



A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown

Report of a Research Study funded by the ESRC

by

Gillian Douglas, Julia Pearce and Hilary Woodward

2007

This study was conducted jointly by Cardiff University and the University of Bristol



**A Failure of Trust:
Resolving Property Disputes on
Cohabitation Breakdown**

by

Gillian Douglas

Julia Pearce

Hilary Woodward

2007

First published in Great Britain in 2007 by:

School of Law
University of Bristol
Wills Memorial Building
Queens Road, Bristol BS8 1RJ

Cardiff Law School
Cardiff University
Museum Avenue
Cardiff CF10 3AX

ISBN 0-9516976-7-6

www.law.cf.ac/research/researchpapers/paper1.html

www.bris.ac.uk/law/research/centres-themes/cohabit/cohabit-rep.pdf

© Gillian Douglas, Julia Pearce and Hilary Woodward 2007

Gillian Douglas is Professor of Law at Cardiff University, **Julia Pearce** is a Research Fellow at the University of Bristol and **Hilary Woodward** is a Research Associate at Cardiff University.

All rights reserved: no part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior written permission of the authors.

Acknowledgements

We would like to express our thanks to the following, whose kind assistance enabled us to complete this study.

The research was funded by the ESRC and conducted during 2004 to 2007. Additional funding was provided by Cardiff University (Vice-Chancellor's Fund) and the University of Bristol (Law and Policy Research Unit) to facilitate completion and production of this report.

Access to court records was provided with the permission of the (then) Department for Constitutional Affairs and the Court Service. We would particularly like to thank Deirdre Back of the DCA Research Secretariat for her assistance in processing our application for access. We also wish to record our gratitude to the staff of the court where we conducted our file study for their help in enabling us to find and sort the records we needed.

We could not have undertaken the study without the co-operation and support of professional practitioners – the family solicitors, conveyancers and mediators in the four study areas. The practitioners who agreed to participate in the study gave generously of their time not only to share their insights and perspectives at interview, but were also immensely helpful and patient with us, particularly when we made repeated telephone calls to seek their advice or to follow up queries arising from interviews. We also wish to thank the district judges and barristers who participated in our focus groups to discuss our preliminary findings and who provided their own perspectives on how these cases are handled in the courts. We would like also to thank James Sandbach, in the Social Policy Department of Citizens Advice, for his informative co-operation at the preliminary stages of the study, and also to the managers of the CABx in two of the study areas who assisted by providing us with information about the types of case they handle, and in offering views on the law and its problems.

Most of all, we owe an enormous debt of gratitude to the 29 cohabitants who agreed to take part in the study. They were dealing with a very stressful situation, over what turned out to be, for many of them, an extended period of time, but they were unfailingly prepared to discuss very personal matters in frank detail. Their experiences, perceptions and views provided us with the greatest insights into the difficulties that arise when cohabitants separate and we hope that we have done justice to their accounts.

We would like to thank Professor Emeritus Gwynn Davis, of the University of Bristol, who advised on the original research proposal, and Professors Nigel Lowe, Richard Moorhead and Mervyn Murch CBE, of Cardiff Law School, who offered advice during the study, read drafts of our report and provided many helpful comments for its improvement. We would also like to express our thanks to Professor Stuart Bridge and Jo Miles of the Law Commission for the opportunity to pass on our findings and discuss their implications for the Law Commission's proposed reforms of the law. Finally our thanks go to Kay Bader for her feedback and invaluable help in the preparation of this report and to Carol Marks for her help with typing up the fieldnotes.

Contents

	Page
List of Tables	i
Table of Cases	ii
Chapter 1: Introduction	1
Research aims and questions	1
The specific population for study	2
Use of qualitative methods	3
Method	3
Report structure	5
Chapter 2: The demographic and social picture	7
Incidence of cohabitation	7
Duration and stability of cohabitation	8
Children of cohabiting couples	8
Pre-marital cohabitation	9
Cohabitation instead of marriage	10
Attitudes to cohabitation	10
Cohabitants' knowledge of their legal position	14
Cohabitants' property arrangements	15
Cohabitants' separation arrangements	16
Summary	18
Chapter 3: The legal landscape	19
Introduction	19
The protection of cohabitation as a human right	20
Ownership of the family home in England and Wales	21
Establishing an interest	24
Quantification of shares in the property	29
Occupation of the family home	31
Statutory protection and recognition of cohabitants' property interests	32
Powers where the cohabitants have a child – Schedule 1 to the Children Act 1989	34
Summary	36

Chapter 4: The cohabitants	37
Basic statistical data	37
General profile of the core sample	39
Attitudes to marriage	40
Financial arrangements during the relationship	43
Engagement with the law	48
Summary	53
Chapter 5: Property	54
Ownership	54
Agreements	55
Understanding of ownership at the time of purchase	56
Views of family solicitors	59
Conveyancing practice and procedures	60
Summary	67
Chapter 6: The issues	69
The cohabitants' perspective	69
The legal perspective	77
Seeking advice	81
Summary	88
Chapter 7: The practitioners	90
The family solicitors	90
The mediators	98
Involvement of barristers	102
Summary	103
Chapter 8: The process of resolving the issues	105
Cohabitants resolving issues with minimal professional help	105
Negotiations	107
The Land Registry	113
Issuing proceedings	115
The duration of cases	119
The cost of cases	119
Summary	121

Chapter 9: Outcomes	122
How the cohabitants resolved their primary issues	122
Cohabitants' satisfaction with the outcomes	124
The practitioner perspective	130
What if the cohabitants had been married?	133
Difficult cases	135
After the final order or agreement	136
Summary	137
Chapter 10: Conclusions and reform	138
The injustice created by the current law	138
Reform of the current law	139
The Law Commission's proposals in 2006	141
A critique of the proposed scheme	144
Suggested reforms to property and conveyancing law	146
In conclusion	147
Appendices	
Appendix 1: Method	149
Appendix 2: Pen pictures	163
Appendix 3: Interview schedules	182
Bibliography	193

List of Tables

	page
Table 1: Sample Profile	37
Table 2: Couples: Length of relationship/Financial contributions	43
Table 3: Couples: Property ownership / Banks accounts / Financial Management	45
Table 4: Home Ownership	55
Table 5: Means of resolution by issue for core sample participants	123

Table of Cases

A v A (A Minor: Financial Provision) [1994] 1 FLR 657
Re B (Child: Property) [1999] 2 FLR 418, CA
Balfour v Balfour [1919] 2 KB 571, CA
Barclays Bank plc v O'Brien [1994] 1 AC 180, HL
Re Basham [1987] 1 All ER 405
Bedson v Bedson [1965] 2 QB 666, CA
Bernard v Josephs [1982] Ch 391, CA
Burns v Burns [1984] Ch 317, CA
Chamberlain v Chamberlain [1974] 1 All ER 33, CA
Chan Pui Chun v Leung Kam Ho [2002] EWCA Civ 1075 [2003] 1 FLR 23
Chapman v United Kingdom (2001) 33 EHRR 399
Cowcher v Cowcher [1972] 1 All ER 943
Curley v Parkes [2004] EWCA Civ 1515
Drake v Whipp [1996] 1 FLR 826, CA
Draskovic v Draskovic (1980) 11 Fam Law 87.
Re Evers' Trust [1980] 3 All ER 399, CA
Eves v Eves [1975] 3 All ER 768, CA
Fender v St John Mildmay [1938] AC 1, HL
G v G (Periodical Payments: Jurisdiction) [1997] 1 FLR 368, CA
Gay v Sheeran [1999] 2 FLR 519, CA
Ghaidan v Godin-Mendoza [2004] UKHL 30 [2004] 2 AC 557
Gillett v Holt [2000] 2 FLR 266, CA
Gillow v United Kingdom (1986) 11 EHRR 335
Gissing v Gissing [1971] AC 886, HL
Goodman v Gallant [1986] Fam 106, CA
Grant v Edwards [1986] Ch 638, CA
Greasley v Cooke [1980] 3 All ER 710, CA.
H v P (Illegitimate Child: Capital Provision) [1993] Fam Law 515
Hammond v Mitchell [1992] 2 All ER 109
Harwood v Harwood [1991] 2 FLR 274
Harrow London Borough Council v Qazi [2003] UKHL 43 [2004] 1 AC 983
Horrocks v Forray [1976] 1 All ER 737, CA
Huntingford v Hobbs [1993] 1 FLR 736, CA
J v C (Child: Financial Provision) [1999] 1 FLR 152
Jones v Challenger [1961] 1 QB 176, CA

K v K (Minors: Property Transfer) [1992] 2 All ER 727, CA
Karner v Austria (2004) 38 EHRR 24
Keegan v Ireland (1994) 18 EHRR 342
Kroon v Netherlands (1995) 19 EHRR 263
Laird v Laird [1999] 1 FLR 791
Lebbink v Netherlands [2004] 2 FLR 463
Le Foe v Le Foe and Woolwich plc [2001] 2 FLR 970
Lloyds Bank plc v Rosset [1991] 1 AC 107, HL
Meshar v Meshar [1980] 1 All ER 126
Midland Bank plc v Cooke [1995] 4 All ER 562, CA
Midland Bank plc v Dobson [1986] 1 FLR 171, CA
Miller v Miller; McFarlane v McFarlane [2006] UKHL 24 [2006] 2 AC 618
Oxley v Hiscock [2004] EWCA Civ 546 [2004] 3 All ER 703
Re P (Child: Financial Provision) [2003] EWCA Civ 837 [2003] 2 FLR 865
Pascoe v Turner [1979] 2 All ER 945, CA
Paul v Constance [1977] 1 All ER 195, CA
Pettitt v Pettitt [1970] AC 777, HL
Rowe v Prance [1999] 2 FLR 787
Royal Bank of Scotland (No 2) v Etridge [2001] UKHL 44, [2002] 2 AC 773
Saucedo Gomez v Spain Application No. 37784/97, 19 January 1998
Re Lorraine Share [2002] 2 FLR 88
Springette v Defoe [1992] 2 FLR 388, CA
Stack v Dowden [2007] UKHL 17 [2007] 2 WLR 831
Sutton v Mishcon De Reya and Gawor and Co [2003] EWHC 3166 (Ch) [2004] 1 FLR 837
Sylvester v Austria (2003) 37 EHRR 17
T v S (Financial Provision for Children) [1994] 2 FLR 883
Tanner v Tanner [1975] 3 All ER 776, CA
Walker v Hall [1984] FLR 126, CA
W v W (Joinder of Trusts of Land and Children Act Applications) [2003] EWCA Civ 924, [2004] 2 FLR 321
Wayling v Jones [1995] 2 FLR 1029, CA
White v White [2001] 1 AC 596, HL
Williams and Glyn's Bank v Boland [1981] AC 487, HL
Yaxley v Gotts [2000] Ch 162, CA
Yousef v Netherlands (2003) 36 EHRR 20

Chapter One: Introduction

1.1 The objective of the research study discussed in this report was to examine the experience of separating opposite-sex cohabitants when there are money and/or property issues to resolve with a former partner. There is a widespread view amongst legal practitioners and academics that the present law fails to meet the needs of cohabitants and operates unfairly. Indeed, the Law Commission is currently engaged in a major project to consider how the law should be reformed, and is due to report in the summer of 2007 with final recommendations on this issue.¹ However, this weight of opinion has been unsupported by any study of the way these matters are handled in practice.

1.2 With funding from the ESRC,² we therefore set out to test such views of the adequacy of the law by an in-depth contemporaneous investigation of the experience of cohabitants separating from their partners who had property issues to resolve and who made use of professional services to assist them. We also explored the practice and views of their professional advisers, including family and property lawyers, mediators, and CAB advice workers, and examined court files relating to concluded disputes to determine how litigated cases were resolved after adjudication and to consider the kinds of outcomes that were produced. The results of our study are presented in this work, together with a consideration of the proposals which have been suggested for reform of this area of law, and discussion of how far the models of private ordering derived from the context of divorce are applicable to this more complex and uncertain field of legal practice.

Research aims and questions

1.3 The broad aim of our research was to inform the current debate by providing a detailed understanding of the practical issues, expectations and needs of those engaged in property disputes with former partners, and the nature of the help and advice which this population is currently given when it seeks professional assistance.

- 1.4 More specifically, we sought to answer the following questions -
- i) How do separating cohabitants characterise their problems relating to finances and property, and how far does this determine from whom they seek help?
 - ii) What entitlements do they think they have and how do they respond to legal advice which might disabuse them of their misconceptions?
 - iii) How do they evaluate the services they receive and how fair do they regard the eventual outcomes?
 - iv) How do the different professionals approach such clients' problems and to what extent does the lack of an 'ancillary relief' regime produce uncertainty and diversity in their approaches?

¹ See Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper* (Consultation Paper No 179, 2006). The Law Commission reviews the criticisms of the current law in Part 4.

² Award reference: RES-000-23-0714.

- v) How useful do they regard the existing remedies that might be used?

The specific population for the study

1.5 There is an extensive literature on the general profile of cohabitants in the United Kingdom which is discussed in detail in the next chapter. Cohabiting couples tend to be younger than married couples, their relationships are, on average, of shorter duration, they are less likely to have children and less likely to be owner-occupiers. They are also less likely to seek legal advice or assistance when their relationship breaks down. However, it seems probable that a significant proportion of couples separate after relatively short periods of cohabitation, perhaps when a 'trial marriage' has proved unsuccessful. In cases where the couples are young, childless and non property-owning, finances will have had little time to become enmeshed, and complex issues are less likely to have arisen by the time of separation. The lower level of resort to legal assistance may therefore not be so surprising. It should also be noted, in any event, that significant numbers of divorces do not involve financial or property disputes either, although spousal separation will usually trigger consultation with a lawyer to deal with the legal formalities of the divorce itself.³

1.6 Our study was focused specifically on those who regard their property and financial issues as sufficiently problematic to warrant seeking professional advice or assistance. This resulted in a sample - with characteristics probably more similar to the current profile of divorcing couples than to the overall average population of cohabiting couples - being typically in long-term relationships, many with children and all but one being owner-occupiers.

1.7 In fact, the increase in cohabitation, coupled with a decrease in the marriage rate,⁴ may well have the consequence that typical cohabiting relationships will increasingly resemble typical marriages. As Maclean and Eekelaar have pointed out:

*'Married and unmarried people who are living together share many values. Indeed, the similarities in the normative determinants of their behaviour may be greater than the dissimilarities.'*⁵

The sample that we collected of 'marriage-like' cohabitation is thus precisely the population which requires careful examination – a population which, though proportionately smaller now, looks set to increase, and one which experiences the most complex difficulties consequent on their unmarried status. If policy change is to be considered, it is crucial that the experiences of separating cohabiting couples of this type are properly understood.

³ See A Perry et al, *How parents cope financially on marriage breakdown* (2000, Joseph Rowntree Foundation)

⁴ Discussed below in Chapter Two.

⁵ M Maclean and J Eekelaar, 'Marriage and the Moral Bases of Personal Relationships' (2004) 31, 4, *Journal of Law and Society* 510-538

Use of qualitative methods

1.8 Our interest was in this area of law *as experienced* by the cohabitants themselves and also by their practitioners. It was not our purpose to quantify incidences of issues, processes or outcomes, or to provide statistical data from which generalisations might be made. For this reason, we adopted a mainly qualitative approach to the research, to explore the individuals' feelings and perceptions and their subjective experiences.

1.9 Our aim was to build up a multi-dimensional picture of the circumstances of members of the cohabiting population with property issues, seeking these particular forms of advice and assistance, and of how their cases were handled, in order to provide an in-depth study of an essentially exploratory character. We sought to capture as diverse a picture as possible of the circumstances of that population, although not necessarily a statistically representative sample, in terms of the prevalence of types of issues arising and of the ways in which people sought to resolve them. We identify key themes emerging from the data and describe the type of complex details and features of issues and circumstances which are not amenable to systematic recording or quantitative analysis.

1.10 In line with our aim of illuminating the circumstances and experiences of separating cohabitants, the report has been written in a style making extensive use of our case studies for illustrative purposes. Where verbatim quotations are given, these are attributed to our respondents in anonymised form. We have provided a brief synopsis of each of our cases in Appendix 2, so that quotations can be read in the context of that individual's particular circumstances. Where numbers are given, this is to indicate the range of cases we are discussing on any particular point. They do not have statistical relevance in terms of representing incidences to be found generally amongst this population.

Method⁶

1.11 The fieldwork was conducted between September 2004 and March 2006 in three cities in England and Wales and one London borough, selected because they largely reflect nationally average levels of cohabitation, home ownership and ethnicity as recorded in 2001 UK Census data, with a mix of socio-economic groups.

1.12 The main limb of the research was qualitative, being a set of case studies, commencing with in-depth interviews with cohabitants who had recently sought professional advice or assistance concerning separation from their partner. These cohabitants' cases were then tracked through to conclusion (including attendance at court hearings where relevant) with regular telephone or email updates. After the case had finished, cohabitants

⁶ We provide a full description and discussion of our method, together with the inherent difficulties of identifying 'hard to reach' subjects, in Appendix 1.

were re-interviewed in depth, and their practitioners were also interviewed for their perspective on the case and for their views on the legal process concerning cohabitants in general. All interviews were tape-recorded and then selectively transcribed to produce detailed field-notes.

1.13 As separating cohabitants do not need to engage in any legal proceedings to mark the ending of their relationship, they are difficult to identify. Since our focus was on the working of the law and legal process governing cohabitants with property in dispute, we decided to seek respondents who had reached the stage of obtaining professional advice. We therefore approached family, litigation and conveyancing solicitors, mediators and CAB managers in two of the cities. We asked them to pass on information about our study to new clients who fitted our eligibility criteria (heterosexual, separating cohabitants with property issues to resolve) with a letter for clients to send back to us if they were willing to participate in the study. In this way, clients' confidentiality was preserved. We obtained a sample of 29 cohabitants, 11 men and 18 women, including five couples. We refer to this group as the *core sample* or *core participants* throughout this report.

1.14 To augment our understanding of the role and experience of practitioners engaged in these kinds of cases, we invited those who had not produced clients for us to be interviewed both on a topic and case basis, the latter based on their last concluded case file, so that they could discuss their practice with reference to a specific case.⁷ This approach gave us data from a further 24 cases on the nature of issues, the solicitor's perspective and outcomes, though of course lacking the client perspective. By and large they reflected the cases in the core sample, but they did include some circumstances not represented in the core sample, thereby adding to the overall picture. We refer to this group of case descriptions in our report as the *secondary sample*.

1.15 Altogether, we conducted interviews with a total of 61 practitioners: 41 family or litigation solicitors, of whom 21 had a client participating in the research; 10 mediators, four with client participants in the study; and 10 conveyancers. We collected data on their experiences and views of 60 clients in total, including the 29 whom we interviewed personally.

1.16 The second limb of our study entailed a quantitative survey of court records, which was intended to provide a broader context against which to assess our interview sample. We conducted this exercise at one large County Court, searching the 2004 case files in both the Civil and Family Sections. This proved an onerous task, given that in neither section is the specific subject matter of applications recorded by the court. Furthermore, our efforts yielded an extremely low number of applications – an estimated 15 cases dealt with under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA), and seven applications made under Schedule 1 to the Children

⁷ For a similar approach, see J Eekelaar, M Maclean and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (2000, Hart Publishing) at p 35.

Act 1989.⁸ Given the paucity of cases, we decided not to search at other courts.

Report Structure

1.17 This report provides the first detailed empirical examination of how the property issues that arise when cohabiting couples separate are dealt with under existing law. Chapter Two details the social and demographic background to the study, indicating how cohabitation has grown and developed in this country over recent years. It traces how social attitudes to cohabitation have changed, both amongst the general population and cohabitants themselves. Chapter Three then provides an analysis of the current legal position governing cohabitants' property, explaining how much of this is still based on case law and then discussing the statutory reforms that have been made so far. Chapters Four and Five deal with the sample of respondents and their property. Chapter Four describes the sample of cohabitants who were tracked for the study, explaining their different circumstances, discussing their views on marriage and cohabitation, how they handled finances whilst in the relationship, and noting their generally low awareness of their legal position. Chapter Five details the property that was in issue and explores how far the couple had discussed the details of ownership in the event of breakdown of their relationship, and finally considers conveyancing practices and problems arising from these.

1.18 The following four chapters explore the experiences of the cohabitants and their practitioners in seeking to resolve their issues. Chapter Six considers how the cohabitants themselves characterised their issues and notes the mismatch with the legal typology used by the professionals. It then examines the cohabitants' first steps in seeking help from the professionals. Chapter Seven describes the perspective of professional practitioners involved in this area, considering how they handled these cases in terms of the law, evidence and procedures. It shows that cohabitation cases make up a relatively small proportion of the caseloads of lawyers and mediators, who generally find these cases challenging and hard to predict compared to divorce ancillary relief cases. Chapter Eight then explores in detail the processes by which practitioners sought to resolve issues, with a focus on the particular characteristics of lawyer negotiations and court proceedings. Chapter Nine deals with the outcomes of these cases and considers how far these met, or fell short of, cohabitants' and practitioners' expectations. It considers what might have affected outcomes, including the nature of the parties' relationships and compares how the position might have differed if they had been married.

1.19 Chapter Ten identifies a number of scenarios where the study found that the current law fails to achieve a just outcome for cohabitants. It then goes on to critique the reform proposals that have been made for this area of the law focusing in particular on those made by the Law Commission. It

⁸ An explanation of these jurisdictions is provided in Chapter Three.

concludes by proposing further reforms to conveyancing and property law in the light of this study.

Chapter Two: The demographic and social picture

2.1 This chapter sets out the social and demographic background to the study. It considers the growth and trends in extra-marital cohabitation in England and Wales in the last thirty years. It then discusses statistical evidence concerning social attitudes to cohabitation, sociological and socio-legal research into how cohabitants view their relationship and how, if at all, these differ from those who are married.¹

Incidence of cohabitation

2.2 Kiernan notes that there is evidence going back over several centuries to indicate that cohabitation outside marriage has taken place in Britain, but there are few statistics to indicate its extent. However, in the twentieth century, especially after the 2nd world war, marriage was increasingly popular and although there will have been a number of non-marital unions where the couple was unable to marry, it is likely that there were relatively few.²

2.3 There has been a significant growth in the number of people cohabiting outside marriage in the past thirty years in Great Britain.³ Between 1976 and 1998, the proportion of women aged under 50, who were not married, and who were currently cohabiting, more than trebled from 9 per cent to 29 per cent. In 1979, only one single woman in 13 (8 per cent) was cohabiting: by 1998, this figure had quadrupled to almost one in three (31 per cent). The proportion of divorced women cohabiting, formerly much higher than that of single women, is now the same, at 31 per cent. The figures for men are broadly similar – rising from one in eight single men cohabiting in 1986, to one in four in 1998, a doubling in 12 years. Divorced men have cohabited at even higher rates, with the proportion remaining stable at about 40 per cent throughout the period. The peak age for cohabitation for both men and women is in their mid to late 20s. Cohabitation is no longer a minority experience, but has become the norm for a significant proportion of the population, with two primary significant groupings – the young, never married, and the older, previously-married.

2.4 The rise in cohabitation is a phenomenon not confined to Britain but is apparent in Europe and North America as well. European countries can be divided into three groupings, according to its incidence: the Nordic countries, where it is very common; the Benelux countries, France, Britain, Ireland (very

¹ The evidence on these issues is also fully described and analysed by the Law Commission in Part 2 of their Consultation Paper: *Law Commission Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper* Consultation Paper No 179 (TSO, 2006).

² K Kiernan, 'Unmarried Cohabitation and Parenthood in Britain and Europe' (2004) *Law and Policy* 33 at p 34.

³ Note that statistics may refer to Great Britain or the United Kingdom (incorporating Scotland and N Ireland as well as England and Wales), or to England and Wales only. Unless otherwise indicated, the following statistics are taken from J Haskey, 'Cohabitation in Great Britain: past, present and future trends – and attitudes' (2001) 103, Spring, *Population Trends* 4. For a comparison of the position in Britain and Europe, see Kiernan n 2.

recently) Germany and Austria where it is increasingly common, and Southern European countries where rates are lower. The United States would fall into the 'intermediate' category as well.⁴

Duration and stability of cohabitation

2.5 The duration and stability of cohabitation are important factors in determining what, if any, legal response should be made to this demographic change. It could be argued that, if most cohabiting couples split up relatively quickly or eventually marry, the detrimental impact of the cohabitation on their economic circumstances is limited or mitigated.⁵ This reduces the need to provide a remedial policy response or, at any rate, weakens any argument that cohabitation should be treated as *equal* to marriage. The demographic evidence in fact shows that the duration of cohabitation is increasing, although it is difficult to calculate this authoritatively. Surveys asking respondents how long their cohabiting relationship has lasted can only indicate its duration up to the time of interview, and not, of course, how much longer it will last. Nonetheless, Haskey reported that the median duration of cohabitation increased between 1986 and 1998, for single men from just under two years to just over three years, and for single women from roughly 18 months to over three years. Divorced men and women's cohabiting relationships lasted about one third longer. Barlow and James⁶ have argued that their more recent survey establishes rather longer durations, with an average of six and a half years and the median exceeding four years. They contrast these figures with the median duration of marriages ending in divorce, at 10.7 years in 2003.⁷ These figures suggest that cohabitation is assuming a greater significance in people's life cycles, although it may still be premature to assert that it should be regarded as functionally equivalent to marriage.⁸

Children of cohabiting couples

2.6 Whilst the focus of this study is not on the children of cohabitants, it is important to note, from a legal policy perspective, that an increasing number of cohabiting couples are having children within that relationship (rather than marrying when the child is born). The percentage of British families with dependent children has remained stable since the 1980s, at around 60 per cent, but the proportion of these which were formed by cohabiting partners grew from one in 30 in 1986 to one in 12 by 1998 (although it appears that cohabiting couples have fewer children than married couples). Policy makers who might argue that adults can be left to fend for themselves and do not require protection if they choose to cohabit cannot apply this argument to their

⁴ Kiernan n 2 at p 39. For the first detailed international consideration of the legal implications of such growth, see J Eekelaar and S Katz (eds) *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* (Butterworths, 1980).

⁵ For an argument along these lines, see R Probert, 'Trusts and the modern woman – establishing an interest in the family home' [2001] CFLQ 275 at p 277.

⁶ A Barlow and G James, 'Regulating Marriage and Cohabitation in 21st Century Britain' [2004] MLR 143 at p 154.

⁷ *Ibid* at n 68.

⁸ Cohabitants' own attitudes to this question are considered below.

children – there may need to be a policy response if it appears that the children of cohabiting parents are at particular risk of insecurity and vulnerability. And indeed, the evidence suggests that there are higher rates of breakdown amongst cohabiting unions than marriages, with the children of cohabitants being twice as likely to see their parents separate, as children born within marriage.⁹

Pre-marital cohabitation

2.7 Pre-marital cohabitation (or ‘trial marriage’) has increased markedly. About five per cent of married women had lived with their first husband beforehand in the 1960s: this proportion had grown to around three-quarters (77 per cent) by 1996. Where women had been married before, this proportion rose further, to over four in five (86 per cent) in 1992. The median length of pre-marital cohabitation has also increased, from under six months in the late 1950s (when of course, such cohabitation was anyway rare) to 27 months in 1998, with the slowest quartile cohabiting for at least four years before marrying. Haskey describes pre-marital cohabitation as “perhaps becoming the modern-day equivalent of the courtship period or of ‘going steady’.”¹⁰ Kiernan suggests that a new form of cohabitation ‘arrived’ in the 1970s, primarily as pre-marital cohabitation.¹¹ This type of cohabitation is reflected in the findings of Arthur et al¹² in their *Settling Up* study comparing divorcing couples and separating cohabitants. Their study involved a telephone survey of 62 former cohabitants, identified from the British Social Attitudes Survey conducted in 2000, followed up by in-depth interviews with 18 of them (nine men and nine women).¹³ This was part of a larger study examining the separation arrangements of married couples as well. The cohabitants’ relationships had lasted a much shorter time on average than the divorcees’, with the median length of cohabitation between three and four years, compared to 14 years of marriage. The cohabitants were younger than the divorcees, less likely to be owner-occupiers, with only 42 per cent being in this position compared to 74 per cent of the divorcees, and less likely to own in joint names. This picture is broadly in line with Haskey’s data.¹⁴

⁹ Haskey n 3 at p 5, citing J Ermisch and M Francesconi, ‘Marriage And Cohabitation’ in R Berthoud and J Gershuny, *Seven years in the lives of British families* (Policy Press, 2001); Kiernan n 2 at p 47. It has been noted by Barlow and James, n 6 at p 159 that this is not surprising, since cohabitation is concentrated amongst younger people whose relationships have always been more fragile.

¹⁰ Haskey n 3 at p 11.

¹¹ Kiernan n 2 at p 36.

¹² S Arthur, J Lewis, M Maclean, S Finch and R Fitzgerald, *Settling Up: making financial arrangements after divorce or separation*. (National Centre for Social Research, 2002), discussed further at para 2.27.

¹³ See n 12.

¹⁴ For the make-up of the sample in our study, see Chapter One and Appendix 1.

Cohabitation instead of marriage

2.8 However, it is also clear that, whilst currently only a small proportion of the overall numbers of cohabiting couples,¹⁵ more couples are cohabiting for the long-term, either as a positive alternative to marriage, or for other reasons (which we explore below). Whilst these couples currently make up only a small proportion of the overall numbers of cohabitants, it is predicted¹⁶ that fewer people will marry during their lifetimes in the future, with the total number of cohabiting couples estimated to rise from 2 million in 2003 to 3.8 million in 2031. The age of the cohabiting population is also projected to rise. Government projections suggest that whilst in 2003, 21 per cent of male and 18 per cent of female cohabitants were aged over 45, by 2031 these proportions will increase to 41 per cent for males and 36 per cent for females. For such couples, who in former times would have regarded marriage as the only morally and socially acceptable living arrangement, cohabitation may present a true alternative to marriage.

Attitudes to cohabitation

General social attitudes

2.9 Policy makers might be wary of improving the legal position of cohabitants, even in the face of the demographic evidence set out above, if there were high proportions of the population who regard cohabitation as 'wrong'.¹⁷ However, statistical surveys over several years have collected data on social attitudes in Britain, which revealed a marked reduction in disapproval of extra-marital cohabitation, although this is age-related, with hostility higher amongst the older generation. In 1993/94, over 60 per cent of British men and women over 60 said they would advise a young person to marry without living together first. The corresponding proportions amongst the younger generations were 40 per cent for those aged 40 to 59, and under 20 per cent for those aged 20 to 39. By 2000, 67 per cent of the population surveyed agreed that it is acceptable to live together without intending to get married, and only 27 per cent believed that married parents make better parents than unmarried ones.¹⁸

¹⁵ The Law Commission (op cit n 1 at para 2.44) cite J Ermisch and M Francesconi, 'Patterns of household and family formation' in R Berthoud and J Gershuny, *Seven Years in the Lives of British Families* (Policy Press, 2001) at 27 as suggesting a proportion of fewer than 10 per cent.

¹⁶ *Report: 2003-based marital status and cohabitation projections for England and Wales* (2005) *Population Trends* 121 Table 3 and p 80.

¹⁷ One might argue that this would appear logically unlikely since one would not expect to find high numbers of couples cohabiting if there were strong social pressure not to do so – but logic does not always govern personal behaviour, and Haskey reported (op cit at p 6) that over 80 per cent of the population surveyed continue to regard adultery as always or mostly wrong, yet adultery is a very frequently cited fact relied upon for divorce.

¹⁸ 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, I Jarvis and C Bromley, C. (eds) *British Social Attitudes: The 18th Report*, (Sage, 2000).

The attitudes of cohabitants and spouses compared

2.10 A number of qualitative research studies have explored the attitudes of cohabitants in order to determine whether the nature of their commitment to each other is different from that of spouses. The 'nature of commitment' has been an issue used by politicians to deny cohabitants equal treatment with spouses. For example, the Family Law Act 1996, s 41(2), provided¹⁹ that cohabitants with no right to remain in the family home under civil or property law would be treated less generously than spouses in terms of protection from domestic violence, with the court required to 'have regard to the fact that they have not given each other the commitment involved in marriage'.

2.11 The *assertion* that cohabitation of itself involves a lesser commitment (and the inference that it is therefore less deserving of protection) has been the subject of empirical enquiry. Smart and Stevens²⁰ interviewed 20 men and 20 women who had raised children in a cohabiting relationship (though not with each other) and who had separated. Eleven of the women had become pregnant and cohabited as a result – the modern equivalent of the 'shotgun marriage'. Only five of the women were opposed to the institution of marriage and had thus deliberately *preferred* cohabitation. Smart and Stevens categorised their sample according to their position on a continuum of commitment from *mutual* to *contingent*. By relationships based on mutual commitment, they meant those in which the couples had reflected on the reasons for cohabiting, who sought jointly to define the nature of their relationship, who monitored its progress and put in place contingency plans to deal with changes. By contingent commitment, they meant those 'based on taking a chance ... or seizing an opportunity ... when faced with significant life events.'²¹ Usually, it was hoped that stability would grow, or that partners would change their behaviour over time. Actual expectations were often unexpressed or rather minimal but it was hoped by one partner, at least, that commitment would start or grow over time. Of their sample, 15 of the women were regarded as clustered toward the contingent end of the continuum and only five toward the other.

2.12 In their sample of male respondents, six had cohabited because of an unplanned pregnancy. This was not because they had felt forced into cohabitation, as the term 'shotgun marriage' might imply. Rather, they had felt a sense of moral obligation to the mother or the child, although two of the six had felt they had 'gone along' with the decision to cohabit rather than been a full party to it.²² Men were more likely to be opposed to marriage *per se* than

But note that there is a difference in the questions asked – the former asks the respondent to advise on a course of action to a given person, whilst the latter asks if the respondent thinks it is 'alright' for others to cohabit – see Haskey n 3 at p 7.

¹⁹ It was repealed by s 2 of the Domestic Violence, Crime and Victims Act 2004, although the court must still consider 'the level of commitment involved in' the parties' relationship:

Family Law Act 1996 s 36(6)(e).

²⁰ C Smart and P Stevens, *Cohabitation breakdown* (Family Policy Studies Centre/Joseph Rowntree Foundation, 2000).

²¹ *Ibid* at p 24.

²² *Ibid* at p 29.

women, with 12 of the 20 so reporting. On the commitment continuum, half (10) were at the contingent end, 6 at the mutual end, and four were found to have had no commitment to the relationship at all.²³

2.13 Smart and Stevens concluded that a 'one size fits all' policy response would be inappropriate to dealing with cohabitation breakdown. For the mutually committed, marriage-like rules would be an irritant, because these cohabitants are most likely to be anti-marriage – thus, provision would have to be made to enable them to opt out of any marriage-like regime. For the contingently committed, by contrast, who viewed their relationship as not yet ready or appropriate for marriage, but who also recognised that, with the passage of time, it had become marriage-like in terms of its economic implications for the partners, a protective regime which still does not carry all the same rights and duties as marriage appeared preferable.

2.14 Lewis, Papacosta and Warin²⁴ interviewed 50 former cohabitants, 28 of whom had been partners. They also found that the majority had not made a conscious decision to move in together – it had just 'happened'. However, this did not mean that the respondents had not felt committed to the relationship – just under half (23) felt that cohabitation involves the same level of commitment as marriage. Two-thirds regarded marriage negatively in some respects, primarily because it was seen as reinforcing traditional values which they rejected, whilst cohabitation permitted a sense of individual freedom and greater gender equality and was for them a more 'honest' relationship. This freedom also meant that they considered themselves more able to end the relationship if the couple 'grew apart' than would have been the case had they married, an attitude perhaps reinforcing the thesis of Giddens and Beck and Beck-Gernsheim about the reflexive nature of modern 'pure' relationships and their constant re-negotiability.²⁵

2.15 Barlow and James²⁶ in their survey of over 3000 respondents, also found that pregnancy could precipitate cohabitation but, in addition, they reported that it may sometimes take the place of, or accompany, the role previously taken by engagements. Echoing Lewis et al, they found that for those who had already experienced marriage, cohabitation could be seen as a more 'honest' relationship than marriage, founded on the love of the partners and their wish to be together, whilst others simply feared another divorce. Another common view was that until the parties could afford a wedding in the style they wanted, they would instead cohabit – but often, the expenditure required for such a wedding²⁷ was put towards other spending priorities, such as improvements to the home, and the wedding was postponed indefinitely.

²³ Ibid at p 30.

²⁴ C Lewis, A Papacosta and J Warin, *Cohabitation, separation and fatherhood* (Joseph Rowntree Foundation, 2002)

²⁵ See A Giddens, *Modernity and Self-Identity* (Polity Press, 1991); U Beck and E Beck-Gernsheim, *The Normal Chaos of Love* (Polity Press, 1995).

²⁶ Above n 6 at p 157.

²⁷ The average cost of getting married in the UK was estimated at around £12,000 in 2004.

2.16 These studies did not include a comparison with married partners, so the question whether spouses are likely to have a 'stronger' commitment to each other than cohabitants could not be explored. Other studies find different and complex patterns, however. In a quantitative survey of 185 cohabitants and 590 married couples by Jane Lewis,²⁸ for example, the vast majority (over 90 per cent) of both types of partners agreed that 'a relationship is about making a long-term commitment to each other'. Yet there was a difference in the *nature* of their commitment to each other, both by form of relationship, and age. The married couples often spoke of making a *public* commitment to each other. But the younger couples felt they had made an *active* choice to marry whilst the older spouses had not felt they had had a choice about whether to marry if they wanted to live together and have children. The cohabitants had tended to drift into cohabitation. In this sample, whilst pregnancy did not appear to assume the significance found by Smart and Stevens, setting up household as students, and continuing thereafter, seemed a common pattern. The cohabitants saw themselves as having a *private* commitment to each other, unshaped, and unsanctioned, by any state, religious or community expectations.

2.17 But age may have been a more significant determinant of attitude than marital status. Lewis found that younger couples, both married and cohabiting, tended to stress the importance of having a degree of personal independence within the relationship, be it through their careers or in leisure activities. The older generation were more likely to talk about 'togetherness'.

*'Above all, the older respondents were able to identify the obligations they felt to each other, whereas many of the younger generation, married and cohabiting, either denied that they owed each other anything or qualified the idea of obligation in some way.'*²⁹

Nonetheless, those cohabitants who did recognise a sense of obligation to each other tended to see this as coming from 'within' the relationship rather than being imposed from outside.

2.18 Lewis' study of both married and unmarried couples enabled her to explore the extent of any difference in their expectations and understandings. A later study by Eekelaar and Maclean took this dimension further.³⁰ They interviewed 39 men and women, aged between 25 and 45, of whom 26 were married, nine currently cohabiting, two now living alone, and two 'living apart together',³¹ one of these being in a same sex relationship. They found a range of attitudes amongst all the interviewees concerning their obligations to each other and the sources of these obligations (externally or internally imposed).

²⁸ J Lewis, 'Relationship Breakdown, Obligations and Contracts' (1999) *Family Law* 149 at p 150. (A full discussion of the research may be found in J Lewis, *The End of Marriage? Individualism and Intimate Relationships* (Edward Elgar, 2001)).

²⁹ *Ibid* at p 151.

³⁰ J Eekelaar and M Maclean, 'Marriage and the Moral Bases of Personal Relationships' (2004) 31 *Journal of Law and Society* 510; M Maclean and J Eekelaar, 'The Obligations and Expectations of Couples within Families: Three Modes of Interaction' (2004) 26 *Journal of Social Welfare and Family Law* 117.

³¹ This is a growing phenomenon in the United Kingdom, and means that the couple were in an intimate relationship but maintained separate homes.

They examined whether individuals tended to view their relationships in terms of a focus on the couple themselves, on the couple as embedded within their wider families, or as part of a wider kin network. They found that those in the first of these categories tended to be the cohabitants.³² This suggests that there may still be some difference between the married and unmarried in how they view the nature of their partnership, with the former perhaps recognising more overtly that they are now part of a wider 'family'.

2.19 This is not to gainsay the message emerging from all the research reviewed here, that findings turn primarily on the types of cohabitants being researched – there may be more in common between young cohabitants and young spouses than between the latter and older married people; there may be more in common between spouses and cohabitants with children, than between the latter and cohabitants engaged in pre-marital cohabitation, and so on. And there may be a need for caution in combining evidence of the views of those who are still within cohabiting relationships with those who have separated, since perceptions can change with experience.

Cohabitants' knowledge of their legal position

2.20 Regardless of how they perceived their relationship, and quite apart from the inferences to be drawn from the above evidence, what has emerged clearly from recent research is a strong lack of awareness of the differences in the legal position which cohabitants occupy compared to married people. This is not surprising. As Smart and Stevens noted,³³ few 'ordinary people ... have a clear and accurate understanding of their legal position and the legal consequences of everyday actions.' Their sample of cohabitants was no different. Very few had given any thought to their legal position whilst cohabiting. Indeed, they regarded the idea of doing so as 'antithetical to the nature of a trusting, loving relationship'. Even on relationship breakdown, however, when those involved might be thought to recognise the need for legal advice and help, it seems that far fewer turn to lawyers than is the case amongst the divorcing population. Arthur et al found in their study that whilst 75 per cent of former spouses had consulted a solicitor about at least one aspect of their separation, only 26 per cent of former cohabitants had done so.³⁴ Moorhead et al found a similar disparity in their survey of 200 lone parents: 66 per cent of the formerly married had considered a solicitor as a main source for advice whilst only 40 per cent of former cohabitants had done so.³⁵

2.21 But perhaps more worrying is the high level of positive misunderstanding by cohabitants of their actual legal position. This has been demonstrated most forcefully by Barlow and James. They found that 56 per

³² Maclean and Eekelaar n 30 at p 128.

³³ Smart and Stevens n 20 at p 41.

³⁴ Arthur et al, n 12 at para 6.2. Discussed further below at para 2.26.

³⁵ R Moorhead, M Sefton and G Douglas, *The Advice Needs of Lone Parents* (One Parent Families, 2004) at p 68. See too, M Maclean and J Eekelaar, *The Parental Obligation* (Hart Publishing, 1997) who found that nearly three-quarters of divorcing parents in their study had seen a lawyer, compared with under a third of separating cohabitant parents.

cent of their respondents believed that cohabitation for a period of time gives the same legal rights as marriage – the ‘myth’ of the ‘common law marriage’.³⁶ In fact, the concept of common law marriage was abolished in England and Wales in 1753,³⁷ when marriage law was codified, but the persistence of the belief that it still exists is again unsurprising.³⁸ First, Probert has shown how the print media’s continued references to ‘common law marriage’ may help reinforce the popular misapprehension of the law.³⁹ Secondly, social security rules generally treat married and unmarried couples alike, so that many couples who have had experience of these may assume that the rest of the law does too. Finally, in areas of the law such as inheritance,⁴⁰ succession to tenancies⁴¹ and domestic violence,⁴² the position of cohabitants has been largely assimilated with that of spouses through legislative reform. It is in the area of finance and property rights and obligations owed to each other, the subject of this study, that the law has been left to the slow and haphazard development allowed by case-law⁴³ and has yet to catch up fully with current needs.

Cohabitants’ property arrangements

2.22 Turning, then, to cohabitants’ property interests, Haskey⁴⁴ reported in 2001 that about one quarter of cohabitants responding to a large statistical survey stated that they had moved into their partner’s existing accommodation when cohabitation began. The rest acquired new accommodation, either having previously lived in their own home or with their parents. Roughly the same proportions of never married men and women moved into their partner’s home. By contrast, amongst the separated and divorced, it was more common for men rather than women to do so. This was probably because many separated and divorced women retained the former family home as part of a settlement in which they had primary care of the children and the home had been preserved until the children reached adulthood.⁴⁵

2.23 In general, cohabiting couples were more likely to rent their home than married couples, who were more likely to be buying their property with the aid of a mortgage. For example, 46 per cent of cohabiting men were renting and 41 per cent buying, compared with 41 per cent of married men renting and 45 per cent buying. Similarly, 46 per cent of cohabiting women were renting and

³⁶ Barlow and James n 6 at p 161. See also Smart and Stevens op cit at p 42.

³⁷ By the Clandestine Marriages Act (known as Lord Hardwicke’s Act), and intended to stop the mischief of secret unions which threatened the ability of wealthy families to control their children’s marriages and hence the orderly inheritance of property.

³⁸ Although it should be noted that a ‘common law marriage’ was a valid *marriage*, whilst those couples who refer to themselves as ‘common law’ husbands or wives today know that they are not, in fact, married, but are claiming instead that they have the same rights as *if* they were.

³⁹ R Probert, ‘Why Couples Still Believe in Common-Law Marriage’ [2007] Fam Law 403.

⁴⁰ The Inheritance (Provision for Families and Dependents) Act 1975.

⁴¹ The Rent Act 1977 and the Housing Act 1985.

⁴² The Family Law Act 1996 Part IV.

⁴³ As to which, see Chapter Three.

⁴⁴ J Haskey, ‘Cohabiting couples in Great Britain: accommodation sharing, tenure and property ownership’ (2001) 103, Spring, *Population Trends* 26.

⁴⁵ *Ibid* at p. 32.

39 per cent buying, compared with 41 per cent of married women renting and 44 per cent buying.⁴⁶

2.24 As we discuss in Chapter Three, whether the property is owned or rented in joint names or by one partner only is an important aspect of legal entitlement. Haskey's data show very little difference between men and women regarding this question. Around a third of cohabiting men and women reported that their home was in their name, a quarter that it was in their partner's name, and around 30 per cent that it was in joint names.⁴⁷ However, age made a difference to this issue, with younger cohabitants more likely to hold in joint names.⁴⁸ Since cohabitation is concentrated amongst the younger age groups, this may suggest that the vulnerability of some cohabitants, especially women, because of their lack of legal entitlement to occupy, may diminish over time as a higher proportion of cohabitants acquire homes jointly in the future, and may affect relatively few cohabitants overall. Moreover, Haskey found that the length of time a couple had been cohabiting was generally shortest amongst those where the home was in the man's name and longest when it was not.⁴⁹ This may reflect couples acquiring a new home after living together for a while, and putting it in joint names. In any case, in the event of the relationship breaking down, the woman will have been proportionately less disadvantaged because of the shortness of the partnership. Finally, as is discussed in our concluding chapter, most reform proposals envisage a claimant having to have lived with a partner for at least two years before taking advantage of any adjustive regime to give him or her a share of the value of the family home. Fewer women might be expected to benefit from such reforms than might therefore have been thought.

Cohabitants' separation arrangements

2.25 The increasing concern that the current law appears to deal inadequately with the problems that can arise when cohabitants separate has been the catalyst for some but, as yet, only limited empirical research, which this present study is intended to supplement.

2.26 Two studies, one published in 2002, and one in 2006, have been completed by the National Centre for Social Research. The first, *Settling Up*, to which we have already referred, found that cohabitants' settlements of their property after separating were characterised by each retaining the assets seen as 'theirs' – both in relation to assets they had brought into the

⁴⁶ Ibid, Table 1. More recent data show the same pattern: See Law Commission, op cit, para 2.27 and the sources cited therein.

⁴⁷ Ibid, Table 2. For comparison, the figures for married respondents were as follows: for married men, 32 per cent in own name, 12 per cent in spouse's name and 43 per cent in joint names; for married women, 14 per cent in own name, 30 per cent in spouse's name and 43 per cent in joint names.

⁴⁸ 43 per cent of men, and 37 per cent of women aged under 30, held in joint names, compared with 20 per cent of men, and 23 per cent of women aged 45 to 59. In comparison, 50 per cent of married men under 30 held the property in joint names, and 43 per cent of married women.

⁴⁹ Ibid at p 34.

relationship and those acquired during it:

*If homes were owned by one partner they remained in that partner's name except in very unusual circumstances. If homes were held jointly the equity was shared, either one partner buying the other out or the property being sold with sale proceeds divided.*⁵⁰

Cohabitants were much less likely than divorcees to reach a settlement based on the parties' respective needs, unless there were children of the relationship, and less likely to divide the assets equally. Instead, Arthur et al found that 'entitlement' was the dominant model, although understandings of such entitlement were not straightforward. Cohabitants might base their view of legal entitlement on what they believed or assumed was the position (which could range from believing the law followed strict title, to believing it required equal shares), or on a view that a larger contribution to the acquisition of an asset should be reflected in a larger share. As we explore in subsequent chapters, such assumptions are not necessarily correct.

2.27 The National Centre carried out a similar study, this time solely of cohabitants, for the Department for Constitutional Affairs, which was published in 2006.⁵¹ Again, the sample was recruited from larger national surveys. This time the researchers interviewed 29 former cohabitants (15 women and 14 men) who had lived with a partner for at least six months and had separated between three months and four years before interview. Group discussions with solicitors and other advisers were also held. Similar outcomes to their previous study were found. Homes owned by one partner were always retained by him or her and jointly-owned homes were either retained by one partner or sold. As before, the most important influence on settlement was ownership, with contributions or the needs of the children or adults carrying little weight except in relation to what happened to jointly-owned homes or household goods. For many, their legal position had not been a significant influence on the arrangements they had made and the researchers considered that their full legal entitlement was not always reflected in such arrangements. In particular, and again reflecting a finding made by Arthur et al previously, there were cases where legal remedies such as Schedule 1 to the Children Act might have been used but had not been.

2.28 One of the conclusions reached by Tennant et al was that cohabitants need to be educated about the legal implications of their relationship and of their patterns of holding assets. In the light of the level of ignorance of these uncovered by the studies we have discussed above, comprehensive information has in fact been made available on the internet through the government's 'Living Together' campaign.⁵² Barlow and colleagues⁵³ carried out an evaluation of the use of this website by cohabitants and the impact such use might have had. They surveyed 102 users via a questionnaire and

⁵⁰ Arthur et al n 12 at para 3.2.1.

⁵¹ R Tennant, J Taylor and J Lewis *Separating from cohabitation: making arrangements for finances and parenting* DCA Research Series 7/06 (London, DCA, 2006).

⁵² <http://www.advicenow.org.uk/livingtogether>.

⁵³ A Barlow, C Burgoyne and J Smithson, 'The Living Together Campaign – the Impact on Cohabitants' [2007] Fam Law 165.

then followed these up with purposive interviews with 18 men and 12 women from the questionnaire respondents. These were largely positive about the site. The proportion of those who felt they were very well informed about the legal position of cohabitants increased from 19 per cent before they had visited the site to 61 per cent afterwards. Over a third said that they would now discuss matters with their partner, and nearly 30 per cent said they would make a will or seek legal advice. Yet by the end of the study, few had actually acted on these intentions, with one of the main reasons being that there was no suitable action that they could take to improve their position. For example, whilst in theory they felt that cohabitation agreements were a good idea, in practice they were not thought to be useful given their questionable enforceability.⁵⁴ Others were reluctant to face the costs of taking legal measures which might be unnecessary, and others did not want to contemplate their relationships ending. Some had difficulty in persuading their partners to do anything. The authors concluded that, although the site is a valuable source of information, people are more likely to act on its advice if initiatives are targeted at the key turning points in their relationships when they are already involved in taking legal steps, such as on buying their home. This is a point to which we return in our final Chapter.

2.29 We turn next to consider the legal context in which disputes between separating cohabitants regarding their property have to be resolved.

Summary

- There has been a significant increase in the number of couples cohabiting outside marriage in the past thirty years in Great Britain. Cohabitation is no longer a minority experience, but has become the norm for a significant proportion of the population, including those with children.
- The nature of cohabitants' relationships varies widely, and there is mixed evidence as to the degree of 'commitment' that they may have, in comparison with spouses. Evidence suggests that there may be more in common between younger spouses *and* cohabitants than between older and younger couples, and between couples with children compared with those without.
- Cohabitants are slightly more likely to rent than own their homes. Where they are owner-occupiers, there is little difference between men and women as to who is on the title. However, younger couples are more likely to own in joint names.
- When cohabitants separate, entitlement or ownership, rather than need, appears to determine how property is divided or settled.
- Cohabitants are generally poorly informed, and uninterested, about their legal position and are less likely to seek legal advice when they separate than divorcing couples.

