Scottish Law Commission

DISCUSSION PAPER No. 86

THE EFFECTS OF COHABITATION IN PRIVATE LAW

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The Commission would be grateful if comments on this Discussion Paper were submitted by 31 October 1990. All correspondence should be addressed to:-

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NOTES

1. In writing a later Report on this subject with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper can be used in this way.

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THE EFFECTS OF COHABITATION IN PRIVATE LAW

PART I - INTRODUCTION

Purpose of discussion paper

1.1 The purpose of this discussion paper is to seek views on various possibilities for changing the law on the effects of cohabitation in private law.

Meaning of "cohabitation"

1.2 By "cohabitation" we mean the relationship of a man and a woman who are not legally married to each other but who are living together as husband and wife, whether or not they pretend to others that they are married to each other. We refer to such a couple as "cohabitants". We do not, at this stage, include any minimum period of living together in the definition of cohabitation although, as we shall see later, it may be that for some legal purposes, but not necessarily all, some minimum period of cohabitation ought to be required before certain rights are conferred.

Factual background

1.3 The incidence of cohabitation in Great Britain has increased significantly in recent years. About 2% of households in Scotland are now headed by a cohabitant.[1] It has been estimated that in Great Britain as a whole 4% of men and women aged 16-59 were

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[1] Information supplied by Central Research Unit, Scottish Office, and derived from the General Household Survey 1987. In the survey on proposed changes to the divorce law carried out for us in 1988 by System Three Scotland 2% of the sample of 1940 adults in Scotland described their marital status as "cohabiting". It is estimated that 9.4% of people in Scotland who are single, separated or divorced are cohabiting. "Cohabitation in Great Britain - characteristics and estimated numbers of cohabiting partners." Population Trends, (OPCS) Winter 1989, p28.

cohabiting in 1986.[1] Among certain categories the proportion of cohabitants is remarkably high. In Great Britain in 1986, 11% of men aged 25-29 and women aged 20-24 were cohabiting,[2] and 28% of divorced men aged 16-59 and 24% of divorced women aged 16-59 were cohabiting.[3] The number of women in Great Britain between 18 and 49 who are cohabiting has more than doubled between 1979 and 1987.[4] The proportions of people cohabiting seem to be still increasing at a rapid rate.[5] There has been a particularly sharp rise in pre-marital cohabitation. In Great Britain in 1970-74 12% of women aged 16-49 who were under 35 at the date of their marriage had cohabited with their husband before the marriage: in 1980-84 this had increased to 38%:[6] for marriages which took place in 1987 over half the couples had lived together before marriage.[7]

1.4 We have very little information in this country about the reasons or motivations which lead people to prefer cohabitation to marriage. Inability to marry because of a subsisting prior marriage is a reason in some cases: 7% of cohabiting men and 4% of cohabiting women in 1986-87 described themselves as separated.[8] However, these figures show that this is not a major reason nowadays. The high rates of cohabitation among divorced people

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1 General Household Survey, 1986, p24.

2 Ibid p24.

3 Ibid, Table 4.7.

4 Population Trends, Winter 1989, p32, Table 10. The estimated numbers have gone up in this period from 327,000 to 887,000.

5 Ibid p24. For example, in Great Britain 38% of divorced men were cohabiting in 1987 and 27% of divorced women.

6 General Household Survey, 1986, Table 4.8.

7 Population Trends, Winter 1989, p25.

8 Ibid. Table 1. This is a Great Britain figure. 66% of cohabiting men and 63% of cohabiting women were single, and 26% and 31% respectively were divorced.

may suggest a certain disillusionment with legal marriage or at least a view that it is not so necessary, or so expected by others, in their circumstances. It seems clear, from comments made by participants in current affairs programmes and others, that some couples are opposed to legal marriage on principle. They regard their relationship as based on an emotional bond or voluntary mutual commitment and regard the addition of any legal or religious bond as in some way diminishing this personal bond. They may also feel that a legal marriage implies the adoption of certain traditional assumptions about the roles of husbands and wives and restricts their freedom to form a type of relationship of their own choosing.[1] These remarks apply to cohabitation as an alternative to legal marriage. In the case of pre-marital cohabitation the reasons for not marrying earlier are likely to be of a more practical nature. In such cases there is clearly no lasting objection to marriage as an institution.

1.5 There is some statistical information about the duration to date of current cohabitations, but not about the average duration of cohabitations which have come to an end.[2] Respondents to the General Household Survey in 1986-87 who said they were cohabiting were asked when they started living together with their partner as husband and wife. Of those who were not divorced over one half had been cohabiting for less than two years, the median duration being about 21 months. It should be emphasised again that these were current cohabitations, and that we do not know how long they would eventually last. The rapid increase in

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[1] There is no legal justification for this view in Scottish private law. Spouses are legally equal and independent. They can keep their own names and are free to pattern their relationship as they choose. The view may be based on social attitudes or a misapprehension of the legal position.

[2] Population Trends, Winter 1989, p27.

cohabitation in recent years is bound to have inflated the number of cohabitations which have not yet lasted a long time. For cohabiting divorced men and women, about one half had been cohabiting for less than three years. A number of cohabitations had, however, lasted for ten years or more.

1.6 The General Household Survey in 1986-87 also asked married men and women, who had married since 1980 and who reported that they had cohabited with their spouse before marriage, how long their pre-marital cohabitation had lasted.[1] In this case therefore the completed duration of cohabitation is known. The median length of pre-marital cohabitation was about 15 months.

1.7 It appears from the General Household Survey that there is little systematic variation across social groups in the extent to which people aged 20 to 39 have cohabited.[2] However, women in the highest status groups - professional, employers and managers - were more likely to be cohabiting than those in other groups.[3] Similarly, women with degrees were more likely to be cohabiting than women with lesser educational qualifications.[4]

1.8 Single women who are cohabiting are more likely to be childless than their married counterparts. The General Household Survey found, for example, that 71% of cohabiting single women aged 25-29 were childless, compared with 29% of married women in this age group.[5] In the whole 16-59 age group these proportions were 72% and 15%. It is clear nonetheless that there are

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[1] Ibid pp27-28.

[2] Ibid pp28-30.

[3] Ibid, Table 6. The proportion of cohabitants among women unskilled manual workers was also high but this group was numerically small.

[4] Ibid, Table 5.

[5] Ibid p30 Table 7.

dependent children in many cohabiting couple families. One estimate is that about 4% of all dependent children - a total of about 440,000 - live in such families.[1]

Legal background

1.9 The law has recognised the existence of cohabiting couples for various purposes. We are not concerned here with the treatment of cohabitants in the legislation on social security, tenants' rights, or taxation beyond noting that cohabitants are for some purposes, but not for all purposes, treated in the same way as married persons.[2] So far as the private law is concerned a cohabitant is accorded protection by the Matrimonial Homes (Family Protection) (Scotland) Act 1981,[3] and can claim damages for the wrongful death of the other cohabitant under the Damages (Scotland) Act

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[1] Ibid p31.

[2] See Pearl, "Cohabitation in English Social Security Legislation" in Marriage and Cohabitation in Contemporary Societies (Eekelaar & Katz eds 1980) at pp335-340. For example, "a married or unmarried couple" is treated as a "family" for the purposes of income-related benefits under the Social Security Act 1986. See s20(11). The same subsection defines an "unmarried couple" as "a man and a woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances." In relation to tenants' rights, a cohabitant may succeed to a protected or statutory tenancy as a "member of the [tenant's] family". Rent (Scotland) Act 1984, s3 and Sch 1. See Dyson's Holdings v Fox [1976] QB 503, interpreting equivalent English legislation. See also Housing (Scotland) Act 1988 s31(4) - for the purposes of the right of succession of a tenant's spouse to an assured tenancy "a person who was living with the tenant at the time of the tenant's death as his or her wife or husband shall be treated as the tenant's spouse". For income tax purposes the differences between cohabitants and married couples have been greatly reduced by the Finance (No 2) Act 1988 which abolished the old rule that a wife's income was deemed to be the income of her husband (s32) and changed the rule whereby cohabitants could obtain two reliefs for interest on a home loan (s42).

[3] S18.

1976.[1] There are no other private law rules applying specifically to cohabitants although, of course, a cohabitant may in certain circumstances be able to found on general rules, such as those of the law on unjustified enrichment, to obtain a remedy for a situation arising out of the cohabitation. In particular the cohabitant has, as such, no rights to aliment. There are no special presumptions, as there are in the case of married couples,[2] on the ownership of household goods purchased during the period of the cohabitation, or on the rights to savings from a housekeeping allowance or property acquired with such savings.[3] On the termination of cohabitation, a cohabitant has no statutory right to apply to a court for a financial provision or redistribution of property. A cohabitant has no rights of intestate succession and no claim for legal rights on the death of the other cohabitant. In this discussion paper we consider whether any such rights should be conferred on cohabitants and, if so, in what circumstances.

1.10 It might be thought that the law on marriage by cohabitation with habit and repute provided an answer to the legal problems of cohabitants. This, however, is clearly not so under the present law. Only 3 or 4 irregular marriages, on average, are registered a year[4] and, even although some marriages by cohabitation with habit and repute may be recognised for various purposes (such as occupational pensions or social security purposes) without insistence on a court declarator, it seems clear that this type of marriage is a statistically insignificant response to the legal

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[1] Ss1, 10(2) and Sch 1 para (aa) (added by the Administration of Justice Act 1982, s14(4)).

[2] Family Law (Scotland) Act 1985, s25.

[3] Ibid s26.

[4] Annual Reports of Registrar General for Scotland since 1961. It may be that some of these irregular marriages are marriages by declaration de praesenti entered into before 1940.

problems of cohabitants. Its main defect is that a couple will only be married in this way if they have acquired a general reputation of being married. If they cohabit openly without pretending to be married this type of marriage is of no help to them. The law on marriage by cohabitation with habit and repute has other defects, including uncertainty and unpredictability, and in another discussion paper we have suggested that it should be abolished.[1] In that discussion paper we point out that to alter the law on marriage by cohabitation with habit and repute so that a large proportion of cohabitants would be held to be married notwithstanding the absence of any marriage ceremony would produce a great deal of uncertainty. Many people would not know whether they were married or not. Later marriages would be at risk from earlier irregular and unregistered ones. In any event it does not seem acceptable to force marriages, and often divorces, on people who have deliberately opted not to get married. We do not think that marriage by cohabitation with habit and repute can be seen as an answer to the legal problems raised by the widespread occurrence of cohabitation.

Summary of discussion paper

1.11 In this discussion paper we raise the question whether Scots law ought to recognise an obligation of aliment or support between cohabitants. Our provisional conclusion is that the mere fact of cohabitation does not justify imposing a legal obligation on one cohabitant to support the other. We also consider whether the presumptions of equal shares in household goods and savings from housekeeping allowances, which apply in the case of married couples, should also apply to cohabitants. Our provisional view is that these presumptions, which are designed to deal with practical

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[1] Family Law: Pre-consolidation reforms (Discussion Paper No 85, March 1990.

problems, might possibly be applied to cohabitants. We consider whether on the termination of cohabitation one cohabitant should be able to claim any financial provision from the other. We set out the arguments for and against allowing claims of different kinds. Our provisional conclusion is that it would not be justifiable to introduce a norm of equal sharing of property acquired during the cohabitation, or any obligation of support (unrelated to child care). However, we can see more of a case for allowing claims designed to take account of any economic advantage derived by one cohabitant from contributions by the other and of any economic disadvantage suffered by one cohabitant in the interest of the other or of the family. We can also see more of a case for allowing claims designed to ensure that any economic burden of caring, after the end of the relationship, for any child of the union should be shared fairly between the parties. We do not, however, reach any provisional conclusion on these questions, but leave them open and invite views. Another important issue discussed is whether one cohabitant should be recognised as entitled to succeed on intestacy on the death of the other and, if so, in what circumstances. Again, we leave this question open and invite views. We suggest, however, that where there is a will a cohabitant should not be able to claim a legal share of the estate in opposition to its terms. We are, in general, favourable to changes which would make it easier for cohabitants to make their own legal arrangements in a responsible manner and suggest minor changes in insurance law and contract law to facilitate such arrangements. Finally, we ask whether the protection currently afforded to cohabitants in relation to occupancy rights in the home and domestic violence ought to be extended.

1.12 The issues covered in this paper are sometimes difficult and controversial but we think that they have to be discussed. The question is not whether the law should recognise cohabitation for certain legal purposes. It already does so, particularly in relation to housing and social security. The question is simply whether the legal response in the private law field is adequate. It may be, or it may not be. We seek views and advice.

Other relationships

1.13 On some of the questions discussed in this paper similar arguments for legal recognition could be made in relation to other types of couples, such as two men living together, or two women living together, or a man and a woman living together but not as husband and wife. We think, however, that it would be unproductive to enlarge the scope of this discussion paper to cover such cases. Cohabitation, as defined above, is a sufficiently important social phenomenon to be dealt with on its own.

PART II - ALIMENT

2.1 Spouses are bound to aliment each other - that is, provide such support as is reasonable in the circumstances.[1] Cohabitants are not. The question for consideration is whether an obligation of aliment should arise, as a matter of law, between cohabitants. Our preliminary view is that it should not. From a theoretical point of view it seems difficult to justify the imposition of a potentially onerous obligation of support by the mere fact that a man and a woman have been living together as husband and wife. They may have deliberately chosen not to get married in order to avoid being fettered by legal obligations of this nature. From a practical point of view a right to aliment would be of little value while the parties were cohabiting and would be objectionable if conferred on a former cohabitant. A divorced spouse has no right to aliment (as opposed to financial provision on divorce, which is based on quite different principles) and it would, we think, be quite unjustifiable to confer such a right on a former cohabitant. We are not concerned here with aliment for children. The parents of a child are liable for his or her aliment in exactly the same way whether or not they are married to each other[2] and we propose no change in that rule.

