childcare.

This all sounds good, and was in fact the result of vigorous campaigning by feminists at the time of the passing of the Divorce Reform Act 1969, which permitted men for the first time to divorce their blameless wives against their will (Stetson 1982, chapter 5). The women argued that, without these provisions and the possibility of capital transfers, many older ex-wives, long out of the workplace if they had ever been there, would be left without sufficient resources to make a new life for themselves. Section 25 recognised both the importance of the wife and mother's contribution to the marriage and the difficult situation these discarded women were in. Important as these provisions are, however, there is no denying that they belong to a different era – an era in which men were expected to be the sole breadwinner in families and wives and mothers did not do paid work, and when divorce was still rare. Case law has developed the principles in step with social change over the succeeding decades, just as constructive trust case law has, but there remain substantial limitations to family law's ability to protect women on divorce.

### 5.1. *The law of financial remedies is discretionary*

Unlike co-ownership in property law, where in the great majority of cases the shares the parties declare on acquisition will automatically be the shares they get on disposal and the courts will not be involved, *all* divorce settlements must be negotiated. It is true that in situations where a cohabitant is claiming an interest under an implied trust in her ex-partner's property, or where a co-owner is challenging the presumption of equal shares on sale because no shares had been declared on acquisition, the claimant will find him- or herself in the discretionary territory of equitable remedies and will have to go to court. But wherein does this differ from the family court's discretion under section 24? Rights in both courts are discretionary rather than automatic and clear rules and principles must be applied in both – for family law, the factors in section 25 MCA 1973; for property law, the rules set out by the House of Lords/Supreme Court in *Lloyds Bank v. Rosset* [1990], *Stack v. Dowden* [2007] and *Jones v. Kernott* [2011].

### 5.2. *The interpretive principles are confused and unpredictable*

A common criticism of the ancillary relief provisions is the lack of clear principle emerging from recent case law as to how section 25 should be applied. Needs are dealt with first, and these often exhaust the assets. From *White v. White* [2001]

came the 'equal sharing' principle which was to come into play if and when needs have been met. *Miller v. Miller; McFarlane v. McFarlane* [2008] saw the introduction of the idea of *compensation* for disadvantage and opportunities lost because of the marriage. These principles are often in conflict; as Ruth Deech comments:

The judges, with their best efforts, have not been able to make the law certain enough in application to avoid lengthy litigation and negotiation between the parties which obviously blocks the process of moving on from the divorce and increases the stress and expense. Indeed, judgments pile new principle on new principle and move further away from the statutory law (Deech 2009, p. 1141).

This comment is actually kinder than those of other academic critics. John Eekelaar described the judgment in *Miller* as a 'descent into chaos' (Eekelaar 2005, p. 870) while Rebecca Bailey-Harris declared:

It is impossible to predict when an articulated statutory principle will be seized upon in a judgement, or when a new sub-principle will be invented, or when the search for principle will simply be disclaimed (Bailey-Harris 2005, p. 240).

More recently, Alison Diduck traced three shifts of approach to financial remedies over the past twenty years from 'a language of paternalism', through one of 'equality/rights' and sharing, to a new focus on 'individualism, autonomy and choice' (Diduck 2011, p. 287). None of these, she suggests, works well for women, simply because the judges pick and choose from a set of established narratives in ways that allow them to reproduce traditional models of family organisation (Diduck 2011, pp. 293-294). The effect of this chopping and changing is to ensure that, whatever the principle adopted, men still do better on divorce. All the evidence shows that men emerge richer, and women poorer, and that women's disadvantage persists for many years (Jarvis and Jenkins 1999, Glosswitch 2014).

### *5.3. Practice is not uniform*

While there is usually little room for manoeuvre in everyday small-money cases, nevertheless practice can vary from court to court, as Emma Hitchings found in her small empirical study of three areas. She quoted one solicitor who spoke of a place where one district judge was 'excellent, consistent, courteous and thoughtful' and the other was 'absolutely mad. So it's a complete lottery' (Hitchings 2009, p. 200). Another told her that some judges are 'pro-wife' and some 'pro-husband' (Hitchings 2009, p. 201). The National Chair of Resolution, the organisation of family lawyers committed to non-confrontational divorce, in an article entitled 'Let's Play Ancillary Relief' likened the process to a 'gambling game' (Greensmith 2007, p. 203). These observations were taken seriously enough by the Law Commission to make lack of uniform application one of their reasons for calling for action on Matrimonial Property in their 2014 report (Law Commission 2014, para. 1.16).

