

# *The limits of marriage protection in property allocation when a relationship ends*

Article

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# THE LIMITS OF MARRIAGE PROTECTION IN PROPERTY ALLOCATION WHEN A RELATIONSHIP ENDS

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## ABSTRACT

This article takes issue with two assumptions commonly present in recent English family law scholarship: 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.

## KEYWORDS

Marriage, property, cohabitation, family law, property law

This article is driven by my reaction to two assumptions so commonly present in recent English family law scholarship as to seem axiomatic. First, that the property law principles that presently apply to cohabitants' property arrangements are too complex and confusing, not to say inadequate, and second, that cohabitants should be protected by a family law-style statutory regime such as that proposed by the Law Commission in 2007.<sup>1</sup> This article attempts a response, indeed a refutation of these assumptions, which

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<sup>1</sup> Law Commission, *Cohabitation: the financial consequences of relationship breakdown*. Law Com. No. 307 (HMSO 2007)

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,<sup>2</sup> 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. There were several drivers for this new approach, not least the introduction of similar protective regimes in other jurisdictions (eg British Columbia's Family Law Act 2011), 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.<sup>3</sup> Follow-up research revealed that many people thought marriage made little difference in terms of rights.<sup>4</sup>

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).<sup>5</sup>

The article focuses on the misleading presentation, in much 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 points out that the effect of the 'marriage is good, cohabitation problematic' mantra is not only to cause misunderstanding of the legal position by non-specialists but also to perpetrate a notion of marriage as the *normal* and sensible way to live and cohabitation as an *abnormal* and irrational choice because it is deficient in rights.

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<sup>2</sup> In 1979 the General Household Survey first included a question about cohabitation: see BJ Elliott, 'Demographic trends in domestic life, 1945-87', in D Clark (ed) *Marriage, domestic life and social change* (Routledge, 1991) at p 89. Commentaries followed: see eg A Bottomley, K Gieve, G Moon, G and A Weir, *The cohabitation handbook* (Pluto, 1981); J Eekelaar and SN Katz, *Marriage and cohabitation in contemporary societies* (Butterworths, 1981).

<sup>3</sup> A Barlow, S Duncan, G James and A Park, 'Just a piece of paper? Marriage and cohabitation in Britain', in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds), *British Social Attitudes: The 18<sup>th</sup> Report – Public policy, social ties* (Sage, 2001).

<sup>4</sup> Eg A Barlow, S Duncan, G James and A Park, *Cohabitation, marriage and the law* (Hart, 2005).

<sup>5</sup> Ibid at p 2.

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 of the rights of cohabitants and spouses in England and Wales is that non-specialists, under the influence of other national contexts (as represented, for example, in the media), are likely to make even more errors about the position here.

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.<sup>6</sup>

## BACKGROUND AND CONTEXT

In England and Wales 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.<sup>7</sup> By 2014, the Office for National Statistics reported that more than one-third of the adult population had never been married, a higher proportion than ever before in recorded history.<sup>8</sup> Many factors have contributed to the

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<sup>6</sup> I would particularly like to thank Anne Barlow, Gillian Douglas, Emma Hitchings and the two anonymous reviewers for their helpful and extensive comments.

<sup>7</sup> Office for National Statistics (ONS), ‘Number of marriages, marriage rates and periods of occurrence’ (2011) xls (244.7 kB)  
<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/datasets/numberofmarriagesmarriageratesandperiodofoccurrence>, accessed 4 October 2016.

<sup>8</sup> ONS, Population estimates by marital status and living arrangements: England and Wales, 2002 to 2014 (2014)

decline of marriage – I have examined this in another article<sup>9</sup> – but it is usually ascribed to the replacement of marriage by increasing numbers of cohabiting relationships. 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).<sup>10</sup> 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’.<sup>11</sup>

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.<sup>12</sup> 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* since 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.<sup>13</sup> 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,

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<http://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/populationestimatesbymaritalstatusandlivingarrangements/2015-07-08>, accessed 4 October 2016.

<sup>9</sup> R Auchmuty, ‘Law and the power of feminism: How marriage lost its power to oppress women’ (2012) 20 *Feminist Legal Studies* 71.

<sup>10</sup> Office for National Statistics, ‘Short Report: Cohabitation in the UK 2012’, p 1, [http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/dcp171776\\_284888.pdf](http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/dcp171776_284888.pdf), accessed 9 March 16.

<sup>11</sup> A Barlow and G James, ‘Regulating marriage and cohabitation in 21<sup>st</sup> century Britain’ (2004) 67 *MLR* 143.