2.2 We discuss later the question of whether, on the termination of a cohabitation, there should be any rights akin to a spouse's right to apply for financial provision on divorce and we consider, in that context, developments in Canada and Australia in relation to maintenance between cohabitants or former cohabitants.

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[1] Family Law (Scotland) Act 1985, s1.

[2] Family Law (Scotland) Act 1985, s1.

2.3 So far as aliment is concerned our provisional view, on which we would welcome comments, is that:

1 **There should continue to be no statutory obligation of aliment between cohabitants.**

PART III - HOUSEHOLD GOODS

3.1 In the case of a married couple there is a presumption that each spouse has an equal share in any household goods obtained in prospect of or during the marriage other than by gift or succession from a third party.[1] The presumption cannot be rebutted by proving only that while the parties were married and living together the goods in question were purchased from a third party by either party alone or by both in unequal shares.[2] "Household goods" are defined as any goods (including decorative or ornamental goods) kept or used at any time during the marriage in any matrimonial home for the joint domestic purposes of the parties to the marriage: it does not, however, include money or securities; cars, caravans or other road vehicles; or domestic animals.[3] It may be convenient to set out the relevant statutory provision in full so that reference can readily be made to it when its possible application to cohabitants is being considered. It is as follows.

> "25.--(1) If any question arises (whether during or after a marriage) as to the respective rights of ownership of the parties to a marriage in any household goods obtained in prospect of or during the marriage other than by gift or succession from a third party, it shall be presumed, unless the contrary is proved, that each has a right to an equal share in the goods in question.
>
> (2) For the purposes of subsection (1) above, the contrary shall not be treated as proved by reason only that while the parties were married and living together the goods in question were purchased from a third party by either party alone or by both in unequal shares.
>
> (3) In this section "household goods" means any goods (including decorative or ornamental goods) kept or used at

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1 Family Law (Scotland) Act 1985 s25(1).

2 S25(2).

3 S25(3).

any time during the marriage in any matrimonial home for the joint domestic purposes of the parties to the marriage, other than--

(a) money or securities;

(b) any motor car, caravan or other road vehicle;

(c) any domestic animal."

In the case of cohabitants there is no such presumption and the ordinary law applies. This means that the question of who owns an item such as a kitchen table may depend on such factors as who happened to buy it, whether the purchaser was acting as agent for the other party, and whether the presumption of ownership based on possession can be rebutted.[1]

3.3 The justification for the presumption of equal shares in household goods in the case of married couples has little to do with the concept of marriage or with the nature of the public commitment of spouses to each other, but is essentially practical. It is difficult, and sometimes unrealistic, to apply the ordinary rules on the acquisition of property to household goods bought by cohabiting spouses.[2] This practical justification might be thought to apply equally strongly to cohabitants who are not married. However, different situations have to be considered before even a tentative conclusion can be reached.

3.4 In many cases cohabitants will agree between themselves as to the allocation of household goods if the relationship comes to an end. Where there is a dispute there would often be clear practical advantages in applying a presumption of equal shares. Instead of

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[1] See eg Prangnell-O'Neill v Skiffington 1984 SLT 282.

[2] See our report on Matrimonial Property (Scot Law Com No 86, 1984) para 4.2.

having to discover and analyse the circumstances surrounding the acquisition of each item of furniture a solicitor would be able to advise the couple that all household goods bought in prospect of or during their relationship were regarded by the law as being owned in equal shares. In the case of a long cohabitation this would probably be regarded as a fair and reasonable solution. In any case where both parties had helped to buy the goods it would also be in accordance with public opinion.[1] It is not, perhaps, so clear that it would be a good solution in the case of a short cohabitation where one party had bought and paid for the item in question, intending to be the sole owner of it. Here there may be a distinction between marriage and cohabitation. In a marriage there is, by definition, a commitment to a lifelong union. In a cohabitation there may be, but will not necessarily be, such a commitment. It is not unlikely that a cohabitant, particularly in a childless relationship, will regard the relationship as short-term or potentially short-term and that in buying an item of furniture he or she will, quite reasonably, intend to own it and keep it if the relationship comes to an end. This consideration may suggest that some qualifying period of cohabitation might reasonably be required before applying the presumption of equal shares. There is also a practical justification for such a solution. On the termination of a short relationship the parties should be able to recollect how and when various items of furniture and equipment were acquired and may even still have receipts or other documentary evidence. This will often not be the case after many years have passed. The length of qualifying period chosen is to a large extent arbitrary but we suggest, for consideration and comment, that a period of three years might be appropriate. It could readily be changed later in the light of experience. If a cohabitation had lasted for 3 years or more then we suggest that

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[1] See Manners and Rauta, Family Property in Scotland (OPCS, 1981) tables 3.9 and 3.10. In the case of household goods which both cohabitants had helped to buy 93% of respondents thought there should be equal shares. In the case of household goods owned by one partner before cohabitation 75% of respondents thought that the original owner should keep them.

the presumption ought to apply to goods acquired in prospect of, or at any time during, the cohabitation.

3.5 Even with a requirement of a qualifying period there might be difficulties of an evidential nature. It might not always be easy to establish when cohabitation began or ended, or when items were acquired. We do not know how serious such difficulties would be in practice. It may be that they would not be very serious. The difficult cases are likely to be those where it is not clear whether the cohabitation lasted just over, or just under, three years (if this is the qualifying period). Most disputes over household goods are likely to arise at or shortly after the end of the cohabitation and people can reasonably be expected to remember major changes in living patterns, and changes of address, within a preceding period of around three years. If a person wished to rely on the statutory provision he or she would need to prove the required cohabitation. In the event of failure he or she would be no worse off than under the present law.

3.6 It seems to us that, on balance and with a suitable qualifying period, it would be helpful to apply section 25 of the Family Law (Scotland) Act 1985 to cohabitants. However, this is not a final or concluded view and rather than putting forward a positive suggestion for reform we simply invite responses to the following questions.

2(a) **Should the presumption of equal shares in household goods in section 25 of the Family Law (Scotland) Act 1985 be applied, with the necessary modifications, to cohabitants?**

(b) If it were to be applied, should any qualifying period of cohabitation be required before the presumption would come into operation?

(c) If there were to be a qualifying period, would a period of 3 years be appropriate?

PART IV - SAVINGS FROM HOUSEKEEPING ALLOWANCE

4.1 Section 26 of the Family Law (Scotland) Act 1985 provides that certain savings from housekeeping allowances, and other similar allowances, are to be treated as owned in equal shares. It is in the following terms.

> **"26.** If any question arises (whether during or after a marriage) as to the right of a party to a marriage to money derived from any allowance made by either party for their joint household expenses or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to each party in equal shares."

This is an updated version of a similar provision, applying only to an allowance made by a husband, which was enacted in 1964.[1] It was designed to remedy the type of situation which arose in the case of Preston v Preston.[2]

> A husband provided his wife with an allowance for the upkeep of the household. She used her own earnings for this purpose and put the sums received from her husband in the bank. A question arose as to the ownership of these savings and it was held that they remained the property of the husband. The wife was regarded as only a stewardess of the funds remitted to her. In the absence of any evidence of donation or special agreement the money which was originally the husband's remained his.

In the case of cohabitants the legal theory which led to the decision in Preston v Preston would probably apply. The money, let us suppose, would initially be the man's and, in the absence of any evidence of donation or special agreement, it would probably be held to remain his. We say "probably" because the opinions of

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[1] Married Women's Property Act 1964, s1.

[2] 1950 SC 253.

the judges in Preston v Preston contain references to the wife's praepositura, which was her legally presumed position as the husband's housekeeper.[1] There would be no legal praepositura in the case of a cohabitant. However, if in fact the allowance was made by one cohabitant to the other as a housekeeping allowance, to be used by the recipient as a housekeeper, then the same principles would apply.

4.2 Our provisional view is that the equitable considerations behind the presumption of equal shares in savings from a housekeeping allowance apply to cohabitants as well as to spouses. It may be that in this case the nature of the presumption is such that no qualifying period of cohabitation would be required, but we would welcome views. In Preston v Preston the husband was abroad in the armed forces at the time when the remittances were made, but this was not legally significant. Temporary absence should, we suggest, be equally irrelevant in relation to cohabitation: the presumption should be capable of applying to an allowance made by a cohabitant while temporarily away from home. We invite responses to the following questions.

3(a) **Should the presumption of equal shares in money and property derived from a housekeeping or similar allowance in section 26 of the Family Law (Scotland) Act 1985 be applied, with the necessary modifications, to cohabitants?**

(b) **Should any qualifying period of cohabitation be required for this purpose?**

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[1] The wife's praepositura was abolished by the Law Reform (Husband and Wife) (Scotland) Act 1984, s7.

PART V - FINANCIAL PROVISION ON TERMINATION OF COHABITATION

Introduction

5.1 We now come to a much more difficult and controversial question. Should the law make any provision enabling one cohabitant to claim from the other, on the termination of the cohabitation, a periodical allowance, or a capital sum or a transfer of property? Under the present law, a cohabitant may be able to claim financial provision on divorce under the Family Law (Scotland) Act 1985 if he or she is able to establish a marriage by cohabitation with habit and repute. It is singularly pointless to establish a marriage just in order to obtain a divorce and it is reasonable therefore to ask whether any of the rules on financial provision on divorce could be extended directly to cohabitants. In so far as these rules derive from the special nature of marriage and of the public commitments undertaken on marriage it may be that they would be inappropriate for cohabitants. We are aware of the danger of imposing marriage-related obligations on people who may have deliberately opted out of marriage in order to avoid such obligations.[1] However, some of the rules on financial provision on divorce are related, not to the nature of marriage or of the commitments publicly undertaken on marriage, but to the simple redress of economic inequities arising out of the factual situation of cohabitation and child-bearing. It may be that the balance between liberty and protection would not be tipped too far in favour of protection if rules of this nature were applied to certain cohabitants. This, at least, seems to us to be an issue worth addressing. We assume in the first part of this discussion that we are concerned with a clear case of cohabitation for a period of some years - a case of a relationship which is a

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[1] See eg Deech, "The Case Against Legal Recognition of Cohabitation"; Cretney, "The Law Relating to Unmarried Partners from the Perspective of a Law Reform Agency" in Marriage and Cohabitation in Contemporary Society (Eekelaar and Katz eds, 1980) pp302 and 365.

marriage in all but name. We consider later[1] the question of an appropriate qualifying period of cohabitation for this purpose.

Comparative law

5.2 Several Canadian provinces have enacted legislation which enables a cohabitant to apply to a court, during the cohabitation or within a specified period after its end, for an order for support against the other cohabitant.[2] The details vary. In Ontario, for example, an application may be made by

> "either a man or a woman who are not married to each other and have cohabited
>
> (a) continuously for a period of not less than 3 years, or
>
> (b) in a relationship of some permanence if they are the natural or adoptive parents of a child."[3]

In Manitoba the required period of cohabitation is 1 year if there is a child of the union and 5 years if there is not.[4] In British Columbia the required period of cohabitation is not less than 2 years, whether or not there is a child of the union.[5] In Nova Scotia one year's cohabitation as husband and wife suffices,[6] while in the Yukon Territory all that is required is cohabitation "in a

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1 Paras 5.15 and 5.16.

2 For a review of the Canadian legislation, see the Institute of Law Research and Reform, Alberta, Towards Reform of the Law Relating to Cohabitation Outside Marriage (Issues Paper No 2, 1987) pp59-62.

3 Family Law Act 1986, s29. The New Brunswick Family Services Act 1980 s112(3) is broadly similar.

4 Family Maintenance Act 1978 (as amended) s2(3).

5 Family Relations Act 1979, s1(c).

6 Family Maintenance Act 1980 (as amended) s2(m).

relationship of some permanence".[1] In a recent report the Alberta Law Reform Institute has, by a majority, recommended that an order for the maintenance of one cohabitant by the other should be possible where

> "(i) the applicant for maintenance has the care and control of a child of the cohabitational relationship and is unable to support himself or herself adequately by reason of the child care responsibilities; or
>
> (ii) the earning capacity of the applicant has been adversely affected by the cohabitational relationship and some transitional maintenance is required to help the applicant to re-adjust his or her life."[2]

5.3 There have also been interesting developments in Australia. One of them took place more than a hundred and fifty years ago. Tasmania has had since 1837 a provision[3] enabling a woman who has cohabited with a man for at least a year to obtain a maintenance order if the man, without just cause or excuse, leaves her without adequate means of support, or deserts her, or is guilty of such misconduct as to make it unreasonable to expect

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[1] Matrimonial Property and Family Support Ordinance 1979 (as amended) s30.6.

[2] Towards Reform of the Law Relating to Cohabitation Outside Marriage (Report No 53, 1989) p19. In addition the making of the order would have to be reasonable. An order under (i) would cease when the child reached the age of 12 (or, if handicapped, 16). An order under (ii) would cease 3 years after the order was made or 4 years after the end of the cohabitation whichever was earlier. An order would terminate automatically if the cohabitant married. The minority recommendation was simply that there should be no maintenance obligation between cohabitants.

[3] Now in s16 of the Maintenance Act 1967.

her to continue to live with him. More recently, New South Wales, following on a report by the New South Wales Law Reform Commission[1] passed the De Facto Relationships Act of 1984. This allows a cohabitant, who must normally have cohabited with his or her partner for at least two years, to claim maintenance if he or she is unable to support himself or herself adequately and if the inability is due either to having the care of a child of the union or to having suffered a reduction in earning capacity as a result of the cohabitation. An order based on the applicant's reduced earning capacity resulting from the cohabitation ceases 3 years from the date of the order or 4 years from the end of the cohabitation, whichever is earlier. The Act also gives the court power to make such order adjusting the interests of the cohabitants in their property as seems just and equitable, having regard to their contributions (financial or otherwise) to the property and to their financial resources. In Victoria, the Property Law (Amendment) Act 1988 enables a court in settling property disputes between cohabitants to take into account contributions of various kinds to the property of the cohabitants and the welfare of the family. The Northern Territory Law Reform Committee in its Report on De Facto Relationships[2] in 1988 recommended rules on maintenance and property adjustment similar, in their essential features, to those enacted in New South Wales.

