From Mrs. Burns to Mrs. Oxley: Do Co-habiting Women (Still) Need Marriage Law?

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Abstract: Following the U.K. Labour government commitment to marriage in the 1998 Green Paper 'Supporting Families', Barlow and Duncan produced a robust critique calling for 'realism' in recognising that many couples are now choosing not to marry, that too many do not make informed decisions as to whether to marry or not and that, on the basis of their survey, over 40% of respondents believed that some form of family law protection would be available to them, despite their lack of marital status. When this is added to a concern that economically vulnerable cohabiting women do not receive adequate protection in property law, it seems all too obvious that the government commitment to marriage should be challenged. In fact, government policy does seem to have shifted somewhat when, partly as a tactical manoeuvre to help the passage of the Civil Partnership Act 2004 and specifically recognising concerns with the needs of economically vulnerable parties, the issue was referred to the Law Commission for England and Wales. This places the 'realism' arguments firmly within the reform agenda. However, this article argues that there is a need to look more closely at the arguments used by the 'realists', in particular at the evocation of the figure of Mrs. Burns. The more contemporary case of *Oxley v. Hiscock* is used to both raise questions about the socio-economic profiles of cohabitants, as well to question the presentation of property law as failing women (and family law as offering the protection they need). I argue that feminists should take a cautious approach in relation to the seemingly compelling argument that cohabitants will benefit from the extension of aspects of marriage law to cover property issues at the end of a relationship.

Keywords: cohabitants - cohabitation - estoppel - feminist - property - realism

Why do we need law reform for cohabitants?[1] For most commentators the answer is all too obvious: unmarried women are too often disadvantaged when dealing with property (by which is usually meant the home in which they have been living) at the end of a cohabiting relationship. The general argument swings on two related points: the first that property law favours the economically dominant partner and the second that, as women are still economically disadvantaged, they are more likely than their partners to suffer economic vulnerability at the end of a relationship. The solution, again, seems all too obvious: extend the protection and benefits of family (marriage) law to the unmarried. In particular, family (divorce) law allows the court to redistribute property between the parties, taking into account factors which are not (overtly at least) recognised in property law, notably the age of the parties and length of the relationship, the circumstances which brought the relationship to an end, contributions made to the welfare of the family (caring) and future needs.[2] In the light of the recent trend in reported decisions to award, in appropriate cases,

[1] Despite the fact that the English and Welsh Law Commission covers same-sex relationships within its remit (not to do so would open the government to an all too obvious challenge under the Human Rights Act 1998), my paper specifically addresses the issue of cohabiting women in heterosexual relationships. The 'push for reform' for cohabitants has come from a concern to protect such women and it is this issue that I am interested in for the purposes of this paper. That any proposals for reform will also be extended to same-sex partners under principles of equality, constructs an interesting trajectory in which reform will, on the argument of this paper, be addressed to women in terms of economic disadvantage arising from (or exacerbated by) heterosexual partnerships, but will then be automatically extended to cover very different scenarios. (See further Bottomley & Wong (2006)).

[2] Under the Matrimonial Causes Act 1973 (as amended). Similar provisions are now available to registered same-sex partners under the Civil Partnership Act 2004.

what seems to be a rather more generous amount to an ex-wife,[3] it seems to many increasingly unjust not to allow unmarried cohabitants access to the same process of decision-making, especially given the number of couples who are now cohabiting rather than marrying.

This article is intended as something of a counterweight to this push for reform. Written primarily as a call for a more careful evaluation of the arguments 'for realism', it also raises questions about why the government, having made clear their initial preference to support marriage (on the basis that the statistics suggest that marriage is a more stable social unit than cohabitation), now seem to be moving towards a position that could support the extension of certain benefits of marriage (or rather divorce) to the unmarried, especially the benefit of property adjustment orders. It is part of my argument that we should consider why the government is now willing, it seems, to reconsider its initial position in favour of marriage. For some sections of the establishment any pattern of reform of this nature will be controversial in (it is argued) further undermining the legal exclusiveness of marriage.[4] Within this context, the political agenda may well become set in terms which suggest that the most (indeed, possibly 'only') progressive move a feminist can make is to support the extension of family law to cover the property disputes of cohabitants. My intention is to try and open a third 'front', which considers rather more carefully the implications of the

[3] Particularly since *White v. White* [2001] A.C. 596. What is most significant is the language and conceptual frames deployed in these cases ('equality', 'compensation', 'entitlement' and 'expectation') rather than the actual awards.

[4] What will become interesting as pressure for reform builds and the 'protection of marriage' defenders have to articulate their views more carefully, is the extent to which they will focus on heterosexuality as the context for the 'marriage' debate, thereby confirming a position that same-sex registered partnerships involve a status which might be analogous to marriage but is not, and was never intended to be, 'marriage' *per se* (Bottomley & Wong 2006).

arguments for reform, and the likely impact of reform for cohabiting women. This is not to argue against reform *per se*, but rather to argue for some caution.

The building of the case for reform rests on the intersection of three primary trajectories. The first is based on analysis of data charting the rise in heterosexual cohabitation and the related fall in marriage in the U.K. This is linked to social policy concerns with both the lack of stability of the cohabitation unit (in contrast to marriage) and the economic vulnerability of cohabiting women (and their children). The second argument, increasingly deployed, is the evidence gained from two surveys that a large proportion of those who cohabit rather than marry think that, when and if necessary, the protection of family law will be available to them despite their lack of marital status. These two arguments are often brought together in an appeal for 'realism' in law reform: in both recognising the reality of changing family patterns as well as meeting people's expectations as to how they will be dealt with in law. This then links to the third argument that property law (specifically the law of trusts and estoppel) neither meets the needs, nor the expectations, of an economically vulnerable partner. When these three trajectories intersect, they form a grid around which the argument for reform is built. Emerging from this grid, sustaining and sustained by the careful deployment of all three arguments in relation to each other, is the iconic figure of a woman who is constantly referred to as embodying the need for reform: Mrs. Burns.[5] After 19 years of living with a man whose name she took, and with whom she had two children, in a house registered in his name alone and towards which she did not make any financial contribution, the Court of Appeal, in 1984, decided

[5] *Burns v. Burns* [1984] Ch. 317. The term 'figure' is used in this context to suggest that the term 'Mrs Burns' has been deployed to (re)present 'a type' which, by continuing to link it through the process of naming to a 'real' woman (as well as the circumstances and decision of the case), carries a particularly evocative rhetorical power, a reminder of the consequences of 'reality'.

that she had no claim towards any equity in the house. It was seen, by many, as a particular injustice to her as she had not been able to take up paid employment due to her domestic responsibilities and, in the few times when she had had some income, she had used the money for the children or family expenses. Mrs. Burns would clearly have benefited from access to the divorce courts.

In this paper I counter-pose the figure of Mrs. Burns with a figure from a more recent Court of Appeal judgment dealing with a property dispute between (ex)cohabitants: Mrs. Oxley from *Oxley v. Hiscock* [2004] 3 All E.R. 703. I will use the figure of Mrs. Oxley in two ways: firstly, to raise questions about how 'realistic' it is to continue to argue the case for reform through the deployment of the figure of Mrs. Burns as, by implication at least, typical of contemporary patterns of cohabitation and the issues arising from these patterns.[6] Secondly, I will argue that the case represents the culmination of considerable developments in property law since 1984, which require a re-evaluation of the argument that property law necessarily fails the economically disadvantaged partner.