<sup>12</sup> Eg E Brake, *Minimizing marriage: Marriage, morality, and the law* (Oxford University Press, 2012); S Peterson and L McLean, *Legally married: Love and law in the UK and the US* (Edinburgh University Press, 2013); M Baker and V Elizabeth, *Marriage in an age of cohabitation: How and when people tie the knot in the twenty-first century* (Oxford University Press, 2014).

<sup>13</sup> R Auchmuty, ‘Out of the shadows: Feminist silence and liberal law’ in C Stychin and V Munro (eds) *Sexuality and the Law: Feminist engagements* (Routledge, 2007), at p 91.

as it turned out.<sup>14</sup> 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<sup>15</sup> whose work, with the exception of some proposals that England should follow other Commonwealth jurisdictions in adopting a legislative regime for ‘de facto’ couples,<sup>16</sup> 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.<sup>17</sup>

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,<sup>18</sup> 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

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<sup>14</sup> R Auchmuty, ‘The experience of civil partnership dissolution: Not “just like divorce”’ (2016) 38 *Journal of Social Welfare and Family Law* 152, at pp 168-70.

<sup>15</sup> A Bottomley, ‘Production of a text: *Hammond v Mitchell*’ (1994) 2 *Feminist Legal Studies* 84; R Auchmuty, ‘The Fiction of Equity’ in S Scott-Hunt and H Lim (eds) *Feminist Perspectives on Equity and Trusts* (Cavendish, 2001) at p 1.

<sup>16</sup> S Wong, ‘Property Rights for home-sharers: Equity versus a legislative framework’ in S Scott-Hunt and H Lim (eds) *Feminist Perspectives on Equity and Trusts* (Cavendish, 2001) at p 133.

<sup>17</sup> S Gardner, ‘Problems in family property’ (2013) 72 *Cambridge Law Journal* 301.

<sup>18</sup> A Barlow, C Burgoyne, E Clery and J Smithson, ‘Cohabitation and the law: myths, money and the media’ in A Park, J Curtice, K Thompson, M Phillips and E Clery (eds) *British Social Attitudes – the 24<sup>th</sup> Report* (2007) at p 29.

but still inferior to married couples, or as unrelated individuals to be nothing other than a **legislative or judicial lottery** (my emphasis).<sup>19</sup>

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.<sup>20</sup> Several potential remedies were identified. While never actually advocating that cohabitants should just get married (and without, I am sure, intending this), many of the ensuing publications were normative in tone, asking (for instance) 'why people in Britain are increasingly cohabiting outside marriage, despite all the legal disadvantages to doing so?'<sup>21</sup> and setting out the dangers of cohabiting and the 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,<sup>22</sup> produced a more focused report in 2007 dealing specifically with *Cohabitation: The Financial Consequences of Relationship Breakdown*.<sup>23</sup> 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 couples, 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,<sup>24</sup> including one from Lady Hale in *Gow v Grant*,<sup>25</sup> 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

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<sup>19</sup> A Barlow and G James, 'Regulating marriage and cohabitation in 21<sup>st</sup> century Britain' (2004) 67 MLR 143 at p 156.

<sup>20</sup> A Barlow, S Duncan, G James and A Park, *Cohabitation, marriage and the law* (Hart, 2005) at p 97.

<sup>21</sup> *Ibid* at p 47.

<sup>22</sup> Law Commission, *Sharing Homes: A discussion paper*, Law Com. No. 278 (HMSO, 2002).

<sup>23</sup> Law Commission, *Cohabitation: the financial consequences of relationship breakdown*. Law Com. No. 307 (HMSO 2007).

<sup>24</sup> Eg J Miles, 'Cohabitation: Lessons for the South from North of the Border?' (2012) 71 CLJ 492.

<sup>25</sup> [2012] UKSC 29.



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’.<sup>26</sup>

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 ‘atrocious tales’; and, third, emphasizing the beneficial practical effects of agreements.<sup>27</sup>

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 ‘Atrocious 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 conclusion and proposals.

## EXAGGERATING THE DEFICIENCIES OF PROPERTY LAW

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, many of which are only relevant for a small minority of people, like the spousal exemption from inheritance tax.<sup>28</sup> Though it might be true to say that, in many of these situations, a married person would fare better than a cohabitant, most of these ‘rights’ would be of little relevance to a particular individual, while the really big differences, as we shall see, do not *automatically* favour the married. In fact, in contrast to the US, where preferential measures for the married have

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<sup>26</sup> S Womack, ‘Cohabiting couples told to be aware of pitfalls’ (2004) *Telegraph* 15 July 2004 <http://www.freerepublic.com/focus/f-news/1171695/posts>, accessed 10 March 2016.

<sup>27</sup> H Reece, ‘Leaping Without Looking’ in R Leckey (ed) *After Legal Equality: Family, Sex, Kinship* (Routledge, 2015) at p 115.