5.4 The examples from Canada and Australia of the legal recognition of claims by cohabitants on the termination of the relationship are not the only ones which could be given. In a number of countries throughout the world there is some recognition, in one way or another, of such claims. Sometimes, as

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[1] Report on De Facto Relationships (No 36, 1983).

[2] Report No 13 (1988).

in the Canadian and Australian jurisdictions mentioned, there has been special legislation.[1] Sometimes existing remedies, such as those based on implied partnership, unjustified enrichment, implied contract, estoppel or trust have been used in a more or less creative way.[2] This approach has not always been regarded as satisfactory. In a recent case in the New Zealand Court of Appeal,[3] involving a claim by a male cohabitant based on work he had done in extending and improving his partner's house, the court was unable, on the facts, to use existing common law doctrines to provide a remedy. The main reason for this was that the female cohabitant had always made it perfectly clear, and the male cohabitant had accepted, that the house was hers alone. Richardson J. referred to the serious practical problems which could arise in attempting to apply existing principles to de facto relationships. There was uncertainty created by the variety of judicial approaches adopted. Moreover the equitable principles invoked by the courts provided only a limited basis on which complex questions could be "readily resolved by reference to clearly stated and well-understood rules." He concluded:

> "In an area of family relations which is now so basic to the functioning of society there is, I believe, much force in the argument that a statutory code enacted after appropriate consideration of all the public policy interests

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[1] Eg in parts of Yugoslavia and in Hungary. See the contributions by Sarcevic and Soltesz in Marriage and Cohabitation in Contemporary Societies (Eekelaar & Katz eds 1980) at pp184 and 293-297.

[2] See eg contributions by Villela (Brazil), Nerson (France), Groffier (Quebec), Grossen (Switzerland), Weyrauch (USA), Graue (West Germany), Deech (England), Folberg (USA) and Cretney (England) in Marriage and Cohabitation in Contemporary Societies (Eekelaar & Katz eds, 1980) at pp174-176, 205, 237, 260-261, 268-271, 284-285, 308-310, 348-352 and 359-361 respectively.

[3] Gillies v Keogh [1989] 2 NZLR 327.

involved, and providing a clear statement of the principles to be applied, would be a better basis for allocating property interests than continued reliance on the innovative skills of the judiciary in developing and adapting equitable principles."[1]

Options for reform

5.5 **Leave the law as it is.** It would be quite possible to make no legislative provision for financial provision or property re-adjustment on the termination of cohabitation. This would leave matters to be regulated by the common law. A cohabitant might be able to base a claim on unjustified enrichment.[2] However this would be an uncertain remedy. Actings or expenditure by the cohabitant which had enriched the other party might be held to have been done or undertaken out of love and affection,[3] or for the cohabitant's own benefit.[4] The law on unjustified enrichment is not easy to discover and apply and the results could well be unpredictable. A cohabitant could also attempt to establish an implied contract, but the Scottish courts have not shown themselves keen to use this technique to create a contract where none exists in fact. In the typical cohabitation the truth is likely to be that the parties did not enter into a contract with each other and to "imply" a contract would be to impose on them a solution to which they had never agreed. Trust law has not been used in Scotland to provide remedies for cohabitants and clearly has limitations. Under the present law proof of trust generally

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1 At p348.

2 Cf Newton v Newton 1925 SC 715.

3 There is no claim for recompense based on unjustified enrichment if the enrichment arose from a donation. See eg Wilson v Paterson (1826) 4 S 817; Drummond v Swayne (1834) 12 S 342; Turnbull v Brien 1908 SC 313 at p315.

4 See eg Rankin v Wither (1886) 13 R 903.

requires written evidence and this will usually be lacking.[1] Even if trust could be proved by any competent evidence (as we have recommended in another report)[2] it would remain the case that there would not usually in fact be any trust to prove. There is little or no prospect of the law on resulting trust or constructive trust, as those concepts are understood in Scotland, being used to provide a remedy for cohabitants.[3] Nor is there any prospect of partnership law being used, as it has been in some continental European countries, to provide a remedy outwith a business context.[4] In Scotland partnership is defined as

> "the relation which subsists between persons carrying on a business in common with a view to profit."[5]

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[1] Cf Newton v Newton 1923 SC 15 (an earlier action between the parties in the case cited above).

[2] Report on Requirements of Writing (SLC No 112, 1988) para 3.19.

[3] The essence of a resulting trust is that there is or has been a trust but there are no trust purposes. There is then a resulting trust for the truster. Wilson and Duncan, Trusts, Trustees and Executors pp73-74. In the normal case of cohabitation there never is a trust in the first place. A constructive trust is one which arises from certain circumstances by operation of law. Ibid at pp77-80. In theory the courts could use this concept to provide a remedy for a cohabitant in certain cases but this would amount to judicial legislation and there is no sign that it is likely to happen in Scotland. The courts in England (see eg Cooke v Head [1972] 1 WLR 518, applying dicta in Gissing v Gissing [1971] AC 886), Canada (see eg Pettkus v Becker (1980) 117 DLR (3d) 257), Australia (see eg Baumgartner v Baumgartner (1987) 76 ALR 75) and New Zealand (see eg Oliver v Bradley [1987] 1 NZLR 586) have used the idea of the constructive trust to provide a remedy for cohabitants in certain situations.

[4] See the contributions by continental authors cited in the second footnote to para 5.4 above.

[5] Partnership Act 1890, s1(1).

If cohabitants have actually been involved in a common business enterprise then partnership law might help but it will be of no help in the ordinary domestic situation where there is no business and no profit motive.

5.6 It seems clear that to leave the law as it is would be to leave most cohabitants without effective claims for financial provision or redistribution of property on the termination of their relationship. Some people might consider this reasonable and justifiable, on the view that cohabitants can generally marry each other if they want to. The introduction of no-fault divorce in 1976 means that even the bar of a prior marriage need not last for ever. If a couple choose not to marry, it might be argued, they ought either to make their own arrangements to ensure an equitable financial result on the break-up of their relationship or accept the position which arises: they should not expect the law to provide special remedies for them. If they opt out of the need for a divorce they should accept that the law on financial provision on divorce will not apply to them. Against this, it might be argued that an unmarried cohabiting couple are likely to find themselves in the same factual position as a married couple. Assets acquired during the cohabitation by their joint efforts may have accumulated in the name of one partner rather than the other, more by accident than by design, and economic disadvantages arising out of the relationship, such as loss of earnings and earning capacity because of child care, may have fallen disproportionately on one partner rather than the other. In a relationship which begins in mutual trust and affection, hard-headed contractual arrangements may be too much to expect. To provide no remedy may be to allow one party to be enriched at

the expense of the other or to allow the risks of a non-commercial domestic relationship to fall unnecessarily on the more vulnerable party. The law may be perceived as allowing injustice to go unremedied when a remedy could easily be provided. In short, there are arguments for and against simply leaving the law as it is. We invite comments on this option.

4 **Would it be acceptable to leave a cohabitant who had suffered economic hardship as a result of the cohabitation to depend for a remedy on existing common law principles?**

5.7 Apply the principles applying on divorce. The Family Law (Scotland) Act 1985 lays down the principles to be applied by a court in deciding what order for financial provision, or transfer of property, to make on divorce. The principles are as follows:

"(a) the net value of matrimonial property should be shared fairly between the parties to the marriage;

(b) fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family;

(c) any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties;

(d) a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to

adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce;

(e) a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period."[1]

These principles are supplemented by various rules and definitions. The most important in the present context is that fair sharing of the net value of matrimonial property (which means roughly property acquired by the parties during the marriage and before their final separation otherwise than by gift or inheritance)[2] means equal sharing unless there are special circumstances justifying a departure from this norm.[3]

5.8 The difficulty about applying all of these principles to cohabitants is that (a) and (e) may go further than is necessary to redress imbalances arising from the relationship. We shall concentrate on these two principles here and discuss the other three, which at first sight seem more appropriate for cohabitants, later.[4]

5.9 The norm of equal division of the net value of matrimonial property on divorce is based on, and itself reinforces, the idea of

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1 S9.

2 S10(4). Matrimonial property also includes property bought before the marriage for use by the couple as a family home or as furniture and plenishings for such a home.

3 S10(1).

4 Para 5.12 below.

marriage as an equal partnership. When a couple get married they are presumed to know that the net value of property acquired by them during the marriage and before their final separation will normally be divided equally on divorce. This property will include the proportion of any rights under a life policy or occupational pension scheme referable to the period from the date of the marriage to the final separation.[1] We doubt whether a similar norm of equal sharing would be appropriate for cohabitants, particularly if they have deliberately opted out of marriage in order to avoid any sharing of property. The position in relation to all property, including savings of various kinds, is arguably different from the position in relation to houshold goods used for joint domestic purposes. In relation to such goods a presumption of equal shares can be justified on practical grounds.[2]

5.10 The principle of relief of serious financial hardship "as a result of the divorce" also seems inappropriate for cohabitants, particularly if, as we have suggested earlier, there is to continue to be no obligation of support between cohabitants. The main long-term hardship resulting from a divorce, as opposed to the factual separation of the spouses, is the loss of the right to aliment. There would be no such loss in the case of a cohabitant. More fundamentally, it is difficult to see any justification for requiring one former cohabitant to relieve long-term hardship likely to be suffered by the other if that hardship arises independently of the circumstances of the cohabitation.

5.11 We would welcome views on these questions but our preliminary view is that:

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[1] 1985 Act s10(5).

[2] See paras 3.3 to 3.6 above.

5 **There is no adequate justification for applying the principles of equal sharing of property and relief of long-term hardship in section 9(1)(a) and (e) of the Family Law (Scotland) Act 1985 to cohabitants.**

5.12 **Apply some of the principles applying on divorce.** The principle in section 9(1)(b) of the Family Law (Scotland) Act 1985 is that

> "fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or the family."

Significantly in the present context, "economic advantage" and "economic disadvantage" and "contributions" include advantages gained, disadvantages suffered and contributions made before the marriage.[1] So where cohabitation is followed by marriage section 9(1)(b) can already be used to correct economic imbalances arising during the period of cohabitation. Section 9(1)(b) is not based on any particular view of marriage. It is based on equitable ideas similar to those underlying the law on unjustified enrichment. It covers the case where one spouse improves the value of the other's property by expending a considerable amount of work and money on it. It also covers the case where one spouse has worked unpaid for years helping to build up the value of the other's business or the case where one spouse suffers an economic disadvantage by giving up paid employment in order to look after the parties' children. In making an order under this head the court is directed to have regard to the extent to which the economic advantages or disadvantages sustained by either party have been balanced by economic advantages or disadvantages sustained by the

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[1] S9(2).

other party, and to the extent to which any resulting imbalance had already been corrected (eg by a voluntary payment or transfer of property).[1] So it is only any uncorrected economic imbalance arising from the relationship between the parties which will be recognised in an order under section 9(1)(b).

5.13 The principle in section 9(1)(b) could be applied, quite readily and appropriately, to cohabitants if that were thought desirable. The argument for applying it is that it would be unfair to let economic gains and losses arising out of contributions or sacrifices made in the course of a relationship of cohabitation simply lie where they fall. To allow a remedy for the type of situation covered by section 9(1)(b) would not be to impose on cohabitants a solution based on a particular view of marriage. It would merely be to give them the benefit of a principle designed to correct imbalances arising out of the circumstances of a non-commercial relationship where the parties are quite likely to make contributions and sacrifices without counting the cost or bargaining for a return. Indeed the potential applicability of the principle to cohabitation is recognised in the 1985 Act which, as we have seen, includes pre-marital advantages, disadvantages and contributions within the scope of section 9(1)(b). It might be thought anomalous to provide a remedy for economic contributions and sacrifices made during a cohabitation which is followed by a short marriage and then divorce[2] but not for those made during a cohabitation of equal length and similar nature which ends without

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[1] S11(2).

[2] See eg Kokosinski v Kokosinski [1980] Fam 72 (where a cohabitation which lasted for 24 years was followed by a marriage and then by a separation a few months later).

a marriage.[1] An argument against extending section 9(1)(b) to cohabitants, with any necessary modifications, is that parties who opt for cohabitation rather than marriage ought to know that gains and losses will lie where they fall and that common law remedies may be inadequate or difficult. They ought to make their own arrangements for any necessary adjustments or accept the consequences.[2] This, however, seems unrealistic. Many cohabitants will not know the law and will not make their own legal arrangements. It might also be argued that to provide an adjustive remedy for cohabitants would be to encourage cohabitation and devalue marriage. This, however, depends on the point of view. From the point of view of the unjustly enriched partner an adjustive remedy may make cohabitation less attractive than it would otherwise be. Moreover, even from the other partner's point of view, an adjustive remedy designed to mitigate injustice is hardly likely to be seen as a positive encouragement.

5.14 If the principle in section 9(1)(b) of the Family Law (Scotland) Act 1985 were to apply to cohabitants the question would arise whether any qualifying period of cohabitation should be required. There is no compelling reason of principle why it should be. The operation of the principle would be self-limiting because it would come into operation only if there were relevant

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[1] We recognised this anomaly in our report on Aliment and Financial Provision, Scot Law Com No 67, (1981) para 3.98 but concluded that the remedy for it might be to deal with the legal effects of cohabitation, something with which we were not concerned in that report.

[2] We consider the legality of such arrangements in para 5.66 below.

contributions or sacrifices, advantages or disadvantages. Indeed relevant events, such as contributions to the purchase or improvement of a home, or the giving up of employment in the interests of the other partner, would often occur at or near the beginning of the cohabitation. On the other hand, there could be a strong practical reason for requiring a qualifying period of cohabitation before allowing a cohabitant to apply to a court for an order for financial provision. This would serve to sift out cases where there was no long-term commitment. As a practical matter it would seem to be undesirable to burden the courts with applications from disappointed parties to short-term relationships. If a qualifying period were thought desirable the choice of period is to some extent an arbitrary one. The period should be long enough to separate casual arrangements from those involving a relationship of some permanence, but not so long as to deny relief to too many deserving cases. We would suggest that a period of three years might be considered. It could, of course, be changed later in the light of experience.