⁵⁴ Sed quaere? See paras 3.41-3.42 below.

Chapter Three: The legal landscape

Introduction

3.1 In the liberal state, the privacy of the family is regarded as a cornerstone of liberty and autonomy. Family life is regulated only to the extent that is 'necessary in a democratic society' (as it is put in art 8 of the European Convention on Human Rights). As far as possible, family members are free, and encouraged, to regulate their affairs without state intervention. Private ordering of family matters, albeit with the assistance of professional advisers and often the courts (through the device of the 'consent order') is strongly encouraged throughout the family justice system as a means of reducing legal costs and promoting harmony between parties who, as family members, may of necessity continue to have an emotional and practical relationship with each other even after they separate or terminate their legal tie.

3.2 English law has recognized that there may be a need to go behind the ostensible legal position to remedy the injustice which may occur when a person is led (or misled) into relying to their detriment on supposed understandings with, or undertakings from, others.¹ It has done this by developing equitable remedies such as the trust and estoppel. Unfortunately, however, the criteria under which equitable remedies arise, and their scope, are subject to on-going re-definition and interpretation, leaving this a highly complex area of law for legal advisers to get to grips with, and one which calls for considerable expertise, as we discuss below.

3.3 Research has been undertaken into the way that family practitioners go about their work. In the United States, for example, attention has been drawn by Mnookin and Kornhauser² to the fact that the parties 'bargain in the shadow of the law' when reaching private settlements, i.e. they arrive at agreements in the knowledge and expectation of what a court might decide if the matter proceeded to trial. The skill of lawyers as negotiators through the family justice system has been described by Sarat and Felstiner³ as based on 'knowing the ropes' rather than 'knowing the rules', in that their expertise lies in understanding how the law (and especially the judge) operates within their local court and amongst their local legal community. However, the bulk of this kind of work has been done in the context of observing divorce practitioners.⁴

¹ For a sociological perspective on such understandings, and 'silent bargains', see J Finch, *Family Obligations and Social Change* (Polity Press, 1989) and J Finch and J Mason *Negotiating Family Responsibilities* (Routledge, 1993).

² R Mnookin and L Kornhauser 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.

³ A Sarat and W Felstiner, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process* (Oxford University Press, 1995) at p 106.

⁴ In the UK context, see, for example, G Davis, *Partisans and Mediators* (Oxford University Press, 1988); G Davis, SM Cretney and J Collins *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, 1994); R Ingleby, *Solicitors and Divorce* (Oxford University Press, 1992); J Eekelaar, M Maclean and S Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, 2000); F Wasoff, 'Settling up: How Scotland

Less is known about their approach to other family disputes or how far such analyses are applicable to cohabitants' property disputes governed by the uncertainties and complexities of trusts law.⁵

The protection of cohabitation as a human right

3.4 The European Convention on Human Rights generally conceptualizes the family as an entity to be protected *from* rather than *by* the state. However, the European Court of Human Rights has gradually recognized the use of Convention provisions as a means of imposing positive obligations on states to undertake such protection, rather than simply as mechanisms for limiting state action.⁶ Whilst the European Court has not yet held that cohabitation between an unmarried couple amounts to 'family life' within art 8 of the European Convention on Human Rights, it has ruled that such 'family life' is established between a parent and his child, even though the father and mother have only cohabited.⁷

3.5 Such rulings suggest that the Court is as concerned with the substance of the relationship as its status in determining whether it falls within the scope of the Convention's protection. One might therefore expect it to rule, in due course, that a cohabiting relationship between heterosexual, or same-sex partners, should be accorded respect and recognition in law and that a failure to do so involves a breach of art 8 taken with art 14. Yet the European Commission, in *Saucedo Gomez v Spain*,⁸ whilst accepting that cohabitants may have a 'family life' together, nonetheless upheld the right of Spain to provide fewer rights to cohabitants than spouses as being within its margin of appreciation, with the legitimate aim of upholding the traditional family. The European Court might therefore conclude that a state is not yet obliged, under the Convention, to *equate* married and unmarried partnerships and may continue to make a distinction between the two in the scope and range of its

manages property settlements' (1999) *Divorce: Property and Pensions: Hume Papers on Public Policy*, Vol. 7 (No 2), 16. For consideration of practitioners' experience in dealing with private law proceedings concerning children, see R Bailey-Harris, G Davis, J Barron and J Pearce, *Monitoring Private Law applications under the Children Act. Research Report to the Nuffield Foundation* (Bristol University, 1998).

⁵ The main studies are those conducted by the National Centre for Social Research (NatCen): S Arthur, J Lewis, M Maclean, S Finch and R Fitzgerald, *Settling Up: making financial arrangements after divorce or separation* (National Centre for Social Research, 2002); R Tennant, J Taylor and J Lewis, *Separating from cohabitation: making arrangements for finances and parenting* DCA Research Series 7/06, (DCA, 2006). These are discussed in Chapter Two.

⁶ See eg *Kroon v Netherlands* (1995) 19 EHRR 263; *Sylvester v Austria* (2003) 37 EHRR 17.

⁷ *Yousef v Netherlands* (2003) 36 EHRR 20. In *Keegan v Ireland* (1994) 18 EHRR 342 the cohabitation occurred only before the child's birth. (Indeed, cohabitation is not required provided that the father has demonstrated his interest in and commitment to the child: *Lebbink v Netherlands* [2004] 2 FLR 463). The Court has also ruled (though in relation to the right to respect for one's *home* rather than family life) that a same-sex partner of a deceased tenant is entitled, by virtue of art 14 (the non-discrimination article in the Convention), to take advantage of a succession law expressed to apply to a 'life companion': *Karner v Austria* (2004) 38 EHRR 24. The House of Lords reached the same conclusion in relation to the equivalent English legislation in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [2004] 2 AC 557.

⁸ Application No. 37784/97, 19 January 1998, unreported.

legal protections. Indeed, many cohabitants positively reject marriage and would not wish to be treated as if they were married. Taking account of such opinions further complicates how the Court would have to approach this question.

3.6 Even if cohabitants could not rely on the concept of family life to improve their legal claims in relation to shared property, they might turn instead to the right to respect for one's *home* which is also included in art 8. This has been described as an aspect of the broader right to privacy contained in that article,⁹ and one's home as

*'the place where [a person] and his family are entitled to be left in peace free from interference by the state or agents of the state. It is an important aspect of his dignity as a human being, and it is protected as such and not as an item of property.'*¹⁰

Whether or not a particular habitation constitutes a 'home' will depend on the facts – it is the place where a person lives (or intends to live)¹¹ on a settled basis, but it is not necessary to show that one has the legal right to occupy the property.¹² The right to respect for one's home (not, it should be noted, a right *to a home*)¹³ has been prayed in aid primarily in support of claims to occupy public-sector rented property, but arguably it may have significance in litigation between private individuals where the court has to determine whether to order possession or sale, and this is discussed below.

Ownership of the family home in England and Wales¹⁴

3.7 Unlike most other European countries,¹⁵ English law does not

⁹ By Lord Hope of Craighead in *Harrow London Borough Council v Qazi* [2003] UKHL 43 [2004] 1 AC 983 at para 50. For criticism of the linkage of the right to respect for one's home with the right to privacy, rather than as importing a clear right to 'occupancy', see I Loveland, 'The Impact of the Human Rights Act on Security of Tenure in Public Housing' [2004] *Public Law* 594 at 601-603.

¹⁰ *Per* Lord Millett *ibid* at para 89.

¹¹ As in *Gillow v United Kingdom* (1986) 11 EHRR 335.

¹² *Harrow London Borough Council v Qazi* (above). But, where a person has no legal right to continue to occupy their home, the right is not 'engaged' so as to permit a court to determine whether the grant of possession is a 'necessary interference' with the exercise of the right within art 8(2).

¹³ *Chapman v United Kingdom* (2001) 33 EHRR 399.

¹⁴ The position of the children of cohabiting couples is not dealt with in any detail here. English law draws few distinctions between children born inside and outside marriage, using parenthood, rather than marital status, as the key determinant of legal regulation. The law discussed is that applying to England and Wales. For the position in Scotland, where the Scottish Parliament introduced new law establishing a discretionary regime for separating cohabitants, see the Family Law (Scotland) Act 2006 ss 25 – 28, and for its background, Scottish Law Commission *Report on Family Law No 135*, (HMSO, 1992) and Scottish Executive, *Family Matters: Improving Family Law in Scotland*, (Scottish Executive, 2004). Northern Ireland law generally follows that of England and Wales, although separate legislation applies. For consideration of the general legal position of cohabitants, see The Law Society, *Cohabitation: The case for clear law: Proposals for reform* (The Law Society, 2002). For a twentieth-century historical perspective, see R Probert, 'Cohabitation in Twentieth Century England and Wales: Law and Policy' (2004) *Law and Policy* 13.

generally attach significance to the parties' marital status (or lack of such status) in determining their rights to property. This does not matter, in practice, in the case of most married couples (and same-sex partners who have registered their relationship), whose property rights will be determined either through the divorce jurisdiction or inheritance rules, although it may be important where the couple are declared bankrupt. However, unless cohabitants have children (when a property adjustment order can be made under Schedule 1 to the Children Act 1989),¹⁶ any claims they may have must be resolved by reference to the usual rules of property law.¹⁷

3.8 Most of this law has developed via case-law rather than statutory intervention. The extent to which the courts have been able to respond to changing social mores has been limited by the general constraints on case-law as a form of law making. In particular, as explained below, a finding that a cohabitant has a share of ownership in the family home (or any other property) must depend upon proof of some entitlement to it based on past actions or intentions. By contrast, on a divorce or dissolution of a civil partnership the courts may exercise a judicial discretion to adjust property ownership between the parties, taking account of their future needs and weighing the non-financial contributions made by each to the welfare of the family during the relationship.

The formal legal requirements

3.9 Ownership of the home depends upon the 'legal' and 'beneficial' (or equitable) interests which the parties may have in it. Where the document of title *expressly* declares who is to hold both the legal title and the beneficial interests (i.e. the rights to occupy and take the benefits of the property, including its monetary value) then this is conclusive in the absence of fraud or mistake.¹⁸ The courts for many years have therefore urged solicitors acting for parties buying a home to enquire what their intentions are and then to spell them out in the conveyance in order to prevent dispute in the future.¹⁹ Yet this is not always done. As Sir Christopher Slade noted, rather wearily,

All too frequently the courts of this country still have to consider cases where, despite many prior judicial warnings given to their legal advisers, the parties to a transfer of the legal estate in property into joint names have failed either to include in the form of transfer a declaration of trust, stating

¹⁵ For a consideration of the community of property approach common in civil law systems, see E Cooke, A Barlow and T Callus, *Community of Property: a Regime for England and Wales?* (Nuffield Foundation, 2006).

¹⁶ See below at para 3.42 et seq.

¹⁷ Couples who have been engaged may take advantage of two particular provisions applicable to spouses (and registered partners) but these are of minimal significance in practice: see N Lowe and G Douglas, *Bromley's Family Law* 10th ed (Oxford University Press, 2006) at p. 146 and 169.

¹⁸ *Goodman v Gallant* [1986] Fam 106, CA, endorsed in *Stack v Dowden* [2007] UKHL 17 [2007] 2 WLR 831 (see Baroness Hale of Richmond at [49]).

¹⁹ *Cowcher v Cowcher* [1972] 1 All ER 943, *Springette v Defoe* [1992] 2 FLR 388, CA. See also A Ralton, 'Co-Owners, The Transfer, The Intent and *Stack*' [2006] Fam Law 26 and J Wilson, 'Tripping up on the TR1' (2006) *Family Law* 305.

*the shares in which they are to hold the property beneficially, or to reach any explicit agreement defining such shares, prior to the transfer.*²⁰

3.10 The Land Registration Rules²¹ require that a transfer document, the 'TR1',²² must be completed for every purchase of land. Where land is to vest in joint proprietors, they are supposed to indicate on the form whether they hold on trust for themselves beneficially as joint tenants, tenants in common or on any other trusts. The parties must tick an appropriate box stating that:

The Transferees are to hold the property on trust for themselves as joint tenants; or

The Transferees are to hold the property on trust for themselves as tenants in common in equal shares;

The Transferees are to hold the property (complete as necessary).

However, as Lady Hale noted in *Stack v Dowden*²³ the primary purpose of the form is to effect the transfer of the property from the vendor to the purchaser, and such transfer will be valid whether or not this part of the form is completed. It is unclear whether merely ticking a box, and not going on to execute the trust (by having it signed and witnessed) would be held by a court to constitute an express declaration of trust.²⁴ Furthermore, as can be seen, the terminology used on the form requires legal advice and interpretation since the meanings are far from obvious to the lay reader. A 'joint tenancy' means that the parties hold the equity in the property (i.e. its net value) in equal shares and that, if one party dies, that party's half share automatically passes to the survivor (known as the 'right of survivorship') who can dispose of the property as he or she thinks fit. A 'tenancy in common', by contrast, provides that a party's share accrues to his or her own estate on death, enabling that person to will their share to whomever they please.²⁵ Under a tenancy in common, the parties may hold the equity in whatever proportionate shares they like.

3.11 Before the introduction of Form TR1, the position was worse. Transfers were carried out on Form 19 (JP) (introduced in 1974) using a different form of words, and this may still govern disputes between cohabitants for some time to come. For example, in *Stack v Dowden*,²⁶ the transfer stated:

²⁰ *Springette v Defoe* [1992] 2 FLR 388 at 396. Lady Hale has noted that it is unrealistic to expect a separate declaration of trust to be executed in the domestic conveyancing market, given the price competition involved: *Stack v Dowden* [2007] HL 17 at [52].

²¹ Land Registration Rules 2003, rr 58, 206 and Sch 1 (as amended).

²² First introduced under previous rules, with effect from 1 April 1998, and thus governing conveyances made since that date.

²³ [2007] HL 17 [2007] 2 WLR 831 at [52].

²⁴ Lady Hale (ibid) appears to conclude that it would not constitute an express declaration, but the case itself was governed by the forerunner to the TR1, explained below.

²⁵ If the person dies intestate, the rules of intestacy govern how the estate is distributed: a surviving cohabitant is not within the list of statutory legatees. See Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper* Consultation Paper No 179 (TSO, 2006), at pp 63-70 and Part 8.

²⁶ [2007] UKHL 17 [2007] 2 WLR 831.

The Purchasers declare that the survivor of them is entitled to give a valid receipt for capital money arising from a disposition of all or part of the property.

The House of Lords upheld the view expressed in *Huntingford v Hobbs*²⁷ that such a statement does not amount to an express declaration of a beneficial joint tenancy. They considered that unless there is evidence that the parties had understood the significance of such a form of words other than in relation to the right of survivorship, they should not be bound by it as indicating whether they had indeed intended to hold the equity in equal shares.²⁸

Establishing an interest

3.12 Where the conveyance is silent or unclear as to what the beneficial ownership was intended to be, then either party (be they the non-legal owner where the home is held in one name only, or a joint legal owner)²⁹ may try to claim a (larger) share of the property, based on the parties' agreement or 'common intention'. However, the presumption that 'equity follows the law' was reiterated in *Stack v Dowden* and, in the words of Baroness Hale:³⁰

Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.

In a case where the property is held in joint names, the House agreed that the onus is a heavy one and the facts will have to be very unusual to justify a departure from the starting point. We consider this further below. Here, we explain the meaning of a 'common intention' and how this can be used to assert a claim.

3.13 The concept of 'common intention' in this context is, as has been pointed out,³¹ notional. It does not mean that the parties necessarily shared an understanding. Rather, a party's intention means that which his words and conduct led the other to believe him to hold.³² There may still be a 'common intention' even though the party making the representation actually intended to hold the property for himself alone.³³ Indeed, even if the parties admit that they never discussed nor intended any agreement as to how the property

²⁷ [1993] 1 FLR 736. See also *Harwood v Harwood* [1991] 2 FLR 274.

²⁸ See *Stack v Dowden* [2007] UKHL 17 [2007] 2 WLR 831, Baroness Hale at [84] and Lord Neuberger at [130].

²⁹ See eg *Springette v Defoe*, CA, [1992] 2 FLR 388 and *Huntingford v Hobbs* [1993] 1 FLR 736, CA.

³⁰ [2007] UKHL 17 [2007] 2 WLR 831 at [56].

³¹ See N Glover and P Todd, 'The myth of common intention' (1996) 16 Legal Studies 325; J Mee, 'Joint Ownership, Subjective Intention and the Common Intention Constructive Trusts' [2007] Conv 14.

³² *Gissing v Gissing* [1971] AC 886.

³³ As in *Eves v Eves* [1975] 3 All ER 768, CA and *Grant v Edwards* [1986] Ch 638, CA.

should be shared, this does not prevent the court from concluding that such an agreement existed.³⁴

3.14 While the Law of Property Act 1925 s 53(1)(b) states that a valid declaration of trust of a beneficial interest in land³⁵ must be in writing, under s 53(2) this does not apply to ‘the creation or operation of resulting, implied or constructive trusts’. This exception provides the mechanism under which the parties (or the court) may retrospectively determine a settlement of any dispute as to how the home should be shared.

Resulting trust

3.15 The sub-section refers to ‘resulting, implied or constructive trusts’. The case-law has tended to distinguish between the first and last of these, whilst the term ‘implied trust’ appears to cover either. A resulting trust may be found presumptively to arise when property is bought by one party and put into the name of the other.³⁶ The proportions in which the parties hold the property in a resulting trust depend upon each of their contributions to its acquisition.³⁷

3.16 Lord Neuberger in *Stack v Dowden*³⁸ considered that, where the parties make unequal contributions to the acquisition of property, a resulting trust should be adopted as the presumptive solution to determining their respective interests in it.³⁹ However, the majority preferred Baroness Hale’s view that in the domestic context, a constructive trust approach is more apposite.⁴⁰

Constructive trust

3.17 A constructive trust may be established in either of two ways, laid down by the House of Lords in *Lloyds Bank plc v Rosset*,⁴¹ according to whether there was an express agreement between the parties to share the property or not.

³⁴ *Midland Bank plc v Cooke* [1995] 4 All ER 562, CA at 574–5.

³⁵ Note, however, this is not required for other property: *Paul v Constance* [1977] 1 All ER 195, CA (furniture); *Rowe v Prance* [1999] 2 FLR 787 (boat).

³⁶ For a refusal to find evidence of a resulting trust, notwithstanding a substantial payment made by the claimant to the defendant, see *Curley v Parkes* [2004] EWCA Civ 1515 (claimant paid £9000 to defendant in respect of deposit, and legal and removal expenses, but this was not found to constitute a contribution to the purchase price).

³⁷ *Walker v Hall* [1984] FLR 126 at 133. Thus, in *Huntingford v Hobbs* [1993] 1 FLR 736, CA, the woman contributed 61 per cent of the purchase price of the parties’ new home from the proceeds of sale of her former property; the rest of the sum was raised on mortgage. She was awarded 61 per cent of the value when the parties’ relationship ended.

³⁸ [2007] UKHL 17 [2007] 2 WLR 831 at [110]-[123].

³⁹ Although he accepted that the presumption could be rebutted and replaced by a constructive trust: [124].

⁴⁰ At [60], noting the view taken by K Gray and S Gray, *Elements of Land Law* 4th ed, (Oxford University Press, 2004) at para 10.21 that ‘the doctrine of resulting trusts has conceded much of its field of application to the constructive trust’.

⁴¹ [1991] 1 AC 107, HL.

Evidence of an express agreement⁴²

3.18 The case-law demonstrates very clearly how ‘notional’ an express agreement apparently embodying the parties’ common intention can be. In *Hammond v Mitchell*,⁴³ for example, such an express agreement was found established where the man had said to the woman:

Don't worry about the future because when we are married [the house] will be half yours anyway and I'll always look after you and [their child].

Other cases include the owner telling his partner that the only reason the home was to be in his name alone rather than joint names was because she was under 21;⁴⁴ that her name was not going on the title because that would prejudice her in matrimonial proceedings between her and her husband;⁴⁵ that if she would help run his business affairs for him while he was in prison he would share various of his assets with her;⁴⁶ and that he would put her name on the title when he had time.⁴⁷

3.19 If an agreement can be proved, then the claimant must then show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on it. This may be harder than establishing the common intention. In *Eves v Eves*⁴⁸ the woman performed manual work in helping to renovate the property, including breaking up concrete, demolishing and rebuilding a shed, stripping wallpaper and painting the woodwork. In *Grant v Edwards*⁴⁹ the woman went out to work and used her earnings to meet the household expenses, without which the mortgage could not have been paid. The court in each case regarded these contributions as conduct on which, in Nourse LJ's words,⁵⁰ ‘the woman could not reasonably have been expected to embark unless she was to have an interest in the house.’ By contrast, in *Midland Bank plc v Dobson*⁵¹ the wife's claim to a beneficial interest in the matrimonial home failed because it was held that using part of her income for household expenses, including the purchase of domestic equipment, and doing some ordinary decorating, did not amount to detrimental reliance.

Evidence of conduct

3.20 In *Lloyds Bank plc v Rosset* it was also held that in the absence of evidence establishing an express agreement, the court may instead rely on the conduct of the parties,

both as to the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a

⁴² But in the absence of any contrary evidence the court may have no choice but to believe the case presented by the claimant: see *Re Lorraine Share* [2002] 2 FLR 88.

⁴³ [1992] 2 All ER 109.

⁴⁴ *Eves v Eves* [1975] 3 All ER 768, CA.

⁴⁵ *Grant v Edwards* [1986] Ch 638, CA.

⁴⁶ *Chan Pui Chun v Leung Kam Ho* [2002] EWCA Civ 1075 [2003] 1 FLR 23.

⁴⁷ *Drake v Whipp* [1996] 1 FLR 826, CA.

⁴⁸ [1975] 3 All ER 768, CA.

⁴⁹ [1986] Ch 638, CA.

⁵⁰ *Ibid* at 648.

⁵¹ [1986] 1 FLR 171, CA at 177.

*constructive trust.*⁵²

However, Lord Bridge, who gave the leading judgment, considered that only direct contributions to the purchase price, whether initially or by payment of mortgage instalments, would suffice to establish this. The wife's supervision of the renovation of the family home was therefore regarded as inadequate to establish her entitlement to a share.⁵³

3.21 The most notorious example of an unsuccessful claim based on conduct alone, and one which has ever since heavily influenced the view that the law operates unfairly, is *Burns v Burns*.⁵⁴ In that case, Mrs Burns (who had adopted her cohabitant partner's surname) lived with her partner for 19 years, but failed to establish a beneficial interest in the family home. She had given up her job to have the couple's two children and then, when she did begin to earn money, had spent it on the household's expenses, fixtures and fittings in the house and the family's clothing. As in other unsuccessful actions, Mrs Burns failed because she could not point to any direct payment towards the acquisition of the home.⁵⁵

3.22 On the other hand, proof of even a relatively small *direct* financial contribution to the acquisition of the property has been readily accepted as establishing that the parties had a common intention to share. Thus, in *Midland Bank plc v Cooke*⁵⁶ it was held that the wife was entitled to a half share in the family home, based on her contribution to the initial deposit. This had been raised by use of a wedding present of just over £1,000 cash provided by the groom's parents as a gift to both spouses equally, so that the wife could be credited with half of it.

3.23 It remains unclear whether anything less than such direct contribution, to the deposit, legal charges or mortgage, will suffice to persuade the court that the parties intended to share the property. Some statements in *Gissing v Gissing* suggest that a contribution 'referable to the acquisition of the house' may suffice (at least if combined with an initial direct contribution),⁵⁷ for example, as Lord Pearson suggested, an 'arrangement between the spouses [whereby] one of them by payment of the household expenses enables the other to pay the mortgage instalments'.⁵⁸ Subsequently, some judges have recognised that 'often where a couple are living together and both are working and pooling their resources, which one of them pays the mortgage may be no

⁵² [1991] 1 AC 107 at 132–3.

⁵³ See also *Pettitt v Pettitt* [1970] AC 777, HL (husband's claim to share of house in wife's name failed because his improvements to the property were the kind that husbands do) and *Gissing v Gissing* [1971] AC 886, HL (wife's claim based on paying for her own and child's clothes and supplementing the housekeeping allowance insufficient).

⁵⁴ [1984] Ch 317, CA.

⁵⁵ For critical comment, see Law Commission, *Sharing Homes: A Discussion Paper* (TSO, 2002) para 5.17; Law Society, *Cohabitation: The case for clear law: Proposals for reform* (Law Society, 2002) p 1.

⁵⁶ [1995] 4 All ER 562, CA.

⁵⁷ [1971] AC 886 at 907–10.

⁵⁸ *Ibid* at 903.

more than a matter of internal accounting between them.’⁵⁹ Such recognition reflects the similar understanding which has now been reached by the courts when allocating property on divorce and it is arguable that a refusal to do so in this context could be regarded as discriminatory on the ground of gender.⁶⁰ Certainly, in *Stack v Dowden*⁶¹ the majority considered that Lord Bridge’s view was probably too strict, but the matter did not fall for decision in that case, so the point remains to be definitively established.

Proprietary estoppel

3.24 An alternative way of formulating a claim may be to base it on a ‘proprietary estoppel’. This is a claim that an owner of property has induced, encouraged, or allowed the claimant to believe that he or she has or will enjoy some right or benefit over that property; that, in reliance on this belief, the claimant has acted to his or her detriment, to the owner’s knowledge; and that the owner then seeks to take unconscionable advantage of the claimant by denying him or her the right or benefit that had been expected.⁶²

3.25 It can be seen that such a claim is very similar to that of a constructive trust and indeed, there appears to be little difference between the two, and little to determine which formulation should be chosen by a claimant or will be relied upon by a judge.⁶³ One distinction is that the claimant under a constructive trust must prove that she acted in reliance on a *common intention* that she should take an interest in the property, whereas an estoppel will arise if her acts result from her being misled by the other’s conduct. Further, as Lord Walker of Gestingthorpe noted in *Stack v Dowden*:⁶⁴

Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the "true" owner. The claim is a "mere equity". It is to be satisfied by the minimum award necessary to do justice ... which may sometimes lead to no more than a monetary award. A "common intention" constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests.

⁵⁹ *Bernard v Josephs* [1982] Ch 391 at 403–4. See also *Le Foe v Le Foe and Woolwich plc* [2001] 2 FLR 970. For the view that shared parental responsibility should found the basis for an equitable share in the family home, see C Sawyer, ‘Equity’s children – constructive trusts for the new generation’ [2004] CFLQ 31.

⁶⁰ See *White v White* [2001] 1 AC 596, HL; *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 [2006] 2 AC 618.

⁶¹ [2007] UKHL 17 [2007] 2 WLR 831: see Lord Hope of Craighead at [12], Lord Walker of Gestingthorpe at [26] and Baroness Hale at [63].

⁶² *Re Basham* [1987] 1 All ER 405 at 410.

⁶³ See eg Lord Bridge in *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 132 who appeared to equate the two; *Grant v Edwards* [1986] Ch 638 at 656: ‘The two principles have been developed separately without cross-fertilisation between them: but they rest on the same foundation and have on all other matters reached the same conclusions’; Chadwick LJ in *Oxley v Hiscock* [2004] EWCA Civ 546 [2004] 3 All ER 703 at para 66; Robert Walker LJ in *Yaxley v Gotts* [2000] Ch 162 at 176 and 180 – but note his change of mind in *Stack v Dowden* below.

⁶⁴ [2007] UKHL 17 [2007] 2 WLR 831 at [37].

3.26 A good example of the operation of proprietary estoppel is *Pascoe v Turner*,⁶⁵ in which the plaintiff and defendant, who was his housekeeper, began to live together as husband and wife. After the relationship broke down, the plaintiff, who had moved out, told the defendant: '*The house is yours and everything in it*'. Relying on his statement, she spent money on redecoration, improvements and repairs. On his claim to possession of the house, the Court of Appeal held that, by encouraging or acquiescing in the defendant's belief that the house was hers, he was estopped from denying this and that the only way in which the equity thus arising could be satisfied was by compelling him to transfer the house to her.

Quantification of shares in the property

When a trust is established

3.27 Once it has been established that the claimant has some beneficial interest in the property, the court must then determine the size of that interest. As we have seen, there is a strong presumption that the beneficial interest reflects the legal interest, so that if the property is held on a joint tenancy, it is presumed that the parties are each entitled to a half share, even though they may have made unequal contributions to the acquisition. To rebut this presumption will require convincing evidence and, in Baroness Hale's view, is 'not a task to be lightly embarked upon'.⁶⁶

3.28 If the task is attempted, however, the court will assess, from the whole course of dealing between the parties during their relationship, what is the appropriate quantification of their respective shares. This exercise enabled the House of Lords in *Stack v Dowden*⁶⁷ to agree with the Court of Appeal that, despite the family home being owned in joint names, the parties' shares were 65 per cent/35 per cent in favour of Ms Dowden, reflecting her financial contribution to the purchase. The House considered that the case was highly unusual because, even though the parties had lived together for some twenty years and had four children, all their financial dealings, apart from in relation to the family home, had always been kept strictly separate. Whether only cases of similar 'unusualness' will result in a departure from the legal title remains to be seen.

3.29 In *Oxley v Hiscock*,⁶⁸ Chadwick LJ considered that, in the absence of evidence of any discussion between the parties as to their respective shares,

⁶⁵[1979] 2 All ER 945, CA.

⁶⁶[2007] UKHL 17 [2007] 2 WLR 831 at [68]. Her Ladyship considered that the approach to quantification in joint names cases should be no stricter than in cases where the property is held in the name of one party only. Nonetheless, she took the view that 'there are differences between sole and joint names cases when trying to divine the common intentions or understanding between the parties', suggesting that it may be harder to rebut the presumption of equality in a joint names case than to establish a share in a sole names case. This is of relevance to our findings at para 8.46 *se seq* concerning the readiness with which legal advisers in our study were prepared to challenge the legal title, and suggests their approach of greater caution in joint names cases was correct.

⁶⁷[2007] UKHL 17 [2007] 2 WLR 831.

⁶⁸[2004] EWCA Civ 546 [2004] 3 All ER 703. See S Edwards, 'Property Rights in the Family Home – Clarity at Last' [2004] Fam Law 524.

*each [party] is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property.*⁶⁹

3.30 But in *Stack v Dowden*, his view that the aim is to find the 'fair' outcome was firmly rejected. Baroness Hale considered⁷⁰ that the preferable way of expressing the task was that used by the Law Commission, in their Discussion Paper, *Sharing Homes*⁷¹ where they stated:

There is much to be said for adopting what has been called a 'holistic approach' to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended.

3.31 Her reasons for preferring this formulation were that first, it emphasises that the court is seeking the result which reflects what the parties must have intended, and secondly, it prevents the court from imposing its own view, contrary to that intention, of what it thinks might be fair, which approach was rejected many years ago by the House of Lords in *Pettitt v Pettitt*.⁷² It might seem ironic that when exercising an equitable jurisdiction, invented to remedy the injustice created by strict adherence to the common law, it is now regarded as impermissible to reach the 'fair' outcome if this conflicts with the parties' prior intentions. Such a conclusion will no doubt reinforce the view that case-law alone cannot provide an adequate solution to the problems arising when cohabiting couples separate, and that a new statutory regime is required, a point we return to in Chapter Ten.

When proprietary estoppel is made out

3.32 By contrast, the remedy granted where the claim is based on proprietary estoppel is whatever is necessary to satisfy the equity which has arisen as a result of the reliance upon the owner's misrepresentation to the claimant. In *Pascoe v Turner*, this led to the complete transfer of the property to the claimant, but this may have been exceptional.⁷³ Chadwick LJ in *Oxley v Hiscock* considered that the outcome should be much the same regardless of whether a case is construed as one of estoppel or constructive trust. That now seems incorrect in the light of the approach taken in *Stack v Dowden* and it has been argued that one consequence of that case will be to encourage claims based on estoppel rather than trust.⁷⁴

⁶⁹ At para [69]. A much fuller list of possible factors was given by Baroness Hale in *Stack v Dowden* [2007] UKHL 17 [2007] 2 WLR 831 at [69].

⁷⁰ *Ibid* at [61]. See too Lord Neuberger at [144].

⁷¹ Law Com 278 (HMSO, 2002) at para 4.27.

⁷² [1970] AC 777.

⁷³ [1979] 2 All ER 945, CA. Though see also *Wayling v Jones* [1995] 2 FLR 1029, where the plaintiff was awarded the proceeds of sale of the deceased's hotel that he had promised the plaintiff.

⁷⁴ See L Barnes, 'Stack v Dowden: The Principles in Practice' at <http://www.familylawweek.co.uk/library.asp?i=2935>.

Occupation of the family home

3.33 It may be possible for a cohabitant to claim a right to *occupy* the home shared with the partner, even though ownership cannot be established. We do not deal here with the right of any cohabitant to seek an occupation order under Part IV of the Family Law Act 1996 in cases of domestic violence.⁷⁵ This is intended to deal with emergency situations where it is necessary for the safety of the victim that the perpetrator of violence or other abuse be excluded from the home. It is regarded as a Draconian measure and quite rightly focuses on the safety of the victim (and any children) rather than on rights to be in the property by virtue of the relationship *per se*. Instead, the focus here is on what means are provided by property law or contract law⁷⁶ to provide a cohabitant with a right to occupy which could survive, for a time at least, the ending of the relationship with the partner.

Licence to occupy

3.34 Where a cohabitant has given up some existing right or suffered some other detriment to go and live with the partner, it may be possible to find that she has an enforceable licence⁷⁷ to remain in occupation, for a time at least. In *Tanner v Tanner*,⁷⁸ for example (not a case of actual cohabitation), the man bought a house for the woman and their twin daughters and the woman gave up her rent-controlled tenancy to move into it. When he later tried to evict her, it was held that her giving up her flat amounted to consideration in return for a contractual licence to occupy and she was permitted to remain there for a year. However, this may be more difficult to establish where the parties did actually cohabit, because even if the non-owning partner can show that he or she suffered a detriment, such as giving up a secure tenancy like the woman in *Tanner*, it is unlikely that the owner would have promised to permit him or her to remain after their relationship has broken down.

Cohabitation contract⁷⁹

3.35 The decision in *Tanner* that it was possible to rely on a contract between the parties is interesting because it appeared to run counter to two generally understood assumptions in English law. First, there was the view that 'domestic' or intimate contracts are incompatible with a relationship based on love and affection.⁸⁰ Secondly, it was considered that on grounds of public

⁷⁵ See Lowe and Douglas, *op cit* n 17 at pp 230-239.

⁷⁶ We consider statutory provisions which may enable cohabitants to remain in occupation below.

⁷⁷ Or a licence by estoppel: see *Greasley v Cook* [1980] 3 All ER 710, CA.

⁷⁸ [1975] 3 All ER 776, CA. Contrast *Horrocks v Forray* [1976] 1 All ER 737, CA.

⁷⁹ See C Barton, *Cohabitation Contracts: Extra-Marital Partnerships and Law Reform* (Dartmouth, 1985) for a general consideration, and his 'Cohabitants, Contracts and Commissioners' [2007] Fam Law 407 for a view in the light of more recent developments. For examples of provisions which could be included in such contracts, see Resolution, *Precedents for Cohabitation Agreements* (Resolution, 2006).

⁸⁰ *Balfour v Balfour* [1919] 2 KB 571, CA; *Horrocks v Forray* [1976] 1 All ER 737, CA.

policy an agreement between unmarried partners should not be upheld, because of its promoting a sexual relationship outside marriage. As Lord Wright stated in *Fender v St John Mildmay*,

*The law will not enforce an immoral promise, such as a promise between a man and a woman to live together without being married or to pay a sum of money or to give some other consideration in return for an immoral association.*⁸¹

3.36 However, in *Sutton v Mishcon de Reya and Gawor and Co*,⁸² the court drew a distinction between a contract for sexual relations outside marriage, which would be unlawful, and a contract setting out property rights arising from a relationship which involves sexual relations, which could be valid. The Committee of Ministers of the Council of Europe (1988) has adopted a recommendation that property contracts between unmarried couples should not be considered invalid solely because of the fact of the parties' unmarried status and it seems likely that an English court would now uphold such a contract, at least where it has been entered into after independent legal advice to guard against any undue influence.

Statutory protection and recognition of cohabitants' property interests

3.37 We turn now to consider the statutory provisions that have been introduced to deal with the property consequences of cohabitation. It will be seen that these do provide the courts with some overt discretion to protect the more vulnerable party, but this will usually be confined to permitting continued occupation of the property.

Ordering or postponing sale of the property

3.38 When cohabitants separate, one may wish to remain in the former home and the other to have it sold so as to realise the capital. It is this step which may trigger disputes as to entitlement to occupy, or to a share in the capital. If the parties are unable to reach an agreement, either may apply to the court for an order under s 14 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA),⁸³ and it is this jurisdiction which primarily governs the outcome of cohabitants' property disputes.⁸⁴ The court may 'declare the nature or extent of a person's interest in property subject to the trust', order a sale, or order that sale be postponed until a certain event and in the meantime require the party remaining in occupation to pay the other rent.

⁸¹ [1938] AC 1 at 42.

⁸² [2003] EWHC 3166 (Ch) [2004] 1 FLR 837. See M Pawlowski, 'Cohabitation Contracts: The *Sutton Case*' [2004] Fam Law 199; R Probert, '*Sutton v Mishcon de Reya and Gawor & Co* - Cohabitation contracts and Swedish sex slaves' [2004] CFLQ 453.

⁸³ See S Baughen 'Trusts of Land and Family Practice' [1996] Fam Law 736; G Ferris and G Battersby, 'The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land' (1998) 62 *Conveyancer* 168.

⁸⁴ *W v W (Joinder of Trusts of Land and Children Act Applications)* [2003] EWCA Civ 924, [2004] 2 FLR 321 per Arden LJ at [26]. An application may be joined with one under the Children Act 1989 Sch 1 – where this is the case, they should be dealt with together: *ibid*.

3.39 TOLATA provides a set of guidelines in s 15 on matters to be taken into account when exercising these powers. Under s 15(1) the matters to which the court is to have regard include:

- (a) *the intentions of the person or persons (if any) who created the trust,*
- (b) *the purpose for which the property subject to the trust is held,*
- (c) *the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and*
- (d) *the interests of any secured creditor or any beneficiary.*

Section 15(3) also requires the court to have regard to the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust.

3.40 In deciding applications under this Act, the courts will take the view that if two people buy property as a *home* for themselves (together with any children they may have), the underlying purpose of the trust is to provide a home and not an investment⁸⁵ and so while that purpose continues to exist, the property should not be sold.⁸⁶ However, once the purpose for which the property was acquired has ended, the court is likely to order a sale.⁸⁷

Transfer of rented property from one cohabitant to another

3.41 We have seen in Chapter Two that cohabitants are statistically more likely to rent than to own their home,⁸⁸ so it should be noted that there is statutory provision, under Schedule 7 to the Family Law Act 1996 for a court to order the transfer of a tenancy (be it granted by a private sector or social landlord) from one cohabitant to another on the breakdown of the relationship.⁸⁹ However, our study did not include any disputes regarding rented property and the Law Commission has found few instances of clients receiving legal aid for assistance with such cases.⁹⁰ The rules applying to the rented housing sector depend upon the type of lease and it seems that housing matters are generally dealt with via the landlord rather than in direct dispute between the parties.⁹¹

⁸⁵ But see *Laird v Laird* [1999] 1 FLR 791, where the district judge and circuit judge on appeal differed in their view of what the parties had intended.

⁸⁶ *Re Evers' Trust* [1980] 3 All ER 399, CA.

⁸⁷ *Jones v Challenger* [1961] 1 QB 176, CA. Cf *Bedson v Bedson* [1965] 2 QB 666, CA (husband permitted to remain in property consisting of a shop with living accommodation above, since the shop was also his livelihood).

⁸⁸ See above, para 2.23.

⁸⁹ The court cannot make an order to transfer the tenancy until the couple have ceased living together: Sch 7, paras 3(2), 4(b). A transfer cannot be made where the tenancy is held jointly by the entitled cohabitant and a third party: *Gay v Sheeran* [1999] 2 FLR 519, CA. The transferee may be ordered to pay compensation to the transferor: Sch 7, para 10.

⁹⁰ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper* Consultation Paper No 179 (TSO, 2006) at para 3.58 n 103. There is no reported case discussing the application of the Schedule to former cohabitants and no statistics are available to determine how frequently a transfer order is made

⁹¹ A tenant of rented property, whether in joint names or not, may unilaterally terminate the tenancy by giving due notice to the landlord, thus precipitating the eviction of the remaining partner. Tenants of social landlords whose relationship has broken down may be advised to

Powers where the cohabitants have a child - Schedule 1 to the Children Act 1989

3.42 The final statutory regime that falls to be considered here is contained in the Children Act 1989, Schedule 1. An application for an order under this jurisdiction may be made by a parent⁹² or other carer of a child⁹³ against the other parent or the child's step-parent.⁹⁴ The court may order the respondent to make periodical payments to the applicant for the benefit of the child or to the child himself, or partly to both;⁹⁵ lump sum payments;⁹⁶ and, if proceedings are heard in the County Court or High Court, settlements of property and property transfers.⁹⁷ It has been held that the words 'the benefit of the child' are not confined to *financial* benefit for the child, but are broader. Thus, in *K v K (Minors: Property Transfer)*⁹⁸, it was held that there was power to order an unmarried father to transfer his tenancy of the family home to the mother for the benefit of the children. However, the more usual settlement, where circumstances permit, is to make an order under which a home is (purchased and) settled on trust during the child's dependency, to revert to the owner (usually the father) at the end of the term.⁹⁹

3.43 The importance of these powers is that they can provide the adult carer of the children with a home (and potentially a valuable maintenance allowance as the child's carer) for the duration of the children's dependency. This can obviate, to a greater or lesser extent, depending upon the wealth of the payer, the lack of any direct rights of support in a cohabiting relationship. The power to order a transfer of property¹⁰⁰ or lump sum was included to cater for the

give such notice, on the assurance that they will be granted a fresh tenancy of another property: see C Hunter and S Blandy, 'Relationship breakdown, women and tenants' rights – choice or paternalism' [2004] CFLQ 165; M Davis and D Hughes, 'An End of the Affair – Social Housing, Relationship Breakdown, and the Human Rights Act 1998' [2004] Conv 19. The Law Commission has recommended that all tenants should be required to agree to the service of a notice to quit for it to be effective: see *Renting Homes: The Final Report* Law Com No 297 (TSO, 2006) paras 4.9, 4.12

⁹² Including the unmarried father without parental responsibility, and a step-parent (so long as he or she is married to, or a civil partner of, the child's parent: Sch 1 para 16(2) as amended).

⁹³ Such carers must be guardians, special guardians and any person in whose favour a residence order is in force Sch 1, para 1(1) as amended by Adoption and Children Act 2002 Sch 3 para 71.

⁹⁴ Note that the definition of step-parent rules out a former cohabitant.

⁹⁵ Sch 1, para 1(1)(a), (b) and 1(2)(a); *G v G (Periodical Payments: Jurisdiction)* [1997] 1 FLR 368, CA.

⁹⁶ Sch 1, para 1(1)(a), (b) and 1(2)(c), up to a maximum of £1,000 (or more as prescribed) if the proceedings are heard in the magistrates' court.

⁹⁷ Sch 1, paras 1(1)(a) and respectively 1(2)(b), (d) and (e). See E Cooke, 'Property adjustment orders for children' (1994) *Journal of Child Law* 156.

⁹⁸ [1992] 2 All ER 727, CA. It would now be possible to transfer the tenancy under Sch 7 to the Family Law Act 1996, as noted above.

⁹⁹ *T v S (Financial Provision for Children)* [1994] 2 FLR 883; *J v C (Child: Financial Provision)* [1999] 1 FLR 152; *A v A (A Minor: Financial Provision)* [1994] 1 FLR 657.

¹⁰⁰ See E Cooke, 'Children and Real Property – Trusts, Interests and Considerations' [1998] *Fam Law* 349.

situation where an absent parent might wish to make a one-off settlement for his child but otherwise have nothing to do with him or her.¹⁰¹ In practice, this is likely to be a luxury that only the wealthy can afford, and reported case-law on this issue has certainly concentrated upon the lifestyles of the very rich. It is also important to note that the general approach of the English courts is not to make orders that provide support for an adult child, so that the purpose of these orders is to ensure that the child (and indirectly the carer) is properly (and perhaps very comfortably) supported during his or her dependency. Thereafter, the child and the carer must fend for themselves.¹⁰²

3.44 In assessing what, if any, order to make the court is directed¹⁰³ to have regard to all the circumstances of the case including:

- (a) The income, earning capacity, property and other financial resources which [any parent, the applicant and any other person in whose favour the court proposes to make the order]¹⁰⁴ has or is likely to have in the foreseeable future.
- (b) The financial needs, obligations and responsibilities which [any parent, the applicant and any other person in whose favour the court proposes to make the order] has or is likely to have in the foreseeable future.
- (c) The financial needs of the child.
- (d) The income, earning capacity (if any), property and other financial resources of the child.
- (e) Any physical or mental disability of the child.
- (f) The manner in which the child was being, or was expected to be, educated or trained.

3.45 Although the above contains no reference to the standard of living of either the applicant or the respondent, the courts have been clear that the child ought not to be prejudiced by the fact that the carer (usually the mother) enjoys a lower standard of living than the absent parent.¹⁰⁵ The child is entitled to be brought up in circumstances bearing some relationship with the payer's current resources and standard of living.¹⁰⁶ This means that the carer will benefit too. Indeed, the courts have accepted that, since the child must be looked after, the child's primary carer must, where feasible, receive an allowance sufficient to enable her to do this at the level appropriate to the other aspects of the standard of living (such as housing, private schooling, private health insurance, etc) that the child is to enjoy.¹⁰⁷

3.46 These guidelines are similar to those used in jurisdictions applicable to married applicants or those in a civil partnership. However, the situations are

¹⁰¹ Law Commission, *Report No 118, Illegitimacy* (HMSO, 1982) para 6.6.

¹⁰² See *Chamberlain v Chamberlain* [1974] 1 All ER 33, CA at 38 per Scarman LJ and *Draskovic v Draskovic* [1980] Fam Law 87.

¹⁰³ Sch 1, para 4(1).

¹⁰⁴ Sch 1, para 4(4).

¹⁰⁵ See *H v P (Illegitimate Child: Capital Provision)* [1993] Fam Law 515; *A v A (A Minor: Financial Provision)* [1994] 1 FLR 657.

¹⁰⁶ *J v C (Child: Financial Provision)* [1999] 1 FLR 152.

¹⁰⁷ *Re P (Child: Financial Provision)* [2003] EWCA Civ 837 [2003] 2 FLR 865 on which see S Gilmore, 'Re P (Child)(Financial Provision) – Shoeboxes and comical shopping trips – child support from the affluent to the fabulously rich' [2004] CFLQ 103.

not analogous since the court's focus in a Sch 1 application has to be on the *child's* needs, with the carer only indirectly considered. Thus, although a carer may be secure for the duration of the child's dependency, she is likely eventually to lose her home and, unless she has been able to establish a share through the mechanisms discussed above or has saved hard in the interim (or established a new relationship), be in the position of Mrs Burns with nowhere to go.¹⁰⁸ This makes Schedule 1 a less attractive option than it might otherwise appear.¹⁰⁹

3.47 Having discussed the legal framework (or, in the phraseology of Mnookin and Kornhauser, the 'shadow') in which cohabitants' disputes must be resolved, in the following chapters we describe the findings from our study, commencing with the circumstances of the cohabitants who took part.

Summary

- The European Court of Human Rights, through its interpretation of 'family life' in Article 8 of the European Convention, has moved closer towards recognizing the claims of cohabitants to protection by the state, but has not equated cohabitation with marriage.
- In English law, equitable remedies, most importantly the constructive trust, have been used to recognise some cohabitants' claims to a share in the family home, but such devices are focused on implementing the parties' (implied) intentions, rather than to produce a fair outcome.
- Statutory innovations can provide a measure of protection for *occupation* of such property, by postponing its sale or even requiring its transfer (but only if held on a periodical tenancy) to the vulnerable partner.
- Where the parties have had a child together, the court may also provide a degree of reasonably long-term security for both child and primary care-taker through a flexible range of powers going so far as to provide a child-caring allowance alongside lump sum and property orders. But these powers stop well short of what a spouse might expect on a divorce.

¹⁰⁸ Cf *Re B (Child: Property)* [1999] 2 FLR 418, CA where the property was in joint names. The parties agreed that the mother was to receive 'for the benefit of the child' 70 per cent of the net equity when the home was eventually sold. It was held that the mother should retain this share as against the child, as compensation for having assumed responsibility for supporting her and paying the mortgage.

¹⁰⁹ S Arthur, J Lewis, M Maclean, S Finch and R Fitzgerald, *Settling Up: making financial arrangements after divorce or separation* (National Centre for Social Research, 2002) found that few of their sample (discussed above at para 2.27) were advised to use it as the basis of a claim. We explore in Chapters Six to Nine below its use in our study and advisers' views of its utility.

Chapter Four: The Cohabitants

Basic Statistical Data

4.1 The core group of participants in our study comprised 29 individuals, including five couples – hence 24 cases. Brief descriptions of each of these individuals and their cases are given in Appendix 2. The group, all of whom had actually been cohabiting full-time, comprised 11 men and 18 women whose ages ranged from 26 to 55 years. The average age of the women was 37 years and that of the men 48 years. They had separated after cohabiting for an average (and also median) duration of 9 years, ranging from 9 months (by some way the briefest period – the next being 2 years) to 24 years. Eleven of the partnerships had lasted for ten years or more. For 19 of these 29 individuals the relationship from which they were then disengaging had evidently been their first major relationship, with their average age at the time it had started being 26 years. The other 10 individuals were aged between 33 and 54 years when their relationships had started, most having followed earlier significant relationships, several involving children.

Table 1: Sample Profile

Age	Women (18)	Men (11)	Total (29)
20s	2	0	2
30s	8	1	9
40s	8	4	12
50 and over	0	6	6
Duration of cohabitation			
Under 2 years	0	1	1
2-5 years	7	3	10
6-10 years	4	0	4
10-19 years	5	6	11
20+ years	2	1	3

4.2 In 15 of the 24 cases there were children of the relationship, ranging in age from six months to 16 years, in families of one to four children. In six of these cases there were also children of one of the partners living with the family. In one case, one partner had dependent children from another relationship living with their former partner. Of the nine cases where there

were no children of the relationship, three had the children of one partner from a previous relationship living within their family unit. In another, the children of one partner lived with their other parent. Of the remaining cases, four couples had no children at all and in one other, only adult children, who were not involved in any way.

4.3 In seven of the cases involving children of the relationship, there was no dispute over them other than relatively trivial occasional wrangling between the parents. Six cases involved more significant parental disagreements of varying degrees. Three further cases had involved prior or concurrent court proceedings in respect of their children.

4.4 Much has already been written describing and categorising the variety of cohabiting relationships,¹ and it was not our primary focus to add further to this analysis. However, differences in the style of relationships experienced within our sample were clear, ranging from the long-term, well-established family unit at one extreme, through to the couples in much shorter childless relationships who had come together sometimes almost as a matter of practical convenience without apparently any commitment in terms of long term intention.² Examples of the two extremes in our sample were Frances, who had lived with her partner for 20 years, bringing up their four children and whose whole adult life had been entirely devoted to her family, and Natalie, whose partner had moved into her home temporarily while in particular financial straits, until she asked him to leave after two and a half years. Between these extremes were a variety of combinations of attitude and commitment bearing out the continuum found by Smart and Stevens. However, it is clearly difficult to assess the degree of commitment to a relationship which is in the process of breaking up.

4.5 A further 24 cases were described to us anonymously by practitioners. These relationships had lasted on average for 8 years, ranging from 1 to 18 years.³ Fourteen of the 24 cases involved children of the relationship. The basic characteristics of these couples appeared to be very similar to those of our core sample.

