No Place Like Home: The Search for a Legal Framework for the Family Home in Canada and Britain

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Abstract:
The family home is more than simply an economic asset or a means of shelter. It is uniquely connected to one's 'personhood interests. “The law in Canada and Britain recognizes this by giving married spouses special rights of possession or title in the family home, but the corresponding rights of the rising number of unmarried cohabitants are found in a patchwork of common law and legislation. The law has a deep-rooted tendency to value property interests above "family" considerations, and the emerging trend toward "familialization" of property law applies mainly to married couples. There is an inherent tension in attempting to secure equal rights for unmarried cohabitants while recognizing that the choice to remain unmarried is an important aspect of one's autonomy. The authors examine how these tensions are manifested in the current law in Canada and Britain. They then analyze reform proposals and reform legislation in both countries, as well as the potential influence of constitutional equality provisions and human rights legislation. They conclude that while an autonomy-based approach to the division of cohabitants' property has some merit, familial considerations should prevail where the family home is concerned. The functional similarities between cohabitants and married persons become stronger the longer the relationship lasts, especially where children are involved. These similarities provide a firm basis for similar legal treatment where the family home is concerned. The emergence of same-sex marriage in Canada and civil unions for same-sex couples in Britain will bring some clarity to the law. Further action is needed, however, to provide a framework for the resolution of disputes over the family home of cohabitants, whether same-sex or opposite-sex, who choose not to formalize their relationships.

Keywords:
Family, home, Canadian Law, British Law, family dynamics

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“No Place Like Home”: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain

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The authors examine how these tensions are manifested in the current law in Canada and Britain. They then analyze reform proposals and reform legislation in both countries, as well as the potential influence of constitutional equality provisions and human rights legislation. They conclude that while an autonomy-based approach to the division of cohabitants' property has some merit, familial considerations should prevail where the family home is concerned. The functional similarities between cohabitants and married persons become stronger the longer the relationship lasts, especially where children are involved. These similarities provide a firm basis for similar legal treatment where the family home is concerned. The emergence of same-sex marriage in Canada and civil unions for same-sex couples in Britain will bring some clarity to the law. Further action is needed, however, to provide a framework for the resolution of disputes over the family home of cohabitants, whether same-sex or opposite-sex, who choose not to formalize their relationships.

Introduction
I. The Position in Canada
   A. Spouses and the Matrimonial Home

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Introduction

“Family” and “home” are two of the most evocative words in the English language. Conjoining them into “family home” raises the emotional stakes even higher. More than the simple idea of shelter, the phrase “family home” connotes safety, security, continuity, a sense of place and even of identity. The family home is a unique locus of what many scholars call “personhood interests”—those particularly connected to a person’s sense of identity and place in the world.1 As the Alberta Law Reform Institute has observed, “the home is a place of special significance; it is not just another asset accumulated over a lifetime.”2 In addition to its emotional significance, the family home also usually represents the single most important economic asset owned by most couples.


The law governing married persons in Canada and Britain has been influenced by these social facts in creating important rights for spouses, and in some cases their children, in the home. These rights in what is significantly known as the "matrimonial home" in law run regardless of the state of title. These rights, which may relate to possession, title or both, arise during marriage, upon death, and upon divorce or a separation expected to be permanent. By contrast, the rights of unmarried couples, or "cohabitants," are left to a sometimes confusing patchwork of common law and legislative remedies that has been the target of much criticism. In both countries, a significant rise in the number of cohabiting couples, and in the proportion of children born to such couples, means that the time is long past when such questions could be dismissed as marginal. Deciding whether change is needed and, if so, what form it should take, raises many difficult questions. To what extent is the decision not to marry an assertion of "autonomy" from the legal regime governing marriage? To what extent should constitutional guarantees of equal treatment inform decisions about the law governing

3. We use the term "cohabitants" in this article to include both heterosexual and homosexual couples living together in a conjugal-style relationship. Any differences which arise in the relevant law as between these two groups are indicated accordingly.


married and unmarried couples? Would legislative provision for the registration of civil unions solve the problems in the current law? If the law governing property relations between cohabitants is to be reformed, should property law, family law, or some combination of both provide the framework for reform?

Much of the Canadian and British literature that is critical of the current state of the law regarding cohabitants’ property does not distinguish between the family home and other assets. However, we restrict our analysis to the family home, arguing that the policy considerations supporting non-intervention with respect to cohabitants’ assets on relationship breakdown should not apply where the family home is concerned. In both Canada and Britain, there is some tentative movement towards distinguishing the family home from other types of assets. However, there is a lack of consensus as to how this might be achieved. This article compares and contrasts the different legal approaches emerging in both jurisdictions. A number of recent events provide the starting point for our discussion: in Britain, the release of the Law Commission’s discussion paper on Sharing Homes⁶ and the recently enacted Civil Partnership Act 2004;⁷ in Canada, the Supreme Court judgment in Nova Scotia (Attorney General) v. Walsh;⁸ and the decision of the Canadian government to proceed with legislation authorizing same-sex marriage⁹ in light of court decisions declaring unconstitutional the restriction of marriage to heterosexuals.¹⁰

7. (U.K.), 2004, c. 33.
On the surface, these events may appear unrelated. *Sharing Homes*, for example, examined the property rights of all those who share homes, and was not restricted to those in intimate or conjugal relationships. It was not drafted with a view to providing proposals for legislative reform, but merely as a “framework for future public debate and consideration by Government.” The Commission concluded that “it was not possible to devise a statutory scheme for the determination of shares in the shared home which can operate fairly and evenly across all the diverse circumstances which are now to be encountered.” *Walsh*, on the other hand, dealt with a claim by a common-law partner that the definition of “spouse” contained in the Nova Scotia *Matrimonial Property Act*, (which provided for a presumptively equal division of the “matrimonial assets” of formally married spouses upon divorce) discriminated against her contrary to section 15 of the *Canadian Charter of Rights and Freedoms*. Although successful in the Nova Scotia Court of Appeal, Ms. Walsh lost in the Supreme Court of Canada. The Supreme Court decided that, while “inequities may exist in certain unmarried cohabiting relationships [that] may result in unfairness between the parties on relationship breakdown, there is no constitutional requirement that the state extend the protections of the [Act] to those persons.”

However, both *Sharing Homes* and *Walsh* consider the protection of personal autonomy to be a paramount virtue, and both display a corresponding reluctance to impose obligations on parties who have not chosen them unequivocally. Both lean towards contract and property law rather than relationship status as the ultimate arbiter of such disputes. This reflects a very deep-rooted tendency in the common law to privilege “property” over “family,” an attitude so pervasive that it may appear to be common sense. The proposals in England and Wales

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13. R.S.N.S. 1989, c. 275, s. 11(3).

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for homosexual civil unions and the availability of same-sex marriage in Canada both maintain this approach in that they impose spousal obligations only on those who have clearly chosen them. Yet, in spite of these tendencies, there are counter-trends at work in both countries. In England, John Dewar argues, there has been a “familialization” of the general law of trusts and real property, as well as the emergence of a nascent statutory regime for the family home. In both cases, however, he asserts that “English law has proceeded inductively, from a variety of starting points, and has ended . . . in a muddle.”17 The trends identified by Dewar can be observed in Canada too, but in both jurisdictions they operate mostly in favour of married couples. Unmarried cohabitants weave in and out of family law and family property legislation like will-o’-the-wisps, and must resort to a combination of contract law, property law and trusts principles to resolve disputes over the family home. Those who opt for marriage or a civil union of some kind will have their rights defined comprehensively by legislation; however, those who do not will be left to the common law and a series of piecemeal statutory concessions.

This article considers the manner in which Britain and Canada have dealt with the vexed issue of property rights in the family home as between unmarried cohabitants. We begin by looking briefly at the law governing matrimonial property in both jurisdictions, since it is in this area that special provisions relating to the family home are most developed, and then contrast this with the law applicable to cohabitants’ property. We then discuss the manner in which the judiciary and legislatures in Canada and Britain have dealt with this issue to date, critically analyze a variety of proposals for future reform, and examine the potential influence of constitutional equality provisions and human rights law on property rights in the family home. We conclude that any change is likely to come through policy initiatives and legislative

changes rather than constitutional ordering. However, we concede that any comprehensive legal regime for the family home which meets the expectations of couples who are living together in conjugal relationships may be a long way off.