THE CASE FOR REFORM: REALISM

The Rise in Cohabitation

[6] In other words, I shall argue that it is not only that Mrs. Burns represents the 'type of woman', or circumstances, from which the strongest case for reform arises, but that her (over-)deployment implies that she is, and remains, typical of cohabiting women.

In 1979 11% of women aged 18-49 were cohabiting, in 2001 it was 32%.[7] In 2002, 25% of unmarried adults of 16-59 were cohabiting.[8] The latest *Population Trends* report (2005) suggests that, on current patterns, within 25 years more couples will be cohabiting than married and that the figure of 2 million cohabiting couples in 2003, will reach 3.8 million in 2031.[9]

These figures are a cause for concern for those who continue to find and exploit evidence that cohabitation is less stable than marriage.[10] This leads many on the Right to argue against any reform which might seem to support or encourage cohabitation and thereby weaken marriage as a positive choice to be encouraged:

> The Solicitors Family Law Association and some other groups have called for extending the same marriage rights to cohabiting couples upon their break up. However, this action would deprive people of their right to live together on their own terms. Furthermore, it would blur the already fuzzy distinction between cohabitation and marriage. Undermining the special status of marriage would weaken an option for people who want to make both a private and a public commitment.[11]

[7] Office for National Statistics (2004a). All these statistics relate to opposite-sex cohabitation.

[8] Office for National Statistics (2004b). See also Haskey (2001).

[9] *Population Trends* (2005).

[10] The Centre for Policy Studies has recently (2006) published yet another research report (by Jill Kirby) concerned with the need to promote marriage as a more stable unit for the care of children: this report has been particularly well covered in the press as it recommends tax incentives to encourage marriage, especially for middle-income groups (see e.g. Craig (2006)).

[11] Civitas, *The Facts behind Cohabitation*, found on www.civitas.org.uk/hwu/cohabitation.php.

Although the primary argument is a need to support the specific choice of the status of marriage, it is interesting that the choice not to marry is also alluded to as a matter of freedom of choice.[12]

A similar approach initially informed Labour government policy. The 1998 Green Paper (Home Office 1998) made clear the government's preference for marriage,[13] which was still evident in the decision in 2004 to set up and finance, via the Department of Constitutional Affairs, an information website (first called "One Plus One: Married or Not", now renamed "One Plus One Marriage and Partnership Research"). The site includes material that, while recognising a case for reform, includes references that clearly indicate that marriage is a better option, not only with regard to the present legal differences but also as providing a more stable family unit.[14] The problem now for the government is simple: if they respond positively to the arguments for reform and legislate for cohabitants, will this necessarily undermine their promotion of marriage as a preferred choice? It could be argued that the government has been brought to this point as a consequence of the need (in order to avoid a human rights challenge) to legislate for the registration of same-sex

[12] See also Dnes (2004) who, in using a highly rationalist model of law and economics (in which it is necessary to presume that people will make choices based on a cost/benefit analysis) has to keep open the principle of choice and therefore supports (in his terms) a 'libertarian' position. Within the same law/economics framework, such authors are then led into asking questions about how law and social policy may play a part in influencing the 'right' choices (that is those which will support stable units) and, for some, this means keeping (or introducing) exclusive privileges for marriage and marriage-like status relationships (e.g. civil partnership), see e.g. Dnes & Rowthorn (2000, 2002). This slips easily (although not necessarily) into a neo-conservative agenda supporting marriage.

[13] See Chapter 4 in particular.

[14] *Who cohabits, when and why?* found on One Plus One Marriage and Partnership Research website at www.oneplusone.org.uk. See also the traces in the Department for Constitutional Affairs Research Papers, e.g. Lewis (1999).

partnerships. During the passage of the Civil Partnership Act 2004, the government agreed to refer the issue of cohabitation to the Law Commission, partly to help overcome the obstacle of concerns that the interests of same-sex partners were being addressed but not the interests of heterosexual, economically vulnerable, cohabiting women (Jacqui Smith, H.C. *Hansard*, 12 Oct. 2004, col. 179).[15] Thus they were brought to a point where it was (is) necessary to reconsider their adherence to the support of 'marriage' as the focus of family policy.

The response from those promoting reform based on 'realism' is robust: the problem is that *not* to make some legislative move will leave women and children economically vulnerable and that there is now evidence that *not only* do people not make carefully informed rational choices about whether to marry or not, but also that many who cohabit think that they will be treated as married if there is a dispute over property.

The Argument for Realism

Barlow and Duncan (2000a, 2000b) introduced this argument in a strong critique of New Labour policies concerned to promote the stability of families through marriage; their research, and approach, has now led to a substantial body of literature (Barlow *et al.* 2005;

[15] I am making the presumption that the reference to the Law Commission was not a 'burial' tactic. Given the subsequent timetable adopted by the Law Commission, I think we can deduce that this is a serious programme for consideration of reform. The support of the Law Society for reform as well as, very probably, some acceptance of the 'realism' argument (although I shall argue later in this paper that the probable government 'reading' of the argument is not one which the authors were likely to have intended) suggests, to me, a very real shift in government thinking from a rather crude support of 'marriage' to a more nuanced support of 'stability': more of this below.

Barlow & James 2004; and see Barlow in this volume). Further, and adding a major impetus to their argument, they found in interviews with cohabitants that 56% of those questioned believed that they would receive some protection from family law in the event of property disputes.[16] The impact of this evidence led to the commissioning of a further survey (in part government sponsored) which found that 61% of 'most people' believe that cohabitants can achieve 'common law marriage' status and thus access the benefits of the divorce courts.[17] The cumulative effects of this evidence, referred to also in material produced for the Law Society and Resolution[18] lobbying for reform, has certainly had an impact.

The 'realism' argument also draws strength from being closely tied to a critique of property law: in which the figure of Mrs. Burns is brought into play to emphasise how much cohabiting women risk. As a 2002 Law Society report arguing for reform begins: "It is over 20 years since Mrs. Burns went to court …" (Law Society 2002, p. 5).[19]

The Inadequacy of Property Law

[16] Supported by the Nuffield Foundation.

[17] *Living Together Survey* (2004) commissioned by Advicenow, which is supported by the Department for Constitutional Affairs and Nuffield Foundation, found on www.Advicenow.org.uk. Anne Barlow is now (2006) undertaking further research, funded by Nuffield, to explore the extent to which the 'common law marriage myth' is still pertinent. It is intended that this research be ready for submission to the Law Commission during the consultation period. She is also undertaking research funded by the Department to investigate their campaign to encourage informed choice through the "Living Together" work.

[18] Previously "The Family Law Solicitors Association".

[19] My thanks to Hilary Lim for reminding me of this reference.