4.6 A substantial majority (22) of the individuals in the core sample told us that they had been the partner who had initiated the separation or that it had been a mutual decision. It is perhaps not surprising that the partner desiring the separation should be the one more inclined to respond to our request to participate in the research, being possibly more proactive and at any rate more positive in respect of the separation. On the other hand, those other seven individuals not in this position also engaged with the research fully and were certainly equally forthcoming with us.

¹ See Chapter Two.

² Compare 'mutual commitment' and 'contingent commitment' in C Smart and P Stevens *Cohabitation breakdown* (2000) Joseph Rowntree Foundation/Family Policy Studies Centre.

³ See Appendix One for an explanation of this part of the study.

4.7 The partner who had initiated the separation was not always the one who initiated the property issue. In terms of which of the partners had initiated the property issue, our sample was mixed and indeed, in many cases it was difficult to identify which of them this was. In some cases, both the partners appeared to have a mutual drive to resolve matters, rather than the impetus coming all from one or the other. There is a slight bias in our core sample towards female participants (18). The greater reluctance of men to participate in research is a not uncommon phenomenon,⁴ and we do not believe that this has significantly affected the diversity of cases.

4.8 The reasons for the breakdown in relationships were not probed in any great detail. The most frequently cited reason was along the lines that the relationship had run its course. Others gave additional or alternative reasons including the intervention of new partners, violence, drunkenness and financial mismanagement.

Involvement of professional practitioners

4.9 By definition, given our methodology, all our core participants (except for one of the partners who joined later) had been, to some degree, in receipt of advice or assistance from a professional practitioner – the 21 family solicitors and 4 mediators, who had referred them to the project. The degree of engagement ranged from taking advice on a one-off consultation basis, to a full-scale client relationship and in several cases involving more than one practitioner. By the end of the study, all but two of the core sample had taken legal advice on at least one occasion. Four cases had involved mediation, which had also been used in three further cases in respect of disputes over the children.

General Profile of the Core Sample

4.10 Our study was aimed at those who seek professional advice or assistance in relation to property and financial issues, and it was our intention to focus on the whole range of separating cohabitants, from those with very little disagreement between them, through to the more contentious cases of dispute. However, we found it more difficult to identify those at the less disputed end of the range. We speculated that numbers of such cases were more likely to be found through conveyancers and CABx, rather than through family law solicitors. However, we recruited no one to the research from either of these two sources.

4.11 Many family law solicitors told us that they see numbers of clients on a one-off consultation basis immediately after, or in some cases before separation who, having been advised on basic property law, recognise that their situation is relatively clear cut and do not return. Five of our core sample fell into this category, which may under-represent a hidden majority of those with property/financial issues to resolve with a former partner. We suspect

⁴ C Smart and P Stevens (2000) *Cohabitation breakdown* Joseph Rowntree Foundation/Family Policy Studies Centre.

that solicitors (though probably not mediators), despite our requests to report on and make the research known to all relevant clients approaching them, in fact let us know mainly about those cases they thought we would find particularly interesting and which perhaps they had found most interesting and memorable themselves. This may have resulted in a sample weighted toward the more complex and contentious end of the range. However, while our numbers do not necessarily represent the actual proportions of cases to be found along the range, they did provide sufficient data around each level of dispute to enable us to examine properly a fully diverse range of disputes in terms of financial value, of complexity and of levels of contentiousness. By the end of our contact with the 24 cases in our core sample, all but six had been concluded, providing us with a range of modes of process and resolution to examine. In approximately one third of the concluded cases, the parties had negotiated between themselves after obtaining legal advice, with approximately another third having been resolved through solicitor negotiation or mediation. Of the final third where court proceedings had been issued, half were ultimately adjudicated in court. Two cases had been abandoned.⁵

4.12 The characteristics of our sample appear more similar to the current profile of divorcing couples than to the overall average population of cohabiting couples, being typically long term relationships, many with children and all but one owning property. Provisional Data Tables provided by the Office of National Statistics in May 2006 show the mean age for divorce in 2004 to be 42.7 years for men and 40.2 years for women. The median duration of marriage is 11.5 years. In our sample, the average age of our subjects was 41 years with the median length of relationship being nine years.

Attitudes to marriage

4.13 Among half the couples in our core sample, neither partner had been married previously. These were, as might be expected, those who had met when in their mid-twenties, including seven with relationships which had gone on to last nine or more years. In seven cases one of the couple had previously been married, and in five cases both partners had been married before – one or two more than once. Only 32 per cent of our interviewees had any personal experience of marriage.

4.14 The issue of why people cohabit rather than marry has been explored in other research.⁶ While it was not our purpose to add to previous studies by

⁵ For detailed discussion of outcomes, see Chapter Nine.

⁶ A Barlow, G James, 'Regulating Marriage and Cohabitation in 21st Century Britain' (2004) 67,2, *Modern Law Review* 143-176; C Smart and P Stevens, (2000) *Cohabitation Breakdown* Joseph Rowntree Foundation/Family Policy Studies Centre; M Hibbs, C Barton, J Beswick, 'Why Marry? Perceptions of the Affianced.' (2001) *Fam Law*, 197; L. Jamieson, M Anderson, D McCrone, F Bechhofer, R Stewart, Y Li, 'Cohabitation and commitment: partnership plans of young men and women.' (2002) *The Sociological Review*, 356, J Ermisch, M Francesconi, 'Patterns of household and family formation', P Morgan, *Marriage-Lite: The Rise of Cohabitation and its Consequences* (2002) The Institute for the Study of Civil Society. S Arthur, J Lewis, M Maclean, S Finch, and R Fitzgerald, '*Settling Up: making financial arrangements after divorce or separation.* (2002), National Centre for Social Research.

exploring these issues in further depth, we did ask our core sample of cohabitants about the individual circumstances and beliefs leading to their being in a cohabiting rather than a married relationship. Many of our sample had been in relationships of considerable duration. Irrespective of how they had originally come to be living together, 16 couples had children and 22 had bought or transferred properties as their joint homes after the start of their relationships – both significant events which might have triggered either a marriage, or some other form of individual agreement setting out rights, responsibilities and entitlements.

4.15 The views given by participants in this research corresponded closely to the sorts of views given by subjects in earlier studies. Marriage had indeed been discussed, with varying degrees of seriousness, by all except two of the couples in our sample. For four couples, it had been a principled and mutual decision not to marry, but in none of these cases had the couple made any alternative form of agreement. In eleven cases – nearly half our sample - one of the partners would have preferred to marry, but the other did not want this. Reasons given by those not wanting to marry included previous experience of divorce, either personal or that of friends or family, religious/cultural factors or simply not considering it a necessary institution:

I never really saw the need for any institutional government to ratify my personal relationships, and P was very much against getting married because it would please his [staunch Catholic] mother.’ (Caroline)

4.16 For Mary, the absence of a legislative framework for her separation was a positive thing:

‘If I don’t get married, I don’t have to pay for a divorce, which sounds pathetic but there does not have to be any state involvement and it can be our decision. That is a plus.’

In contrast Gina said:

In hindsight, I can see the very strong financial case for being married. In terms of everything else, it’s not something that has ever been important to me – or him. But it was discussed – it’s not like we didn’t agree or didn’t think of it. We did talk about things like ‘commitment ceremonies’, but it all seemed a bit like marriage really.

Frances would have liked to have married:

... I suppose I’m quite traditional. P never was. I have a feeling it was to do with money and not sharing money.’

As the family expanded however, it never seemed quite the right time to do anything about this:

I honestly did think we would get married. We drifted along. In the end I realised it wasn’t going to happen. Looking back, I think ‘Why didn’t I do

something before that?' - but at each stage there were things happening with the children.

4.17 In five other cases, the couple had agreed that they would marry at some stage, but for them too, the time had never been right and they had never given it sufficient priority actually to go ahead with it. As Martin commented:

It seemed the right thing to do... It was always going to be in the future. We always seemed to be too busy doing other things. It's a shame really.

4.18 Some acknowledged, in hindsight, that they probably had actually lacked sufficient commitment:

Yes, she became pregnant and we were going to get married ... firstly [son] came and after that – if you're not totally committed, there sort of must be something wrong. (Ben)

4.19 Jenny, who had been briefly married before, never really saw the point in getting married during her 15 year relationship, despite her partner's wishes, describing a combination of reasons:

No, I didn't. I'd done it. Just 'no, I'm not doing it again', and he didn't go on about it. Then, a couple of years before we separated we discussed it again. He said why wouldn't I marry him? But we'd been together so long, I didn't see the point. That was my answer, it wasn't an issue. But then I did agree that we would. We bought the rings but never got round to doing it. Something more important each time would come up. Something in the budget which would not allow us to do it. We had to do the kitchen, or the bathroom, or the garden. We just never got round to doing it, and then he left.

4.20 In two cases, arrangements had actually been made for a wedding, but the relationship had broken down before that date.

4.21 Even among those who would like to have been married, there appeared to be a residual suspicion of marriage, or rather of divorce. Views expressed by several of our sample, regarding experience of 'messy divorces', revealed a curious misconception regarding the ending of a marriage. A 'messy divorce' was seen as potentially more difficult and traumatic than separation from cohabitation. Though objectively the cohabitants in our sample may have been facing similar or worse problems in resolving issues consequent on the breakdown of their relationship – arrangements for the children and resolution of finances and property, there was a perception that the very fact of the separation involving a divorce would make it more painful. This was perhaps most poignantly expressed by Frances, who, while she would actually have preferred to be married, nevertheless saw it as one piece of luck in her otherwise rather dire situation that she at least did not have to go through a divorce:

...but then I'd have a divorce on my hands as well. So I think from the point of view that I'm not married, at least I don't have a divorce to worry about, and I know how stressful that is for a lot of people...

4.22 It was not perceived or understood that the divorce procedure itself might well be the least difficult aspect and that the issues which make divorce difficult – sorting out arrangements for the children and resolving financial and property issues – are likely to be equally problematic whether the broken relationship has been a marriage or a cohabitation. Similarly, Karen had not realised she might have been in a better position had she been married, but although she does now, she remains wary of marriage:

I know legally I might have been in a better position, but emotionally it would have been harder so I don't regret not knowing at all.

4.23 Emma, while going through her own violent dispute involving very high stakes, had been comparing notes with a friend of hers currently going through a divorce. When considering whether she might have been better off if she had been married herself, she commented:

I don't know – I could imagine it'd be ten times worse.

Financial Arrangements during the relationship

4.24 There was considerable variation in the way couples organised their day to day finances, with no clear pattern emerging. This is a complex area involving a variety of potentially interrelating dimensions. We tested various models, seeking correlations between the 'types' of relationships and the ways in which finances were organised.

4.25 We looked first at the 'types' of relationships, in terms of their longevity, whether or not there were children of the relationship and then at the way in which income earning was split between the partners. Long relationships are likely to have created a degree of inter-dependence between the partners, the more so where there are children, adding in the dimension of the division of roles and responsibility between the partners in terms of breadwinning and childcare. Income earning capacity is not, of course, a feature solely related to the competing demands of child care. Among our sample, there were significant differences between the men and the women, with a clear bias towards lower paid employment for women, reflecting the picture found in the population at large⁷.

⁷ Individual Incomes of Men and Women 1996/7 to 2002/03: A Summary. (2004) Women and Equality Unit, DTI, London.

Table 2: Couples: Length of relationship/Financial contributions

	Long (8+ years), with dependent children	Short (6- years), with dependent children	Short – no children	Total
One main breadwinner	6 * (+1 without children)	4 *	2	13
Unequal contributions	5	2		7
Equal contributions	1	-	3	4
Total	13	6	5	24

* 3 of the couples in these categories had only children from another relationship living with them.

4.26 Here there were clear patterns. Table 2 shows that in half our sample, income was coming substantially from only one partner – typically the man. This is easily explained where there were children of the relationship, with one partner going out to work, leaving the other at home with responsibility for the children. This extended to cases where, though there were no children of that relationship, one of the partners had children from previous relationships. Some of these couples too relied on income from one partner. All in all, this demonstrates a very traditional model of family life. The two childless couples where only one partner contributed financially were both, as it happened, relationships which proved unsuccessful very quickly and were the shortest in the sample.

4.27 We can look next at the seven cases of unequal financial contributions to the partnership, by which we mean couples where there was a main breadwinner, but also significant additional income from the other partner. All these cases involved children and, with one exception where the roles were reversed, the woman in part-time and lower paid employment.

4.28 The far fewer cases involving equal financial contributions to the relationship were not surprisingly clustered towards the shorter relationships without children. Here both partners were earning to full capacity and contributing in a more business-like manner which, at that stage at least, would not lead to financial interdependence. There was only one case involving children where contributions were seen as having been more or less equal over the course of the relationship.

4.29 As the circumstances of a relationship change, most obviously when children are born, and then grow up, the financial arrangements are likely also to change. Our sample included many couples where financial organisation had clearly been of a dynamic nature, changing several times to

accommodate new situations. On the other hand, there were also those relationships where arrangements had changed very little over time.

4.30 We then looked at the modes by which finances were owned and managed between the partners. We investigated whether or not the ownership of assets, and the mode of banking bore any correspondence to each other, and then to the question of who took on the responsibility for actually managing the finances in terms of ensuring that bills were paid, budgeting, etc.

Table 3: Couples: Property ownership/Banks accounts/Financial management

	Sole manager	Joint Manager	Total
Sole home owners (n = 11):			
Sole accounts	6	3	9
Combination	-	2	2
Joint accounts	1	-	1
Joint home owners (n = 12):			
Sole accounts	3	4	7
Combination	1	-	1
Joint accounts	2	2	4
Total	13	11	24

4.31 Table 3 shows that ownership of the home was divided equally between sole and joint owners, with sole ownership being divided equally between men and women.⁸ . With regard to formal arrangements in terms of bank accounts, two-thirds of our sample operated their finances from sole accounts. This trend reflects similar findings in other studies that the majority of cohabiting couples keep individual accounts,⁹ and a growing trend towards a separation of finances has been identified in other studies¹⁰ for couples overall, cohabiting and married. A few couples in the sample also operated additional accounts used for specific purposes (for example: holidays, school fees), some of which were held jointly and others in sole names. A remaining five couples operated entirely from joint accounts.

⁸ Property issues are discussed fully in Chapter Five.

⁹ See for example S Arthur, J Lewis, M Maclean, S Finch, and R Fitzgerald, *Settling Up: making financial arrangements after divorce or separation*. (2002), National Centre for Social Research.

¹⁰ See for example J Pahl, 'Individualisation in Couple Finances: Who Pays for the Children?' [Social Policy and Society](#), (2005) 4/4, pp 381-391.

4.32 Where the home was owned solely by one partner, typically the couple also operated from sole accounts. In the case of joint owners, again slightly more than half operated from sole accounts, with the remainder using a combination or just joint accounts.

4.33 However, the day to day management of finances showed an entirely different picture, with little correspondence to the formal mode of ownership. Our sample was divided more or less equally between those couples who managed their finances together, and those where one partner had taken on that responsibility. Where this had happened, this was divided equally between men and women (taking into account that our sample included more women than men).

4.34 It was difficult to find patterns across these two sets of dimensions. However, there were four cases where one partner - the man - was clearly dominant in terms of economic power – owning the home, operating from a sole account, being the main breadwinner and managing the finances. While this was true of only a small number, it happened to be the largest cluster of corresponding dimensions in our sample and demonstrates the clear scope for the Mrs Burns scenario, even today. However, there were also apparent inconsistencies. While frequently the main breadwinner was also the partner running the finances, there were several examples where the other partner appeared to be the financial ‘boss’. One rather extreme example of this situation was James, whose partner somehow had the control of an account in his sole name to the extent that he was unable to use it himself. In another case, Linda took day to day responsibility for the finances in her family, while her partner was the main breadwinner, had his own account and owned their home in his sole name. It was clearly not necessarily the case that the economically stronger partner always held the reins.

4.35 Looking at the couples having the greatest areas of equality – joint home ownership, joint accounts and equal contribution – there appears to be little correlation with the mode of management. Of the few cases operating from joint bank accounts, more were in fact managed on a day to day basis by one partner alone. In each case where one partner took this role it was for pragmatic reasons. It is a fact of life that some people are more capable of financial management than others, and would therefore naturally be more suited to taking on that role in their relationship. For example Mary explained:

I was always really good on money and set up bankers' standing orders and the managing of the finances. He was rubbish. I knew that when I met him. That's my strength, and he's brilliant at cooking - so he can do that, and I'll do the finances.

On the other hand, several couples organised their finances together, albeit from sole bank accounts.

4.36 We looked finally at whether or not the degree of commitment to the relationship had any bearing on a couple's financial organisation. As already stated, this is obviously a difficult concept to measure objectively. From our

interviews of couples, we are only too aware that two former partners can hold quite inconsistent views. Again, however, this yielded no pattern, with the differing degrees of apparent commitment spread across the full range of financial organisation.¹¹

4.37 We could find no patterns of financial organisation to do justice to the myriad of facets which contribute to a full and meaningful picture of how finances are organised.¹² Furthermore, the ways in which finances are organised are prone, as we have described, to change over time. Organisation of finances in partnerships appeared to be based far more on pragmatic and circumstantial factors of an individual and idiosyncratic nature, than on the 'type' of relationship, formal modes of ownership or any notion of commitment.

4.38 Generally speaking, the longer relationships had lasted, the more enmeshed and complex they had become, as would be expected. In many cases these arrangements appear to have been on a fairly ad hoc and flexible basis, reflecting happier and more trusting times. Conversely, the shorter childless relationships appeared generally to be less of a shared enterprise between the couple. In these relationships, financial arrangements were both on a more businesslike and a more independent footing. Typically one partner would make a monthly contribution towards household expenses to the other, and they would otherwise operate independently of each other. However, it appeared to us overall that in fact financial arrangements between couples are more haphazard than being organised on the basis of deliberate decision making. We would suggest that arrangements arise out of a variety of circumstances: default, pragmatic considerations, financial/management expertise, and personality dominance.

4.39 For many couples, their financial arrangements appeared not to have been discussed but had simply evolved from the arrangements in existence before they came together. For example, it was not untypical that in cases where one partner had owned a property previously, when a new home had been purchased during the couple's relationship, it too was put in the name of that partner. In one or two cases, one of the partners had not previously held a bank account, and so the finances were run from the other partner's already existing sole account.

4.40 Pragmatic considerations included one or two instances where people were employed by a bank or building society and were thereby eligible for preferential rates. In such cases, the couple's finances were operated from an account in that partner's name. In another case, the female partner in a couple whose relationship lasted only two years and appeared at the 'contingent' end of commitment, who took on the role of financial manager,

¹¹ Compare A Barlow, C Burgoyne and J Smithson, 'The Living Together Campaign – the Impact on Cohabitants' [2007] Fam Law 165.

¹² Compare R Tennant, J Taylor, J. Lewis, *Separating from cohabitation: making arrangements for finances and parenting*. (2006) DCA Research Series 7/06 Chap 2, who found four financial models: joint and equal, joint and unequal, individual and unequal, and individual and equal.

insisted that they set up a joint account in order to pre-empt the regular and difficult monthly requests for money to pay routine bills.

4.41 Finally, in a significant number of cases, it appeared that the partner managing the finances was in fact the dominant partner in the relationship generally. For example, while Colin had been for many years the main breadwinner for the couple, his partner retained a very tight control of the finances. She knew everything about his financial situation, while he knew nothing of hers.

4.42 On the basis of our sample, we conclude that the ways in which couples organise their financial affairs owe as much or more to 'small' and idiosyncratic factors, as to calculated decisions relating to relationship 'type'. Much financial organisation arises from ad hoc decisions and circumstances requiring pragmatic solutions, rather than being based on any more considered or systematic scheme. This corresponds to the seemingly unconsidered nature of other major arrangements made by cohabiting couples. One thing that seems certain is that couples do not organise their finances on the basis of any legal knowledge as to what might happen on separation

Engagement with the law

Legal Knowledge

4.43 The combination of a lack of knowledge together with a lack of interest in the legal consequences of cohabitation is a well reported phenomenon. Our sample largely reflected findings made in earlier studies.¹³ Not one of our subjects claimed to have had any real idea of the legal consequences of cohabitation before embarking on it. Only one had made any, and then only rather cursory, investigation about this. Another admitted to some very slight knowledge given to him by his rather anxious mother. This is not a simple case of couples drifting together without a particular defining event. The majority of the cases in our sample had engaged in significant life events (birth of a child, acquisition of family home) but this did not lead them to investigate the legal consequences of such events and of their relationships generally.

4.44 A significant minority of our core sample did not consider that law had or should have any particular relevance to their situation. They believed – more on the basis of 'common sense' than of legal knowledge – that their property would be divided up as per any agreement they had made or in accordance with how it was owned. The possibility that there might, or should, be a special regime for cohabiting couples did not appear to have occurred to them. Of course, they may well not have appreciated that a special regime exists for married couples.

¹³ See e.g. A Barlow, G James, 'Regulating Marriage and Cohabitation in 21st Century Britain' (2004) 67,2, *Modern Law Review* 143-176; M Hibbs, CBarton, J Beswick, 'Why Marry? Perceptions of the Affianced' [2001] *Fam Law* 197.

4.45 The majority of our core sample did not in fact suffer from the widely observed misconception concerning common law marriage, with only four women and two men (20 per cent) believing that they had had rights as a common law spouse. This compares to the 59 per cent of cohabitants found by Barlow and James, and 30 per cent by Hibbs, Barton and Beswick.¹⁴ However, while the majority of our sample did not go as far as thinking expressly that they were in a 'common law marriage', several were nonetheless shocked to find that the relationship had involved no rights at all. They had expected that the relationship would have counted for something, albeit possibly less than a full-scale marriage:

I thought there would be something there. I don't think I knew quite what it was. I thought that, given the situation and that this was not something I fell into – a joint decision to move in – I thought there would be something.
(Helen)

Linda appreciated that her

rights were not as good as if I had been married, but I thought I might come out with some sort of money ... I was surprised by exactly how the law does differentiate.

4.46 At the other extreme, others thought that they knew the law and that the fact of being unmarried would serve to protect them. Natalie, for example, had thought that, although if married you would take on some responsibility for your spouse, in cohabitation no such obligations arose. She took no legal advice on cohabitation, assuming that the home in her sole name would remain that way.

4.47 It should be recognised that knowledge of the legal consequences of marriage was also extremely sketchy and inaccurate. It was a very widely held understanding that divorce would have involved a straight 50/50 split of assets, or other more comprehensible and formulaic methods of resolution, reflecting findings by Smart and Stevens.¹⁵ This was exemplified by Ewan's confident new 'understanding', at the end of his case:

I accept that she was entitled to 50 per cent. I didn't realise that if you're married it's 60 per cent (for the woman) and if you're not married it's 50 per cent.

Making legal provision for cohabitation

4.48 Only three of the couples in our core sample had any form of written agreement relating specifically to their property. However, not one had entered into a full scale Cohabitation Agreement, and many had never heard of them. This lack of interest in setting up a legal structure for a relationship

¹⁴ See also C Smart, and P Stevens, (2000) *Cohabitation breakdown* Joseph Rowntree Foundation/Family Policy Studies Centre.

¹⁵ *Ibid* at n 14 above.

followed naturally from the general lack of awareness of the legal consequences of cohabitation just described.

4.49 It is perhaps not surprising that people planning to embark on a cohabiting relationship might find it difficult at the same time, to make plans about what should happen should they separate. This would require quite a mental juxtaposition. It might seem to imply that they could not trust their own judgement.

But that suggests doubts about the relationship. It runs counter to your natural instincts ...planning to fail. (James)

You don't think about that do you? You don't think about the end of a relationship when you've just started. (Gina)

We could have had more advice. We just didn't ask for more ...I don't think, with hindsight, we'd have done anything differently – you don't plan for failure, you plan for continuation. (Ben)

4.50 It is understandably not considered romantic, at the start of a relationship to lay down rules and to specify financial shares, which might imply a lack of love or trust. The legal consequences of relationship breakdown are simply not something that people in the throes of new love like to think about:

I could have said, 'it's all my money going into this, so I am entitled to 100 per cent of it' but we didn't do that. I don't put a financial head on when I'm talking about emotions – that may be a mistake – but that's the way I did it. (Frank)

4.51 Although more of our sample wished later that they had known more about their legal position, one or two implied that even knowing what they know now, they might still have done the same thing. It does not follow that even with a greater knowledge of the law, people would make different arrangements when embarking on cohabitation. Adding to his earlier comment Ben explained:

It's a bit like if you take on an x year mortgage and in the small print it says if you pay off a year early, you'll be charged xper cent of the pay-off as a penalty. You know it's there, but you don't think through the implications.

Ewan admitted that he might well have handled things in the same way, even knowing what he did now, on the question of protecting his individual financial contribution:

Now I understand that if I'd had an 'annulment' I would have had a charge on the property. The children do need a home – I accept that responsibility. She would still have needed the money – and I think we all make mistakes. I'd have done the same thing again.

Frank hinted that he would never have wanted to give his financial contribution special protection:

It's an eminently sensible thing to do, but to me, if you're in love with somebody, you don't put little 'buts' in there.

4.52 Jenny was the only one of our core sample with a new partner, whom she was planning to marry. However, despite her recent experience, she was not worried about the new relationship and had not considered investigating the legal consequence of marriage any more than she did about cohabitation in her previous relationship:

To be honest, I don't think I need to protect things with (fiancé). He's not like that. He's always said that even if I would have had to get a mortgage with his name on it just to get the right amount, he would have signed a document saying he had no interest in the house whatsoever. He would have done that – he told me.

4.53 This lack of interest or awareness was fully reflected in solicitors' observations on the subject. One point at which there might be consideration of making an agreement follows on the purchase of a property, and typically the conveyancing department will refer couples to the family department. However, without exception, they told us that though they routinely give advice on the desirability of making proper agreements, this is rarely taken up. Few reported drafting more than one or two cohabitation agreements in their entire careers.

4.54 Many solicitors noted the same point made by the clients themselves – that they are typically in a romantic state at the start of their relationship, making it impossible for them to envisage future problems:

Sometimes I get referrals in that way, but most people seem fairly reluctant because at that stage they're in the honeymoon phase and don't want to think about the legalities. (CHS4)

4.55 Another disincentive suggested by several practitioners is that the prospect of having a full scale Living Together Agreement drawn up may appear just too much for most clients. One told us that he sends out a checklist to interested clients to take instructions, but:

That tends to stop them. Once they see potentially what it covers, they don't always take it any further. (BH2)

Another similarly reported that he sends clients the precedents for them to consider, but

... the problem is, if the couple are getting together, the precedent is talking about having children, their education and God knows what else. I think it's a bit much. (BHC1)

4.56 Another commented on the issue of costs, which, often immediately following the purchase of a house, will be a further disincentive. Speaking of potential costs of up to £1,000, he suggested:

Most people are resistant – they've just paid out to move house, they're just not interested. ... If you're going to the trouble of having it, you might as well have the small print – it's got to stand up. Are you better off just advising? But they don't do it, or do it and get it wrong ... Clients expect - £200 –'Can I have a red one?' and walk out with it. It isn't like that. (BJS1)

4.57 Finally, a further disincentive mentioned by a few solicitors was the fact that, having not been tested in court, cohabitation agreements are a less than certain way of providing security and certainty.

4.58 Our findings in this respect reflect those of Barlow et al¹⁶ in their study of the impact of the 'Living Together' campaign that very few cohabitants actually take steps to see solicitors to make living together agreements or wills, even though reporting that they had found the information given very useful.

4.59 Uptake on agreements was reported to be more common among the more mature couples, with experience of how things can go wrong. One solicitor described a typical scenario where a divorce client later opts for an agreement in his subsequent relationship:

He suffered, so he wants to make sure everyone is comfortable this time, rather than go through that again.

4.60 There were exceptions to the general picture, One conveyancer reported a good uptake of what he termed 'Joint Ownership Agreements' which cover very basic matters including capital contributions, liability for contributions to the mortgage, other outgoings and the procedure for one partner to buy the other out. This is a low cost agreement which simply requires the clients to complete details on a schedule. One other practitioner, whose work unusually straddled family and conveyancing work in equal proportions, reported a reasonable uptake of Living Together Agreements.

Wills

4.61 Will-making probably provides the best-known example of the general lack of engagement with the law among the population at large, with 70 per cent of the population not having a will at any one time, and 50 per cent never making wills.¹⁷ Among our sample of cohabitants, we found that over a third of them had made wills during their relationships. This compares with the 13 per cent found in the British Social Attitudes Survey.¹⁸ Several of these had

¹⁶ A Barlow, C Burgoyne and J Smithson, 'The Living Together Campaign – the Impact on Cohabitants' [2007] Fam Law 165.

¹⁷ Moneybasics.co.uk, 15.1.07.

¹⁸ A Barlow, G James, 'Regulating Marriage and Cohabitation in 21st Century Britain' (2004) MLR 143-17

been made with the main objective of providing for the individual's children from a previous relationship. Several conveyancing solicitors reported their perception that cohabiting couples are more likely to make wills than their married counterparts. Older couples were seen, perhaps not surprisingly, to be more likely than younger ones to make wills.

4.62 The making of a will is obviously something of a two-edged sword however, in that it was not clear that the majority of these wills, made during happier times, had yet been revoked by new wills since the separation. Our question on this point tended to prompt a realisation and resolution to 'do something about it.'

Summary

- Our sample comprised 18 women and 11 men, with an average age of 41 years. Their relationships had lasted on average 9 years. Two thirds of the sample had children.
- In line with their longer than average duration of relationship, in comparison with the overall population of cohabiting couples, the characteristics of our sample appeared more like those of divorcing couples.
- Attitudes to marriage were mixed. It had been discussed in all but two cases. In nearly half the couples, one of the partners would like to have been married but the other not. In some cases vague agreements had been made, but not put into practice. A similar number of couples had decided deliberately not to marry. For many there appeared a certain wariness of marriage.
- There was a considerable variation in the way couples' finances were organised, and organisation was likely to change over time as a couple's circumstances changed, for example, when they had children.
- Formal modes of ownership, of homes, bank accounts, etc were not necessarily reflected by which of the partners actually managed the finances on a day to day basis. This depended on pragmatic considerations or personality dynamics or had evolved from earlier arrangements.
- Reflecting many other studies, our sample had little knowledge or interest in their legal position as cohabitants.
- While only a small number thought they were in a common law marriage, many others had thought the relationship would have involved some rights.
- Living together agreements were rare.
- One third of the sample had made wills. While more than found in previous research, this tended to be among older individuals with children from a former relationship.

Chapter Five: Property

5.1 In this chapter we look at how the individuals in our sample owned their properties, what agreements they had regarding ownership and how they had understood advice given to them regarding ownership. We then turn to the views of family solicitors, and finally to an examination of conveyancing practice and procedures.

Ownership

5.2 All but one of the cases in our core sample of 24 involved properties owned by one or both partners. For the majority (18) the former shared home was the only property owned between the couple. In five cases there were also second properties. In 11 cases the main property – the former shared home – was in sole ownership. Of the 12 homes in joint ownership, only one was owned as a tenancy in common. In the main – 18 of the 23 cases involving property – the couple’s home had been bought during the relationship – 9 in their joint names and 9 in one of the partner’s sole names. In the remaining 5 cases, the property had already been in the ownership of one of the partners with the other partner moving in subsequently. In two of these cases, the property remained in the sole ownership of the original owner. In the other three the properties were transferred into joint names with new partners.

Table 4: Home Ownership

	Sole	Joint Tenancy	Tenancy in common
Acquired during relationship (n = 18)	9	8	1
Owned prior to relationship but then transferred to joint names with new partner (n = 3)	-	3	-
Owned prior to relationship and remaining in sole name (n = 2)	2	-	-
Total	11	11	1

5.3 Of all the homes owned in sole names, five were owned by women and six by men, with one case where both partners had bought properties during the relationship. In all cases where two properties were owned concurrently, the second property – i.e. the one which was not used as the home – was owned solely by one of the partners. The average value of the equity in these property holdings for each couple was £186,000, ranging between £52,000 and £400,000.

5.4 Only one of the core sample cases concerned a tenancy rather than ownership of a property, and none in the secondary sample. We did not set

out to exclude issues over tenancies from our study and the criteria given to participating practitioners specifically included them. However, we were told by family solicitors that they are consulted only extremely rarely, if ever, about tenancies. It was suggested that obtaining Legal Aid for such an issue might prove an obstacle, but that in any case, tenancies are probably handled directly through landlords. For the one subject whose issue did not concern property ownership, the preliminary issue presenting to the solicitor had in fact been the tenancy. Before considering the financial claim against her former partner, Gina had initially experienced practical difficulties in having the tenancy transferred to her sole name. Her partner had proved uncooperative over the transfer, and she had been unable to qualify for Housing Benefit without a secure tenancy, while the landlord would not start a new tenancy for an individual on benefit. The problem was overcome when her parents agreed to act as guarantors.

Agreements

5.5 Agreements relating to the ownership of properties were rare in any form. Andy and Caroline both had informal written agreements with their partners, relating to the fact that one of them had made a significantly larger financial contribution at the time of purchase. Andy and his partner had done this on the advice of a friend, to provide that his partner should be guaranteed a two thirds share of the equity in the property reflecting the proportion of the purchase price she had contributed. For some reason he did not articulate, Andy had never actually signed this agreement.

5.6 Caroline had a similar informal agreement, described by her solicitor as a 'note of intention' comprising one paragraph on a sheet of paper which had been signed by both partners but not formally executed as a deed. This was to protect her initial £75,000 contribution to the purchase price. Unfortunately in her case this was expressed as a sum rather than as a proportion:

It seems a bit sad to me now. I should have made it the proportion of money I put in – but not knowing how much property prices would rise by - and also you have trust in that person at that time.

By the time of the separation, this property had risen in value by three times since its purchase.

5.7 Annette and her partner, who contributed equally to the purchase of their home which was, however, put into her partner's sole name, had a formal deed drawn up by a solicitor at the time of purchase providing for equal beneficial ownership. Unfortunately though, this deed had never been executed. Annette put this down to a combination of the disruption of the move itself, followed by a very difficult pregnancy.

5.8 Based on our limited evidence, it appeared that far from providing the definitive evidence envisaged, the existence of some form of agreement – albeit informal or unsigned - had as much potential to exacerbate as to clarify

issues. For most of the couples however, the idea of making an agreement seems never to have occurred to them.

Understanding of ownership at the time of purchase

5.9 For everyone in our core sample, this was a hazy area. Most could not recall if or what legal advice had been given. Although all were reasonably clear as to whether their home was in joint or sole ownership, many were unclear, where in joint names, as to their particular mode of ownership. It was typically the case that it was only when we probed further, describing the concept of joint tenancy and tenancy in common that, always at the mention of the survivorship rule, they would remember that it must have been a joint tenancy. In the one case of a tenancy in common, the client thought she too owned as a joint tenant, but her solicitor told us otherwise.

5.10 It was clear that the only feature of a joint tenancy which had really impinged on these individuals had been the survivorship rule, which had, at the time, assumed a more important and relevant feature of the joint tenancy option than the fact that it also presumptively meant equal ownership irrespective of contributions at the time of purchase or subsequently. It may be easier for purchasers to contemplate their relationships being ended by death than by separation. However, it seems more likely that the joint tenancy option generally appears simpler than a tenancy in common, which would also involve potentially awkward decisions to be made and also the making of a will, both incurring greater costs.

5.11 In cases where the particular circumstances might have been expected to give rise to specific advice, clients often denied that this had been given at all. For example, Natalie felt that she should have been advised when buying a property in her sole name, in which she would be living with her then partner. He had been required to sign the mortgagee's declaration:

... to say that he didn't have any rights. I thought that would protect me and no-one ever advised me – not even my conveyancing solicitor. She didn't say that I should get him to sign something to protect me and I had no indication at all that he'd ever have any claim on the property..... which I think is a massive oversight.

She clearly felt that, with the solicitor's knowledge that she would be cohabiting in her new property, she should have received advice regarding the legal implications of this and how she could have protected herself.

5.12 Others claimed that, though advice may have been given, this had been in circumstances which made it difficult properly to consider or act on it. Rosie, who had not known whether she owned as a joint tenant or tenant in common, told us that she had been present in the solicitor's office when it had been put to her partner, Ewan, that he might want to provide some form of protection for the substantial capital sum he was contributing to the purchase price of their joint home. She acknowledged that this had been his first opportunity to think about this option. He himself told us:

It was explained to me that I could protect my extra contribution – but she was pregnant, sitting there next to me – you just don't do that.

Frank had felt similarly constrained:

It's an embarrassing situation to sit there in front of the financial adviser – when you have to tick the box, when you're with the woman you're engaged to be married to, that you've committed the rest of your life to and say this is actually all my money and it's going to stay my money just in case we split up.

Perhaps things could have been put differently to him. Frank described the advice given regarding the TR1 form:

I think he just said 'this one means this, this one means that, that means that.' He didn't say 'well it's all your money, or have you thought about your children?'

5.13 On the other hand, many of our subjects readily, if ruefully, acknowledged their own failings in not questioning proposed arrangements more carefully themselves, or seeking their own separate legal advice, but it had never occurred to them at the time. Damien described how the home he shared with his partner and daughter came to be in his sole name:

I'm sure there were conversations about it, but I don't think there was any view one way or the other. It was a question – I'd found the house and arranged the conveyancing – it was all my money. We were pretty much happy together at the time...

His partner Susan had not found the arrangement strange at the time:

It didn't even cross my mind ... when I look back, I think what a silly woman you were. Now I think I didn't ask the questions because I didn't want to know the answers.

5.14 Others had also felt quite comfortable *at the time*. Helen had only known her partner for a short time when he bought a property in his sole name, as a renovation project, and had not then questioned the arrangement:

I didn't think we'd been together long enough. If it had been a home, I might have felt differently.

As time went on and she made considerable non-financial contributions to the property, helping to create what came to be their joint home, it did not occur to her to reassess or investigate her legal position.

5.15 Some, even when given the opportunity to make changes to the ownership of their home, failed to see this as an important priority. Linda clearly felt blasé about the whole issue:

It just kind of ended up that way ...I don't think it occurred to either one of us to do it any other way. Later: We did sort of discuss putting my name on the deeds but there was no in-depth discussion when we bought the house. So he was more than willing to make things formal and me part owner of the home. I really wish we'd done it.

5.16 On the other hand, Frances had never been really happy about her position as a non-owning occupier of her home, but found it impossible to question the arrangement. Having lived for eight years with her partner and four children in a tiny rented flat, they finally moved to a large family home, which was an enormous relief to her in practical terms. However, she explained how she had felt when it was made clear that this property would be in her partner's sole name:

It was his house. I was quite surprised. Everything was in his name. Obviously after eight years in the flat it was just great to move out, but I objected to this all along. I wanted a share, I can always remember when we moved here and the baby was tiny. I had to go somewhere and had to sign a paper saying I had no claim on the house. Apparently that's a standard thing for the mortgage – but at the time I felt really uncomfortable about doing that.

5.17 In several cases of sole ownership, the reasons for this rather than for joint ownership were put by the owner to the non-owning partner as being of a technical legal nature – which in some cases appeared with hindsight to be spurious, though believed by the partner at the time. Isabel had entirely misunderstood the point of the declaration she was required to sign as a non-owning occupier for the mortgagee:

In the end, once we'd moved in, he then produced a document and said 'right, you're allowed to sign this now because, in the future, because you live here and you're my partner – practically my wife'....

She believed that what she had signed was a document giving her joint ownership.

5.18 In situations where one partner had moved into a property already owned by the other there were similar failings to make full assessments of the situation or to take independent legal advice. Colin felt relaxed about moving in with his partner:

I suppose it was discussed. I think she was adamant that my children shouldn't benefit from the house. I was happy with that because why should they? I came in with baggage. I didn't put money in initially, no lump sum.

He certainly did not think about how circumstances might have changed after eleven years, during most of which he had been the main breadwinner carrying out and paying for significant improvements and repairs to the house.

5.19 In each of the cases where an existing owner of a property had transferred it into the joint names of themselves and their partners, the reason for the transfer had been to remortgage on the basis of the partner's higher or extra income. However, no account was taken of the existing ownership, either by way of a financial transaction or by reflecting this in the shares, each property being transferred to the couple as joint tenants. Emma had already owned her home for 7 years when she met her boyfriend. At that time she had become concerned about news of problems with endowment mortgages. The decision was made to remortgage her property jointly with her boyfriend, and the arrangement was made by brokers instructed by him, and implemented by solicitors hundreds of miles away whom she never met. She had perceived the consequent joint ownership as no more than a legal technicality, given that her boyfriend had made no form of capital contribution. This was in effect a gift to him of half the existing equity in her property. She had not seen this relationship as necessarily being permanent, and they were one of the few couples in our sample never even to have discussed their future together in terms of marriage. Clearly a joint tenancy was inappropriate, but this was never recognised or pointed out.

5.20 In Jenny's case, she and her partner bought out her former husband's share of her matrimonial home by a remortgage in joint names. While no acknowledgement was made in the deeds regarding the half share she already had in her own right, the solicitor acting in her later dispute suggested that morally the partner had acquired only 25 per cent of the property at the time of transfer. It was particularly galling that he was legally entitled to 50 per cent, because he also owned a property in his sole name, which had been funded by a mortgage secured on the family home.

5.21 In each of the cases where formerly solely owned properties were transferred to joint names, the original owners had been women, arguably in a vulnerable position. It is reasonable to suggest that this may be a common scenario. Such women might well be on state benefit with mortgage interest being paid by the DSS – both of which would cease on cohabitation, presenting them with a difficult financial dilemma. Women in this situation might understandably be wary about marrying, given past experience, but would certainly wish to preserve their home for themselves and their children – possibly having already done this once following divorce.

Views of family solicitors

5.22 Family solicitors tended to be critical of the work of conveyancers, with a third of those who spoke about possible reforms to this area of the law seeing conveyancing as a major contributor to difficulties encountered and suggesting improvements in practice and procedures. For example:

You do find – quite often there are unequal contributions and you ask what advice they got at the time. You get a blank stare. That's where there's a lot of missed opportunities. Conveyancing solicitors need to advise much more fully. (BJS5)

Clients generally expect that if they've paid for something they own it. Maybe conveyancers should explain that in a joint tenancy it doesn't matter who paid the mortgage. You quite often get that situation where a woman is not working and so the man's paying the mortgage – the traditional set up. Then you get the chap who's really angry because he's put all the money in and is still only going to get half of it back. I think that could be better explained at the time of the conveyancing.
(BJS2)

5.23 Some ventured the explanation that conveyancing may be a negligence prone area, with conveyancers being used to an element of litigation, possibly accepting some level of risk concerning the consequences of inadequate or inappropriate advice. These observations were repeated by some of the District Judges and barristers contributing to focus groups.

5.24 Many family lawyers were critical of the conveyancing files they examine in the course of their handling of disputes. One recently had cause to call for a three year old conveyancing file in one of her cases, only to find that there was not a single reference on it relating to how the couple should hold the property. Declaring this to be quite typical, she queried:

Now without any evidence at all that there was any discussion, what do you do? So it's up in the air ... There are so many – there's nothing there (on the conveyancing file) we throw it back to them, they throw it back to us. It's very difficult. (BYJS1)

Again, this was a view reinforced by the barristers to whom we spoke.

Conveyancing practice and procedures

The conveyancers

5.25 We interviewed a group of conveyancers with a wide range of experience. Some operated on a departmental basis with different conveyancers handling different stages of each transaction, and not necessarily having any personal contact with the client. Others operated in a more traditional manner, personally handling every aspect of the transaction and advising clients in a personal and individualised way. The number of files open at any time ranged from 20 to 200, clearly depending very much on the style of operation, with an average lifetime of 6 to 12 weeks.

Purchasers

5.26 This group of conveyancers reported the proportions of cohabitant purchasers at between 10 per cent to as many as 50 per cent of their total caseloads. On the other hand, all reported seeing only very small numbers of cohabitant clients at the separation stage, requiring implementation of agreed arrangements. Several conveyancers reported that a large proportion of their cohabiting clients are young first time buyers. The typical scenario is that both salaries are needed to fund the purchase which therefore goes into joint names. Often the mortgage is for almost the full purchase price so that

minimal capital is being contributed by way of deposit, leaving very little to argue about. A complication to this scenario described to us is the increasing phenomenon whereby the parents of one of the partners make a financial contribution to the purchase. Conveyancers find this difficult, as one put it:

What we're finding more and more is a complete nightmare – that they're being gifted money by parents. Little Johnny hasn't got the money for a deposit. Dad says 'OK I'll give you 20 grand but I'm giving it to you, I'm not giving it to you both'. That is a complete nightmare scenario because (a) you don't always know because they don't tell you, (b) you can ask the question but if the money is sat in their bank account and they say 'no it's our savings', how on earth d'you know? (BHC4)

5.27 Several contrasted this majority group of younger clients with a significant minority of more mature couples, usually with previous experience both of property ownership and relationship breakdown. It was suggested that such couples are both more savvy and more receptive to advice on ownership options. However, this observation was not borne out within our core sample.

Giving advice

5.28 One conveyancer summed up the attitude of purchasing clients in a nutshell:

Normally they just want the keys and to know when they're moving in. The legal aspects of it, they don't really think about. (NJC1)

This was reflected in a remark made by one of our cohabitant interviewees:

... at that stage, things seemed OK – we had more important things to think about. (Ben)

Joint ownership

5.29 Conveyancers varied in the degree to which they will press purchasing clients regarding the mode of joint ownership. Some strongly favoured tenancies in common for any cohabitation:

We try and lead it in in a nice way – but quite frankly, what we're saying is a little unpalatable. And when clients fail to take the fairly strongly proffered advice: We squawk very loudly at them if they will, after it all, go for a joint tenancy. We at least try to get them into tenancy in common. Tenancy in common would at least say that if the one dies, then it's not then going to immediately escheat to the other – and of course, it does leave room then for wills – which again, we can tell them about. At least we've got that for them, so that in the worst possible case – the number of scenarios you can think of where a joint tenancy could lead you into trouble are endless - and so we prefer to say 'well at least you've got to be tenants in common', and we can build on that... I would say that's our irreducible minimum. We feel

we've failed if we haven't persuaded them to hold the property the right way. If they still want to go ahead as joint tenants, we would write a strong letter saying 'right, well you've ignored our advice' – in the nicest possible way – 'but the best of luck in the future.' (BJC4)

The same solicitor was mindful of the potential for negligence claims:

Our conveyancers are under instructions to ensure that relationships of that kind get given the right treatment – that they should be aware that if they simply treat it as a tick-box exercise, we're going to get our come-uppance one of these days because we'll almost certainly have been negligent.

5.30 Others were really only concerned where unequal financial contributions were being made, but even then would not push too hard:

When one is putting in a lot more, then we would positively advise a Declaration of Trust and not to go down the joint tenancy route. So certainly, if one is putting in £50K and the other nothing, certainly I would let them know there are issues – then take it from there (But) at the end of the day I will follow their instructions. (BJC2)

You've got to ask the questions. The first question is, 'is the money coming in equally, or is somebody's Mum putting up the deposit?' – which is a common scenario. If it's wildly different, then clearly we're going to ask them about holding as tenants in common, even if they're considering it as an integral deal between just the two of them, not involving anyone else, and they actually want their interest to go to a surviving partner. It may be that if part of the deal is that the deposit came from Mum, that perhaps wouldn't be the right way. It's just a matter of asking the questions. (BJC3)

5.31 It was generally perceived that, mainly because of the survivorship rule, most joint purchasers prefer a joint tenancy, which fully reflected what we had been told by individuals regarding their understandings at the time of purchase. Conveyancers perceived the reasons for this as that joint tenancy is seen as involving less effort and expense:

We try to make sure they understand it. You sometimes get the impression that they are plumping for the easier option. One of the aspects of joint ownership is the position on death. If they're unmarried and it's explained that they wouldn't inherit from each other and therefore they should make a will ... their reaction may well be that that's extra expense – 'all we're doing is buying a house now. We want each other to benefit'. So there may be a certain amount of inertia and they will go for the simpler option of joint tenancy rather than thinking about a will and a joint ownership agreement. (BJC1)

Purchasers were seen as not taking these issues too seriously:

Often they do look at each other because they've not thought about it before and there's a smile and a joke about what would happen if one of them died

or ran off with someone else. It doesn't necessarily mean they'll opt for the slightly more complicated option. (BJC1)

5.32 On the other hand, the category of older couples was seen as being generally more cautious and thoughtful about their situation:

Interestingly, they're always the ones convinced of the need for a trust agreement in contrast to the first timers. They say '... and also we know we need agreements', whereas the younger ones are just not switched on to it... I think anybody who's got some baggage is much more comfortable doing that ... and often there are children that they feel they need to take account of as well. It all tends to be accepted as part of a sort of business transaction. (BJC3)

5.33 Not all conveyancers saw the need for this type of pro-active advice to cohabiting purchasers. One of those interviewed reported that he couches his advice effectively in favour of joint tenancy:

I just tend to do this on a practical basis. I explain that with one, if one passes away, their share goes to the other, and with the other the share goes to whoever. So it could be the survivor might end up owning a property with someone they've never met or who they don't like. That's the main practical difference. Also, if it's a large amount, I would advise on the tax benefit of owning as joint tenants as opposed to tenants in common. Anything more and I just see the eyes glaze over. (NJC1)

Form TR1

5.34 Conveyancers expressed a mix of views regarding Form TR1, with some expressing doubts as to whether this current form of transfer has in fact improved the situation:

I still don't think it makes the position clear. What individual ticks that box? I bet the only part of the TR1 form that a client looks at is their name and the price. The rest of it is gobbledegook – it's gobbledegook in boxes. There's no way that solicitors are not filling that box in – absolutely no way at all. Now if they've gone for something complicated – a tenancy in common with a declaration of trust, then they're going to recognise that they've done that. But I don't see ... if family solicitors are putting hope in that, they're going to be sadly deluded. (BJC3)

Another felt the form could be 'more foolproof' and that

The section giving the three options could be expanded to give information as to whether the parties are married or not. Even that might just concentrate the minds of solicitors. I sense much of this work is just done by unqualified staff. It could always be just off the register, but at least it would be a matter of public record that when this couple bought that house,

this was the understanding. The Land Registry could refuse registration if there was not enough detail. (BJC4)

5.35 One family solicitor had given the TR1 considerable thought and proposed the following reform:

In a sense it is a classic time at which people should be told what is going on. Effectively if solicitors are not doing it at that point, they're negligent. The curiosity is that, on that point, the TR1, I think, is not particularly clear. There is one box - you can define tenants in common which is fine, or you have joint tenants. And the difficulty with joint tenants is that there are arguments then still over what your equitable interest in that property is. I think in every case the TR1 should simply define:

If you sell this property and either separate or are still together, how do you wish the shares to be divided?'

If it simply said that, then it would just knock away all the problems. (BJS8)

5.36 The dates of purchase of properties in joint names among our sample divided them equally between pre- and post- TR1 transfers. However, it is not obvious that those purchasing following the introduction of this form had any greater understanding of their position than those who purchased under the earlier form.