### *5.4. There is rarely enough money to go round, let alone for a remedy*

The big-money cases that get all the media attention – and London is known as the divorce capital of the world – are of little use to the great majority of divorcing couples, where the available means are barely enough to meet the parties' needs, or not even that (Law Commission 2014, para. 1.16). The consequence is that the protective capabilities of family law are more limited than some family law accounts suggest, and often no better than those of property law where the home is jointly owned.

### *5.5. Most divorces today do not go before a judge*

Not only is there insufficient money to meet the parties' needs in many cases, most divorcing couples today do not have their financial settlements made by a judge; indeed, as the Law Commission on Matrimonial Property observed, if they all had to, 'the court system would be unable to cope' (Law Commission 2014, para. 1.14).

Solicitor negotiation and informal discussion are the two most commonly reported methods of achieving settlement (Hitchings *et al.* 2013, p. 36) and, with the near-demise of Legal Aid, many litigants have no legal advice at all. Judges still need to approve pension orders, but property settlements can be agreed outside the court. So the protection of the courts is just not present in the majority of divorces in England and Wales today. Indeed, one of the solicitors interviewed by Hitchings and her team said that co-ownership disputes under property law provisions were *more* likely to go to a hearing 'because it can be black and white [section 15 of the Trusts of Land and Appointment of Trustees Act 1996 states that a sale will be ordered simply if the purpose of the co-ownership has ended], whereas in ancillary relief you've got to decide which shade of grey you're on' (Hitchings *et al.* 2013, p. 84).

#### 5.6. *Divorce settlements require agreement*

Each of the above forms of reaching agreement has been subject to vigorous criticism, largely on the ground of inequality of bargaining power between the parties but also because many of these specialised services do not offer legal information and cannot offer legal advice. Their goal is to reach agreement, and this must sometimes cause the less strident party, aware or unaware of their rights, to give in or give up.

#### 5.7. *Divorce is expensive*

Family law critics are quick to say that bringing a case in property law is expensive (as it is) but, as I have shown, most property divisions by cohabitants take place without legal intervention and only disputes will go to court. This is true of many financial remedy cases, especially with the curtailment of Legal Aid; but there are still considerable administrative costs for divorce. In carrying out my research into civil partnership dissolution, I found that many respondents were outraged at the cost of dissolution, even when uncontested, in comparison with the cost of entering *into* a civil partnership or marriage (Auchmuty 2016). Contested divorce cases often eat up all the assets, with a recent report stating that costs have 'spun out of control' (Boffey 2015 p. 30).

#### 5.8. *The process can be deeply unpleasant*

Our divorce law betrays its origins as a compromise between church and state in the 1960s. Rather than adopting a no-fault approach, it retained fault-based principles that can play out very nastily not only in justifying the divorce itself but also in the property negotiations. As Deech puts it:

Modern financial provision law has substituted for the old public divorce hearing an equally unpleasant inquisitorial procedure designed to establish the husband's financial position and rivals the old law in its depth, length, cost, temptation to lie and humiliation ... (Deech 2009, p. 1142).

#### 5.9. *It is wrong to say that marriage protects couples. What it protects is vulnerable individuals within couples*

Perhaps the most egregious misrepresentation of the law lies in the careless use of the word 'couples' or 'partners' in relation to the law's protection. Divorce law does not, as is often claimed, protect *couples* or *partners*; it protects only the financially vulnerable party to the marriage, and only to the extent that his or her ex-spouse can afford to pay. It follows that the assets of the party in a stronger financial position will *not* be protected; rather, their assets may be taken away. When Barlow *et al.* wondered 'why people in Britain are increasingly cohabiting outside marriage despite all the legal disadvantages to doing so?' (Barlow *et al.* 2005, p. 47), they begged the question of 'Advantageous for whom?' Not for the man who seeks to ensure that his partner cannot get her hands on his assets. Not for the woman who wants to keep her boyfriend's name off her child's birth certificate or to

avoid having to support a financially irresponsible partner. All the generalised talk of 'couples' or 'yourself and your partner' obscures the fact that financial protection for one party involves financial loss for the other. And if there are no assets, there is no protection.