5.15 We would welcome comments on the following questions.

6(a) Should the law provide that on the termination of cohabitation a cohabitant should be able to apply to a court for an order for financial provision based on the principle in section 9(1)(b) of the Family Law (Scotland) Act 1985 - ie an order designed to provide fair compensation for (i) any economic advantage derived by either party from contributions by the other or (ii) any economic disadvantage suffered by either party in the interests of the other party or the family?

(b) If this principle were to be applied to cohabitants should it be provided that only a cohabitant who had lived with the other partner as husband and wife for a certain period should be able to apply?

(c) Would a period of 3 years be appropriate for the purposes of the preceding paragraph?

5.16 The arguments are similar in relation to the principle in section 9(1)(c) of the Family Law (Scotland) Act 1985. This is that

> "any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties."

This principle supplements the law on aliment for children. It recognises that, even when aliment for a child has been awarded, there may be additional child-care burdens, such as loss of employment opportunities or the cost of child-care arrangements, which ought not to fall entirely on one party without some compensation from the other. This principle seems appropriate for cohabitants, with appropriate alterations of terminology. Again it is worth noting that the principle would already apply to a case where a couple cohabited and had a child[1] and then married and then were divorced, even if the period of the marriage was very short. The principle is not based on any particular view of marriage but simply on the view that where a couple living together in a relationship of some permanence have a child the burden of caring for that child after the couple split up should be shared fairly between them and should not fall on one of them alone. Again, however, it might be argued that a couple who opt out of marriage must be taken as opting out of the application of this principle. This argument, however, seems harsh, unconvincing

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[1] "Child" includes a child whether or not his parents were ever married to each other and "child of the marriage" includes any child (other than one boarded out with the parties by a local or public authority or a voluntary organisation) accepted by the parties as a child of their family. 1985 Act s27(1).

and calculated to penalise those who suffer loss in order to look after their children.

5.17 If the principle in section 9(1)(c) of the Family Law (Scotland) Act 1985 were to be applied to cohabitants, should any qualifying period of cohabitation be required? At first sight it might appear that this would be unnecessary and undesirable, given that the birth of a child or, at least, the acceptance of a child as a child of the family, would always be required before a claim could be made. However, a claim based simply on the birth of a child would be a different sort of claim and we are not persuaded that the mere birth of a child should entitle one of the parents to claim compensation or support from the other, in addition to aliment for the child.[1] It is, we suggest, the breakdown of a family situation of some commitment and stability which gives rise to the justification for a claim by one party against the other, over and above aliment for the child. If this approach is right, and we would welcome views on it, then some qualifying period of cohabitation would be desirable in order to distinguish casual unions from unions of some permanence. Again, we would suggest that a qualifying period of three years might be considered in the first place. It could be changed later, if need be, in the light of experience.

5.18 We would welcome comments on the following questions.

7(a) On the termination of cohabitation should a cohabitant be able to apply to a court for an order for financial

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[1] We considered, but did not recommend, the introduction of a claim for aliment for the mother of a child on this basis in our report on Aliment and Financial Provision (Scot Law Com No 67, 1981) para 2.15.

provision based on the principle in section 9(1)(c) of the Family Law (Scotland) Act 1985 - ie an order designed to ensure that any economic burden of caring, after the termination of the cohabitation, for a child of the union, or a child accepted by the parties as a child of their family, under the age of 16 years should be shared fairly between the parties?

(b) If this principle were to be applied to cohabitants should it be provided that only a cohabitant who had lived with the other partner as husband and wife for a certain period should be able to apply?

(c) Would a period of 3 years be appropriate for the purposes of the preceding paragraph?

5.19 The principle in section 9(1)(d) of the Family Law (Scotland) Act 1985 might at first sight seem appropriate to cohabitants. It is that:

> "a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce."

We have already noted that a principle similar to this is applied to cohabitants in New South Wales and has been recommended by a majority of the Alberta Law Reform Institute. However, the main justification for the provision in New South Wales is that one cohabitant may have given up career opportunities in order to devote energies to the household.[1] Similarly, the Alberta recommendation was aimed at the case where a person's earning

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[1] New South Wales Law Reform Commission, Report on De Facto Relationships (LRC 36, 1983) para 8.24.

capacity has been adversely affected by the cohabitational relationship and some transitional maintenance is required to help the applicant to adjust his or her life.[1] This situation would, however, be covered in Scotland by the principle, already discussed, that an order could be made to compensate a cohabitant for any economic disadvantage suffered in the interests of the other party or of the family. The principle in section 9(1)(d) of the Family Law (Scotland) Act 1985 is related to relief for the cessation of financial support on divorce and hence to the cessation of the right to aliment. As we are not recommending that there should be a right to aliment during cohabitation outside marriage we do not think that it would be justified to recommend compensation, even on a transitional basis over a short term, for the loss of that right. We therefore suggest, for consideration and comment, that:

8 **It would not be appropriate to give a cohabitant a right to apply for financial provision on the termination of the cohabitation on a principle analogous to that in section 9(1)(d) of the Family Law (Scotland) Act 1985 - i e provision to enable him or her to adjust, over a period of not more than three years, to the cessation of financial support by the other partner.**

5.20 Disputes about money and property when cohabitation comes to an end are likely to arise at or around the time of the termination. In the new Canadian statutes there is a time limit - generally of one year from the termination of the cohabitation - within which an application for maintenance by a former

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[1] Alberta Law Reform Institute, Towards Reform of the Law Relating to Cohabitation Outside Marriage (Report No 53, 1989) pp16-17.

cohabitant must be made.[1] It is not obvious that such a short time limit would be appropriate in all cases, although stale claims are to be discouraged. A short time limit could cause hardship in cases where one party had hoped for a reconciliation, or for a voluntary payment or payments by the other party. A time limit running from the end of the cohabitation could also cause hardship where the need for a claim in relation to child care costs only became apparent some years after the termination of the relationship. In relation to this type of claim it would seem to be more appropriate to allow a claim to be made at any time until the child in question attains the age of 16. In relation to other claims some time limit running from the end of the cohabitation would seem to be useful. It might be thought that, in line with the prescriptive period applying to most common law claims,[2] the period should be five years. However, in relation to a common law claim the period would run from the date when the obligation became enforceable, which might be well before the end of the cohabitation. A shorter period might therefore be justified if the starting point is the date of termination of the cohabitation. Where the cohabitation ends by death,[3] a much shorter period than 5 years might be justified whether the claim is based on child care or any other ground. The death of the cohabitant crystallises the legal position. There is no question of a resumption of cohabitation in such a case and no question of voluntary payments by the other partner. There is also a strong interest in enabling estates to be wound up without undue delay. We put forward the following suggestions and invitations for views.

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1 See the Alberta Institute of Law Research and Reform Towards Reform of the Law Relating to Cohabitation Outside Marriage (1987) pp59-60.

2 Eg a claim based on unjustified enrichment. See Prescription and Limitation (Scotland) Act 1973, s6 and Sch 1 para 1(b).

3 See para 6.30 below.

9(a) If any of the principles in section 9(1) of the Family Law (Scotland) Act 1985 were to be extended to cohabitants, it is suggested that a claim against the other cohabitant based on the sharing of the economic burden of child care should have to be made before the child in question attains the age of 16 and that an application based on any other ground should have to be made within a period of not more than 5 years after the end of the cohabitation.

(b) Views are invited as to what this period should be.

(c) Where the other cohabitant has died, it is suggested that any statutory claim against his or her executors, of the type discussed in this part of the paper, should have to be made within a short period (say, 6 months or 1 year) of the date of death.

(d) Views are invited as to what this period should be.

5.21 If any of the principles in section 9(1) of the Family Law (Scotland) Act 1985 were to be extended to cohabitants various subsidiary questions relating to such matters as jurisdiction, procedure, and the powers of the courts to make orders of various kinds would have to be resolved. We think that these questions could be answered fairly readily by using the analogy of financial provision on divorce. Indeed to a large extent the provisions on divorce might simply be applied to claims by cohabitants. We would like consultees to be able to concentrate on the broad questions of principle at this stage and we have therefore decided not to discuss these ancillary questions here.

PART VI - INTESTATE SUCCESSION AND LEGAL RIGHTS

Intestate succession

6.1 **Introduction.** In our report on Succession we left open for further consideration, after full consultation, the question whether the cohabitant of a deceased person should be entitled to inherit from him or her on intestacy, that is if the deceased person left property which he or she had not disposed of by will or by some equivalent of a will.[1] In that report we recommended that the basic scheme of division of intestate estate in the case where the deceased was survived by a husband or wife should be as follows.[2]

1 If the deceased was survived by a spouse but no issue (ie children, grandchildren or other descendants) the spouse should take the whole intestate estate.

2 If the deceased was survived by a spouse and issue, the spouse should take the first £100,000 (or the whole estate, if less) and any excess over £100,000 should be shared equally between the spouse and the issue.

We also recommended that the surviving spouse should be able to elect to take the deceased's interest in the matrimonial home and its contents in satisfaction or part satisfaction of his or her share of the estate.[3] Where the deceased was not survived by a spouse but was survived by issue we recommended that, as under the present law, the issue should take the whole intestate estate.[4] If the deceased was not survived by a spouse or issue the intestate estate would go to his or her parents and brothers or sisters,

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1 Scot Law Com No 124 (1990) para 2.30.
2 Paras 2.3 and 2.7.
3 Paras 8.2 to 8.14.
4 Para 2.4.

whom failing other relatives in a specified order.[1] The main question for consideration here is how, if at all, a surviving cohabitant should be fitted into that scheme.

6.2 If our report on Succession were to remain unimplemented the question would be how, if at all, a cohabitant should be fitted into the existing law on intestate succession. That law is much more complicated and arbitrary in its operation than the scheme outlined above. The surviving spouse has certain "prior rights" to the house (up to a value of £65,000), furniture (up to a value of £12,000), and a financial sum (£21,000 if there are issue; £35,000 if there are no issue).[2] After these have been satisfied, the surviving spouse has "legal rights" in the intestate moveable estate (a third if there are issue; a half if there are no issue). In relation to any intestate estate left after prior rights and legal rights have been met, the surviving spouse takes a share only if the deceased is not survived by issue, or by a parent, or by a brother or sister or the issue of a brother or sister. Although these existing rules are complicated and, in our view, unsatisfactory they often have the effect, given that most intestate estates are of small or modest value,[3] that the surviving spouse takes everything by virtue of his or her prior rights. So the arguments for and against conferring rights of intestate succession on cohabitants are very much the same in relation to the existing law and the scheme we have recommended.

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[1] Paras 2.18 to 2.29.

[2] Succession (Scotland) Act 1964, ss8 and 9, as amended. There are qualifications and restrictions but it is not necessary to go into these for present purposes.

[3] Research carried out for us by the Central Research Unit of the Scottish Office showed that in 1986/87 the majority (62%) of intestate estates had a gross value of no more than £20,000.

6.3 **Public opinion.** The survey on Family Property in Scotland carried out for us some years ago by the Office of Population Censuses and Surveys, in connection with our work on matrimonial property and financial provision on divorce, included questions on attitudes to intestate succession. One question sought views on what should happen to a man's intestate estate if he was survived by his wife or cohabitant and a brother. In the case of the surviving wife, 89% of respondents thought that the whole estate should go to the wife, 8% thought it should go to the wife and brother equally, and the rest thought the result should depend on the circumstances. In the case of the surviving cohabitant, 56% thought that the whole estate should go to the cohabitant, 29% thought that it should be shared equally, 8% thought that it should all go to the brother, and the rest thought the result should depend on the circumstances or gave other answers.[1] Respondents were not asked what should happen if a person died intestate survived by a cohabitant and children, or by a cohabitant and an estranged spouse. In a public opinion survey carried out in England and Wales in 1988-89 respondents were asked what should happen to the estate of a woman who died, survived by her sister and by the man with whom she had been cohabiting for more than ten years. Half of all respondents thought that the cohabitant should get the whole estate, and 26% thought that the cohabitant should get a fixed share of the estate. Those who favoured a fixed share for the man were equally divided between those who thought he should receive 50% or thereabouts, and those who favoured 75% or more. Only one in ten thought the cohabitant should receive nothing.[2]

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[1] Manners and Rauta, Family Property in Scotland (OPCS, 1981) table 4.7.

[2] Law Commission, Report on Distribution on Intestacy (Law Com No 187, 1989) Appendix C, para 2.23. Of respondents who were cohabiting 65% thought that the cohabitant should inherit the whole estate. Table 13.

6.4 **Comparative law.** In South Australia a cohabitant who fulfils certain conditions can apply to a court for a declaration that he or she is a "putative spouse". The cohabitant is then entitled to succeed on intestacy, if there is no surviving husband or wife of the deceased partner, in the same way as a surviving spouse would do. If there is a surviving spouse, the spouse's share of the deceased cohabitant's estate is divided equally between the lawful spouse and the putative spouse. To qualify as a putative spouse a cohabitant must show that the parties were cohabiting at the date of death of the deceased partner and either that the cohabitation had lasted for at least five years before that date or that the parties had a child.[1]

6.5 In its impressive report on De Facto Relationships in 1983 the New South Wales Law Reform Commission recommended a different approach.[2] It distinguished between the case where the deceased was survived by a cohabitant and by a spouse or children (not being children of the cohabitant) and cases where the deceased was survived by the cohabitant but not by a spouse or children (other than children of the cohabitant). In the first case the Commission recommended that the cohabitant should take the spouse's share, to the exclusion of the spouse, if the cohabitant had lived with the deceased for a period of at least two years before his or her death.[3] In the second type of case (no spouse and no children other than children by the surviving cohabitant) the Commission recommended that the cohabitant, if living with the deceased at the time of his or her death, should be entitled to the spouse's share on intestacy: in this case no qualifying

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[1] Family Relationships Act 1975.