Purchase in sole name

5.37 This scenario was not seen as a problem in itself, but threw up issues concerning the advice to be given to the non-owning occupier. Lenders invariably require that the non-owning occupier sign a declaration waiving any interests they may have over that of the lender. Increasingly such individuals are required to sign that they have received independent legal advice regarding this. Conveyancers expressed misgivings about being asked to give this advice, in that it is likely then to raise the question of the individual's position vis à vis their partner. They see this as a serious burden and something which cannot be undertaken lightly, and also as having the potential to rock the boat in the midst of a purchase:

Occasionally they ask if it affects their rights regarding the property – you explain no, they may well have rights against the owner. I wouldn't wish to give advice to an occupier in relation to their rights against a sole owner. I tell people that is more a matter for a family lawyer. (BJC1)

It's almost a situation where we don't want to know, because if you think about it, we could very easily find ourselves in a conflict of interest as a conveyancer – and that's three quarters of the way through buying the property, and that's really not helpful to anybody to be honest ... So it's a troublesome area for conveyancing practitioners and there's no easy answer. (a) They don't want to hear anything bad, and (b) to be honest, they don't know what the hell they're doing there. All they want is to be out

of there as fast as conceivably possible. But you've got to do certain things. By the letter of the Law Society, you open a file. You have a detailed attendance note of all the circumstances. You write them a report of what you have done, and you do all the usual - and how are you going to do that for less than £120 - £150? People won't do that. ...I think this is an issue a lot of buyers are going to have. It's at a time when no one's got any money – all the money is going into the purchase. This is just seen as a hassle. I think it's why a lot of situations go through, where, if the solicitor acting had had a quarter of the background information, it would at least raise the alarm with people and raise the questions. (BJC3)

Declarations of Trust

5.38 Persuading clients to focus on making a full Declaration of Trust was seen as problematic, with clients losing interest in the legal technicalities of their purchase once they were about to move in to their new home. One solicitor summed up the views of many:

We don't chase them. If we've done the work on their instructions and we've been paid, then it's up to them. People are excited about their new property which may make them slightly over-optimistic about the future, and although they see the sense in it when it's explained to them, they just put it on one side. It's the same as for wills. Everyone thinks it's a good idea, but it's a minority who actually do anything about it. (BJC1)

5.39 Where clients do opt for declarations of trust:

They mainly go for the simplest thing they can possibly get. We've got an off-the-shelf basic trust agreement that literally just says that if we split up, we both carry on paying the mortgage until the place is sold, or one party is formally removed from the mortgage. Most don't even go for this – but if they do, they take the simplest. (BJC3)

5.40 However, another asserted firmly that making such agreements at the time of purchase might be a pointless exercise:

There's only so much can be done at the time of purchase. In ten years time contributions could have superseded trust provisions – in which case, even though the trust is in place, the court may feel later that it doesn't quite reflect the situation. So whatever we do is only a snapshot of that time anyway and not carved in stone for the future. (NJC1)

Getting documents signed

5.41 We encountered two or three instances from our case studies of couples who had made written agreements but left these unsigned. Conveyancers confirmed that even where people have made written agreements, it is not uncommon for these not to get signed. One solicitor

estimated that something like 75 per cent of the deeds she drafts never get signed:

There's a limit to what you can do It's not my position to say they have to get it signed before they move. It tends to get raised at the pre-contract meeting. That is why I don't spend ages tailor making declarations of trust – I'm not going to get paid for it – that's pure hard fact. I often wonder if they start talking about it, and that's when they start to argue – or maybe they just don't get round to it. It's the same with wills. People are full of good intentions, but never get round to it. (BJC3)

Others expressed similar views:

There's only so much you can do – it's part of the job. You're there to do what you're asked. If they ask you to draw up an agreement you do it. The assumption is they will sign it. If they don't make an appointment, you can write four or five times, but you've got to be able to draw the line somewhere. (NJC1)

5.42 In addition to our interviews, we also examined a sample of eleven of the standard information sheets which many conveyancers provide for their purchasing clients. Some of these incorporated details regarding joint ownership within the whole of their information on home purchase, amongst sections on 'Survey', 'Searches', 'Mortgage', etc., illustrating graphically just how much information the conveyancer has to impart. Others provided separate sheets devoted to the issue of joint ownership. The information varied enormously in quality and content. When explaining the differences between joint tenancies and tenancies in common, most emphasised the situation on death, while barely touching on the situation on separation. Some advised on the possibility of declarations of trust and of making wills, spelling out the likely costs of these. The inheritance tax consequences of each mode of joint ownership were mentioned by some, with inconsistent advice. Two solicitors told us that they do not have standardised information, on the basis that individual situations vary too much to give standard advice.

5.43 It is clear that, despite the declarations of best practice described by a number of the conveyancers interviewed, conveyancing advice and procedures vary considerably in their quality. We were told disparagingly both by 'quality' conveyancers and by family solicitors of 'conveyancing warehouses', where property transactions are carried out mechanically by unqualified staff only nominally supervised, without any regard to individual circumstances:

I think conveyancing as an area of law is dying ... conveyancing is becoming very much mechanical and it's having a bad impact on the advice, because everything is just press the button, press the button. (BJC4)

The conveyancing in several of our case studies had apparently been carried out in just such a way – at a distance and without personal contact with the

client. Not surprisingly, conveyancers of this type did not participate in the research.

Summary

- In 18 of the 24 core sample cases, the property had been bought during the couple's relationship. In five cases, the property had already been owned by one partner. In three cases the property was transferred into joint names and remortgaged. In two cases, the property remained in the sole name of the original owner.
- Solicitors are rarely asked to advise/assist regarding tenancies, suggesting that these are more likely to be handled directly with the landlord, and also that it would probably be impossible to get Legal Aid for legal advice.
- Agreements about property ownership were rare in any form. Our sample involved no properly executed declarations of trust, though some had informal agreements. Conveyancers confirmed that declarations of trust are unusual. Documents such as agreements are sometimes left unsigned by clients.
- Cohabitants were hazy about what, if any legal advice had been given to them at the time they purchased their properties. In some cases, advice had been given in circumstances (in the presence of their partner) which made it difficult to consider or take up. Many were hazy about their mode of joint ownership. The rule of survivorship seemed to assume the most important and relevant feature of joint tenancy, with purchasers opting for this without recognising that it also implied equal ownership.
- In three cases, properties formerly in the name of one partner had been transferred to the joint names of the couple without any financial contribution, but also without any recognition of the original owner's existing share. Often such transactions had been handled by financial advisers and remote conveyancers.
- Family solicitors tended to be critical of conveyancers, feeling that proper advice had not been given.
- Conveyancers perceive cohabiting purchasers as being simply keen to get into their new properties and not interested or focused on advice as to ownership options.
- Some conveyancers strenuously encourage cohabiting clients towards tenancies in common, while others seem unconcerned, recognising that clients prefer joint tenancies as being less bother and preferring the survivorship rule.

- Some conveyancers expressed doubts as to the effectiveness of form TR1, suggesting that many clients will still not really know what they have signed up to. This was confirmed among our sample of cohabitants.
- Some conveyancers expressed anxieties about advising non-owning occupiers of solely owned properties, which arises in the context of the declarations required by lenders. They feared that advice might disrupt the transaction, and suggested also that the giving of proper advice would involve fees far greater than clients are prepared to pay.

Chapter Six: The Issues

6.1 In this chapter we look first at the issues concerning the separating cohabitants from their own perspective, and at what factors they considered should be taken into account in resolving them. We will then turn to how these issues are redefined in legal terms. Finally we will look at how and when cohabitants start seeking professional advice, the initial legal advice they are given and how this is received.

6.2 As we have reported, the main issue for all but one of our core sample concerned the property which had served as the shared home of the couple. In 18 of the 24 cases, this was the only property in issue. In five cases there were other properties owned by one or both partners jointly. In only one of these cases was the second property a seriously contested issue between the couple, with the others involving varying degrees of argument or none at all. In one case, there was no property, the family home being rented. The issue in that case centred around the claim for a lump sum.

The cohabitants' perspectives

6.3 The separating cohabitants perceived the issues facing them in practical rather than legal terms, at least in the initial stages. Separation inevitably changes the individual's circumstances, and a way must be found to disentangle property and finances from former partners, involving greater or lesser degrees of agreement or acrimony. The issues raised by individuals contained elements of a practical nature and also matters of principle.

6.4 Our sample of 29 individuals fell into the following broad categories in relation to the issues they faced:

- Those seeking to preserve a home for themselves and/or their children
- Those who accepted that the home had to be divided, but could not agree shares
- Those needing help to find a practical solution as to how to separate their households
- Those defending claims on properties they considered their own
- Those seeking compensation for contributions made to properties owned by their former partners

1 Those seeking to preserve a home for themselves and/or their children

6.5 This was the predominant issue for five of our sample – not the largest category but probably the one which involved the greatest anxieties, stemming from the high stakes nature of any likely resolution. These cases revolved more around the practicalities of the situation rather than questions of principle. All in this category were female, had children and had been in relationships lasting eight years or more. All of the properties involved were in the sole ownership of their partners. For all but one of the women in this category, it was their partner who had initiated the separation. Typically the

female partner had been left, for the time being, in occupation of the family home with the children of the relationship, while the partner moved elsewhere, although in one case, the couple continued to live in increasing hostility in the same property. Despite being in occupation of their home, none of these women assumed (rightly as it transpired) that they would be able to remain living there indefinitely.

6.6 Having initially no idea of their legal situation, the plight of these women was not always immediately obvious to them. When Linda's partner announced that he was leaving her, her first priority was to secure a home for herself and her son. However, she assumed confidently that, after six years together, she would have an entitlement to half the family home. She was mindful of her partner's needs, as well as her own:

He has to be able to live ... it's got to be a fair deal all round.

However, she soon realised that her magnanimity was misplaced as she had to face the reality that she it was she who was in the situation of having to fight for a roof over her head.

6.7 Annette also assumed that she was entitled to a half share in her home, on the basis that as far as she was concerned, this had always been the understanding between herself and her partner. It came as a bombshell to her when he told her that he had decided not to give her a half share. Her position was made all the more frightening because, not being party to the mortgage, she had been unaware for some time that the house was under threat of repossession for mortgage arrears. She was genuinely fearful of having herself and her two young sons put out on the street with nothing.

6.8 Frances, on the other hand, had been the one to make the decision to separate from her partner, and did so after having taken advice in advance from the CAB as to her legal position. Even though she had been given a very pessimistic appraisal of her situation, she nevertheless went ahead to end her difficult 20 year relationship, in the full knowledge and acceptance that she was not entitled to any share in the family home. This was despite the fact that her former partner was in a financial position immediately to purchase a new home for himself, while continuing funding for the family. Her concern then was how to ensure that the home was retained for the four children until they had finished their education.

2 Those who accepted that the home had to be divided, but could not agree shares

6.9 The largest proportion of individuals (nine of our sample) fell into this category. In the majority of these cases, the properties were jointly owned, with one exception as joint tenants. In over half of these cases the couples had children. All those cases where there was more than one property involved came into this category. In many instances, cases in this category involved matters of principle as well as practicalities.

6.10 Some of those owning properties jointly were uncertain in their own minds as to how the value of their properties should be shared between themselves and their partners. Andy and his partner were one of the very few couples who had actually made any prior agreement as to their respective shares in their property, by means of an informal written agreement drawn up between themselves, taking account of his partner's initial contribution of one third of the purchase price. However, when the time came to separate after 14 years, Andy felt ambivalent about the agreement. He was swayed in different directions by friends. On the one hand, he felt persuaded to adopt a generous stance and to step back from pursuing absolute rights, on the basis that the property was his children's home. He did not want in the future to feel or look bad, or to make life for his partner and the children difficult. He felt he could survive reasonably on the basis of the agreement, although did not think he would be in a position to buy another property for himself in the foreseeable future. He explained:

I want to keep self respect and not stoop so low as to what x, y and z might do... [my partner] and the kids are alright – even if technically the numbers are not right.

On the other hand, other friends queried the basis of the agreement, citing typical agreements in this situation as being a 50/50 split irrespective of initial contributions. He felt in fact that overall during their ownership, he had probably contributed more financially and queried why this should not be taken into account, when the fact of her initial contribution was. Andy obviously felt slightly confused, admitting that he still found it hard to resolve in his head" whether the original agreement was fair.

6.11 In a couple of cases, the individuals, who were seeking more than half the equity in the family home, were concerned about having sufficient funds to rehouse within the area where they were currently living and not to be forced downmarket. Rosie, for example, was extremely anxious that, despite an objectively generous offer from her partner, she would not be able to afford a property for herself and the children in the area she wished to stay in.

6.12 Others were content to share the value of their property equally, which is what they understood joint tenancy to entail. For example Ben was clear on his understanding that he and his partner were each entitled to a half share in the house. This was on the basis of their holding it as joint tenants. He explained that he would find it impossible to say now, which of them over the years they have been together, had made the greater contribution:

I couldn't work out who had paid most. How would you roll forward the value of money ten years ago? It's one of whose things you could do if you had a spreadsheet of all payments in and, whatever variable you changed, you could make one side better... . I don't care about that my contention would be that as we bought as joint tenants, so we should split it right down the middle, regardless of if she paid that or anything. That's the basis.

That's what a joint tenant should mean..... We made the decision to sign like that ...

However, Ben's partner did not see it this way at all, evidently sharing the same anxieties as Rosie. Both partners remained living in the property in increasing acrimony as their dispute escalated.

6.13 Two cases in this category involved more than one property owned in various combinations by the partners jointly or solely. The fact that the issue was not confined simply to the couple's home might have offered useful potential for trade-offs or alternatively, greater scope for disputes to arise, involving matters of principle. Sometimes the way in which second properties had been purchased was complex, potentially giving rise to resentment. For example, Jenny and her former partner had owned the family home jointly. It had been her home before they had met, having been transferred to her after her divorce. During the course of their 15 year relationship, which she considered very much as a marriage in all but name, she and her partner had decided together to acquire her partner's grandmother's 'right-to-buy' council flat when the opportunity arose. For technical legal reasons, the transaction went through on her partner's sole name but was, as Jenny understood it, very much a shared enterprise, with the funding having been provided by means of a remortgage on the family home. As far as she was concerned, this flat was as much part of their joint property ownership as their family home, and she assumed that this was also in issue. Her former partner thought otherwise.

6.14 In Caroline's case there had been a convoluted series of property transactions during the relationship. She and her partner owned their family home together, and she had sole ownership of a second property to which her partner felt he had made a significant contribution by virtue of its mortgage having been secured on the family home. This in turn led to disputes over how the mortgage had been paid, Caroline claiming that this was partly from rental income from a flat on the top floor of their jointly owned home which was managed solely by herself. In one of the cases in the secondary sample a volatile couple had separated several times and bought properties in their sole names, but then come together again, whereupon one property would be sold and the proceeds put into the other's property. The final separation had occurred at a point where there was only one property in one partner's name, but with financial contributions from each. The issue was to quantify the amount due to each.

3 Those needing help to find a practical solution as to how to separate their households

6.15 In two cases in the core sample – both of which involved children - the issue was as basic as how physically to separate their households in such a way as to provide homes for each of the partners and their children. There were several other cases of this nature in the secondary sample, described by mediators. The main characteristic of all these was the overall financial

circumstances of the couple, where both assets and income were minimal, and budgets already tightly stretched to fund one home. Funding two homes appeared to be a practical impossibility. These issues involved very little in the way of principle, and were focused entirely on practicalities.

6.16 In some of these cases the couple, having made the decision to separate, had not been able financially to find the way to do so. Mary and Geoff faced this intractable problem without actually physically separating for several months. Their family home had very little equity and was, in any case, at the bottom end of the housing market so that selling it could not possibly realise sufficient funds to create two households. Finally, and still without any resolution, Mary, the main breadwinner, decided she could cope with the situation no longer and moved out to rented accommodation, whilst at the same time continuing to fund the mortgage on the family home, although this made her financial position extremely precarious. She was prepared to do this, despite the difficulties and perhaps the objective unfairness of the situation. As she put it:

Gosh, fair is different to what's possible in this case.

In another case, one partner had moved out, but to very unsatisfactory accommodation. Luke, at the age of 50, had gone to live with his parents, where he stayed for a year before taking steps to bring the situation to a head.

6.17 Some of these cases were characterised by a level of goodwill and consideration between the partners sufficient to enable them to live with quite long-standing but unsatisfactory temporary arrangements. There were other cases though where neither partner would move out, preferring to live on in increasingly acrimonious atmospheres.

4 Those defending claims on properties they considered their own

6.18 There was a group (6 of our sample) for whom the issue was how to disengage themselves and their properties from their partners. In the majority of these cases the property was in the individual's sole name, but in any event, the issue was the same for all of them, being how to persuade former partners that they had no rights in the home they had been sharing. For example, Pat had owned her own home for several years before her partner moved in. She had only invited him to the property as a temporary measure, as she thought, while he was experiencing financial difficulties. She had no intention of conferring any entitlement in the property and did not have any great commitment to the relationship. When it ended at her behest, her partner refused to leave without payment from her, and then threatened proceedings to establish a share in her property. Perceiving her partner's claim for £24,000 as spurious and nothing more than an underhand attempt to fund the deposit to purchase a property for himself, she commented:

If he got that, he'd have lived in my house all those years for free.

6.19 In other cases, the property was owned jointly, but in circumstances where the individual felt it entirely unjust that the partner should take a share in its value. For example, while his fiancée had contributed nothing to the purchase of a home for the two of them, Frank had contributed £90,000 from the proceeds of sale of his previous home, plus a further £26,000 from savings for refurbishments. After nine months, the relationship foundered, but the fiancée refused to co-operate in a sale of the property without payment to herself of half its net proceeds.

6.20 It was not uncommon for individuals in this situation to feel initially that some sort of token financial recognition of the relationship ought to be offered, and in some cases, offers of small lump sum payments had been made to partners. However, the sums offered proved insufficient to settle the issue.

5 Those seeking compensation for contributions made to properties owned by their former partners

6.21 Four of the individuals in our sample had left a property in which they lived with a partner, and believed strongly that something was due to them as a consequence of their input into the relationship and/or the property, and that they should not be expected simply to walk away without any sort of financial recompense. All the properties involved in this category were in the sole ownership of the other partner. Those in this category may represent the other side of the previous scenario.

6.22 Helen had helped her boyfriend on a major restoration project to a property he had bought in his sole name. As far as she was concerned, this had been a shared enterprise, which took over their lives for a considerable period. As the relationship had developed she had come to perceive it as a quasi-marriage and saw it as grossly unfair that her partner alone should benefit from the fruits of her hard work when they separated. However, he refused to offer any form of financial recompense, or to engage with her at all.

6.23 Martin considered that he had made a substantial financial contribution to his partner Tara's purchase of her council house in her sole name, which she told him would be transferred into their joint names after three years. However, they separated before then and the transfer was never made. The property was subsequently sold for a handsome profit, but Tara refused to pay him anything at all. For her part, she considered that the relationship had been relatively short-term and had not involved a high level of commitment. She also questioned the sums Martin claimed to have paid, suggesting that he would have to have spent a similar amount for his own living expenditure whether they had been together or not.

Principles which it was considered should influence resolution

6.24 We have already seen that the cohabitants had only the sketchiest of ideas as to their legal position and entitlements. However, it is apparent from the above, that in addition to trying to keep a roof over their heads, many had

their own view of the principles by which their issues *ought* to be resolved. This was particularly true in cases where the individual had been the one to initiate the separation. In cases where the separation had been thrust upon the individual, it was often more a case of coping with the particular circumstances in responsive mode. Several in this category just wanted the dispute to be over and done with as quickly as possible, almost irrespective of any other consideration.

6.25 Among those who did express some sort of rationale as to how their issues should be resolved, there were a variety of ideas. These included division based on a model of contribution/compensation, the concept of need, some form of moral/honourable basis, and strict legal entitlement.¹

Contribution/compensation

6.26 This was the underlying rationale considered by all those in categories 4 and 5 above, mainly involving sole ownership. The individuals in category 4 clearly all believed that, since they had paid for the property in issue, it must therefore be theirs. Those in the fifth category believed that they should take out what they had put in. A refinement of this approach was that the former partners should share only what had been made while they were together, so that what either might have brought into the relationship should return to that partner. For example, Brenda stressed that she did not want to “screw” her partner for everything:

I just want half of what we've had since we were together.

This was also Gina's rationale, which unfortunately did not help her very much:

But the problem was that I'd given up my opportunity to work, while looking after the children – while he was making no attempt to work. So there was no 'current' money. There was never anything which was half mine and half his. It was only ever the stuff from before.

6.27 Linked to this rationale was the idea of compensation. Those individuals in category 5 had all made specific contributions to their former partners' properties. Martin simply wanted returned what he claimed he had put into his partner's property:

The way I feel, she has actually stolen money off me knowingly. To me that's illegal ... It seems like she's legally mugged me.

Need

6.28 Another rationale was the concept of need – invariably the needs of children, though this might also be linked to the needs of their carers. The mothers of children tended to think this, but some of the men also recognised

¹ Cf R Tennant, J Taylor and J Lewis, *Separating from cohabitation: making arrangements for finances and parenting* DCA Research Series 7/06 (London, DCA, 2006) .

the special needs of the parent caring for the children, as exemplified by Ewan, He explained how he had meticulously worked out what he thought his partner needed before putting his first offer to her:

That's what she needed ... I thought with the two children she needed more [than half]. I worked it all out on a spreadsheet. That's how it came out.

6.29 As we have noted, Mary could see that the arrangement she came to with her partner was not fair; however this was over-ridden by her perception of the family's need:

... if fairness happened I should have more of a stake in the house, but in terms of the greater good, that's not the way to go. I can see that. I have to let that go.

As we have seen (Para 6.10), for Andy also, the concept of need over-rode that of strict legal entitlement. All these cases involved joint tenancies and children of the relationship, but varying lengths of cohabitation.

Honesty/honour

6.30 Some individuals identified the concept of honesty and honour as being the way they would wish to resolve their issue. Irrespective of any rules or norms, they would want to be able to live with themselves afterwards. We have seen how important a consideration this was for Andy, finally over-riding other concepts of fairness in his mind. Frank was devastated and shocked at the way his former fiancée was treating him:

I wouldn't do it. I can't steal anything that wasn't mine. You tend to think other people work the same as you. I told her that she could trust me - so I must be able to trust her – surely?

Strict legal entitlement

6.31 A small number considered that strict legal entitlement was the over-riding consideration. This was the main consideration for Ben, who expressly ruled out the idea of contribution as being the proper way to look at his issue. Frances, who very early on was advised of her legal position in having no entitlement at all to her home, took this on board and never sought to question it, despite the severe consequences for her future. This rationale could apply even though people may have been unaware as to what the law was. Damien, for example, claimed that his legal entitlement was the major consideration for him:

I must stress, I didn't mind what the law said. If it had said 50/50 I'd sort it out and walk away – but it isn't.

Fault

6.32 Not one of our sample expressed the view that the question of fault, in the context of the breakdown of the relationship, should be taken into consideration when resolving their issues. We suspect that in an equivalent sample of divorcing cases, this would not be the case. This perhaps highlights a significant difference in the type of commitment involved in a cohabiting relationship as compared to a marriage, with cohabitants not having made the same assumption as their married counterparts might do, that their relationships should go on for ever, and that it was therefore objectively 'wrong' for one partner to bring it to an end.

6.33 Views as to the factors which should be employed in guiding resolution of disputes were clearly not confined to those which would apply to married couples in ancillary relief disputes.² For those individuals who did not wish to marry, it may be the case that they would prefer their own sets of principles to apply on separation; this may be one reason why they chose not to marry. This study did not extend to an in-depth exploration of this issue but, as mentioned in Chapter Two³ other research has commented on the greater sense of individual freedom and lack of constraints in a cohabiting relationship. It seems, therefore, that not all cohabitants would wish to be bound by a 'one size fits all' legally imposed regime for cohabitants in relation to asset distribution on separation.

The Legal Perspective

6.34 There is extensive literature concerning the way in which the law 'translates' the layman's problem into an issue amenable to legal resolution,⁴ However, the mismatch between the cohabitant's perception of issues over property they have with their partners and the legal view of these is rather more extreme for separating cohabitants, going far beyond matters of interpretation, practice and procedure. The redefinition of their issues into legal concepts may bear little relation to the categories as perceived from the perspective of cohabitants. Issues of justice, need, or the practicalities of a situation can appear to have no relevance in property law, which is concerned only with legal and beneficial ownership. A court can only declare and quantify the parties' respective rights in real property.⁵

6.35 One of the first things that a separating cohabitant has to realise is that the chance of making a claim on anything other than real property, where

² Of course, married couples themselves do not necessarily accept the factors set out in s 25 of the Matrimonial Causes Act: see G Davis et al '*Simple Quarrels*' (1994) Clarendon Press, Oxford.

³ See paras 2.15-2.17.

⁴ See A Sarat, and W L F Felstiner, 'Law and Strategy in the Divorce Lawyer's Office', (1986) *Law and Society Review*, 20/1. A Sarat, and W L F Felstiner, 'Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction', (1988) *Law and Society Review*, 22/4/737. L Mather, R J Maiman, and C A McEwen, 'The Passenger decides on the Destination and I decide on the Route: Are Divorce Lawyers expensive cab drivers?' (1995) *International Journal of Law and the Family*, 9/286

⁵ See Chapter Three., paras 3.12 et seq.

there are other assets in the partner's sole name, is very small. Thus, there is no hope of making a claim for a share of a partner's pension (in complete contrast to the position for divorcing couples). For most of our sample, there were in fact few significant assets other than the family home. However, there were some exceptions. For example, Ewan had a substantial works pension and share-holdings in his sole name. His partner Rosie was clearly aware of these, which may have led her to hope for more than she found herself even entitled to claim against. Frances' partner had sufficient resources to enable him to buy another house immediately on separation, while still continuing to support the family home and children. However, there was never any question of his very superior financial position having any effect on what should happen to the family home. The family home is almost invariably the only asset against which the law gives scope for any claim to be made.

Sole ownership

6.36 Where a property is in sole legal ownership, the issues to be determined are whether that owner is also the sole beneficial owner, or whether anyone else can establish an interest in it, and if so, what is the size of that interest. Thus, the first enquiry is as to whether there is any declaration of trust on which a property is held. Ideally this would take the form of a written declaration either incorporated into the transfer of the property, or as a free-standing deed. However, as we have described in Chapter Three, it may be that a beneficial interest can be established under one of the available equitable doctrines – resulting trusts, constructive trusts, proprietary estoppel. Each of these requires very specific combinations of actions and understandings to have taken place, which, while likely to appear legalistic and arbitrary to clients, will form the only basis for a claim in property law. If no such interest can be found, the case can go no further. However, once an interest has been established, the next issue will be to quantify the share. This again will involve seemingly abstruse matters, depending on how the share has been established, and is likely to prove highly unpredictable.

Joint ownership

6.37 Where the property is in joint legal ownership, the issue again concerns the beneficial ownership – whether this is equally as joint tenants or tenants in common, or in agreed unequal proportions as tenants in common. Here the transfer document Form TR1⁶ is supposed to provide definitive evidence of the purchasers' intention. However, the meaning of the terminology used on the form is by no means clear to the lay reader. Whichever of the boxes on the form has been ticked defines the ownership of the property, irrespective of the purchasers' state of mind at the time or subsequent changes over time. It was frequently not appreciated by the cohabitants in our core sample that by ticking a box and signing the form the parties may have created a binding declaration of trust. Many purchasers regarded the survivorship aspect of a joint tenancy as being of most significance and, while wishing to provide for this feature, typically did not realise that at the same time they were opting to

⁶ Discussed in Chapter Three at paras 3.9-3.11 and in Chapter Five at paras 5.34-5.36.

own the property in equal shares regardless of contributions, present or future.

Mismatch between client and legal issues

6.38 The legal construction of property ownership does not reflect any lay conception of cohabiting partnerships. The concepts used in property law do not reflect matters which are likely to appear relevant and important to clients, or the way they have lived their lives together. Furthermore, the law brings together and treats as the same issues which from a practical 'client' point of view are quite different, while conversely separating and treating differently issues which, as experienced practically, seem very similar to the lay person.

6.39 Under the legal concept of sole ownership we find combined together a variety of different client issues: preserving a home, defending a claim made on a home, seeking compensation and being unable to work out how to separate. Whilst the first two of these, which may well be two sides of the same issue, do clearly involve the issue of ownership, the other two are quite different in nature and may not even involve any desire on the client's part to establish an 'interest in a property'. Frances' property was in the sole name of her partner. She had devoted 20 years of her life to bringing up her four children and running the family home, but could nevertheless find no specific actions or stated intentions on which to base a claim on it. Her life had not been lived on the arbitrary bases which would have satisfied the requirements needed to establish a trust. Her solicitor saw her situation as being crystal clear:

It was always going to be impossible to get her an interest. No contributions, no promises – so no constructive trust or resulting trust, and no proprietary estoppel.

Another classic 'Mrs Burns' case was that of Susan who had lived with her partner for 25 years or so, bringing up their daughter. While she claimed to have contributed a significant sum toward their family home, she was unable to prove this or that there had been a legally satisfactory form of intention that she should share its ownership.

6.40 Pat, whose home was in her sole name, on the other hand, was faced with a claim which she had simply not imagined possible. She had thought she knew the law, though she had never heard of a cohabitation agreement.

I was always under the impression that if you married someone, they could claim half your house. My house was always going to be my house and I said that to him. In my head, everything was in my name and I paid the mortgage and there was no common law intention, so I had no worries.

However, her partner refused to move out at the end of the relationship and ultimately claimed an interest in her property, forcing her to face concepts very alien to her everyday life in trying to prove her case.

6.41 Helen would not have perceived of her case as resembling those above at all. She was simply seeking compensation for her work – not an interest in her former partner’s property. However, because she had failed to articulate her understandings in a way to suit the requirements of a trust, this was to prove difficult. Talking about how it had felt to be sharing the renovation enterprise with her former partner, she explained:

At the time I was so involved in what was going on – doing the work – I didn’t think. It didn’t seem important. We were happy. It just felt so natural.

The arbitrary concepts of trust law did not happen to match her behaviour. In hindsight she reflected:

It’s interesting what weight you put on what people say to you. If you have conversations about what you’re doing in the future, how much of that is a promise and how much of it going to become reality. It’s a kind of careful balance. I think I’ll be more careful in the future to find out what’s expected in what timescale.

6.42 In three of the cases described to us by mediators, the property in issue was owned solely by one of the partners. However, the legal quest to establish ownership was a technical irrelevance to their urgent problem of how to provide homes for themselves and their children.

6.43 Under the legal category of joint ownership we again find a variety of unrelated client issues. These include the issue of how to quantify shares in a property, but also more of those of defending claims on their property, and being unable to work out how to separate. We have already described how, at the time of purchasing a property, the majority of people were not focused on the technicalities of ownership, and may not understand the implications of decisions they take. The way in which the property is owned may not reflect the parties’ understandings, what they feel to be fair, or what can practically be achieved.

6.44 Andy was struggling with the issue of whether his former home should be divided on the basis of his informal agreement which he felt had been overtaken by the 14 years they were together, the basis of his greater subsequent contributions since the purchase, or on the basis of his children’s need for a home. However, as the property was indisputably held as joint tenants, the legal response would be a 50/50 split. While he was unsure as to what was the right thing to do, he certainly did not want that.

6.45 Within the same legal category of joint ownership were couples similar to those mentioned under sole ownership, where the mode of ownership and methods to establish and quantify this could be of no relevance or assistance. Diane and Luke, for example, were not interested in strict property law solutions, but Luke needed to be relieved of his duty of paying the mortgage and Diane needed to find a way to take it over.

6.46 Emma found herself in a different position from the other cases of joint ownership, in seeking to defend the home that had been hers for many years previously, from the claims of her former boyfriend. She would have seen herself as having more in common with Pat. Each had experienced a short-lived relationship with a partner who then sought to make a claim on their homes. For Pat, as a sole owner, this had to be handled by reference to trust law, involving intention and contribution. However, for Emma, an unwitting joint tenant due to the misunderstood statement on her transfer document, those very same factors were excluded. Neither approach seemed a satisfactory or relevant way of handling the practical situation.

Children Act, Schedule I

6.47 The one part of the law relating to cohabitation property disputes which does address issues in a way in which clients are likely to see them is Schedule I to the Children Act 1989.⁷ On the face of it, it may seem that this provision goes directly to meeting the needs of those individuals in category 1 above. Generally speaking, this provision comes closest to some of the principles articulated by our sample as to how they felt issues should be resolved. However, in giving occupation rights to carers of children while still in their minority, the provision has serious limitations and does not serve to address fully needs or expectations, as it gives no property interest to applicants in their own right. Schedule I will be discussed further in Chapter Seven.

Seeking Advice

6.48 We now look at the first steps taken by individuals separating from their partners, how they come to feel they needed legal advice, and the timing for seeking this.

First steps

6.49 Depending on the nature and urgency of their situation, a number of individuals looked to friends and family for advice in the first instance. A few others looked on the internet. Neither of these sources appeared to be taken very seriously however, with the feeling that whatever advice had been obtained in these ways would need to be confirmed face to face by a professional advisor.

6.50 Four of our sample, all women, initially consulted a CAB. This was where Frances was first given the stark advice that she had no entitlement to her home at all, after 20 years, creating a sense of resignation about her circumstances. However, in not dissimilar circumstances, Susan found the advice rather confusing:

⁷ See Chapter Three, paras 3.42-3.47.

There was so much information. All I wanted was a simple answer to a simple question.

Rosie was advised to try to negotiate directly with her partner because she might get a better settlement, rather than to involve solicitors, which would be expensive. This was advice which she ignored, but which later turned out to be absolutely right. She was also advised about how she might improve her financial situation by a combination of work, benefits and tax credits.

Seeking legal advice

6.51 The timing of the first visit to a solicitor varied among the individuals in our sample, depending on their personal circumstances. Nearly a quarter had taken legal advice of an exploratory nature some time before having made their final decision to separate. All of these were individuals who were contemplating initiating the separation but first wished to investigate the likely consequences of doing so. Solicitors are clearly familiar with this scenario:

We can tell them, as it were, a view from 30,000 feet, our initial reaction as to what might happen. At the end of that they say 'Fine, you've clarified that for me. We're still on friendly relations – I'm going to try to sort it out with her or him.' They feel they've got the backing – they didn't really know what they might be entitled to. Often that kind of person, where it's still amicable, they sort of know what they'd like to do. They may have had a preliminary talk and one of them says, 'Well, I'll get some advice'. So if we don't see them again, we assume something was worked out even if it wasn't on a very scientific basis. It might be 'Look, give me a few thousand and I'll go away'. (BJS6)

Another family solicitor told us that he believes that once he has advised such clients of the harsh realities, many may in fact go home and resolve to make their relationships work.

6.52 A slightly smaller group, all women, had consulted solicitors immediately following the separation. In some cases this was in shocked response to the partners' decision to separate, sometimes out of the blue. In other cases, the women had made the decision to separate themselves, but needed legal action to effect this. Emma had to take out an injunction to stop her violent partner returning to the property. Gina initially sought urgent advice when her partner refused to co-operate in a transfer of the tenancy of their rented home to herself, but simply gave notice to the landlord.

6.53 The largest group – a little under half our sample – sought legal advice within a few months of the separation, in periods ranging from two to five months. Typically in these cases, the couple had tried initially to sort out their property and finance between themselves. In some cases, direct negotiation had broken down because the positions of the partners were simply too far apart. In others, separations which had started as amicable turned sour, making further negotiation between the partners impossible.

6.54 The remaining group of individuals did not seek legal advice until much later, after periods ranging from eight to 22 months. For some this period reflected a reasonably amicable separation followed by a period of inertia, when neither partner felt any need to take urgent or precipitate action. For others, this period was simply an extension of time being given for DIY negotiation, perhaps also allowing the dust to settle. In the cases of greatest delay, this was mainly due to the emotional trauma suffered by individuals whose separations had been particularly painful, but without necessitating urgent legal action. In these cases the partner had been left in the former shared home owned in their sole name, until these individuals finally found the strength to consider making claims.

Reasons for seeking advice

6.55 A variety of reasons was given by people for feeling the need to move on to the stage of seeking legal advice about their separation, and their reasons depended to some extent on the timing of this. For many, this simply seemed to be the natural thing to do:

How else do you split up? It's not the sort of thing you can do on your own is it? (Ben)

Others had more specific reasons:-

To obtain an appraisal of their situation

6.56 The majority of those seeking specifically legal advice from solicitors wanted to get an appraisal of their situation. Many of our sample visited solicitors with a view simply to establishing their legal position, rather than to present a problem for resolution, which is what Colin had done:

I wanted to know where I stood legally, as we weren't married and there was nothing in writing.

Many family solicitors talked of this type of client:

Sometimes people come in for a one-off meeting. We tell them ... they're young, little equity, no children, nothing to argue over. Some are under the impression there's some common-law wife thing. You advise them there's not and that the best thing to do is to go away and agree something. A lot of people just come in to see where they stand. We don't necessarily hear from them again. (BYJS5)

For some cohabitants, knowledge of the strict legal position was vital before they could even start discussion with their partners:

We had a few conversations, but I guess it was clear that because we didn't know what the legal position was, probably neither of us were in a position to do anything really... To be honest I didn't know what the legal position

was. *Lack of knowledge was not a good basis for us to hold those conversations really.* (Damien)

For confirmation of a proposed arrangement

6.57 Typically those who were thinking of working things out between themselves nevertheless seemed to feel the need not only to confirm their legal position but also, just as important, to be given some sort of 'approval' for the line they were proposing to take in negotiations with their former partners. For example, Andy who had his own ideas as to how the separation should be effected, was advised as to his strict legal entitlement in his property, and also that the only way to enforce this would be to apply for an order for sale. He did not wish to pursue his full legal entitlement nor to take such drastic action, but nevertheless, he wanted to hear from the solicitor he consulted that the agreement he had made with his former partner at the time they purchased their property was 'reasonable', even if not legally binding. Mary, whose problem was more of a practical than legal nature, was extremely surprised and relieved at the non-adversarial attitude of the solicitor she saw. Although she found the advice a little confusing and the whole experience very emotionally upsetting, it was obviously important to her to have her own ideas as to a way forward confirmed as being reasonable.

6.58 Six of our sample did in fact go on to work out their own agreements after one single consultation with a solicitor. In this sort of case and at this stage, it may also be suggested to clients that they try mediation, and a few took up this option.⁸

For documents to be drawn up

6.59 Others made their first visits to solicitors in order to have letters written on their behalf, or documentation drafted, having already reached an agreement with their former partners. For example Brenda had already reached agreement with her partner, but wanted this made 'legal':

I just wanted to go to a solicitor basically to make sure it was done as it should be – obviously with the mortgage – to have my name taken off. I wanted to have things above board really. You know sometimes if you make an amicable agreement or things you sign amongst yourselves, they're easily broken. It seemed the obvious thing to do

One solicitor confirmed this scenario:

We get a lot of people coming in for transfers of equity because they've agreed settlements. Others have agreed things and you end up writing some letters to try to confirm the agreement. I suppose some never get as far as me, but stay with the conveyancing department.

⁸ See 7.31-7.44 and 8.9-8.16

It should be said that in fact, conveyancers themselves reported seeing very few cohabitants at the end of their relationships.

For advice, having failed to settle directly

6.60 Some clients are prompted to visit solicitors when they have tried but failed to reach agreement by direct negotiation. Ewan made proposals of his own, but when his offer was immediately rejected, he asked a solicitor to repeat it (against her advice) on his behalf:

I just wanted to end it – I thought it would be over in a couple of months.

For advice on what to do

6.61 Many clients arrive at a solicitor's office without presenting an already formulated legal issue. As one solicitor put it:

I don't think she had envisaged any form of outcome. She just had a problem and wanted me to sort it out. (BYJS2)

Typically those who had taken urgent legal advice were in this category. Linda and Isabel, for example, both initially feared for the roof over their and their children's heads. Emma and Gina both faced violent and difficult partners.

For advice regarding other problems

6.62 Finally, some separating cohabitants consulted solicitors initially in relation to problems arising over arrangements for their children. It may only be when discussing these disputes that the subject of property arises. For example, in Martin's case, in the course of seeking advice concerning his problems over child contact, it emerged that these arose whenever he raised financial and property issues with his partner Tara. He then moved on to look at his legal position with regard to the former family home. Several of the mediators who described cases to us saw this as a typical scenario.

Solicitors' Initial Responses

6.63 The task of a lawyer giving initial advice to a separating client can never be easy. However, the task of the lawyer giving initial advice to a cohabiting client with an issue over property is considerably more difficult in comparison to the task of advising a divorcing client about ancillary relief. In the latter case, the solicitor can explain the factors in s 25 of the Matrimonial Causes Act. Whilst the divorcing client may have been expecting a more formulaic answer or more certainty, the s 25 factors at least appear comprehensible, reasonable and relevant to his/her situation. The client can even be given a printed copy of the factors for reference and consideration without requiring further legal 'translation'. In contrast, for the cohabiting client, the law will almost always appear incomprehensible, esoteric and irrelevant to

their particular circumstances, with the solicitor having to redefine their problems into the very rigid legal issues: (i) is the property owned jointly or solely? (ii) if solely, is there a trust? (iii) is Schedule I relevant?

6.64 More often than not, the advice to be given is likely to be unpalatable to some degree. Specific difficulties identified by solicitors, and also reflected back by their clients, included the fact that the advice is likely to disappoint the client, that the law is complex, that it is unpredictable and that they personally find it unjust. Due to the complex and unpredictable nature of the law, it can easily be the case that both partners in the couple may have to face disappointing advice. For example, in the situation where a property is in a sole name, the non-owner is very likely to be disappointed at the rigidity or at best uncertainty of his/her prospects. However, the sole owner may well also be disappointed to be advised about the potential for trust and/or Schedule I claims.

6.65 Many clients will have been under the impression that they have some sort of entitlement and must be disabused of this. At one extreme, solicitors would approach this head on, as one described:

First, I very briefly say what would have happened if they'd been married – the basis on which the law would operate, then I say 'Forget that – you don't have any rights.' I tell them they have to think of their relationship or ownership as like a business partnership. It doesn't involve any rights as such. (BYJS4)

6.66 Some clients have to be told straight that they have no chance of success: Frank's solicitor was well aware how let down he felt at her advice:

It wasn't the advice he wanted to hear and it wasn't good news from his point of view because financially he was going to be losing out, so that's as far as it ever went.

6.67 Solicitors described significant numbers of cases involving a discrepancy between the advice they were giving and client expectation. A number of solicitors referred to the shock arising from the myth of common law marriage. Many told us anecdotally that the myth is still prevalent, while others felt that these days clients are becoming more savvy. However, undoubtedly many clients had expected some sort of recognition of their status as a cohabitant, if not quite 'common law marriage'.

You don't hear the phrase 'common law wife' so much these days, but just the fact that there is nothing in terms of discretionary powers is widely

misunderstood. Some people think that the length of time they're together is material. (Linda's solicitor)

6.68 Several described the sort of shock stereotypically attributed as the reaction of the majority of cohabiting clients on hearing of their legal position:

I guess if I were dealing with it all the time, it would be that much easier but I think it's more difficult because it's more nebulous and more difficult for clients to get their heads round.... You're dealing with a hostility before you even start then because people are so surprised they haven't got the rights that maybe they thought they had. It's more difficult to deal with them generally. (BHS2)

6.69 These difficulties were reflected in the views of clients. Emma for example, was extremely shocked at the discrepancy between the law and her own notion of entitlement:

I was mortified – it was quite a shock – that somebody could walk in, not work, not pay for anything, not buy any food, live here for nothing and then do everything he's done. It's really wrong – and now he wants me to give him money ... I always think you should get out of it what you put into it. (Emma)

6.70 Another problem solicitors face when advising clients is the complexity of the law:

It is not easy explaining the principles of trust law to clients and it is sometimes not easy explaining the difference between a joint tenancy and a tenancy in common. I suppose we all have our own ways, and over the years I have tried to develop a way that's in very plain English and very simplified, but it's not easy for clients to grasp. (CHS2)

6.71 Again, solicitors found it difficult to advise, and clients found it hard to accept, that the law in this area is so unpredictable. What clients most want to know is the likely outcome of their dispute. The difficulties that the lawyers had in predicting outcomes clearly placed demands on their relationship with their clients.

It is difficult – there are lots of ifs and buts – but I think we tend to focus very much initially on the factual issues, the history of how things got there. We get onto the legal issues at the appropriate time... In publicly funded work with a lot of stuff at the lower end, sometimes you are having to look at very pragmatic issues such as the cost versus the benefit, and sometimes, really, these cases are not worth pursuing. But the law feeds into this – you have to make them aware of the uncertainty in the law. That can make it difficult for us to explain what their prospects are. (BJS4)

6.72 Certainly the clients in our sample found the unpredictability frustrating:

She tried to explain the law to me, but it was so not any guarantees ...It was so vague. There was no guarantee, no black and white lines drawn... (Jenny)

The quest for predictability is of course very natural and some cohabitants expressed the belief that, in a divorce, the position would have been clearer:

They don't have the parameters that they have on divorce where all is very clear cut. (Natalie)

In fact it is not always the case that divorcing clients feel they are in any better position than cohabitants in this respect. Perry et al.⁹ found divorcing clients expressing similar views about wanting something more concrete than the advice they were getting.

6.73 In practice, a significant number of our sample actually received initial advice which was more or less as they had expected. These were the individuals whose own views of the principles on which issues should be settled included strict legal entitlement – perhaps simply to the extent that they believed that the way in which property was owned in law should be determinative. For some, such an outcome was also what would suit them. Some, fearing the worst, were even pleasantly surprised, finding their positions better than they had expected, where solicitors offered the prospect of finding some sort of trust which they had not heard of.

Summary

- Separating cohabitants perceived the issues facing them in practical rather than legal terms.
- Many individuals held their own views as to the principles by which their issues ought to be resolved. These included contribution/compensation, need and honour. Few focused on strict legal entitlement.
- The mismatch between the lay concept of the issues arising out of cohabitation separation and the legal response was very marked, requiring major redefinition by lawyers of their clients' concerns into appropriate legal concepts.
- Cohabitants took advice at varying stages of their disputes, some initially from informal sources and the CAB, before moving on to legal advice. Most sought professional advice within a few months of the separation, though some waited several months before doing so.
- Legal advice was sought for a variety of reasons, including an assessment of the legal position, approval of their own proposals, the

⁹ A Perry, G Douglas, M Murch, K Bader, M Borkowski, 'How parents cope financially on marriage breakdown. (2000) Joseph Rowntree Foundation.

need for legal documentation to be drawn up and failure of direct negotiation.

- Solicitors faced a variety of difficulties in giving initial advice to cohabitation clients, due to the law's complexity and unpredictability. Many cohabitants were shocked and disappointed by the advice received.

Chapter Seven: The Practitioners

7.1 In this chapter, we describe the practitioners' general approach to, and experience of, handling cohabitation cases in terms of the law, the evidence and the procedure.

The family solicitors

Expertise

7.2 Our pool of 41 family solicitors came from a varied background. Whilst not representative of the profession as a whole, their backgrounds were sufficiently diverse to provide a broad insight into the challenges of dealing with this area of law. They practised in a wide variety of firms in size and type, ranging from single branch sole practitioners to large city centre or multi-branch firms with many partners. Their family 'departments' ranged from single solicitors to some with over ten fee earners. Approximately 60 per cent did some publicly funded work. The solicitors themselves included a mix of age, status and gender, and their experience ranged from 2 to 37 years.

7.3 Thirty-nine of the 41 solicitors practised mainly in the field of family law. Thirty-two of these practised exclusively in the field of family law, including 21 who were on either the Resolution or the Law Society Family Law panel, and three whose panel specialisms were in cohabitation. For seven of those who also practised in other areas of law, family law formed a significant proportion of their caseloads, 50 per cent or more of their time being spent on it. The other areas of law covered by these nine solicitors included general civil work, property, trusts and conveyancing. Only two could be described as generalists devoting relatively little time to family law.

7.4 Property issues concerning separating cohabitants appear to have become the province of the family lawyers, rather than that of chancery / property / trust lawyers, at least at solicitor level. Whilst we did make efforts to meet with civil and property litigators, we were more often than not referred to the family department as the place to which such cases were directed. Only those cohabitant clients presenting with a business, insolvency or contested inheritance issue would usually be referred to anyone other than a family lawyer, or perhaps when professional negligence was involved.

7.5 This practice was confirmed by the family lawyers whom we interviewed, and indeed by the cohabitants themselves, most of whom perceived the issues as falling within the arena of family law. Quite often, the clients presented to their solicitors with general enquiries about separation, or about the children, and the property issues did not emerge until a later point.¹

7.6 It was clear that cohabitation property cases were not mainstream work for most family lawyers, making up only a relatively small proportion of their caseloads. For all but eight of them, it was less than 10 per cent. Overall,

¹ See Chapter Six para 6.62.

caseloads varied significantly in size, from around 40 to over 200, the size depending on the status, experience and hours of work of the solicitor, but mainly on whether the solicitor undertook any publicly funded work, with those who did invariably having much larger caseloads. In practice, however, many solicitors would deal with only 'a handful' of cohabitation property cases – just five or fewer in any one year. Of the eight lawyers whose cohabitation property caseload was more than 10 per cent, all but one estimated between 10 and 20 per cent, which for most of them meant between 10 and 20 cases a year, including one-off consultations. The only solicitor doing more than that was a Resolution panel member specialising in cohabitation who currently had approximately 25 current cohabitation cases out of a total caseload of about 80.

7.7 A major consequence of the relatively small cohabitation caseloads was that family lawyers were significantly less confident in handling cohabitation cases than they were their divorce cases. Lack of familiarity with both the law and the procedure was certainly a factor contributing to their lack of confidence. The small volume of cases meant that the work could not become routinised, and the lawyers' approach was more individualised and idiosyncratic, with the result that it was a learning experience for them as well as for their clients. Davis argues that routinisation in divorce practice leads to solicitors assuming 'a standardized client to whom the solicitor assumes standardized ends' to the detriment of achieving the actual client's real goals,² but in this study, the more individualised approach did not appear necessarily to result in better handling or outcomes. As one lawyer said:

In a sense what you want is 20 times the litigation, so that you could develop some expertise. I shouldn't think, in all honesty – certainly in all the practices I know in this neck of the woods – I couldn't name you a specialist in this field. None of us do enough of it. (BYJS4)

And another:

The way I put it to clients is usually that actually it would be much easier if they were getting divorced, because there are well-trodden paths and there are ways you can predict what the outcome is going to be. (BJ1)

7.8 Whilst most of the lawyers specialised in family law, very few held themselves out as having a specific expertise in cohabitation law. The few who did had made a conscious effort to master the law and procedure and found it a satisfying area to work in. However, only a few of the larger family departments were able to offer any real measure of specialisation within the field of family law, such as finance and property or children. Most could not afford this luxury and simply allocated the work according to whoever had a convenient space in their diary.

² G Davis *Partisans and Mediators* (1988) Oxford University Press, Oxford 1988 above n 9 at 57.

7.9 There appeared to be a greater enthusiasm and confidence with these cases among the younger, and perhaps more ambitious, family lawyers. Five of the eight lawyers who positively welcomed these cases were qualified for less than seven years, and overall the younger lawyers expressed fewer reservations than their more experienced colleagues. It may be that they had had less time to get into the 'rut' of ancillary relief proceedings, or that their more recent experience of academic study equipped them better to deal with the more academic nature of trust cases. One of the solicitors who enjoyed this work, for example, had in the recent past been a law lecturer. Not surprisingly, knowledge and experience were related to enjoyment and confidence, in that at least four who positively enjoyed the work were amongst the solicitors whose cohabitation cases exceeded 10 per cent of their caseload, and two were on the Resolution cohabitation panel. Several of the less experienced solicitors who enjoyed the work came across as potential high flyers with a good understanding of the law and procedure and an enthusiasm for the intellectual challenge that these cases can offer.

Legal complexity

7.10 By far the majority of lawyers expressed the view that this was a legally challenging area of law, particularly where cases involved sole ownership with trust or proprietary estoppel issues. There was a suggestion from more than one lawyer that, within the field of family law, only divorce pensions law compared in complexity.