A paper on the government sponsored website "One Plus One" is representative of the use of the figure of Mrs. Burns:

> Fewer Rights?
>
> As the case of *Burns v. Burns* (1984) demonstrated 20 years ago, sharing a house, a name and having children together is no guarantee of financial provision for the more vulnerable partner.[20]

The major problem with the evocation of this case in 2006, is that it is no longer representative of the law (as will be discussed below). Why then does it continue to be invoked by campaigners and even appear on a government-sponsored website? I suggest that there are two major reasons for this. Firstly, it stands as a strong warning to women of the dangers of cohabitation without marriage. Secondly, for the campaigners, it not only displays the inadequacies of the law but also invokes the image of the women they are concerned to protect – a woman with children who becomes financially vulnerable because of her role as partner/mother. This is the paradigm figure: the woman in need of legal protection (or perhaps, rather, legal intervention) in the form of extending (aspects of) marriage law beyond the married.

Bringing together the iconic image of Mrs. Burns with the simple argument that the law should be brought into line with what most people already believe *is* the law, has made the reform position very strong. Added to this the sense that the English have fallen behind in contrast to so many other jurisdictions (Barlow & James 2004), and in a jurisdiction

[20] *Who cohabits, when and why?*, *supra*, n. 14.

which has been willing to legislate for same-sex couples but not yet for cohabiting women, what is presented is a case not only for 'justice' but also for 'equality'.[21]

From within this frame, and with a focus on such women as Mrs. Burns, what does the case of Mrs. Oxley suggest?

Oxley v. Hiscock [22]

In 1987, Mrs. Oxley, a divorced woman with children, was encouraged by her partner, Mr. Hiscock, to exercise her 'right to buy' the property she was living in as a social tenant.[23] It was valued for sale at £45,200, from which Mrs. Oxley, based on the number of years she had been a social tenant, received a discount of £20,000. Mr. Hiscock provided the further £25,200 required, which he raised by selling a property he owned. He was generally working abroad, but he lived with her in the house when he was in England.

Given the terms of the 'right to buy' provisions, the house was registered in her name alone. It is clear from the solicitor's letters, that a number of options had been presented to them by the lawyers in order 'to protect the interest' of Mr. Hiscock. The one which was recommended as the simplest was that a charge be taken out on the property to protect what was described as a 'loan' made by Mr. Hiscock to Mrs. Oxley. It was informally agreed that the parties would convey the property into joint names when, in

[21] This is not to argue, of course, that Barlow and James veer towards the 'equality' argument. It is deployed by those who (as in arguments during the passage of the 2004 Act) find the fact that this jurisdiction has legislated for same-sex partners before (as in most other jurisdictions) dealing with the vulnerability of heterosexual women as evidence of 'wrong priorities'.

[22] This summary of the facts is drawn from the judgment in the Court of Appeal.

[23] Under Part V of the Housing Act 1985.

1990, the three year limitation period was over.[24] In fact, rather than transfer the property into joint names, in 1991 it was sold for £61,500.

Mr. Hiscock having returned permanently to England, the next purchase was a property, costing £127,000, in which they set up home together. It was purchased with the monies raised from the sale of the first house, plus £35,000 from Mr. Hiscock with the balance of £30,000 being raised as a mortgage loan. This time the property was purchased in his name alone.

It is (again) clear from the solicitor's correspondence that the lawyer was not happy that the property be put into Mr. Hiscock's name with no legal protection for Mrs. Oxley's investment. Again a number of solutions were suggested and the lawyer pressed Mrs. Oxley for a decision. She finally responded, writing:

> Your comments on any claim I might have … have been noted, and I appreciate your concern. However, I am quite satisfied with the present arrangements, and feel I know Mr. Hiscock well enough not to need written protection in this matter (p. 707).

Although they did not open a joint bank account, they pooled resources to meet the outgoings, probably including the mortgage repayments, although the details are not clear and we have no evidence on income, etc. They both worked on home improvements and decoration (from the evidence given, their roles in relation to this work sound classically gendered). In 1999 Mr. Hiscock took early retirement and the mortgage debt was repaid.

[24] Property bought under this scheme cannot be sold within three years without repayment of an element of the subsidy: Housing Act 1985, s.155, as amended by Housing and Planning Act 1986, s.2(3).

In 2001 the relationship ended and the house was sold for £232,000. One property was then bought for Mrs. Oxley, costing £73,000 of which £33,000 was provided from the sale of the house and a £40,000 mortgage loan, in her name, made up the balance.

Mr. Hiscock also gave her £5,000, claimed to have already given her c. £3,200 for renovation work on the new house and admitted to still owing her c. £1,000. In other words, in making these calculations, he treated her financial contribution to the property as a loan. He retained the balance from the sale and bought a property for himself for £122,000.

We have no evidence from the court of how discussions surrounding these arrangements proceeded, but we can surmise that Mrs. Oxley felt that she was entitled to more as, in late 2002, she began legal proceedings arguing that the beneficial interest in the house had been held equally and that she was entitled to a further £72,000.

In 2003 she was awarded that amount by the trial judge (a woman), who believed her evidence rather than that of Mr. Hiscock. When asked, during court proceedings, why the property had been purchased in Mr. Hiscock's name alone, there was some dispute between the parties as to whether they had intended to be joint purchasers but Mrs. Oxley contended that they had intended joint ownership and that she had been persuaded by Mr. Hiscock that, if the property had been purchased in joint names, her ex-husband might have a claim to a portion of it if she died. She also gave evidence that they had planned to marry, but that Mr. Hiscock had decided against marriage on the grounds that he had found that it would be fiscally disadvantageous.

Mr. Hiscock appealed against the judgment of the court of first instance on a point of law: whether the trial judge had been right in her use of authority to allow for a range of discretion via imputing intention to the parties under a constructive trusts formula,[25] or

[25] *Midland Bank plc v. Cooke* [1995] 4 All E.R. 562.

whether she should have treated the arrangement under a stricter formula based on a resulting trusts model.[26] I shall return to this appeal and the legal arguments raised later. I want to use *Oxley* firstly, to consider the social and emotional narratives evidenced in this case and to argue that they raise some interesting issues for us in discussing the reform of property redistribution at the end of a relationship.

MRS. OXLEY: MRS. BURNS

I chose to focus on *Oxley* not only because of its legal importance, but because it offers a very different scenario from the case used as the paradigm exemplifier of the need for reform. Mrs. Burns had been in a long-term relationship, with children. Not only was she economically disadvantaged by her role as mother, but she had also clearly seen herself as, and acted as, an economically dependent 'wife' who expected to be supported by her partner. Mrs. Oxley presents a rather different figure of cohabitant. Although her relationship was also a lengthy one (14 years), she was a woman of 34 at the beginning of the relationship, had already been married and already had (three) children. There are three significant aspects in this profile: her previous marriage, the fact that she brought a property interest into the partnership and that her children were of her marriage, not of her relationship with Hiscock. All these aspects merit some consideration: they do not 'fit' the Burns profile but they do exemplify important trends in contemporary cohabitation patterns. In other words, they can be used to suggest a rather more complex 'take' on realism than a picture which continues to be read through the lens (the figure) of Mrs. Burns.

[26] *Spingette v. Defoe* [1992] 2 F.L.R. 388.

Later Cohabitations

Not only is there a dramatic increase in the numbers of cohabitants but also, in projections forward, this trend will have a significant impact in terms of age. The proportion of women over 45 living with a partner is expected to reach 36% by 2031. However, these projections are based primarily on the present cohabiting population ageing and the Office for National Statistics reports that it does not have evidence to presume that it will be increased by women entering into cohabitation following, for instance, the breakdown of a marriage (*Population Trends* 2005, pp. 77-83). Despite this, I want to suggest that more research needs to be undertaken on the pattern of divorced or separated women cohabiting in later relationships: anecdotal evidence and some case material suggests that this is a significant trend, albeit that it might be one which is being 'played out' in a generation of women who in their youth chose marriage, unlike their daughters.

