SHARING LIVES, DIVIDING ASSETS

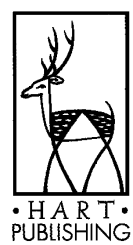
With many couples separating each year, the question of how to determine the financial and property consequences of such separation has always been a problem area within family law. Should the principles be the same for married and cohabiting couples? Should the division of assets reflect the parties' own expectations or norms imposed by society? These are just two of the questions which the essays in this collection seek to explore.

Recent cases in the House of Lords have seen willingness on the part of the judges to seek out empirical studies to inform their deliberations, but if the law is to engage with empirical data then much more information is needed, both about the arrangements people make during their relationships, and about the impact of the law when a relationship breaks down. This inter-disciplinary work brings together leading academics in the fields of law, economics, sociology and psychology in an attempt to provide some of the missing empirical information. Part I sets out the legal framework and identifies the importance of empirical studies for this area. Part II examines how couples—whether cohabitants or spouses—manage their money during their relationships. Part III then considers the impact that the law currently has on separating couples—examining how legal principles translate into reality and what their consequences are for the parties. Finally, Part IV considers the issue of legal rationality: it may be rational for the law to be shaped by patterns of behaviour, but how far will individual couples allow their behaviour to be shaped by the law?

Sharing Lives, Dividing Assets

An Inter-Disciplinary Study

Edited by
Joanna Miles
and
Rebecca Probert



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Preface

The idea for this project, and so this book, originated in our growing awareness of two things. First, that the courts' decisions about appropriate basis for dividing wealth on divorce or allocating ownership of property on separation were being increasingly influenced by how parties (are perceived to) organise their lives while together and by what that was supposed to indicate, for example, about their intentions regarding ownership or about the economic impact of relationship breakdown, but that the judges were not always apprised of all the research data necessary to make a fully informed decision about those issues. Secondly, that there is a vast social science literature touching on many issues relevant to legal decision-making in this area, but that researchers in those other disciplines generally run along parallel tracks that never meet each other—or lawyers. We thought that we could usefully try to make a contribution on both fronts by bringing together people working in a wide range of disciplines pertinent to the broad theme of money, property, relationships and relationship breakdown, in order to stimulate debate and cross-fertilisation of ideas between them, and to bring their valuable research to the attention of a wider audience.

The project, run under the aegis of the Cambridge Socio-Legal Group, based at the University of Cambridge, adopted a workshop model. Invited contributors circulated draft chapters on their research in advance of a two-day meeting at which each contributor was then able, following a short presentation, to discuss their work with the whole group. This methodology proved highly successful in enhancing inter-disciplinary understanding, not least in identifying and unravelling areas of *mis*understanding, often generated simply by the use of seemingly familiar language in an unfamiliar way. It was also highly productive of ideas for new lines of inquiry in all of the disciplines represented at the workshop, thanks to the fresh perspectives cast on otherwise familiar territory by those whose disciplinary background provided a different vantage point from which to view the material. In light of those discussions, the contributors were then able to revise their chapters before publication, and our introductory chapter benefited considerably from insights offered by members of the group during our discussions over those two days. We hope that the result is a volume that provides a valuable resource, giving access to findings on wide range of issues from a wide range of disciplines, in a way that will both inform legal development in this field and encourage further research.

We are extremely grateful to the Cambridge Socio-Legal Group, the John Hall Fund of the University of Cambridge, and to Trinity College, Cambridge for their financial support for this project, and to the staff of Trinity College who helped the workshop to run so smoothly. In addition to the contributors themselves,

whose biographies appear in the following pages, we must also acknowledge a huge debt to the following individuals for their contributions to discussion during the workshop: Belinda Brooks-Gordon, Ceridwen Roberts, Martin Richards, Brian Sloan and Anke Zimmermann. Finally, we must also thank Liam D'Arcy Brown for his assistance with proof-reading and editing.

Contents

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Jane Lewis is Director of Research, Evidence and Evaluation at the National Children's Bureau and was formerly Director of the Qualitative Research Unit at the National Centre for Social Research. She practised as a solicitor before moving into social policy research. Her recent research includes *Separating from Cohabitation: Making Arrangements for Finances and Parenting* (2006, funded by the Department for Constitutional Affairs); *Settling Up: Making Financial Arrangements after Divorce or Separation* (2002, funded by the Nuffield Foundation), and *Pensions and Divorce: A Qualitative Study among Solicitors* (2000, funded by the Department for Work and Pensions). She has written widely on research methods and is co-editor of *Qualitative Research Practice,* published by Sage in 2003. She has a long-standing interest in relationship breakdown and more broadly in research on children and young people's lives; social inclusion, inequality and disadvantage; and research methods.

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Part I

General Issues

1

Sharing Lives, Dividing Assets

Legal Principles and Real Life

JOANNA MILES AND REBECCA PROBERT

INTRODUCTION

A PERENNIAL DEBATE in family law concerns the principles that should be applied in determining the financial and property consequences of relationship breakdown. Key questions include the following: should the principles (whatever they may be) be the same for married[1] and cohabiting couples? What principles should be adopted, for both or for either category of relationship? Should the division of resources, and so the applicable principles, reflect the parties' own expectations or societal norms? If the former, how are those expectations or intentions to be discerned? If the latter, how should policy-makers—whether judicial or legislative—determine what those norms are or should be?

The House of Lords has endeavoured to take heed of empirical data in its deliberations on some of these questions in recent cases concerning the financial consequences of divorce[2] and the separation of cohabitants.[3] The Law Commission similarly drew on socio-legal research[4] in devising its recommendations for reform of the law governing cohabitants' financial remedies following separation.[5] More recently, it cited the *lack* of large-scale empirical research that would provide a contemporary socio-economic background for law reform amongst its reasons for declining to take on a project considering the financial remedies available on the dissolution of marriage and civil partnership.[6] The importance of both quantitative and qualitative socio-legal research in informing the development and reform of family law is therefore widely accepted. But if family lawyers and policy-makers

[1] The same questions apply to civil partners, although, for the reasons set out below, the focus of this collection is on opposite-sex couples.

[2] *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24 (referred to as '*Miller; McFarlane*').

[3] *Stack v Dowden* [2007] UKHL 17.