7.11 A number of solicitors expressed discomfort with the ever-evolving nature of the case law. One complained:

It's very difficult to advise a client, and there have been a series of high profile reported decisions recently which tend to be big money, where it's often been quite difficult to determine the trend. (BJ3S)

Another fairly typical view was expressed thus:

Generally most solicitors struggle with it...In this field we are still having to look things up because it's constantly evolving - there is no single book to look in. Text books are pretty hopeless – they're all out of date by the time you've got them anyway. (BYJS4)

One young but seemingly very competent lawyer commented:

It's an area that I don't think many of us are comfortable with...You do look at the case law, it's so complex, proprietary estoppel, resulting and constructive trusts, it's so academic and not very practical. It is very difficult to apply, sometimes, the principles to your situation...I think it's an area you probably can't dabble in – you need to specialise. (CHS2)

7.12 Several solicitors, whilst not necessarily admitting to any major difficulties themselves, expressed criticisms of other solicitors' grasp of the law. As fairness and discretion play such a limited role in trust proceedings,

disagreements between solicitors or criticisms of each other tended to focus on lack of understanding of the law or procedure rather than on poor judgement. One relatively newly qualified solicitor observed,

It's much more difficult, but it's important to know the different types of trust. It's clear in correspondence that some [solicitors] don't. I'm not saying I'm an expert but I am fresh from academic study. (BJS3)

Another commented:

The other difficulty with these is that I find some solicitors just don't know the law either. I did one quite recently where I advised the client it would be a 50/50 split. The other side came back and offered 75 per cent. I told the client – if the solicitor doesn't know, shut up and agree it!...It's still an up and coming area – not so easy. (BYJS2)

This perception was reinforced by the focus groups of barristers and district judges who were generally critical of family lawyers' grasp of trust law.

7.13 Most lawyers found the 'piecemeal' nature of trusts law taxing and clearly wished for some form of clarification or codification. Although a significant minority of lawyers welcomed the break from the routine of divorce ancillary relief, the lack of a comprehensive s 25-type structure made these cases more of a challenge to manage.

One solicitor with numerous panel memberships described the problem:

There are different bits of law and there's not a kind of integrated system for you to follow. With divorce you follow a procedure, you can't predict the outcome exactly but you know pretty much where it's going once you've got full disclosure, whereas with cohabitants it could be that you're trying to prove a constructive trust or a Schedule 1 application. There are bits of law that you could use to suit your purposes but there isn't one sort of blob of law which you can turn to which covers all eventualities. (CHS4)

Another generally experienced and confident lawyer admitted:

The law is complicated. It's very difficult to pin it down – no statutory framework – court based law. That makes it a nightmare. (BYJS4)

7.14 Cases which might have been assisted by Schedule 1 to the Children Act 1989³ also presented difficulties. The relative lack of reported cases under this Schedule, and the fact that most of the (few) reported cases are big money ones, makes it harder for solicitors to advise their more 'average' clients. Commenting on the rarity of Schedule 1 applications, one solicitor commented:

³ See Chapter Three, paras 3.42-3.46.

Part of that is because there are so few cases, solicitors find it difficult to advise. Most of the case law on Children Act financial provision [involves] big money cases – where it's much easier for the father to afford to buy a home for the mother and children. (BJS5)

Advising clients

7.15 We have noted the particular difficulties for solicitors in giving initial advice to cohabiting clients on the basis of the contrast between the law as it is, and what clients had expected. Solicitors' own difficulties in finding their way around the law as it affected cohabitants inevitably also had an impact on the way they advised their clients.⁴ Explaining the law in general terms was hard enough; going on to explain how it related to their clients and trying to predict the outcome was even more fraught with difficulty. As one solicitor put it:

I guess if I were dealing with it all the time it would be that much easier but I think it's more difficult because it's more nebulous and more difficult for clients to get their heads round. (BHS3)

And another:

It is mightily difficult to explain an 18th century concept like coming to equity with clean hands... (BHS4)

The requirement for evidence

7.16 Part of the difficulty for lawyers was that they frequently had to send their clients away to get more evidence before they felt they could advise them with any certainty. The theme of the unpredictability of cohabitation cases came up time and again. The reasons for the lack of predictability included the difficulties not only of knowing and interpreting the case law with any certainty, but also of producing documentary evidence to back up claims. It was sometimes an onerous requirement to prove past financial contributions. Clients who kept records, receipts and bank statements from the start of their relationships were a relative rarity, and for some the effort of trawling back through years of paperwork defeated them. One solicitor observed that '*a lot of cases fall at that stage.*' (BH7S)

7.17 The forensic enquiry aspect of cohabitation cases – going back through years of financial records, accounts and discussions - could be as demanding for lawyers as it was for their clients. Clearly, these enquiries were more necessary in some cases than in others, sole ownership cases for example requiring more enquiry than cases involving joint tenancies with clear declarations of trust.⁵ One solicitor recalled:

"[These cases] can be messy because people are trying to bring in all sorts of things into it, whereas divorce is much more clear. People come in with

⁴ See Chapter Six, paras 6.63-6.73.

⁵ See Chapter Three, paras 3.15-3.17.

their plastic bag saying ‘ I paid this and that,’ they have all these receipts, ‘Because he stopped paying the standing order and didn’t tell me, my overdraft went up and I got charged £10 and a letter from the bank’... (BH10S)

Another solicitor took exception for a different reason, summing up what many others implied:

Of course the evidence is all back to front really. It’s all on end – what each put in. That’s what they’ve done away with in ancillary relief proceedings, for good reason. (BH2S)

7.18 We observed cases where there was no, or insufficient, documentary evidence to back up what the client was saying and the client simply had to try and recall who did or said what to whom, when, where, how and so on. If the parties did not agree on this, then the lawyer had the difficult job of assessing the strength of each party’s version. Oral evidence is a particular feature of constructive trust and proprietary estoppel cases, and it means that a decision as to whether or not to pursue such claims is a hard one. We discuss this in more detail in Chapter 8.⁶

7.19 One lawyer who specialised in property and family law made an observation on the interrelationship between the evidence and the law:

There is always a dispute about facts. There is never any clear evidence about the facts so you’re dealing with quite amorphous arguments with then very complex legal issues around the edge which are hugely affected by changes in the facts. (BH1S)

The procedural rules

7.20 A debate which has continued for many years amongst practitioners and academics concerns how cases should be handled within the litigation process.⁷ Major reforms were introduced in 1998 to the Civil Procedure Rules (CPR),⁸ and these are the rules which govern TOLATA cases. However, divorce and other family cases are covered by the Family Proceedings Rules (FPR), with the result that most family practitioners are far less familiar and confident with the CPR.⁹

7.21 Some of the distinctions between the two sets of procedural rules, and particularly between the CPR and the Ancillary Relief Rules¹⁰ became apparent in our discussions with the solicitors. One early distinction is the way that the proceedings are issued. In an ancillary relief case, all proceedings are

⁶ See para 8.43.

⁷ Rt Hon Woolf, H (Baron), Master of the Rolls, *Access to justice: final report to the Lord Chancellor on the civil justice system in England and Wales* (1996) HMSO, London

⁸ The Civil Procedure Rules 1998 SI 1998 No.3132

⁹ E Da Costa, and B Garrod, ‘Procedural Aspects of Cohabitation Claims’ *Family Law* April [2003] p270

¹⁰ Family Proceedings (Amendment No.2) Rules 1999 SI 1999 No.3491. The Ancillary Relief Rules were introduced in December 2000.

commenced by filing Form A, which sets out the relief claimed in the simplest possible manner. In contrast, solicitors issuing an application under TOLATA have first to make the decision as to which Part of the CPR they are going to issue under - Part 7 or Part 8. Part 7 requires a claim form and a rather more formal 'statement of case' through particulars of claim.¹¹ Part 8 requires a claim form setting out the issue to be decided and the remedy sought in summary form only, supported by a witness statement.¹² Whichever Part is the basis of issue, the claimant's main case has to be made at the outset of the proceedings, unlike ancillary relief applicants who have several weeks to prepare the main statement of their case after the date of issue.

7.22 Few family lawyers had had much experience of drafting particulars of claim and many preferred the rather simpler procedure under Part 8. However, the rules suggest that Part 8 should not be used where there is a major dispute of fact,¹³ such as might occur under a constructive trust case when one partner's interest in a property is contested. We were given several examples of cases in which arguments had arisen over the correct Part for issue. Natalie's solicitor referred to more than one experience of solicitors inappropriately issuing under Part 8 and then having to transfer the proceedings to Part 7. She described "a lot of confusion" on the issue, including in Natalie's case, when she and her opposing solicitor had "endless arguments" over which Part the proceedings should have been issued under, resulting in significantly increased costs.

7.23 The problem for most of our sample of family solicitors was their lack of familiarity with the CPR. Many admitted that they constantly had to go back and check the details, a time-consuming exercise not legitimately chargeable to the client:

Part 7 applications, where you're arguing all sorts of indirect contributions, third party interest, bank interest – how does a family lawyer cope with that? Part 8 is OK – quite simple. For Part 7, I'm out of my depth on procedure..... Maybe that's why none of us go to court! Can you charge the client for spending five times as long drafting the application? (BYJS4)

Another fairly typical response was:

I don't struggle but I have to be careful. ((CHS3)

7.24 Some solicitors were quite critical of the CPR, suggesting that they were family-unfriendly and un-conducive to settlement. One family property / trust specialist observed:

There is a mismatch between the desire to propel things through the court quickly with actually getting people to settle...For people to sit down and try and agree things, it takes longer. (BH1S)

¹¹ CPR rr. 7.2 and 7.4.

¹² CPR rr. 8.1, 8.2 and 8.5.

¹³ CPR r. 8.8.

7.25 Most lawyers preferred the Family Proceedings Rules as a means of dealing with the issues, one describing the ancillary relief procedure as

much clearer and more structured, including the time-tabling... (CHS2)

Financial Dispute Resolution (FDR) appointments were a particularly popular aspect of ancillary relief procedure, and the lack of an FDR procedure in TOLATA cases was frequently bemoaned. We understand, however, that some courts have started listing TOLATA cases in their Family FDR lists. The FDR, which is time-tabled to follow full financial disclosure, and which requires the parties and their representatives to clarify their proposals to each other and to the judge, was seen as a very helpful part of the ancillary relief procedure.

7.26 Another significant difference between the ancillary relief procedure and the procedure which applies to applications under TOLATA, is the form of the pleadings and statements. Under the Ancillary Relief Rules, the main statement, Form E, sets out the financial information in a standard, comprehensive, concise and relatively neutral way, giving little opportunity to focus on the past, or for expressions of emotion. In contrast, '*long, rambling statements*' in TOLATA cases were mentioned by more than one lawyer, and were variously described as '*unhelpful*', and '*like the old days*', giving an unnecessary opportunity for inflammatory allegations. One solicitor went so far as to suggest that Form E could equally apply to trust cases, and that any party arguing that they had contributed in cash or in kind could simply append a schedule to the Form E detailing all their contributions.

The costs rules

7.27 One of the major differences between the procedure in ancillary relief and that in trust proceedings is the costs rules. While costs 'follow the event' in civil proceedings, i.e. the loser is expected to pay the winner's costs, this is not so in family proceedings, where, unless a litigant acts unreasonably, each party bears his or her own costs. The costs rules under the CPR caused the solicitors much anxiety and were frequently cited as one reason for their taking counsel's advice.¹⁴ Several lawyers referred to the risk of an order for costs against their client and the harshness of the costs rules under the CPR.¹⁵ For example, one of the cohabitation specialists, who was convinced that the cost rules under the CPR put many solicitors off issuing proceedings in trust or estoppel cases, commented:

And it is one of those arguments, isn't it, where if you prove it you're going to be successful. If you do not prove it you're going to be unsuccessful and the costs regime for the CPR ...is very much more harsh. If you lose you pay costs. It is much more black and white. You say in family financial relief

¹⁴ See also para 7.46 and Chapter 8 para 8.55.

¹⁵ See Part 36 CPR which deals with the making and receiving of offers, and Part 44 which deals with the court's discretion to order costs.

cases that there are no winners and losers but in Trust of Land Act cases there are. (BHS4)

Schedule 1 procedure

7.28 The procedure for Schedule 1 cases is covered by the Family Proceedings Rules. Despite the similarities between Schedule 1¹⁶ and s25 Matrimonial Causes Act 1973, applications are not dealt with procedurally in the same way as divorce ancillary relief, and that has caused problems for family lawyers.

7.29 The procedure under Schedule 1 came in for a lot of criticism from many solicitors. One gave his views very comprehensively:

Proceedings really have stayed in the dark ages, like ancillary relief before it was revised. Judges try to apply rules like ancillary relief and they call the second appointment an FDR but it isn't really. The forms aren't the same. Instead of having a reasonably comprehensive means form you have an application and a standard means form and that's all you get – four pages – that compared with the Form E...There's no mechanism for asking questions or getting replies as there is in ancillary relief. In some situations that can be very troublesome because the procedure is not at all helpful in getting disclosure and resolving any issues about disclosure in the same way as ancillary relief. (BH2S)

7.30 There is also the difficulty of combining proceedings under TOLATA and Children Act and running the cases with two different sets of rules.¹⁷ The court has to decide the TOLATA claim first, as to whether the claimant has a beneficial interest and if so, how much, and then if necessary, go on to decide whether an order needs to be made under Schedule 1. In practice, the CPR govern the application under TOLATA and the FPR govern the application under Schedule 1, which means that there are two different and sometimes conflicting sets of rules governing the same case. It appears, from what the solicitors told us, that practice varies from court to court, with some courts operating a pseudo-ancillary relief procedure throughout.

The mediators

7.31 Statistics produced by the UK College of Family Mediators¹⁸ suggest that there are around 1000 family mediators working in England and Wales, divided approximately equally between the for-profit and not-for-profit sectors and with roughly equal numbers coming from legal and non-legal professional backgrounds. Of the ten family mediators we interviewed, six worked in the for-profit sector and four in the not-for-profit sector. All did some publicly funded mediation. Six had a background in legal practice, one of whom had specialised in cohabitation work, and four had either a social work or

¹⁶ Sch 1 para 4(1).

¹⁷ See *W v W (Joinder of Trusts of Land Act and Children Act Applications)*[2003] EWCA Civ 924 [2004] 2 FLR 321.

¹⁸ Unpublished, 2006.

counselling background. Their years of mediation experience ranged from 5 to 28, with an average of 12. Nine were female and one male.

7.32 As with the lawyers, the caseloads of mediators included only a very small proportion of cases involving cohabitant clients with property issues. For all but two of the ten interviewed, such cases constituted fewer than ten per cent of their caseload and the most was about 20 per cent of such cases over a year. As most mediators work part-time, ten per cent could mean as few as two to three cases per year.

7.33 Referral to an initial meeting with a mediator is a requirement for most clients seeking public funding from their solicitors.¹⁹ The limitations on the availability of public funding until this referral has been made mean that many solicitors will not have had a chance to investigate or advise their clients on potential claims in any detail. The result is that cohabitant clients may enter into mediation with very little idea of the complexity of the law or of whether they have any entitlement or not. Several of the core participants had received only very general or outline advice before they started mediation. Cohabitants who turned up for mediation with little knowledge of their legal entitlement presented mediators with a dilemma. Most mediators preferred their clients to have had some preliminary advice beforehand. Failing that, most if not all of our mediators thought it appropriate at least to disabuse their clients of the notion that they were common law husbands or wives. Some were willing to go further in their explanation of the law.

7.34 One mediator described a case in which a male cohabitant had moved into his partner's house and they had then re-mortgaged her house and put it into joint names. He was seeking half of the equity although he had only paid the mortgage for six months. The mediator, who also practised as a family lawyer and so had knowledge of the law, clearly felt this was inequitable, and at his intake meeting she warned him that the court would take account of their respective contributions. Whether that was strictly correct was probably impossible for her to tell, without sight of the transfer deed or any declaration of trust. But she gave legal 'information' which she said she would not have considered necessary in a divorce case, where the court has so much more flexibility.

He wasn't going to budge and I was trying not to take sides. I warned him about the contributions issue and asked him to get details. (BH5M)

7.35 Other mediators, in contrast, both lawyers and non-lawyers, tended to give a *pretty limited* explanation of the law. One said:

It is quite a difficult area of law anyway and people can easily get the wrong end of the stick, so, on the whole, I ask if they have heard from their solicitors or suggest that they go back to their solicitors. (BH8M)

¹⁹ The Legal Services Commission Funding Code (3B-057) provides that a client must usually attend an intake assessment with a mediator before an application for legal aid can be granted.

7.36 The reality is that mediators cannot force clients to obtain legal advice even if they think it appropriate for them to do so. Public funding for legal advice during the mediation process is available to those who are eligible under a Help with Mediation certificate. However, fewer than one quarter of those who are eligible and attend mediation apply for this.²⁰ Concerns have also been expressed about the extent to which solicitors are willing or able to advise their clients during the mediation process.²¹

7.37 The potentially awkward interface which exists between mediation and the law is particularly acute in trust cases, where decisions that seem fair to the clients may be completely at odds with those that they might get if they took their case to court. The line between information and advice is a fine one, and likely to be more of a challenge in cohabitation cases governed by property and trust law than in divorce and Children Act cases, where the concepts of needs and fairness are far more in keeping with the ethos of mediation. Mediators will be in even less of a position to predict the outcomes than solicitors, and are constrained in any event by the professional rules of impartiality from offering their clients anything more than 'neutral information'.

7.38 Solicitors varied in their views as to how appropriate mediation was for cohabitation cases. Some always actively and positively considered mediation as an option and could see no difference in suitability between cohabitation cases and any others. Others were more circumspect and took the view that mediation involving cohabitants and property should only be carried out by a lawyer mediator, or only once the clients had had prior advice on the law, or even that it should not be attempted at all. One relatively young and inexperienced solicitor said he only routinely considered mediation if his client wanted to apply for legal aid. His view was that if clients are amicable they are capable of negotiating themselves.

If they hate each other, negotiation can't help so I don't see much scope for mediation either way. (BJS3)

7.39 Mediators themselves tended not to see a relevant distinction between mediation with cohabitants and with married clients, even though some reported that they found the complexities of the law challenging. Lawyers and mediators agreed that the prospect of success for the mediation process depended more on the personalities of the clients and on how they felt about the separation than on the issues themselves. However, the focus of the mediators was rather different from that of the lawyers. The mediators, who were not constrained by the law, focused more on achieving a fair and workable solution for the future, as compared to the lawyers whose focus was, more commonly, on past contributions and entitlements – as dictated by the law.

7.40 In practice most of the cases described by our mediators involved practical issues around future arrangements for property and housing rather

²⁰ Legal Services Commission, *Focus* August 06 Issue 51 'Family – Help with Mediation is Available' p 13.

²¹ S Tilley, 'Providing Legal and Financial Information' [2007] Fam Law 74.

than entitlement issues. Two of the more experienced mediators suggested that cases where there was a dispute as to whether there was any entitlement at all tended not to get past the first information meeting, and failed to go on to mediation. Sometimes this may have been because one party had had legal advice on their entitlement and was reluctant to give up what they saw as their legal advantage.

7.41 The Mrs. Burns scenario was rare in mediators' experience. Three said that they had come across that scenario several times, but that such couples usually chose not to mediate. Others observed that their cohabitant clients tended to be younger couples from shorter relationships with fewer, if any, assets to discuss.

7.42 Mediation, however, provides scope for a more 'discretionary' outcome than the strict legal process can provide. Mediators suggested to us that referrals had been made to them by solicitors whose clients appeared to have a very weak legal case and whom they guessed had been referred to mediation as the best hope of their negotiating a settlement based on fairness rather than entitlement. Cases were also described in which *both* parties were fully aware of their legal entitlement had they gone to court, but had chosen to disregard that and instead put in place an arrangement which they both viewed as fairer. As one mediator said:

Mediation offers a different way out...they [cohabitants] can also take into account other assets if they want to, for example a pension, and (referring to a recent case) even though she can't get a pension share he was able to contribute in other ways and take it into account. (BH8M)

7.43 The extent to which mediators were prepared to encourage settlements that would not have been ordered by the court varied. Some would simply tell their clients, for example, that the law for cohabitants does not allow for pension orders, so pensions should be completely ignored. Luke and Diane's mediator (a lawyer mediator) referred to the common law myth that cohabitants are entitled to a share of their partner's pension.

I have to say it doesn't matter. You then have to look at why there should be anything other than a 50/50 split. You have to look at the contributions side of it.

Referring specifically to Luke and Diane, she said:

Because they weren't married, pensions etc did not come into it.

7.44 Others would discuss with their clients the option of including information about pensions in their negotiations, on the basis that some sort of offsetting or nomination might still be possible. In this way, the mediator could have quite an influence not only on the extent of financial disclosure between cohabitants in mediation but also on the themes for negotiation. Caroline's mediator, for example, commented:

Where there are children you're looking more at needs – more like married couples. (BJ7M)

She was trying to steer the couple away from the past (which was the main focus of the law) and was encouraging them instead to focus on the future arrangements for themselves and their children.

Involvement of barristers

7.45 Barristers were involved in at least ten of our core sample of cases, including two in which proceedings were not issued. Similar figures applied to our secondary sample. We did not formally interview those barristers involved in our cases, although court observations provided the opportunity for some lengthy discussions as well as to witness them in action.

7.46 Solicitors generally reported using counsel more, and at an earlier stage, in cohabitant property cases than they did in their divorce cases. The barristers participating in the focus group meeting confirmed this. The uncertainty around the law and evidence, the lack of familiarity with the CPR, fears about costs orders, the difficulties of advising clients and predicting outcomes and the apparently black/white nature of these cases were all reasons given for why solicitors tended to turn to counsel for help with their cohabitant clients. Pat's solicitor, for example, rarely turned to counsel for advice on his ancillary relief cases, but chose to instruct counsel in Pat's case:

*I was pretty clear from *Lloyds Bank v Rossett*²² that unless there is a contribution towards the mortgage or purchase price it is difficult to infer a common intention to share the beneficial interest. But this area of law is so difficult to interpret that I thought it a good idea to have a further opinion. I also wanted a view about the way the court might interpret the contributions.*

7.47 In that case, as in most others that we are aware of, counsel confirmed the advice that the solicitor had given to his client. Indeed, counsel was sometimes instructed precisely as a means to reinforce unpalatable advice in cases which the solicitor thought were not very hopeful. Helen's case was an example of this. She was claiming an interest in her ex-partner's property. Her solicitor admitted:

I have grave concerns about any possible claim she could make from what she was saying. My initial step was to get counsel's advice – that's the first thing we did. I just had real doubts, and I didn't want to be giving her negative advice at such an early stage if in fact there was any possible way we thought we could get something for her...I just felt if she could hear it from somebody else and me as well, it was far more likely to be understood and accepted than if it was just coming from me really.

7.48 Counsel was instructed in all of our core cases in which proceedings were issued. The cases which were fully adjudicated were all presented to the

²² [1991] 1 AC 107, HL. See Chapter Three, para 3.17 et seq.

court by counsel, sometimes unaccompanied by the solicitor because of cost constraints. In addition, the barristers took the lead role in the negotiations in those cases which settled at the final hearing.

7.49 However, even for barristers specialising in this field, like all the other professionals, cohabitation cases made up only a small proportion of their caseload. Those in our focus group admitted that it was rare to find a barrister who had in depth knowledge of family law as well as property and trust law. Despite this, in most of those cases where counsel was used, both client and solicitor saw their involvement as positive.

7.50 The use of barristers by the other party was sometimes a source of irritation, however. Several solicitors complained that they could never get a straight or prompt answer from the partner's solicitor because s/he always had to speak to counsel first. As one complained:

Some people are more at sea than the rest of us.you get the ones which are counsel-led. That's a problem because you can't talk to anybody. You phone them up but they don't know the answer, or they don't know the point you're making – and it's terribly frustrating. (BYJS4)

7.51 All the cases involving counsel involved high legal costs.²³ This was probably not simply a result of the additional expense of counsel's fees, but more to do with the general complexity or contentiousness of the case. For eight out of eleven cohabitants who engaged counsel the property was held in one party's sole name. For the other three, there was a high level of ill feeling between the couple. The effect, for all of them, was that their legal costs amounted to several thousand pounds. One solicitor summed up his view of this field of law:

It's a recipe for enormous fees, counsel, and huge amounts of time in court. (BH1S)

Summary

- Cases involving separating cohabitants and property made up a relatively small proportion of lawyers' and mediators' caseloads.
- Most family solicitors were less confident in handling cases of this type and found the law difficult to interpret and explain to their clients.
- Solicitors found outcomes in trust cases particularly difficult to predict, often because of the lack of documentary evidence of past contributions and the unreliability of oral evidence.
- The Civil Procedure Rules, particularly those relating to the issue of proceedings and costs, were generally seen as less family-friendly. The Children Act Schedule 1 procedure was generally thought to be inadequate.

²³ See Chapter Eight para 8.55

- Mediation was more likely to be used where the issue was to do with practicalities rather than entitlement. Mediators saw mediation as an opportunity for a 'fair' outcome rather than adherence to the rules. Clients often lacked detailed advice when they entered into mediation.
- Solicitors were more likely to seek counsel's opinion than in ancillary relief proceedings and at an earlier stage. Counsel's involvement was associated with higher legal costs.

Chapter Eight: The process of resolving the issues

8.1 In this chapter we discuss the processes by which the separating cohabitants resolved their issues, starting with those that took minimal or no legal advice, then moving onto those for whom mediation or solicitor negotiation was a major feature, and finally to those who became involved with Land Registry applications and court proceedings. We conclude with a brief consideration of the length and cost of the cases.

Cohabitants resolving issues with minimal professional help

8.2 We reported in Chapter Six that solicitors see many clients for one-off consultations.¹ Having been given advice as to their legal position, these clients make their own arrangements without further legal assistance – other than for conveyancing transactions. Six of the core sample participants did this and a further two did not consult a solicitor at all. In addition, two of the secondary sample cases involved preliminary advice only. There were several reasons why these individuals dealt with matters in this way.

8.3 In some cases the issues were relatively straightforward. Nine of the ten individuals acting with minimal, or no, advice owned their properties jointly with their partners as joint tenants and so, on the face of it, their disputes were not complicated. In most of these cases the solicitor advised their clients that they owned the property in equal shares and may have encouraged them to sort things out themselves. One solicitor, commenting from general experience, observed:

Typically the client is someone in their late 20s/early 30s, probably professional, in a relatively short relationship, probably childless, who have simply pooled their resources for three to four years. The relationship has broken down, and – 'if we were to sell the flat, what do we do?' – and that's it. When you discover that the equity in the flat is relatively small, even if there is an argument, you would say, 'There probably is an argument to look at, but you'll probably spend more looking at it. You're better off going home and sorting it out' and that's what happens. (BYJS4)

8.4 Some solicitors positively encouraged their clients to go away and try and sort things out themselves, because they were not confident of the strength of their client's case and thought they might do better on their own. Colin's solicitor, for example, clearly had doubts about the strength of his case and initially advised him that it would be 'more convenient' if he could get his partner to confirm her promise in writing that she would give him half the value of the house. In fact, Colin did not succeed in securing this, and he had to return to his solicitor for more advice and assistance.

¹ See Chapter 6 para 6.56.

8.5 Another reason that some participants took minimal or no legal advice was that they associated solicitors with acrimony and were wary of involving them, in case things turned nasty. Mary, for example, having taken preliminary legal advice on her options, explained:

I'll get a solicitor involved when I know what the position is going to be rather than getting a solicitor involved now and starting to go down some sort of acrimonious route.

8.6 A third reason was the fear of the costs of engaging a solicitor. All those choosing to act on their own behalf expressed concern about this. James was quoted a figure of around £4,000 should it have been necessary to take his partner to court. In wanting to avoid this he seemed effectively to conflate instructing a solicitor with venturing straight into contested court proceedings. Luke, whose legal advice had been free, subsequently went on to mediation for which he paid £170, which seemed a lot to him. When asked whether he intended to go back to a solicitor with the agreement made in mediation, his response was: *'Why should I pay out for something I don't need to?'* Andy was very keen to avoid legal fees and quite put out at the £35 he was charged for a 30 minute consultation. Mary explained: *'It feels quite frightening. I think it could be a couple of thousand pounds.'* Frank had been told he had no legal claim against his former partner. Unhappy at this, he sought a second opinion which confirmed the first. After paying a total of about £300 for this unwelcome advice, he was put off exploring a claim for professional negligence by the prospect of incurring further considerable costs.

8.7 A fourth factor influencing the cohabitant's desire to negotiate directly was the attitude being taken by their partner. In four of these cases, the former partner was also acting alone, having taken legal advice. In two cases the participants made their own agreements without the benefit of prior legal advice in order to move on as quickly as possible from dominant and bullying partners, while appreciating that they were not getting their full legal entitlement:

When it came to the time of me leaving, it was just a case of a) what he could afford, and b) the simplicity of it all because things were getting messy and it was just a case of peace of mind and move on and not fight all the time. (Brenda)

It transpired in both cases that the 'agreements' reached were ill-conceived and both ended up requiring professional legal assistance to resolve the issues in a manner slightly fairer to them. Unfortunately in both these cases, negotiations between the parties themselves had gone too far to achieve an outcome which, on further reflection by the participants, appeared wholly fair.

8.8 Clearly these examples can only be illustrative of individuals in this situation, but given that large numbers do not seek legal advice at all,² it is of concern that in the only two cases where individuals had made agreements without any prior legal advice, they fared badly. A number of solicitors expressed concerns along these lines. A major procedural distinction between these cases and ancillary relief in divorce is the lack of any obvious opportunity for judicial scrutiny of agreements over financial and property agreements, which is so readily available to divorcing couples by means of consent orders. It may also sometimes be to the individual's disadvantage that there are no formalities to resolve akin to the divorce, as this means that there is not always such an obvious reason to seek legal advice.

Negotiations

Negotiations through mediators

8.9 Seven of our core sample involved some mediation, out of a total of 12 who had an initial meeting with a mediator. Mediation was helpful for some of those who tried it and for at least three couples made a positive contribution to the final outcome. For others it was not successful. Generally, as we noted in Chapter Seven,³ the process was more successful when the issues involved practicalities or the extent of the respective shares - when it was a question of how big a slice of the cake each was to get and when, rather than whether, they were to get any share at all. In addition, when the couple explicitly put the needs of the children high on their list of priorities the process appeared to work better. Those cases which involved the issue of whether there was any entitlement at all tended not to benefit from the mediation process.

8.10 Diane and Luke were two for whom mediation was a positive part of the process. They were primarily concerned with the practicalities of dividing their household into two. They agreed in mediation on a Mesher type arrangement,⁴ although they subsequently varied this agreement when Diane found herself able to buy Luke out earlier.

8.11 Isabel was another for whom the mediation process contributed positively. For Isabel and her partner the issue was primarily the extent of their respective shares in the family home, albeit that this was held in the partner's sole name. However, she had been able to produce to her solicitor documentary evidence of her financial contributions to the home and thus put herself in a stronger negotiating position. The couple agreed on a lump sum for which Isabel would buy her partner out of the family home.

8.12 Diane and Isabel both used solicitors alongside mediation to guide them through the process and for implementation of their agreements. Both solicitors were enthusiastic about the role of mediation, and their clients were

² S Arthur, J Lewis, M Maclean, and R Fitzgerald, *Settling Up: making financial arrangements after divorce or separation*. (2002), National Centre for Social Research.

³ See paras 7.39-7.40.

⁴ *Mesher v Mesher* [1980] 1 All ER 126. The arrangement allows for postponement of the sale of the house until certain trigger events, whereupon the non-occupying partner /spouse may realise his share.

complimentary about both their solicitors' and mediators' roles in the negotiation process.

8.13 Most of the cases which went successfully to mediation involved issues around the practicalities of separating two households, or of agreeing the respective shares. In one such case, the issue started off as one of beneficial entitlement but ended up as one of practicalities. The couple had become embroiled in a long and expensive argument through their solicitors about their beneficial interests in the jointly owned home. After some time in mediation, it became apparent to the mediator that their issue was more about *occupation* of the home than ownership. In the end they were able to acknowledge each other's contributions towards the property and to move on to work out the practicalities of one buying the other out.

8.14 Cases in which the issue involved entitlement based on past contributions and agreements were generally less successful in mediation, as in the case of Caroline and her partner, whose history of financial and property arrangements was complex. Caroline had been advised by her solicitor that it could be complicated and expensive to take her case to court, so she decided to try mediation, despite limited advice on her legal position:

Mediation might be better as a way of getting something between us. That seems perfectly reasonable to me – if I can get a reasonable agreement.

It took an abnormally high number of mediation sessions (seven) for the mediator to work through the issues presented by Caroline and her partner to some sort of conclusion. The mediator commented:

Who paid for what was one of the ongoing issues for them on a day to day basis. Some clients come – I'm not there as a counsellor or to sort out relationship difficulties, but to look to the future. Some people come with left over financial things that they need to sort out first. These wanted to do that, but it just went on and on....I realized it wasn't my job to get to understand it all in the end. We were using the whole time looking at recent bills. I came to see my job as getting them through the process from A to B. Then the next month would be the same. I had to call a halt to that and look to the future. ...I got sucked in a bit, trying to help them.

Although Caroline and her partner finally came to an agreement in mediation – perhaps by a process of attrition - this was never implemented and they then turned to solicitors to renegotiate the arrangements. The solicitors too had difficulties in resolving the issues and the case was still continuing at the end of our fieldwork phase.

8.15 Mediation will not be possible where one partner chooses to sabotage the process by simply refusing to talk about an issue that the other desperately wants to resolve. This happened when Tara refused to discuss any financial issues with Martin in mediation and would only discuss the arrangements for the children. Similarly, in Gina's case, although she put the issue of her need for a car on the agenda for discussion, the couple discussed

only the children issues, which were the subject of court proceedings, because that was all her ex-partner was willing to discuss.

8.16 Personality dynamics make some cases inherently unsuitable for mediation. Ben and his partner, for example, tried mediation, mainly to discuss the arrangements for their son, but this broke down after two sessions when his partner refused to continue with it. This couple ended up in litigation about every aspect of their separation, including the arrangements for their son and home, extending to an appeal and application for enforcement. Ben's solicitor, having initially encouraged Ben to try to sort things out direct with his partner, described the case as '*an absolute nightmare*', and this would surely have been true for any professional practitioner taking it on.

Negotiations through solicitors without court proceedings

8.17 Of the total sample of 48 cases, 13 involved active solicitor negotiations without the issue of court proceedings. In most of these, inter-solicitor negotiation was just one part of the resolution process which might also involve varying degrees of active involvement by the clients themselves, and also input from barristers.

8.18 In two cases the parties themselves had a significant impact on the course of the negotiations. Brenda had initiated the separation from her dominating ex-partner and left the jointly owned family home before she consulted a solicitor. By that time she had already agreed to be bought out for far less than her legal entitlement and had also been persuaded to let him take over the main care of their two year old daughter. She had clearly put herself in a weak bargaining position, as a result of which her solicitor was only able to negotiate a modest improvement to the original deal.

8.19 Jenny, in contrast, did have the benefit of legal advice when she negotiated a final settlement with her ex-partner, but she too settled for less than she was probably entitled to. She had felt that her solicitor might not have been up to a hard-fought contest, admitting also that she herself did not have the stomach for a potentially nasty fight.

8.20 Pat's barrister had a major input into the negotiation process in her case, which involved some tricky legal and evidential points around her ex-partner's claim to an interest in the property owned in her sole name. Before the conference, Pat described her feelings:

I'm not legal – I don't know- I'm Joe Public so therefore I have to go with what my counsel will tell me to do.

The barrister gave his opinion in conference that the ex-partner had a 20 per cent prospect of success and on that basis advised Pat to make an offer of 20 per cent of his claim. This was a novel approach as far as the solicitor was concerned, but he and Pat followed the advice and were successful in negotiating a settlement on those lines. Pat expressed great confidence in both her legal advisors, especially valuing the fact that they had been 'straight' with her about her prospects.

8.21 In two cases still ongoing at the end of our fieldwork, active negotiations between solicitors were proceeding. In both, the solicitors held their clients partly responsible for the lack of progress. Caroline's solicitor, who expressed frustration at the slow pace of negotiations, blamed her former partner for the lack of resolution, but suggested also that it was time to give Caroline some tough advice. Frances' solicitor was more explicit in holding her client responsible for the lack of resolution of her case. Frances had suffered several changes of personnel in her solicitor's firm which may have increased her uncertainty, but it was also clear that she was reluctant to take any steps which might have been regarded by her former partner as confrontational. While the substantive outcome had been agreed, the legal means to achieve this was not. Frances admitted a lack of motivation to follow her solicitor's advice or bring the negotiations to a head:

(My solicitor) wanted me to do the trust deed – and I could understand why – I had to sign something saying I wasn't taking his advice...I didn't want to (take court proceedings). In my mind, the major thing in all of this has been trying to sort out the children. As I understand I am not entitled to any money, and so to even fight for something – it would have destroyed everybody – and I get more from him – giving to the children – he's paying for their school, for going on holidays – and all the things that they will gain, hopefully.

8.22 The nature of negotiations in cohabitation and trust cases appears to be different in character from those in ancillary relief. First, there is the lack of opportunity for the parties to off-set, or bargain over, other assets or pensions, because of the limited jurisdiction under TOLATA compared to that of ancillary relief, which has to take all the circumstances and a much wider range of factors into account. Secondly, the lack of notions of fairness, equality and needs gives a rather harder edge to trust negotiations. In ancillary relief, the parties are negotiating over how big a slice of the cake they are each going to get whereas in trust proceedings the cake may not only be much more limited, but also the parties may well be arguing over whether one is going to get a slice at all. The perception of trust cases as being more black and white in character and their unpredictability leads to a negotiating approach which may be more about tactics and less about substance than in ancillary relief cases. Nevertheless, the fear of the consequences of losing a trust case, including the real risk of an order for costs against the loser, meant that 15 of the 18 core sample cases which were concluded by the end of our field work were resolved one way or another without full adjudication.

Understanding the legal advice and negotiations

8.23 We looked at how well the cohabitants in the core sample understood their solicitors' and barristers' advice, and their dealings with their opposite numbers, and how closely their understanding matched their solicitors'. While usually the solicitor and client agreed on how well they had understood things, solicitors sometimes appeared to overestimate their clients' understanding. Occasionally, clients admitted to not understanding fully the advice or the

prognosis, suggesting that the advice was 'messy', 'murky', 'muddled', 'woolly', 'confusing', 'complicated' or 'vague'. However, this was acknowledged to be a result of the law as much as the fault of the solicitor.

8.24 Several clients referred to 'jargon', especially where counsel had been asked to advise, and we had the impression that conferences may have ended up as discussions between counsel and solicitor rather than between counsel and client. Susan admitted:

I did find it quite confusing. I have to say I'm not particularly quick on the uptake when it comes to legal jargon. There was quite a bit I didn't understand – the different terms, the conditions under which the judge might decide what I might end up with.

8.25 Pat, on the other hand, although mistaking some of the terminology, felt quite capable of understanding her advice:

My family lost the plot about two months ago with all the legal jargon, but I feel very confident that I understand everything he tells me... The fact that there are these constructive trusts or relating trusts – I have several friends who are cohabiting who haven't a clue what I'm talking about. They're saying, 'you've got to be joking.' They look at me like I'm talking Swahili.

8.26 The terminology used by solicitor and client often differed, but as cases progressed, there generally appeared to be a good level of overlap between what the solicitor advised and what the client understood on key issues. Where there were differences, they were usually that the client overestimated the strength of their position. James, for example, reported that he was advised that he could claim more than half of the jointly owned home because of his financial contributions. The solicitor reported that she had merely advised that his level of financial support was generous, not that he might claim a greater than 50 per cent share in the property.

8.27 Sometimes it seemed that clients found it hard to hear or accept their solicitors' advice, unless the solicitors were not being as frank or clear with their clients as they were with us. Helen, for example, understood her solicitor's advice to mean that she probably had an interest in her ex-partner's property, but just that it was hard to quantify; she later suggested that her share was worth 25 per cent of the increase in value of the property. Her solicitor told us that she and her barrister had advised from the start that Helen's case and evidence were weak. It took Helen some time before she could accept that her claim was not going to succeed. Rosie suggested that her solicitor had raised her expectations somewhat unrealistically about her Schedule 1 claim, whereas her solicitor suggested that it was Rosie who had not been prepared to settle or accept that she would not be treated in the same way as a wife.

The role of in-court negotiations

8.28 Two cases ended up in court as a result of the other party's unwillingness or failure to negotiate. Linda's solicitor had tried hard to engage her ex-partner in negotiations and to secure financial disclosure, to no avail. Eventually her ex-partner consulted a solicitor, but even then appeared reluctant to provide the necessary financial information and was threatening to sell the house. Linda's solicitor felt there was no alternative but to issue proceedings. Annette's ex-partner was so elusive that negotiations did not even get off the ground. He initially agreed that she owned a half share of the family home which was registered in his sole name, but subsequently reneged on this agreement and left the country. Some time later when Annette decided to open his correspondence she discovered that he had not paid the mortgage and in addition had incurred substantial debts. Her solicitor issued applications under TOLATA and Schedule 1 to the Children Act.

8.29 Both cases went right up until the last possible moment – literally to the court waiting room on the day of the final hearing - before each was finally settled by intensive negotiations on the court premises. In each case, both solicitors and barristers were present, with the barristers moving back and forth between their clients and the opponents' representatives. For both clients, the process was stressful and exhausting, despite the fact that they were relatively passive parties in the negotiations. They were left on their own for long periods of time while the legal representatives argued things out, often in far-off little side rooms in the court building, entirely removed from the 'action', as their disputes were pursued almost without reference to them. It was apparent in both cases that control had effectively passed almost entirely from the client to the legal representatives, who took upon themselves decisions as to what was and what was not important, or arguable.

Cases where attempts to negotiate failed

8.30 Those cases which went to full adjudication were characterised by an *absence* of negotiation. A common feature was a high level of intransigence and acrimony between the parties. In two cases, the parties lived under the same roof for part or all of the time, heightening the tension and creating unwelcome distractions to the solicitors' efforts to achieve a negotiated settlement. In Ben's case, relations became so strained that proceedings under Part IV of the Family Law Act 1996 were actually issued

8.31 Where it was tried, mediation had proved futile. Similarly, the solicitors' attempts at negotiations through correspondence had met with no success. Earlier in-court attempts to negotiate had proved no more successful. As well as difficult relations between the parties, relations between solicitors were also sometimes strained, with criticisms on both sides of the other's handling of the case.

8.32 The nature of the issues seemed to make little difference to the likelihood of success in negotiation. In Damien and Susan's case, there was a dispute as to whether Susan had given Damien any money towards the purchase of the family home held in his sole name (and had any beneficial

interest in the family home as a result). Given that there was a dispute as to the facts, it is easy to see why negotiations at court might not have been thought worthwhile. However, In Ben's case, the property was jointly owned under a joint tenancy and Ben's partner was claiming a greater beneficial share. In Ewan and Rosie's case, the property was also held in joint names under a joint tenancy, and there was no dispute over the equal beneficial shares, but Rosie was seeking an additional share under Schedule 1. In these last two cases one might think that negotiations would have some potential, but the battle of wills between the parties, and perhaps between the solicitors, appeared to rule out any prospects of success.

The Land Registry

8.33 Cohabitation property disputes frequently involve consideration of an application to the Land Registry. This may be prompted by a severance of the joint tenancy when the cohabitants separate, or by a need to protect the alleged interest of a non-owning ex- or soon to be ex-partner against disposal of the property before their claim has been dealt with. Alternatively, an application to the Land Registry in respect of a disputed property may be made once an application has been made to court. Disputing cohabitants inevitably rely heavily on their solicitors to make the right application at the right time, using appropriate legal and/or factual arguments in support and the correct procedure. This is an additional area of technicality for family solicitors to grapple with, some reporting finding the rules and procedure opaque and, in their personal experience, inconsistently applied. A brief look at the recently updated legislation⁵ and rules⁶ goes some way towards explaining the apparent wariness of several solicitors about this aspect of their work.

8.34 An application for a *restriction* may be made following severance of the joint tenancy in joint ownership cases, or in sole ownership cases where a trust of land is alleged to have arisen as a result of an implied, resulting or constructive trust,⁷ an application to enter a *unilateral notice* may be made in proprietary estoppel cases and an application for either a *unilateral notice* or *restriction* may be made in pending land action cases.⁸ The procedure is slightly different for each application. No fee is required for an application for a restriction but one is levied for the unilateral notice.

8.35 All applications are open to challenge, in which case an independent adjudicator may become involved.⁹ The adjudicator has power to make decisions in clear-cut cases, including power to award costs, but will put pressure on the applicant to issue court proceedings if the claim is more complicated. Solicitors' experience of this procedure varied, but all appeared

⁵ Land Registration Act 2002

⁶ Land Registration (Amendment) Rules 2005

⁷ See Land Registry Practice Guides 19 and 24, Oct 2005

⁸ Prior to October 2003, one way of protecting an interest in land was by an application for a *caution against dealings*.

⁹ The adjudicator is an independent judicial office holder appointed for the Tribunals Service, an office created by the Land Registration Act 2002, to deal mainly with cases referred from the Land Registry involving disputes. See Land Registry Practice Guide 37, Mar 2003.

wary of it and of the adjudicator's powers. It represented yet another layer of unpredictability in already unpredictable cases.

8.36 In two cases, which involved Land Registry applications on behalf of participants in the core sample, the applications were helpful both in protecting the participant's interest in the property and in strengthening their hand in the negotiations. Annette's solicitor, for example, registered her claim to a beneficial interest at the Land Registry before issuing court proceedings, allowing him time to investigate her claim more thoroughly.

8.37 An application by Pat's partner to the Land Registry had quite a powerful effect on her willingness to negotiate. Although her solicitor advised that the basis of the application was confused and flawed, she still felt very threatened by it. Her solicitor had gone to some effort to acquaint himself with the rules, and challenged the application, but nevertheless encouraged Pat to negotiate because he was concerned to avoid any risk of a cost penalty through the adjudicator. She ended up settling an otherwise strong case, partly because she was so anxious to clear her title at the Land Registry.

8.38 There were other cases with potential for an application, where none was made. Martin's solicitor might have applied for a restriction or unilateral notice, but her advice did not give Martin confidence and she herself described the procedure as 'a nightmare'.

They are always changing the rules on registering a caution. Clients have to gather evidence before you can advise on the merits of an application. It has to go through an adjudicator. The decision should be with the court.

She had had the experience of being given a deadline by the adjudicator in a previous case which was clearly putting her off making an application for Martin. Because of Martin's difficulties in securing documentary evidence to back up his claim, she was not sure he would succeed on a Land Registry application.

8.39 Colin's solicitor was also not convinced that he had sufficient evidence to back up an application to the Land Registry on Colin's behalf. He described the quandary that he was in about applying to the Land Registry:

We can't do that until we've issued the court application – unless we can convince the Land Registry there's the basis of a claim. We couldn't really get going with that. I've had some cases recently where the Land Registry appear to be more willing to consider a claim and have entered a caution, in some cases ones that have surprised me. I've been on both sides of this – in one case trying to prevent the Land Registry entering a caution, where we failed, and in another trying to persuade them to enter a caution and again we failed. There seems to be inconsistency of practice between different limbs of the Land Registry.

Here, in contrast to most applications, the main purpose of the court application was to "give a cast iron basis for registering a caution". In the

interim, however, Colin's partner had sold the family home which was registered in her sole name and disappeared with the proceeds.

Issuing proceedings

8.40 Our study of closed cases in one county court revealed only tiny numbers of applications to court under TOLATA and/or Schedule 1. The national figures reveal a similar 'surprisingly small' use of the Schedule, with only 1024 applications and 389 orders made in 2004.¹⁰ With such low numbers, practitioners' experience of dealing with these claims is inevitably limited. Nearly half of the solicitors in this study reported no experience at all of an application under TOLATA or of applications under Schedule 1. Of those who had some experience, this was sometimes of just one or two cases. Only three had any experience at all of an application to transfer a tenancy under Schedule 7 to the Family Law Act 1996, which seemed barely to have entered the consciousness of many lawyers. Interestingly, however, those who reported experience of it had used it several times.

8.41 Eight of our core sample involved the issue of court proceedings, along with 12 of the 19 secondary sample of cases described to us by solicitors.¹¹ Thirteen of these 20 cases were under TOLATA, four were applications under Schedule 1, and three involved both sets of proceedings.

8.42 Mnookin and Kornhauser have noted how the risk preferences of clients can affect the outcome of bargaining when the legal outcome is uncertain.¹² In a different context – that of the introduction of conditional fees as a means of financing litigation – Yarrow has identified that lawyers, too, may vary in their degree of risk-averseness when deciding which clients to accept.¹³ It was clear in this study that the confidence or optimism of the lawyer could also play a part in determining the willingness to issue proceedings, influenced heavily by the risk of an order for costs and the (non)-availability of legal aid. Generally, solicitors expressed themselves as reluctant to issue court proceedings. Recurring themes were unpredictability and the potentially all or nothing nature of outcomes, particularly in trust cases. As one solicitor put it:

It's such a grey area. There are no clear guidelines on what someone might expect. Firstly you don't know whether the court is going to accept a person

¹⁰ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper* (Consultation Paper No 179), (TSO, 2006) at para 4.34. Not all of these cases will have related to cohabitants, since this jurisdiction can be used (subject to the provisions of the Child Support Act 1991) by any parent, including those who are married, or who have never cohabited, seeking an order for support against the other.

¹¹ We have already acknowledged that the cases in our sample were at the more disputed and complex end of the range.

¹² R Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950 at 970.

¹³ S Yarrow, *Just Rewards: the outcome of conditional fee cases* (Nuffield Foundation, London, 2000) cited by R Moorhead, 'CFAs: A Weightless Reform of Legal Aid?' [2002] NILQ 153 at n 21.

has any share whatsoever so it could be nil. At least with ancillary relief you know someone is going to get something. (BH10S)

Another said,

In one sense it ought to be easy, because courts don't have the discretion where judges could perhaps justify whatever decision they make by referring to certain relevant factors. It gives the judges scope to make orders which are often very difficult to appeal. So it ought to be easier to advise on trust law by looking at financial contributions and then at the more nebulous grey area of intention. However, in Trust of Land Act cases, I tend to feel you can never be quite sure what you're going to get in a contested final hearing. (CHS5)

8.43 When lawyers are considering whether to issue proceedings, they have the difficulties not only of analysing the law and the evidence, but also of having to second-guess their client's likely quality as a witness in court as well as their opponent's. This is a feature of any contested case, but it is particularly difficult when the evidence is mainly oral and the parties are giving evidence about their intentions, about who said what to whom, when and where, in the context of an intimate personal relationship. Some cases can hang simply on whom the judge believes about a conversation between the parties many years earlier. They are fact-sensitive and high-risk cases.

One of the cohabitant specialists summed up the difficulties:

You find a lot of people are reluctant to issue proceedings..... The litigation is riskier because there's a big difference again in contrast to ancillary relief where you can, with an element of certainty, predict a band of outcome and say to people, 'it's going to be between this and that amount or your maintenance is going to be between this and that figure and between this and that number of years.' If you pursue an argument of proprietary estoppel or constructive trust, which are the two most common ones, very very often you have no evidence, just oral - they don't write these things down and therefore you're going to trial on the basis of oral evidence which makes it very difficult to predict because you don't know how the other party is going to come across in their evidence. You can have a vague idea of how your client will come across but you don't know how the other party will. (BHS4)

8.44 Not surprisingly, solicitors with particular expertise in this area of law – who were also those who handled the greatest volume of cases – appeared the most ready to initiate court proceedings. Emma's solicitor, for example, was on the Resolution panel as a cohabitation specialist and he was the only solicitor from the core sample who was willing to test the boundaries by challenging a post-TR1 joint tenancy in court, planning to take technical and legal points to defend the case, including an argument that the 'agreement' behind the joint tenancy was so fundamentally breached that it was open to the court to reverse it.

8.45 Susan's solicitor, also very expert and experienced, advised from the outset that she would have an uphill struggle to prove her claim to a share of the family home, but was nevertheless prepared to attempt it. She claimed a share of the equity in the family home owned in Damien's sole name on the basis that she had made a contribution towards the mortgage, but without clear documentary evidence to substantiate the claim. Perhaps her solicitor was testing the court to see how far it would go to assist a woman/mother who had brought up the parties' sixteen-year old daughter but stood to gain nothing from a 20-year relationship. Significantly, Susan had little to lose, being publicly funded. Either way, we guess that other solicitors might have been more diffident about issuing such proceedings.