#### 5.10. *Marriage institutionalises dependency*

Once this is grasped, it becomes clear that family law *expects* that there will be substantial differences of financial power within the marriage and that, without this protective law, the stronger party is likely to abuse his power. Our divorce law, essentially unchanged since 1969 when wives really were dependent and vulnerable on divorce, is premised on a model of economic *dominance* and *dependence* which is clearly out of step with today's more usual and approved model of *equality* (see Diduck 2011, p. 293). Indeed, the very way we speak about the 'protections' of marriage betrays our assumption that marriage relationships will be *unequal*. Our law assumes that, *thanks to the very nature of the marriage relationship*, there will be someone whom the courts need to protect. Ruth Deech notes:

Judges tend to call it a 'partnership' when dividing the couple's assets on divorce but analysis of the judge-made law shows that it still rests on a picture of the male earner and the wife as housekeeper and child-rearer (Deech 2009, p.1142).

While there is some truth in the claim that gendered dependency is a function of intimate relationships generally, not just marriage, particularly where there are children, the dependency that Deech and I are referring to is something different: it is the assumption that, because this form of relationship was once universal in marriage, family law should still treat every marriage this way. A law framed this way may encourage women not to bother to retain a measure of financial independence or to negotiate a more egalitarian spread of domestic responsibilities when they marry; it may even persuade them to choose dependence in the expectation that the law will protect them if it goes wrong. This includes encouraging women who are rich by anyone's standards to embark on ludicrously expensive litigation when their marriages end (see, for example, Boffey 2015, p. 22). Even as I was writing this article, a high court judge in a high-profile divorce case was reported in the national press as saying

I do not find it very edifying that people in this financial bracket should be taking up a day of court time over a sum which to them, though not to others, is objectively so small. However, agreement has not been reached and *I must rule* (my emphasis) (Bowcott and Booth 2016, p. 3).

Surely agreements made by the parties themselves (properly informed, and preferably empowered) are better than a passive reliance on the power of family law to sort things out. Ten years ago Anne Bottomley expressed disquiet at the prospect of a statutory regime for cohabitants precisely for this reason. She wrote: 'What is worrying is the possibility that any extension of family law in these circumstances might well lead women like Mrs. Oxley to take even fewer steps to protect their position' (Bottomley 2006, p. 199).

#### 5.11. *There are even more myths about marriage than there are about 'common-law marriage'*

First, a word about that 'common-law marriage myth'. It is not a total myth. Marital status is irrelevant in most areas of English law and there is no reason to believe that, when the British Social Attitudes Survey asked people whether they thought cohabitants had the same rights as married people, they had their rights on separation in mind. In most of their day-to-day activities they would indeed be treated the same and all the evidence shows that the last thing couples want to think about is breaking up (Hibbs *et al.* 2001). What the surveys did reveal was that, when presented with sample scenarios, interviewees' responses often showed

a mismatch between what they thought *should* be the case and the reality (Barlow *et al.* 2007). But that does not prove that they knew what the reality was.

Given that most of those who hear (and believe) that marriage is more protective than cohabitation have little idea *in what specific ways*, it is hardly surprising that the vacuum of ignorance gets filled with all sorts of ideas and expectations, some true, some not. Noting that the British Social Attitudes Survey failed to enquire as to what rights the people who believed that cohabitants had the same rights as married people had in mind, Pleasance and Balmer (2012) set out to discover just what the public *did* understand, and found that large proportions of respondents held misconceptions about *both*. Fifty-two per cent incorrectly believed that on separation after ten years a homemaker cohabitant had a good claim for financial support from her partner. But 35 per cent believed that a homemaker spouse would *not* have a good claim, which is just as incorrect. Misunderstandings of entitlement on intestacy were worse: only 14 per cent thought (wrongly) that a cohabitant would automatically inherit a share of a deceased partner's property after ten years, but a full 48 per cent thought (equally wrongly) that a spouse would not.