I. The Position in Canada

A. Spouses and the Matrimonial Home

In every Canadian province and territory since 1980, formally married spouses have had a recognized set of rights in the matrimonial home, regardless of the actual state of the title. They have occupation rights during marriage similar to those that exist in Britain under the Family Law Act 1996, and a prima facie claim to an equal share of the capital value is available on dissolution of the marriage. This is in stark contrast to the previous situation under separate property, where title ruled and the courts were reduced to creating novel equitable interests out of thin air in order to remedy situations of injustice. These rights are not identical across all provinces, but—with the exception of Newfoundland and Labrador—the differences are not significant.

19. Opting out of either or both sets of rights is, generally speaking, allowed. "Dissolution of the marriage" is used throughout as a shorthand for death, divorce or separation where the resumption of cohabitation is unlikely. Any one of these triggers the right to apply for a division of statutorily defined "matrimonial assets" or "family property."
21. For a convenient overview, see James G. McLeod & Alfred A. Mamo, Matrimonial Property Law in Canada, looseleaf (Scarborough, ON: Carswell, 1993). While largely a civil law jurisdiction in its private law, the articles of the Quebec Civil Code on these matters provide results very similar to those in the common law provinces. Although married parties have a choice of matrimonial regime, between the (default) deferred community regime called partnership of acquests and separate property, non-titled spouses are given occupation rights in the matrimonial home and veto rights on its disposition during marriage pursuant to imperative provisions which cannot be derogated from by contract; Arts. 401-413 C.C.Q. In Newfoundland the Family Law Act creates a
Three sets of rights in the matrimonial home exist during marriage in addition to occupation rights. First, each spouse has a right of possession equal to any interest of the other spouse in a matrimonial home. In practical terms, a titled spouse can no longer evict a non-titled spouse. The latter has been granted a legislative “toe-hold” in the matrimonial home, in that only a court order or separation agreement could vary or terminate the right to possession. Such rights are clearly based not just on the need for shelter, which might be supplied in some other place, but on the desirability of providing continuity in a specific abode. Second, the consent of each spouse is required with regard to any disposition or encumbrance of the matrimonial home, whether or not he or she holds a title interest in it. This does not involve a major change since it only mimics in a clearer and more principled way the protection afforded a wife by her dower right and earlier, the protection afforded a husband by his right to curtesy. The policy basis of such rights is clearly to encourage consultation between spouses before any major change is made to their living arrangements. These rights also recognize the uniquely personal nature of the matrimonial home; no other asset of the spouses is treated in this fashion. The law here recognizes a use-based personhood interest in a particular asset, even though the person possessing that interest may have no formal title to the asset at all. Finally, both spouses have rights to notification by encumbrancers of the home seeking to realize upon a security interest.

Statutory joint tenancy in the matrimonial home between spouses regardless of the initial state of title; R.S.N. 1990, c. F-2, s. 8.

22. This is not quite true in the Western provinces, where spouses are not formally endowed with an equal right to possession of the matrimonial home, but a spouse can apply for a court order for exclusive possession of, or eviction of a spouse from, the matrimonial home regardless of title.

23. Unlike the situation in England and Wales, dower remained a live issue in conveyancing in the common law provinces until its abolition in the matrimonial property reform legislation. The prohibitions on dispositions of the matrimonial home are, in the Western provinces, largely left in their homesteads legislation which replaced common law dower early in the 20th century. Such legislation also provides a life estate in the matrimonial home to a surviving spouse over and above the claims of any creditors of the deceased spouse’s estate.
and the same rights to redemption or relief from forfeiture, regardless of the state of the title.

For a complete view of the legal regime of the matrimonial home, one must also look at both post-divorce and post-mortem situations. Treatment of the matrimonial home after divorce reveals that persons other than the spouses may be considered to have a personhood interest in it, for example, the children of the marriage. In Quebec, articles 409 and 410 of the Civil Code authorize a court to grant a right of occupation in the former matrimonial home to the parent having custody of any child of the marriage, and Nova Scotia case law shows a clear pattern of allowing a postponement of the equal division of the home on divorce if the custodial parent wishes to remain there and it is financially feasible. Nova Scotia courts have adopted this rule almost instinctively, without a great deal of reflection, and it is a clear exception to what is otherwise a strictly enforced principle of equal division of matrimonial assets. The same tendency has been noted in some other provinces.

It is in the post-mortem context that there is the most variation between provinces with regard to the treatment of the matrimonial home. Surviving spouses may gain, over and above entitlements arising from a division of property or by will: (1) specific property rights in the matrimonial home, as in the Western provinces and Nova Scotia; (2) rights of occupation, as in Quebec; or (3) minimal or no additional rights, as in the rest of Canada. The four Western provinces all provide for a statutory life estate in the “homestead” (essentially the matrimonial home) for the surviving spouse in addition to any matrimonial property, testate and intestate succession entitlements. The survivor’s life estate also prevails over any inconsistent disposition of a homestead.

24. Arts. 409, 410 C.C.Q.
26. Matrimonial Home, supra note 2, suggests the same is true in that province. For Saskatchewan, see McLeod & Mamo, supra note 21 at S-43-54, though the authors note a trend away from this in the case of very young children where the interest of the non-custodial spouse would be postponed for a long time.
27. Arts. 409, 410 of the Civil Code of Quebec also authorize a court to grant occupation rights to a surviving parent in case of a spouse’s death.
in a will. In Nova Scotia, the *Intestate Succession Act*\(^{28}\) allows a surviving spouse to elect to take the matrimonial home instead of his or her preferential share of $50,000 in the estate of the deceased spouse, even though the equity in the home is frequently worth much more.\(^{29}\) The policy basis of this provision is ambiguous. On one view, it looks like a clear commitment to the personhood interest in the matrimonial home. On another, it may be more concerned with securing the basic right of shelter to a surviving spouse where there are few assets and little economic security. Even if the latter is the primary rationale, however, it does not exclude the former. Nova Scotia's *Matrimonial Property Act* also allows a child to apply for possession of the matrimonial home until age 24, where the surviving spouse did not live in the home but the child did (presumably with the now deceased spouse).\(^{30}\)

In other provinces, the post-mortem situation is much less favourable to the surviving spouse. In Ontario, the *Family Law Act*\(^{31}\) accords a right of occupation of sixty days to a surviving spouse who has no title interest in the matrimonial home.\(^{32}\) The remaining provinces have no specific provision for any continuing rights of a surviving spouse in the matrimonial home. While an application by a surviving spouse for a division of assets (Canadian matrimonial property legislation generally applies on death), coupled with testate or intestate succession benefits, will normally provide at least a half-share in the capital of the matrimonial home, any co-tenants will be able to exercise their rights to partition. This may well force the surviving spouse to leave the home if he or she cannot afford to buy out the others.

The general policy of Canadian law is to recognize the special position of the matrimonial home in the lives of married couples and their families. The state of the title is basically irrelevant during marriage, and it is the only asset over which spouses do not have free power of disposition. Consultation between spouses with regard to major

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29. The provision has been copied in the Northwest Territories and Nunavut.
30. R.S.N.S. 1989, c. 275, s. 11(3).
32. *Ibid.*, s. 26(2). This represents a 50% increase on the original period of quarantine allowed to a widow at common law.
decisions about the home is mandatory and non-titled spouses have a number of important rights vis-à-vis encumbrancers. The interests of children in stability and continuity of residence are recognized in the jurisprudence on post-divorce occupation by custodial parents, and in some cases by legislation. The regime for the matrimonial home in Canada is more than "nascent," as Dewar suggests it is in England; it is comprehensive, except for the somewhat ragged provisions for continued occupation by a non-title holding surviving spouse.