[2] LRC 36 (1983).

[3] Paras 12.34-12.36. Where there was a surviving spouse the cohabitant would not succeed if the deceased had lived with the spouse during any part of the two year period.

period of cohabitation would be required.[1] These recommendations were implemented by legislation in 1984.[2] The Northern Territory Law Reform Commission has recommended legislation on similar lines.[3]

6.6 In Canada the Alberta Law Reform Institute has also unanimously recommended legislation on this question similar to that in force in New South Wales.[4] Two legislative jurisdictions in Yugoslavia give cohabitants inheritance rights. In Slovenia a cohabitant who has been cohabiting "for a long period of time" is in the same legal position as a spouse, "if no reasons exist that a marriage between them would be invalid".[5] In the autonomous province of Kosovo a cohabitant is given inheritance rights if the cohabitation has lasted at least five years and if at the time of

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[1] Para 12.38. The New South Wales law on intestate succession is very similar to the scheme we have recommended in our report on Succession. An estate under $100,000 would go entirely to the spouse. If the estate were above that amount and the deceased were survived by a spouse and children, the spouse would take the household goods and the first $100,000 (with interest) and the remainder would be divided half and half between the spouse and the children. Ibid para 12.6.

[2] Wills, Probate and Administration (De Facto Relationships) Amendment Act 1984 No 159.

[3] Report on De Facto Relationships (Report No 13, 1988) p41.

[4] Towards Reform of the Law Relating to Cohabitation Outside Marriage (Report No 53, 1989) pp28-29. The Institute noted that no submission received by them was at odds with this proposal.

[5] See Sarcevic, "Cohabitation without formal marriage in Yugoslav law" in Marriage and Cohabitation in Contemporary Societies (Eekelaar & Katz eds, 1980) at pp294-297.

the deceased's death neither party was married to a third person.[1]

6.7 In England and Wales and many Commonwealth countries a cohabitant who is not adequately provided for by the will of the deceased partner can often apply to a court for a discretionary provision out of the deceased's estate.[2]

6.8 **General policy considerations.** It is, in our view, important that the law on intestate succession should be acceptable to a broad spectrum of public opinion. It reflects, or should reflect, general ideas about an appropriate division of a person's property if he or she dies without making a will. In cohabitation cases what is considered appropriate may well depend not only on the existence of a surviving cohabitant but also on the nature of the cohabitation and on the existence or otherwise of other competing family members. There are at least four different types of cohabitation which have to be considered--

(a) a long cohabitation which has resulted in children;

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[1] Ibid at pp296-297. The cohabitant can also inherit if the deceased was married to a third party but the marriage was in the process of being dissolved by divorce at the date of his death and the action for divorce was completed after his death. In all cases the cohabitant takes only after the forced heirs.

[2] See our consultative memorandum on Intestate Succession and Legal Rights (CM No 69, 1986) para 4.7.In its report on Distribution on Intestacy (Law Com No 187, 1989) the English Law Commission has recommended an extension of the cohabitant's claim, so that it would be available even where the cohabitant could not show dependence on the deceased. Para 59.

(b) a short cohabitation which has resulted in children;

(c) a long childless cohabitation, and

(d) a short childless cohabitation.

In relation to each type, the appropriate intestate succession rule may depend on whether there is also a surviving spouse or a child or another near relative. We discuss these different situations later. First, we consider some general arguments which apply to a wide variety of situations.

6.9 One argument against recognising any cohabitant as entitled to succeed on intestacy is that this would devalue marriage. This argument cannot be proved or disproved. It might have some plausibility if the rules on intestacy were to provide that a cohabitant were to be preferred to a legal spouse, where the deceased was survived by both. It seems much less plausible if all that is done is to give certain cohabitants succession rights in the absence of a surviving spouse. It can also be said that the real question is whether particular results in particular situations in which an intestate deceased is survived by a cohabitant are regarded as acceptable or unacceptable. If they are regarded as unacceptable then no honour is done to the institution of marriage by preserving them for its sake.

6.10 Another argument against conferring rights of intestate succession on cohabitants is that it is unnecessary because cohabitants can make wills in each other's favour and take the title to their home in joint names with a survivorship clause. There is some force in this argument and, in fact, survivorship

clauses seem to be common where cohabitants have taken the title to their house in joint names.[1] However, the counter-argument is that there will always be some cohabitants who die without having made a will. The reasons for not making a will are many and need not reflect any disinclination to have the other partner inherit.[2] The incidence of wills in the age groups where cohabitation is currently most common is remarkably low.[3] It follows that if a cohabitant is killed in an accident there is a high probability, whatever may be thought about what the position ought to be, that he or she will die intestate.

6.11 A third argument against giving cohabitants rights of intestate succession is that this would result, in some cases, in uncertainty and delay in the administration of estates. There could be cases where it was doubtful whether the deceased's relationship with a person of the opposite sex was one of cohabitation as husband and wife, or whether it was of the required duration, and where only a court decree could resolve the issue. This would, however, apply in only some cases and the disadvantages in these

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[1] Research by Dr David Nichols in the Sasine Registers and Land Register showed that out of 1000 titles examined for 1985, 28 were apparently in favour of cohabiting couples and of these 24 included a survivorship clause.

[2] The recent survey done for the English Law Commission found that the reasons most commonly given were of the type (a) nothing to leave (b) never thought about it (c) too young. See the report on Distribution on Intestacy (Law Com No 187, 1989) App C, Table 2. To these reasons may be added disinclination to consult a lawyer.

[3] The survey mentioned in the preceding footnote found that 92% of respondents in the age range 18-30 had not made a will. In the 31-44 age group 84% had not made a will. Table 1A. The survey on Family Property in Scotland (OPCS, 1981) carried out for us in 1979 showed that 81% of married or cohabiting couples had never made a will. Table 4.1.

cases would have to be set against the benefits in cases where the facts were clear and undisputed.

6.12 In Part I of this paper we referred to the fact that the arguments for conferring rights on cohabitants could also be used, in some situations, for conferring similar rights on others - such as homosexual partners or close friends living together. This is particularly so in relation to intestate succession. If the approach is to ask what the deceased would probably have wished, then it is quite likely that in many cases the answer would be that the deceased would have wished to benefit the person who was in fact closest to him or her, whether or not the relationship was a heterosexual one akin to marriage. Yet to incorporate any criterion of closeness of relationship into the fixed rules of intestate succession would be quite impracticable. It might be argued that the clearest line which can be drawn is that between legal marriage and all other relationships (other than those by blood or adoption) and that once the line is moved away from legal marriage it becomes difficult to justify drawing it at one place rather than another. Against this, however, it might be argued that cohabitants are an identifiable class, that a line could be drawn so as to include them, and that if other identifiable classes have a strong case for inclusion in the future then this could be considered on its merits in the future but is not a reason for holding up all reform now. It could also be pointed out that where there have been children of the union this in itself distinguishes it from childless relationships of various kinds.

6.13 Another argument which might be made against intestate succession rights for cohabitants is that there could be several qualifying cohabitants. This, however, would be unlikely if it were

to be a requirement that the cohabitation was continuing immediately before the death (apart from temporary absences, such as absence in hospital). The problem is perhaps not likely to be any more serious than the problem posed by cases of polygamy and the solution - equal division of the available share - seems equally obvious.

6.14 **Long cohabitation, with children.** The clearest case for recognising the position of a cohabitant in the rules on intestacy is where there has been a long cohabitation (for, say, 10 years or more) which has resulted in children, even if no child of the union survives the deceased. We are assuming here, and in all the other situations discussed, that the cohabitation has continued, apart from temporary absences, until the deceased's death. In this type of situation the claims of the cohabitant may well be as strong as those of a lawful spouse. Indeed it is hard to argue that no regard whatsoever should be paid to a surviving cohabitant in this type of situation. The question is rather where the cohabitant should be placed in relation to other possible heirs.

6.15 If no child of the union survives and there are no other surviving relatives of the deceased at all, then we suspect that there would be very general agreement that this type of surviving cohabitant ought to be preferred to the Crown. If the only other surviving relatives are uncles and aunts or nephews or nieces or remoter relatives then we suspect that there would be general agreement that the person with whom the deceased had cohabited for many years, and who had been the parent of his or her children, should be preferred. If the deceased is survived by a brother or sister then, as we have seen, there appears to be

majority support in Scotland for preferring the cohabitant. Parents of the deceased rank equally with brothers or sisters in the existing law on intestate succession and it may be thought that the long-standing cohabitant, where there has been a child of the union, ought to be preferred to them too.

6.16 It is perhaps more debatable whether a cohabitant - even where the cohabitation has been long and has produced children - should be preferred to surviving children or remoter issue of the deceased. Two situations may be considered - first, where the issue are all issue of the union in question and, secondly, where they are not. In the first type of case there would seem to be a fairly strong argument for preferring the cohabitant to his or her own children or grandchildren, at least if the intestate estate is of the usual modest size. Where the children are young there would be clear practical advantages in this course. If, for example, the family home was in the cohabitants' joint names without a survivorship clause it would seem preferable to have the deceased's half share pass to the cohabitant rather than to the couple's 3 year old child. The position would be the same with regard to the deceased's household furniture, car and modest savings. In the second type of case where there are children of the union and also other surviving issue of the deceased the considerations are slightly different but it would be difficult, we think, to justify a distinction between the deceased's children by the cohabitant and his or her children as a result of another relationship, particularly if all the children had been members of the same household, as would quite often be the case. The most principled and most acceptable approach, it might be suggested, would be to treat the surviving cohabitant in this type of situation in the same way as a surviving spouse.

6.17 The most difficult question arises if the deceased is also survived by a spouse. Given that the cohabitation is assumed to have been of long duration there is no legal reason why there should still be a spouse at the date of the deceased's death: a divorce could have been obtained on one of the separation grounds.[1] Nonetheless this situation could arise. There is clearly an argument that the person with whom the deceased had in fact shared his or her life for many years before death, and by whom he or she had had children, should be preferred to a long-separated spouse. Indeed in our earlier work on succession we received strong complaints that the existing law in certain circumstances gave the whole intestate estate to a deserting spouse, who had not seen the deceased for decades, and provided nothing for the person with whom the deceased had in fact been living as husband and wife. This situation was felt to be unjust and unacceptable and we can readily sympathise with that point of view. On the other hand it must be said that the rules on intestate succession have to be general, cannot pay much attention to conduct or merit, and are liable to produce unfortunate results on occasion. In our recent examination of succession law we considered whether a separated, but not divorced, spouse should lose succession rights after a certain time. We were eventually persuaded that it would be unsatisfactory to introduce any arbitrary cut-off after a certain number of years.[2] There could be difficulties in proving when separation occurred and it might seem harsh to cut off the rights of a deserted spouse who had remained willing to have the other spouse back. Our conclusion was that a separated spouse had the remedy in his or her own hands by obtaining a divorce, or leaving a will (which would be subject to legal rights but could still effectively dispose of the bulk of the

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[1] Divorce (Scotland) Act 1976 s1(2)(d) or (e).

[2] Report on Succession (Scot Law Com No 124, 1990) paras 7.28-7.33.

estate) or taking other steps such as by transferring property during his or her lifetime. The question which has to be asked is why, if separation by itself does not cut off the surviving spouse's rights, separation combined with cohabitation should do so. There is a well-known and readily available remedy for dead marriages in the form of divorce. To cut off a spouse's rights by the mere lapse of time might be seen as encouraging people not to clear up the legal situation by obtaining a divorce. There are clearly arguments both ways on this question but our preliminary view is that the cohabitant should not be preferred to the legal spouse even where the cohabitation has been a long one and has resulted in children. In the absence of a surviving spouse, however, we think there is a strong case for treating such a cohabitant in the same way as a surviving spouse.

6.18 We invite views in response to the following questions.

10(a) Where a deceased is survived by a cohabitant with whom he or she has cohabited for a long period (say, 10 years or more) immediately preceding his or her death and by whom he or she has had a child or children, but is not survived by a legal spouse, should the cohabitant succeed to the deceased's intestate estate in the same way as a surviving spouse would do?

(b) If the cohabitant should not succeed in the same way as a surviving spouse would do, should he or she nonetheless be preferred to the deceased's brother or sister or parents?

(c) If the cohabitant should not be preferred to the deceased's brother or sister or parents, should he or she nonetheless be preferred to remoter relatives or the state?

(d) Are we justified in our preliminary view that the cohabitant should not inherit on intestacy in this type of case if the deceased is survived by a legal spouse?

6.19 **Shorter cohabitation, with children.** This is a slightly more difficult case. However, the presence of children of the union and the fact that the cohabitation was current at the date of the death suggest that, provided a distinction can be drawn between cohabitations as husband and wife and merely temporary living arrangements, the solution ought to be the same. Again, it is worth noting that if the cohabitant does not succeed on intestacy, and if a child of the union survives and no other children of the deceased survive, then the result would be that the child of the union would succeed. As the child would generally be quite young in this type of situation there is much to be said on practical grounds for allowing the cohabitant to succeed.

6.20 The choice of a qualifying period, if any is thought necessary in this type of situation, is fairly arbitrary. We would suggest for consideration that a period of a year would be sufficient.

6.21 We invite views in response to the following questions.

11(a) Where a deceased is survived by a cohabitant with whom he or she has cohabited for a period of a year or more (but less than 10 years) immediately preceding

his or her death and by whom he or she has had a child or children, but is not survived by a legal spouse, should the cohabitant succeed to the deceased's intestate estate in the same way as a surviving spouse would do?

(b) If the cohabitant should not succeed in the same way as a surviving spouse would do, should he or she nonetheless be preferred to the deceased's brother or sister or parents?

(c) If the cohabitant should not be preferred to the deceased's brother or sister or parents, should he or she nonetheless be preferred to remoter relatives or the state?

(d) Are we justified in our preliminary view that the cohabitant should not inherit on intestacy in this type of case if the deceased is survived by a legal spouse?

(e) Is the period of a year appropriate in this context and, if not, what period, if any, should be substituted?