[4] For example research concerning couples' money-management practices and public attitudes towards law and law reform in this area: Vogler (2005); Burgoyne et al (2006); Vogler, Brockmann and Wiggins (2006, 2008).

[5] Law Commission (2006, 2007).

[6] Law Commission (2008) [5.6].

are to engage successfully with empirical data in this sphere then, as the Law Commission's recent decision about its future programme of work indicates, much more research is needed, not least about the arrangements people make during their relationships and about the operation and impact of the current law.

This inter-disciplinary volume is intended to make some contribution towards addressing this gap in our knowledge—and to overcome perceived difficulties of accessing material from what might otherwise (to the legal audience, in particular) be an unfamiliar literature—by bringing together leading academics in the fields of law, economics, sociology, psychology and other social sciences. It seeks to provide a critical examination of issues relating to the financial relationships and obligations between couples (both during their relationships and on separation) by collating empirical research conducted from the perspectives of various social science disciplines.

Part I of the book, of which this chapter forms a part, sets out the legal framework and identifies the importance of empirical studies for this area. If legal principles are to take account of what couples do in practice, then information about practice is essential. It is therefore crucial to build up a body of research on the ways in which couples behave and, very importantly, what meaning can reliably be attributed to that behaviour in order to inform what will otherwise be 'instinctive', but quite possibly incorrect, assessments of these matters. Part II accordingly examines how couples, whether cohabitants or spouses, manage their various resources—monetary, property and human—during their relationships. Part III considers the impact that the law currently has on separating couples, examining how legal principles translate into reality and what their consequences are for the parties. This requires separate consideration of cohabitants and spouses, since significantly different rules currently apply to each group. Finally, Part IV considers the issue of legal rationality: it may be rational for the law to be shaped by patterns of behaviour, but how far will individual couples allow their behaviour to be shaped by the law?

The focus on opposite-sex couples is both necessary and justified: necessary, because much[7] of the research carried out to date has focused exclusively on married couples and opposite-sex cohabitants, and one cannot assume that it can be transposed to couples of the same sex (and still less to those who are not in couple relationships[8]); and justified, because one of the most striking findings

[7] There is a growing literature on the family practices and perspectives of same-sex couples (see eg Weeks, Heaphy and Donovan (2001); Smart, Mason and Shipman (2006), Clarke, Burgoyne and Burns (2007); Burns, Burgoyne and Clarke (2008); Peel and Harding (2008)). The data is still limited in comparison to that available for opposite-sex couples, inevitably so for civil partnership, given its recent introduction.

[8] Although the position of wider kin has attracted more attention in recent months in the wake of *Burden and Burden v UK* (2008) 47 EHRR 38, and the proposals contained in the consultation paper issued by Resolution and Lord Lester in 2008 (see www.resolution.org.uk/livingtogether/). For literature in this area, see eg the work of Roseneil and others on friendship and non-conventional partnerships within the CAVA research project: www.leeds.ac.uk/cava/research/strand3d.htm; Williams (2004); Bottomley and Wong (2006).

that permeates all of the chapters is the continuing relevance of gender to the division of both responsibilities and wealth, as Scott and Dex discuss in chapter three. This has implications for the way in which money is dealt with during the relationship and the resources available to each party, as illustrated by Vogler (chapter four), and Burgoyne and Sonnenberg (chapter five) in their examinations of money management practices, and by Finney (chapter six), focusing on the issue of debt. Crucially, it also has a profound impact upon relationship breakdown, both in the immediate aftermath, as Lewis, Tennant and Taylor show in their discussion of disadvantage on the breakdown of cohabiting relationships in chapter eight; and in the longer term—quite how long being revealed by Fisher and Low, in their analysis of post-separation income levels in chapter eleven, and by Price, in her discussion of pension assets in later life in chapter twelve.

THE LEGAL AND POLICY CONTEXT

The laws currently applicable to financial disputes that may arise between spouses and cohabitants are complex and, in key respects, different. During the currency of these relationships, much of the law applies even-handedly to both types of relationship. While spouses enjoy certain limited statutory entitlements (notably statutory rights to occupy the shared home[9]), they are for the most part treated in private law[10] as entirely separate individuals, each equally entitled to earn, acquire and own property, and to manage those resources independently of the other party.[11] Indeed, they are formally treated no differently from cohabitants. The same rules of property and trust law apply across the board in order to determine who owns what—in particular, who owns the family home and in what shares (if any). The legal position of spouses and cohabitants diverges substantially, however, at the point of relationship breakdown. While both may apply for the court-based remedy of tenancy transfer,[12] only spouses have access to a more general jurisdiction which enables the discretionary redistribution of income and capital resources, present and future.[13] Cohabitants, by contrast, are left with whatever the law of property and trust entitles them to, supplemented (or reduced) only by

[9] Family Law Act 1996 ss 30–34. See also the statutory duty to maintain during marriage (in practice substantially less important than maintenance following divorce): eg Matrimonial Causes Act 1973 s 27. Other spousal rights and duties are of rather less practical relevance in the current social context, and have not been extended to civil partners: Married Women's Property Act 1964 s 1 (determining the ownership of savings made by the wife (specifically) from a housekeeping allowance); the 'presumption of advancement' whereby transfers of wealth made from husband to wife (but not vice versa) are presumed (now only weakly—*Pettitt v Pettitt* [1970] AC 777) to be intended as a gift. See generally Harris-Short and Miles (2007) ch 3; Masson, Bailey-Harris and Probert (2008) chs 3 and 4.

[10] Contrast the aggregation of spouses' (and cohabitants') resources for the purpose of calculating entitlement to means-tested benefits and tax credits.

[11] Since the Married Women's Property Acts of the late 19th century.

[12] Family Law Act 1996 s 53 and Sch 7.

[13] Matrimonial Causes Act 1973 Part II.

whatever is afforded (or demanded) by the law relating to the financial support of children.[14] We outline the details of these laws further below.