The figure of the cohabitant entering into cohabitation later in life raises some interesting questions. Whilst it is likely that she has suffered the economic differential within the labour market of being both a woman, once-a-wife and a mother – she is not a figure who, within this particular relationship, has overtly suffered the major factors which cause economic vulnerability from within the relationship itself.

Property (and Children)

It is interesting the number of cases recorded in court decisions on property disputes which involve women accessing property rights through 'the right to buy' but requiring the input

of capital or income from another source in order to be able to exercise that right. By combining these factors, women in social housing have been able to become home-owners and a number of men have been able to share in the market profits released by privatisation. I am not aware of any academic work undertaken on this, but I am aware, anecdotally, of women in this position needing to seek financial help from partners or relatives in order to access this resource and of it (often) being seen as a 'family' investment in which the details of benefit are blurred between discussions of the home as a place in which to live, a resource which could be sold and the monies used to get 'into better housing' and as an inheritance for the children. These discussions rarely get anywhere near legal advice – partly because the house must be bought in the woman's name anyway.

In the familial situation (particularly in a class setting in which members of the family are not used to taking legal advice or thinking in legal terms) these arrangements are not only informal but also, in my experience, often inchoate (in the sense that such discussions or agreements are seen as something which can be postponed, the important thing is to access the resource). This, I think, is also true of many sexual partnerships: but the crucial element in these is the extent to which one party might bring a more 'commercial' (and individualistic) perspective to the purchase.

In the case of Mrs. Oxley, it is clear that they both thought it was a good idea to benefit from such a purchase: Mr. Hiscock seeing it as a good investment and Mrs. Oxley as the only way in which she could access it. But if Mr. Hiscock viewed the purchase in commercial terms, to what extent did Mrs. Oxley view the same purchase from a much more familial perspective?

Research undertaken by Jan Pahl (2000a, 2000b)[27] suggests that couples, including married couples, are increasingly keeping their financial resources as separate 'pockets' of money in recognition that the life cycle of relationships is such that they are likely to move through them, rather than remain in one. However, her work does not take into account the issue of house purchase. It is evident that, with the rise in property prices, few individuals can now afford to purchase property on their own. Accessing the property market therefore requires, for the majority of couples, some form of pooling: the question is how they view that aspect of pooling. Each might, as Mrs. Oxley and Mr. Hiscock did, bring capital into the purchasing of property of differential amounts and will also have to decide how to finance a mortgage from their earnings. Women may well, not only because of domestic obligations but also because of labour market inequalities, be earning a lower income than male partners. If we extended the implications of Jan Pahl's research, the critical question is the extent to which parties have addressed their minds to the respective proportions they would each hold in property they have jointly, but possibly disproportionately, acquired. It is here that the figure of Mrs. Oxley represents an interesting issue. It is not a question of economic vulnerability arising from the relationship (as in the case of Mrs. Burns) but rather her presumption that the proportions held in the property would be equal. Was she bringing to her understanding of 'how' the property was to be shared, a presumption that married couples would share equally and that, as they had discussed marriage and as they had also discussed sharing legal title, it would follow that the property would be jointly held?[28] Was she, essentially, presuming a familial model of ownership, that is of equal

[27] Jan Pahl's work is primarily focused on gendered differences in expenditure, but she has also found this distinctive shift away from the pooling of resources. Many thanks to Jan Pahl for having discussions with Simone Wong and myself on this research.

[28] I am not using 'jointly' here to suggest a joint tenancy as opposed to a tenancy in common.

sharing because they were in a cohabiting relationship which could have been a marriage? I will return to this point later.

Conversely, I would suggest that there are an increasing number of women who, having achieved some financial resources before their current cohabitation, often want to protect those resources not only for themselves but even more so, for children from a previous relationship. A resource that divorced women may bring into a later relationship is the matrimonial home, especially if they had children in the marital relationship. In these circumstances, again anecdotally but I think it links in with Jan Pahl's evidence, women are often concerned, as are their children if old enough, to 'protect' their children's inheritance. These women, in my experience, will often cohabit and choose not to marry, expressing such a choice as based on their need to protect their only capital asset.

I suggest that the financial position women are in at the beginning of a new relationship is crucial in determining their attitude towards the sharing of property, as well as the decision to marry, or not, when it is available to them. The factors of age, most especially when they have already been in a long-term relationship, and whether they have children, are still of child bearing years or have that behind them, are also critical.

We need, then, to distinguish between the different circumstances in which women enter into cohabitation and not only deal with the paradigm figure of the younger woman who is made economically vulnerable by factors arising from within the relationship itself. What Mrs. Oxley represents is a woman whose vulnerability arises from the fact that she believed that the resources within the relationship would be pooled (which also means that she had an expectation that she would in part benefit from sharing the wealth of Mr. Hiscock). Mrs. Oxley, standing in strong contrast to Mrs. Burns, is not a figure who enters into a relationship with no economic resources or who becomes economically vulnerable because of childbirth and childcare within that relationship, but rather is to be thought of as

a woman who made a presumption about the sharing of assets which was not shared by her partner.

Drawing from the issues raised by the case of Mrs. Oxley, I think that three factors suggest that the continued use of the figure of Mrs. Burns distort issues raised by contemporary cohabitation patterns. The first is that the figure of Mrs. Burns is used to present a pattern linking cohabitation, motherhood and economic vulnerability in a way which suggests that not only is this figure *the* reason for extending family law (the person most in need of protection) but also, by implication, that the figure is representative of female cohabitants. The need for intervention is then self-evident: but what this ignores is both the complexity of the contemporary and emerging patterns of cohabitation and the more complex issues raised in asking *why* such women as Mrs. Oxley should be able to appeal to family law for protection, especially when (as in her case) they have not used the protections available to them in property law which have been drawn to their attention. Secondly, to argue the need for intervention based on the figure of Mrs. Burns is to ignore (or at least not deal with) the cases of women who are not the economically vulnerable parties and who, having achieved some capital, are now concerned to protect it. Finally, and very pragmatically, the circumstances of the property market now make it much less likely that many couples can afford to buy property without some form of joint financial investment so that the figure of the non-contributing Mrs. Burns, in this context, presents a rather out of date picture. However, Mrs. Oxley raises the issue of how to deal with circumstances which lead to property being registered in one name alone: the question then is whether this, of itself, requires the intervention of family law (especially when the protection of property law has been ignored or refused).[29]

[29] Of course (as argued below) this may seem harsh when placed within the context of emotional vulnerability.

Mrs. Oxley represents rather different policy issues from those raised by the figure of Mrs. Burns and Mrs. Oxley is only one example (only one 'type')[30] of the more plural and complex pattern of contemporary cohabitation. Why then continue to focus on Mrs. Burns? The answer is obvious: Mrs. Burns exemplifies the victim who has lost everything through her commitment to the man who was the father of her children. She is the iconic figure crying out for the protection of law. Mrs. Oxley is a rather more problematic figure to focus on. The issue raised by Mrs. Oxley is the extent to which the law can, or should, focus on her presumption that the relationship gave rise to a pooling of assets. In this sense Mrs. Oxley does present a figure of a vulnerable woman, in that she invested her financial resources in her new relationship because she 'trusted her man'.