B. Cohabitants and the Family Home

The position of common law spouses is governed by the doctrine of separate property, under which beneficial ownership follows the legal title, tempered somewhat by the law of trusts, contract and unjust enrichment. Two Supreme Court of Canada cases, Pettkus v. Becker and Peter v. Beblow, are considered landmarks in clarifying the law governing the property of individuals in common-law relationships, but the voluminous case law purporting to apply them reveals few easily discernible patterns. Cossman and Melamed report that "the doctrine of unjust enrichment imposes onerous requirements on claimants, at the same time as it vests very broad discretion with the courts." In effect, Canada has a regime of judicial discretion in property allocation on termination of a common-law relationship. Ironically, this regime would not have a hope of passing in any legislature in the country if it were presented as a bill.

With regard to the family home, there is very patchy protection for a common law spouse who is not a co-tenant. Temporary orders for exclusive possession of the home can be given on an emergency basis in cases of domestic violence in at least five provinces and the Yukon.

33. See Introduction, above.
while in Nova Scotia and Newfoundland and Labrador, orders for
possession can be given to a cohabitant without title who has made a
support application.38 No province requires the title holder of a family
home to seek the consent of his or her common-law spouse before
alienating or encumbering it. In British Columbia, for example, the
definition of spouse was changed in a number of provincial statutes, but
it was not changed in the Land (Spouse Protection) Act,39 the statute
mandating consent to dispositions of the matrimonial home by a
formally married spouse without title. Curiously, in some provinces,
the position of a common-law partner improves dramatically upon the
death of his or her partner. For example, under the British Columbia
Estate Administration Act,40 the surviving common-law partner of an
intestate automatically receives a life estate in the family home, in
addition to other benefits to which he or she may be entitled.41

It cannot be said that there is a regime for the family home with
respect to common-law families in Canada, but Canadian family lawyers
expected that this might change with the Supreme Court’s decision in
Walsh.42 Susan Walsh and Wayne Bona had lived together for about ten
years and had two children together when they decided to separate in
1995. The parties were joint tenants of the family home, but after
separation Bona retained some assets in his name to which Walsh felt
she was entitled. However, she did not meet the definition of “spouse”
under the Act. She could have started an action based on the private law

38. Maintenance and Custody Act, R.S.N.S. 1989, c. 160, s. 7, as am. by S.N.S. 2000, c. 29;
Family Law Act, R.S.N. 1990, c. F-2, s. 40(1)(d) as am. by S.N.S. 2000, c. 29.
40. Estate Administration Act, R.S.B.C. 1996, s. 96.
41. The definition of common-law spouse in this Act requires two years of cohabitation
in a marriage-like relationship (including a same-sex relationship) immediately before the
death of the intestate.
42. Walsh, supra note 8. See e.g. Onofrio Ferlisi, “Recognizing a Fundamental Change: A
Comment on Walsh, the Charter, and the Definition of Spouse”, Case Comment (2001)
18 Can. J. Fam. L. 159 (comment on Court of Appeal decision); D.A. Rollie Thompson,
“Annotation to Walsh v. Bona” (2003), 32 R.F.L. 87 at 91 (observing that the Supreme
Court’s previous jurisprudence seemed to “pre-ordain the result in Walsh v. Bona, as
similar family functions overcame any differences of status”).

726 (2005) 30 Queen’s L.J.
remedies outlined above, but was advised to challenge the relevant provisions of the Nova Scotia Matrimonial Property Act. If successful, she would have been able to claim the benefit of a *prima facie* equal division of the parties' "matrimonial" assets, rather than bearing the onus of proof in an action based on unjust enrichment. Based on a series of Supreme Court decisions restricting governmental power to deny benefits on the basis of marital status, many court watchers predicted success for Walsh. She did succeed at the Nova Scotia Court of Appeal, though the government was given time to amend its legislation in order to address the constitutional violation. However, her arguments failed at the Supreme Court of Canada, where eight judges agreed that the Act, which made certain rights available to those who had chosen marriage but withheld them from those who had not, was not discriminatory. Functional similarities between married and cohabiting couples were not, by themselves, sufficient to guarantee equal treatment because there was considerable heterogeneity among cohabitants. Walsh's right to dignity, considered the touchstone of equality analysis since the Supreme Court's decision in *Law v. Canada,* was thus not compromised, especially where some remedies existed to address her situation. Furthermore, the right to choose whether or not to marry was upheld, not infringed, by the treatment of marriage in the Act. This right is part of the basic value of liberty enshrined in the Canadian Charter, which guarantees the right to make fundamental choices in life. The definition of spouse in the Act protected autonomy by restricting the rights and obligations of marriage to those who unequivocally choose to marry.

We agree with other commentators that the Supreme Court did not convincingly distinguish its own decisions in *M. v. H.* or in *Miron v. Trudel.* In the latter case, a provision of the Ontario Insurance Act

45. Thompson, *supra* note 42; Bala, "Controversy", *supra* note 5 at 48-55.

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restricting benefits of an insurance policy to formally married parties was found to discriminate on the basis of marital status, and the Court "read in" an expanded definition including common-law partners who had cohabited for at least three years. It is true that Miron dealt with the rights of a couple with regard to third parties, as opposed to the rights of the members of the couple between themselves, but the majority did not limit its analysis to this type of situation. Conversely, reading the emphasis on "autonomy" in Walsh back into Miron leads to the conclusion that it should not be considered wrong for a legislature to decline to provide the insurance benefits in question; the legislature could claim to be merely respecting the decision of the parties themselves not to marry.

While Justice Bastarache, for the majority in Walsh, at least tried to distinguish Miron, he did not even mention M. v. H. In M. v. H., the Supreme Court held that it was discriminatory to exclude same-sex couples from the right to apply for support after termination of their relationship, a right available to opposite-sex couples who had cohabited for three years or had a child. Although the Supreme Court in M. v. H. extended the right to apply for support to same-sex cohabitants, it refused in Walsh to grant a right of division of the family home to opposite-sex cohabitants. Why does exclusion from the right to apply for support compromise human dignity but not exclusion from the right to apply for a division of property?

Justice Gonthier tried to answer this question in his concurring opinion in Walsh by making a distinction between a division of matrimonial property as a matter of contract—either entered into directly by the parties or "indirectly by the fact of marriage"—and support obligations, which seek to fill "a social objective," that is, alleviating the burden on the public purse by imposing support obligations on family members. With respect, whatever analytical value this distinction may have in civil law jurisdictions (and it may possess considerable power there, given the traditional choice of matrimonial regimes open to parties marrying in Quebec), it is not convincing in common law Canada. Matrimonial property legislation, at least in the

50. Ibid.

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common law provinces, was undoubtedly enacted to fulfill a social objective: "to recognize . . . that there is a joint contribution to marriage made by each spouse that entitles each spouse equally to the matrimonial assets." This deemed joint contribution was undeniably a significant change in Canadian public policy regarding marriage and the family. Public policy had previously relied on differentiated gender roles as the basis for legal entitlements (or lack of them) on marriage breakdown. Equally surprising is a complete absence in *Walsh* of any concern about the feminization of poverty, one of the leitmotifs of the Supreme Court’s divorce jurisprudence over the last dozen years. Arguably, the decision illustrates the profound commitment of the common law to maintain “property” as a zone of autonomy and privacy that cannot be entered without consent.

C. The Policy Question

Why do we treat common-law families differently from marriage-based families? The Supreme Court of Canada, in *Walsh*, has told us that it is legitimate to treat them differently because the value of autonomy in personal relationships trumps claims for equal treatment. Certainly autonomy is highly valued in Canada and in most Western countries. However, the Supreme Court overlooked the practical effects of considering only the couple itself in its conception of autonomy. For example, it did not look at the effect of this view on children of the relationship. The children of married couples will have their need for stability and continuity taken into account when decisions are made about allocation of the matrimonial home after divorce. The children of common-law couples, however, are treated with no such solicitude. The title holder can evict his or her family with impunity on termination of the relationship, and even a successful claim based on unjust enrichment is unlikely to lead to the non-title holder regaining

possession. It is difficult to understand why the law should countenance such divergent treatment of these two groups of families. Even where cohabiting couples keep their economic lives separate, the one area in which they must co-operate is with regard to their shared home. This non-negotiable reality is sufficient to justify intervention by the law to deal with occupation rights or title on termination of the relationship.