<sup>28</sup> Eg A Barlow, S Duncan, G James and A Park, *Cohabitation, marriage and the law* (Hart, 2005) at p 7.

proliferated in the hope of incentivising cohabiting couples to marry,<sup>29</sup> the law's response in the UK has been (until very recently, at least) to do away with distinctions between married and unmarried people. "The "tenderness" shown by the law to married women is not based on the marriage ceremony but reflects the underlying risk of one cohabitee exploiting the involvement and trust of the other," observed Lord Browne-Wilkinson in *Barclays Bank plc v O'Brien and another*.<sup>30</sup> "Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this."<sup>31</sup>

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.<sup>32</sup> As Rebecca Probert points out in her study of the common-law marriage myth,<sup>33</sup> 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.

The biggest area of difference, and the one I want to focus on here, is what happens to the family home at the end of a relationship. 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 linked to higher income, access to health benefits and a desire to protect assets.<sup>34</sup> Perhaps because marriage offers fewer legal and financial advantages in the UK, the same link has not been documented here. The

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<sup>29</sup> L Cooke, 'For richer, not poorer; Marriage and the growing class divide', *USNews* 26 October 2015. <http://www.usnews.com/news/blogs/data-mine/2015/10/26/marriage-and-the-growing-class-divide>, accessed 22 April 2016.

<sup>30</sup> [1993] 4 All ER 417, at 431.

<sup>31</sup> *Ibid.*

<sup>32</sup> For details, see R Auchmuty, 'Law and the power of feminism: How marriage lost its power to oppress women' (2012) 20 *Feminist Legal Studies* 71.

<sup>33</sup> R Probert, 'The evolution of the common-law marriage myth' (2011) 41 *Family Law* 283.

<sup>34</sup> L Cooke, 'For richer, not poorer; Marriage and the growing class divide', *USNews* 26 October 2015. <http://www.usnews.com/news/blogs/data-mine/2015/10/26/marriage-and-the-growing-class-divide>, accessed 22 April 2016.

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,<sup>35</sup> it is clear that cohabitation can be found across the social spectrum, including the propertied classes.

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

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. 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, transferees have been required since 1998 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. A joint tenancy can be converted into a tenancy in common ('severance') under section 36 or informally as a consequence of certain actions identified in *Williams v Hensman*;<sup>36</sup> but, if that happens, then the share taken will be the proportion that would have been available on sale – that is, if there are two owners and one severs, each has half.

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 the declaration 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, this is not especially significant: in 99 cases out of 100, the legal owners will simply hold the property on trust for themselves. Legal

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<sup>35</sup> Office for National Statistics, *A Century of Home Ownership and Renting in England and Wales* (HMSO, 2013)

<http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/census/2011-census-analysis/a-century-of-home-ownership-and-renting-in-england-and-wales/short-story-on-housing.html>, accessed 21 April 2016.

<sup>36</sup> (1861) 1 John and H 546.

ownership is recorded on the documents of title but it is the beneficial ownership that determines shares. *Goodman v Gallant*<sup>37</sup> is authority for two propositions: one, that if the conveyance explicitly states that the owners are to hold the property as joint tenants in law and equity then this declaration is conclusive unless the joint tenancy is subsequently severed, and, two, that upon severance, shares will be divided equally among the co-owners. That the shares cannot be varied on sale will, of course, be problematic for claimants who believe (perhaps because they have contributed more, as Mrs Goodman did) that they deserve a greater proportion. Although there has been considerable litigation on this point, the lesson of *Goodman v Gallant* is that the declaration will be determinative, relegating the constructive trust to a marginal status as a remedy in disputes where either the beneficial shares have not been declared or where a person is claiming a share against a sole legal owner. Simon Gardner, however, contends that *Goodman v Gallant* is only authority for claims in existence at the time of the declaration (for instance, where one person contributed more to the purchase price); subsequent claims, for example on the basis of higher mortgage repayments after purchase, could in his view be invoked to displace the original declaration.<sup>38</sup> There is no case law to demonstrate this and, as Gardner himself concedes, the original declaration, if made by parties fully informed as to its meaning and consequences, could well be seen as the cohabitants' equivalent of a pre-nuptial agreement and thus intended to be binding.<sup>39</sup>

The commonest use of the constructive trust is in situations where the property is in the sole legal ownership of one cohabitant and the other claims a share of the beneficial ownership. Sole ownership of the family home was once the norm; up to the 1980s homes were normally conveyed into the husband's name alone. This was because 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 name was not on the conveyance and who wanted to claim a share on separation would have had to resort to implied trusts. The criteria for obtaining this equitable remedy, developed in case law over the past 70 years, are now fairly settled, and its use has declined since couples living in sole-owned homes are the exception rather than the rule.