6.22 **Long childless cohabitation.** Even in the absence of children of the union it may be argued that a surviving cohabitant who was living with the deceased at the time of his or her death and who had been living with him or her for a long period (say, 10 years or more) prior to that time ought to appear somewhere in the list of heirs on intestacy. The Scottish public opinion survey mentioned earlier asked about a man who had never married and had no children and who was survived by the woman with whom

he had lived "for many years" and also by his brother. As we have seen, 56% of the respondents thought that the estate should go to the surviving cohabitant and only 8% thought that it should go to the brother, which is what would happen under the present law.[1] There would presumably be even more support for preferring the cohabitant to remoter relatives, such as nephews or cousins, or to the Crown.

6.23 The position is more difficult if the deceased is survived by children of another relationship. Again it might be suggested that the cohabitant of long standing should be preferred, in the same way as a surviving spouse would be. Circumstances vary, but the normal intestate estate is modest and includes household goods and personal effects. A larger estate may include a house or a share in it. To prefer a child of the deceased (who may or may not have been a member of the cohabiting couple's household) to a cohabitant of long standing who was living with the deceased at the time of his or her death would often seem inappropriate. We considered the position of the surviving spouse in relation to children of the deceased by another person in our recent work on succession law. A majority of those who commented on this question favoured treating the surviving spouse in the same way whether or not there were children of the deceased by another person. In our report on Succession we recommended accordingly.[2] The English Law Commission reached a similar conclusion in its report on Distribution on Intestacy.[3] We think that the considerations are very similar in the case of a long-standing cohabitant and that there is a fairly strong case for treating such a cohabitant in the same way as a surviving spouse.

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[1] Manners and Rauta, Family Property in Scotland (OPCS, 1981) p20, Table 4.7 and App B, question 88.

[2] Scot Law Com No 124 (1990) para 2.17.

[3] Law Com No 187 (1989) paras 41-45.

6.24 Where the deceased is survived by a cohabitant and a legal spouse our preliminary view, for the reasons given earlier, is that the spouse should exclude the cohabitant but we would welcome comments.

6.25 We invite views in response to the following questions.

12(a) **Where a deceased is survived by a cohabitant with whom he or she has cohabited for a long period (say, 10 years or more) immediately preceding his or her death, there having been no children of the union, but is not survived by a legal spouse, should the cohabitant succeed to the deceased's intestate estate in the same way as a surviving spouse would do?**

(b) **If the cohabitant should not succeed in the same way as a surviving spouse would do, should he or she nonetheless be preferred to the deceased's brother or sister or parents?**

(c) **If the cohabitant should not be preferred to the deceased's brother or sister or parents, should he or she nonetheless be preferred to remoter relatives or the state.**

(d) **Are we justified in our preliminary view that the cohabitant should not inherit on intestacy in this type of case if the deceased is survived by a legal spouse?**

6.26 **Short childless cohabitation.** This is the situation where the case for succession rights for the cohabitant on intestacy is weakest. It is quite possible that the parties may regard their arrangement as one of temporary mutual convenience with no financial or property implications at all. Neither may have had any expectation that the other would succeed on intestacy. The danger of "gold-digging" cohabitations must also be taken into account. Much may depend on the duration of the cohabitation. Anything less than 5 years might possibly be regarded as too short to justify the grant of rights of intestate succession rights, although even in this case some people might consider that a cohabitant of, say, 3 years' standing should be preferred to the Crown or a second cousin. Where the cohabitation has lasted for 5 years or more and was continuing at death there may be people who would consider that the cohabitant should be preferred on intestacy not only to the Crown and distant relatives but also to the deceased's brother or sister and father or mother. There might be more reluctance to prefer the cohabitant of 5 years' standing to the children of the deceased by another relationship. As explained earlier we think that there are objections to preferring a cohabitant to a legal spouse.

6.27 In the case of a childless cohabitation which has lasted for less than, say, 10 years there is clearly room for a wide range of opinions as to the appropriate result. It need hardly be said that a cautious approach at this stage would not be inconsistent with further extensions of the rights of cohabitants later in the light of experience, and in the light of any changes in prevailing living patterns which may occur. We would welcome responses to the following questions.

13(a) Where a deceased is survived by a cohabitant with whom he or she has cohabited for a period of 5 years or more (but less than 10 years) immediately preceding his or her death, there having been no children of the union, but is not survived by a legal spouse, should the cohabitant succeed to the deceased's intestate estate in the same way as a surviving spouse would do?

(b) If the cohabitant should not succeed in the same way as a surviving spouse would do, should he or she nonetheless be preferred to the deceased's brother or sister or parents?

(c) If the cohabitant should not be preferred to the deceased's brother or sister or parents, should he or she nonetheless be preferred to remoter relatives or the state?

(d) Would your answers to questions (a), (b) and (c) be the same if the period of 5 years were replaced by a period of 3 years and, if not, how would they differ?

(e) Would your answers to questions (a), (b) and (c) be the same if the period of 5 years were replaced by a period of 1 year and, if not, how would they differ?

(f) Are we justified in our preliminary view that the cohabitant should not inherit on intestacy, in these types of case, if the deceased is survived by a legal spouse?

6.28 **Summary.** We have tried to set out the arguments for and against giving rights of intestate succession to cohabitants in the various types of situation which can arise. We hope to be able to commission further research on public attitudes before preparing a report with recommendations. We will also take responses to this discussion paper fully into account. In the meantime it might be helpful to summarise the above discussion by observing that one possible approach would be to say that

(a) a cohabitant would be treated as a surviving spouse for the purposes of intestate succession

(i) if he or she had cohabited with the deceased for X years or more immediately before the deceased's death (ignoring temporary absences) or

(ii) if he or she had cohabited with the deceased for a shorter period of Y years or more immediately before the deceased's death (ignoring temporary absences) and there had been a child of the union

provided in both cases that the deceased was not survived by a legal spouse.

(b) a cohabitant who did not qualify under the preceding rules would nonetheless be preferred on intestacy to the deceased's brother or sister or father or mother and remoter relatives (but not to the deceased's spouse or children) if he or she had cohabited with the deceased for Z years or more (where Z is less than X) immediately before the deceased's death (ignoring temporary absences).

If, for example, X were 10, Y were 1 and Z were 5 then the result would be (1) that the spouse is preferred to the cohabitant in any case where the deceased is survived by both a spouse and a cohabitant (2) that the cohabitant is preferred to the deceased's children and other relatives if the cohabitation has lasted for 10 years, or has lasted for 1 year and there has been a child or children of the union (3) that the cohabitant is preferred to the deceased's brother or sister or father or mother or remoter relatives if the cohabitation, although childless, has lasted for 5 years and (4) that the cohabitant, as under the present law, would not succeed on intestacy in any other case. This, of course, is just one possible scheme and we mention it only by way of illustration. Such a scheme, whatever values are assigned to X, Y and Z, could be fitted quite readily into the rules on intestate succession recommended in our recent report on Succession.[1]

Legal rights

6.29 Under the existing law in Scotland a spouse who has been excluded from the will of the deceased spouse is nonetheless entitled to legal rights (jus relictae; jus relicti) which amount to a half of the moveable estate if the deceased is not survived by issue and a third of that estate if the deceased is survived by issue. In our report on Succession we have recommended that instead of an automatically vesting legal right to a proportion of the moveable estate, the spouse should have a right to claim a share of the whole estate ("the spouse's legal share").[2] We have recommended that the share should be 30% of the first £200,000 and 10% of any excess. If the spouse claimed legal share he or she would forfeit all other rights of succession in the estate.

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[1] Scot Law Com No 124 (1990).

[2] Scot Law Com No 124 (1990) Part III and clauses 5 to 10 of the draft Bill annexed to the report.

6.30 Our preliminary view is that it would be inappropriate to give a cohabitant a right to claim a legal share in his or her deceased partner's estate in opposition to the terms of a will. It is one thing to provide, by means of the rules on intestate succession, for the situation where the deceased has failed to make a will and quite another to intervene where the deceased has made a will. One justification for giving a right to claim legal share is that this gives effect, in an admittedly rough and ready way, to the spouse's interests in the matrimonial property - that is, the property built up by the spouses during the marriage. We have tentatively rejected the idea of imposing rules on the sharing of property on cohabitants and it would be consistent with this view not to allow a cohabitant to claim a legal share after death. Denying a cohabitant a right to claim legal share would not necessarily leave him or her totally without a remedy if the deceased left his or her whole estate to someone else. There might, even under the existing law, be a claim based on unjustified enrichment in certain situations. Moreover, if a cohabitant were given statutory rights to claim financial provision on the termination of the cohabitation in respect of contributions or sacrifices or child care burdens,[1] such a claim ought to be permissible within a certain period after the termination of cohabitation by death.[2]

6.31 We recognise that our preliminary view is not the only one that could be taken. Indeed the public opinion survey, mentioned earlier, found that 73% of the respondents supported the idea of giving a surviving cohabitant a right to some part of the deceased partner's estate in spite of omission from his or her will.[3]

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[1] See paras 5.12-5.21 above.

[2] See para 5.20 above.

[3] Manners and Rauta, Family Property in Scotland (OPCS, 1981) p21 and table 4.8.

However, a slight majority of the respondents in this survey favoured the technique of allowing the surviving spouse or cohabitant to apply to a court for a discretionary provision - a technique which we have rejected for the reasons set out at length in our report on Succession.[1] So it is not clear what support there would be for giving a cohabitant a right to claim, say, 30% of an average sized estate even if the deceased had deliberately left the estate by will to some other person or persons.

6.32 We would welcome comments.

14 Our preliminary view is that a cohabitant should not be given a right to claim a legal share of the deceased partner's estate in opposition to the terms of his or her will. Is this view justified, or are there any circumstances where a cohabitant should be able to claim a legal share in opposition to the terms of the deceased's will?

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[1] Scot Law Com No 124, (1990) paras 3.3 to 3.14.

PART VII - OCCUPANCY RIGHTS AND PROTECTION FROM VIOLENCE

Introduction

7.1 The Matrimonial Homes (Family Protection) (Scotland) Act 1981 conferred occupancy rights in the matrimonial home on the spouse ("the non-entitled spouse") who is not the owner or tenant of it. It also introduced provisions designed to provide protection against domestic violence, of which the most important relate to the obtaining of exclusion orders and the obtaining of interdicts with a power of arrest attached. Occupancy rights are protected against certain dealings by the entitled spouse (such as a sale of the house without the consent of the non-entitled spouse) which might have the effect of defeating them. In our discussion paper on Family Law: Pre-consolidation reforms[1] we have considered the 1981 Act in relation to spouses and have sought views on certain reforms, particularly in relation to the provisions on dealings, which have proved to have serious practical disadvantages. Here we are concerned only with the position of cohabitants under the Act.

Occupancy rights in home

7.2 **Automatic rights.** A cohabitant has no automatic occupancy rights under the 1981 Act. However, he or she can apply to a court for a grant of occupancy rights for a period of up to six months. This period can be extended for a further period or periods but not by more than 6 months at a time.[2] It has been suggested that cohabitants should have automatic occupancy rights[3] and this is the first question to which we turn.

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[1] Discussion Paper No 85 (1990).

[2] S18(1), as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

[3] By Scottish Women's Aid in 1984 Journal of the Law Society of Scotland 436 at p437.

7.3 It would be legislatively possible to apply the provisions of the 1981 Act on occupancy rights to couples who had been cohabiting for a period of time as husband and wife without requiring the non-entitled partner to obtain a court order. This would be less problematic if some of the reforms suggested in our discussion paper on Family Law: Pre-consolidation reforms, including in particular those relating to dealings with third parties and the prescription of occupancy rights, were implemented.[1] Third parties acting in good faith would not then be at risk, and occupancy rights would not last indefinitely even after a couple had separated. There would not be much practical difference in relation to the availability of an exclusion order under section 4 of the Act. Under the existing law a cohabitant can obtain such an order in a two stage process. First, he or she must obtain a grant of occupancy rights from a court under section 18(1). This requires the court to be satisfied that there is the requisite cohabitation. Then he or she can obtain an exclusion order under section 4 if the requirements of that section are met. This can be done in the same court proceedings. If cohabitants had automatic occupancy rights then a cohabitant could apply directly for an exclusion order. Before obtaining it, he or she would need to satisfy the court (a) that there was the necessary cohabitation and (b) that the requirements for obtaining an exclusion order were met. The results would be the same. In the case of a married couple an exclusion order ceases to have effect on the termination

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[1] In that Discussion Paper (No 85, 1990) we have put forward for consideration a scheme whereby purchasers in good faith would not be affected by a spouse's occupancy rights (paras 6.13-6.29). We have also suggested that occupancy rights should terminate if the spouses have been separated for a continuous period of one year during which period the non-entitled spouse has neither occupied the home nor been engaged in court proceedings to assert his or her occupancy rights (paras 6.30-6.31).

of the marriage.[1] In the case of a cohabiting couple where one of the spouses is non-entitled it ceases to have effect on such a date as may be specified in the order.[2] Where both are entitled, or permitted by a third party, to occupy the home, an exclusion order continues until a further order of the court.[3] We can see no reason why this approach to the duration of exclusion orders, or some variant of it, should not continue to apply even if cohabitants were given automatic occupancy rights.

7.4 The advantage of conferring occupancy rights on cohabitants without the need for a court order would be that it would confer some protection in the emergency situations of domestic dispute where it is most needed. The findings of a recent research report suggest that police officers would generally find it helpful in such situations to be able to say that one partner could not simply put the other out.[4] The disadvantage, even if there were an appropriate qualifying period,[5] would be that if the couple's relationship broke down it would be difficult for the one who was the owner or tenant of the house to put the other out. An exclusion order could be obtained if a court considered that this was

> "necessary for the protection of the applicant or any child of the family from any conduct or threatened or reasonably apprehended conduct of the non-applicant spouse which is or would be injurious to the physical or mental health of the applicant or child."[6]

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1 S5.