It is likely that many people are surprised by these key features of the current law. For example, we know from the British Social Attitudes survey that a majority (albeit shrinking) still positively believe (in general terms[15]) that spouses and cohabitants enjoy similar legal status, leaving many cohabitants disappointed (and seriously disadvantaged) on relationship breakdown.[16] Conversely, a large number of spouses would probably be surprised to discover that they do not automatically—by virtue of marriage—enjoy joint ownership of all or certain assets (particularly the matrimonial home and/or its essential household contents), as is the case in certain European jurisdictions operating systems of 'community of property'.[17]

The Law of 'Ancillary Relief' on Divorce

Upon divorce, the court has a discretion as to how it should exercise its wide-ranging powers to reallocate assets between the former spouses. Until 1984, courts were directed to exercise these powers in such a way as would keep the parties, so far as it was practicable and (having regard to their conduct) just to do so, in the financial position in which they would have been if the marriage had not broken down. Since the removal of that direction by the Matrimonial and Family Proceedings Act 1984 (see further Maclean and Eekelaar, chapter two, this volume), there has been no statutory guidance as to the aims of the process. The legislation simply states that first consideration is to be given to the welfare of any child of the family, that the court is to take all the circumstances of the case into account (referring judges to a list of specific but non-exhaustive factors), and that the court is to consider the desirability of an order that will achieve a clean break between the parties, that is to say, to bring to an end any ongoing financial ties between them. In line with the shift away from a divorce law based on fault to one based on the breakdown of the marriage, the conduct of the parties is rarely a factor that will influence the division of the parties' assets, save where it is 'obvious and gross'[18] or directly affects the assets available for division.[19]

[14] Child Support Act 1991, and Children Act 1989 s 15 and Sch 1.

[15] Contrast the responses given to more specific questions regarding particular legal entitlements: Barlow et al (2001).

[16] See Barlow et al (2008).

[17] See generally the attitudes of those interviewed by Cooke, Barlow and Callus (2006) about what the law *should* be, both for spouses and cohabitants; a majority of British Social Attitudes respondents think that *cohabitants* should pool their resources: Barlow et al (2008) table 2.4; see Harris-Short and Miles (2007) 3.5 for discussion of community of property and joint ownership systems.

[18] See *Wachtel v Wachtel (No 2)* [1973] Fam 72.

[19] As in the case of financial or litigation misconduct: see eg *M v M (Financial Misconduct: Subpoena Against Third Party)* [2006] 2 FLR 1253.

The principles underpinning the court's exercise of discretion were discussed by the House of Lords in the cases of *White v White*[20] and *Miller; McFarlane*[21] and subsequently by the Court of Appeal in *Charman v Charman*.[22] Three bases for reallocation were articulated: need, compensation, and sharing. From a theoretical perspective this proliferation poses a problem, in that each of the bases presupposes a slightly different model of marriage; from both a practical and a theoretical perspective, there is the challenge of deciding whether, and if so when, needs should take precedence over sharing, and how compensation fits into the court's assessment. There have also been debates as to what exactly is to be shared: does the principle apply only to assets acquired as a result of the parties' joint efforts during the marriage, or does it extend to other assets acquired before,[23] during, or after[24] this period?[25]

At present the position would appear to be that the court will first consider the needs of the parties, and that any assets owned by either party, whenever acquired, may be used to ensure that such needs are met.[26] In lower-income cases, meeting the needs of the parent with primary care for the children of the marriage may well result in that party receiving more than half of the assets. If there is a surplus after the needs of the parties are met, then the sharing principle comes into play. This principle does not, however, simply dictate that all assets, or even all assets acquired during the marriage, are to be divided equally between the parties: the duration of the marriage and the contributions of the parties may suggest that a different distribution would be fairer.[27] As the Court of Appeal put it in *Charman v Charman*, 'property should be shared in equal proportions unless there is good reason to depart from such proportions'.[28]

This flexible approach reflects the way in which the modern courts have consistently eschewed a formulaic approach.[29] They have also been reluctant to develop the idea of compensation introduced in *Miller; McFarlane*. While there is now a greater awareness of the impact of sacrificing a career,[30] such sacrifices tend to be addressed by means other than including a specifically compensatory element

[20] [2001] 1 AC 596.
[21] [2006] UKHL 24.
[22] [2007] EWCA Civ 503.
[23] A clear answer in the negative was given in *B v B (Ancillary Relief)* [2008] EWCA Civ 543; see also *McCartney v Mills McCartney* [2008] EWHC 401 (Fam).
[24] See eg the debates regarding post-separation property in *Rossi v Rossi* [2006] EWHC 1482 (Fam); *S v S* [2006] EWHC 2339 (Fam); *H v H* [2007] EWHC 459 (Fam).
[25] See also *Vaughan v Vaughan* [2007] EWCA Civ 1085, in which Wilson LJ drew a distinction between equality of *assets* and equality of *outcome.*
[26] See eg *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793; *S v S (Ancillary Relief: Importance of FDR)* [2007] EWHC 1975.
[27] See eg *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793; *NA v MA* [2006] EWHC 2900; *McCartney v Mills McCartney* [2008] EWHC 401 (Fam).
[28] [2007] EWCA Civ 503 [65].
[29] See eg *H v H* [2007] EWHC 459 (Fam).
[30] See eg *Lauder v Lauder* [2007] EWHC 1227 (Fam); *VB v JP* [2008] EWHC 112 (Fam).

in that party's share of the assets.[31] In lower-income cases the ongoing effect of sacrifices made during the marriage (for example giving up paid employment to care for the children of the marriage) will be dealt with as an aspect of that party's needs;[32] in higher-income cases the sharing principle may produce more than the spouse would have earned as a result of paid employment,[33] and, or alternatively, the loss of earning capacity will be recognised through a 'generous assessment' of that party's needs.[34] In other cases the principle is not seen as relevant, either because the spouse had not developed a career before the marriage,[35] or because giving up work was a 'lifestyle choice' rather than a necessity.[36] And even if the principle is seen as appropriate, courts may struggle with its application to the case before them: one judge suggested that it was neither possible nor desirable to attempt to ascertain the career that the spouse would have had.[37] As yet, therefore, there have been few cases in which the concept of compensation has played an independent role in the court's deliberations.