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<sup>37</sup> [1986] Fam 106.

<sup>38</sup> S Gardner, 'Understanding *Goodman v Gallant*' (2015) 5 Conv 199.

<sup>39</sup> Ibid p 208.

Jointly-occupied homes are no longer routinely conveyed into the man's name. Not only are lenders unable to discriminate against women but, since the landmark case of *Williams & Glyn's Bank v Boland*,<sup>40</sup> 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.<sup>41</sup> This means that the problem of the sole legal owner has all but disappeared. Philipp Lersch and Sergi 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 usually the result of a conscious decision by someone who had children by a former partner and who wished to preserve inheritance rights for them.<sup>42</sup>

It remains true that a person who moves in with a partner who already owns his or her own home could end up having to claim a share under an implied trust if the relationship ends. These days, however, re-mortgaging or moving to a new property – common events in long-term relationships – will trigger conveyance into joint names,<sup>43</sup> thus, again, reducing the incidence of sole ownership.

### **Co-ownership as often represented in 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 many 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

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<sup>40</sup> [1981] AC 487.

<sup>41</sup> S Cretney, *Family Law in the Twentieth Century: A history* (Oxford University Press, 2003) at p 140.

<sup>42</sup> P Lersch and S Vidal, 'My House or our Home? Entry into sole ownership in British couples' (Universitat Pompeu Fabra Demography Society Working Paper No 2015 – 57) at p 13.

<sup>43</sup> That this has long been normal practice among cohabitants was demonstrated by J Burgoyne, 'Does the ring make any difference? Couples and the private face of a public relationship' in D Clark ed. *Marriage, Domestic Life and Social Change: writings for Jacqueline Burgoyne* (Routledge, 1984) at p 251

resources, present and future. ... Cohabitants, by contrast, are **left with whatever the law of property and trust entitles them to** ... (my emphasis).<sup>44</sup>

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 be sure.

Does this give a different impression? Yet this is just as true as the Miles and Probert 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, Duncan, James and Park, perhaps the most influential work in this field. Instead of explaining co-ownership in terms of section 36 of the Law of Property

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<sup>44</sup> J Miles and R Probert (eds) *Sharing Lives, Dividing Assets: an inter-disciplinary study* (Hart, 2009) at p 5.

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'.<sup>45</sup> 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 normally give rise to joint ownership of the beneficial ownership. 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',<sup>46</sup> the implication being that she may come away with *nothing*. In fact, most cohabitants of jointly-owned homes take one-half without having to prove anything, while the case law is replete with examples of non-owner cohabitants who succeeded in winning a share under a constructive trust, such as *Grant v Edwards*,<sup>47</sup> 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 article of 2007:

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).<sup>48</sup>

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.<sup>49</sup>

True enough if you are not a co-owner, but you probably are! – and co-owners, like spouses, have automatic rights of occupation.

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, the *formal* joint ownership

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<sup>45</sup> A Barlow, S Duncan, G James and A Park, *Cohabitation, marriage and the law* (Hart, 2005) at p 9.

<sup>46</sup> *Ibid* at p 10.

<sup>47</sup> [1986] 2 All ER 426.

<sup>48</sup> A Barlow, C Burgoyne, E Clery and J Smithson, 'Cohabitation and the law: myths, money and the media' in A Park, J Curtice, K Thompson, M Phillips and E Clery (eds) *British Social Attitudes – the 24<sup>th</sup> Report*, (2007) at p 40.

<sup>49</sup> A Barlow and G James, 'Regulating marriage and cohabitation in 21<sup>st</sup> century Britain' (2004) 67 MLR 147.

rules of section 36 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 Gillian Douglas, Julia Pearce and Hilary Woodward<sup>50</sup> 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*.<sup>51</sup> 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.

## 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.

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<sup>50</sup> G Douglas, J Pearce and H Woodward, ‘Cohabitation and conveyancing practice: Problems and solutions’ (2008) 72 *Conveyancer* 365; G Douglas, J Pearce and H Woodward, ‘Money, property, cohabitation and separation’ in J Miles and R Probert (eds) *Sharing Lives, Dividing Assets: an interdisciplinary study* (Hart, 2009) at p 139.

<sup>51</sup> [2007] 2 AC 432.



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* and *Jones v Kernott*<sup>52</sup> were not declared (in both cases the property in question was bought before the requirement was introduced), and because Douglas and her colleagues 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. 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 property law, which works perfectly well for those who do observe the rules and are happy with the shares declared on purchase.