Where assets other than the family home are concerned, the Supreme Court’s protection of autonomy is arguably more defensible. Where one party to a common-law relationship enters with substantial assets, and the other with none, there seems to be no moral or policy justification for a large transfer of wealth at the end of a relatively brief period of cohabitation. Although laypersons may widely assume that equal division of assets follows the termination of a common-law relationship, this expectation may not be a legitimate basis for justifying an equal division of wealth. Any argument based on functional similarity between common-law couples and married couples gains force only as the period of cohabitation lengthens. However, at some necessarily arbitrary point, one can infer that the “trial” period of a relationship has passed, such that it is reasonable to consider a commitment to exist. We believe that Manitoba’s three-year threshold is appropriate for this purpose. Social science evidence indicates that less than half of cohabitating relationships reach this point. Thus, we believe that three years of cohabitation represents a reasonable threshold for deeming the trial period to be over. Many provincial laws dealing with support also deem a relationship with legal consequences to exist between unmarried parents when a child is born into the relationship. The child is effectively treated as a proxy for the commitment involved in a formal marriage. Even though this equivalency can be challenged as unwarranted in some cases—for example, where a pregnancy was unplanned—legislation must address the generality of human experience.

55. For a similar critique of Quebec law, which is also the only Canadian jurisdiction without a legislated support obligation between cohabitants, see Goubau, Otis & Robitaille, supra note 4.

We believe that the "child equals deemed relationship" presumption is usually a valid one.

A high threshold for ascribing legal status to cohabitation relationships would seem sufficient to protect the autonomy of individuals. However, even if there is agreement about the appropriate threshold, there is no constitutional requirement that the legal rights and responsibilities of those who reach it must be identical to those of married couples. The next section analyzes the various choices made by provincial governments with respect to the regulation of cohabitants' economic lives, with particular reference to their treatment of the family home.

D. Recent Legislation and Proposals for Future Reform

There are several ways in which legislation might address issues relating to the shared home of common-law spouses. One way is simply to extend the benefits and obligations of matrimonial property laws to them after a certain threshold of cohabitation is reached. Another is to create a new form of civil status and allow couples opting into it to be treated as spouses under relevant legislation, while those not opting to do so remain subject to the common law. Yet another possibility is to create a new form of spousal status but also provide a safety net for those who do not register for it. All of these approaches have recently been tried in Canada.

Saskatchewan extended its matrimonial property legislation to unmarried couples as a result of an unappealed lower court decision that declared unconstitutional the restricted definition of spouse. However, when the Nova Scotia Court of Appeal came to the same conclusion and gave that province a year to change the law, a different approach was taken. The Nova Scotia government implemented the registered domestic partnership, a new form of civil status open to both opposite-sex and same-sex couples living in a conjugal relationship. On registration of a declaration of domestic partnership, the parties opt into more than a dozen provincial statutes that confer benefits and impose

57. Watch v. Watch (1999), 182 Sask. R. 237 (Q.B.). Since Nova Scotia v. Walsh, it is clear that Watch was wrong and the province need not have acted as it did.
obligations on formally married spouses.\textsuperscript{59} Nova Scotia has secreted a new type of civil status in the interstices of the \textit{Vital Statistics Act}:\textsuperscript{60} the domestic partnership, which comes complete with its own set of formalities, "divorce" provisions, and civil effects.\textsuperscript{61} As might be expected, this new status has been used much more by same-sex couples than opposite-sex couples. According to the Nova Scotia Registrar of Vital Statistics, same-sex couples accounted for 70-80 percent of the 180 domestic partnerships registered between June 1, 2001 and March 1, 2003.\textsuperscript{62} It may be that same-sex couples see it as a much desired official validation of their relationship; opposite-sex couples, on the other hand, are free to marry if they want that kind of validation. The new partnership would be attractive to only the small subset of opposite-sex couples who oppose the formal institution of marriage on ideological grounds but wish to engage its civil effects.

Two Western provinces have recently tried to mix and match these two approaches. Manitoba's \textit{Common Law Partners' Property and Related Amendments Act}\textsuperscript{63} (CLPPA) adopts the Nova Scotia type of registered domestic partnership, defined as a "relationship between two adults who, not being married to each other, are cohabiting with each other in a conjugal relationship."\textsuperscript{64} The \textit{Act} then proceeds to amend a dozen or so statutes to place parties to such relationships on the same footing as formally married spouses. Among other matters covered by the amendments, provisions on the family home are included in the \textit{Marital Property Act}\textsuperscript{65} (now renamed the \textit{Family Property Act}), the \textit{Family Law Reform (2000) Act}, S.N.S. 2000, c. 29.

\begin{itemize}
  \item \textsuperscript{60} R.S.N.S. 1989, C. 494.
  \item \textsuperscript{61} Quebec too created a new title on "civil unions" in 2002. Art. 121, C.C.Q..
  \item \textsuperscript{62} Exact figures are not available because the Act does not require the parties to state their gender on the application form. The Registrar kindly provided an estimate by scanning the first names of the parties.
  \item \textsuperscript{63} S.M. 2002, c. 48 s. 23 [CLPPA]. The \textit{CLPPA} amends the Manitoba \textit{Vital Statistics Act} by adding this definition to s. 1 and a number of provisions relating to registration and termination of such relationships. The Act was passed in August 2002 but not proclaimed in force until 30 June 2004; parts of s. 25 dealing with consequential amendments to the \textit{Wills Act} remain unproclaimed.
  \item \textsuperscript{64} \textit{Ibid.}, section 10(1)(b.2).
  \item \textsuperscript{65} C.C.S.M., c. F25.
\end{itemize}
Maintenance Act,\textsuperscript{66} and the Homesteads Act.\textsuperscript{67} However, the CLPPA also recognizes a new form of unregistered domestic partnership and provides for it the same legal consequences with respect to the family home as for the registered domestic partnership in the statutes it amends. The parties to an unregistered domestic partnership must have cohabited in a conjugal relationship for at least three years, or for one year if they are "together the parents of a child."\textsuperscript{68} Presumably, the "togetherness" requirement excludes same-sex couples where one partner has a child, but this will no doubt be the subject of judicial interpretation.

The CLPPA provides for occupation orders, previously unavailable in Canada, between common-law spouses during their relationship and after its termination. It states that:

one of the spouses or common-law partners has the right to continue occupying the family residence for such length of time as the court may order, notwithstanding that the other spouse or common-law partner alone is the owner or lessee of the residence or that both spouses or common-law partners together are the owners or lessees of the residence.\textsuperscript{69}

It also clarifies that where an order is made, the court may include in the order a provision that such rights as the other spouse or common-law partner may have as owner or lessee to apply for partition and sale, to sell, or to otherwise dispose of the residence shall be postponed subject to the right of occupancy contained in the order.\textsuperscript{70}

The Manitoba example represents a thoughtful attempt to come to grips with some of the problems created by the proliferation of common-law families. It is unusual in that it was not spurred by court challenges to Manitoba laws, but was a proactive move by government. Although Manitoba has chosen to make the rights and obligations of common-law couples, whether registered or unregistered, essentially uniform with those of married persons, this is not the only model

\textsuperscript{66} C.C.S.M., c. F20.
\textsuperscript{67} C.C.S.M., c. H80.
\textsuperscript{68} CLPPA, supra note 63, s. 1(b)(ii).
\textsuperscript{69} S.M. 2002, c. 48 s. 6(4).
\textsuperscript{70} Ibid., s. 10(5).
available. Other provinces may wish to experiment with less intrusive measures, such as those dealing with the family home only.