The Law Commission on Matrimonial Property noted a number of myths of marriage (Law Commission 2014), of which the most common is the idea that *in marriage the spouses share property 50:50*. 'In my experience,' wrote Anne Bottomley (2006, p. 199), 'many married women think that the *fact* of marriage gives them equal rights to property'. In fact, property ownership is determined by property law during the subsistence of a marriage, meaning that spouses have no rights to the other's property while still married, but, on divorce, the court has complete discretion as to how the property is divided. Douglas, Pearce and Woodward commented on the mistaken belief of cohabiting couples that they acquired rights of some sort to their partner's property (Douglas *et al.* 2009, p. 142) but they did not explain that, in fact, spouses do not, either. The public misunderstanding may be due to careless reporting of the equal-sharing principle of *White v. White* [2001] or perhaps confusion with the 'community of property' regimes that operate in most continental jurisdictions and some American states, under which marital property is shared equally between the spouses. What is more likely than either of these explanations, I submit, is that people assume joint ownership of family property because they have chosen to have their family home conveyed to them as joint tenants in law and equity. In this situation, usual for most committed couples whether married or cohabiting, equal ownership (of the home, at least) is not a myth at all but the reality while the relationship subsists.

There are other myths about marriage not relevant to this paper, but which also call into question the idea that the rights people think cohabitants should have are necessarily those actually enjoyed by married couples. For example, the idea that *former spouses 'may be entitled to lifelong support in all cases, or to no support'* (Law Commission 2014, para. 1.19), or the idea that *mothers always get custody of children on divorce and fathers are treated unfairly*, as frequently alleged by Fathers' Rights groups, are both untrue. The point is that, for every person who believes in the 'common-law marriage myth', there is another who holds some erroneous idea about the protection afforded by marriage, and this is not helped by the often vague and generalised way in which this protection is described in criticisms of the legal position of cohabitants.

## 6. Discussion

In seeking to establish whether marriage is more protective than cohabitation in property matters, we need to understand exactly what is the problem needing to be solved. Here it has been identified as the *lack of legal protection for cohabitants in relation to property*, in comparison with the *protection afforded by marriage*, and the solution proposed is that a family law-style protection should be offered to cohabitants. The argument in this article is that the problem identified by family

lawyers has been exaggerated, as have the protections offered by marriage and family law generally. Taking it a step further, however, I contend that this is not the real problem, and therefore not the right solution. Cohabitants who lose out in property disputes and wives who require the protection of family law are but symptoms of a much more serious problem, gendered disadvantage in relationships, and in society generally. Extending a protective regime to cohabitants may treat the symptoms but will not really tackle the problem – rather, it will make it worse.

In stressing the inadequacies of property law, as exemplified by atrocity stories such as that of Mrs Burns, family lawyers have failed to consider, on the one hand, how far women's difficulties might be historically specific – that the circumstances and the law might be different now – or, on the other hand, that they might be due to some other factor – not the law itself, but the way it has been applied by male-dominated courts committed (however unconsciously) to preserving men's economic power; and the fact that the same criticisms can be made of the ways that, historically and *still today*, property has been allocated on divorce.

In the past, many factors played into the courts' hands in family home disputes to ensure that women were kept disempowered. First, homes were routinely conveyed into the man's name; this ensured that a woman claiming a share had to take the complex, expensive and uncertain implied trust route. *But well over 80 per cent of couples' homes are conveyed into joint names today.* Second, the adoption of resulting trust rules, and even constructive trust rules in their narrower interpretation, ensured that women would always be disadvantaged, since their domestic responsibilities, low pay and/or exclusion from the paid workforce made them were less able to make financial contributions to the home. Women like Mrs Burns were victims of a systemic, structural inequality which was not of their own choosing nor a consequence of their own lack of motivation or talent. Although women still do most domestic labour and earn less, on average, than men, *very few women are unable to make financial contributions to the home today*, and there are plenty of women – Ms Dowden and Ms Jones of the recent case law being good examples – whose contributions were *higher* and financial resources *better* than their male partner's. A financial contribution will guarantee a share in the home under the constructive trust rules. Today, moreover, those rules can be much more flexibly applied to include *non*-financial contributions. Third, women's ignorance of the law, trust in their men and the assumption that they would be supported for life in an era when divorce was still rare meant that they were unprepared for what would happen when the relationship ended. While Britons remain notoriously ignorant of the law, the high divorce rate and widely-publicised relationship break-ups ensure that women are less likely to be so starry-eyed today as to imagine that a relationship will last forever. Finally, property law rules now aim to ensure that, on acquisition of a property, couples must discuss ownership and shares – and they will not be allowed to leave their name off the documents if there is a mortgage involved. My conclusion is that the female cohabitant of today is in a very different place from the vulnerable 'Mrs Burns' of the 'marriage protects' imagination. This is not just yesterday's problem; like community of property in the 1980s, post-*Boland*, the proposal for family law protection is yesterday's reform (Cretney 2003 p. 141).