It follows that what these family lawyers see as the essential property law rules is quite different from what property lawyers see. 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), not in the constructive trust emphasised by these family lawyers.

It is true that I have not set out the constructive trust rules. This is not just because they are both numerically and conceptually the exception, not the norm: co-owned property was *intended* by the Law of Property Act 1925 to be held in joint names, with declared beneficial ownership; and it *is* now generally held in joint names.<sup>53</sup> But the other reason for not focusing on them is that the constructive trust is a *remedy*, 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, and many cases intentionally so, if the TR1 form were always filled out upon purchase we would hardly ever see a constructive case.

I am aware, as family lawyers are, that many individuals are not equally empowered within the relationship to make free rational choices. Rather than call for judicial protection, however, I view the ordinary property law rules and procedures as

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<sup>52</sup> [2011] UKSC 53.

<sup>53</sup> The problem was that the patriarchal framers of the LRA 1925 never dreamt that wives would ever be co-owners, let alone cohabitants.

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. And let's not dismiss its past helpfulness: in spite of a chequered history, the constructive trust has enabled many claimants, mostly women, to acquire an interest in the family home through informal means. Today, as Gardner observes, 'The trust rules display a commitment to taking material communality, where it exists, seriously: that is, to following the parties' own choice to pooling their resources, rather than keeping separate accounts'.<sup>54</sup> *Exactly like family law.*

### ATROCITY TALES

In its efforts to persuade unmarried couples to draw up cohabitation agreements, the Advicenow site<sup>55</sup> 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*,<sup>56</sup> 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*, for example, Barlow et al illustrate their account of co-ownership law by reference to 'the classic case of *Burns v Burns*'.<sup>57</sup> So does the Law Commission Report on *Cohabitation*, using the very same words.<sup>58</sup> In an article of 2012, Jo Miles was still referring to 'the totemic Mrs Burns'.<sup>59</sup> Yet the facts of this case took place four decades ago and, as Anne Bottomley pointed out ten years ago, neither the law as

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<sup>54</sup> S Gardner, 'Problems in family property' (2013) 72 CLJ 301 at p 311.

<sup>55</sup> Advicenow, How to make a Living Together Agreement (2016) <http://www.advicenow.org.uk/guides/how-make-living-together-agreement>, accessed 10 March 2016.

<sup>56</sup> [1984] Ch 317.

<sup>57</sup> A Barlow, S Duncan, G James and A Park, *Cohabitation, marriage and the law* (Hart, 2005) at p 9.

<sup>58</sup> Law Commission, *Cohabitation: the financial consequences of relationship breakdown*. Law Com. No. 307 (HMSO 2007) p 21 footnote 27.

<sup>59</sup> J Miles, 'Cohabitation: Lessons for the South from North of the Border?' (2012) 71 CLJ 492.

applied to Mrs Burns nor the woman herself represents the norm today.<sup>60</sup> Even if some Mrs Burnses remain, this is hardly sufficient rationale for such a wholesale revision of the law, especially as the problem is so 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 claims.<sup>61</sup> The law has moved on, as Lord Walker remarked in *Stack v Dowden*.<sup>62</sup> Intention to co-own, he explained, is now established by taking 'account of all significant contributions, direct or indirect, in cash or in kind'.<sup>63</sup> And in quantifying the shares, attention will be given to 'the whole course of dealings between the parties in relation to the property'.<sup>64</sup> Using the modern tests, Mrs Burns would almost certainly get *something*; indeed, Gardner thinks she might be entitled to as much as 50 per cent in a court today.<sup>65</sup> 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 pointed out, misrepresent the actual *sociological* situation by focusing on a stereotype (of which Mrs Burns is the exemplar) who even ten years ago 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 Ruth 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.<sup>66</sup> Bottomley instances Mrs Oxley of *Oxley v Hiscock* as a more modern female cohabitant; I would point to Ms Dowden of *Stack v Dowden*.<sup>67</sup> 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 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*.<sup>68</sup> And let's not forget: both Ms Dowden and

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<sup>60</sup> A Bottomley, 'From Mrs. Burns to Mrs. Oxley: Do co-habiting women (still) need marriage law?' (2006) 14 *Feminist Legal Studies* 181 at p 194.

<sup>61</sup> J Miles, 'Cohabitation: Lessons for the South from North of the Border?' (2012) 71 CLJ 492.

<sup>62</sup> [2007] 2 AC 432 at para 26.

<sup>63</sup> *Ibid*, para 31.

<sup>64</sup> *Oxley v Hiscock* [2005] Fam 211, at p 246.

<sup>65</sup> S Gardner, 'Problems in family property' (2013) 72 CLJ 301 at p 305.

<sup>66</sup> R Deech, 'What's a woman worth?' (2009) 39 *Family Law* 1140 at p 1141.