The Law of Property and Trusts: Dividing the Assets when Cohabitants Separate

Decisions made during the lifetime of the relationship have a profound, if not necessarily anticipated, effect on the parties' property rights on separation. Most couples who have purchased a home together in the past decade will be jointly registered as legal owners of that property and will have made an express declaration as to their beneficial interests in the property[38] (even if some of them may not have realised the effect of so doing[39]). Such a declaration is determinative of their rights—in the absence of fraud or common mistake—regardless of their respective contributions.[40] The recent House of Lords decision in *Stack v Dowden*[41] made clear that if a couple purchase a home in joint names without making any such declaration, the starting point will be that they too intended that the beneficial title should be held jointly,[42] and strong evidence will be required

[31] See eg *H v H* [2007] EWHC 459 (Fam).
[32] See eg *Lauder v Lauder* [2007] EWHC 1227 (Fam).
[33] *CR v CR* [2007] EWHC 3334 (Fam).
[34] See eg *Lauder v Lauder* [2007] EWHC 1227; *VB v JP* [2008] EWHC 112.
[35] *NA v MA* [2006] EWHC 2900.
[36] *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793.
[37] *P v P* [2007] EWHC 779 (Fam). See also *VB v JP* [2008] EWHC 112 (Fam) and *CR v CR* [2007] EWHC 3334 (Fam).
[38] Since 1998 the relevant Land Registry forms have invited those purchasing a home in joint names to indicate whether they hold the beneficial title as joint tenants, or as tenants in common in equal shares, or on some other trusts. However, the Land Registry will not reject a form that fails to complete this declaration.
[39] See Douglas, Pearce and Woodward, ch 7, this volume.
[40] *Goodman v Gallant* [1986] 1 FLR 513.
[41] [2007] UKHL 17.
[42] See also *Abbott v Abbott* [2007] UKPC 53.

to show that, 'unusually', a different arrangement was intended. By contrast, if the home was purchased in the name of one party (or was owned by him or her before the relationship began), then the onus is on the other party to establish a beneficial interest under the law of trusts. This may be done by showing either that the claimant made a financial contribution to the initial purchase price or that there was an agreement, arrangement or understanding between the parties on which the claimant has relied to his or her detriment.[43] The former may give rise to a resulting trust (which will yield an interest in the property proportionate to the original contribution), or, more probably in the domestic context,[44] will lead the court to infer a constructive trust on the basis that there was a common intention that the beneficial interest should be shared, the financial contribution establishing the necessary element of detrimental reliance. The extent of the parties' interests under a constructive trust will be determined by reference to the whole course of dealing between the parties.

Such distinctions lead to some stark differences in outcome. In *Fowler v Barron*,[45] for example, the property had been conveyed into joint names, but during the 17 years of the parties' relationship it was Mr Barron who made all the payments under the mortgage and who met other household expenses. Miss Fowler's salary was used for more transient items, such as holidays, meals out, and clothes in particular for the children and herself. The court's interpretation of this was that, despite the lack of a joint bank account, the parties had effectively pooled their assets and did not care who paid for what, or how much; the inference was that they had not intended that their different contributions should lead to them having different interests in the property. Each party was thus entitled to 50 per cent of the equity in the property. By contrast, in *James v Thomas*,[46] Miss James moved into a home already owned by Mr Thomas, and he was reluctant to convey it into their joint names. Although she worked unpaid in his business for the better part of their 15-year relationship and the mortgage was paid from the profits of that business, the court held that there was no common intention that she should have an interest in the property, and that her contributions were simply attributable to the fact that she and Mr Thomas 'were making their life together as man and wife'.[47] She was therefore not entitled to any interest in the home.[48]

Whether these outcomes truly reflected the intentions of the parties is open to question: Mr Thomas acknowledged that it would be fair for Miss James to receive some interest in the property, while Mr Barron argued that, while he had intended that Miss Fowler should inherit the property if he pre-deceased her, he had not intended that she should be entitled to half if they separated. This is not an

[43] *Lloyds Bank v Rosset* [1991] AC 107.

[44] At least where the parties are sharing a home: see eg *Adekunle and Others v Ritchie* [2007] EW Misc 5 (EWCC); cf *Laskar v Laskar* [2008] EWCA Civ 347.

[45] [2008] EWCA Civ 377.

[46] [2007] EWCA Civ 1212.

[47] ibid [36] (Chadwick LJ).

[48] See also *Morris v Morris* [2008] EWCA Civ 257.

unusual view: it has been suggested that many in this situation would be perfectly happy for their partner to inherit all their property in the case of their death, but are far less willing to split their assets equally in case of separation.[49] The sharing that is part of a loving relationship is often fiercely resisted by the parties when that relationship has come to an end, whether they were married or cohabiting (as is evident from the research of Lewis et al in this volume). The law, however, takes the view that while the parties' intentions regarding the shares each has in the property may change over time, those intentions—and so those shares—must at any given point in time be the same for all purposes.[50]

Financial Provision for Children whose Parents Live Apart

In order to complete the picture of the current law relating to the distribution of wealth on relationship breakdown, it is necessary briefly to outline the law governing provision for children. This law applies almost identically to children of married and unmarried parents.[51] However, given the very different background of provision/division of property between the adults, described above, the overall outcomes for formerly marital and cohabiting households and the children within them are very different.

The Child Support Act 1991, as amended, declares the responsibility of each parent to maintain his children,[52] regardless of the nature of the parents' relationship. In the case of a 'non-resident parent' (a parent with whom the child does not principally live), this responsibility is met by the payment of child maintenance calculated by reference to a formula which (subject to possible variation on limited grounds set out in the Act) requires payment of a given percentage of that parent's income, depending on the number of children to be supported. Recent changes effected by the Child Maintenance and Other Payments Act 2008 mean that child maintenance is now viewed principally as a matter to be resolved by (non-binding) private agreement between the parties.[53] The statutory agency, its formula and enforcement powers are intended to provide a fallback where such agreement is unattainable or breaks down.

Basic child maintenance (generally made by way of regular payments) is not a matter for the courts, except where agreed by the parties and enshrined in a

[49] See Douglas, Pearce and Woodward, ch 7, this volume.

[50] Contrast the findings of Douglas, Pearce and Woodward, ch 7, this volume, who find that parties may have precisely the sort of multiple intention that the law does not accommodate.