8.46 Our own assessment was that some solicitors took a cautious view of the law and were unwilling to go behind the legal title, particularly in the case of joint tenancies. Of the 11 core sample cases involving joint tenancies, all but one involved unequal financial contributions but in only two was any real challenge made to the principle of equal beneficial ownership. Generally, the cohabitants were advised that they owned the property in equal shares, and that there was no prospect of challenging this, whether or not the transfer pre- or post-dated the introduction of the TR1. In contrast, of the 12 cases in which the property was held in only one party's name, at least eight involved a serious challenge to the sole beneficial ownership and a claim by the non-owner to a share.¹⁴

8.47 In many cases the advice regarding joint tenancies produced a quick result which satisfied the parties. However, we had many examples of cases where properties had been put into the couple's joint names notwithstanding vastly differing contributions towards the value of the property. Sometimes this occurred when one party transferred a home they already owned from their sole name into joint names, for example, in Emma's case, and sometimes it occurred when one party simply contributed the bulk of the capital to the purchase of the home, such as in Frank's case.

8.48 Frank was a classic example of someone who allowed his heart to rule his head. He fell in love and invested over £100,000 of his own money into the purchase and improvement of a home with his new partner. The property was purchased in the joint names of himself and his partner as a joint tenancy, despite the fact that she had contributed nothing. When they separated nine months later, she demanded 50 per cent of the equity. Two separate solicitors advised Frank against issuing proceedings, telling him that, given the wording on the TR1, there was nothing to be done apart from possibly suing his conveyancing solicitor. Needless to say, Frank was very disappointed that the law could provide him with no justice in what he saw as a particularly immoral situation.

¹⁴ Cf R Tennant, J Taylor and J Lewis *Separating from cohabitation: making arrangements for finances and parenting* DCA Research Series 7/06 (DCA, 2006) at para 5.1 who found that it was rare for a claim to be made against a sole owner.

8.49 The solicitors may have taken this sort of approach because they regarded the wording of the transfer document as conclusive and assumed that it would be extremely difficult to challenge a half-share, even where the true intent of the parties appeared to conflict with the title (and even though it is clear from this study that many clients did not appreciate the significance of the form). This cautious approach has now been vindicated by the decision in *Stack v Dowden*¹⁵ where the House of Lords made it plain that attempting to challenge the legal title 'is not a task to be lightly embarked upon.'¹⁶

8.50 Schedule 1 proceedings appeared to be no more popular than TOLATA applications. Although the factors to be considered on an application under Schedule 1 clearly have much in common with s25 Matrimonial Causes Act 1973, solicitors were critical of it in making no provision for the caring parent in their own right, and often saw it as a remedy more suited to big money cases.¹⁷ They also noted that it is often not possible for the couple to fund two properties from the available assets, and a lump sum is of limited use to a claimant who is on social security benefits or legal aid. The fact that the Family Proceedings Rules do not as yet¹⁸ apply to Schedule 1 claims also made them more problematic to handle. One solicitor suggested that there is:

...something about the psyche of the separating person who still wants some degree of finality, rather than x years down the line, the property reverting or something of that sort. Of course, that may be the only option – but I do find quite often that even where there's a degree of financial hardship, people prefer finality. (BJS4)

Another commented:

It's useless unless they are rich. It's for the very rich basically. If you've got a partner who's a millionaire, then of course you're going to get help from Schedule 1 – but it has to go back to him – there's that disincentive. Then there are also the costs of it. If they qualify for Legal Aid – OK, but if you and they're in the middle, they can't fund it. Those in the middle can't afford to put away £10,000 just for court fees. (BYJS1)

8.51 Despite such comments, however, in practice among the cases we observed, solicitors succeeded in making good use of it, either in negotiations or in proceedings. In Linda's case, being given a large lump sum put her in a position to get into the property market in her own right, where her own mortgage-raising capacity would have been inadequate otherwise. Although she will have to repay the lump sum some ten years down the line, having had the use of it will place her in a far superior position than would otherwise

¹⁵ [2007] UKHL 17 [2007] 2 WLR 831 discussed at paras 3.16 et seq above and 10.26 et seq below.

¹⁶ *Ibid* per Baroness Hale of Richmond at [68]. See further Chapter Three para 3.16.

¹⁷ See the Law Commission Consultation Paper No 179 *Cohabitation: The Financial Consequences of Relationship Breakdown* 4.34 which reports that only 1024 applications were made nationally under Schedule 1 in 2004, resulting in just 389 orders.

¹⁸ It has been recommended that they should do so: HMCS, *Family Procedure Rules: A new procedural code for family proceedings* CP 19/06, (HMCS, 2006), para 48.

have been the case. Similarly in Annette's case, having negotiated a half share in her home outright, the other half was then negotiated under a Schedule I arrangement. This again would allow her to build on her own rather inadequate property-owning capacity to stand her in better stead by the time the sum comes to be repaid. Clearly, where applicants have a small, but inadequate mortgage-raising capacity, Schedule I can boost this to enable them to get into property ownership. It appeared that this possibility was not being fully explored or exploited, and, pending further reform, we echo the view of Arthur et al¹⁹ that more consideration could be given by advisers to whether this jurisdiction might be utilised.

The duration of cases

8.52 As we have described in Chapter 6²⁰ the average length of time between the decision to separate and a consultation with a professional advisor varied considerably. Once they did consult with a professional, some took only a couple of months to resolve their case while others took considerably longer. Of the 22 core participants who had sought some professional assistance and whose cases were concluded, the timescale from seeking professional assistance to final order or agreement averaged 14.5 months, ranging between two to 30 months. Twelve took 12 months or more to resolve, including all of the participants who were involved in court proceedings. Those who tried to deal with matters with no or minimal legal help did not necessarily resolve the issues any more quickly.

8.53 One of the notable features of the 12 cohabitant property disputes found in the survey of civil court files was a significant time lapse between the date of separation and the issue of court proceedings at just under three years. Four, however, had taken far longer – 5, 6, 9 and 11 years respectively. In some cases the application had been prompted by a significant change in the equity of the property in dispute resulting from the general increase in property prices.

The cost of cases

8.54 Costs, and the fear of incurring them, were significant factors in determining how individuals dealt with their issues. All those individuals (8 of our core sample of 29) who took minimal or no legal advice had expressed concerns about the potential costs of dealing with matters through solicitors. Not surprisingly, the costs of those eight were amongst the lowest of all, none exceeding £400.

8.55 Estimates of the costs incurred by 23 of the 29 core sample participants averaged just under £4,700 each. However, that figure belies a tremendous variation in costs. Some participants incurred none at all whilst others incurred thousands of pounds. Those who became involved in court

¹⁹ S Arthur, J Lewis, M Maclean, S Finch and R Fitzgerald, *Settling Up: making financial arrangements after divorce or separation* (National Centre for Social Research, 2002) at pp 108-109.

²⁰ See paras 6.51-6.54.

proceedings paid by far the most, averaging over £11,500 and ranging from £5,000 to £23,000 each. Those cases involving counsel (which of course included the cases which went to court) were all also associated with higher costs. They averaged over £10,000 each and ranged from £3,000 to £23,000.

8.56 Fear of an *order* for costs was raised on numerous occasions, though by solicitors more than their clients, as a factor influencing decisions in the legal process, particularly in relation to issuing proceedings and seeking counsel's advice. The fear of an order for costs from the Land Registry adjudicator and the wish to avoid the costs of proceedings influenced Pat's decision to negotiate with her ex-partner, even though she was quite sure of her ground. Her solicitor had advised that even if she was successful, there was no guarantee that her ex-partner would be able to pay her costs.

8.57 This raises a further dimension. As explained in Chapter Seven,²¹ the basic principle regarding costs in TOLATA claims is that the loser pays. However, this theoretical position is complicated in practice. First, the litigant must factor into his or her decision whether to proceed the possibility of bearing the costs of both sides should he or she ultimately be unsuccessful, yet it is very difficult to predict the chances of success in these sorts of claims. Secondly, the loser may simply not have the ability to pay costs, irrespective of an order against them. Finally, legal aid may distort the balance between the parties.

8.58 Three of the six concluded cases which involved court proceedings included an order for costs against one or other of the parties. For Linda and Annette, both of whom were successful in securing an order for costs in their favour, the subject of costs formed quite a significant part of the negotiations at court. Their orders were effective because the ex-partners retained some assets against which the orders for costs could bite. Damien, in contrast, who had little trouble in securing an order for costs against Susan following her unsuccessful claim to a share of the family home, was unlikely to be able to enforce it because Susan had no other assets of her own. On the other hand, Ewan, who was successful in his case, was unsuccessful on his separate application for an order for costs against Rosie, and in the process, of course, further increased his own costs. It is ironic that in these two latter cases, the winners had originally made significant offers which, had they been accepted, would have meant the money would have gone to the losers rather than to solicitors.

8.59 Public funding could give the recipient an advantage, both because of the lower charging rates and ability to postpone repayment of costs, and also because it gave the publicly-funded recipient some protection against an order for costs, or in respect of payment if an order was made. Susan, for example, who was publicly funded, incurred costs of £10,000 whilst her opponent, Damien, who was privately paying, incurred costs of over £14,000. She was advised that she had nothing to lose by pursuing her case to court. She did not pursue her application for a lump sum under Schedule 1 partly

²¹ See para 7.27.

because any award would immediately have been swallowed up by the order for costs against her. Thus, her costs were met almost entirely from public funds without any liability on her part for the statutory charge. This, not surprisingly, was a source of some resentment for Damien.

8.60 However, those individuals who were lucky enough to get public funding were normally faced with the prospect of paying their costs back through the statutory charge if they were successful. This could present a problem, particularly if there had been other proceedings. Emma, for example, had the benefit of public funding for proceedings against her violent ex-partner, and the costs of those proceedings would have to be deducted from any money or property that she secured in the trust proceedings. Similarly, Gina, who was hoping to obtain legal aid to apply for a lump sum from her ex-partner for a car, had to consider the implications of the statutory charge in relation to her legal aid costs amounting to £12,500 incurred in contested residence and contact proceedings.

8.61 An additional complication of public funding and the statutory charge emerged in relation to Schedule 1 proceedings. At least two of the solicitors acting for clients in Schedule 1 proceedings reported disagreements with the Legal Services Commission. Linda's solicitor was arguing that all she had secured in the court proceedings was a right of occupation, not any actual equity, and was in dispute with the LSC over whether the charge should apply at all. Rosie's solicitor was arguing over whether the charge for her costs could be postponed. We did not hear the outcome of these disputes, but suspect that they created yet more stress and delay for the clients which they would have preferred to avoid.

Summary

- Many cohabitants took minimal or no legal advice on their separation, or did not do so until long after. Those who did were sometimes actively encouraged by their solicitors to try to resolve issues themselves
- Those cases which were resolved without the issue of court proceedings involved a mixture of self-help, mediation, solicitor negotiation and input from counsel
- Applications to the Land Registry are an important feature of trust cases but some solicitors were put off making applications by what they saw as problematic or inconsistently applied rules.
- Most solicitors were cautious about issuing proceedings. Trust cases were seen as high risk and solicitors were deterred by the risk of a costs order
- Cases took an average of 14.5 months to conclude, but ranged in length from 2 to 30 months.
- Costs ranged from £0 to £23,000, and averaged just under £4,700. Cases involving counsel and/or court proceedings were by far the most expensive. Publicly funded clients were normally at an advantage, but the statutory charge could cause difficulties.

Chapter Nine: Outcomes

9.1 In this chapter we look at how the cohabitants finally resolved their property issues, what the outcomes were, and how far these matched client and practitioner expectations. We discuss how successful the cohabitants were and explore the more complex question of how satisfied they and their practitioners were with the outcomes. We briefly compare the outcomes with those that might have been achieved if the parties had been married and discuss what happened following agreements and orders, and the extent to which the settlements were subsequently varied.

How the cohabitants resolved their primary issues

9.2 In Chapter Six we looked at how the cohabitants perceived the issues facing them, and at how these issues were redefined in legal terms. For the cohabitants themselves the issues were broadly categorised as follows:

1. Those seeking to preserve a home for themselves and/or their children ('preserving a home')
2. Those who accepted that the home had to be divided, but could not agree shares ('extent of shares')
3. Those needing help to find practical solutions as to how to separate their households ('practicalities')
4. Those defending claims on properties they considered their own ('defending property claim')
5. Those seeking financial compensation for contributions to their partners' properties ('seeking compensation')

Some cohabitants had several issues to resolve, and generally issues evolved over time, sometimes in the light of legal advice. In this section we focus on the issues which appeared to be of primary significance to the participants throughout the process.

9.3 Overall, the picture presented by our core sample as to the means by which they finally resolved their cases was fairly evenly spread. Five cases were resolved with minimal or no professional help, five were negotiated through mediators or solicitors without court proceedings, six were resolved following the issue of court proceedings and six remained unresolved.

9.4 Table 5 below shows the various means of resolution by reference to how the 29 core respondents perceived their primary issues.

Table 5: Means of resolution by issue for core sample participants

	Issue 1 Preserving a home	Issue 2 Extent of shares	Issue 3 Practicalities	Issue 4 Defending property claim	Issue 5 Seeking compensation	Total
Settled between the cohabitants themselves		2	3	1		6
Negotiated through mediators or solicitors – no court proceedings		3	2	1		6
Settled through mediators or solicitors with court proceedings	2			1		3
Adjudicated through the court		3		1	1	5
Claim abandoned				1	2	3
Still ongoing at the end of the research	1	1		1	3	6
Total	3	9	5	6	6	29

Factors affecting outcomes

9.5 Few correlations could be found between the nature of the issues and the ways in which they were resolved. Predictably the issue of practicalities appeared to come lowest on the scale of contentiousness, with all those cohabitants for whom that was the primary issue resolving it either between themselves or through negotiation with mediators or solicitors. In none of these cases was there ever any real argument over who was entitled to what. At the other extreme, none of those whose primary issue was to secure some sort of compensation for their alleged contributions resolved the issue either themselves or with solicitor or mediator help. Their cases were all adjudicated, abandoned or unresolved at the conclusion of our fieldwork. Those whose primary issue was to preserve a home clearly also presented difficulty, either requiring the issue of court proceedings or failing to have settled by the end of our fieldwork. The issues of the extent of the shares and those of defending a property claim, each employed the whole range of means of resolution, with no one process predominating.

Mode of ownership

9.6 One factor which appeared to be related to the means of resolution was whether the property was owned in sole or joint names. By the conclusion of our field work only two of the 12 sole ownership cases had settled without the issue of proceedings; the rest either involved court proceedings, or were abandoned or unresolved. In contrast, only two of the 11 joint tenancy cases involved the issue of court proceedings; the rest, except

for one which was abandoned, were settled either by the parties themselves or with solicitor or mediator help.¹

Personality and relationship dynamics

9.7 Personality and relationship dynamics were also major factors which affected outcomes. Generally, and not surprisingly, it seems that the more dominant character won out, irrespective of the issue. Dominance came about as a result of age difference, earning capacity, financial astuteness, risk averseness or sheer force of personality. Gender as a factor was not necessarily related to dominance - it could work both ways. The dominance arose in some cases as a result of abuse.

9.8 There will undoubtedly be many couples where there is an imbalance of financial astuteness or assertiveness in the relationship.² Frances' partner, for example, was a financial consultant and managed the family finances throughout, whilst Frances concentrated on looking after the four children. It was his decision not to marry and to put the family home into his sole name. As a result, Frances faced the prospect of leaving a twenty year relationship with virtually no property or capital of her own, compared to her ex-partner who had a major financial interest in two properties and various other investments.

9.9 There were other cases, however, where even financially astute and capable partners still needed the assistance of solicitors and the intervention of the court to redress a potentially abusive imbalance of power. Annette, for example, contributed equally to the deposit on the purchase of a home but was persuaded by her partner to put it into his sole name. She was a careful money manager; he had a serious gambling habit. He left the family home unexpectedly, defaulted on the mortgage and ran up major debts. He then retracted his agreement to give Annette her half share of the house, and attempted through family and friends to threaten and bully her into submission. Annette instructed a solicitor who issued proceedings on her behalf. In negotiations at court before the final hearing, she not only succeeded in securing a half share of the house, but also obtained an extra 4 per cent of the equity, and an agreement that the mortgage arrears and her costs be deducted from her ex-partner's share. It is hard to see how Annette could have achieved such a favourable result for her and the children without the protection of the court.

Cohabitants' satisfaction with the outcome

9.10 We classed nine of our core sample as having achieved a successful outcome; ten reached some sort of compromise; four were unsuccessful and six had not resolved the issues by the end of our field work. By successful we mean those who resolved their primary issue with almost no loss or cost³ to themselves, relative to their ex-partners. For example, where the primary

¹ See also Chapter 8, paras 8. et seq

² See also Chapter 4 paras 4.34-4.42.

³ For an analysis of the impact of *legal* costs, however, see para 9.27 below.

issue was the extent of the shares, we classed the participants as successful if they left with the share that they claimed, partially successful if they left with rather less than claimed and unsuccessful if they left with nothing at all.

9.11 Thus the majority of our core sample succeeded or partially succeeded in resolving their primary issue, whether through contested court proceedings or a negotiated compromise. Yet many expressed a high level of dissatisfaction with the outcome. Over half of them felt that the outcome had been unfair to them in some way, and others had serious misgivings about the compromises they had made. Their responses to questions about levels of satisfaction with outcomes and views of their fairness were complex and varied in nature. Some focused on how well the law had worked in recognising their specific financial and non-financial contributions, and others more on how fair they thought the law was generally; some focused on the process and the costs, or the performance of their practitioners, and others on the behaviour of their ex-partners; some described a combination of several factors.

Satisfaction and success

9.12 Whilst success and satisfaction were clearly related, they were by no means synonymous. Only two of the nine who were successful appeared to be very satisfied with the outcome, the rest expressing mild to strong dissatisfaction or reservations about its fairness. Unsurprisingly, of the four who were completely unsuccessful, three could be described as very dissatisfied and the fourth had a somewhat mixed reaction. All of those who had compromised their own or their partners' claims, or who could be regarded as partially successful in their objectives, expressed mild to strong dissatisfaction with the outcome.

9.13 The only two who could be described both as successful and as satisfied with the outcome were Diane and James. There were several factors contributing to both their success and their high level of satisfaction. Despite very different circumstances, Diane and James's cases had common features. Both had as their objective the practicalities of separating out their households. Both owned the family homes under a joint tenancy. For both the outcome fitted fairly closely with their expectations of the law. Both managed to resolve the issue without court proceedings and with minimal costs. For both, at least by the time the issues were resolved, there was little emotional conflict between themselves and their partners. Diane commented simply that *'It all worked very well'*. James expressed appreciation for his solicitor's *'frank appraisal of the situation'*, but for him the key to his success was *'keeping solicitors out of it'*. He described the outcome as fair and *'two civilised adults coming to an agreement'*.

9.14 At the negative end of the continuum, there were three for whom the outcome was both unsuccessful and deeply unsatisfactory – Susan, Helen and Rosie. A cluster of negative factors contributed to their dissatisfaction and sense of unfairness. All felt let down by the law, and found the process painfully slow and stressful.

9.15 For Susan, who ended up with nothing after a 25 year relationship and bringing up their sixteen year old daughter, it was her perception of the unfairness of the court hearing rather than the law itself that most disturbed her:

I was quite shocked because I know I am an honest person and that I told the truth in court and [he] didn't... I think that (my daughter) and I have come out of it very badly indeed.

Fraught relations between herself and Damien also coloured her view of the outcome and she blamed Damien for this: *'In order to hurt me he has said he's prepared to see his daughter suffer'*. (It is fair to point out here that Damien would not have agreed with this view.)

9.16 For Helen, it was a matter of the law discriminating against her because she was not married. She felt that the outcome had been unfair to her and expressed her dissatisfaction thus:

Why would it not be the same? If you've made the decision to live together, I don't see why it should be any different...I think you should have the same rights as if you were married.

9.17 Rosie concluded that the law was not fair to women and that it favoured the breadwinner. She also felt that Ewan had *'behaved appallingly'* in not treating her as his wife. If she had not had children, things would have been very different for her:

I'd have quite happily taken my half share. I wouldn't have given up work for a start. I'd still be earning ... I think the law should take into account the fact that, although I didn't earn an income, I made a huge sacrifice and that should be taken into account. My contribution was to stay at home and bring up the children and if that's what you decide as a couple, that's what should be taken into account.

Expectations and outcomes

9.18 Clients' expectations about the outcome of their cases evolved over time. As we described in Chapter Six,⁴ many clients had to adjust their original expectations once they received their initial advice. Inevitably, this was more difficult for some than for others. Rosie, for example, never fully accepted that she should be treated any differently from a spouse. In contrast, Linda, in similar or worse circumstances, having absorbed the unpalatable advice to that effect, quickly adjusted her sights simply to securing enough to re-house herself and her son during his minority.

9.19 As a result of the evolving nature of client expectations, it was hard to measure the extent to which the outcomes fulfilled the expectations of our

⁴ At paras 6.67-6.69.

core sample. We did, however, ask them in their initial interview what outcome they expected or thought would be fair, and in their final interview how the final settlements compared with their original expectations. Their responses were fairly evenly spread between (i) those for whom the outcomes were much as they expected, (ii) those for whom the outcomes were not as expected and (iii) those who had either been uncertain throughout or who had not resolved the issues by the time of their final interview.

9.20 Frances, Frank, Rosie and Natalie all felt that the outcome was very unfair to them, and all, albeit to differing extents, expressed surprise and disappointment with the outcome. The overriding feeling was that the law had failed to offer them adequate protection. Frances, for example, knew she would be able to remain in the family home owned in her ex-partner's name only until the youngest of their four children reached 18, but found it shocking that she would have no entitlement in her own right. Commenting on how the law applied to her situation:

Not good. It was really hard to find the will to fight, or to know that I could fight in my situation. I was very surprised to know that I could fight to stay here. I didn't realise I could do that, and I guess there are people that would have just walked away, and that's quite awful when you think that you've put in a lot of hard work over all those years – working, with the children as well – not only the house. And then to think that you're not going to get anything – it's quite shocking.

Natalie had two main complaints: first, that she should have been given more advice when she and her partner started living together and when she bought her house, and secondly, that the law was so open to abuse by an unscrupulous partner. She had bought the home in her sole name from her own savings and had no idea that her partner might be able to claim an interest:

I was just amazed at how woolly and how grey the law is anyway. So the fact that the law of trust can be verbal or implied is quite ridiculous. I can't believe that UK law could have that.

9.21 Annette and Linda also expressed disappointment with the way the law had operated for them, despite the fact that they were both successful in their claims from a legal perspective. Annette did not achieve as much as she felt she was entitled to: no provision was made in recognition of the fact that she was unlikely to get on-going financial support from her ex-partner. Further, the settlement did not fully recognise the complex history of her financial and non-financial contributions. For her it was not just a question of recognising her initial equal contribution to the house, but also the fact that her ex-partner had increased the mortgage to satisfy his gambling habit, he had taken her savings and borrowed money that had been set aside for the children, and he was playing no part in the children's upbringing following the separation. Her feeling that these issues had been glossed over at court was not entirely without justification and her case was one example of the limitations of the

current law in dealing with the complexities of family finances and arrangements.

9.22 For Linda, the outcome had been rather better than she thought it might be:

Obviously I have to give him the money back but at one stage I thought I was going to have to stay here and pay the mortgage and not get anything out of it eventually so at least this way I may get some money back so I am reasonably pleased with the outcome. I knew it couldn't be any better.

However, she had mixed feelings about the law:

It's quite outdated in some aspects. I think it's unfair that the money has to go back to him really eventually, so I think there should be some changes. But I don't know really, it's a bit of an old dinosaur. At least it protects my son, which is the main thing. Obviously from my point of view it wouldn't have done anything, it wouldn't have helped me, but at least the law will protect the children to a degree which is something...It doesn't recognise our [women's] rights, but I fulfilled the same role as wife and mother and they don't seem to recognise that.

The process and costs

Cohabitants' views of the process

9.23 Dissatisfaction with the legal process itself was a major theme, irrespective of outcome, as it is undoubtedly in other areas of legal dispute. Some who had either negotiated the settlement themselves, or used mediation to do so appeared to feel more satisfied with the outcome. By contrast, many of those whose cases involved deep immersion in the legal process had complaints about the process, even where they felt the outcome was fair.

It's too laborious. Nothing happens. You have to make a court application. That takes a week for the solicitor and about £700. Then you put the application into court. Then it takes 3 or 4 weeks. Then it takes a week for it to become a piece of paper that you can wave around. The whole thing is about 6 weeks - £1,000. (Ben)

Damien commented:

If we step back and look at the whole process, then it's one of the most inefficient and costly processes to everybody – and not just financially.

Comparing the process to his business background, he added:

If we've got a problem, we sit down and sort it out. We lock the door and throw away the key until we've sorted it out – we don't wait for 18 months

Cohabitants' views of their practitioners

9.24 On the whole, clients' dissatisfaction with the process did not manifest itself as a criticism of their practitioners.⁵ Most clients appeared to be genuinely appreciative of the service that they received from their solicitors and were complimentary about them. One of the most appreciated qualities, although rarely achievable, was that the advice be clear and unequivocal, even if it was not what they had originally expected or wanted.⁶

Both my barrister and solicitor were very good in looking after my interests when I could easily have been conned or given in. They were very good, very thorough, researched every angle and did their best. (Linda)

He has been absolutely spot on... (Pat)

9.25 A few had criticisms. Frank, for example, felt let down by those who had advised him, albeit correctly, that his ex-partner was likely to succeed in claiming half the house even though she had contributed nothing towards it, and he felt particularly '*cheated*' by the second solicitor who in his view did little more than confirm the (free) advice of the first, and charged him over £300 for a single consultation and letter. This disillusion with the professionals, together with the associated costs and risks, deterred him from pursuing an action for negligence against his original conveyancing solicitor.

9.26 Keith was also somewhat critical of his solicitor. He found it difficult to understand the point of the advice that he was given and was not sure whether his solicitor was to blame for that. It took him a long time to produce even part of the evidence requested by his solicitor and she took some time trying to explain the law to him and how it might affect his case. These delays, with the inevitable increase in costs, and his failure to reach resolution, all contributed to his general sense of dissatisfaction.

Cohabitants' views of the costs

9.27 The issue of costs naturally had an impact on the participants' satisfaction with the outcomes. Ben, Damien and Ewan, for example, had all been successful in court and were obviously pleased about that. However, the cost of achieving their success had been high, approximately £10,000, £14,000 and over £23,000 respectively, which inevitably muted their satisfaction with the outcome, particularly, perhaps, because their costs were higher than their ostensibly unsuccessful partners'. By contrast, Pat, whose costs amounted to over £8,000, felt that if she had not checked everything out thoroughly with a solicitor she would not have been able to sleep at night and she considered that the advice was worth every penny.⁷

⁵ We cannot rule out the possibility here that the participants' responses were influenced by the fact that most had been introduced to the research through their solicitors, and that they were aware that their solicitors were also being interviewed.

⁶ For a fuller analysis of the role of family lawyers and their relationship with their clients, see J Eekelaar et al *Family Lawyers The Divorce Work of Solicitors* (2000) Hart Publishing and H Genn, *Paths to Justice* (1999) Hart Publishing.

⁷ See also Chapter Eight, paras 8.54 et seq.

Satisfaction, personality and relationship dynamics

9.28 For some, their reservations about the fairness of the outcome stemmed from the fact that the prospect of an argument with their ex-partner was worse than the prospect of a relatively poor deal. Both Andy and Isabel, for example, felt on balance that the outcome of their cases was fair, but they simultaneously recognised that their partners had done rather better than they might have done had they (Andy and Isabel) been more prepared to put up a fight.

9.29 Others were more definite about their dissatisfaction. They all settled for rather less, or gave rather more, than they felt they or their partners were entitled to. For Brenda and Karen, for example, the fact that they both had oppressively dominating ex-partners influenced their decisions to settle. Brenda said that '*the gamble was not worth the risk*', but admitted also that she had not been prepared to be as tough and dirty a fighter as her partner. Karen said:

I have to accept some sort of responsibility for the fact that I've allowed him to take money out of the house.... I just can't face any more dramas and arguments.

9.30 Jenny found the negotiation process upsetting and disturbing, and the outcome unfair, but she too could not face the fight. She had originally transferred her former matrimonial home into the joint names of herself and her new partner with no recognition of her prior share. During the relationship she and her partner re-mortgaged the home in order to buy his grand mother's right-to-buy flat. The flat was put into his sole name. She settled for buying him out for a lump sum equivalent to 35 per cent of the equity in the family home, while he kept the entire proceeds of sale of the flat - a settlement which reflected what she could afford rather than her financial contributions. She took some responsibility for the outcome and commented:

My solicitor thinks he got too much – but I didn't want to fight it...It will never seem fair to me, never ever. I think I've really got the raw end of the deal, I always will do. But then, I have to think, I've got the two things (the children) he wants most in the world really. I think that is why he is punishing me so badly.

The practitioner perspective

Expectations of outcomes

9.31 We were able to discuss the outcomes for the 29 core participants with 20 of their instructed solicitors.⁸ Just over one third (seven) failed to predict the outcome and only nine were reasonably accurate in their predictions. The remaining four were somewhat doubtful, either because the solicitor had not

⁸ The other cases were either unresolved or did not involve a solicitor.

been involved long enough to predict the outcome, or because their predictions were somewhat mixed. Practitioners frequently complained to us about how hard it was for them to predict the outcomes for their cohabitant clients, and there were a number of reasons for this, as we outlined in Chapter Seven.⁹ Their views about lack of predictability were borne out by several of our cases, particularly those under TOLATA.

9.32 For most of the cases which were inaccurately predicted, either the negotiations did not go as expected, or the client settled for more or less than advised. The inaccuracy of the predictions could go either way for the client - some did better than their solicitors expected and some did worse. For example, Natalie's solicitor had warned Natalie that she might have to pay her ex-partner as much as half the equity from her solely owned home as the case had '*all the hallmarks of a joint venture*'. In fact, Natalie agreed in mediation to pay a lump sum equivalent to about one tenth of the equity. This was a sensible but surprising outcome so far as her solicitor was concerned:

Because they were so far apart and it was such an unpleasant dispute, I just didn't think it would be resolved.

In contrast, Isabel's solicitor advised that she could claim as much as £60,000 from her ex-partner for her share in the home, notwithstanding the fact that it was owned in his sole name. The solicitor's view was that the court would bend over backwards to be fair to Isabel as the mother and main carer of his children. In fact, Isabel, also partly as a result of mediation, settled for £39,000. Her solicitor said:

We could have pushed a bit more, but I respected her wish just to get it over and done with. I would have pushed for more, but she just wanted a quiet life.

9.33 Six of the seven core cases in which the prediction was inaccurate involved a potential or actual TOLATA claim. This finding echoed the concern expressed by many solicitors about predicting the outcomes in TOLATA cases. Decisions in these cases could also sometimes be reversed on appeal or retrial.

Outcomes and practitioners' satisfaction

9.34 Notwithstanding the limited accuracy of their predictions, practitioners were generally rather more satisfied with the outcomes than their clients, with the majority of the core solicitors (12 out of 20) describing outcomes as fair or satisfactory within the current context of the law. A significant number (nine), however, expressed a clear view that, even given the current state of the law, the outcome was unfair for their clients.¹⁰

⁹ At para 7.16.

¹⁰ This was one of the rare instances in which there was a difference between our core and secondary groups of solicitors, the latter being even less positive. Only a quarter (5) believed that a fair result had occurred in the cases which they described to us. Of the

9.35 On the whole, there was a significant measure of agreement between the solicitors and their clients about the fairness of the outcome. Susan's solicitor, for example, said that the fairness of the outcome depended on whom you believed (much as Susan herself had said, rather more ruefully). He recognised that, as the judge believed Damien's evidence rather than hers, the outcome was in accordance with the law. But looking at the wider context, he observed that:

After a relationship of over twenty years, she walked away with nothing. (Her partner) had significant earning capacity, living in a £400,000 property, mortgage free virtually, and no child support. That is difficult to justify.

9.36 But not all solicitors saw eye to eye with their clients about the outcome. Sometimes this was because solicitors saw their clients' expectations as unrealistic, or not in their own interests. Natalie, for example, felt that the outcome of her case was completely unfair and that her partner should have received nothing. Her solicitor in contrast felt that the outcome had been very fair, although she conceded: *'I guess it's always difficult when the property is in one party's name.'* She was pleased that it settled at mediation, when Natalie agreed to pay her ex-partner a lump sum of £16,000, not least because her client was *'very emotionally caught up in it and for her to be able to move on was worth a lot more to her'*.

Another example was a secondary sample case, in which the client secured an order under Schedule 1 requiring her ex-partner to provide the funds to buy a house for her and child of the family, on the basis that the house would revert to him when the child was 18. The solicitor (BJS5) described the outcome as *'terrific'* and *'at the top end'* of what she and the barrister had advised and hoped for, but told us that the client had expressed extreme disappointment not to have been awarded an outright transfer.

9.37 A few of the lawyers, however, who described the outcome as fair within the context of the current law, expressed quite strong views about whether the law itself was fair in respect of their clients' situations. This came across particularly for Linda and Frances, two of our cases which were closest to the Mrs. Burns scenario. Frances' solicitor described her case as legally correct but not fair. Linda's solicitor, whilst acknowledging that she had 'won' her case, thought that the law had not worked well for her.

She now has all sorts of restrictions under this trust and just enough to re-house, there is no cushion, and when (the child) is older it will all go back to (her ex-partner) and in the meantime... you've only got to compare it with divorce ... I just think it's a shame, really, with his conduct and the state of the law at the moment that you have to go through all this.

remaining 15, roughly equal numbers thought that the outcome was unfair or unsatisfactory for the client or gave no clear view.

Practitioners' views of reform

9.38 In the light of their experiences, we asked the practitioners for their thoughts on how, if at all, the law should be reformed. They made three main suggestions. An overwhelming majority considered that much more should be done to educate cohabitants, and the general public, about their legal position. They were not looking for changes in the law, but that people should be more aware of what the law is, and decide accordingly. It may be noted that there are, in fact, excellent websites devoted to this issue¹¹ and Barlow et al have evaluated the utility of one of them, finding that, although the majority of users said the site had enabled them to become better-informed, few had taken action in consequence.¹² This suggests that legal awareness can be raised, but without necessarily influencing behaviour. Nonetheless, given the variety and complexity of couples' situations, it would clearly be desirable for couples at least to recognise that such complexity may exist and that they might need to take steps to protect themselves.

9.39 Secondly, practitioners suggested more specifically that better and firmer advice should be given at the conveyancing stage, when property is purchased, and that there should be a change in the terminology used, to bring home to clients the implications of their actions.

9.40 Thirdly, while a large majority of solicitors did not consider that cohabitants should be equated with spouses when their relationship breaks down, most did consider that some form of law reform was necessary to provide a fairer way of meeting couples' interests. We return to these suggestions in Chapter Ten.

What if the cohabitants had been married?

9.41 Eleven of the core sample thought that they would have fared better if they had been married, even though that did not always mean that they wished they had done so. The four women who had children but no legal claim to the family home, Frances, Linda, Gina and Susan, all believed (rightly) that they would have done better if married, along with Rosie, who had a half share but felt she would have got more from her relatively more comfortably-off ex-partner.

*In hindsight, I can see the very strong financial case for being married.
(Gina).*

*I'd have known automatically that I had some rights. I'd have felt a lot safer.
(Linda).*

I would have had no problems at all. (Susan).

¹¹ See <http://www.oneplusone.org.uk/marriedornot/> and <http://www.advicenow.org.uk/go/livingtogether/index>.

¹² A Barlow, C Burgoyne and J Smithson, 'The Living Together Campaign – the Impact on Cohabitants' [2007] Fam Law 165, discussed in Chapter Two at para 2.28.

9.42 However, the cohabitants' perceptions of outcomes had they been married were not always fully informed. Susan, for example, assumed that if she had been married, Damien would have had to move out and that she would automatically have been entitled to 50 per cent of the equity. Rosie, who was awarded an extra £10,000 under her Children Act Schedule 1 application, on top of her existing 50 per cent, assumed that, if married, she would automatically get 60 per cent of the house with no obligation to repay any of that at a later date.

9.43 Colin, Helen, and Martin, who were making a claim against their partner's property, also thought they would have done better. Martin, who ended up abandoning all financial claims, was quite certain that he would have been a lot better off had he been married. Helen was not quite sure *how much* better off she would have been:

I would assume, given the length of time we were together, I'd be entitled to something. It probably wouldn't be 50/50 because it wasn't long enough and obviously it depends on the original stake – but there would be something.

9.44 A similar number (ten) thought that they would have been worse off if they had married. They included three of the higher earning males, three who owned properties in their sole names and three who felt that their partners' financial behaviour during the relationship had been irresponsible. For example, Ewan was under the same impression as Rosie, that on divorce she would automatically have been entitled to 60 per cent of the house (and of all the other assets). Damien, who kept the whole house in his sole name despite Susan's application under TOLATA, guessed that it would have been divided 50/50, but added '*There might have been a case to reduce that a little bit.*'

9.45 Eight thought that marriage would have made no difference to the outcome or were undecided about it, including two who did not appreciate, or show any interest in, the differences between marriage and cohabitation.

9.46 Our views on who might have done better or worse if married, and those of many of the practitioners, overlapped considerably with the clients' views on the basic position. However, our predictions were different to the clients' as to the amount of the shares that they might have secured on divorce. In comparing the possible outcomes, we restricted ourselves to consideration only of the family home, although the reality of course is that on divorce all financial circumstances would have been taken into account and that would in most cases have benefited the claimant. Certainly, when the practitioners compared their clients' overall position with how it might have been if they had been married, most thought that they would have been better off married.

9.47 Taking the family home in isolation, we were of the view that the wide discretion of the divorce court to adjust interests would have benefited all the women with children, as they themselves thought. The two main exceptions to this were Diane and Mary, who settled for pragmatic reasons which would equally have applied on divorce. They were trying to create two households

out of one and their limited resources meant they had limited options as to how to achieve this.

9.48 Contrary to what the clients themselves thought, we took the view that the divorce court's wide discretion would also have benefited Keith, Emma and Frank, albeit that they were all in rather different positions. Keith would have had some protection as a non-owning spouse, and would have been able to register his interest in the disputed property at the Land Registry much more quickly and simply. He would not have been so dependent on finding the evidence of his specific contributions to the property bought in his partner's sole name, or of discussions about their intentions. His other financial and non-financial contributions to the family would have been of some account, as well as other possible factors such as his history of ill-health. Emma and Frank's major financial contributions to their short childless relationships would almost certainly have been treated as a significant factor under section 25 had they been divorcing. In addition, the fact that they were both foolish enough to put their homes into joint names under an express joint tenancy would not have had anything like the impact that it did under trust law.

9.49 There were several, however, for whom we thought marriage would have bestowed no particular advantage or disadvantage in outcome because the reasons they settled their cases as cohabitants would probably also have applied if they were married. For example, Andy's dilemma as to how much weight should be attached to the original agreement that his partner have a greater share of the equity as against the impact of his greater contributions later on in the relationship would have paled into insignificance on divorce. However, the outcome would probably have been similar because the main point for him was to give priority to the needs of the children.

Difficult cases

9.50 As noted in Chapter Eight¹³, the average time taken from separation until resolution of disputes in our core sample was 14.5 months. However, six of the core sample had failed to resolve their cases by the end of the field work phase of our project. All of these cases had already lasted an unusually long period of time: a range of between 19 and 33 months, or an average of 25 months to the date of our last contact with them. These cases provided an opportunity to explore common features which might make cases more difficult to resolve.

9.51 The cases were spread among the range of issue types, with a cluster in the category of seeking compensation, which we have already noted as being one of the more problematic. It appeared likely that difficulties arose more as a result of personality and couple dynamics, rather than because of the nature of the issues themselves. The main feature that these cases had in common was that they all involved dominating, uncompromising or unco-operative partners. This view of the ex-partners was not simply that of the

¹³ At para 8.52.

participants themselves, but also often that of their practitioners, or apparent from the facts of the case. Caroline, for example, and to some extent her solicitor, portrayed her ex-partner as highly unco-operative throughout the mediation and solicitor negotiations. (Caroline herself was clearly the stronger personality in the relationship with firm views regarding settlement.) Colin appeared the weaker partner in his relationship and was in constant anxiety lest he upset his partner, giving her unlimited time to come to a settlement – which she used with disastrous consequences to himself. Frances similarly clearly felt unable to cross her former partner, even within the legal process, because of his power to disrupt her life and, more importantly to her, those of her children, if she was to displease him.

9.52 Some of these cases also involved evidential problems, or a complex financial history, with plenty of potential for argument over past contributions and intentions. All this took a lot of time and energy from the participants and gradually weakened their motivation to resolve matters effectively. Furthermore all but one of the cases was publicly funded for part or all of the time. Whether the participants would have continued for so long had they been privately paying is a matter of speculation.

After the final order or agreement

9.53 The story did not always end with the final settlement or order. Final agreements or orders were subsequently varied, or became the subject of appeal or enforcement applications or both, in at least four of the core cases and one of the 19 concluded secondary cases. Several other cases had ongoing problems long after the final orders or agreements were made.

9.54 Luke and Diane, for example, negotiated a 50/50 ‘Mesher’ type agreement¹⁴ in mediation, but changed this when Diane inherited some money and she was able to buy Luke out sooner but for a smaller share. Ewan and Rosie had a judgment giving Rosie an extra £10,000 out of the proceeds of sale on the basis that this would revert to Ewan on certain trigger events. Rosie was so dismayed at the idea of being tied to Ewan in this way that she borrowed the £10,000 from her parents instead.

9.55 Ben’s case involved an appeal and difficulties over implementation. He was successful in securing an order for sale of the jointly owned home and an equal share of the proceeds, and he was successful on his ex-partner’s appeal against the order. But he had to return to court twice more after that to enforce the order, once because his ex-partner refused to put the house on the market and then because she refused to sign the forms for the estate agent. He commented:

The law’s OK. The problem is enforcing it... The court was fine, but the court’s orders are almost impossible to enforce. It’s a piece of paper – what

¹⁴ *Mesher v Mesher* [1980] 1 All ER 126.

do you do? I've had the police a couple of times but you can't do that every day.

Summary

- Separating cohabitants used a whole range of means to resolve issues with their ex-partners. Those issues involving practicalities rather than legal entitlement were the least contentious and those involving preserving a home were most contentious.
- Only two of the 12 sole ownership cases were resolved without the issue of proceedings, whereas only two of the 11 joint tenancy cases involved the issue of court proceedings.
- Personality and partnership dynamics played an important part in determining the outcome. The dominant partner, both male and female, usually won out but court applications sometimes levelled the playing field.
- Most cohabitants achieved their primary objective in whole or in part, but over half expressed dissatisfaction with the outcome or felt that it was unfair. Dissatisfaction included criticisms of the law and procedure, or was related to an imbalance of power.
- Practitioners were on the whole more satisfied with the outcomes than their clients, although over one third were inaccurate in their predictions. All but one of the inaccurate predictions involved a claim under TOLATA.
- Many participants would have fared better if they had been married, especially the women with children who had no interest in property, and those (of either gender) claiming compensation for contributions to property owned by their partner.

Chapter Ten: Conclusions and reform

10.1 In this final chapter, we consider the conclusions to be drawn from our findings, in the context of the various proposals that have been made for reform of the law. We conclude that the case for reform is overwhelmingly made out, but that it will be necessary to make changes to a number of different aspects of the law to remedy all of the injustices and shortcomings that our study has identified. We also consider how far previous socio-legal analyses of bargaining in family disputes fit the particular context in which property issues arising on cohabitation breakdown fall to be resolved.

The injustice created by the current law

10.2 The Law Commission¹ have drawn attention to the failure of the current law to recognise the value of contributions made by one party to the acquisition of the couple's assets, or the economic sacrifices made by a party who gives up paid employment to care for the children. We adopt a similar view of what constitutes injustice in this context. By injustice, we mean an outcome which does not recognise the contributions, sacrifice, or investment (financial or otherwise) which one party has made to the relationship. Our analysis of the cases in our core sample, together with those in the secondary sample described to us by practitioners, enabled us to identify five discrete situations where we would argue that the current law produced an unjust outcome.

- **1) The 'Mrs Burns' scenario**

10.3 It will be recalled that in *Burns v Burns*,² after a cohabitation of nearly 20 years, the woman applicant failed to establish a beneficial interest in the family home because she could not point to having made any direct payment towards the acquisition of the family home. Contrary to the speculation that this type of case is unlikely to be common,³ we had such cases in our sample. The disadvantaged partner was always the woman and after a long cohabitation in which she had cared for the children, she had no right to a share in the home which was held in the sole name of her partner, because she had made no financial contribution to its acquisition.

- **2) Home put in joint names when re-mortgaged**

10.4 However, an interesting, perhaps newer, category of injustice arose where a home owned by one partner before the cohabitation was then re-mortgaged and put into joint names as a joint tenancy. This was generally done where a woman had been the sole owner, perhaps as a result of a prior

¹ See Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper* (Consultation Paper No 179) (TSO, 2006), Part 4.

² [1984] Ch 317, CA. See Chapter Three para 3.21.

³ R Probert, 'Trusts and the modern woman – establishing an interest in the family home' [2001] CFLQ 275 at p 277.

divorce settlement. This meant that the value of the property became shared equally, with no recognition of the partner's prior ownership, effectively resulting in an inadvertent gift of a half share to the partner.

- **3) One partner put up all or most of the money but the property was in joint names**

10.5 A similar situation arose in cases where one partner had contributed all or most of the finance to purchase a property which was then put in joint names as a joint tenancy. The paying partner, for various reasons (which might include misunderstanding of the legal implications, or a reluctance or refusal to face the possibility of the relationship ending) had failed to protect his or her contribution.

- **4) Property in sole name but partner claimed a share**

10.6 In contrast to cases (2) and (3) where the property was put into joint names, we had several cases where one party was the sole owner and never had any intention of sharing the value of his – or often her - home with the partner. Nevertheless, on separation, the partner claimed, unmeritoriously, to have contributed to the acquisition of the property. Such claims, whilst rebuttable, proved extremely stressful and costly to defend.

- **5) Inability to claim compensation for contribution to property**

10.7 Finally, there were a number of claims which represented the other side of the coin to situation (4). Here, one partner had indeed made significant financial or other forms of contribution to the relationship and to the home owned in the other's sole name, but was unable to obtain any recognition of this due to lack of adequate evidence of the contribution or of the couple's common intention.

Reform of the current law

10.8 These examples of injustice, together with the findings we have discussed in earlier chapters concerning the complexity and unpredictability of the law, reinforce criticisms that have been made over many years and which led to the subject being referred to the Law Commission for review as long ago as 1995. The Law Commission produced a Discussion Paper on the subject in 2002,⁴ which attempted to propose reforms to the law that would apply generally to anyone who might be sharing a home with others, and they were not, at that stage, concerned with the particular problems of cohabitants. They considered that the law should be based on the parties' contributions to the shared home, and not on their intentions (as is currently the case) because it would be possible to value contributions objectively and there would be no need to rely on vaguely remembered, or imputed, agreements. However, they found it impossible to produce a scheme which would result in a fair outcome

⁴ See Law Commission, *Sharing Homes: A Discussion Paper* Law Com No 278, (TSO, 2002) paras 2.105-2.102.

based on contributions alone, without taking account of the different nature of the relationships between different sorts of parties. Regarding this as raising policy implications beyond their remit, they therefore confined their recommendations largely to urging a) legal advisers to encourage parties to make express written arrangements setting out what they intend their rights to be (but our study suggests that clients are unlikely to respond positively to this suggestion, either because of embarrassment, inertia or fear of the costs); and b) the courts to adopt greater flexibility in recognising an indirect contribution to the mortgage, although they stopped short of recommending that the courts take account of non-financial contributions such as caring for the home and family (but this, as we have seen, is the most important difference between trusts law and divorce law, and the issue most likely to cause a sense of unfairness).

Cohabitation contracts

10.9 An alternative or supplementary approach toward greater recognition of cohabitants' claims against one another would be to give legal effect to cohabitation contracts. As we discussed in Chapter Three, it is probable that the courts would now be prepared to uphold such contracts, provided certain safeguards (such as having taken independent legal advice) have been followed. However, resort to contracts is unlikely to prove a viable option for the majority of cohabitants. The Law Society⁵ has pointed out that a contract made at the start of a relationship may become out of date and inapt to meet the parties' needs some years later, especially where children have been born. A more cogent objection is that most couples would simply fail to make one, either failing to recognise the desirability of doing so, or being unable, or unwilling (as we have seen in this study), in the context of British society which has traditionally been reluctant to encourage 'legalising' intimate ties, to enter into a legal agreement which might appear to question the success of their relationship.

Introduction of a discretionary regime

10.10 Despite failing to arrive at a satisfactory solution in 2002, the Law Commission⁶ recognised nonetheless that there is a strong case for considering the introduction of legislation allowing the courts to adjust property rights on cohabitation breakdown. The Law Society⁷ has made a similar call, proposing that, where a cohabiting couple has had a child, or lived together for at least two years, the court should have power, similar to that on divorce, to order the transfer of property or the payment of a lump sum to one partner. However, they considered that the court should not adopt the same approach to the exercise of these powers as on a divorce, since the purpose of the jurisdiction should be to protect the disadvantaged, and not to provide general recognition of the status of cohabitants. Thus, rather than give direct recognition to the non-financial contributions made to the welfare of the family

⁵ The Law Society, *Cohabitation: The case for clear law: Proposals for reform* (Law Society, 2002).

⁶ Above n 1 at para 5.45.

⁷ Above n 5 at paras 10, 94-105.

(the 'housewife' role), the Law Society would adopt the Scottish approach on divorce of taking

*a fair account ... of any economic advantage derived by either party from contributions from the other, and of any economic disadvantages suffered by either part in the interests of the other party or of the family.*⁸

10.11 Although this approach would enable the vulnerable partner to claim for the economic disadvantage she had suffered by, for example, giving up a career, the court would not be required to 'value' her contributions as of equivalent value to those of the breadwinner, and this approach would thus stop short of the recognition of the divorce courts⁹ that there is an inherent gender bias involved in valuing financial contributions (such as building up a business) as against those on which a figure cannot readily be put (such as acting as home-maker and full-time carer of the children).

10.12 Scottish law now goes beyond that in England and Wales in mirroring the provision it has already made for divorcees. The Family Law (Scotland) Act 2006 permits a cohabitant to seek a capital order from the court on the ending of the relationship, which may include a sum to cover the economic cost of caring for the parties' children, with no qualifying period required (though duration of cohabitation is a relevant consideration for the court to take into account). The court must take into account the extent to which the payer has derived economic advantage from contributions made by the applicant; and the extent to which the applicant has suffered economic disadvantage in the interests of either the partner or their children. 'Contributions' include indirect and non-financial contributions (and, in particular, any such contribution made by looking after any child of the cohabitants or any house in which they cohabited); and 'economic advantage' includes gains in capital, income, and earning capacity; and 'economic disadvantage' shall be construed accordingly. It remains to be seen whether Scottish courts will value non-financial contributions as of equivalent value to financial ones and thus avoid the problem with the Law Society's proposal.

The Law Commission's proposals in 2006

10.13 The disappointing conclusion¹⁰ reached by the Law Commission in 2002 was not, fortunately, their last word on the subject, because, having batted the ball to the politicians, it was hit straight back to them in 2004 when they were asked to consider the financial hardship suffered by cohabitants (including same-sex couples) and their children on the termination of the relationship by breakdown or death. This new remit enabled them to

⁸ Family Law (Scotland) Act 1985 s 9(1)(b).

⁹ *White v White* [2001] 1 AC 596; *Lambert v Lambert* [2002] EWCA Civ 1685 [2003] Fam 103; *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24 [2006] 2 AC 618.