<sup>67</sup> [2007] AC 432.

<sup>68</sup> [2011] UKSC 53.

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. Where Mr Stack, at least, could have presented himself as having fewer resources.

Atrocity tales, although by their nature exceptional, tend to be generalised across every cohabiting situation and thus strike fear into the hearts of all cohabitants who read about them (and who remember them even when the actual details of law have been forgotten). This is, of course, the purpose for which they are used. As Bottomley observed, the image of Mrs Burns 'stands as a strong warning to women of the dangers of cohabitation'.<sup>69</sup> 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.

### 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).<sup>70</sup> This section deals with the law's provisions for property allocation on divorce, which are only available to spouses and civil partners: it is not a critique of marriage *per se*. 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

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<sup>69</sup> A Bottomley, 'From Mrs. Burns to Mrs. Oxley: Do co-habiting women (still) need marriage law?' (2006) 14 *Feminist Legal Studies* 181 at p 187.

<sup>70</sup> *Ibid* at p 207.

men for the first time to divorce their blameless wives against their will.<sup>71</sup> 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 main breadwinner in families and wives and mothers had broken and lower-paid (or no) experience of paid employment, 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.

**(a) 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. Moreover, given that the resulting trust (which only looks at contributions at the point of purchase) has been abandoned in family home disputes in favour of the constructive trust (which can take account of subsequent contributions and detriment suffered), property court judges, just like family law judges, have some possibility of surveying the whole course of dealings between the couple in relation to the property.<sup>72</sup>

**(b) The interpretive principles are confused and unpredictable.**

A common criticism of the financial relief provisions is the lack of clear principle emerging from recent case law as to how section 25 should be applied. *Needs* are dealt

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<sup>71</sup> DM Stetson, *A Woman's Issue: The politics of family law reform in England* (Greenwood Press, 1982) ch 5.

<sup>72</sup> *Oxley v Hiscock* [2004] EWCA Civ 546.

with first, and these often exhaust the assets. From *White v White*<sup>73</sup> came the *equal sharing* principle which was to come into play if and when needs have been met. *Miller; McFarlane*<sup>74</sup> saw the introduction of the idea of *compensation* for disadvantage and opportunities lost because of the marriage. These principles are often in conflict; as 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.<sup>75</sup>

John Eekelaar described the judgment in *Miller* as a ‘descent into chaos’<sup>76</sup> 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.<sup>77</sup>

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’. None of these, she suggested, 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.<sup>78</sup> The effect of this chopping and changing is to ensure that, whatever the principle adopted, men still do better on divorce and women’s disadvantage persists for years.<sup>79</sup>

### **(c) 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

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<sup>73</sup> [2001] 1 AC 596.

<sup>74</sup> [2008] UKHL 24.

<sup>75</sup> R Deech, ‘What’s a woman worth?’ (2009) 39 *Family Law* 1140 at p 1141.

<sup>76</sup> J Eekelaar, ‘*Miller v Miller*: The descent into chaos’ (2005) 35 *Family Law* 870.

<sup>77</sup> R Bailey-Harris, ‘The paradoxes of principle and pragmatism: Ancillary relief in England and Wales’ (2005) 19 *International Journal of Law, Policy and the Family* 229 at p 240.

<sup>78</sup> A Diduck, ‘What is family law for?’ (2011) 64 *Current Legal Problems* 287 at pp 293-4.

<sup>79</sup> S Jarvis and SP Jenkins ‘Marital splits and income changes: Evidence from the British Household Panel Survey’ (1999) 53 *Population Studies* 237; Glosswitch, ‘Why do we still believe that divorce leaves men worse off than women?’ (2014) *New Statesman* 30 September 2014.

other was ‘absolutely mad. So it’s a complete lottery’. Another told her that some judges are ‘pro-wife’ and some ‘pro-husband’.<sup>80</sup> 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’.<sup>81</sup> 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.<sup>82</sup>

**(d) There is rarely enough money to go round, let alone for a remedy.**

The big-money cases that get all the media attention 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.<sup>83</sup> The consequence is that the protective capabilities of family law are more limited than some family law accounts suggest, and may be no better than those of property law where the home is jointly owned.

**(e) 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’.<sup>84</sup> Solicitor negotiation and informal discussion are the two most commonly reported methods of achieving settlement<sup>85</sup> 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. 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-

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<sup>80</sup> E Hitchings, ‘Chaos or consistency? Ancillary relief in the ‘everyday’ case’ in J Miles and R Probert (eds) *Sharing Lives, Dividing Assets: an inter-disciplinary study* (Hart Publishing, 2009) at pp 200-201.