[51] The only key distinction pertains to the responsibility of step-parents: only an individual who is married to (or a civil partner of) a child's legal parent may be required to maintain the child; someone who has merely lived with that parent may not: see the concepts of 'parent' in Children Act 1989 Sch 1 para 16(2); and 'child of the family' in Matrimonial Causes Act 1973 s 52(1).

[52] Child Support Act 1991 s 1. Only 'qualifying children', as defined by ss 3 and 55 of the Act, are owed this duty.

[53] Prior to these reforms, if the parent with care was claiming a means-tested benefit, the Child Support Agency's involvement was effectively mandatory.

'consent order'.[54] However, the courts have exclusive jurisdiction to order various forms of capital provision 'for the benefit of the child'.[55] Crucially, that qualification has been interpreted in such a way as effectively prevents the outright transfer of property to the parent with care. Generally, any capital transferred must either be spent for the child's benefit during the child's minority (for example on depreciating assets such as a car for taking the child to and from school and other activities, or 'white goods' for the child's home), or, in the case of the transfer of a house, the property must revert to the other parent once the child attains independence.[56] Provision for dependent children of a formerly married or cohabiting couple can therefore offer no long-term or direct security for the parent with care. But, as we have seen, that limitation of these remedies is of far greater significance for former cohabitants (who have no personal financial remedy and may have no claim in property law) than for former spouses (who have the benefit of financial relief under the matrimonial legislation, whatever their property rights may be).

Future Reform?

As increasing numbers of couples cohabit outside marriage and as more children are born outside marriage, reform providing statutory financial remedies between cohabitants—already available in a number of other jurisdictions[57]—has been actively considered. The Law Commission for England and Wales recently published its recommendations for a scheme of remedies between separating cohabitants who had either had a child together or lived together beyond a minimum duration (fixed somewhere between two and five years), unless they had executed a valid 'opt-out agreement' excluding the operation of the scheme and (perhaps) made their own arrangements.[58] Under this scheme, the courts would have largely the same powers to reallocate assets as they enjoy on divorce, but those powers would be exercisable on a different basis. The Law Commission concluded that, given broadly observable differences between many cohabiting and marital relationships (including the substantial heterogeneity of the cohabiting population; the lack of express, public commitment to the relationship; and various patterns

[54] The courts also have exclusive jurisdiction (see Child Support Act 1991 s 8) to order periodical payments for meeting educational expenses, costs associated with extra needs created by a child's disability, and 'top-up' payments where the non-resident parent's income exceeds the jurisdictional limit of the statutory agency responsible for child maintenance: Children Act 1989 Sch 1; Matrimonial Causes Act 1973 s 23(1)(d) and (e). In the last case, in particular, payment may include a 'carer's allowance' to cover the parent with care's needs as carer: *Re P (A Child: Financial Provision)* [2003] EWCA Civ 837.

[55] These powers are exercisable by the courts under various statutes. In the case of married parents who are divorcing, jurisdiction would usually be exercised under the Matrimonial Causes Act 1973; in the case of unmarried parents, under the Children Act 1989 Sch 1.

[56] *A v A* [1995] 1 FCR 309.

[57] Most recently, Scotland: Family Law (Scotland) Act 2006.

[58] Law Commission (2007). See also Law Commission (2006) for its earlier consultation paper.

of money management and property ownership), provision between cohabitants should not be based on the needs of the parties or a norm of equal sharing. Instead, the court would exercise a principled discretion with restitutionary and compensatory purposes designed to respond to the enduring economic impact of the parties' contributions to their life together. The court would therefore aim broadly to reverse gains ('retained benefits') made by one party as a result of the other's contributions, such as the latter's direct or indirect financial contribution to the acquisition of property held in the former's sole name; and to share the burden of losses ('economic disadvantage') suffered by one party for the benefit of the family, for example, the loss of future earnings arising from having given up paid employment to care for children.

The Role of Empirical Data in Developing the Law

The consequence that, following *Stack v Dowden*, the proceeds of sale of the family home will be divided 50:50 in most joint ownership cases between cohabitants on separation may seem to resemble the approach in the context of ancillary relief in the wake of cases such as *White v White* and *Miller; McFarlane*. There is, however, a difference: the 'sharing principle' established in the latter context rests upon the view that the assets accrued during the 'partnership' of marriage should as a matter of principle be shared, while the presumption that equity follows the law in the context of the family home rests on the assumption that this is what such couples would usually have intended. The role that individual intentions play in the context of ancillary relief remains a moot point,[59] whereas evidence as to the parties' intentions may play a crucial role under the law of trusts.[60]

This brings us on to the crucial distinction between empirically based presumptions and normative judgments. The principles developed and asserted in the recent House of Lords decisions may be put into these two inter-related categories:

(i) empirically based presumptions about what parties to particular relationships may be taken to intend in particular circumstances: for example, that couples who purchase a home in joint names intend to hold it in equal shares; that couples who manage their money separately may not have that intention.
(ii) normative judgements about what consequences ought to be taken to flow from particular situations: for example, that marriage is a partnership

[59] For example, pre-nuptial agreements retain a rather limited role, just one factor for the court to take into account in the exercise of its discretion, although in some cases an agreement may be a factor of 'magnetic importance': *Crossley v Crossley* [2007] EWCA Civ 1491.

[60] See eg *Williamson v Sheikh* [2008] EWCA Civ 990 (house in sole name of male partner, intentions gauged from an unexecuted declaration that female partner would be entitled to £10,000 plus 60% of proceeds).

> which should entitle the partners to equal shares of certain property, regardless of need or financial contribution; that 'special contributions' should nevertheless receive recognition; that needs arising during a marriage (and perhaps to some extent afterwards) should generally be met by the other spouse; that some measure of 'compensation' ought to be afforded to recompense one spouse for economic disadvantage incurred, typically as a result of sacrificing paid employment to care for home and family.