¹⁰ For criticism, see J Miles, 'Property law v family law: resolving the problems of family property' (2003) 23 *Legal Studies* 624; S Wong, 'Trusting in Trust(s): The Family Home and Human Rights' (2003) 10 *Feminist Legal Studies* 109; J Mee, 'Property rights and personal relationships: reflections on reform' (2004) 24 *Legal Studies* 414.

concentrate on the particular policy challenges presented by cohabitation in the context primarily of its impact on the parties' financial and property ties, and they duly produced a fresh Consultation Paper in 2006.¹¹ Much of this was devoted to the elaboration of a new regime which would operate by default in relation to eligible couples, to provide a discretionary jurisdiction which could make similar kinds of orders to those operating on divorce. However, unlike the law for married couples, it would be possible, subject to certain criteria, for the parties to 'opt out' by making a written agreement to that effect. In this way, cohabitation contracts could receive clear legal recognition.

10.14 Given the evidence of this, and other studies, that couples are not interested in their legal position and may fail, through inertia or reluctance, to take steps to protect themselves from potential disadvantage, it seems unlikely that many couples would in fact opt out of a default scheme unless they are very wealthy or there are third parties, such as children from a former relationship, whom they need to protect. The Law Commission's suggested regime, therefore, would be of critical importance in potentially addressing the problems which may be faced by separating cohabitants.

A regime based on past contributions

10.15 This regime would, like the Law Commission's earlier preference, be based upon the parties' proved 'contributions' rather than their intentions as trusts law currently requires, but here the focus would be on their contributions to the relationship, rather than to the acquisition of the property in dispute, and would include 'non-financial' contributions such as caring for children and keeping the home. The rationale for the scheme would be *compensation* for 'the contributions made by the applicant to the relationship, and associated sacrifices'.¹² This may be contrasted with the objectives of financial provision and property allocation on divorce identified by the House of Lords in *Miller v Miller; McFarlane v McFarlane*¹³ – meeting the parties' needs; compensation 'aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage'; and sharing, the latter principle deriving 'from the basic concept of equality permeating a marriage as understood today'.¹⁴ The Law Commission rejected needs and sharing as the basis for its scheme as inappropriate to relationships which display such diversity in the attitudes of the parties to their level of commitment, to their understanding of what the relationship entails and to the consequences of that relationship in financial terms. In response to this, it could be argued that marriages display a similarly wide diversity in these regards and that the courts can, and do, exercise their discretion in determining what weight to put on such differences. However, in the same way that their Lordships in *Miller v Miller* recognised public attitudes as being relevant to deciding how, for example, to assess the weight to put on

¹¹ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper* (Consultation Paper No 179) (TSO, 2006).

¹² *Ibid* at para 6.71.

¹³ [2006] UKHL 24 [2006] 2 AC 618.

¹⁴ Lord Nicholls of Birkenhead at [13] and [16].

the length of the marriage,¹⁵ so too it could certainly be pointed out that general public attitudes do seem to distinguish between marriage and cohabitation, and that many cohabitants themselves do not wish to be treated as if married. On that basis, the Law Commission may well have judged soundly in declining to apply marriage (or in fact divorce) law to the aftermath of cohabitation.

10.16 Instead, their provisional proposals followed the Scottish approach (and that of the Law Society) noted above quite closely. Thus, the applicant would be required to establish that

the economic effects of the relationship, positive and negative, are not fairly shared between the parties on separation. Specifically, such a claim would involve examination of:

(1) any economic advantage retained by the respondent on separation (whether of capital, income or earning capacity) which arose from the applicant's contributions during the relationship; and/or

(2) any economic disadvantage (in terms of capital, income or earning capacity) sustained by the applicant on or after separation as a result of contributions made during the relationship, or to be sustained as a result of continuing child-care responsibilities following separation.¹⁶

10.17 The court would be able to address this economic imbalance through the same wide range of orders as are now available on divorce or dissolution of a civil partnership, but the need to establish that a party had bestowed economic advantage or incurred economic disadvantage would produce a more limited approach to the parties' positions, since the court would not be able to make an order based on an applicant's needs alone, or to share out the parties' property, as is common on divorce.

Eligibility

10.18 Whilst they were clear that cohabitants with children of the relationship should be automatically eligible to apply under this regime, the Law Commission were less certain as to whether a couple without children should be eligible at all, and if so, whether they must have cohabited for a minimum duration (and if so, how long that should be). The findings from our study suggest that injustice can certainly arise where the parties do not have children, and we conclude that they should therefore be eligible.

10.19 However, it is not clear that there is a *principled* basis on which an appropriate minimum duration of cohabitation can be selected. The demographic evidence suggests that cohabitants are living together for longer periods than hitherto and the average length of cohabitation in our sample was nine years. It could be argued that it is longer relationships that need particular protection, since these are most likely to have led to economic imbalance between the parties as a consequence of the cohabitation. But we also had cases in our study where there was significant unfairness even when

¹⁵ Lord Nicholls at [24]; Baroness Hale at [147-152].

¹⁶ Law Commission, above n 11 at para 6.50.

the cohabitants lived together for less than a year and of the 24 cases in our core sample, six had been together for under five years without having had children.

10.20 If it is concluded by policy-makers that, contrary to the Scottish position, a minimum must be set for *pragmatic* reasons (in order to limit claims, and to avoid the charge that the regime undermines marriage, for example) then it would seem sensible to set this at the same level as has been established by legislation in other contexts, and the period favoured by the legislature has been two years - for example, a cohabitant of a deceased person may claim provision from his or her estate if they lived together for two years immediately preceding the death (Inheritance (Provision for Family and Dependents) Act 1975) or compensation from a person responsible for his or her death (Fatal Accidents Act 1976).

A critique of the proposed scheme

10.21 The Law Commission's proposed scheme represents a major advance on the current law, and would certainly achieve the primary goal of freeing cohabitants (at least, those eligible under its criteria) from the constraints imposed by the limitations of trusts law. It would also enable the court to tailor its orders to the parties' particular situation, for example, through the award of lump sums, or orders relating to pensions, which could have been very beneficial to some of the cohabitants in our study.

10.22 However, the operation of the scheme as proposed in the Consultation Paper does present difficulties.¹⁷ First, the Law Commission were clear that a broad-brush approach should be taken so that a 'protracted accounting for the entire relationship' is avoided.¹⁸ But it is hard to see how this could be done in practice. The applicant would still have to *prove* the past contributions which have resulted in economic advantage or disadvantage, which could thus produce the same kinds of disputes and difficulties over the evidence that trusts law currently generates, particularly where there has been a longer cohabitation involving a history of property transactions or complex financial arrangements. We found several cases in our study where it was costly and difficult for clients to find the appropriate evidence to support their claim, and where solicitors were unable to give clear advice until they had actually seen what evidence was available.

10.23 Secondly, its focus is backward-looking, in contrast to current divorce law which enables the needs of all the family members as projected into the future to be taken into account and, where possible, met. The Law Commission¹⁹ rejected a scheme based on relief of a party's needs on the primary basis that a cohabiting partner has no obligation to meet such needs during the on-going relationship, let alone once it has ended. But for many

¹⁷ See M Humphries, 'The Law Commission Consultation on Cohabitation' [2006] Fam Law 860; R Probert, 'Cohabitation, Contributions and Sacrifices' [2006] Fam Law 1060.

¹⁸ Above n 11 at para 6.133.

¹⁹ *Ibid* at para 6.66.

separating cohabitants, it is going to be precisely their ongoing needs that require to be met, and the 'economic imbalance' argument is a means of doing this, albeit under another label.

10.24 Thirdly, it is also unclear how economic loss, e.g. from loss of career, would be valued, and in particular how future loss would be taken into account, and yet distinguished from a claimant's 'needs'. As Probert cogently points out:

*The difficulties of ascertaining who contributed what during the relationship pale into insignificance when compared to the problems of predicting the future impact of past sacrifices.*²⁰

10.25 A further difficulty lies in weeding out unmeritorious claims. We had a number of cases where a party had to defend such a claim, and often paid off the claimant in order to limit costs and the aggravation involved. The Law Commission tentatively suggested²¹ imposing a test of establishing 'manifest' or 'substantial' unfairness to justify an award, but this would not necessarily prevent a determined claimant from causing the defending party significant trouble and costs in the hope of achieving a 'nuisance' payment. There may be no solution to this problem, which is, of course, a risk across the civil law in general, but it is a more than negligible factor to be considered when deciding whether to legislate on the Law Commission's proposals.

10.26 Finally, it should be noted that, where a couple fall outside the eligibility requirements of the proposed scheme, a partner would still be able to turn to trusts and property law to attempt to obtain redress. Given its unsatisfactory nature, unless there are further reforms to the way the courts apply this law, instances of injustice are still likely to occur. Indeed, arguably, the impact of *Stack v Dowden*²² is to compound such a risk, because of the strong presumption laid down in that case that equity will follow the law in determining a party's beneficial interest.

10.27 This discussion demonstrates the practical obstacles in the way to achieving reform even where the utmost effort is put into designing a scheme which is intended to redress the current shortfalls in the law. Our study cannot, and was not intended to, identify whether there is a better way forward than an discretionary scheme along the lines of that proposed by the Law Commission, but it did shed light on other reforms that might usefully be put in place, regardless of what happens to the Law Commission's proposals

²⁰ Above n 17 at p 1063.

²¹ Law Commission, above n 11 at para 6.230.

²² [2007] UKHL 17 [2007] 2 WLR 831. This point also raises the difficult question of how any new jurisdiction would interrelate with the old. See Law Commission above n 11 at paras 6.284-6.287

Suggested reforms to property and conveyancing law

10.28 It became clear in the study that some of the difficulties that cohabitants experience in sorting out their property after they separate stem from actions (and omissions) they make at the time of purchasing (or re-mortgaging) the family home and from a failure to understand, or appreciate, the implications of these. Thus, we saw that the cohabitants did not generally understand that a 'joint tenancy' is regarded as presumptively giving rise to equal shares in the equity value of the property, regardless of the actual financial contributions made to its acquisition, and that sole ownership can leave the non-owner completely unprotected *and yet* lay the owner open to a speculative claim to have contributed to the purchase. The legal jargon used in property law is opaque and confusing, despite many solicitors' attempts to simplify and explain it.

10.29 Conveyancing lawyers whom we interviewed were no doubt rightly cautious about the ethical implications and limits of providing advice to non-clients (in the case of sole ownership purchases) or challenging clients' apparent preferences for joint ownership in situations where contributions were clearly unequal. There was also an assumption – albeit not shared by all – that the TR1 form, which is intended to provide clear evidence of the parties' intentions, is sufficient both in expressing those intentions and in curtailing any subsequent argument about them.

10.30 The sensitivity of raising difficult questions at a time when the parties are apparently acting in harmony and the professionally awkward issue of how one is to advise a non-client are clearly important. However, it is clear from other similar situations that legal obligations to protect an apparently weaker party *can* be imposed on commercial concerns. House purchase and re-mortgaging are central areas of personal economic activity where the commercial sector – prompted by the courts – has put procedures in place to cover them from future negligence or other claims by a vulnerable party.²³ Conveyancing solicitors (and mortgage brokers and financial advisers) could, and in our view should, be a great deal more proactive in their advice to purchasing couples. They could, for example, regard it as standard practice for a partner making a significantly larger financial contribution to protect this, and even ask for a written disclaimer if the advice is to be ignored. It could be made more difficult *not* to protect sole contributions than to do so. This would take the responsibility and embarrassment out of the situation for some clients and, if backed up by a general campaign of public information, could reinforce the message that it is perfectly reasonable and acceptable to consider these matters. The fact that cohabitants appeared ready to make wills suggests that it is not impossible to persuade people to do the 'unromantic' thing and take – and weigh up – proper considered advice as to their position. It would, it is true, create considerable challenges for conveyancers, especially where

²³ See *Williams and Glyn's Bank v Boland* [1981] AC 487, HL (protection of occupier with overriding interest in property being disposed of); *Barclays Bank plc v O'Brien* [1994] 1 AC 180, HL and *Royal Bank of Scotland (No 2) v Etridge* [2001] UKHL 44, [2002] 2 AC 773 (protection against undue influence). Indeed, it is as a result of such cases that conveyancers are now obliged to open a file when they advise a non-owner, but their duties to such parties are clearly still inadequate to provide proper protection.

conveyancing is done on a 'warehouse' or 'factory' basis with minimal or no face-to-face contact with the parties, but this should not be allowed to be an obstacle to ensuring the parties are adequately protected.

10.31 Secondly, the TR1 form should be improved by expanding the 'Declaration of Trust' section so that purchasers are absolutely clear about what they are signing up to. Joint tenants should have it spelled out that if they separate, under the current law their shares will, in most circumstances, be 50/50 irrespective of initial or subsequent financial input. The current version of the form, though apparently simple, still requires legal interpretation. It needs to be expressed so that its meaning is completely clear to the lay person.

10.32 Thirdly, moving into deeper legal complexities, given that the survivorship rule is so appealing to purchasers, we suggest that a means should be devised to allow purchasers to opt for this feature, without also inadvertently opting for equal shares on separation. The problems caused by the consequences of a joint tenancy have been discussed by Thompson.²⁴ He takes the view that it is the right of survivorship that causes problems and his solution is to abolish the concept of an equitable joint tenancy. We would prefer the flexibility of allowing the parties to opt for survivorship if the relationship endures till death, but tenancy in common (with unequal shares as appropriate) if it terminates by separation. This is notwithstanding the view of Baroness Hale in *Stack v Dowden*²⁵ that the parties 'cannot' simultaneously intend both. On the contrary, we would expect many couples, if asked, to indicate that this would be exactly what they would intend to happen. Such a change would of course, require that the parties be adequately advised as to their options, and would, it might be hoped, at last ensure that they thoroughly consider their future interests.

In conclusion

10.33 This study has confirmed the view of the Law Commission that:

*the rules contained in the general law have proved to be relatively rigid and extremely difficult to apply, and their application can lead to what many would regard as unfairness between the parties. The formulation of a claim based on these rules is time-consuming and expensive, and the nature of the inquiry before the court into the history of the relationship results in a protracted hearing for those disputes that are not compromised. The inherent uncertainty of the underlying principles makes effective bargaining difficult to achieve as parties will find it hard to predict the outcome of contested litigation.*²⁶

²⁴ M Thompson, 'Beneficial Joint Tenancies: A Case for Abolition' [1987] Conv 29.

²⁵ [2007] UKHL 17 [2007] 2 WLR 831 at [62].

²⁶ Above n 11 at para 1.28.

10.34 Retrospective private ordering in cohabitation breakdown cases, set against a fog of uncertainty and complexity rather than the 'shadow of the law', has led to a position where trusts law may now serve to perpetuate rather than redress injustice. Even if the parties reach some sort of rough and ready compromise, ignoring or sidestepping the 'true' legal position, this comes at a cost, both actual and figurative. Whatever the fate of the Law Commission's or other similar proposals, the present study has thus indicated that maintenance of the status quo is unarguable. However controversial it may be, reform of the current law to meet the legitimate interests of separating cohabitants is both justified and overdue.

Appendix 1: Method

We report our method in some detail, first, in order to discuss the particular difficulties experienced in a study seeking to identify inherently 'hard to reach' subjects, and secondly, because our method in itself threw up a number of initial findings.

Research Design

The basic design concept was simple and straightforward – a study comprising two limbs. The main qualitative limb was to be a set of case studies following the progress of a series of disputes, commencing with in-depth interviews with cohabitants in the course of seeking advice or assistance on their separation from former partners, tracking their progress to a resolution of their issues, together with interviews with their professional practitioners. These would include both family and property lawyers, mediators and CAB advice workers. This approach would enable us to explore and describe live cases from multiple perspectives as they progressed to their conclusions. A secondary, more quantitative, limb would comprise a survey of court files of concluded cases and of closed CAB files, which together would provide data from each end of the financial spectrum, and ranging also from the least to the most contested cases, to provide a broader context against which to view the case studies.

Our main obstacle was the difficulty of identifying cohabitants in dispute with former partners, since there is no legal threshold for them to cross akin to the divorce petition for the married. However, since the focus of this study was to be on those who had actually taken steps to obtain advice or assistance of some kind, we planned to enlist the help of the main groups of practitioners to whom those involved might turn. We anticipated that solicitors might become involved in such cases in three main ways. Family solicitors might be approached because the client perceives the matter as a family issue – possibly linked to issues regarding children. Other cases might arrive in the civil litigation department, presenting as property issues. Finally, since we were aware from previous research how few separating cohabitants seek legal advice on their position¹, we envisaged that conveyancers might also be consulted, to put already agreed transfers, remortgages or sales into effect. We speculated also that cohabitants might approach CABx and mediation services, not necessarily identifying any problems they had as specifically 'legal'.

We planned to ask practitioners in all these categories either to pass on a letter from ourselves describing the research and requesting participation, to be handed to potential subjects at or shortly after their first interview, or to seek their clients' consent to pass their names and contact details to us.

¹ See S Arthur, J Lewis, M Maclean, S Finch, and R Fitzgerald, *Settling Up: making financial arrangements after divorce or separation*. (2002) National Centre for Social Research.

We sought to collect a sample of separating cohabitants from two locations in England and Wales chosen to provide a broad range of economic and social circumstances, in order to ensure diversity within our sample: one, a large city which, in terms of home-ownership, ethnicity and proportion of cohabiting households, broadly reflects the national average;² the second, a smaller conurbation encompassing some pockets of deprivation and more rural areas, to provide a balance going towards the financially lower end of the spectrum.

Preliminary Discussions

Before embarking on the research, we held separate meetings with groups of representatives of the various professional practitioners to be involved to enlist their support for the research. At these we discussed the feasibility of our proposed methods, checking in particular with family and civil litigation solicitors and with mediators their preferred methods and the timing of approaches to their clients, which we appreciated would be a delicate and sensitive matter for them. Similarly, we met with the managers of the relevant CABx to explain and discuss our method of recruitment of subjects to the research. Finally, with regard to the court survey limb of the research, we made preliminary investigations at a county court which appeared to establish both that there were large numbers of relevant cases, and that the identification of the files of cases relevant to our research would be a feasible proposition.

Recruitment of Practitioners

In line with our primary aim of identifying separating cohabitants, through the professional practitioners from whom they have sought advice or assistance, our first task was to recruit the relevant practitioners.

Family and Civil Litigation Solicitors

We commenced our recruitment of family and civil litigation solicitors by approaching a group of 77 individual solicitors from the first area, purposively selected with the objective of achieving a diverse sample. These had been identified from the Solicitors' Regional Directory, to represent the spectrum of solicitors' firms from 'premier' large city centre firms with ten or more partners, through firms with several branches in central, urban and rural locations, single branch firms in each type of location, to sole practitioners operating on their own. Within this range, we aimed also to include individual solicitors of varying experience in terms of years of qualification and degree of specialisation, using information obtained from the Law Society website.

We found in practice that there was less of a distinction than we had thought between family law and civil litigation solicitors in most firms. It appeared that in firms which did not offer family law, civil litigators tended not to handle this type of case at all, focusing more on commercial or personal injury work. In firms which offered both family law and civil litigation the departments or

² Office of National Statistics: Neighbourhood statistics.gov.uk

individual solicitors offering each area of law would sometimes liaise with each other. In smaller firms, the same individual solicitors sometimes offered both areas of law. In effect therefore our selection was biased towards family lawyers, which we believe reflects how these cases are generally handled, with many solicitors telling us that in their firm, cohabitation cases are routinely passed to the family department. It did appear that cohabitation property issues are handled in most firms by family solicitors at least in the first instance.³

We wrote describing the purpose of the research, and our request to each of these solicitors, following up our letter with a personal telephone call. These follow-up telephone calls often required up to half a dozen attempts to find the solicitor available.

Of the 77 solicitors approached, 49 agreed to participate in the research. Of those declining, 8 informed us that they no longer carried out this sort of work. A few said they were simply too busy, and some felt they saw too few cases to be able to help. A small number never returned our calls. A large proportion of those agreeing to participate warned us from the outset that they see very few clients of the type we were seeking. Between one and three per year was a not uncommon estimate, although those at the more specialised end of the spectrum reported seeing as many as 15-20 cases a year.

Having agreed to participate, each solicitor was sent a pack including an Aide Memoire specifying the criteria for selection of clients and the procedure to be followed, information sheets for clients, and client contact forms. We also requested solicitors to complete an anonymous 'survey' form in respect of every client consulting them who fitted our criteria. The objective of this was to establish a baseline figure for the 'population' of relevant individuals consulting our participating solicitors. In this way we hoped to provide a background context against which to view those clients choosing to participate fully in the research. We felt this was desirable given the absence of any other data on the full population of separating cohabitants with financial/property issues consulting professional practitioners, or even data relating to the number of separating cohabitants overall, against which to compare our sample. This form asked for basic details including the gender of the client, whether children were involved, the value of property, and a brief outline of the presenting financial/property issue together with a predicted outcome.

In the event, return both of contact forms for clients agreeing to participate, and of survey forms including all relevant consulting clients, was slow and patchy. We sent reminders to participating solicitors about the research and spoke personally to several of them. The main explanation for the scarcity of potential subjects for our project given to us by solicitors was that in fact there were only very few presenting clients – fewer even than they themselves had predicted. However, it was admitted by several solicitors that they found it difficult always to find the most appropriate moment to approach clients about the research, and that it was sometimes forgotten altogether.

³ See also Chapter Seven paras 7.4 – 7.5.

We therefore approached a second wave of solicitors. This time, given the blurred distinctions noted previously, we approached only solicitors offering family law among other areas they might also cover. We made our approach to one solicitor in each of the remaining solicitors' offices offering family law in the first research area (again identified from the Solicitors Regional Directory). Sixty-five per cent of these agreed to participate. It was evident that solicitors from the larger and city centre/urban offices were more willing and able to participate than those in small and rural offices who often seemed particularly hard-pressed.

We approached family and civil litigation solicitors in all 20 firms offering these fields of law in the second location in accordance with the same method. Our contact with one solicitor in every office offering these categories yielded nine solicitors agreeing to participate.

Several months into the fieldwork, still with low recruitment of cohabitants to the study, we decided that modification to our original design was required in order to boost numbers. This took two forms. Our original scheme had entailed a full interview with those practitioners who had identified clients for us, towards the end of the case. We now decided to approach, for full interview, a number of those solicitors who had already agreed in principle to participate, choosing those who had estimated seeing higher numbers of relevant clients but who had not in practice been able to provide a client for the research. After a number of pilot interviews, we started asking these solicitors, as a major component of their interview, to describe fully the case of a cohabitation property issue which they had most recently concluded.⁴ Our second modification was to ask all participating solicitors to augment their more personal approach to their clients about the research, by also forwarding a standard letter from ourselves (making it clear that we had no idea who they were and that the letter was being forwarded anonymously via their solicitor) to all relevant clients who had consulted them during the research period, asking them directly from ourselves whether they would be prepared to participate in the research.

We also decided on a further modification of the original plan by extending our geographical areas, to include another provincial city and a London borough. Both areas were demographically similar to the first two – and to the national average – in terms of ethnicity, home ownership levels and percentage of the population cohabiting. In the additional city we made a selection from the Solicitors Regional Directory of 21 firms, being the largest and most central, which from our experience were most likely to provide the clients we were seeking. We approached solicitors from all firms offering family law in the London borough, with the exception of 5 firms in outlying areas – a total of 25. These approaches resulted in a further 28 solicitors agreeing to participate, of whom we interviewed a total of 13 on the basis described in the paragraph above.

⁴ Cf the case file interview technique used by Eekelaar, J., Maclean, M. and Beinart, S. *Family Lawyers: The Divorce Work of Solicitors* (2000) Hart Publishing, and by Ingleby, R. (1992) *Solicitors and Divorce* (Oxford University Press, Oxford).

Mediators

We approached all providers of mediation in the original research areas, comprising mediation services and individuals operating alone, and set up similar procedures and documentation as for the solicitors. Whilst 25 out of the 28 individual mediators and their services were enthusiastic and willing to participate, the same problem of lack of clients was experienced. Again, we broadened our geographical areas into the two new areas, and also asked mediators to adopt the 'mailshot' approach to their cohabitation clients.

Citizens Advice Bureaux

From our preliminary discussions with local managers and with Citizens Advice in London, we had envisaged that we might recruit relevant subjects, probably including those at the lower end of the financial range. We anticipated that some of these enquirers might be directed to solicitors for more specialised advice, but that others might be enabled to proceed with their financial or property separation themselves after initial advice.

At an early stage of the research we made a study of 'Social Policy Evidence' forms collected from local bureaux by NACAB. These forms record cases regarded by local advisors as being of significant interest which may be used to develop policy. Some 2,000 such forms are received each week from an annual total of one million queries to CABx. There is no specific categorisation for cohabitation property issues, but we examined 750 reports taken from all potentially relevant sections, finding 28 relating specifically to cohabitation property, mainly from 2003 and the early part of 2004. Here we found concerns expressed by clients including regarding their inability to fund legal advice or intervention, inability to sustain a mortgage on the departure of a partner, tenancy issues and potential homelessness or benefit issues arising out of joint ownership of properties which the client can no longer occupy following relationship breakdown.

We made personal visits to the managers of the CABx in our original research areas to explain our purpose and procedures, which were positively received and understood. However, in the event, during the period of our research, no relevant clients were recruited in either location. Local CAB managers expressed surprise at this outcome, acknowledging that their recording systems make it impossible to check precise figures. They suggested that in fact the nature of their work appears to be changing in that they are now handling larger proportions of crisis consultation relating to debt and benefits, in comparison to their provision of 'routine' advice or information. With the limited resources they have available this creates long waiting times which may put off some categories of client, including those seeking advice on separation.⁵

⁵ Cf similar findings by R Tennant, J Taylor, and J Lewis, *Separating from cohabitation: making arrangements for finances and parenting* (2006) DCA Research Series 7/06 at 52.

Conveyancers

We envisaged identifying from this group of practitioners those clients who had either come to a resolution of issues they had over property in separating from their partners, or who may never have had problems at all. We anticipated that such people would consult conveyancers, as would any other clients, simply in connection with the conveyancing transactions required to implement their agreements, such as transfers of equity, remortgages and sales.

We again used the Solicitors Regional Directory to identify all firms of solicitors offering residential conveyancing – 122 in the original two areas. We wrote to the individual solicitor in each of these firms who appeared the most senior and/or most specialised in residential conveyancing. We explained the purpose of the research to these solicitors and followed up by a personal telephone conversation to discuss their participation. However, recruitment from this group of practitioners was problematic and prone to misunderstanding and confusion, with a significant number thinking that we had approached them in error, in that they “do not handle disputes”. It proved very difficult to get the message across to conveyancing solicitors that we were looking to them only for clients where either there never had been a dispute, or where any dispute had already been resolved.

It proved impossible to recruit any clients from this category of practitioner at all, despite 46 solicitors (38 per cent of those approached) agreeing to participate in principle. Instead, we selected for full in-depth interview, a number of conveyancers from among those who had already agreed to participate. This group, while not statistically representative, was chosen to provide a range of experience from major city centre firms with large conveyancing departments through to a rural sole practitioner. The group mainly comprising conveyancing solicitors also included two licensed conveyancers and a legal executive.

Practitioner Interviews

We conducted full interviews with a total of 61 professional practitioners. Of these, 41 were family/civil litigation solicitors either with a client participating in the research (21), or on the basis of having described an anonymous case (20). We interviewed a total of ten mediators, four with clients participating in the research and six on a described case basis. Finally, we interviewed ten conveyancers.

Our interviews with each set of professional family practitioners were semi-structured, based on a topic and case based schedule. We sought to discover first the practitioner’s background in terms of the nature of the firm/service, years of experience, degree of specialisation and numbers of cohabitation clients as a proportion of overall caseload. We then explored in detail either the case which the practitioner had recruited to the research for us, or, where this had not happened, a specific anonymous case handled by the practitioner. Finally we focussed more generally on the features peculiar to

the handling of cohabitation property disputes and any opinions the practitioner might have regarding reform in this area. Each interview took between one and one-and-a-half hours and all were tape-recorded.

As none of the ten conveyancers interviewed had clients participating in the study, their interviews took a different form to that of the other practitioners. They focused both on conveyancing practice at the point at which properties are purchased by clients in cohabiting relationships, and then on practice and procedures at the point when cohabiting couples separate.

Samples

The core sample of cohabitants comprised 29 individuals, including five couples – thus 24 cases. The majority of these came into the project as a result of being informed about the research by the professional practitioner they had consulted: 21 by solicitors and four by mediators. One of the researchers is a practising mediator and one of her own clients participated in the Study, having seen a notice asking for volunteers. All interviews with this client were conducted by another member of the research team. We made direct contact later with four more individuals who were partners of individuals already participating in the research, either through that partner, or with their consent. Whilst we had not initially sought specifically to recruit any couples to our sample, these cases were particularly valuable for the rich data they provided, allowing for a greater depth of understanding through the juxtaposition of opposite perspectives. This was particularly true of two cases where the stereotypical gender roles happened to be reversed, throwing into sharp relief the relative concerns of each as to the consequences of their separation and their likely future role and status.

The secondary sample comprised 24 cases. These were the cases described to us in detail on an anonymous basis by their practitioners – 19 solicitors and six mediators. In most cases, the practitioner had the file of the case to hand for ready reference. We had asked those practitioners interviewed in this way to describe the case they had most recently concluded. However, we suspect from comments made that in fact a large number chose cases which they felt would be of most interest to us.⁶ Furthermore, five of the 24 cases they described had not in fact concluded.

Our aim in this study was to examine cohabitation property issues within the mainstream population in ways which have not been done before. Our focus was on the relationship between cohabitation property issues and the law, which is in itself a complex and multi-dimensional area. For this reason, whilst we welcomed any minority ethnic subjects willing to participate in the research, we did not specifically target such participants. We believe that both cohabitation itself, and separation, raise particular cultural and religious issues for some minority ethnic groups that we were not only ill-equipped to explore,

⁶ See similarly A Sarat and W Felstiner, (1986) 'Law and Strategy in the Divorce Lawyer's Office' 20 *Law and Society Review* 93-134 at 95 n1.

but for which we also lacked resources. In the event, just one of our core sample and a handful of the group of cases described by solicitors (this was not a question specifically asked of practitioners) were from minority ethnic groups.

We restricted the research to opposite-sex couples. Again, we felt that the additional dimensions to same-sex relationships would have added further complexity which we did not have the resources to explore. Coupled with this, the Civil Partnership Act 2004 was implemented several months into the project, creating a new complex and dynamic legal context for same-sex cohabitants, making research at this time inappropriate.

Case Studies

Case studies of our core sample were conducted over the 18 months between November 2004 and May 2006. We picked up cases at varying stages, depending on the point at which individuals had been informed about the research and agreed to participate, and beyond that, how long it had taken them to see a practitioner following separation. In fact four individuals had not actually separated when we first met them although the decision had been made to do so and each had taken professional advice by then. Fifteen of our core subjects were first seen within six months of their separation, or where this had been earlier, within three months of their first approach to a solicitor. A further four had separated and taken professional advice within the twelve months before we met them and three more within the previous two years. Two had separated two and a half years previously and finally, one had separated four and a half years earlier. All but three disputes were still active at the time we first encountered the case. Two had been concluded within the previous month and the third a few months earlier. In the two of these cases involving children, issues remained regarding the children.

Our tracking of the 29 individuals commenced in every case with a full face to face in-depth interview. These were conducted in an interactive conversational style, loosely structured by reference to a topic guide to ensure all relevant issues were covered. Respondents were encouraged to tell their stories in their own way, with the interviewer responding by an exploration of issues considered important by the respondent. We aimed to cover basic factual data – ages, length of relationship, children, etc., a brief history of the relationship including attitudes to marriage, legal understandings, how the couple had organised their finances and how property had been acquired. We moved on to the nature of the issues arising on separation, the current position and how respondents had been advised, finally discussing their response to the advice and their expectations.

These interviews, most of which took place in respondents' homes, took between one and two hours. Respondents were paid £20 in acknowledgement of their time. Interviews were tape-recorded with the respondents' consent, with only two declining.

Once a rapport had been established between respondent and interviewer, monitoring of the progress of each individual's case was carried out by telephone or email at intervals of two to three months, depending on availability and developments in the case. In some cases, we also spoke to the solicitors involved, usually to establish dates and times of court hearings or other events.

Eight cases overall involved court proceedings. We attended court in three of these cases, to observe proceedings, in each case with the consent of both partners and the District Judge. It was at this stage that one of the partners of our participants agreed also to join the project. These hearings, each lasting several hours, gave further opportunity for individuals to express their views and feelings to us, and also for discussion with solicitors and barristers. Detailed notes of these occasions were taken.

In almost every case, the practitioners involved were interviewed. We conducted full face to face interviews with 21 of the solicitors for the individuals in the 'core' sample. In four instances where a solicitor had more than one client participating in the research, we conducted only one full interview, with shorter supplementary conversations relating to their other client(s). Interviews followed the format already described above⁷ with a major focus on their perception and handling of the client's case. In one case, where the original solicitor handling the bulk of the case had moved on, we were given the case file to read, instead of an interview. Four mediators were also interviewed in connection with clients they had helped to recruit to the project. Two of our subjects had no professional practitioner. Interviews with practitioners normally took place either at the conclusion of their client's case or, where the case had not yet concluded, at the end of the fieldwork period.

Finally we conducted a second full interview with 22 of the 29 individuals. Of these interviews half were conducted on a face to face, tape-recorded basis and half by telephone. The same interactive style was used allowing respondents scope to express their views freely. Issues covered in this interview included the outcome, how it had been arrived at and why the respondent had come to the agreement reached. We also sought views of the process and their understanding of the law as it had applied to them. Contact with one individual was lost four months before the end of the fieldwork period, although we were able to talk to the solicitor involved, establishing that the case did not conclude within that period. The remaining individuals were all interviewed once only, having joined the research towards the conclusion of their case or very shortly afterwards.

⁷ See pp155-156.

File Surveys

Court files

The original intention of this limb of the research was to survey 100 concluded applications under TOLATA and Schedule I to the Children Act, from each of two courts, dating back to 2000. We had been given a very rough estimate of 150-200 applications being issued each year.

Consent obtained from the Department for Constitutional Affairs gave us scope for a survey of all relevant civil applications issued in 2004 in the two county courts. Despite our earlier information, it transpired that there was no way of identifying the cases relevant to our study other than by physically checking through each one, since the Courts Service does not record categories of application in civil cases. We commenced our investigation in the Civil Section of the first county court, where we found a total of 16,181 civil applications had been issued in 2004, the vast majority (94.3 per cent) being small claims. We checked through each of the 928 fast and multi-track cases for 2004 – which were likely to include all the more complex cases – finding a total of seven TOLATA claims. We then checked 7,300 small claims cases – approximately half the remaining number issued in 2004 – finding four cases. We suggest that a further four cases might have been found had we had time to check the remaining small claims files, assuming the same rate as for the first half – thus an estimated total of 15 for the whole year.

Permission for a survey of files in the Family Section came later than that for the Civil Section, following implementation of the Family Proceedings (Amendment No 4) Rules 2005⁸ allowing access to records concerning proceedings relating to children in connection with research. This part of the survey was intended to check applications for financial provision under Schedule I to the Children Act 1989. We had anticipated, given the very low number of TOLATA files found in the Civil Section, that more might be found in the Family Section, consolidated with Children Act applications. Again, it proved impossible to identify cases relevant to us other than by physically checking through all Children Act applications – the total of which made in 2004 in this court was 1010. Certain categories of files were kept separately, leaving us with 775 to check for applications under Schedule I. We found just seven Schedule I cases, only two of which were consolidated with TOLATA claims.

Survey of completed CAB files

We had originally intended and been given to believe that it might be possible and relevant for us to make a retrospective study of local CAB files, with the purpose of exploring cases where the parties may never have taken formal legal advice – thus at the opposite end of the spectrum to the cases involving court proceedings. However, our approaches to the local CABx raised immediate concerns regarding data protection issues. Given the abortive

⁸ SI 1976/2005,

results for the parallel court file surveys and also the fact that we had recruited no subjects from the CAB for the qualitative limb of the research, we decided not to pursue this.

Focus Groups

We held two focus groups, the first with District Judges from the areas where the research was conducted, and a second with a small group of barristers – both property and family law - from different chambers in one of the research areas. These were held shortly beyond the end of the field work phase, just after analysis of the data had commenced. The purpose was twofold, first to share our preliminary findings and to obtain feedback, and secondly to discuss with these groups the same sort of issues and information we had explored with the other practitioners involved in the project.

Data Analysis

The data produced was mainly in the form of interview material. All but two of these were tape recorded and then extensively transcribed by the interviewer on a thematic basis, together with the interviewer's observations and impressions, allowing for the process of analysis to commence at this stage. In addition we produced detailed accounts of each of the court observations. Finally we produced full notes of all updates obtained from our regular contact with respondents during the research. All this data required a systematic and lengthy process of intensive reading and organisation into key themes and categories for analysis.

Data from court files was recorded, on an anonymous basis, on standard forms, though information was incomplete in some cases. However, the figures of 11 TOLATA and seven Children Act cases clearly do not allow for the possibility of any form of quantitative analysis. The nature of the data furthermore allows for very little in the way of qualitative analysis and we were therefore largely unable to pursue our original objective for this element of the study.

Comment

It will have been noted that, as with all studies, our methodology developed as the project progressed. Given the nature of the issues we were exploring, involving people and disputes which are not officially recorded in any way, it was anticipated from the outset that we would need to adopt an adaptive approach to our method of recruitment to the sample. In light of the inherently 'hidden' nature of our target subjects, we did not recruit as large a sample as we would have wished, and neither could we establish the representativeness of that sample within the cohabiting population overall. Both issues clearly stem from the same issue of the unrecorded and 'unofficial' nature of these cases.

Sample size

We recognised that recruiting a sample via third party intermediaries (the professional practitioners) was potentially not ideal and it is always preferable for researchers to be in a position to recruit a sample directly. Nevertheless, our method was the most appropriate in the circumstances for three reasons. First, we needed a way of identifying potential subjects in the first place given their inherently 'hidden' nature. Secondly, we wished, as far as possible, to focus on contemporaneous cases, in order to obtain the views of our subjects to events as they occurred, rather than with the benefit of hindsight or blurred by the lapse of time. It is easy for those who have been involved in a dispute themselves to rationalise their perceptions later, and as easy for practitioners to generalise their perceptions of specific cases into stereotypes. Finally, our focus was to be not only on the cohabitants themselves, but equally on the professional practitioners handling their cases. In these circumstances it made sense to ask those third parties whom the cohabitants were likely to contact, to identify individuals, to make approaches regarding the research on our behalf, and then to contribute their perceptions on those same cases. Other methods might have involved approaching organisations to which individuals might be drawn. However, we discounted this, anticipating the possibility of issue-driven 'agendas'. In any case, membership of such organisations does not necessarily correspond to having a current on-going dispute. 'Snowballing' was another method we considered, but given that we wished to contact subjects at a particular moment in time, this seemed inappropriate and unlikely to produce results. Survey material was not available to us, but in any event, being necessarily 'historical' data, would not have allowed for the focus on unfolding scenarios which we planned.

We were conscious of the delicate nature of what we were asking of our practitioners. Clients consulting over issues around relationship breakdown are entitled to expect confidentiality and sensitivity from those they consult. We therefore understood that many practitioners, however enthusiastic in principle about the research, found it difficult in practice to approach clients, fearing possibly that negative feelings engendered by such a request might rebound on to them. However, it has been our previous experience that there are in fact many people who are willing, in difficult circumstances, to speak to researchers. Indeed, several of our respondents expressed their gratitude to us for providing an extra ear to listen to their problems, finding our interest therapeutic. Some solicitors seemed to find approaching clients relatively straightforward, in several cases recruiting without difficulty the only client they encountered during the research period. Others – notably some of those solicitors who saw larger numbers of 'higher value' clients – were far more diffident and protective of their clients.

Perhaps more significant was the finding that, in fact, for both solicitors and mediators, cohabitation property issues form only a very small percentage of their caseloads; they simply encountered very few clients to inform about the research. When first approaching practitioners to participate, we asked for estimates of relevant cases. Most gave estimates of only handfuls of cases,

but then, when we spoke to them later, acknowledged with some surprise that even these low figures appeared to have been over-estimates.

To remedy the shortfall in our sample size, we modified our method as explained earlier, by introducing the second group of practitioners. Our full sample of 61 practitioners enabled us to gain full immersion in the issues, with a good diversity of perspective. The 24 cases described to us in detail by these practitioners provided valuable additional data to the core sample, which has been used in our analysis, contributing in terms of creating a picture of the nature of cases encountered by practitioners, how they were perceived and handled by practitioners, and their outcomes.

Representativeness

This project was not envisaged as one which could provide a representative sample of separating cohabitants with financial or property issues to resolve. As we have noted, it is an inherent feature of that population that it cannot be identified or counted, requiring for the dissolution of their relationships no form of official notification or process akin to divorce for married couples. Since there is no defining point at which they can be pinpointed, there can be no ascertainable baseline statistics for separating cohabitants, and no identifiable population against which we could check our sample.

As explained earlier, we asked all practitioners participating in the project, in addition to bringing the research to the attention of their clients where appropriate, to complete an anonymous 'survey' form for every relevant client consulting them, irrespective of whether the client subsequently went on to participate fully in the research. However, despite several reminders, many practitioners failed to return these forms to us, or did so on an incomplete basis. This rendered our objective of identifying a small scale 'population' of all the clients approaching these particular practitioners, against which to view our core sample, impossible to achieve. 62 forms were returned to us, but we cannot say what proportion this represents of all those who consulted the solicitors participating in the research.

Appendix 2: Pen Pictures

Andy

Andy met his partner P in his late twenties. They lived together for 14 years and have two children, now aged 6 and 10 years. During the course of their relationship both worked and each also had periods of training for their current professional qualifications. Their earnings are currently roughly equal.

Early in their relationship Andy and P bought a house together as joint tenants, subject to an agreement drawn up, but never actually signed, reflecting the fact that P had contributed significantly to the house from the proceeds of sale of a previous property, while Andy had not made a capital contribution. P would like to have been married, but Andy was adamantly against this, citing the case of his own parents' very bitter experience of divorce but acknowledging also that, with hindsight, perhaps he wasn't sufficiently committed to the relationship with P. During their relationship, the couple always maintained separate bank accounts, though organising their finances jointly without friction.

When they separated, Andy felt duty bound to honour the agreement regarding the house, which gave him one third of the net value of the property (£41,000). He felt this was probably the best solution for the sake of the children, and on balance a fair outcome overall, albeit with some misgivings. P has remained in the family home, having bought Andy out. Andy lives in a rented property nearby. The children spend their time roughly equally with each parent. The settlement was reached by a process of slightly fractious negotiation between Andy and P themselves, with minimal input from solicitors, Andy having first established his legal position. The agreement was finalised 14 months from the date of separation, costing Andy nominal advice fees plus half the conveyancing costs.

Ben

Ben is in his late 30s, and had lived with P, who is from the Far East for 12 years before their separation. This was at Ben's instigation, on the ground that the relationship had run its course. They have a four year old son. P had a good job for their first few years together, but more or less stopped work when they moved from London for Ben's job, and she has not worked at all since their son was born. Ben's income has been relatively high throughout the relationship, and he has been the main breadwinner.

The couple's home was the second property they had owned together as joint tenants during their years together. Its net value is well over £400,000. P made an initial capital contribution to the purchase price from a redundancy payment; Ben contributed later from an inheritance and again from the sale of a property he had owned in his sole name. They ran their finances from an account in Ben's sole name, with P contributing very little financially. They

discussed marriage when P became pregnant, but never got round to it. Ben now feels that he, and maybe also P, lacked proper commitment.

On separation, Ben proposed that the house should be sold and the proceeds divided equally – as per the joint tenancy – leaving each with a sum in the region of £200,000 to put towards new accommodation. In the meantime, pending agreement on this and the sale of the property, they both remained living in the large family home with their son. Relations, initially eased by the final decision to separate, gradually became extremely embittered, leaving them and their son living in an atmosphere of permanent tension punctuated by vitriolic rows. P found herself unable to accept Ben's proposals, and the dispute has gone through the court, alongside disputes regarding their son. The court made an order in exactly the terms of Ben's proposal, which P tried unsuccessfully to appeal. The case is now concluded, all but the implementation. Ben has had to resort to the court to get the market price for the house established and it is anticipated that more court applications will be required in order to complete the implementation. The case, lasting 17 months, has cost Ben £10,000 to date.

Colin

Colin and his partner P, both now in their mid 50s, had both been married before starting their relationship 11 years ago, when Colin moved from his council house into P's home – owned in her sole name. They each had bad experiences of divorce and, though the idea of marriage was discussed in their early days, it was never seriously pursued. Each had adult children, but none living with them or involved in any way.

During their first year together, Colin struggled financially while training as an electrician. P was working during this time but, shortly after Colin started his business, injured her back and gave up work. Subsequently, Colin was the main breadwinner, paying all bills, except the mortgage, from his own account. They had no joint account. During the time he lived with P, Colin made significant contributions to the property in terms of major maintenance and improvements.

Colin gradually concluded that the relationship was over and left to move into rented accommodation, although remaining on amicable terms with P. He took legal advice as to how he might be recompensed for his financial contributions. The solicitor was tentative, requesting more detailed information and documentation from Colin before giving an opinion, meanwhile encouraging him to try to reach agreement with P by himself. Colin understood from P that she would give him 40 per cent of the proceeds of sale of her house, which she was intending to sell, but she refused to put this in writing. Unfortunately, before anything could be settled, Colin was injured in a car accident which left him in a depressed and apathetic state, and unable to follow his solicitor's advice with regard to producing the required evidence. Meanwhile, P spent much time abroad, making it difficult for Colin to broach the question of a financial settlement. He was finding this

awkward in any event not wanting to antagonise P in case she reconsidered what he considered her generous proposal to him.

After many months, Colin, urged on by his solicitor, decided on a more proactive approach, and obtained legal aid funding for a court application with the aim of claiming a more modest lump sum from P's property in recompense for his expenditure. However, this application has to date not been served, since P has now sold her property without notice to Colin, and effectively disappeared without trace. Colin is now bankrupt, having been unfit to work since his accident and failing to get on to benefit for many months. It is now 17 months since the separation.

Annette

Annette, aged 35, was born in the Far East, but has lived in the UK with her family since she was 7. Her partner P is also from the same area and they were together for 9 years before P suddenly decided to leave her and their sons aged 4 and 6 for a new partner.

The family lived together in a property purchased in P's sole name, but funded jointly by them both. At that time, Annette understood that she was not earning sufficiently to be on the mortgage, though throughout the relationship she worked either full or part time contributing to the mortgage and bills, which were paid from an account in P's name. A formal agreement as to their equal beneficial ownership of the property was drawn up at the time of purchase, but never signed. P had asked Annette to marry him, but she was adamantly against this, not wishing to become an integral part of P's family (who she dislikes), which marriage would entail in their culture.

At the time of his departure, Annette and P discussed arrangements whereby she and the children would continue living in their home until the youngest reached the age of 18, when it would be sold and the proceeds divided equally. However, relations between the couple disintegrated when he disappeared, effectively abandoning her and the boys. Annette, not being party to the mortgage became aware only belatedly that the house (worth £215,000) was under threat of repossession as the mortgage (£100,000) was not being paid. She became genuinely fearful that she and the boys might become homeless – at which point she took legal advice.

P, whose address was never known, kept appearing and disappearing abroad, making negotiation impossible. TOLATA and Schedule I Children Act applications were made to the court and it initially took some time before P could be served. This still did not produce any inclination to negotiate and the case went all the way to a final hearing, before a settlement was brokered between barristers in court. This provides for the house to be transferred into Annette's sole name – 54 per cent for herself and 46 per cent for P, charged to the property until the boys finish their full time education. P is also to pay Annette's Legal Aid costs – in the region of £9,000. This case took 13 months to the court order.

Brenda

Brenda is a part time hairdresser aged 29. She lived with P, who is considerably older than her and a very dominant character, for three years, from the time she became pregnant with their two year old daughter. Brenda also has a daughter of 10 years, and P two sons aged 17 and 19 years. Issues of control of the children and the stress of overcrowding led to the breakdown of the relationship, as far as Brenda was concerned, and she left the family home together with her two daughters, much against P's wishes.

The family home had previously been owned by Brenda's parents, and she was renting it from them when she met P. When they came together, the couple bought this property as joint-tenants from Brenda's parents, with P contributing either £65,000 (75 per cent) as claimed by him, or £44,000 (50 per cent) as indicated by the figures, to the purchase price, from the proceeds of sale of his previous home. This disparity was never clearly resolved. During their relationship, Brenda took little interest in the couple's financial affairs leaving this to P. Brenda would like to have married, but P was reluctant. On separation, Brenda accepted that it was she who should leave, given that this was her decision. She felt it only right to leave P and his sons in the house, since he told her that he could not afford to move. On this basis, she accepted £12,000 in settlement, although this amounted only to 14 per cent of the equity in the house. At this stage, Brenda had not taken legal advice on the settlement, but only on the conveyancing procedures.

Relations between the couple worsened when P decided unexpectedly to sell the house, at the same time bullying Brenda into allowing him to take over as major carer of their daughter. The property was sold for little more than the original purchase price. Feeling she had been duped Brenda then rather belatedly tried, through solicitors, to increase the size of her settlement to £20,000 (24 per cent of the equity). However, this was resisted vigorously by P, and eventually Brenda settled for £14,000 on her solicitor's advice that it would not be cost effective to fight the case through the court. She was relieved simply for the dispute to be over – after 12 months. Brenda paid £550 under the Legal help scheme.

Caroline

Caroline and P lived together for 16 years, having met in their late 20s. Neither had been married before. They have 3 children, the oldest of 15 and twins of 11 years. Both are part time teachers. They separated at Caroline's instigation, due to lack of communication and P's financial ineptitude. In Caroline's view, P has always mismanaged money and failed to contribute properly to the family finances. Both have always been against marriage in principle. Although 'separated', both Caroline and P remained living in the family home with the children for about 6 months, until P reluctantly moved out.

While together, Caroline ran the finances from a joint account, to which each had agreed to contribute from their own accounts. Property ownership and finances between the couple are slightly convoluted. They own the family home (net value £372,000) as joint tenants subject to an agreement at the time of purchase protecting £75,000 contributed by Caroline from her previous home. This sum represented 70 per cent of the value at that time, but is only 20 per cent of the current value. Caroline accepts this 'mistake', but it clearly affects her view of a fair settlement. The property incorporates a self contained flat which Caroline has always managed. She also owns outright a flat (in which P is currently living) worth £110,000, the purchase of which was assisted by a loan of £16,000 secured on the family home. At some point P sold his own former home realising £87,000 and also benefited from an inheritance of £25,000. There is no trace of either sum, which P claims to have spent on unspecified debts. He also has a pension of unknown value. Finally there is a joint endowment policy of £26,000. Both are agreed on a basic equal split of the jointly owned property, subject to Caroline's initial deposit, the dispute now centring around how this should be achieved, given the desire to retain the children's family home, the fact that both are on relatively low incomes, and on the division of the other assets and liabilities.

Having failed to reach agreement between themselves, the couple tried mediation. After 7 sessions, a partial agreement was brokered. However, this never took effect as the couple continued to argue over details. The dispute is now being negotiated by solicitors. 14 months from the separation, Caroline's solicitor hopes that by dint of heavy advice, the case can be concluded without recourse to the court. So far her costs under Legal Help are just over £300.

Emma

Emma (31) lived with P (37) for two years. Neither had been married before, and marriage was never discussed between them. They have no children. Emma works in a clerical position and P is unemployed, though a qualified tradesman. They separated at Emma's instigation, when she asked P to leave due to his increasing violence towards her and their home, and his refusal to make any financial contribution.

When they met, Emma had owned her property for 7 years, but was temporarily renting it out to tenants whilst on a very low income. She had become very concerned over news about endowment policies being insufficient to pay off mortgages, at around the time she met P. P suggested that they together take over her property and remortgage it. Including his income on the mortgage would mean that they could afford to move back there. Thus the property was transferred from Emma's sole name to become a joint tenancy with a new joint mortgage. At the same time the couple also took on joint debts of £32,000 for various home improvements to the property, which currently has a net value of £68,000. Having masterminded the new arrangements, P then stopped working and made no financial contributions whatever.