In 2012, a case was heard in the Supreme Court whose facts seemed to contradict this confident assumption. *Gow v. Grant* [2012] concerned a woman of 64 who moved, at his invitation, into the home of a widower of 58, and in so doing sold her flat, at his request, and agreed, again at his request, not to seek more work when her post came to an end. She used the proceeds of sale from her flat to pay debts and fund the couple's 'relatively extravagant' lifestyle (*Gow v. Grant* [2012], para. 41), including buying two timeshare weeks. The relationship ended after five years leaving Mr Grant with his £200,000 house and Mrs Gow with nothing. The case was heard under Scottish, not English, law, and Mrs Gow succeeded in obtaining

compensation for incurring disadvantage under section 28 of the Family Law (Scotland) Act 2006, a measure which has no parallel in England and Wales. She would not have been able to claim anything under English law.

Lady Hale remarked in the course of her judgment that a situation like Mrs Gow's, where the woman emerged from the relationship 'markedly less well off than she was at the beginning' while the man's remained unchanged (and much better than hers) was 'by no means uncommon these days' (*Gow v. Grant* [2012], para. 51). If this is true, it is time it changed. Even allowing for the possibility that the facts were possibly not quite as they were reported (Dawn Watkins (2003) has done a splendid analysis of the gap between reported facts, reality and the claimant's understanding of the position in relation to Mrs Burns), my response to Mrs Gow's predicament is that she really has behaved very foolishly and should have known better. I would not go so far as to say that she has only herself to blame – clearly the villain here is Mr Grant, who pressured her to sell the flat and not to take another job, thereby obliging her to forgo both capital and future income. Still, no woman today should be so blinded by love or loneliness as to give up all her assets just because a man asks her to.

The outcome of the case is of course welcome in the sense that the controlling and exploitative Mr Grant got his just deserts. Family lawyers (eg Miles 2012) have taken the lesson from this story that, as long as there are men like him and women who will sacrifice their independence and hard-won property, a protective regime is needed, and have called for its extension to England and Wales. But the drawback of the Scots law is that, as long as the law offers protection, there is no incentive for women to change. This may sound cruel, but feminist strategists have always divided into two camps, those who argue for equality and autonomy and those who argue for special treatment for women in recognition of their particular roles and circumstances in an unequal society. Property lawyers, as this article makes clear, tend to fall into the equal-rights, gender-neutrality camp, while some family lawyers (for example, Barlow, Douglas, and Miles), though not all (for example, Deech), tend to be more concerned with the practical consequences of existing inequalities. Over the long term, history has come down on the side of the equal-rights camp simply because, in not giving in to gendered difference, liberal assumptions of equality and autonomy enable (and sometimes force) women to transcend their traditional roles and circumstances.

## 7. Proposals

It was not my intention in this article to demonstrate that the idea that 'marriage protects' in English law is a total myth or to deny that there are situations in which, in relation to property, an individual might be better off married. Law is never the best way to resolve disputes; neither property law nor family law is perfect nor can it be, and what we really want is a society in which the protection of neither would be needed.

Rather, the article is a plea for the following:

*Greater accuracy and precision in family law accounts* when they set out the property law principles applicable to cohabitants' homes on relationship breakdown, so that the normal and usual arrangement is explained first and the exceptional and difficult situations are described as such.

*Greater clarity about what usually happens in practice*, not just in property law disputes but in divorce disputes over property, and to be upfront about the nature and limitations of marriage's claimed protections.