The Alberta Adult Interdependent Relationships Act\(^{71}\) is certainly less intrusive. It amends a variety of provincial legislation to give spousal-type rights to “adult interdependent partners,” but mainly in non-property related contexts such as consent to medical treatment and support obligations. For example, the Matrimonial Property Act is not amended to include adult interdependent partners, nor is the Dower Act\(^{72}\). The only property-related act to be amended is the Intestate Succession Act\(^{73}\), where the rights of the adult interdependent partner are equated with those of a surviving spouse. Outside this rather narrow context, an adult interdependent partner with no title acquires no rights in the home in which the partners cohabit. The AIRA applies on an ascriptive basis where two adults have been living in a “relationship of interdependence” other than a marriage for at least three years, or in a relationship of “some permanence” where a child has been born.\(^{74}\) Conjugality is not a requirement, but the parties are required to “share each other’s lives, [be] emotionally committed to one another, and function as an economic and domestic unit.”\(^{75}\) In addition, there is a long list of factors to be considered by a court in deciding whether a particular relationship falls within the Act.\(^{76}\) It is widely acknowledged that the Act was passed in response to growing pressure to recognize the rights of gay and lesbian couples, but drafted so as to disguise this motivation.\(^{77}\)

\(^{71}\) S.A. 2002, c. 1; consolidated as R.S.A., c. A-4.5 [AIRA].
\(^{73}\) R.S.A. 2000, c. I-10.
\(^{74}\) AIRA, supra note 71, s. 3(1)(a).
\(^{75}\) Ibid., s.1(1)(f).
\(^{76}\) It should be noted that if the parties are related by blood or adoption, the Act will apply to them only if they contract into it.
\(^{77}\) See the discussion in Bala, “Controversy”, supra note 5 at 89-96. Alberta is the only province which has announced it will try to invoke s. 33 of the Canadian Charter of Rights and Freedoms to avoid any federal legislation on same-sex marriage, but it is not clear whether this avenue is legally permissible.
E. Functional Equality Versus Autonomy: Potential Problems

Canadian law is in a state of flux at the moment, as legislators experiment with a variety of approaches to deal with new family groupings. With the recent legal recognition of same-sex marriage, the device of the registered domestic partnership may soon be superceded. Since full legal marriage is now open to them, it is not clear why gay and lesbian couples seeking a marital-type commitment would choose a registered domestic partnership, and the device seems to be of limited appeal to heterosexual couples. This suggests that the main policy issue in the future, given the favourable treatment by the Supreme Court of the support obligations of same-sex couples, will relate to property issues between unmarried couples, whether same-sex or opposite-sex. Disputes over the shared home will feature prominently. Even though the Supreme Court in *Walsh* said that governments are not constitutionally obliged to treat married and unmarried couples equally in terms of family home protections and property division mechanisms, this does not mean they are precluded from doing so, or that some halfway measures between full marital-type treatment and the common law might not be advisable.

Academic and law reform opinion in Canada is divided on the subject of ascribing equivalency to married and common-law couples. The Ontario Law Reform Commission, before its demise, recommended that the definition of spouse in the *Family Law Act* be amended to include heterosexual couples cohabiting for three years or in a relationship of some permanence if they are the parents of a child; it did not recommend ascriptive inclusion for same-sex couples, but rather the

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creation of a registered domestic partnership scheme. The Nova Scotia Law Reform Commission recommended in 1997 that the Matrimonial Property Act be extended to same-sex and opposite-sex cohabitants on an ascriptive basis where parties have cohabited for at least a year in "a personal relationship in which one provides personal or financial commitment and support of a domestic nature for the benefit of the other." The Law Commission of Canada seeks to have it both ways, observing that "the value of autonomy requires that governments put in place the conditions in which people can freely choose their close personal relationships," but that "autonomy is compromised if the state provides one relationship status with more benefits and legal support than others." However, if one's choice is only between various types of "relationship status," all of which have the same attributes, how is autonomy advanced? The Manitoba and Saskatchewan reforms may be criticized on that ground, while the law in Alberta may be faulted for ignoring one of the major sources of conflict between parties to "adult interdependent relationships": the allocation of property rights. The fuzzy definition of interdependent relationships beyond those that are clearly conjugal is also likely to cause considerable confusion.

It is not surprising that legislators are puzzled. The competing claims of equality and autonomy are not easily reconciled. The decision to live together without marrying conveys a negative message—we are not married—but it is less clear what the positive message is. Empirical studies in Canada reveal that relationships based on cohabitation are shorter and produce fewer children than marriages. Less than half of all cohabiting unions will last for three years, whereas 90 percent of all first marriages last for at least ten years. Some sociologists argue that cohabitation is not just a prelude to marriage, but has become an alternative living arrangement in its own right. For example, some U.S.

82. Wu, supra note 56 at 108.
scholars suggest that cohabitation be viewed as more functionally similar to being single than it is to being married, based on similar patterns of behaviour between cohabitants and single persons. This suggests that fully equating the rights of married and cohabiting couples may not be advisable, but that a more modest set of rights in the family home, a sort of "lite" regime relating principally to possession rather than title (similar to the Manitoba provision), might be appropriate. Such a proposal would still leave largely intact the value of autonomy in domestic relations while providing a safety net to address the need for stability and continuity in family life, especially where children are concerned. A requirement for consent to disposition by the non-titled common-law spouse would not necessarily have to be part of the package, but the rights to notification and redemption against foreclosing encumbrancers should be. Such rights would not affect autonomy but might enhance stability.

With regard to the post-mortem situation, some Canadian provinces have arguably moved too quickly to equate marriage and cohabitation in the area of intestate succession. Canadian intestate succession provisions typically allow a surviving spouse a preferential share in the estate of the deceased where it is worth less than a certain amount (ranging between $40,000 and $75,000). Children are entirely excluded from succession in such cases. This is justifiable in the case of married persons because the survivor will have a support obligation towards any dependent children, and it avoids multiple titles to the matrimonial home. However, equating a surviving cohabitant or "adult interdependent partner" with a spouse in this context means their rights will trump those of any children of the deceased, even though the cohabitant may not be the parent of those children or have any support obligation towards them. If the purpose of intestate succession law is to be a statutory will, one may wonder whether the new provisions in Alberta and British Columbia truly reflect the desires of most cohabitants. Those who bring children into a relationship of cohabitation may prefer them to share in their assets rather than have all

of those assets devolve to the surviving common-law spouse. Once again, it may be appropriate that some share of the deceased cohabitant's estate pass to the survivor, but not necessarily the same share as that of a deceased spouse.

While provincial legislators have tested a range of legal responses to the issues raised by unmarried cohabitation and ownership of the family home, each creates its own problems. Such observations are not unique to Canada. In Britain, attempts to improve the existing law governing the property relations of cohabitants have created a similar legal dilemma.

II. The Legal Framework in Britain

A. Spouses and the Matrimonial Home

In Britain, as in Canada, the starting point is the doctrine of separate property.⁸⁴ During marriage, beneficial ownership of the matrimonial home is determined by the names on the title documents or by ordinary rules of property law—the law of trusts in particular—where title is not in joint names.⁸⁵ This is often an issue where one spouse is trying to resist sale of the home at the behest of a third party, such as a lender or trustee in bankruptcy with a claim against the other spouse's interest in the property.⁸⁶ Unlike in Canada, there is no statutory requirement for one spouse to secure the other's consent in relation to any disposition or encumbrance of the home. The fact that major decisions about the property can be made without consultation between couples is a significant gap in English law.

⁸⁴. As established by the Married Women's Property Act 1882 (U.K.), 45 & 46 Vict., c. 75. For criticisms of this doctrine, see Otto Kahn-Freund, "Inconsistencies and Injustices in the Law of Husband and Wife" (1952) 15 Mod. L. Rev. 133.

⁸⁵. A non-owning spouse will have to rely on the rules of resulting and constructive trusts. The relevant criteria are the same as those for cohabiting couples and are discussed below. Another option is the doctrine of proprietary estoppel, which is also discussed below.