<sup>81</sup> A Greensmith, ‘Let’s Play Ancillary Relief’ (2007) 37 *Family Law* 203.

<sup>82</sup> Law Commission, *Matrimonial Property, Needs and Agreements*. Law Com. 343 (HMSO 2014) para 1.16.

<sup>83</sup> *Ibid* para 1.16.

<sup>84</sup> *Ibid* para 1.14.

<sup>85</sup> E Hitchings, J Miles and H Woodward, *Assembling the jigsaw puzzle: understanding financial settlement on divorce* (University of Bristol/Nuffield Foundation, 2013) at p 36.

ownership has ended], whereas in ancillary relief you've got to decide which shade of grey you're on'.<sup>86</sup>

**(f) 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, or simply desperate to end the relationship, to give in or give up.

**(g) 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 also 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.<sup>87</sup> Contested divorce cases often eat up all the assets, with a recent article stating that costs have 'spun out of control'.<sup>88</sup>

**(h) 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 ....<sup>89</sup>

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<sup>86</sup> Ibid at p 84.

<sup>87</sup> R Auchmuty, 'The experience of civil partnership dissolution: Not "just like divorce"' (2016) 38 *Journal of Social Welfare and Family Law* 152 at p 164.

<sup>88</sup> D Boffey, 'The Ex-factor' *Observer Magazine* 6 December 2015 at p 30.

<sup>89</sup> R Deech, 'What's a woman worth?' (2009) 39 *Family Law* 1140 at p 1142.



The absence of a legal process for ending a cohabiting relationship means that couples need not endure this additional aggravation.

**(i) It is wrong to say that marriage protects couples. What it protects is protects 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?’<sup>90</sup> 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.

**(j) 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*.<sup>91</sup> 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.

While there is some truth in the claim that gendered dependency is a function of intimate relationships generally, not just of marriage, particularly where there are children, the dependency that I am referring to is something different: it is the assumption that, because this form of relationship was once universal in marriage,

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<sup>90</sup> A Barlow, S Duncan, G James and A Park, *Cohabitation, marriage and the law* (Hart, 2005) at p 47.

<sup>91</sup> A Diduck, ‘What is family law for?’ (2011) 64 *Current Legal Problems* 287 at p 293.

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.

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 Bottomley expressed disquiet at the prospect of a statutory regime for cohabitants precisely for this reason: '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'.<sup>92</sup>

**(k) 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 BSA 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 married and unmarried people will indeed be treated the same and all the evidence shows that the last thing couples want to think about is breaking up.<sup>93</sup> What the surveys did reveal was that, when presented with imaginary scenarios, what interviewees thought the law should be was often quite different from what it actually is. But the research methodology did not reveal whether these people in fact *knew* what the law was; they were simply asked for what they thought was 'the best way' to deal with a situation.<sup>94</sup>

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. Pascoe Pleasence and Nigel Balmer set out to discover just what the public did understand, and found that large proportions of respondents held misconceptions about

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<sup>92</sup> A Bottomley, 'From Mrs. Burns to Mrs. Oxley: Do co-habiting women (still) need marriage law?' (2006) 14 *Feminist Legal Studies* 181 at p 199.

<sup>93</sup> M Hibbs, C Barton and J Beswick, 'Why marry? Perceptions of the affianced' (2001) 31 *Family Law* 197.

<sup>94</sup> A Barlow, C Burgoyne, E Clery and J Smithson, 'Cohabitation and the law: myths, money and the media' in A Park, J Curtice, K Thompson, M Phillips and E Clery (eds) *British Social Attitudes - the 24<sup>th</sup> Report*, (2007) pp 29, 37.

both cohabitation *and* marriage. 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.<sup>95</sup>

The Law Commission report on Matrimonial Property noted a number of myths of marriage,<sup>96</sup> of which the most common is the idea that *in marriage the spouses share property 50:50*. 'In my experience,' wrote Bottomley, 'many married women think that the *fact* of marriage gives them equal rights to property'.<sup>97</sup> 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 on divorce, however, the court is able to grant such rights. Douglas, Pearce and Woodward commented on the mistaken belief of cohabiting couples that they acquired rights of some sort to their partner's property<sup>98</sup> 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*<sup>99</sup> or perhaps confusion with the 'community of property' regimes that operate in most continental and some American jurisdictions, 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.

## Discussion

This article has argued that the problems associated with cohabitation have been exaggerated, as have the protections offered by marriage and family law generally.

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<sup>95</sup> P Pleasence and NJ Balmer, 'Ignorance in bliss: Modeling knowledge of rights in marriage and cohabitation' (2012) 46 *Law and Society Review* 297.