*An end to family lawyers' portrayal of cohabitation as a deficiency model and the patronising and pathologising of cohabitants* in accounts where, for example, they are called 'legally irrational' or put into categories with labels such as 'romantics' and 'ideologues' (Barlow and Smithson 2010, pp. 335-336). In relation to the first,

I know many cohabitants who have made quite rational decisions to organise their property affairs outside marriage, preferring the certainty of property law to a judge's notion of fairness based on some normative notion of how couples live. In relation to the second, contemporary representations of marriage as a benign institution that couples would sensibly embrace ignore its long and ignominious history of oppression and exploitation of women, features reflected in those very provisions for property division on divorce. Not to speak of the long and ignominious history of stigmatising unmarried people! What should be cause for celebration, for those of us who grew up in an era where the pressure to marry and the shame of spinsterhood blighted many women's lives, is that 'Cohabitation has become a *normal* part of the life course ... Cohabitation is no longer seen as *socially deviant*' (my emphasis) (Beaujouan and Ni Bhrolchain 2011, p. 1).

*Better conveyancing practice.* It should be compulsory for co-ownership shares to be declared and for individuals to be separately advised when entering into a co-ownership arrangement (along the lines of the separate advice required for joint mortgages under *Royal Bank of Scotland plc v. Etridge (No 2)* [2001]). Lady Hale called for mandatory declaration to be made mandatory in *Stack v. Dowden* ([2007], para 52), and the problem is not going to go away with the increasing delegation of conveyancing to unqualified staff in firms 'instructed by lenders on a bulk basis' (Douglas *et al.* 2008, p. 375), since lenders are not concerned with shares, all co-owners being jointly and separately liable for a mortgage. Such a requirement would oblige conveyancers to advise their clients *properly*, including explaining the effect of a joint tenancy on sale: yes, you are effectively giving your partner a half share, as Douglas *et al.* (2008, p. 375) note, which at least ensures that s/he will have something if the relationship ends.

*Better education of the general public about law.* One of the conveyancing solicitors interviewed by Douglas *et al.* said that couples wanted only the minimum of information: 'Anything more and I just see the eyes glaze over' (Douglas *et al.* 2009, p. 144). This patronising attitude, once characteristic of doctors' interactions with patients but now abandoned in favour of encouraging us to take control of our own health, needs to go. Conveyancing law is, frankly, a great deal less difficult to understand than medicine and we can all find out more about it if we want to on the internet, if not from an actual lawyer.

A more urgent reason for change is the recent tendency noted by family lawyers for judges to treat separating spouses as autonomous individuals who must live with the consequences of choices they made during their marriage. Anne Barlow writes:

Adult couple relationships are increasingly characterised as equal partnerships where the partners should be at liberty jointly to exercise their autonomy around decision-making on family issues. ... Recent examples of this phenomenon include: recognition of enforceable pre-nuptial agreements; replacement of statutory child maintenance; strong regulatory encouragement of family mediation; and rejection of calls for family law regulation of cohabitant separation (Barlow 2015, p. 223).

Some family lawyers endorse this shift; Ruth Deech, for instance, urges that

What is needed is an end to discretion and the recognition of autonomy in contracts with the aim of reducing costs and promoting negotiation in a better spirit (Deech 2009, p. 1145).

But the majority fear that an assumption of individual autonomy and 'choice' will have the effect of perpetuating male dominance in a society where women commonly have less bargaining power and fewer choices than their male partners. Feminists may indeed suspect that one reason it has been taken up with such enthusiasm is precisely because it restores the patriarchal status quo.

If this trend continues, *family law will lose much of its potential for protecting women*, and education becomes even more crucial. The public need to be empowered to make informed decisions about property at the point when it matters



– that is, on the acquisition of property rather than on sale. This education needs to come from accurate sources, which makes it even more important that family lawyers are clear about the law, so that those who learn from their work do not get it wrong, as they so often do. And it needs to be presented in a way that is neither normative nor scaremongering and does not require reading through pages of legal detail (cf Advicenow 2016). That is why conveyancing advice is so crucial: it forces couples to make choices together, instead of waiting for the right moment that might never come.