⁸⁶. For illustrations of a non-owning spouse trying to assert a beneficial interest in the home in these circumstances, see Lloyds Bank plc v. Rosset, [1991] 1 A.C. 107 (H.L.) [Lloyds Bank]; Le Foe v. Le Foe [2001] 2 Fam L.R. 970 (Fam. Div.) [Le Foe].
However, there are a number of statutes relating principally to enjoyment of the home that do recognize the emotional and financial significance of the property for those who reside there. The *Trusts of Land and Appointment of Trustees Act 1996* allows courts to resolve disputes involving co-owned property, such as disagreements between spouses over whether to sell the matrimonial home or, more frequently, applications for sale of the home by third parties. In settling such disputes, the court must take account of specific factors, including the purposes for which the property is held, the welfare of any minor who occupies the property and the interests of secured creditors. The extreme financial and emotional repercussions of bankruptcy engender an additional layer of statutory protection for the matrimonial home and those who live there where a trustee in bankruptcy seeks sale of the property under the *TLATA*. Under the *Insolvency Act 1986*, the court must consider the needs and financial resources of the bankrupt’s spouse and any children in deciding whether to order sale. Despite statutory recognition of their personhood interest in the home, the judicial bias is still very much towards sale of the property on bankruptcy in order to satisfy the creditors. According to Nourse L.J. in *Re Citro*, the fact that a wife and young children may be forced to move to another home and school is merely the “melancholy [consequence] of debt and improvidence with which every civilised society has been familiar.” Meanwhile, the *Family Law Act 1996* provides a legal framework for regulating occupation of the home between the couple themselves. During marriage, a non-owning spouse enjoys “matrimonial home rights” under the *FLA*, and cannot be evicted or excluded from the

90. *Ibid.*, s. 336(4). However, this protection is weakened by a statutory presumption that, once a year has passed since the initial bankruptcy order, the interests of the creditors are deemed to outweigh the bankrupt’s family in the absence of “special circumstances”; s. 336(5).
91. [1991] Ch. 142 at 157 (C.A).

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property by the other spouse without a court order.93 These rights can also be registered by the non-owning spouse to provide statutory notice to a third party of the spouse’s occupation,94 though (as in Canada) this is not common practice. The FLA also contains extensive provisions for dealing with allegations of domestic violence between spouses; section 33, for example, allows the court to make an occupation order regulating occupation of the home.95 The court must consider the couple’s housing needs, their conduct and, most important, the effect of its decision on the health, safety and well-being of the parties and any relevant children.96 An occupation order is mandatory where the applicant or a relevant child would otherwise suffer significant harm.97

On relationship breakdown, beneficial ownership of the matrimonial home is irrelevant and the emphasis shifts from property law to family law; judges will reallocate a couple’s assets if it is just and reasonable to do so.98 There is no deemed community of property on relationship breakdown as there is in most Canadian provinces under the respective matrimonial property laws. Instead, the Matrimonial Causes Act 197399 contemplates a range of financial provision orders and property adjustment orders upon judicial separation and divorce, taking account of the couple’s resources, their financial needs and any contributions (both financial and non-financial) towards the welfare of the family.100 Overall primary consideration must be given to the welfare of any minor children,101 which takes account of the need for stability and

93. Ibid., s. 30.
94. Ibid., ss. 31-32.
95. Ibid., s. 33(3). For example, the applicant may be permitted to enter the property, or the respondent instructed to leave the home where the couple is still living together.
96. Ibid., s. 33(6).
97. Ibid., s. 33(7). Former spouses may also seek occupation orders under s. 35.
100. Ibid., s. 25.
101. Ibid.
continuity in their upbringing. Such factors might persuade the court to instruct the non-custodial spouse to transfer the matrimonial home to the custodial spouse, irrespective of the state of title. That aside, the judicial trend is increasingly towards equal division of spousal assets on divorce, especially at the end of a long marriage, with the emphasis on achieving a fair outcome and equal weight being placed on “breadwinning” and “homemaking” contributions to the family during marriage. In other words, English law is now similar to that in the common-law Canadian provinces; despite fundamentally different approaches, the practical outcome is broadly the same for spouses on the dissolution of a marriage.

Turning to the postmortem context, English law makes no special provision for the matrimonial home beyond any general testate and intestate succession, and does not compare favourably with Canada. In Britain, a surviving spouse does have first claim on the deceased’s estate as next-of-kin under the Administration of Estates Act 1925, which applies a statutory model for the distribution of assets where the deceased died intestate. Where title to the family home is not in joint names, the surviving spouse can appropriate the property as part of his

102. See e.g. White v. White, [2000] 2 Fam. L.R. 981 (H.L.); Lambert v. Lambert, [2002] EWCA 1685 (C.A.). However, in a landmark case, the wife of Premiership footballer, Ray Parlour, was recently awarded a share of her husband’s future earnings as part of a divorce settlement. The Court of Appeal described the case as “far removed from the norm,” but was influenced by the huge surplus income once the reasonable needs of the couple and their children had been met, as well as Karen Parlour’s part in persuading her husband to give up drinking and to concentrate on his high-earning football career early in the marriage. Legal observers have suggested that the implications of the ruling for the rich and famous will lead to a huge increase in the number of pre-nuptial agreements in Britain; see “Footballer’s Ex-Wife Nets Share of His Future Income” The Times (8 July 2004).

103. (U.K.), 15 & 16 Geo. V, s. 41 [AEA]; Intestates Act 1952 (U.K.), 15 & 16 Geo. VI, c. 64, Sch. 2, para. 1(1). The current financial limits for this statutory legacy are the first £200,000 plus half of the residue where there are no children or the first £125,000 plus one-third of the residue where the deceased dies leaving issue. Where title to the home is in joint names, the deceased’s interest in the property passes to the surviving spouse by virtue of survivorship; it does not form part of the deceased’s estate for intestacy purposes.

104. AEA, ibid., s. 46.
or her statutory legacy under the AEA. In addition, a surviving spouse may make a further claim for financial provision from the deceased’s estate under the *Inheritance (Provision for Family and Dependents) Act 1975* if the will or intestacy distribution failed to make “reasonable financial provision” for them. Such claims are not confined to maintenance, but are based on a more generous test of prevailing circumstances and, in particular, what the applicant would have received if the marriage had ended in divorce instead of death. Thus, a surviving spouse may be able to retain the home following the death of the other spouse, even if they were not originally co-tenants of the property. However, the absence of specific property rights in the home arising at the death of a spouse and the implications for a surviving spouse in terms of shelter and financial security must be regarded as another weakness in English law.

**B. Cohabitants and the Family Home**

Given the absence of a comprehensive legal regime for spouses and the home in English law, it is hardly surprising that unmarried cohabitants are in an even worse position. In terms of legislation, much depends on the wording of the relevant statute. For example, the general jurisdiction to resolve disputes relating to co-owned property under the *TLATA* applies to cohabitants and the family home, whereas specific references to a “spouse” and the “matrimonial home” in the *Insolvency Act 1986* ignore cohabitants on bankruptcy. Other legislation expressly includes cohabitants by adopting a “status approach,” whereby couples who reach the relevant cohabitation threshold are accorded specific spousal rights and obligations. Despite the fact that non-owning cohabitants do not enjoy “matrimonial home rights” under the *FLA* and cannot use the legislation to secure any protection against third parties, unmarried

105. *Inheritance (Provision for Family and Dependents) Act 1975*, (U.K.), 1975, c. 63, s. 1(1)(a) [*Inheritance Act*].


couples are entitled to similar occupation orders as spouses. The court considers the same broad factors, but also the nature of the parties’ relationship and the length of time they lived together. This is vital in situations of domestic violence, though the level of protection offered by the FLA depends on marital status. While an occupation order is mandatory where a spouse or relevant child would suffer significant harm, this is not the case for cohabitants. Here the court must balance significant harm to an applicant or relevant child against the harm that the respondent would suffer if an order were made. Section 41(2) of the FLA also states that if the parties are cohabitants the court should take account of the fact that the couple “have not given each other the commitment involved in marriage.” While we accept that cohabitation can involve different types of commitment, there are obvious dangers in implying that couples should be entitled to less legal protection (especially in cases of domestic violence) merely because they are not married. In any event, it is doubtful whether English courts have attached any great significance to this particular provision.

Discrepancies also exist in the succession law context, in particular where the couple are not co-tenants of the family home and the legal title holder dies. A surviving cohabitant is in a much more precarious position than a surviving spouse in these circumstances. Unmarried cohabitants are excluded from the intestacy regime and can seek financial provision from a partner's estate only under the Inheritance Act.