2 S18(4)(a).

3 S18(4)(b).

4 Jackson, Robertson and Robson (of the Law School, University of Strathclyde), The Operation of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (1988) pp53 and 54. We refer to this report as "the Strathclyde report".

5 See para 7.5 below.

6 1981 Act s4(1).

but would not be granted if the court considered that to grant it would be "unjustified or unreasonable".[1] If, therefore, a person (man or woman) who was the owner or tenant of a flat began to cohabit there with a person of the opposite sex, the entitled partner could find himself or herself in some difficulty if the relationship broke down but the non-entitled partner, quietly and non-violently, declined to leave. A possible remedy is provided by section 1(3) of the 1981 Act which provides:

> "If the entitled spouse refuses to allow the non-entitled spouse to exercise the right conferred by subsection (1)(b) above [which is the right, if not in occupation, to enter into and occupy the matrimonial home] the non-entitled spouse may exercise that right only with the leave of the court ...."

There are two potential legal drawbacks to simply refusing to allow the non-entitled partner to enter. First, it might, if the non-entitled partner has statutory occupancy rights, be a criminal offence under section 22 of the Rent (Scotland) Act 1984.[2] Secondly, it might give the excluded cohabitant a claim under section 3(7) of the 1981 Act for compensation for loss of occupancy rights or impairment of "the quality of the ...

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[1] 1981 Act s4(2).

[2] Section 22(1) provides that "if any person unlawfully deprives the residential occupier of any premises of his occupation of the premises ... or attempts to do so he shall be guilty of an offence ...." A "residential occupier" includes (s22(5)) "a person occupying the premises as a residence ... by virtue of any enactment ... giving him the right to remain in occupation". It is not clear that deprivation would be "unlawful" where the 1981 Act itself seems to permit the entitled spouse to refuse entry, until the leave of a court is obtained.

occupation" of the home.[1] Whether there would be a serious risk of a prosecution or a conviction or an award of damages, in the type of situation we are considering, may be doubted, but the risks must be noted. As a practical matter, simply locking the non-entitled partner out would often be an effective remedy.[2] We would welcome views as to whether it is sufficient. If it is not then it may be that the Act should be amended so as to make it clear that a court could terminate a non-entitled partner's occupancy rights where it was reasonable in all the circumstances to do so, even if there was no risk of violence or injury to health. If an amendment on these lines were thought reasonable in the case of cohabitants it might be wise to extend it to spouses also, although it is not so necessary in their case because of the possibility of terminating occupancy rights by obtaining a divorce.

7.5 There would probably have to be a qualifying period of cohabitation before occupancy rights were conferred on cohabitants

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[1] Technically, the excluded partner would still have occupancy rights, although prevented from exercising them. He or she would therefore have to argue that the quality of occupation was impaired by being kept out! It is not clear that this is what s3(7) is aimed at. Even if this legal hurdle is cleared, the excluded partner would still have to convince the court that compensation was "just and reasonable" in the circumstances.

[2] For an example of its use by an entitled wife against a non-entitled husband, see Nimmo v Nimmo Glasgow Sheriff Court, Aug 12 1983, noted in 1984 Journal of the Law Society of Scotland p4 and discussed in the Strathclyde report at pp40-41.

automatically. Under the existing law it is unlikely that a court would confer occupancy rights on a person who had been cohabiting for only a very short time.[1] The period chosen should be sufficient to distinguish a relationship of some permanence from a mere temporary arrangement. We suggest, for consideration and in order to elicit comments, that, for the purposes of occupancy rights and exclusion orders, the period of cohabitation required might be

(a) 3 years if there are no children of the relationship; or

(b) 1 year if there is a child of the relationship.

7.6 We invite views on the following questions.

15(a) Should cohabitants be given occupancy rights under the Matrimonial Homes (Family Protection)(Scotland) Act 1981 without the need to apply to a court for them?

(b) Should there be a qualifying period of cohabitation for this purpose?

(c) If so, should it be

(i) 3 years if there are no children of the relationship, and

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[1] See the Strathclyde report pp52 and 53. The 1981 Act s18(2) directs the court, in determining whether a man and woman are a cohabiting couple, to have regard to all the circumstances including

"(a) the time for which it appears they have been living together; and

(b) whether there are any children of the relationship."

(ii) 1 year if there is a child of the relationship?

(d) **If cohabitants were given automatic occupancy rights should the 1981 Act be amended to make it clear that a court could terminate a non-entitled cohabitant's occupancy rights where it was reasonable to do so?**

7.7 **Discretionary rights.** If occupancy rights were conferred automatically on cohabitants in certain circumstances it would be for consideration whether a cohabitant who failed to satisfy the qualifying requirements should nonetheless still be entitled to apply to a court for a grant of occupancy rights at the court's discretion. This would depend very largley on what qualifying period were thought appropriate. If it were, for example, one year it may be that no additional discretionary provision would be necessary. If it were, say, 5 years, there would be a strong case for an additional discretionary remedy. In general, it would seem to be preferable to set the qualifying requirements at such a level that additional discretionary provision would not be necessary, but we would welcome views.

16 **If cohabitants were given automatic occupancy rights if certain requirements were satisfied, should they still be able to apply for occupancy rights to be granted at the discretion of a court in cases where these qualifying requirements were not satisfied?**

Protection against dealings.

7.8 We would not be in favour of applying to cohabitants the existing provisions of the 1981 Act on dealings. They give rise to

enough difficulty in the case of spouses. However, we can see no objection to extending to cohabitants who have occupancy rights a more limited protection against collusive dealings, the whole or main purpose of which is to defeat occupancy rights, provided there were complete protection for third parties who acquired the home, or an interest in it, in good faith and for value. We have sought views on such a solution in our discussion paper on Family Law: Pre-consolidation reforms.[1] If an entitled partner could apply to a court to have occupancy rights terminated where it was reasonable to do so, the temptation to resort to collusive dealings would be greatly reduced. We invite views on the following questions.

17(a) Should cohabitants with occupancy rights be protected against dealings designed to defeat those rights?

(b) If so, should the protection be without prejudice to the rights of third parties who have acquired the home, or an interest in it, in good faith and for value?

(c) Are there any suggestions as to the form which protection should take, if any is thought necessary?

These questions do not exhaust the issues which have to be considered but the answers to them will give us an indication of general views. The precise form of protection provided, if any is thought necessary, will depend on what is decided in relation to spouses.

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[1] Discussion Paper No 85 (1990) paras 6.13-6.29.

Transfer of tenancies

7.9 The 1981 Act applies section 13 (which enables a court to transfer a tenancy from one spouse to the other, or from both spouses to one) to cohabitants but only if one has been granted occupancy rights by the court or if both are entitled to occupy the house (eg where they are joint tenants). This seems unduly restrictive. The position would, however, be ameliorated if cohabitants, after a certain period, had automatic occupancy rights, as suggested above. We therefore do not think it necessary to consult separately on this question.

Interdicts

7.10 So far as interdicts are concerned the existing provisions of the 1981 Act seem clearly inadequate in relation to cohabitants. The protection of a matrimonial interdict, with power of arrest attached, is available only if a cohabitant has obtained a grant of occupancy rights from a court, or if both cohabitants are entitled, or permitted by a third party, to occupy the home.[1] It follows that if a woman who is the owner or tenant of a house cohabits there with a man who is not owner or tenant, and he begins to be violent towards her, she cannot obtain the protection of a matrimonial interdict unless he has applied successfully for occupancy rights.[2] This is unfortunate and, in our view, unjustifiable. To confer occupancy rights on all cohabitants who satisfied the time criteria mentioned above (3 years' cohabitation, or one if there was a child) would not be a complete answer because protection against domestic violence ought to be available to a cohabitant regardless of the length of the cohabitation. We suggest for consideration that:

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[1] S18(3).

[2] See the Strathclyde report pp68 and 158.

18 **Matrimonial interdicts, with powers of arrest attachable, should be available to cohabitants, whether or not they have occupancy rights, and without the need for any qualifying period of cohabitation.**

It should be noted that a rule on these lines would not mean that interdicts could be used as a backdoor method of excluding an entitled cohabitant from the home. In the case of spouses the Court of Session has held that a spouse cannot have lawful rights to occupy a home removed by an interdict,[1] and the same reasoning would apply to a cohabitant.

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[1] Tattersall v Tattersall 1983 SLT 506 at p509.

PART VIII - LIFE ASSURANCE

Insurable interest

8.1 A person effecting a policy of assurance on someone else's life must have an insurable interest in the other person's life.[1] It is accepted, although it has not been the subject of direct decision in Scotland, that one spouse has an insurable interest in the life of the other.[2] This is not regarded as being merely pecuniary and is regarded as supporting insurance of any amount. Family protection policies, whereby one spouse insures the life of the other so as to recover, say, an annuity to cover the period when children are dependent and likely to impair earning potential, are commonplace. It seems to us that it would be unfortunate if any legal barrier were to be placed in the way of a cohabitant wishing to take out a policy of this nature. Although there is no obligation of aliment between cohabitants the factual risks are essentially the same. No qualifying period of cohabitation would seem to be necessary for this purpose. A cohabitant would be likely to think of effecting an insurance policy on the life of his or her partner only if the relationship was one of some permanence. We therefore suggest for consideration that

19(a) It should be made clear by statute that a cohabitant has an insurable interest in the life of his or her partner.

(b) No qualifying period of cohabitation should be required for this purpose.

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[1] Life Assurance Act 1774, s1.

[2] MacGillivray & Parkington on Insurance Law (8th edn, 1988) paras 67 and 68. The insurable interest of a man in the life of his wife was not doubted in Champion v Duncan (1867) 6 M 17; Wight v Brown (1849) 11 D 459.

Married Women's Policies of Assurance (Scotland) Act 1880.

8.2 Section 2 of this Act, as amended,[1] enables a person to take out a policy of assurance on his or her own life for the benefit of his or her spouse in such a way that the policy is held in trust for the beneficiary as soon as it is effected, without the need for any delivery or intimation.[2] "Spouse" includes a person, named in the policy as a beneficiary, who later becomes the spouse of the person effecting the policy.[3] A cohabitant could take out a policy on his or her own life for the benefit of his or her partner, without the benefit of the Act, and could do so either by naming the partner as the direct beneficiary[4] or by taking the policy in trust for the cohabitant. In either case, however, there would have to be delivery of the policy, or some sufficient equivalent of delivery (such as intimation, or registration in the Books of Council and Session) before the cohabitant would acquire a vested beneficial right.[5] The 1880 Act is useful because it obviates the need for delivery or intimation and avoids the difficulties which might arise at a later stage if delivery or some equivalent could not be established. It enables a simple family trust to be created without the need for an expensive trust deed. It also contains a provision on the rights of the creditors of the person effecting the policy which is arguably better adapted to the circumstances of this type of transaction than the general rules on gratuitous

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[1] The amendments were made by the Married Women's Policies of Assurance (Scotland) (Amendment) Act 1980 which implemented the Scottish Law Commission's Report on The Married Women's Policies of Assurance (Scotland) Act 1880 (Scot Law Com No 52, 1978). Before the amendments s2 applied only to a policy effected by a "married man".

[2] The section also applies to policies for a person's children, including children whose parents are not married to each other. See s2. So it can already be used by either cohabitant to take out a policy for his or her children.

[3] S2. So the section can already be used by cohabitants who intend to marry each other later.

[4] Thus giving him or her a jus quaesitum tertio. See Carmichael v Carmichael's Exrx 1920 SC (HL) 195.

[5] See Jarvie's Tr v Jarvie's Trs (1887) 14 R 411; Carmichael v Carmichael's Exrx 1920 SC (HL) 195; Allan's Trs v Lord Advocate 1971 SC (HL) 45.

alienations.[1] Our provisional view, on which we would welcome comments, is that it would be useful if the benefits of the 1880 Act were extended to cohabitants. Indeed the fact that cohabitants cannot rely on benefits under many superannuation schemes will often make the taking out of private life assurance a very wise precaution. The law should, in our view, do what it can to make it easier for people to provide for their dependants in this way. If the 1880 Act were to be extended to cohabitants no qualifying period of cohabitation would seem to be necessary. A person can already, as we have seen, take out a policy in favour of a cohabitant (or anyone else) so long as there is the necessary intimation or delivery. There is no great question of policy involved. All that is involved is a simple extension of a facility. The Act might, we suggest, apply to a policy expressed on the face of it to be for the benefit of a person with whom the person effecting the policy is cohabiting as husband and wife at the date of the policy, or with whom he or she intends to take up such

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[1] S2 provides that "if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof.". This provision is expressly preserved by s34 of the Bankruptcy (Scotland) Act 1985 (gratuitous alienations).

cohabitation.[1] We suggest, therefore, for consideration and comment that

20(a) The benefits of the Married Women's Policies of Assurance (Scotland) Act 1880 (which enables a person to take out a life insurance policy on his or her own life for the benefit of his or her spouse in such a way that the policy is held in trust for the beneficiary as soon as it is effected) should be extended to cohabitants.

(b) No qualifying period of cohabitation should be required for this purpose.

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[1] The extension to prospective cohabitants may well be unnecessary but this facility exists for prospective spouses and perhaps the law should encourage people to think of such arrangements before embarking on cohabitation.

PART IX - COHABITATION CONTRACTS

9.1 Where cohabitants have the foresight to attempt to regulate by contract the questions of property and finance arising out of the cohabitation, it might be thought that the policy of the law should be to give effect to their arrangements. There is, however, a possibility that at least some contracts between cohabitants would be held to be illegal and unenforceable.[1] The following passage is taken from Gloag on Contract.[2]

> "A contract having as its object the furtherance of illicit sexual intercourse is illegal. Thus a bond granted to a woman to induce her to submit to intercourse, or to reward her for having submitted, cannot be enforced. Where a bill was given to induce a man to take back his divorced wife - there being no provision that he should remarry her, and the agreement being in effect that he should live with her as his mistress - opinions were given that this consideration amounted to turpis causa. And neither a bond nor a legacy given or promised as the price of continued illicit intercourse can be enforced. On the other hand, there is no legal objection to a provision made for the woman after the illicit intercourse has ceased. And the fact that A. and B. were living, and continued to live, in adultery, was held not to invalidate a mutual will, so as to deprive a third party of a benefit under it."