*Rejection of a family law-style protective regime for cohabitants.* Although no one would argue with the proposition that women in general continue to suffer financial disadvantage in society, which makes equal contributions to property difficult for many, the assumption of joint ownership of the family home goes a long way towards redressing the balance. There are, moreover, plenty of women with equal or greater means than their male partners, as case law like *Stack v. Dowden* [2007] shows. The problem with protective regimes of the sort proposed for cohabitants is that they tend to discourage further efforts within society towards gender inequality or by individual women to achieve financial independence. For this reason I think it would be retrograde to impose on cohabitants the kind of legislative regime that exists in other jurisdictions or was proposed by the Law Commission in 2007.

First, such a regime would perpetuate the notion that women need and want protection, not just from the law, but from the men out of whose assets their financial compensation must come. It would reinforce an already existing impression that women are foolish, too trusting, blinded by love, an impression strengthened by the traditional omission of agency from the person protection is required *from*: that is, the man. It would not challenge the idea that women should be mainly responsible for domestic work and childcare, but rather would encourage it since, if they suffer disadvantage for making this ‘choice’, they will be compensated under the protective regime. The assumption that women will take this role would in turn perpetuate the privatisation of care, saving the state money and deflecting attention from measures that could really help women such as affordable childcare and family-friendly work policies, not to speak of genuinely equal pay. It would finally maintain the existing power structure in which men are dominant because they are richer.

Finally, as Anne Bottomley put it, ‘reform which extends crucial aspects of our marriage law will lessen our choices about how we organise our domestic lives’ (Bottomley 2006, p. 207). Conservative forces in society do not actually want women to be independent; they want to see them tied to men as breadwinners and providers, holding the family together; for women to be demonstrably able to cope on their own would render marriage, and men, superfluous. In the family-law vision of society I have described, marriage risks becoming the status from which our rights are derived, like coverture in the past, suggesting that women (it is always the vulnerable woman we have in mind when speaking of marriage’s protection) should receive their protection in law from the fact of having husbands or male partners – a position against which feminists have been fighting for 200 years.

## 8. Conclusion

Property law may be an imperfect tool with which to regulate family relationships, but so too is family law. The problem is not the law but the fact that family relationships are still so often unequal. These inequalities are still often gendered and structural rather than the result of poor choices. But the other side of the coin is that the certainty of property law can protect genuinely autonomous individuals while the uncertainty and discretionary nature of family law can take away that autonomy. People with property are generally going to be better off than those without it, and people who go into whatever arrangement they choose open-eyed

and with equal bargaining power should be better off than those who trust in the law's protection. For this reason, it seems to me that the goals we should be aiming for are autonomy, empowerment, and properly informed choice – not protection.

I do not think it is accidental that the call for marriage-like protection for cohabitants has come at the precise point when the tried and trusted property law rules that had always worked for men started to work in women's favour, as in *Stack v. Dowden* [2007] and *Jones v. Kernott* [2011]. Whenever there is a perception that *men* are now losing out, as the fathers' rights movement demonstrates, there are calls for change back to the status quo. So a new set of imperatives arises: How do we look after men? How do we keep women dependent? We do it by encouraging marriage, which offers 'protection' on the breakdown of a relationship, or (if this fails) we bring in a similar regime for cohabitants so that they, too, may choose to occupy the preferred roles. There are other side-benefits. How do we create more work for lawyers? – by introducing a new legal action. Civil partnerships were a huge boost; now we have prenuptial and cohabitation agreements and same-sex marriage, so why not a divorce-like scheme for unmarried couples? How do we make the study of land law and equity easier for students? – by leaving out implied co-ownership ...

Of course these were not the motives of the family lawyers who took up this cause. *But they could well be the effect.* I think that their arguments, and the vague and inaccurate way in which the relevant law is conveyed and taken up by non-legal users of this research, have altered the discourse around marriage and cohabitation in ways that diminish the autonomy of cohabitants and play into the hands of pro-marriage conservatives, giving them ammunition to persuade women back into domestic roles and return financial control in relationships to men.

In a recent article criticising the divorce courts' return to a formal equality approach, Anne Barlow exposes the contradiction between advocating that family-law protection should be extended to cohabitants and the recognition that family law no longer protects wives the way it should:

[A] substantive equality analysis ... must not only be retained in the divorce context in private family law, but also expanded to apply on cohabitation breakdown where there is economic relationship-generated disadvantage (Barlow 2015, p. 235).

But if family law is in fact moving closer to property law in its conception of the parties' rights and responsibilities, is there any point in continuing to call for its protection?

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