To some extent, these empirically based presumptions and normative judgements articulated by the House of Lords were consciously based not just on the courts' assessment of the position of individual litigants who have appeared before them or on 'common sense' views adopted by the courts over time, but also on observations yielded from social science data, including socio-legal research. The speeches of Baroness Hale, in particular, are distinctive for and often enriched by her use of such material.[61]

Whether legal development is to be driven by reference to how people actually think or behave in their relationships, or by reference to what society considers the law ought to be seeking to achieve, or (perhaps most likely) a combination of both, social science data and analysis have central roles to play in informing the deliberations of appellate courts, law reformers and policy-makers. Such information is always essential to obtaining a proper understanding of the context in which the current law is operating and how that law is impacting on those to whom it applies. For example, data regarding participation in paid employment during relationships and about the economic disadvantage experienced following relationship breakdown by those who have been absent from the labour market may readily prompt the preliminary conclusion that remedies should be provided in response to this hardship.[62] Determining precisely *how* that should be achieved, on what basis and in which cases may, of course, be more difficult to resolve, but research data may have a valuable contribution to make here too. In a rather different vein, data about how couples deal with the financial implications of separation, and about the obstacles that they encounter in the process, may prompt us to re-examine both procedural and other contextual aspects of dispute resolution and the extent to which complexity in the substantive law may itself impede settlement. Moreover, without a clear understanding of the social context in which the law is to operate, the law of unintended consequences is likely to rule the day.

[61] In *Miller, McFarlane* and *Stack v Dowden* she refers to Pahl (1989), Ermisch (2000), Barlow et al (2001), Lewis (2001), Arthur et al (2002) and Douglas, Pearce and Woodward (2007) (*cf* the contribution by the latter authors to this volume (ch 7)). See also her extra-judicial writing: eg Hale (2004) draws on Rake (2000).

[62] Although see remarks in the conclusion to this chapter regarding the relative responsibility of private family law and other areas of law and policy to deal with the issues explored in this volume.

The importance of empirical data can only grow as those considering legal reform in this field explore schemes based not on the exercise of a wholly individualised, strong discretion, with which many are becoming disenchanted,[63] but on a more 'standardised' basis, such as community of property regimes, guidelines for wealth distribution,[64] or 'structured discretion' of the sort recently recommended for cohabitants by the Law Commission.[65] If a (more or less) standardised scheme is to 'fit' the population to which it is to apply—to supply a satisfactory measure of 'average rather than individualised justice'[66]—its development must be fully informed by data on a wider range of issues such as: patterns of property ownership, money management, employment and so on, and what (if anything) these patterns imply about parties' intentions, commitment and so on; the degree of disparity in earning capacity or standard of living between partners following separation; and public attitudes towards the provision of remedies in particular cases and about the appropriate basis for remedies.[67]

It is also important that the judges in our appellate courts should refer to social science data when developing the current law, as they have done in recent cases such as *Stack v Dowden*.[68] All too often their Lordships are not referred to key findings bearing on the empirical questions which they inevitably have to address in the course of their decision-making.[69] One major obstacle is, of course, the accessibility of such data: those presenting the case to the court will not usually be *au fait* with literature in non-legal disciplines, and even research assistants employed by the court may find it difficult to discover and interpret papers written by economists, sociologists and psychologists. It is equally unlikely, of course, that empirical researchers will be aware of ongoing legal proceedings to which their findings may be highly relevant, and terminological differences sometimes pose a barrier to mutual understanding. There is thus a role for intermediaries to make empirical research from one discipline more accessible—both physically and intellectually—to another.

It must, however, be conceded that no distillation of the existing research evidence will ever be value-free. Indeed, it is clear from academic criticisms of *Stack v*

[63] See eg the disadvantages of the current Matrimonial Causes Act scheme identified by the Law Society (2003) [71]; concerns reported in the wake of *Miller, McFarlane* by the Court of Appeal in *Charman v Charman (No 4)* [2007] EWCA Civ 503 [120]; and proposals for presumptive formulae for the calculation of periodical payments awards: eg Eekelaar (2006).

[64] See for example the Canadian spousal support guidelines: Department of Justice Canada (2008).

[65] Law Commission (2006, 2007).

[66] Rogerson and Thompson (2005) 10.

[67] Cf the view of Maclean and Eekelaar, in ch 2, this volume at p 34 regarding the difficulty today of identifying shared expectations and values on which reform might be based.

[68] See for example Harris-Short and Miles (2008), Probert (2008a, 2008b), and Douglas, Pearce and Woodward, ch 7, this volume.

[69] For example, there is no reference in *Stack v Dowden* to research into couples' money management practices, data which have been central to many commentators' criticisms of the case—see previous note.

Dowden that the research data cited in that case is open to interpretations different from those adopted by the House of Lords. Since such different interpretations can generate different conclusions about the appropriate response from the law, there is a need for constant evaluation of the interplay between such research evidence and judicial decision-making—an example of which appears in this volume, in chapter seven, by Douglas, Pearce and Woodward.

THE ISSUES AND THE DATA

As Maclean and Eekelaar indicate in chapter two of this volume, much research to date has focused on divorced or separating couples. But every separating couple was once an intact family, and the choices made while the relationship was subsisting will obviously be a significant constraint on the options available on relationship breakdown. Part II of the book, 'Work, Money and Property within Intimate Relationships: Expectations and Actions', examines data relevant to these questions.

Problems originating during the relationship are particularly acute where one or both of the parties are in debt. There has to date been relatively little discussion of this aspect of relationships or its legal implications: for example, we now recognise a loose concept of 'matrimonial property'—should we also recognise more explicitly the reality of 'matrimonial debt', and if so how should we distinguish it from personal debt?[70] Finney's discussion of debt within relationships and the links between debt and relationship breakdown in chapter six highlights key background data about both indebtedness and saving habits, and their association with particular types of relationship and life events such as relationship formation, the arrival of children, and relationship breakdown.

In addition, the House of Lords in both *Miller; McFarlane* and *Stack v Dowden* placed some importance on the way in which the couple dealt with their assets during the relationship, both when dividing assets on divorce and when discerning the parties' intentions regarding their property. But without empirical data it is difficult to know what forms of behaviour are unusual, or what light such behaviour can throw on the parties' intentions. The assumption that Mr Stack and Ms Dowden were unusual in keeping their finances separate is clearly contradicted by several studies. The chapters by Vogler (chapter four), Burgoyne and Sonnenberg (chapter five), and Douglas, Pearce and Woodward (chapter seven) cast valuable light on this area, showing in particular that what we might instinctively assume certain money management practices indicate about parties' intentions regarding ownership and use of their money might be incorrect.