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108. FLA, supra note 92, s. 36.
109. Ibid., s. 36(6). Section 62(1)(a) of the FLA defines cohabitants as a man and woman who are living together as husband and wife, though there is no specified period of cohabitation. An occupation order under s. 36 is also available between former cohabitants, defined in s. 62(1)(b) as a couple who are no longer living together as husband and wife but not including cohabitants who have subsequently married each other.
110. Ibid., s. 36(8).
111. Section 46 of the Administration of Estates Act 1925 does not include cohabitants within the definition of next-of-kin. The current law does, however, avoid a surviving partner taking precedence over the deceased’s children where he or she has no financial obligation towards them.
(Provision for Family and Dependants) Act 1975 where they were living together for at least two years prior to the partner's death. This, combined with the fact that the applicant can only claim for maintenance under the Inheritance Act, means that a surviving cohabitant may be unable to retain the family home on the death of his or her partner. More generally, the inclusion of unmarried couples in the Inheritance Act (as well as the FLA) by the legislative yardstick of living together "as husband and wife" has been held to be gender-specific, and thus restricted to heterosexual cohabitants. However, this may be open to reinterpretation following the decision in Ghaidan v. Mendoza and the incorporation of the European Convention on Human Rights into domestic law, which we discuss below.

In determining beneficial ownership of the family home on relationship breakdown or in disputes involving third parties, cohabitants (opposite-sex or same-sex) must rely on the rules of resulting and constructive trusts where title to the property is not in joint names. There is no broad concept of unjust enrichment such as that

112. Supra note 105, s. 1(1)(ba). Failing this, cohabitants can only apply by establishing that they were being maintained by the deceased, either wholly or partly, immediately before death; s. 1(1)(e).
113. Ibid., s. 1(2).
114. FLA, supra note 92, ss. 62(1)(a) and (b); Inheritance Act, supra note 105, s. 1(1)(ba).
118. See Part II.F, below.
119. The constructive trust is used more often in practice. Under a resulting trust, the beneficial interest is quantified by the sum that the claimant contributed to the purchase of the property; under a constructive trust, the deciding factor is not the amount of contributions, but the common intention between the parties as to how the beneficial interest was to be shared. Cohabitants may also attempt to use the doctrine of proprietary estoppel in these circumstances, though this creates practical difficulties in terms of establishing the requisite representation or assurance from the property owner, as well as the associated detriment, by the claimant. See e.g. Lissimore v. Downing, [2003] 2 Fam. L.R. 308 (Ch. D.) (a generalized promise of future support was not a sufficient representation, while "detriment" necessitated conduct beyond what might normally be
which underpins the Canadian model; instead, the focus in Britain is on monetary input. In practice, the majority of claims by unmarried cohabitants are made under the presumed intention constructive trust where the court implies an intention to share in the beneficial interest in the home on the basis of conduct. Roundly criticized by a majority of the Supreme Court of Canada in Pettkus v. Becker some twenty-five years ago—and in particular by Dickson J, who described it as a “judicial quest for [a] fugitive common intention”—the presumed intention constructive trust is still a key feature of English law. While cases such as Lloyds Bank plc v. Rosset initially insisted on a direct contribution to the purchase price by the non-owning cohabitant as evidence of common intention to share beneficial ownership in the family home, judges will now consider indirect financial contributions over the course of the relationship. The decision in Oxley v. Hiscock provides a recent illustration. In that case, an unmarried couple pooled their money to buy a home and registered ownership in the sole name of the male partner. The Court of Appeal held that the appropriate method of assessment was to look at the whole course of dealing between the couple and the contributions, financial and otherwise, made by each after the purchase of the home. This included contributions by the female partner towards household expenditure as well as improvements to and maintenance of the property. However, it is still the case that non-monetary contributions such as domestic labour and child-rearing are disregarded under the presumed intention constructive trust. Again, expected of the relationship between the parties); Re Bursill (Deceased), [2003] W.T.L.R. 779.

120. Though this, as we have mentioned, is not without its critics. See Part I.B, above.
123. Ibid. at 269.
126. For earlier illustrations, see Midland Bank plc v. Cooke, [1995] 4 All E.R. 562 (C.A.); Le Foe, supra note 86.
this does not compare favourably with the Canadian unjust enrichment constructive trust, where such contributions are taken into account.

In applying the law of trusts to the family home in Britain, judges can only ascertain and quantify the beneficial interest of each cohabitant; they cannot alter this interest to take account of the couple’s post-separation needs. Even if a cohabitant succeeds in establishing a beneficial interest, he or (more often) she does not automatically keep possession of the home, or regain possession if he or she has already vacated the property. While spouses have a discretionary regime for readjusting their respective property entitlements in the home on judicial separation or divorce under the Matrimonial Causes Act 1973, the absence of comparable redistributive powers for cohabitants on relationship breakdown, combined with the fact that there are no support obligations between the couple, leaves them in a more vulnerable position when their relationship ends. The only apparent concession to family law values in this context is the Children Act 1989,127 which permits courts to make an order transferring or settling property between unmarried cohabitants for the benefit of a minor child. The underlying policy is quite clear: children need stability and continuity in their upbringing and the Children Act 1989 facilitates this in relation to the family home. However, this discretionary power will not be used to confer an indirect windfall on a non-owning cohabitant;128 the most that he or she can expect as the custodial parent is to remain in the home until the youngest child attains the age of 21, after which the property will be divided under the property law framework. Despite such limitations, this is a significant improvement on the Canadian position, where there is no provision for children in property distribution at the end of a cohabiting relationship.

C. Protecting Autonomy Versus the Need for a Functional Approach

How do we account for the distinction in English law between the property rights of married spouses and unmarried cohabitants? The traditional view of marriage as a special and privileged institution that

127. (U.K.), 1989, c. 41, s. 15, Sch. 1.
forms the basis of family life in Britain still holds sway, with a pro-marriage stance reflected in certain Labour government policies and law reform initiatives. Another key factor is respect for autonomy, which dictates that couples who have deliberately chosen to avoid marriage and its attendant consequences should not have "undesired norms of behavior" imposed on them by the state simply because their relationship is judged to be qualitatively similar to marriage. The fact that cohabitation may be regarded as a form of intimate family relationship with emotional and financial consequences, not just for the couple themselves but for any children, is irrelevant. The perceived need to respect the autonomous choice of the individuals concerned prevails, so that a different legal framework for determining their rights and responsibilities is perfectly acceptable. However, changing social trends suggest that this view is no longer tenable.

A decline in marriage has been accompanied by a rapid growth in cohabitation as an alternative partnering and parenting arrangement in Britain. Recent figures show that over 50 percent of couples in Britain live together before marriage and that more than 24 percent of live births are to cohabiting couples. Yet, the current legal framework


130. Tee, supra note 4 at 46.


132. Proposals for Reform, supra note 129 at 7-8. No figures were available for same-sex couples. For an overview of changing population trends in Britain in the latter half of the twentieth century, see Colin Gibson, "Changing Family Patterns in England and Wales over the Last Fifty Years" in Katz, Eekelaar & Maclean, supra note 17, c. 2.
seems ill-equipped to deal with this social reality, with the law of trusts attracting the most criticism. Research carried out in 2000 revealed that almost 60 percent of opposite-sex cohabitants were living together in an owner-occupied family home, yet in 44 percent of these cases, title to the home was vested in the name of one partner only.133 Thus, more and more couples are being forced to rely on resulting and constructive trusts to determine ownership of the family home on relationship breakdown, even though the relevant law ignores the functional similarities between cohabitation and marriage and produces potentially disparate and inequitable results.134 On the breakdown of a marriage, courts can look at both financial and non-financial contributions towards the family, and will now weigh these equally when dividing family assets. According to Lord Nicholls in *White v. White*, “[i]f, in their different sphere, [the husband and wife] each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and child-carer.”135 In contrast, cohabitants must earn a beneficial interest in the family home on the basis of financial contributions alone; non-monetary contributions by a non-owning partner are simply discounted as the “normal altruism which familial contributions engender at no cost.”136

Craig Rotherham has remarked that the relevant law is based on an absolutist concept of property. He argues that adherence to strict rules of property law is an inefficient and unjust mechanism for resolving