<sup>96</sup> Law Commission, *Matrimonial Property, Needs and Agreements*. Law Com. 343 (HMSO 2014).

<sup>97</sup> A Bottomley, 'From Mrs. Burns to Mrs. Oxley: Do co-habiting women (still) need marriage law?' (2006) 14 *Feminist Legal Studies* 181 at p 199.

<sup>98</sup> G Douglas, J Pearce and H Woodward, 'Money, property, cohabitation and separation' in J Miles and R Probert (eds) *Sharing Lives, Dividing Assets: an inter-disciplinary study* (Hart, 2009) at p 142.

<sup>99</sup> [2001] 1 AC 596.

Further, it contends that the lack of legal protection for cohabitants is not the real problem: 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, which is 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, many 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 now 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 paid employment made them less able to make financial contributions to the home. 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 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 – and the courts are, if not yet free of gender bias, much less dominated by patriarchal ideologies than they used to be.

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 often 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. 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 yesterday’s problem and, like community of property in the 1980s, post-*Boland*, the proposal for family law protection is yesterday’s reform.<sup>100</sup>

In seeming contradiction of this confident assertion stands the Scottish case heard in the Supreme Court, *Gow v Grant*.<sup>101</sup> This 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,<sup>102</sup> 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.

Family lawyers like Miles<sup>103</sup> and Lady Hale herself have taken the lesson from this story that, as long as there are men like him and women who like her, a protective regime is needed, and have called for its extension to England and Wales. But the drawback of such proposals is that, as long as the law offers protection, there is no incentive for women to change their behaviour, take charge of their lives, negotiate fair and equal relationships and stop looking to a man or, failing the man, the law, to look after them.

## 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. 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

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<sup>100</sup> S Cretney, *Family Law in the Twentieth Century: A history* (Oxford University Press, 2003) p 141.

<sup>101</sup> [2012] UKSC 29.

<sup>102</sup> *Ibid*, para 41.

<sup>103</sup> J Miles, ‘Cohabitation: Lessons for the South from North of the Border?’ (2012) 71 CLJ 492.

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'.<sup>104</sup> 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, especially 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).<sup>105</sup>

**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)*).<sup>106</sup> Lady Hale called for mandatory declaration in *Stack v Dowden*,<sup>107</sup> 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',<sup>108</sup> 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

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<sup>104</sup> A Barlow and J Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' (2010) 22 CFLQ 328 at pp 335-336.

<sup>105</sup> E Beaujouan and M Ni Bhrolchain, 'Cohabitation and marriage in Britain since the 1970s'. 145 *Population Trends* (Office for National Statistics, 2011) at p 1.

<sup>106</sup> [2001] UKHL 44.

<sup>107</sup> [2007] AC 432, at para 52.

<sup>108</sup> G Douglas, J Pearce and H Woodward, 'Cohabitation and conveyancing practice: Problems and solutions' (2008) 72 Conv 365 at p 375.

effectively giving your partner a half share, as Douglas et al note,<sup>109</sup> but this 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'.<sup>110</sup> This patronising attitude, once characteristic of doctors' interactions with patients but now abandoned in favour of encouraging us to take more control of our health, needs to go. Conveyancing law is, frankly, a great deal less difficult to understand than medicine and if we can master one, we can manage the other.

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.<sup>111</sup>

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.<sup>112</sup>

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 - I do - 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

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<sup>109</sup> Ibid.

<sup>110</sup> G Douglas, J Pearce and H Woodward, 'Money, property, cohabitation and separation' in J Miles and R Probert (eds) *Sharing Lives, Dividing Assets: an inter-disciplinary study* (Hart, 2009) at p 144.

<sup>111</sup> A Barlow, 'Solidarity, autonomy and equality: mixed messages for the family?' (2015) 27 CFLQ 223.

<sup>112</sup> R Deech, 'What's a woman worth?' (2009) 39 *Family Law* 1140 at p 1145.

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). 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 disagree 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* shows. The problem with protective regimes of the sort proposed for cohabitants is that they tend to discourage further efforts within society towards gender equality 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 entrenched cultural norm 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, or blinded by love, an impression strengthened by the traditional omission of any mention of 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. This would then sustain the existing power structure in which men are dominant because, not having to deflect from paid employment to do this work, they are usually richer.

Finally, as Bottomley put it, 'reform which extends crucial aspects of our marriage law will lessen our choices about how we organise our domestic lives'.<sup>113</sup> Conservative forces in society do not really want women to be independent; they want to see them

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<sup>113</sup> A Bottomley, 'From Mrs. Burns to Mrs. Oxley: Do co-habiting women (still) need marriage law?' (2006) 14 *Feminist Legal Studies* 181 at p 207.



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 even men (they fear), 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.