Of course, an individual's behaviour may reflect constraints as well as their preferences, as is evident from the analysis by Scott and Dex in chapter three

[70] *cf* the findings of Cooke et al (2006), where respondents to their qualitative survey were largely not supportive of debts, as well as assets, being treated as joint as between spouses.

of the division of labour in the context of the UK labour market.[71] Given the difficulties of changing the underlying conditions that produce such inequality, it is likely that it will persist for the foreseeable future, and it is therefore necessary to consider its effect both during relationships and upon separation. Unequal earnings may, for example, affect the way in which couples manage their money and generate differing concepts of 'equality' in this sphere, as chapter four by Vogler, and chapter five by Burgoyne and Sonnenberg show. For some, inequality in income is seen as mandating inequality in contributions, with each contributing according to their ability;[72] for others, equal contributions are made despite differences in earnings. But as the next section shows, contributions, in whatever proportions, do not always translate into a share of the assets, equal or otherwise, upon relationship breakdown.

In the third part of the book, 'Dividing the Assets on Relationship Breakdown', the discussion of married and cohabiting couples of necessity diverges, owing to the very different legal regimes that apply to each on divorce and separation. Douglas, Pearce and Woodward in chapter seven draw on empirical research to highlight how difficult it is to ascertain the 'common intention' required by the law of trusts, particularly by reference to the factors identified by the House of Lords in *Stack v Dowden*. They show that the law has set itself a daunting task in seeking to give effect to parties' intentions, given the difficulties encountered in practice in attempting to ascertain from the parties' conduct of their relationship any shared intention specifically regarding property ownership.

Lewis, Tennant and Taylor in chapter eight identify those disadvantaged by the current law relating to cohabitants and consider whether the Law Commission's recommendations for reform in this area would do any better at addressing those individuals' problems. Their study shows, in particular, how *legal* ownership (specifically) rather than the needs of the parties (or beneficial entitlements under the law of trusts) currently dominates the way in which assets are divided when a cohabiting relationship breaks down. By contrast, upon divorce needs assume far greater importance: indeed, as Hitchings shows in chapter nine, the needs of the parties, and the range of practical options available to meet those needs, are of crucial importance in determining the nature of any settlement in most everyday cases. The emphasis on needs may help to achieve a degree of consistency in the disposal of these cases, despite the lack of guidance in the legislation. Further research is necessary in this area, not least given the concerns expressed by the Law Society in 2003 about uncertainty of outcome, which may vary between different county courts.[73] 'Local knowledge' may be extremely important in practice, which poses a particular problem for the growing number of litigants in person appearing

[71] And see further La Valle, Clery and Huerta (2008).

[72] See also *Stack v Dowden* [2007] UKHL 17 [91], where Baroness Hale refers to the idea of 'each doing what they could', as a form of organisation that could then reflect an intention that the property be equally shared.

[73] Law Society (2003) [60]–[70]. See also Hitchings, ch 9, this volume.

before the family courts, who will almost certainly lack the insider knowledge garnered by repeat players.

Moreover, public misconceptions about the role of the law in this context may hinder a speedy settlement, and Dowding's chapter ten sets the issue of settlement in its practical context, identifying the many opportunities which parties have—and are strongly encouraged by their legal advisors to use—to reach agreement without recourse to litigation, and the cost implications of their choices in this respect. As the chapters in this volume by Vogler (chapter four), Burgoyne and Sonnenberg (chapter five), and Douglas, Pearce and Woodward (chapter seven) indicate, couples often find it difficult to discuss money and property during their relationships—or easy to avoid having to do so. Inevitably if their relationship breaks down, such discussions become unavoidable and the earlier the couple can be helped to resolve their disagreements, the lower will be the costs of their dispute, both financial and emotional. But in the case of cohabitants (where there are no judicial powers of the sort enjoyed on divorce to adjust property rights and where the special matrimonial procedures described by Dowding in chapter ten do not apply), by the time the couple do belatedly address the issue of who owns what (and so who leaves the relationship with what), it may be too late for one party to guard against disadvantage of the sort discussed by Lewis, Tennant and Taylor in chapter eight.

One feature, however, is common to both cohabiting and married relationships, especially where there are dependent children, and that is inequality on relationship breakdown arising in particular from decisions made during the relationship about each party's participation in paid employment. The impact of these decisions on the income of men and women after divorce and the end of cohabitation is made manifest by Fisher and Low in chapter eleven, based on an analysis of several sweeps of the British Household Panel Survey. Their conclusion that income recovers over time gives some cause for optimism, although it is clear from their analysis that in many cases income recovery following divorce is achieved by repartnering rather than by improvements in personal income from employment. While this may guard against poverty following divorce, repartnering may be said simply to substitute a new dependency for the old one, and as such fails to address what for many is the underlying problem. Moreover, as Fisher and Low demonstrate, repartnering is less likely for older women and for women with children, leaving them economically disadvantaged unless able substantially to increase their labour market participation, which few appear to do.

Price's chapter on pensions (chapter twelve) builds on this theme of post-divorce inequality, providing powerful evidence that under current conditions divorced women do not and cannot catch up in pension building, and that, contrary to government's expectations, pension sharing on divorce is rare rather than routine, leaving divorced women facing poverty in old age. The reasons for the rarity of pension-sharing orders are hard to diagnose, although some anecdotal evidence suggests that pensions are not routinely included in parties' schedule of assets ('Form E') on divorce, so potentially rendering that valuable

asset 'invisible' and not a 'matrimonial asset' to be shared. The assumption may be that women will create their own pension fund by 'downsizing' once the children reach independence, or that they will protect themselves via repartnering; and we know from research that some women are principally motivated to ensure their short-term security (for example in securing accommodation for themselves and the children) to the neglect of their long-term interests.[74] But as Fisher and Low's data show, the latter assumption may be misplaced, and the inherent uncertainty about prospects of repartnering and about the security of any new relationship makes it difficult to factor that possibility into any individual settlement. Moreover, the principles developed by the House of Lords in *Miller; McFarlane* have clear application to pension savings: savings accumulated during the marriage should be treated as matrimonial property and in principle be brought into account in dividing those assets pursuant to the 'sharing' principle; and women's disadvantage in relation to pensions offers a clear example of the sort of economic disadvantage to which the 'compensation' strand is intended to alert us. However, we also lack information about the characteristics of the tiny minority of cases in which such orders *are* made. This is clearly an area ripe for further investigation and, given the uncertainty that surrounds future state provision beyond retirement age, is a matter of considerable importance as the proportion of older women who are divorced, and living longer, increases.