MRS. OXLEY: OLDER AND WISER

Mrs. Oxley answered the concerned lawyer with the statement "[I] feel I know Mr. Hiscock well enough not to need written legal protection" (p. 707). In 2004 (and by then living with another partner) Claire Dyer in *The Guardian* (8 June 2004) reported her as saying:

> I really would not want anyone else to go through what I've gone through. Cohabiting couples should have a written agreement expressing their interests in the house. Otherwise one half can lose everything.

[30] Consider also, for instance, the figure of the career woman with an older (and wealthier) lover in *Cox v. Jones* [2004] 3 F.C.R. 693. My point here is that there are many different 'types' of cohabitants and that in looking more closely at them, different social policy issues are raised. Taking the figure of Mrs. Oxley raises one set of issues, which are explored here, but using her as one example should also be read as exemplifying the plural nature of cohabitation – it is not only her 'type' which challenges the figure of Mrs. Burns, she is but one example of the many very different figures which are covered by the term 'cohabitant'.

Mrs. Oxley, returns us to the issue of vulnerability, but emotional rather than economic vulnerability and perhaps, particularly, the emotional vulnerability of women made single in later life through divorce or separation.

When I considered familial patterns in relation to acquiring property through the right to buy, I did not, at that point, go on to suggest that, within this setting, women may be subject to a complex pattern of emotional (as well as economic) pressures. Anne Barlow has made the point, very succinctly, that the role of family law is to act in the sphere in which emotional ties are the fulcrum for actions, or lack of them, and decision-making, or lack of it.[31] Familial patterns although often riven with power do however tend to subsist, sexual partnerships are more vulnerable. It is possible, given the facts as we have them, that Mr. Hiscock sold his own home to move in with Mrs. Oxley primarily because, in so doing, he released the capital which made the purchase of her home possible and he saw it as a good capital investment. It is equally possible that Mrs. Oxley wanted him to move in anyway and was glad that there was now a good reason to do so. How are we to unravel the extent to which either party saw it as a means to a particular end? They certainly moved on to live together in another home – but am I alone in thinking that it is likely that Mrs. Oxley invested much more emotionally in this relationship than he did? The evidence, I would suggest, is found in such factors as when, if we are to believe Mrs. Oxley, having promised to marry her he then used his 'taxation' argument as a reason not to do so.

I think that here we have the crux of two related issues: emotional vulnerability and the promise of marriage. Emotional vulnerability and how this plays out in terms of what is

[31] This argument is a general theme in family law literature, but I cite Anne Barlow here because of the particular elegance and power she gave to this argument in a presentation addressing the issues at an E.S.R.C. seminar held at Leeds in June 2005.

spoken and when, and what remains silent, is something I have written about before (Bottomley 1994). I argued then that women and men deploy language, conversations and silences differently – and that this leaves women crucially disadvantaged in an area of law which requires express discussions on express issues. Women who do not entirely trust the commitment of their man, often allow themselves to retreat from confronting crucial issues because they fear the loss (I mean this term very broadly) of that man if he is provoked by such a confrontation. As one judge said in a previous case: "she knew her man well enough" not to press him.[32] Women will too often hope for the best, hope that he sees things the way they do or that he will come round over time. I think that it is very likely that Mrs. Oxley, having invested emotionally in the relationship, would be unwilling to face difficult facts. She wanted to trust him and, in the end, he abused this trust: not necessarily by consciously tricking her (although there is some suggestion that he probably did) but by, in his own mind, quite clearly keeping his own understanding of his separate economic interests.

It is clear that she thought of the property as 'jointly owned', even the first house. The evidence is there in the reported facts, and fits the profile of a woman who hoped that their relationship was one of a joint venture, a pooling of assets, and that therefore holding property in one name or another was simply a question of convenience. Conversely, Mr. Hiscock, from the beginning, made sure that his economic investment was secure. He was clear about *his* investment, and he also seems to have been very controlling: he gave her a reason for not marrying and he gave her a reason for putting the second house in his name. I think I would not be alone in thinking, also, that his hand was behind the letter written to the solicitor rejecting the suggestion that her share in the property be protected: "I feel … I

[32] *Per* Waite J., *Hammond v. Mitchell* [1991] 1 W.L.R. 1127, at p.1132, in relation to a promise to marry. See Bottomley (1998).

know Mr. Hiscock well enough not to need … legal protection". "Feel" certainly, "know well enough", in what sense I wonder? Mrs. Oxley, through her brave and foolish gesture of not formalising her affairs, displayed her emotional vulnerability and her susceptibility to his controlling behaviour. Emotional vulnerability is linked, here, to the question of marriage. Mrs. Oxley saw, I think, the promise of marriage as exemplifying her understanding of their commitment to each other and it was this which led her to risk trusting him and to presume that everything they each 'owned' was, in practice, joint assets. In other words, she was using the promise of marriage to signal a form of partnership which she understood to be one of merger and commitment – despite the fact that they did not actually marry because he found a reason not to. Here marriage is being used as a sign of commitment to a particular type of partnership.

Are women like Mrs. Oxley, who are or 'feel' married, more likely to allow themselves to become economically vulnerable (that is not to protect their separate interests) than those who are not married or do not think of themselves as married? If this is the case, then Mrs. Oxley's evidence is even more interesting: the suggestion being that she only allowed this to happen *because* she thought of herself as part of a 'marriage-like relationship'. Despite Jan Pahl's evidence that fewer couples, whether married or not, now pool their resources, it might well be that older women (that is women of an older generation) still regard such pooling as the mark and product of commitment. Further, as Mr. Hiscock clearly had greater financial resources, Mrs. Oxley may well have thought that 'commitment' would give her access to economic resources she would not have had if she had remained single. She may have made herself vulnerable, but she may have calculated that it was worth it if she continued to benefit economically from the relationship.

There are three questions to be asked here. Did Mrs. Oxley allow herself to presume a pooling of assets because she thought of herself as a kind-of-married woman who

therefore could, or should, be able to trust her man? Was this why she did not confront Mr. Hiscock, or protect her own financial position? Is she (along with Mrs. Burns) someone we believe needs the protection of family law?

Interestingly, given the data collected by Barlow *et al.* (2005) that many women believe that they will be treated in law as 'common law wives', there is no evidence given in the case that Mrs. Oxley thought in quite these terms. However, she is reported as saying, after the case, that:

> People have a misapprehension that after x number of months or a number of years you are a common-law wife. It doesn't exist. The law doesn't recognise that. But as much as a married person, you are putting in a huge investment for the future and it can be wiped out. People cohabiting should have something in writing (Claire Dyer, *The Guardian*, 8 June 2004).