Emma first consulted a solicitor after 6 months to obtain an injunction because of continuing violence. The violence against Emma and burglary to the house culminated in criminal proceedings against P. Regarding the property, Emma's solicitor initially proposed a professional negligence claim against the solicitors handling the transfer to joint names. However, P issued TOLATA proceedings for an order for sale and equal division of the proceeds of the property. 28 months from the date of separation (longer than the relationship itself) the dispute is still ongoing. The solicitor is basing a defence on Emma's behalf that P so fundamentally breached the implicit agreement that he should make financial contribution, that the joint tenancy should be overturned. Emma has very little comprehension of the law, but full confidence in her solicitor. Her costs, which amount to several thousand pounds, were initially publicly funded, but latterly paid privately due to changes in eligibility for legal aid.

Frances

Frances and her partner P met while they were both university students and started living together, initially in rented accommodation in their early twenties. They were together for 20 years, before separating, on Frances' initiative, due to P's emotional and mental abuse. They have four children aged 16, 14, 10 and 9 years, who are in private education. Frances had felt for some years that she wanted to end the relationship but had not known how to go about this in practical terms. The crunch came when P physically abused her, resulting in an injunction ousting him from the family home. There has also been litigation over arrangements for the children, culminating in a residence order in Frances' favour and defined contact arrangements.

The family home is in P's sole name. Frances has remained living there together with three of the children. Just prior to the separation P had bought a second property also in his sole name, in which he is now living with the second child. Frances does not have values for either property or mortgage details. Frances has not worked at all since having the children. P, working in the financial sector has always brought in a high income (Frances does not know exactly what), and also plays the stock exchange. The family finances were always run by P and the couple never shared a joint bank account. While Frances would like to have been married for traditional reasons, P was always against this – she now believes, for financial reasons.

Frances has accepted totally, though with initial shock and dismay, that she has no claim on either property in her own right. The case has focussed on the provision of accommodation for herself and the children in their minority. The parties separated 15 months ago, but the legal arrangements are still being negotiated between solicitors. Frances' solicitor advised a trust deed to create a Schedule I type arrangement. However, P was opposed to this, preferring a tenancy type arrangement, which is currently under discussion. Frances does not regard the dispute as being very high on her list of priorities. Her main focus has always – both before and since the separation - been on the four children and all the normal decisions needing to be made regarding their education and welfare generally. Frances has been on Legal Aid throughout.

Gina

Gina and P met and started living together in P's flat in their late twenties. Neither party had been married before, and neither saw the point of marriage. The couple set up and ran a very successful company, based largely on Gina's technical skills. P had a family background in the hospitality sector which was his main area of employment. When he fell out with his family, the couple moved away from London, to the town where Gina's parents live. Using the proceeds of sale from his flat and a large pay-out from the hotel business, P bought a property outright (worth about £400,000) to renovate and rent out, as a business. The family – by then there were two small children – lived in a rented house. The business fizzled out, given Gina's full time care of the children and P's lack of interest. The relationship, which had always been very volatile, ended after six years together, when Gina refused to go with P to live in his property, instead having the tenancy transferred into her own name.

P, who was always the dominant partner, was grossly affronted by Gina's decision to separate, and embarked on major court litigation over the children, which has been the main focus since their separation. This took two and a half years to reach a conclusion, involving several CAFCASS reports, psychologists' reports and school reports. The outcome was exactly what Gina had hoped for. However, though the issue of a financial settlement has been broached, P has flatly refused to engage with this at all in the 32 months since the separation. All Gina wants is that P returns the original, or provides a substitute, car for her use with the children. They live some way out of town with little public transport. P removed the family car at a particularly bitter moment in the child dispute, although he has transport of his own. The position for Gina, who is on Legal Aid, is complicated by the fact that were she to succeed in any litigation over finance, any payment would immediately be swallowed up by her Legal Aid costs, which, for the dispute over the children, were £12,500. Only now that the children case is over, does Gina feel she can focus fully on her rather modest financial claim under Schedule 1.

Frank

Frank, aged 55 has just retired with a good public service pension. Having been married for 16 years when younger, Frank had subsequently lived a bachelor life for many years. However, he met and fell head over heels in love with P and they became engaged to be married. Both had adult children from previous relationships. Two months later they bought a house together, to which Frank contributed £90,000 and an additional £26,000 later for improvements, while P contributed nothing financially. Despite this, the property was conveyed into both names as joint tenants. At the time they bought the property, Frank was still working full time; P was on benefit and working only casually.

Sadly the relationship did not work out, as Frank fairly soon realised that P was an alcoholic and extremely unstable, prone to violent attacks on himself and their property. Nine months after they moved into the property together,

Frank left, with P initially claiming to understand his point of view and promising to leave without making any claim on him. The property was put on the market, but did not sell, during which time P's attitude hardened. Frank offered P £5,000, but she insisted on her full 50 per cent of the proceeds of sale - £45,000. Frank took legal advice to the effect that he could not dispute this claim, although he might have a professional negligence claim against the conveyancing solicitors.

The dispute was finally resolved, 13 months after their separation, when P unexpectedly decided to leave the property and to accept his offer of £25,000 for her share. Frank has moved back into the property and had it transferred to his sole name. This was effected, though not without enormous difficulties in obtaining a new mortgage, given that by that time his income had reduced to a pension.

He is still considering the pros and cons of a professional negligence claim. His costs were in the region of £300 to £400.

Helen

Helen and P met while both working in the construction sector. After a relationship of two years, they started living together, initially in Helen's rented flat. P then bought a derelict property, in his sole name, and the couple commenced work on a large scale renovation project. After a while P moved into his property, though still using the facilities in Helen's flat. She later moved in to join him. Neither had been married before and neither was particularly anxious to get married. Without giving the matter any systematic thought, Helen envisaged that the relationship would last, and the couple had talked about buying a property in France together at some time in the future. During the three years they lived together, each retained their own separate bank accounts. Helen paid an agreed sum into P's account as her share of the bills and mortgage. She did not know the value of the property or the size of the mortgage. Sometime after moving into P's property, Helen bought a property of her own – feeling concerned that she should get into property ownership while she could still afford it. The couple did some minimal work on her property following which it was let out to tenants.

The stresses of the project took their toll and, after increasing volatility, the relationship finally broke down. This was extremely traumatic for Helen, and she hoped sometime for reconciliation. However, this was not to be and 18 months after leaving P, she initiated discussions with him with a view to reaching a financial settlement to recompense her for the work she had done to his property. Initially appearing positive, P soon decided not to negotiate or to offer anything, at which point Helen consulted a solicitor. The solicitor's advice, backed by a second opinion from a barrister, given the slightly unusual nature of the potential claim, was that Helen did not have a strong case, but that it would be worth attempting to reach a settlement through negotiation. A letter was written to P seeking £10,000 in full and final settlement, but this was refused and Helen has now abandoned her claim, having spent £3,000 in legal costs.

Isabel

Isabel is a 32 year old part-time medical worker. She and her former partner P, who is aged 37 and in well paid secure employment in the public sector, were together for 10 years and have children aged 5 years and six months. Neither had been married before. Isabel was always keen to be married, but P rather reluctant. However, plans had finally been made for a wedding and a date set. Before this though, the couple separated at Isabel's instigation when, four months pregnant, she discovered that P was having an affair.

The couple lived in a house owned solely by P. Isabel had been pregnant with her first child at the time of its purchase, and while she did not make any capital contribution, she certainly envisaged the property being equally hers. She was led by P to believe that the document required by the mortgagee concerning her occupation of the property as a non-owner, actually gave her ownership rights. Isabel worked at least part-time for most of the years she was with P, though acknowledges that he was the major breadwinner. The couple had a joint bank account from which bills and the mortgage were paid, into which Isabel contributed a regular sum fixed by P. P had other assets including a car and boat (each worth about £6,000) and a large pension. He also had credit card debts of £20,000.

When the couple separated, Isabel remained in the family home with the children. The house had equity of £80,000. She immediately consulted a solicitor who advised her that she had a claim. She was able to provide very full documentary evidence of her contributions. P made an offer of £25,000 for Isabel to leave the property. While Isabel's solicitor considered that she could press for £60,000, Isabel herself did not wish to over-extend P, and finally settled in mediation for £39,000. With this sum and a mortgage she was able to raise on the basis of her part time income and tax credits plus maintenance from P, she was able to purchase a property for herself and the children. P immediately moved back into his property – with his new wife.

Jenny

Jenny, now aged 44, had been with her former partner P for 15 years before he left her for another woman. They had two children aged 13 and 7 years, who remained with Jenny in the family home together with Jenny's oldest son aged 20 from her earlier marriage. Jenny now works part time in an office job; P is in the financial sector. Jenny always worked either full or part time during her relationship with P until the birth of their youngest child – that is for the final four years they were together, but acknowledges that P was always the main breadwinner. Jenny did not want to be married, although P would have wished this.

The family home is the house where Jenny has lived for 23 years, being also her former matrimonial home. When her first marriage broke down (amicably) she and P bought her former husband out by means of a transfer to them as joint tenants, without any consideration of the fact that Jenny already had a 50 per cent share in the property. There is now £167,000 equity in the property.

Some years ago the couple increased their mortgage by £14,000 in order to finance P's grandmother's 'right to buy' flat – on the basis of it reverting to him on her death. This it duly did, but into his sole name rather than joint names.

Initially relations between Jenny and P were amicable following the separation – Jenny guesses due to his guilt. He continued paying bills and the mortgage for a considerable period, until Jenny was able to start work when the youngest child started school and gradually took over more of the payments. However, when Jenny started a new relationship P became more antagonistic and instructed a very aggressive solicitor. The case was settled by negotiation, with Jenny unwilling to fight as hard as P. She raised the highest possible sum she could in order to pay out P to the tune of about 35 per cent of the equity of the family home – which recognised to a limited extent the fact that the flat had been purchased by a mortgage secured on the family home, but recognised no interest for her in the flat. Jenny felt that this outcome had not really been very fair to her, but that she hadn't wanted to fight any further. The dispute took 11 months to resolve.

Diane and Luke

Diane and Luke had both briefly been married when younger, coming together when she was in her late twenties and he ten years older. Neither had suffered acrimonious divorces, but although it was discussed, neither was particularly interested in marrying again. Each had one child from the earlier marriage; Diane's daughter lived with the couple, together with the daughter of the relationship who was aged 12 at the time they separated, after a relationship of about 14 years.

When the couple met, Diane was living in her former matrimonial home which had been transferred to her on divorce. This had fallen into a state of disrepair as she had not been able to afford to keep it well maintained. She and Luke decided to remortgage the property together, to provide funds for renovations, and as part of this transaction the house was transferred into their joint names as joint tenants. Luke worked full-time throughout the relationship as the main breadwinner, while Diane worked part time after their daughter's birth. Throughout their relationship they operated a joint bank account, pooling their finances, with Diane taking the role of financial organiser.

On separation Diane remained in the property with her two daughters, while Luke went to live with his parents. Both agreed to the principle of a 50/50 split of the equity in the house, which was between £50,000 - £60,000. Their main problem was how to arrange this in practical terms, given that Diane could not afford to increase the mortgage in order to buy out Luke's share. Each took initial legal advice and Diane's solicitor suggested mediation, to which both agreed. An agreement was quickly reached in mediation, giving Luke a proportion based on half the current equity, to be paid when their daughter finished full time education or the usual triggers. Luke was to remain as joint owner and mortgagor, though whilst Diane would actually be responsible for paying the mortgage. In the event however, Diane found that

she could after all raise extra funding and offered to buy Luke out for £15,000. He accepted this immediate, though less than originally agreed sum, and the property was duly transferred into Diane's sole name.

Luke's legal advice was free and his mediation costs amounted to £170. Diane, being on benefits at the time, paid nothing for mediation, but covered the conveyancing costs and the penalty for early redemption of the mortgage.

Mary and Geoff

Mary is aged 43 and works full time in a managerial position. Geoff is aged 54 and works part time in the medical service. They met 14 years ago and have lived together since then. They bought their home together 12 years ago as a joint tenancy. This is a modest property with equity of around £110,000. They have two daughters aged 11 and 8. Geoff had been married before, going through an acrimonious divorce, which he is anxious not to repeat. His two sons, aged 18 and 21, from his first marriage have been living in the family home for the last few years, which has caused some friction. They discussed marriage seriously, but although Geoff would like to have been married, Mary had reservations about marriage as an institution, and they did not go ahead.

Mary was keen to further her career and so while she worked full time, Geoff became the main child carer. These arrangements suited them both, very much reflecting their individual life style choices. However, whilst more than happy to take responsibility for child care, they have severely affected Geoff's career prospects. Mary always took responsibility for managing the routine family finances from their pooled resources in a joint account.

The strains of six people living in a small house with stretched financial resources contributed to the breakdown in the couple's relationship. The separation was at Mary's instigation and Geoff has found this very difficult to face. His low earnings have made it practically difficult for the couple to separate. After several months, Mary moved out, initially into rented accommodation, until she finally managed to find a way of financing the purchase of a new property for herself, whilst still contributing to the mortgage on, and retaining an interest in, the family home.

Mary had a free consultation with a family solicitor, but fears over the cost of further advice and the risk of being pushed into litigation deterred her from going again. Mediation was considered but not pursued because Geoff was resistant to the idea. Geoff has not taken any legal advice at all, so that the arrangements agreed between them were reached largely without legal advice and at minimal cost.

Damien and Susan

Damien is 52 and Susan 49. They were together for 24 years and have a 16 year old daughter. Damien had previously been married but says that he never had any intention of marrying again, although Susan's understanding was that they would get married.

They had met while both employed in the finance sector. After their daughter was born, Susan did not resume this career, despite a scheme offered by her former employer for returnee mothers and encouragement from Damien. Latterly she took up casual employment locally. The family home was purchased in Damien's sole name, and as far as he is concerned, Susan made no financial contribution to the property – either by way of capital or by contributions to the mortgage. However, Susan's case was that she contributed a lump sum of £10,000 within a year of the purchase of the property.

Ten years ago Damien was offered employment in Australia and asked Susan and their daughter to accompany him. However Susan did not want to leave home and Damien went on his own. During these years, although considering the relationship effectively over, Damien was content to leave Susan and their daughter living in his property, not wanting to disrupt his daughter's life and not having any immediate requirement for the property. He says he continued to pay the mortgage and bills, and also sent money home; Susan suggests that his financial support was irregular and inadequate.

On his return to the UK, Damien wished to take possession of the property for himself, and offered to pay the rent on accommodation locally for Susan and their daughter for the three years until their daughter finished her full time education. He hoped during this period Susan would have time to readjust her life and become independent of him. Susan rejected this offer, feeling threatened and insecure about leaving her home after so long there, and pessimistic about the prospects of finding suitable accommodation for herself and their daughter locally.

The couple continued living in the family home in great animosity as their dispute escalated, occasionally involving police intervention. Court proceedings were issued under both TOLATA and Schedule I Children Act which went all the way to a full adjudication. By then Susan had found alternative affordable accommodation locally. She was unable to produce evidence of her disputed contribution towards the family home and the court declared Damien sole proprietor of the property, dismissing Susan's claims for an interest or any lump sum. Maintenance for their daughter is still an outstanding issue.

The dispute lasted 15 months, costing Damien about £14,000 and Susan, who was publicly funded, £10,000. Susan was ordered to pay Damien's costs, though it seems unlikely she will ever be in a position to do so.

Martin and Tara

Martin and Tara are in their forties and separated about 2 years ago after a five year relationship producing two children, now aged 6 and 4. Martin is in manual employment and Tara has her own business. Martin had lived with a couple of girlfriends before; Tara was previously married and has three teenage children, two of whom have lived with her throughout. Martin always expected him and Tara to marry, especially after their first child was born, but says they were always too busy doing other things. Tara was never keen to marry because of her earlier unhappy experience.

When they first met, Tara was living in a council house and Martin owned his own home which was in poor condition. Martin moved into Tara's home but shortly afterwards was made redundant, and they spent the next year doing up his house for sale. He sold it and realised over £20,000 net. A few months later, Tara bought her council house for £42,000 with the benefit of a full discount. Martin understood that he could go onto the title once Tara had owned it for three years. Together over the next year or so they did a lot of work on the house, putting in a new kitchen, conservatory and bedroom and improving and repairing it generally. Martin had given up full time employment, doing some work for Tara's business and also working on house renovation. Tara raised a further £10,000 on the mortgage to finish the work. Martin says that he used most of the proceeds of sale of his home to fund the costs of purchase and the work but Tara disputes this, saying that his contributions amounted to no more than a reasonable contribution to the household expenses during the time they were together in her home.

Martin went back to work full time after the birth of their first child. He and Tara each had their own bank accounts, but Martin used to transfer his wages into Tara's personal account and generally managed the family finances through her account. Relations gradually deteriorated until Tara asked Martin to move out just under three years after the purchase of her house. She has now sold it for over £220,000 and purchased a larger property. Martin is living in one room in a friend's house and has the children to stay roughly every other weekend.

Martin took legal advice about 18 months after the separation following difficulties over his contact with the children. He was advised that he had a potential claim on Tara's house if he could produce documentary evidence to support his contributions, but he has had difficulty in doing this. Tara denies that Martin has any interest in her property.

Tara has not taken legal advice nor received any communication from Martin's solicitor. The couple were referred to mediation, as Tara thought to discuss difficulties over child contact, and she was not prepared to discuss Martin's financial claim. He has now reluctantly abandoned this claim. Neither have incurred any costs, both having had the benefit of public funding with the mediator and Martin also with his solicitor.

Ewan and Rosie

Ewan and Rosie came together in something of a rush, following an unplanned pregnancy within a few months of their meeting. Ewan at 48 is 18 years older than Rosie. They now have two children aged 5 and 3 years. Their relationship ended after 5 years together when Ewan left the family home at Rosie's request, admitting himself that they had never really been compatible. Although they had got engaged and vaguely discussed plans for a wedding, there had never been any real impetus for marriage from either of them. Rosie was just starting her career when she met Ewan, but with his agreement gave up work when their first child was born. From then until the separation Ewan was the only breadwinner, paying his salary into a joint account.

Ewan owned his own property when he met Rosie. While she was still pregnant with their first child, the couple bought a property as joint tenants. Ewan contributed £41,000 to the purchase – from the proceeds of the sale of his own property. Over the next couple of years he invested a further £25,000 from his savings for home improvements. Rosie made no financial contribution of capital or income, having no assets or income of her own apart from Child Benefit. In addition to his interest in the family home, Ewan had a good pension, an endowment policy and shares. Following the separation Rosie took a part time job.

On separation, Ewan proposed that the family home be sold and the proceeds split equally, which would give each of them in the region of £77,000. He offered additionally an outright lump sum of £17,000 to put Rosie in a better position to purchase a property for her and the children. After 6 months fruitless negotiation Ewan, by now with the additional advice of a barrister, made a final offer of a 50/50 split plus a lump sum of £10,000 charged on the property, repayable to him when the children finished full time education. Rosie, very late in the day, claimed a 50/50 split plus £20,000 on a charge-back basis. The case went to a full adjudication under Schedule 1 – a process which both Ewan and Rosie found traumatic and distressing. The case turned on Rosie's reasonable needs in respect of rehousing, and the court made an order in the terms of Ewan's offer.

Four days prior to completion of the sale, Rosie's parents offered to lend her the £10,000 since Rosie could not face the prospect of Ewan retaining an interest in her new home. The dispute took a total of 20 months from the time of separation, and cost Ewan £23,000. Rosie, who had legal aid, incurred costs of about £7,500. Ewan was unsuccessful in his application for an order for costs against Rosie.

Karen

Karen (25) is a postgraduate student and supports herself through a bursary and part time work. Her ex-partner, P, works in the building trade. They have known each other since they were children, and lived together for about four years. P would like them to have married. Karen, although committed to the relationship, does not believe in marriage. She left P about a year ago

because of his excessive use of alcohol. Neither of them had been married or cohabited before, and they do not have any children.

Initially, they lived in a flat owned in P's name. He then sold that and they went travelling for a couple of years. On their return to England, Karen inherited some money and they purchased a house together, putting down a deposit of £10,000 each. The property needed some work, and they rented a flat whilst doing it up. They had separate bank accounts and shared their expenses equally, although P was always the higher earner. Karen never lived at the property because they split up shortly before they were due to move in. P took up occupation, did a bit more work on the property and took over payment of the mortgage.

Several months after their separation, and after efforts by Karen's family to mediate between them, P offered to refund Karen's contribution plus an extra £2,000 in return for the transfer of the house and mortgage into his sole name. Karen went to sign the papers at his solicitor's office, but was told that she should seek independent advice. The independent advice that Karen received was that she was entitled to between £25,000 and £30,000, being one half of the equity, the property having increased in value considerably. Karen eventually accepted a lump sum of £18,000, because she couldn't face any more arguments and that was the most that P said he could afford. He still owes her £2,000.

Karen's costs amounted to £180 and her case was settled within a month of her taking advice, about one year from their separation.

Linda

Linda is aged 33. She and her partner, P, split up after eight years cohabitation. They have one son together aged six. P is in a well-paid managerial position and is aged 44. He is divorced and has one dependent son whom he rarely sees. He and Linda talked a lot about marriage in the first few years but never actually got round to it. P has now moved out of the family home and is living with a new partner about 200 miles away.

Shortly before the birth of their son, they purchased a property in P's sole name, with the benefit of a mortgage and a deposit paid from P's divorce settlement. Linda gave up her full time job when their son was born. P paid the mortgage and bills throughout, and gave Linda regular housekeeping. They kept separate accounts, but Linda managed the household finances and was aware of P's finances.

Linda took advice as soon as P told her he wanted to separate. She was shocked to discover that she might not be allowed to remain in the family home and that she had no claim to it in her own right. She then concentrated on trying to persuade P to provide sufficient for her to buy a home for her and their son on the basis that his contribution would be repaid to him once their son was independent. She took a part time job locally as a receptionist to help support herself and her son. P eventually consulted a solicitor but still refused

to disclose his finances or to negotiate, so Linda's solicitor issued an application under Schedule 1 Children Act 1989.

At the final hearing the only issue was how much Linda needed for the purchase of a new home. Barristers and solicitors for both parties spent the whole day hammering out a complex agreement under which Linda was to receive £90,000, the bulk of the net proceeds of sale of the family home, on trust for P until their son reached 18 or finished his full time education. The agreement was more or less what Linda had asked for several months previously, and was about £10,000 more than P's best offer. P has agreed to pay approximately half of Linda's costs.

Linda was publicly funded and her costs have totalled about £5,000. Her case has taken about 18 months to resolve. The order is still being implemented.

James

James and his ex-partner, P, are in their 40s and lived together for 15 years. James had not been married or cohabited before; P was divorced and had three sons from that marriage, now in their mid to late teens, with whom James has kept good contact. There are no children of the relationship. P would like to have remarried but James never wanted to do so, having experienced a poor and painful family track record.

James is a successful self-employed management consultant. He has supported the whole family financially throughout most of the relationship, paying the mortgage and all main household outgoings out of his earnings. P retained her child benefit and modest income as a doctor's receptionist for her own use. They never operated a joint account, but because James worked long hours, he allowed P almost total control over his bank account and household finances generally.

Initially they lived in P's house, but after a while bought a bigger house in James's sole name and finally one in their joint names under a joint tenancy.

James initiated the separation, citing P's controlling behaviour and violence as the reason. He continued to pay the whole of the mortgage and most of the bills on the family home for nearly a year after moving out, and then reduced his contribution to half. P did not respond well to James' efforts to negotiate arrangements direct, and so he consulted a solicitor. He was advised that he was entitled to a half share of the house and that he could probably force a sale. James reported this back to P and eventually she agreed to put the house on the market and to share the proceeds equally. They received about £50,000 each and both have managed to buy a new home.

James has incurred no legal costs at all other than for the sale of the house, but it has taken nearly two years to finalise the issues.

Keith

Keith is a long distance lorry driver aged 50. His ex-partner, P, is in her mid-forties. Both have been married before, Keith twice with four adult children, and P once with two children aged 11 and 7 living with her. They lived together for about four years. P initially wanted them to get married but Keith was not keen to marry again, giving serious health problems in the last ten years as the reason.

When they met, both Keith and P owned their own properties. After a short while Keith moved into P's home, and they started up a courier business together with the help of a business loan raised by P. Keith did not have his own bank account and paid all his earnings into P's account. P worked only occasionally in the business and Keith was always the main breadwinner, supporting both P and her children.

Two years later, Keith and P purchased a house and some land in the country. The property was put into P's sole name and was subject to a nearly 100 per cent mortgage of £140,000. The plan was to rebuild the house and sell the property for a handsome profit. Over the first year, Keith invested a total of £36,000 on repairs and improvements to the property and on repayments towards the mortgage, as well as carrying out much of the planning and labour himself. P and her children moved into the property. By then, the relationship was getting into difficulty and Keith moved back to his home in the city. After prompting from friends, Keith asked P to put the property into their joint names. She initially agreed but then refused, denying that he had any interest at all.

Keith consulted a solicitor who advised him that he needed to provide evidence of his contribution to the purchase of the property and of his discussions with P. Keith collected evidence rather erratically over the next few months, but little of the documentation was easily accessible as it was with P or in her name. He became rather demoralised, left his job and went abroad. He has now returned to England and has remarried.

Keith's costs so far are £1,400. He has recently reinstructed his solicitor, and has discovered that P has sold the property.

Natalie

Natalie is in her mid thirties and is a high earning advertising executive. She separated from her partner, P, four years ago, having lived with him in London for two and a half years. Neither of them had been married before, although both had cohabited for a brief period. They have no children. Neither of them ever discussed, or considered, marriage as a serious possibility.

P moved into Natalie's rented home when he was evicted from his accommodation for non-payment of rent. A few months later, Natalie bought a flat in her name with money that she had saved over the previous five years. Initially P paid her an agreed amount for 'rent' and bills, but P was always a poor payer, and eventually Natalie suggested that they have one joint account

towards which they would contribute equally and out of which everything, including the mortgage, would get paid. They took out a joint loan for £15,000 and P did some work on the new flat.

A year or so after they started living together, P gave up his job and stopped contributing to the joint account. After a lot of argument and an incident of violence, Natalie asked him to leave, and then changed the locks. She sold her flat in London and used the net proceeds of sale of about £160,000 to buy herself another property in the South West.

Every now and then Natalie would receive a letter from P's solicitor claiming money from her. Three years later, Natalie received notice from P's solicitor that he was making a claim to court for £150,000 in lieu of his interest in her home. Natalie regarded P as an unscrupulous gold digger, but her solicitor and barrister advised her that her position in law was not so clear-cut. The proceedings were stayed while she and P went to mediation. There they agreed that Natalie would pay P £15,000 in full and final settlement.

Her costs have amounted to £15,000 and her case has taken four years to resolve.

Pat

Pat is a medical rep in her early forties. She had neither cohabited nor married before she met P. He is a similar age but has been married twice before and also cohabited. He has three dependent children from his marriages. Neither Pat nor P ever wanted to marry because of unhappy experiences of marriage either personally or, in Pat's case, through her family.

When Pat and P met they both owned their own homes. After a year or two, P was struggling with his mortgage (because unbeknown to Pat he had bought his ex-wife out) and Pat suggested he move in with her till he got back on his feet. He subsequently sold his house, most of the proceeds going to pay off his debts. During the six years that they were together, they kept separate bank accounts, but P paid Pat a regular amount each month towards the bills, food, health club membership and holidays. Pat paid the mortgage and all household and other expenses out of her account. Both worked long hours and earned good salaries. P, however, always seemed to have a lot of debt and a poor credit rating.

P became unwell and very moody and the relationship deteriorated. Eventually, Pat asked P to move out. He refused unless she paid him back for all the fixtures and fittings that he had bought and some more besides. She gave him what he asked, nearly £4,000, and he left. Two months later Pat received notice from the Land Registry that P was claiming an interest in her house and that he had applied for a caution.

Pat consulted a solicitor and when P was about to issue court proceedings took Counsel's advice. She was able to produce documents and figures that largely disproved P's claim that he had contributed towards the mortgage. Her

counsel, however, suggested that she offer a nuisance payment equivalent to 20 per cent of the value of his claim. After further correspondence between solicitors, P accepted her offer of £5,000 in full and final settlement and the caution was withdrawn.

It has taken Pat eight months from the date of separation, over £8,000 in legal fees, and payments to P of nearly £9,000 in total, to resolve the dispute.

APPENDIX 3: INTERVIEW SCHEDULES

Aide Memoire for Solicitors

The Research

The purpose of this research is to examine the experience of separating cohabitants and the approaches of their practitioners, when there are money and/or property issues to resolve. Since there are currently around 3 million cohabiting households in the UK, this is a major growth area for legal intervention.

Interviews with practitioners and their cohabitant clients will be conducted over the next few months. Clients will be offered £20 for their participation.

Criteria of client

Any opposite-sex cohabitant, with or without children, who has either already separated from his/her partner or is intending to do so, and who is seeking advice or assistance about financial or property issues. Finance and property includes: a home, either owned or rented, property, business and assets of any kind, pensions, debt, financial support.

Please include **all** clients fitting this description. We wish to include as wide a spectrum as possible – from those in bitter dispute to those who simply wish to separate their property on an agreed basis.

Period of involvement: _____ **to** _____

Client Referral

Please approach all clients fitting the criteria at their first meeting with you, with a brief description of the research and encouragement to participate.

Every client should be handed a copy of the **Information Sheet**.

If the client indicates either immediate willingness to participate in the research, or consent for his/her name to be given to the research team, to be contacted to discuss the possibility of participation, please obtain his/her signature and telephone number on the **Referral Form**.

If the client would like more time to consider, please ask him/her to make direct contact with the research team as described on the **Information Sheet**.

If it appears inappropriate to mention the research at the first meeting, for example in a particularly sensitive case, please bring it to your client's attention at the earliest possible opportunity, and no later than one month after their first appointment.

Client Survey

Please complete the **Survey Form** for **every** new client fitting the criteria who consults you within the above period, even those not willing to be interviewed ; since the form is anonymous, client consent is not required.

Please return the **Survey form** to the research team, together with the **Referral Form** if applicable, immediately after seeing the client.

For further information and/or clarification, contact Julia Pearce on 0117 954 5320, or by email: Julia.Pearce@Bristol.ac.uk

Similar Aide Memoires were adapted for use by Mediators and CABx.

First interview schedule for clients

£20 fee

Purpose of research/queries
[Confidentiality / Taping]

Obtain back-up address for future contact
Signing of consent form

1. Initial Factual Information

- Age and occupation.
- Have you separated? If so, when?
Cause of separation.
How amicable/antagonistic with partner?
- Length of cohabitation.
- Any children? Ages? Whose?
- Current circumstances:
Accommodation
Who with? Children? New partner?
Ex-partner's accommodation
What has happened to former shared home?

Your current income and sources
Who is currently paying for what?
Are the CSA involved?
- Nature of query to practitioner (in outline):

Property/finances / Children / Domestic violence?

Exploratory enquiry / Initiating action / Responding to action by partner?

2. Relationship

- When did the relationship start?
- Did you have any plans to marry? Reasons for decision either way.
- Any previous experience of marriage/divorce/cohabitation?
- Understanding of difference in legal position for married/unmarried

3. Property

- Was any property / finance brought into the relationship?
- Was shared home owned or rented?

If rented: In whose name?
 Who is the landlord?
 How much is the rent?

If owned: Whose name is on deeds/mortgage/lease?
 Who owned it initially?
 Did you buy it together?
 What legal advice was given at that time?
 How was it paid for?
 Current value / equity.

- Current value and ownership of other assets:

Other properties	Pensions
Car	Current and Savings accounts
Furniture	Policies
Valuables	Shares
Business	
- Debts of either party: nature, value and whose name

4. Financial circumstances during relationship

- Whether either/both worked. Relative earnings.
- Ex-partner's occupation.
- Any other income?
- Financial arrangements between couple during cohabitation.
 - Who paid for what?
 - What were your respective contributions?
 - Did you have separate or joint accounts/financial arrangements?

5. Understandings and expectations during relationship

- Was any legal advice taken at start of cohabitation, or subsequently?
- What steps were taken as a result?
- Were any written legal arrangements entered into regarding property?
- Were any private understandings entered into?
 - Written
 - Spoken
 - Assumed as a result of conduct – by either or both?
- Did you each have full knowledge/understanding of the finances?
- How were decisions regarding the home made?
- How were decisions regarding other property/finances made?
- How were decisions regarding income/expenditure made?
- Your assumptions as to what would happen should you separate.
- Your assumptions in the event of one of you dying.
- To what extent were these assumptions shared?

6. The dispute / issue

- What prompted your approach to a solicitor?
- What, if any, property / finance is in dispute?
- What is the issue?
- What are your immediate priorities?
- Initial assessment of basic financial needs for self/children re house/income
- What do you feel would be a 'fair' outcome ultimately?
 - in terms of type and amount of property / income?
 - on what basis ? comparative lifestyle, children, contributions, responsibilities, length of relationship, cause of breakdown.
 - promises, expectations, assumptions.
- How do you assess your ex- partner's needs.
What is he/she asking for?

7. Advice or assistance

- What have you and your ex-partner done yourselves to try to sort out your affairs?
- Have you spoken to anyone else, formally or informally, about your situation?
 - family, friends, vicar, bank, building society, etc?
- Have you sought any other kind of information?
 - books, internet, etc?
- Why have you sought professional help?
- Any professional advice received elsewhere before this?
- How did you choose this practitioner?
- Do you know whether your ex-partner has sought professional help?
- What advice or assistance have you been given?
- How clear did you find the advice regarding your legal position?
- Is the advice what you had expected?
- If not, what had you believed was your legal position?
- Do you think what you have been told is fair?
- How satisfied are you with your practitioner?

- Do you intend to go any further with your case?

If so, what are the next steps?

If not, reasons for not proceeding.

- Costs for advice: so far
 estimate for future

Thanks.

Agreement to keep in touch.

Email address / best method of making contact.

Final Client Interview Schedule

1. Recap

Current circumstances (where living, new partners, child arrangements, etc.)
Issue

2. Settlement

What was finally settled
this arrived at
Impact on lifestyle
Any issues still outstanding?
finish

If there is no settlement yet

What is the current position
What are the next steps How was
What outcome do you expect
Would this seem fair
When do you expect to

[Continue with Q.4]

3. Views on settlement

How does this compare with original expectations
Does it seem fair
Why did you agree to it
Partner's views

4. Main Impressions / complaints

Of the process
Of the law

5. Process/professional input

How long did it take
Could it have been settled without professional assistance
How much did it cost
Views on negotiation process – tactics, power, quality of practitioner

6. The Law

Understanding of law for cohabitants
How the law applied in this case
How reasonable

Would the outcome have been different had you been married
Should the law be the same for married and unmarried couples
What is the point of marriage
Why did not marry

7. Hindsight

Do you wish you had done anything differently
What advice would you give to others in your situation
Would you have wanted more information
What information
How could this have been given to you, and who from

8. Reform

What should be the basis of the law for cohabitants
Comment on reform proposals

Interview Schedule: Solicitor Practitioners

Introduction

Main aims of research
Who we are
Permission to tape record

Confidentiality
Client Authority

General Background: Firm

Size of firm: number of partners, branches, etc
Name and make-up of department

Legal Aid contract? For what?

General background: Solicitor

Status
Years p.q.e.
Panel / professional memberships
Main areas of specialisation
To what extent do you regard cohabitation cases as a specialism
Mediation training or practice
Approximate legal aid percentage of total caseload

Cohabitation Background

How are cohabitation cases allocated:

- Within firm
- Within department

Usual procedure for cases of one-off advice

Approximate number/percentage of cohabitation / property cases in last year

Anyone else in firm doing such cases.

Any clients seeking advice prior to / at start of cohabitation

Case Specific Background

[either case study case or description of last concluded case]

Basic details: Client (include: age, sex, income)
Partner (ditto)
Length of cohabitation
Children (include: ages, who living with, any dispute)
Current circumstances – eg who living where

Main issues

Nature and approximate value of property and finance

Initial advice

Progress of case – by reference to file

General impression of:

- client
- other party
- other party's solicitor (if any)

Referrals:

- mediation
- counsel
- elsewhere

Court proceedings:

- if issued, details (type, stage, etc)
- if not issued, likelihood of issue and details

Other steps taken or to be taken

Predicted outcome

Actual outcome

Costs:

- Legal aid or private
- Initial estimate
- Costs to date
- Estimate costs to conclusion (if different)

Views on Specific Case

Legal complexity

Factual complexity

Procedural complexity

Client's understanding of issues

Client's response to advice

Client's response to outcome

How well has law and procedure worked for this particular client

How fair in solicitor's personal opinion

Better or worse if married

How satisfied with own conduct of case

General Views on Cohabitation Cases

Main issues that arise in such cases

Significance of children element

How appropriate for mediation

Legal complexity

Procedural complexity

How comfortable / confident with such cases

How easy is it to explain the law to clients

How does advice match up to client expectations / knowledge

View of current cohabitation / property law compared to divorce ancillary relief

Use of Schedule 1: General experience

TOLATA: General experience

Tenancies: General experience

Pre-cohabitation consultations

Reform

Is there a need for reform

How urgent

Any suggestions

Awareness of and views on:

Agreements

Registration

Protective net, eg Resolution draft bill

Should cohabiting couples be treated same as married couples

Maintenance and pension rights for ex partners

Urgency / importance of such changes

Adapted for use also with Mediators

Interview Schedule for Conveyancers

Introduction

Main aims research
Confidentiality

General Background: Firm

Size of firm: number of partners, branches, etc

Conveyancing Department: personnel and organisation of work
Relationship to Family Department

General background: Solicitor

Status
Years qualified

Panel / professional memberships
Main areas of specialisation

Current clients

Total current and average number of files
Average lifetime of file
Numbers involving cohabiting couples - at start
- at end

Clients at the start of/in the course of a relationship

Where do the clients come from
Common / typical scenarios

Procedure for unmarried clients:

- Do you provide standard/written information / advice (if so, get copy)
- Solicitor's role in exploring respective shares – how proactive
- Explanation of joint tenancy / tenancy in common
- Advice on Declarations of Trust, Wills
- What if only consulted by one party – duty to other
- What duty felt to ensure Deeds are actually signed

Level of client knowledge

- How often do clients specifically request spelling out shares, and in what circumstances
- How many clients request Cohabitation Agreements
- Client understanding of / action on advice given
- Client uptake of advice (eg declaration of trust, cohabitation agreement, will)

What impact does the mortgage lender have on the question of joint or sole ownership

Clients at end of relationship

Where from? (eg off the street, from family department)

Would you always know clients are separating cohabitants?
If so, how?

Standard issues:

Sale (and division of proceeds)

Re-mortgage / top-up

Transfer of equity

Endowment policies

Procedures: if straightforward

if becomes contentious

Bibliography

Arthur, S., Lewis, J., Maclean, M., Finch, S. and Fitzgerald, R. *'Settling Up: making financial arrangements after divorce or separation.* (2002), National Centre for Social Research, London

Atkin, B., 'The rights of married and unmarried couples in New Zealand – radical new laws on property and succession' (2003) *CFLQ* 173

Bailey-Harris, R., Davis, G., Barron, J., Pearce, J., *Monitoring Private Law applications under the Children Act*, Research Report to the Nuffield Foundation (1998), Bristol University, Bristol

Barlow, A., Duncan, S., James, G., and Park, A. 'Just a Piece of Paper? Marriage and Cohabitation in Britain' in Park, A., Curtice, J., Thomson, K., Jarvis, I. and Bromley, C. (eds) *British Social Attitudes: The 18th Report*, (2001) Sage.

Barlow A. and James G., "Regulating Marriage and Cohabitation in 21st Century Britain" 67, 2, (2004) *Modern Law Review* 143-176

Barlow A., Burgoyne C. and Smithson J., (2007) 'The Living Together Campaign –the Impact on Cohabitants' (2007) *Family Law* 165-168

Barnes, L., 'Stack v Dowden: The Principles in Practice' at <http://www.familylawweek.co.uk/library.asp?i=2935>

Barton, C., *Cohabitation Contracts: Extra-Marital Partnerships and Law Reform* (1985) Dartmouth Publishing,

Barton, C., 'Cohabitants, Contracts and Commissioners' (2007) *Family Law* 407

Baughen, S., 'Trusts of Land and Family Practice' [1996] *Family Law* 736

Beck, U and Beck-Gernsheim, E., *The Normal Chaos of Love* (1995) Polity Press.

Cooke, E., 'Property adjustment orders for children' (1994) *Journal of Child Law* 156

Cooke, E., 'Children and Real Property – Trusts, Interests and Considerations' (1998) *Family Law* 349

Cooke, E., Barlow, A., and Callus, T., *Community of Property: a Regime for England and Wales?* (2006) Nuffield Foundation, London

Council of Europe, (1988) *Recommendation N° R (88)3 of the Committee of Ministers to Member States on the validity of contracts between persons living*

together as an unmarried couple and their testamentary dispositions adopted on 7 March 1988

Cretney, S.M., *Family Law in the Twentieth Century: A History* (2003) Oxford University Press, Oxford

Da Costa, E. and Garrod, B. 'Procedural Aspects of Cohabitation Claims' (2003) *Family Law*, 270

Davis G., *Partisans and Mediators* Oxford University Press (1988) Oxford

Davis G., Cretney C. and Collins J., *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (1994) Clarendon Press, Oxford

Davis, G., Pearce, J., Bird, R., Woodward, H., Wallace, C., (2000) 'Ancillary Relief Outcomes', (2000) *CFLQ* 43

Davis, G., Wikeley, N. and Young, R. *Child Support in Action* (1998) Hart Publishing, Oxford

Davis M., and Hughes, D., 'An End of the Affair – Social Housing, Relationship Breakdown, and the Human Rights Act 1998' (2004) *Conv* 19

Edwards, S., 'Property Rights in the Family Home – Clarity at Last' (2004) *Family Law* 524

Eekelaar, J. and Katz, S. (eds) *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* (1980) Butterworths

Eekelaar J., Maclean M. and Beinart S, *Family Lawyers: The Divorce Work of Solicitors* (2000) Hart Publishing, Oxford

Ermisch, J. and Francesconi, M., 'Patterns of household and family formation' in Berthoud, R. and Gershuny, J., *Seven Years in the Lives of British Families* (2001) Policy Press, Bristol at 27

Ermisch, J. and Francesconi, M., 'Marriage and cohabitation' in Berthoud R. and Gershuny J., *Seven years in the lives of British families* (2001) Policy Press, Bristol

Ferris, G., and Battersby, G., 'The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land' (1998) *Conv* 168

Finch, J., *Family Obligations and Social Change* (1989) Polity Press, Cambridge

Finch, J. and Mason, J., *Negotiating Family Responsibilities* (1993) Routledge, London

Fox, L., 'Reforming family property – comparisons, compromises and common dimensions' (2003) *CFLQ* 1

Genn, H., *Paths to Justice* (1999) Hart Publishing

Giddens A., *Modernity and Self-Identity* (1991) Polity Press

Gilmore, S., 'Re *P (Child)(Financial Provision)* – Shoeboxes and comical shopping trips – child support from the affluent to the fabulously rich' (2004) *CFLQ* 103

Glover, N., and Todd, P., 'The myth of common intention' (1996) 16 *Legal Studies* 325

Gray, K., and Gray, S., *Elements of Land Law* 4th (2004) ed., Oxford University Press, Oxford

Hale, B., (Baroness), Rt Hon, 'Unmarried couples in family law' (2004) *Family Law* 419-426

Haskey J., "Cohabitation in Great Britain: past, present and future trends – and attitudes" (2001a) 103, Spring, *Population Trends* 4-25

Haskey J., "Cohabiting couples in Great Britain: accommodation sharing, tenure and property ownership" (2001b) 103, Spring, *Population Trends* 26-36

Hibbs, M., Barton, C., Beswick, J., 'Why Marry? Perceptions of the Affianced.' (2001) *Family Law* 197

HMCS *Family Procedure Rules: A new procedural code for family proceedings* (2006) CP 19/06, HMCS, London

Hayes, M., (1995) written evidence to the House of Lords Special Public Bill Committee, Session 1994–95 HL 55

Henshaw, Sir D., *Recovering child support: routes to responsibility* (2006) DWP

Horton, M., *Family Homes and Domestic Violence: The New Legislation* (1996) FT Law and Tax, London

Humphries M., 'The Law Commission Consultation on Cohabitation' (2006) *Family Law* 860-863

Hunter C., and Blandy, S., 'Relationship breakdown, women and tenants' rights – choice or paternalism' (2004) *CFLQ* 165

Ingleby, R. *Solicitors and Divorce* (1992) Oxford University Press, Oxford

Jamieson, L., Anderson, M., McCrone, D., Bechhofer, F., Stewart, R., Li, Y. 'Cohabitation and commitment: partnership plans of young men and women.' (2002) 50, 3, *The Sociological Review* 356-377

Kiernan K., "Unmarried Cohabitation and Parenthood in Britain and Europe" (2004) *Law and Policy*, 33-55

Law Commission, *Report No 118, Illegitimacy* (1982) HMSO, London

Law Commission, *Domestic Violence and Occupation of the Family Home: Report No 207* (1992) HMSO, London

Law Commission, *Sharing Homes: A Discussion Paper* (2002) Law Com No 278, TSO, Norwich

Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper* (Consultation Paper No 179) (2006), TSO, Norwich

Law Commission, *Renting Homes: The Final Report* Law Com No 297 (2006) TSO, Norwich

Law Society, *Cohabitation: The case for clear law: Proposals for reform* (2002) Law Society, London

Legal Services Commission, 'Family – Help with Mediation is Available' (2006) *Focus* August, Issue 51 13

Lewis, C., Papacosta, A., Warin, J., *Cohabitation, separation and fatherhood* (2002) Joseph Rowntree Foundation, York

Lewis, J., 'Relationship Breakdown, Obligations and Contracts' (1999) *Family Law* 149 at p 150.

Lewis, J., *The End of Marriage? Individualism and Intimate Relationships* (2001) Edward Elgar

Loveland, I., (2004) 'The Impact of the Human Rights Act on Security of Tenure in Public Housing' (2004) *Public Law* 594

Lowe, N. and Douglas, G., *Bromley's Family Law* 10th ed., (2007) Oxford University Press, Oxford

Maclean, M and Eekelaar, J., *The Parental Obligation* (1997) Hart Publishing

Maclean, M. and Eekelaar, J., 'The Obligations and Expectations of Couples within Families: Three Modes of Interaction' (2004) 26 *Journal of Social Welfare and Family Law* 117.

Maclean, M. and Eekelaar, J. 'Marriage and the Moral Bases of Personal Relationships (2004) 31, 4, *Journal of Law and Society* 510-538

Maclean, M., Eekelaar, J., Lewis, J., Arthur, S., Finch, S. and Fitzgerald, R. 'When Cohabiting Parents separate – Law and Expectations' (2002) *Family Law* 373

Martin, C., and Théry, I., 'The PACS and Marriage and Cohabitation in France' (2001) *International Journal of Law, Policy and the Family* 135

Mather, L., Maiman, R. and McEwen, C., "The Passenger Decides on the Destination and I Decide on the Route": Are Divorce Lawyers "Expensive Cab Drivers"?' (1995) 9 *International Journal of Law and the Family* 286-310

Mee, J., 'Property rights and personal relationships: reflections on reform' (2004) 24 *Legal Studies* 414

Mee, J., 'Joint Ownership, Subjective Intention and the Common Intention Constructive Trusts' (2007) *Conv* 14

Miles J., 'Property law v family law: resolving the problems of family property' (2003) 23 *Legal Studies* 624

Mnookin R., and Kornhauser L., 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950-997

Moorhead R., Sefton M. and Douglas G., *The Advice Needs of Lone Parents* (2004) One Parent Families, London

Morgan, P. *Marriage-Lite: The Rise of Cohabitation and its Consequences* (2002) The Institute for the Study of Civil Society, London

Murphy, J., 'Same-Sex Marriage in England: A Role for Human Rights?' (2004) *CFLQ* 245

ONS, *Social Trends 2004* (2004) ONS, London

Pahl, J. 'Individualisation in Couple Finance: Who Pays for the Children?' (2005) 4 *Social Policy and Society* 381

Pawlowski M., (2004) 'Cohabitation Contracts: The *Sutton* Case' [2004] *Family Law* 199

Perry A., Douglas G., Murch M., Bader K. and Borkowski M., *How parents cope financially on marriage breakdown* (2000) Joseph Rowntree Foundation, York

Probert, R., 'Trusts and the modern woman – establishing an interest in the family home' (2001) *CFLQ* 275 at p 277

Probert, R., 'Cohabitation in Twentieth Century England and Wales: Law and Policy' (2004) *Law and Policy* 13.

Probert, R., '*Sutton v Mischon de Reya and Gawor & Co* - Cohabitation contracts and Swedish sex slaves' (2004) *CFLQ* 453

Probert, R., 'Cohabitation, Contributions and Sacrifices' (2006) *Family Law* 1060-1064

Probert, R., 'Why Couples Still Believe in Common-Law Marriage' (2007) *Family Law* 403

Ralton, A., 'Co-Owners, The Transfer, The Intent and *Stack*' (2006) *Family Law* 26

Report: 2003-based marital status and cohabitation projections for England and Wales (2005) *Population Trends* 121 Table 3 and p 80

Resolution, *Precedents for Cohabitation Agreements* (2006) Resolution, Orpington

Sarat A. and Felstiner W., 'Law and Strategy in the Divorce Lawyer's Office' (1986) 20 *Law and Society Review* 93-134

Sarat, A., and Felstiner, W., 'Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction', (1988) *Law and Society Review*, 22/4/737

Sarat A. and Felstiner W., *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process* (1995) Oxford University Press, New York

Sawyer, C., 'Equity's children – constructive trusts for the new generation' (2004) *CFLQ* 31

Scottish Executive, *Family Matters: Improving Family Law in Scotland* (2004) Scottish Executive, Edinburgh

Scottish Law Commission *Report on Family Law No 135*, (1992) HMSO, Edinburgh

Smart, C. and Stevens, P. *Cohabitation breakdown* (2000) Joseph Rowntree Foundation/Family Policy Studies Centre, London

Solicitors Family Law Association *Fairness for Families* (2001) SFLA, London

Steiner, E., 'The spirit of the new French registered partnership law – promoting autonomy and pluralism or weakening marriage?' (2000) *Child and Family Law Quarterly* 1

Tennant R., Taylor J. and Lewis J., *Separating from cohabitation: making arrangements for finances and parenting* (2006) DCA Research Series 7/06, DCA, London

Thompson M., 'Beneficial Joint Tenancies: A Case for Abolition' 1987 Conv 29.

Tilley S., 'Providing Legal and Financial Information' (2007) *Family Law* 74.

Wasoff, F., 'Settling up: How Scotland manages property settlements', *Divorce: Property and Pensions, Hume Papers on Public Policy* (1999) Vol. 7 No. 2, pp. 16 – 25

Wilson, J. 'Tripping up on the TR1.' (2006) *Family Law* 305-311

Wintemute, R. and Andenaes, M., (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (2001) Hart Publishing, Oxford

Women and Equality Unit, *Individual Incomes of Men and Women 1996/7 to 2002/03: A Summary*, (2004), DTI, London.

Wong S., 'Trusting in Trust(s): The Family Home and Human Rights' (2003) 11 *Feminist Legal Studies* 119

Wong, S., 'Property Regimes for Home-sharers: the Civil Partnership Bill and Some Antipodean Models' (2004) *JSWFL* 361

Woolf, H., (Baron), Rt. Hon., *Access to justice: final report to the Lord Chancellor on the civil justice system in England and Wales* (1996) HMSO, London

Yarrow, S., *Just Rewards: the outcome of conditional fee cases* (2000) Nuffield Foundation, London, cited by Moorhead, R., 'CFAs: A Weightless Reform of Legal Aid?' (2002) *NILQ* 153-166