Fisher and Low's data also provide material against which they evaluate alternative principles on which financial remedies following relationship breakdown might be based—comparing income-based measures (reflecting the impact of the relationship on each party's human capital) with consumption-based measures (based on needs or expected living standard)—and so for analysing the outcomes in and the incentive effects created by *Miller; McFarlane*. This theme—how to choose the most appropriate basis for financial relief—is developed further in the contrasting contributions of Dnes and Barlow in the final part of the book, 'A Rational Approach?'. Barlow in chapter fourteen draws on recent social attitude surveys and demographic changes to support her argument in favour of a 'bottom-up' approach to law reform: a reconfiguration of remedies on relationship breakdown according to whether the parties (married or not) had children, with a focus on needs-based remedies between couples with children and on greater autonomy for childless couples. Meanwhile, Dnes' chapter thirteen offers an economist's view of the law governing financial and property disputes on divorce and the end of cohabitation, demonstrating the potential for economic analysis to provide greater clarity to discussions in this area, for example by articulating welfare goals more explicitly and highlighting the different incentive effects of various settlement rules, including the introduction of financial remedies at the end of cohabitation.[75]

[74] Douglas and Perry (2001).
[75] See generally Dnes and Rowthorn (2002).

These chapters also provide competing views on the ability of the law to influence behaviour within the family context, and how different research methodologies can be used to detect such influences at work. This discussion has been described by Barlow and others as being concerned with 'legal rationality', that is the idea that people respond to the framework of family regulation created by the law and order their intimate relationships in line with the law's expectations.[76] Barlow argues, in light of data yielded from various research projects conducted by herself and other socio-legal scholars, that legislators in the family-law sphere are in danger of making a 'rationality mistake', overestimating law's ability to influence behaviour in the family field. She considers the evidence of people's changing attitudes to relationships and property and how well or otherwise this fits with the law's expectations, arguing that the legal and financial consequences of marriage rarely figure in the decision whether to marry (at least for first marriages). Even assuming that the parties have an accurate understanding of the law, to marry for such pragmatic reasons is seen by many as distasteful, despite the potentially far-reaching economic consequences of this decision when the relationship ends, whether by separation or by death. Dnes, by contrast, explains the insights that can be provided by positivistic, quantitative analysis of longitudinal samples (such as that undertaken by Fisher and Low), arguing that how people explain their own behaviour to qualitative researchers may not necessarily correspond with independent indicators about what people are in fact doing, and highlighting a number of studies identifying significant changes in certain types of behaviour, including partnering behaviour, in response to legal change. This debate about the influence of law on family behaviour is undoubtedly one that will continue and requires further examination. It may be that some laws, such as those relating to welfare benefits and tax credits[77] have greater influence over family practices than those relating to financial settlements following relationship breakdown,[78] not least given what to the individuals concerned is the relative complexity and perceived remoteness of those laws from decisions about marriage and conduct within ongoing relationships.

WHERE SHOULD WE GO FROM HERE?

One clear finding that emerges from the empirical research is the great diversity of practices within families. Whether such diversity militates against devising proposals for reform on the basis of shared values, as Maclean and Eekelaar

[76] In the language of economists, 'rationality' is simply concerned with observations about the consistency or otherwise of a subject's decisions, and is entirely unrelated to the desirability of those decisions, the information on which they are based, or their compatibility with or conformity with a particular policy goal or objective perception of the subject's best interests, given the current legal framework.

[77] See eg Anderberg (2008).

[78] Although see Mechoulan (2006), who found that the rules governing allocation of property on divorce had a stronger effect on the divorce rate than the grounds for divorce.

suggest in chapter two, is a moot point. The surveys discussed by Barlow in chapter fourteen suggest that there is still a considerable degree of common ground in the wider population, and a solution that does not resonate with individuals' values may be difficult to implement in practice.

As noted above, there are difficulties in ascertaining the parties' intentions regarding their property from their money management practices during their relationship. There is also a more fundamental question to be posed, which is how far the law *should* be guided by the parties' intentions when dividing assets at the end of a relationship. To date, as we have seen, the answer to that question has differed according to the nature of the relationship, rather than the extent of the disadvantage experienced by the individual in question. This has resulted in a situation in which very similar contributions may result in very different outcomes (as demonstrated by Lewis, Tennant and Taylor, in chapter eight, who compare the results that their cohabitants might have expected had they been married with the actual arrangements that were made).

Yet although individual experiences differ, some common trends can be observed. While we have, as a society, departed from the pure version of Lloyd Cohen's profile of marriage,[79] it remains the case that women tend to earn less than men and spend more time on unpaid household tasks. Whether the first causes the second, or vice versa, is difficult to determine; still more difficult is the task of devising a solution to encourage greater equality in both spheres.[80] The positive story of women's enhanced earning capacity and labour market participation has a negative consequence: the extent of downward mobility for those who move out of the labour market even for a short period is greater for today's women than it was for previous generations. And although remaining out of the labour market to care for children and other dependants should be respected as a choice, this does not mean that the financial detriment of doing so should fall on the carer alone. A division of responsibilities that works within the intact family may well leave the partner who has not pursued a career vulnerable on relationship breakdown (as demonstrated by Fisher and Low and by Price in chapters eleven and twelve).

To the extent that the other party—whether married or cohabiting—has benefited from the contribution of the one who provided care or other non-tangible contributions, then there is a justification for the court to intervene as between the parties themselves. But on what basis? Underlying much of the discussion in this volume is the concept of 'equality'. But this is a multi-faceted concept which could support a variety of solutions to the problems experienced on relationship breakdown. Should equal sharing of assets arise only following equality of contribution? Is contribution to be regarded as equal only where it is of equal value,

[79] Cohen (1987).

[80] See eg recent comments of Nicola Brewer, chief executive of the Equalities and Human Rights Commission, regarding the negative impact that improved maternity rights have had on women's progression in the labour market: Bennett and Ahmed (2008).