This may be construed as suggesting that she did think that she might have such rights and that she was only disabused when having to take the action she did. However, the muddle surrounding the idea of 'common law marriage' is reflected in the way in which her case was reported in the popular press. The *Daily Mail* (25 May 2004), drawing on an interview with Mrs. Oxley, with pictures, used the headline: "My victory for the common-law wives left with nothing". The *Dartford Times* (27 May 2004) also used the term in its headline: "Common-law wife sets legal history over house". Both could be read as trying to establish that 'common law wives' have no particular status in law, but equally, at the same time, the deployment of the term in such headlines keeps it in common currency, as if it does have some kind of meaning, if only to indicate a cohabiting relationship. Even *The Guardian* (8 June 2004) covered the case from the same angle, if more explicitly making the legal point: "Many people believe that living with a partner for several years entitles them to the same

rights as marriage. But as Claire Dyer reports, there is no such thing as a 'common-law wife'". (True to form, Claire Dyer used the case of Mrs. Burns to exemplify the legal vulnerability of cohabiting women.)

The data collected by Barlow and Duncan (2000a, 2000b) suggests that women such as Mrs. Oxley might well think that they would, in some sense, be recognised and protected in law as 'common-law wives' and hence their argument that not to bring the law into line with this belief would be to bring the law into disrepute (Barlow *et al.* 2005). It seems obvious to lawyers that the protection offered is access to the divorce courts and property redistribution orders. I wonder, however, if there is not a more fundamental problem here. In my experience, many married women think that the *fact* of marriage gives them equal rights to property. For many, this is confirmed through a muddle in their minds between marriage status and the process many of them have experienced of buying property in joint names (especially when not only legal title but also the equitable interest is held as joint tenants).[33] It is difficult to explain to some married women that the fact of marriage has not been the determining (legal) factor in whether property is jointly owned or not. By extension, I suggest that women like Mrs. Oxley, if they think of themselves as 'common law wives', might not be thinking about access to the divorce courts, but rather sharing the common misapprehension of many married women that they will have a right to joint ownership of property.[34] One of the elements of the realism argument, for which I have a great deal of sympathy, is that too many cohabitants do not make informed legal choices and that they therefore require the protection of family law. My concern is that in

[33] See also Mr. Hammond in *Hammond v. Mitchell* (Bottomley 1998).

[34] The case of Mrs. Cooke (*Midland Bank v. Cooke*) is instructive here: she took steps to have legal title to the home transferred from the single name of her husband into their joint names, only to find out later that this was not sufficient to deal with the sharing of the beneficial interest (Bottomley 1998).

relation to purchasing the family home, people in general, including the married, are muddled about the law. In this context, allowing access to the divorce courts for property redistribution is not the answer. What is worrying is the possibility that any extension of family law in these circumstances might well lead such women as Mrs. Oxley to take even fewer steps to protect their position. As with many of their married sisters, simple steps taken in property law could well have provided them with the legal form (joint ownership) which they wanted: presuming, of course, that their partners were agreeable.[35]

In *Oxley* the lawyer, following professional guidelines, properly advised protection for the party not holding legal title. However, and given that we do not know the full discussions, what is worrying is that the range of options offered covered very different scenarios: was the money placed in either property a contribution or a loan? Did the parties understand the difference? Mrs. Oxley seems to have thought of the monies on all occasions as contributions (a more familial model), it suited Mr. Hiscock to argue that they were loans (a more commercial model). These sharp distinctions in law might feed into differences in people's minds facilitated by the simple fact that both of them, for different reasons, did not overtly address what they were actually doing until things went wrong. The factor of marriage *per se* would not have made a difference, in law, to this scenario. It *might* have made a difference in the ways in which the lawyer advised them, especially in relation to the second property. But if Mr. Hiscock had remained, even if married, concerned to protect his own interests, then he would still have had the legal capacity to

[35] It should be remembered that many cases involve actions in relation to third parties rather than between the partners (as in *Midland Bank v. Cooke*) and that the issue of protection of property interests and claims to priority are crucial in these cases.

have done so. It is not marriage, but access to the divorce courts which is on offer in family law.[36]

What would giving women such as Mrs. Oxley access to the divorce courts and property orders do for her? At best, it would give her a chance to bring into account her presumption that the assets were jointly owned, evidence that she had lost her expectation of a comfortable lifestyle in the future and, possibly, a concern with her 'future needs'. But how true is it that property law fails such people as her in not being able to address these issues?

THE LEGAL IMPLICATIONS OF *OXLEY v. HISCOCK*

Early press coverage generally reported a victory for Mrs. Oxley, which in a sense it was in that the Court of Appeal did not agree with the argument, put for Mr. Hiscock, that the division of the assets should be based on direct financial contributions. Others viewed the case more negatively, in that the court did not support the judge at first instance and uphold the award of 50%, but reduced it to 40%. Unpacking the legal implications of the judgment requires placing the decision within the context of the development of the law in this area.

[36] This would, of course, be radically changed if a move was made to push for the introduction of community of property in this country: such a possibility is beginning to emerge in Anne Barlow's work (Barlow 2003), and see her current research, "Community of Property: A Regime for England and Wales?" being undertaken with Elizabeth Smith (funded by Nuffield Foundation).

Two aspects to the present law need to be distinguished: the first is finding the existence of a beneficial interest and the second is the process by which the proportion of that interest is determined.

Finding a beneficial interest has, since *Lloyds Bank plc v. Rosset* [1991] 1 A.C. 107, been focused on whether or not the parties discussed sharing the interest ('common intention') and, as a consequence of these discussions, the claimant acted to her detriment. In the absence of such express discussions, the courts accept direct financial contributions to the purchase of the property as evidence of an implied agreement. This focus on intention evidenced through express discussions or direct financial contributions, has been the object of sustained criticism by commentators who have argued that the first is too unlikely in most domestic relationships and the second too unfair to economically disadvantaged women (see e.g. Bottomley 1998; Wong 1998). However, later cases have somewhat mitigated these concerns by proving to be more flexible in their approach to finding common intention (Bottomley 2001).

In relation to the quantification of the beneficial interest, the primary difficulty has been that even when there is evidence of a common intention to share, there is often no direct evidence of an agreement as to proportions. In the years after *Rosset*, a line of cases developed which, under the fiction of finding a 'common intention' as to proportions,[37] displayed a willingness to look at all the relevant factors, even when dealing with cases in which the finding of the beneficial interest was based on direct financial contributions. In *Midland Bank v. Cooke* [1995] 4 All E.R. 562, this included the length of the relationship, that they had shown commitment to the relationship by marrying, that the parties' conduct evidenced a sharing of both economic resources and risks, and that childcare had prevented

[37] That is to say, what the courts thought the parties would have (should have?) agreed if they had addressed the question.

the woman from substantially contributing to the purchase of the home. The flexible use of 'relevant factors' in pursuing 'common intention', in particular in cases founded on direct financial contributions, gave rise to concerns from critics who argued that the law was becoming too discretionary and operating a form of re-distribution behind the fiction of finding 'common intention' (see e.g. O'Hagan 1997). These commentators argued for a return to a sharp distinction between cases in which the beneficial interest arose from express discussions and those cases based on direct financial contributions, which, they argued should be limited to awarding the financial proportion invested in the property (in other words a return to treating them as resulting trusts). This distinction lay behind the case put for Mr. Hiscock, in which it was argued that, as evidence of the beneficial interest had been based on the financial contributions made by Mrs. Oxley, the court should only award her the proportion of money she had contributed. They used in support of this argument the Court of Appeal decision in *Springette v. Defoe* [1992] 2 F.L.R. 388, which predates the 1995 decision of *Midland Bank v. Cooke*. The court rejected this argument but, in so doing, did not return to the line of reasoning established in *Cooke*. The preference of the Court of Appeal was to approach a decision as to proportions not on 'the fiction of common intention' but rather on the basis of 'fairness' and, in so doing, they adopted 'estoppel' principles as the correct approach for the courts to take.