The cases cited in support of these propositions all date from the 19th century or earlier and it is to be hoped that a court today would not regard a contract between cohabitants relating to aliment, property or other such matters as contrary to public

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[1] This question has been the subject of fairly extensive discussion in England. See eg Barton, Cohabitation Contracts (1985) pp37-49; Parry, The Law Relating to Cohabitation (2d ed 1988) paras 9.06 to 9.10; Poulter, "Cohabitation Contracts and Public Policy" (1974) 124 New Law Journal pp999 and 1034; Bottomley, Gieve, Moon & Weir, The Cohabitation Handbook (1981) pp190-192.

[2] (2nd edn, 1929) p562 (footnotes omitted). See also Walker, Contracts (2d edn 1985) para 11.34.

policy. Given that cohabitation is already recognised for various legal purposes (including occupancy rights in the matrimonial home,[1] succession to certain tenancies[2] and damages on death[3]) such a view would be highly questionable. The typical cohabitation relationship nowadays is not one of female, or male, prostitution but is a reciprocal arrangement for living together, supporting each other and sharing important areas of life, which is often indistinguishable from marriage from the factual point of view. Whether legislation is necessary on this point is open to question[4] but if there is any legal doubt which might deter cohabitants from making their own contractual arrangements relating to property or financial matters then perhaps it ought to be removed.[5] We invite views on the proposition that

21 **A contract between cohabitants or prospective cohabitants should not be void or unenforceable on any ground if it**

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1 Matrimonial Homes (Family Protection) (Scotland) Act 1981, s18.

2 Housing (Scotland) Act 1988, s31(4).

3 Damages (Scotland) Act 1976, ss1 and 10(2) and Sch 1, para (aa) (added by the Administration of Justice Act 1982, s14(4).

4 A number of courts in the United States of America have rejected the view that cohabitation contracts are unenforceable. See Weitzman, The Marriage Contract (1981) pp392-401. The best known American case is Marvin v Marvin 18 Cal 3d 660 (1976).

5 The Committee of Ministers of the Council of Europe adopted a recommendation (No R (88) 3) on 7 March 1988 that governments of member states should take the necessary measures "to ensure that contracts relating to property between persons living together as an unmarried couple, or which regulate matters concerning their property either during their relationship or when their relationship has ceased, should not be considered to be invalid solely because they have been concluded under these conditions.".

would not have been void or unenforceable had they been spouses or prospective spouses.

PART X - MISCELLANEOUS MATTERS

10.1 There are various rules of Scottish law which distinguish between spouses and cohabitants. For example, the spouse of an accused is not, in general, a compellable witness for the prosecution, and cannot be compelled to disclose any communication made between the spouses during the marriage.[1] In civil proceedings a spouse is not "competent or compellable" to give against the other spouse evidence of any matter communicated by that other spouse during the marriage.[2] We do not suggest that these rules should be extended to cohabitants. Indeed the privileges against disclosure of marital communications are themselves worthy of examination with a view to abolition or reform.[3]

10.2 There are various rules in bankruptcy law which refer to the spouse, but not to the cohabitant, of a debtor. Some of these, such as the definition of an "associate" of the debtor[4] operate in the interests of the bankrupt's creditors.[5] Others, such as the restriction on the sale of the debtor's family home if his spouse or former spouse is living in it,[6] operate against the interests of the creditors.[7] The Bankruptcy (Scotland) Act 1985 is comparatively recent. It involves a careful balancing of different interests, including the interests of creditors. We do not think that this is the context in which to consider whether the balance is right in relation to spouses and cohabitants. No doubt if the Bankruptcy (Scotland) Act 1985 were being reviewed as a whole it would be for consideration whether, for example, the protection

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1 Criminal Procedure (Scotland) Act 1975, ss143 and 343.

2 Evidence (Scotland) Act 1853, s3.

3 See our Memorandum on the Law of Evidence (Memo No 46, 1980) paras S.09-S.18.

4 Bankruptcy (Scotland) Act 1985, s74.

5 In this case by extending the time during which gratuitous alienations are challengeable. Bankruptcy (Scotland) Act 1985, s34.

6 1985 Act, s40.

7 In this case by causing additional delay and expense if the spouse or former spouse does not consent to a sale. 1985 Act, s40(2).

afforded to the spouse or former spouse, in relation to a house owned by the debtor, should be extended to a cohabitant or former cohabitant or, conversely, abolished altogether.

10.3 We think that a similar approach should be taken in relation to the references to spouses, but not cohabitants, in the Companies Act 1985. There is of necessity something arbitrary about definitions such as "connected person"[1] and we do not think that this is the place to consider whether a spouse ought, in certain circumstances, to be excluded or a cohabitant ought, in certain circumstances to be included. The same applies to the reference to the "wife or husband" of an officer of court in the Debtors (Scotland) Act 1987.[2]

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[1] Companies Act 1985, s346. See also ss203, 232, 327 and 328.
[2] S83(3).

PART XI - SUMMARY OF PROPOSITIONS AND QUESTIONS FOR CONSIDERATION

1 There should continue to be no statutory obligation of aliment between cohabitants.

(Para 2.3)

2 (a) Should the presumption of equal shares in household goods in section 25 of the Family Law (Scotland) Act 1985 be applied, with the necessary modifications, to cohabitants?

(b) If it were to be applied, should any qualifying period of cohabitation be required before the presumption would come into operation?

(c) If there were to be a qualifying period, would a period of 3 years be appropriate?

(Para 3.6)

3 (a) Should the presumption of equal shares in money and property derived from a housekeeping or similar allowance in section 26 of the Family Law (Scotland) Act 1985 be applied, with the necessary modifications, to cohabitants?

(b) Should any qualifying period of cohabitation be required for this purpose?

(Para 4.2)

4 Would it be acceptable to leave a cohabitant who had suffered economic hardship as a result of the cohabitation

to depend for a remedy on existing common law principles?

(Para 5.6)

5 There is no adequate justification for applying the principles of equal sharing of property and relief of long-term hardship in section 9(1)(a) and (e) of the Family Law (Scotland) Act 1985 to cohabitants.

(Para 4.11)

6 (a) Should the law provide that on the termination of cohabitation a cohabitant should be able to apply to a court for an order for financial provision based on the principle in section 9(1)(b) of the Family Law (Scotland) Act 1985 - ie an order designed to provide fair compensation for (i) any economic advantage derived by either party from contributions by the other or (ii) any economic disadvantage suffered by either party in the interests of the other party or the family?

(b) If this principle were to be applied to cohabitants should it be provided that only a cohabitant who had lived with the other partner as husband and wife for a certain period should be able to apply?

(c) Would a period of 3 years be appropriate for the purposes of the preceding paragraph?

(Para 5.15)

7 (a) On the termination of cohabitation should a cohabitant be able to apply to a court for an order for financial

provision based on the principle in section 9(1)(c) of the Family Law (Scotland) Act 1985 - ie an order designed to ensure that any economic burden of caring, after the termination of the cohabitation, for a child of the union, or a child accepted by the parties as a child of their family, under the age of 16 years should be shared fairly between the parties?

(b) If this principle were to be applied to cohabitants should it be provided that only a cohabitant who had lived with the other partner as husband and wife for a certain period should be able to apply?

(c) Would a period of 3 years be appropriate for the purposes of the preceding paragraph?

(Para 5.18)

8 It would not be appropriate to give a cohabitant a right to apply for financial provision on the termination of the cohabitation on a principle analogous to that in section 9(1)(d) of the Family Law (Scotland) Act 1985 - i e provision to enable him or her to adjust, over a period of not more than three years, to the cessation of financial support by the other partner.

(Para 5.19)

9 (a) If any of the principles in section 9(1) of the Family Law (Scotland) Act 1985 were to be extended to cohabitants, it is suggested that a claim against the other cohabitant based on the sharing of the economic burden of child care should have to be made

before the child in question attains the age of 16 and that an application based on any other ground should have to be made within a period of not more than 5 years after the end of the cohabitation.

(b) Views are invited as to what this period should be.

(c) Where the other cohabitant has died, it is suggested that any statutory claim against his or her executors, of the type discussed in this part of the paper, should have to be made within a short period (say, 6 months or 1 year) of the date of death.

(d) Views are invited as to what this period should be.

(Para 5.20)

10 (a) Where a deceased is survived by a cohabitant with whom he or she has cohabited for a long period (say, 10 years or more) immediately preceding his or her death and by whom he or she has had a child or children, but is not survived by a legal spouse, should the cohabitant succeed to the deceased's intestate estate in the same way as a surviving spouse would do?

(b) If the cohabitant should not succeed in the same way as a surviving spouse would do, should he or she nonetheless be preferred to the deceased's brother or sister or parents?

(c) If the cohabitant should not be preferred to the deceased's brother or sister or parents, should he or she nonetheless be preferred to remoter relatives or the state?

(d) Are we justified in our preliminary view that the cohabitant should not inherit on intestacy in this type of case if the deceased is survived by a legal spouse?

(Para 6.18)

11 (a) Where a deceased is survived by a cohabitant with whom he or she has cohabited for a period of a year or more (but less than 10 years) immediately preceding his or her death and by whom he or she has had a child or children, but is not survived by a legal spouse, should the cohabitant succeed to the deceased's intestate estate in the same way as a surviving spouse would do?

(b) If the cohabitant should not succeed in the same way as a surviving spouse would do, should he or she nonetheless be preferred to the deceased's brother or sister or parents?

(c) If the cohabitant should not be preferred to the deceased's brother or sister or parents, should he or she nonetheless be preferred to remoter relatives or the state?

(d) Are we justified in our preliminary view that the cohabitant should not inherit on intestacy in this type of case if the deceased is survived by a legal spouse?

(e) Is the period of a year appropriate in this context and, if not, what period, if any, should be substituted? (Para 6.21)

12 (a) Where a deceased is survived by a cohabitant with whom he or she has cohabited for a long period (say, 10 years or more) immediately preceding his or her death, there having been no children of the union, but is not survived by a legal spouse, should the cohabitant succeed to the deceased's intestate estate in the same way as a surviving spouse would do?

(b) If the cohabitant should not succeed in the same way as a surviving spouse would do, should he or she nonetheless be preferred to the deceased's brother or sister or parents?

(c) If the cohabitant should not be preferred to the deceased's brother or sister or parents, should he or she nonetheless be preferred to remoter relatives or the state.

(d) Are we justified in our preliminary view that the cohabitant should not inherit on intestacy in this type of case if the deceased is survived by a legal spouse? (Para 6.25)

13 (a) Where a deceased is survived by a cohabitant with whom he or she has cohabited for a period of 5 years or more (but less than 10 years) immediately preceding his or her death, there having been no children of the

union, but is not survived by a legal spouse, should the cohabitant succeed to the deceased's intestate estate in the same way as a surviving spouse would do?

(b) If the cohabitant should not succeed in the same way as a surviving spouse would do, should he or she nonetheless be preferred to the deceased's brother or sister or parents?

(c) If the cohabitant should not be preferred to the deceased's brother or sister or parents, should he or she nonetheless be preferred to remoter relatives or the state?

(d) Would your answers to questions (a), (b) and (c) be the same if the period of 5 years were replaced by a period of 3 years and, if not, how would they differ?

(e) Would your answers to questions (a), (b) and (c) be the same if the period of 5 years were replaced by a period of 1 year and, if not, how would they differ?

(f) Are we justified in our preliminary view that the cohabitant should not inherit on intestacy, in these types of case, if the deceased is survived by a legal spouse?

(Para 6.27)

14 Our preliminary view is that a cohabitant should not be given a right to claim a legal share of the deceased partner's estate in opposition to the terms of his or her

will. Is this view justified, or are there any circumstances where a cohabitant should be able to claim a legal share in opposition to the terms of the deceased's will?

(Para 6.32)

15 (a) Should cohabitants be given occupancy rights under the Matrimonial Homes (Family Protection)(Scotland) Act 1981 without the need to apply to a court for them?

(b) Should there be a qualifying period of cohabitation for this purpose?

(c) If so, should it be

(i) 3 years if there are no children of the relationship, and

(ii) 1 year if there is a child of the relationship?

(d) If cohabitants were given automatic occupancy rights should the 1981 Act be amended to make it clear that a court could terminate a non-entitled cohabitant's occupancy rights where it was reasonable to do so?

(Para 7.6)

16 If cohabitants were given automatic occupancy rights if certain requirements were satisfied, should they still be able to apply for occupancy rights to be granted at the discretion of a court in cases where these qualifying requirements were not satisfied?

(Para 7.7)

17 (a) Should cohabitants with occupancy rights be protected against dealings designed to defeat those rights?

(b) If so, should the protection be without prejudice to the rights of third parties who have acquired the home, or an interest in it, in good faith and for value?

(c) Are there any suggestions as to the form which protection should take, if any is thought necessary?

(Para 7.8)

18 Matrimonial interdicts, with powers of arrest attachable, should be available to cohabitants, whether or not they have occupancy rights, and without the need for any qualifying period of cohabitation.

(Para 7.10)

19 (a) It should be made clear by statute that a cohabitant has an insurable interest in the life of his or her partner.

(b) No qualifying period of cohabitation should be required for this purpose.

(Para 8.1)

20 (a) The benefits of the Married Women's Policies of Assurance (Scotland) Act 1880 (which enables a person to take out a life insurance policy on his or her own life for the benefit of his or her spouse in such a way that the policy is held in trust for the beneficiary as

soon as it is effected) should be extended to cohabitants.

(b) No qualifying period of cohabitation should be required for this purpose.

(Para 8.2)

21 A contract between cohabitants or prospective cohabitants should not be void or unenforceable on any ground if it would not have been void or unenforceable had they been spouses or prospective spouses.

(Para 9.1)

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