In taking this position, the court emphasised the extent to which the jurisprudence of 'common intention constructive trust' cases has become closely tied to that of estoppel. Estoppel, must be understood as two distinctive phases. The first establishes the case for legal intervention (that there has been a representation made to the claimant, in reliance upon which the claimant acted to her detriment) and the second is the process by which the court decides what it would be 'fair' to award, which is not entirely discretionary but is

based on taking into account the belief of the claimant, the extent of the detriment and other relevant factors.[38]

In the case of *Oxley v. Hiscock*, the judge awarded 40% based on the respective initial contributions of the parties (which would have given Mrs. Oxley c. 28%) plus the fact that they had pooled resources to pay for household expenses which, in the absence of contrary evidence, he presumed to have provided equal contributions to the mortgage repayments. It could certainly be argued that this still gave too much weight to finances and that Mrs. Oxley was lucky in that she had had monies to contribute. It could also be argued that the approach of the trial judge was fairer to Mrs. Oxley, in that she emphasised Mrs. Oxley's belief that she was an equal owner in the property. However, none of these factors should be taken as suggesting, necessarily, that this shift towards estoppel signals a move away from being able to use the width of 'relevant' factors developed through *Cooke* and a return to privileging financial contributions.[39]

It remains to be seen whether the new approach of the Court of Appeal will prove to be more limiting and operate against those who lack financial resources. I do think that there was some concern that lower courts were acting in a too discretionary manner and that the Court of Appeal were concerned to return to a more 'principled approach'. How the new jurisprudence develops will, however, depend in great part on not only the type of cases which will come before the courts, but also the extent to which the courts might begin to distinguish key elements in these case which could result to a more nuanced account of

[38] See guidance given in *Yaxley v. Gotts* [2000] Ch. 102*, Gillett v. Holt* [2001] Ch. 210 and *Jennings v. Rice* [2003] 1 P. & C. R. 100. An extensive discussion is found in Bright & McFarlane (2005).

[39] The argument that it is more restrictive than the previous line of cases has been put orally by a number of feminists in workshops and seminars I have attended, which is why I addressed the issue in these terms in this paper.

'fairness'. For instance, how might the courts begin to balance the issue of expectation as opposed to a focus on the extent of the detriment (Gray & Gray 2005; Bright & McFarlane 2005; Smith 2006)? Answers to these kinds of questions will be teased out not in an abstract account of the jurisprudence but rather within the specific context in which the cases occur. But for instance: might it develop that cases which suggest a more 'familial' context will result in the courts looking more closely at expectation rather than an account of detriment?

The award in *Oxley v. Hiscock* should be seen as decided on a particular set of facts, rather than as operating as an indication of the approach that is likely to be taken in all cohabitation cases. For instance, the age of the parties (which resulted in 'later' cohabitation without children), the fact that they both brought some financial resources into the purchase of the properties and their use of a formula which spoke of 'loans', might be said to contribute to a scenario of a more 'commercial' rather than 'familial' type. Such scenarios might well lead to the court focusing on detriment rather than expectation.[40] However, the key is the principle stated by Chadwick L.J. that:

> …each is entitled to the share which the court thinks fair having regard to the whole course of dealings between them in relation to the property (p. 148).

Oxley v. Hiscock is regarded by some commentators as a positive and progressive contribution to developing principles in this area of law whilst keeping open a flexible approach (see e.g. Gray & Gray 2005, p. 931) and it may be that the concern that some have expressed that, whilst estoppel does somewhat mitigate the rigours of the more

[40] See also *Cox v. Jones*.

conventional trusts approach it is still too limited when compared to family law (e.g. Miles 2003), is not now so pertinent.

There is another aspect in which opening up trusts to estoppel may help cohabitants when presenting a claim and that is in the raising of the beneficial interest. *Oxley v. Hiscock* returns us to look more closely at the ways in which the jurisprudence of estoppel may enhance the possibilities of a more flexible reading of *Rosset*. Waite J. in *Hammond v. Mitchell* [1991] 1 W.L.R. 1127 gives an example of the potential in his astute use of *Grant v. Edwards* [1986] 1 Ch. 638 to bring in 'expectation' when dealing with finding 'common intention'. Given the frequent problem of finding express discussions as required by *Rosset*, a more direct use of estoppel when seeking a beneficial interest might be helped by references to estoppel cases in which express discussions are not always needed. It may be sufficient that the party against whom the claim is being made should 'reasonably have known' that the claimant would not have acted in the way they did, but for the fact that they honestly believed that they had an interest in the property (and they were not disabused).[41]

[41] Some commentators, including myself, have been concerned that an estoppel approach moves towards litigation based on a 'claim' rather than a 'right' and that is too open to the discretion of the court in terms of the award given (Bottomley 1998, 2001). It is now clear that common intention constructive trusts and estoppel are so jurisprudentially close that it is impossible to attempt to hold to a sharp distinction between the two. Further, my arguments here suggest that the jurisprudence of estoppel may well have a beneficial effect in mitigating the limitations of *Rosset.* Moreover, our concern that estoppel is remedy-based and may not be protected against a third party is now finally answered by s.116 of the Land Registration Act 2002 (and see Bright & McFarlane 2005). In my opinion, in domestic property cases, the close tie between common intention constructive trusts and estoppel holds the virtue of keeping the jurisprudence closely tied to the intentions of the parties, with a now far better 'fallback' position of whether an expectation was raised upon which the claimant acted to her detriment.

Would such an approach have helped Mrs. Burns? It is interesting to pose this question as the first domestic property case to, in part, use estoppel principles did so to try and avoid the limitations of the *Burns v. Burns* judgment, which rested entirely on the lack of direct financial contributions.[42] The difficulty, however, in all domestic partnership cases is proving, under either an estoppel or trusts approach, that the claimant acted because of her belief that she had a property interest, rather than because of the relationship itself.[43] However, the flexibility of estoppel remedies means that, having raised the equity, the court could find that it is met by a lesser interest than a beneficial interest: for instance, a compensation award or an occupation right. Although this does open us to the problems of a remedial approach (Bottomley 2001), it has the benefits of not having to remain focused on issues of ownership as the only fulcrum for accessing remedies which may protect occupation or provide some capital (Dewar 1998). Although trusts claims arise in relation to specific property rather than simply against the wealth of the partner, estoppel can operate to open this to some extent and look at wealth more generally if, for instance, the claimant was led to believe that she would be 'looked after' by the transfer of property to her at some point, without the actual property being specified.[44] Further, 'expectation' can be used, in part, to address future needs by emphasising what has been lost as a result of the claimant acting to her detriment.

If Mrs. Burns is, so to speak, still not satisfied by property law, she would now be able to seek an award in family law through an application to the court on behalf of her children, which could include a capital payment.[45] Therefore, what is clear is that the

[42] *Grant v. Edwards*.

[43] Although see the flexible attitude with which Waite J. approaches this in *Hammond v. Mitchell*.

[44] *Jennings v. Rice*.

[45] Family Law Reform Act 1987, s.12.

continual references to Mrs. Burn's plight in the courts does not take into account subsequent changes in the law and does not allow us really to judge how far she is a good representative of what is at stake.

REASSESSING THE CASE FOR REFORM

There are, of course, other aspects to the work being carried out by the Law Commission beyond the issue of property adjustment after separation, the important issues of intestate succession and taxation among them, but it is the issue of property readjustment that has continually been at the forefront of the demand for reform.[46]

The case for realism is built on the simple fact that fewer couples are choosing to marry. Placed against initial government policy to encourage marriage as the more stable domestic unit, the problem for government is that reform may well encourage the trend away from marriage. Certainly, concerns with social stability will be raised if and when proposals are put to parliament, along with the concerns of those who wish to protect marriage for religious reasons. But as the case for realism has been put, and put forcefully, government attitudes have shifted and it is interesting to consider why. It could, of course, be simply that they are persuaded by the arguments. It could also be that they are concerned that legal challenges may be mounted on the basis of equality if no moves are made. It could also be that they are concerned not to be seen as having been willing to legislate for same-sex couples and, at the same time, not meet the demand that vulnerable women

[46] Many of these matters could, of course, be dealt with by amending relevant legislation to include cohabitants.

should be protected in law (especially when they believe that they already are). All these aspects could well have played a part in the shift in government thinking. But I would also suggest that there could be another factor in play: an argument that by bringing cohabitants into family law, a modified marriage law regime, law and social policy might be able to find ways of stabilising domestic units through a reinforcement of family values carried through the application of a marriage (like) model.[47] What is seen by reformers as protection for women is, at the very same time, an extension of the regulation of domestic units and a pushing of such units into a model based on not only the rights but also the obligations and responsibilities of marriage.[48]

The benevolent model of extending the protections of family law to cohabitants is premised on an assumption that not only does property law fail women, but that family law does not. What this assumes is that we have to accept that marriage is a model worth extending to cohabitants: what we, as feminists, have to keep open is the question of whether the benefits of such a move outweigh the disadvantages.

Within this paper I have kept referring to 'marriage' law rather than simply 'family' law, in order to emphasise that that is what, I think, is at present being argued for (even given the fact that it will only be certain indices of the legal status of marriage which will be given to cohabitants). However, the question can be raised as to whether by continuing to extend 'marriage' (that is elements of marriage law to civil partnerships and then to all cohabitants) all relationships are subsumed into a marriage model or whether such

[47] In relation to this, see the economic modelling which addresses this social policy aim (e.g. Dnes 2004 ; Dnes & Rowthorn 2000, 2002).

[48] I mean this in social policy terms rather than legal ones.

extensions (particularly if they move beyond sexual partners)[49] might 'stretch' marriage to a point at which it becomes only one aspect of a law of domestic relations (Bottomley & Wong 2006).

Essentially, I think that we need to be much more careful with the terms within which the argument for realism has been put. How 'realistic' is it to continually refer to Mrs. Burns? How careful are we being in considering the different trends in cohabitation and the very much more plural circumstances within which women place or find themselves as cohabitants? From the best of all possible motives (protection), is the case for realism feeding not only a rather patronising picture of an ill informed and economically/emotionally vulnerable woman, but also feeding into a social policy imperative to draw more domestic units into patterns of familial regulation which are aimed not so much at protection of the individual but rather at stabilisation of the unit? Is it really true that too many women now suffer by not being able to access financial orders at the end of the relationship? To what extent does family law really offer protection for economically or emotionally vulnerable women in a way which property law simply cannot? Seeking answers to these questions should surely be rather more cautious and nuanced than the arguments which, to date, are being presented by those arguing the case for reform. Even given the fact that, initially at least, a robust campaign and critique had to be presented as a counterweight to the government investment in marriage, I think it would be very problematic, for feminists, to continue to present a case which *presumes* that cohabiting women are failed by property law and need the benefits of family law.

What is clear is that reform which extends crucial aspects of marriage law will lessen our choices about how we organise our domestic lives. It has been argued by the

[49] In extending the law to cover cohabitants of same-sex as well as opposite-sex partners, the issue of the centrality of sexual relations will, necessarily, come much more into focus.

reformers, and it is a strong argument, that the evidence shows that too many of us do not make informed choices and I have argued in this paper that many of us are too often vulnerable when choices have to, or should, be made in relation to sexual partners. It may be, in this light, that bringing in reform will address these issues, especially if it includes the proposal that couples should be able to 'opt-out' of the regime.[50] But I then return to my argument that, on the specific issue of property ownership, reform can do no more than allow for property redistribution and that, at best, it is only specific categories of economically vulnerable women (probably with children) who can benefit from this. In relation to these cases, I agree with the critics of property law that 'future needs' can only be adequately and directly addressed within a family law approach (Miles 2003), but it could be argued that most of these cases could be covered by an extension of the remedies available via claims made on behalf of children. From a feminist perspective: is there really any other group of cohabiting women who we think would and should benefit from access to the family law courts? Further, whilst I have never thought that property law can or should be a vehicle for property redistribution, I do not believe that it continues to be as harsh a regime as the critics suggest. And finally, I am concerned that the case for realism addresses 'difficult' cases and the proportion of people who believe that 'common law marriage' has a status in law, without giving adequate consideration to a rather more general but more progressive point: if nearly 40% of people know that 'common law

[50] See Wong (2006) in this issue. It is interesting to place the issue of opt-out within the context of, first, the 1998 Green Paper (*supra*, n. 13) interest in using pre-nuptial contracts to help focus the parties minds on property arrangements and, second, the Nuffield research project (*supra*, n. 36) being undertaken by Anne Barlow and Elizabeth Smith on the issue of introducing community of property in the U.K. for married couples. If the introduction of community of property were to be recommended, then: (a) would it extend to cohabitants; and (b) would cohabitants and married couples be allowed to opt-out of the regime by the use of such agreements?

marriage' is a fiction, do these people represent a group that also know, even if in a muddled way, that they have to, or should, take steps to protect the economic aspect of their domestic lives and should they not be encouraged to take those steps? By bringing in a marriage-like regime, we could simply reinforce the idea that nothing needs to be done because the courts will sort it out if it goes wrong.

Is there, then, a feminist position which may take an alternative approach to the demand that family law be extended to cohabitants? It is interesting that one paper on the government website dealing with marriage and divorce does so from the perspective that 'individualism' fails 'the family'.[51] In a sense, but coming from a very different political position, this concern also permeates feminist approaches to the family and family law. On the one hand, we seek policies that support our own independence and, on the other hand, we seek policies which recognise and support interdependency, especially when such interdependency has left women economically vulnerable. It is, in an unfortunately messy way, a situation in which we have to try and find the best balance we can in difficult circumstances. I do not, therefore, have a simple answer to whether women (still) need marriage law: what I am, however, convinced about is that the question needs asking and that we should approach the issue of reform with caution. At its worst it could become, ironically given the claim for realism used by the reformers, a symbolic reform which will answer, in reality, only a narrow range of issues for a small proportion of women, whilst, at the same time, serving to reinforce the continuing centrality of the ideal of marriage and marriage-like relationships for us all.[52]

[51] *Supra*, n. 14.

[52] In relation to this I believe that we should take the warnings of Donzelot (1997) seriously.

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