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135. *Supra* note 102 at 989.
disputes between unmarried couples because it is “predicated on a view of human behavior that is not consistent with the social practices found in intimate relationships.”\textsuperscript{137} Cohabitants do not think in terms of quasi-contractual arrangements and reward for contributions during the course of their relationship, yet these “cold legal question[s]”\textsuperscript{138} are central to ascertaining their respective interests in the home on relationship breakdown. Recourse to resulting and, more often, constructive trusts makes for lengthy and costly legal battles with unpredictable outcomes, while the emphasis on financial contribution prejudices economically weaker cohabitants and has led to allegations of inherent gender bias against female partners.\textsuperscript{139} Judges have occasionally attempted to import familial considerations into this property law framework by evaluating cohabitants’ contributions in light of their relationship and domestic circumstances. Recent cases have adopted a more holistic approach, with courts looking at direct and indirect financial contributions over the whole course of the relationship and determining the respective shares in the home accordingly.\textsuperscript{140} This has produced a unique branch of trusts law, one which Anne Barlow has described as “unnecessarily complex, illogical and often unjust,” as judges struggle to balance the need for a “coherent property law doctrine against the expectations of family law style justice” between the

\textsuperscript{139} See Anne Bottomley, “Self and Subjectivities: Languages of Claim in Property Law” (1993) 20:1 J.L. & Soc’y 56; Simone Wong, “Property Rights for Home-Sharers: Equity Versus a Legislative Framework” in Susan Scott-Hunt & Hilary Lim, eds., Feminist Perspectives on Equity and Trusts (London: Cavendish Publishing, 2001) c. 7, both of which argue that the rules of trusts reflect a male model of behaviour with their emphasis on agreements and financial contributions. However, it has been suggested that female contributions (both domestic and financial) within relationships are often underestimated. See Rebecca Probert, “Cohabitants and the Family Home” (2000) 30 Family Law 925 at 928.
Again, the overall result appears similar to that obtained in Canada, despite some variations in the formal doctrine. The same criticisms have been levied at the unjust enrichment constructive trust in light of the onerous requirements that it places on cohabitants seeking to establish an interest in the family home, and the fact that the inherent judicial discretion makes for few easily discernible patterns.

While Britain has been much more tentative than the Canadian provinces in tackling the issue of reform, criticisms of the current legal framework, combined with the exponential growth in unmarried cohabitation, have provided a new impetus for change. More worrying is a survey carried out in June 2004, which revealed that many couples were still unaware of the legal consequences of cohabitation; 61 percent of those questioned believed that they enjoyed the same legal rights as spouses after living together for five years. The survey has spurred a government campaign to inform citizens on the issue. Before these latest figures, various proposals had already been put forward for remedying the defects in the existing law, ranging from a variant of the trusts-based approach to a new status-based approach, recognizing the functional similarities between marriage and cohabitation and conferring analogous rights and duties on unmarried couples. As the following section illustrates, the emphasis has now shifted firmly towards the latter approach. However, like the reforms which have been implemented in Canada, each of the proposals mooted in Britain creates its own particular set of problems.

D. From Property to Status: Proposals for Reform

(i) An Enhanced Property Framework

In the 1970s, the Law Commission for England and Wales was assigned the task of recommending reforms to property rights in the

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141. Barlow, supra note 136 at 53. See also Tee, supra note 4 at 58-59.

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home. The Commission recommended a scheme of statutory co-ownership for the matrimonial home as a means of shifting the emphasis away from financial contributions. Despite its laudable aims, this presumption of equal sharing was criticized on the grounds that it perpetuated economic inequality between spouses and was too far-reaching. By focusing solely on married couples, the proposals also ignored the emergence of cohabitation as an alternative social structure to marriage. In response, the Law Commission went beyond the issue of conjugal cohabitants by shifting its attention to the property rights of homesharers in general. This response was reflected in its long-awaited discussion paper, Sharing Homes, released in July 2002.

Sharing Homes contemplated a property-based approach for determining the rights of all those who share homes, whereby courts would assess the economic value of financial and non-financial contributions according to a specific legislative scheme in an attempt to

143. The Law Commission is an independent body set up by Parliament in 1965 to review continually the law in England and Wales and to recommend reforms where appropriate; see online: Law Commission for England and Wales <http://www.lawcom.gov.uk>.


146. Sharing Homes, supra note 5. However, the principle of statutory co-ownership still has some support: see Anne Barlow & Craig Lind, “A Matter of Trust: The Allocation of Rights in the Family Home” (1999) 19 L.S. 468, which proposes a modified community of property regime for persons in intimate family relationships, with beneficial entitlements in the home accumulating in proportion to the duration of the relationship.

147. The discussion paper covered a broad range of homesharers, including spouses (although not on judicial separation or divorce) and unmarried couples, as well as relatives and friends living together “for reasons of companionship or care and support,” where the parties occupied the property as a home and one of them had an interest in the property. Sharing Homes, ibid. at vi. It did not extend to commercial relationships such as landlord and tenant.
promote "certainty and predictability" in the relevant law. The nature of the relationship between the parties would be irrelevant in making this assessment; each would receive a beneficial interest in the home commensurate to his or her respective contribution. On one hand, the emphasis on property and rewarding contributions seemed to accord with individualistic norms of modern relationships, in that homesharers could leave the relationship with what they had brought to it. However, attempts to apply the proposed system served only to highlight its inherent weakness. An impartial scheme that did not differentiate between different types of relationships was unworkable in practice, simply because it was not sufficiently flexible to deal with the diversity of relations between homesharers. In short, "one size could not fit all." Abandoning the proposals, the Commission was forced to revert to the existing framework of resulting and constructive trusts. The Commission acknowledged that this framework was unsatisfactory and in need of reform, but recommended that judges counter some of these criticisms by adopting a broader approach towards quantifying beneficial entitlements in the home.

The Law Commission's fixation on applying a property framework to the home is perhaps understandable, given that it was considering the rights of homesharers in general and seeking to adopt a universally applicable scheme. However, such a wide-ranging approach ignores the realities of domestic relationships, and cohabitation in particular. The home has a unique position at the centre of family life, and the relationship between cohabitants is relevant in ascertaining their intentions regarding ownership of the property. While the Law Commission did mention the possibility of a status-based approach, whereby rights and obligations would be imposed on cohabitants by

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148. Ibid. at viii.


150. Sharing Homes, supra note 6 at 70.

151. Bridge, supra note 149 at 387.

152. As noted earlier, there is already some evidence of this in the case law; see Part II.C., above.

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labeling their relationship as familial and legislating accordingly, it concluded that this raised important issues of social policy that were beyond its remit and should be dealt with by the government.\footnote{Sharing Homes, supra note 6 at ix. Recent proposals from the Women and Equality Unit address some of these concerns, and the government has also recently asked the Law Commission to look specifically at the rights of unmarried cohabitants.}

(ii) Enhanced Legal Protection for Cohabitants

In the same month that Sharing Homes was released, the Law Society of England and Wales published specific proposals for reform of the law governing unmarried cohabitation.\footnote{Proposals for Reform, supra note 129. The Law Society is the professional body that represents solicitors practising in England and Wales. See online: Law Society of England and Wales <http://www.lawsociety.org.uk/home.law>.} The Law Society began by recognizing \"the need to retain the status of marriage in law, as demonstrating a particularly high level of commitment.\"\footnote{Proposals for Reform, ibid. at 4.} However, it proposed that the current ad hoc legal regime for determining the rights and duties of unmarried couples should be replaced with a more rational and structured system covering a range of areas, including property and financial entitlements on relationship breakdown, as well as limited succession rights. Cohabitants would automatically qualify where they had been living together as a couple for at least two years or had a \"relevant child,\" the child serving as proof of stability and commitment in the relationship irrespective of the period of cohabitation.\footnote{Ibid. at Part II. A \"relevant child\" was defined as; a biological child; offspring born by assisted reproduction licensed by the Human Fertilisation and Embryology Act 1990 (U.K.), 1990, c. 37; an adopted child; and a child born as the result of a non-commercial surrogacy agreement, as well as a child in respect of whom there existed a joint residence order in favour of the parties, ibid. at 13. While adoption in Britain was previously confined to married couples and single persons, this has now changed under the Adoption and Children Act 2002 (U.K.), 2002, c. 38, s. 50, which states that an adoption order may be made in respect of a couple where both have attained the age of 21. The absence of any marriage requirement combined with the use of gender-neutral language suggests that both same-sex and opposite-sex couples will be able to apply to adopt a child.} Regarding disputes involving the family home, the Law Society was of the opinion that these should be dealt with under family law instead of

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property law and trusts. It proposed that courts should have the power to make property adjustment orders with respect to the home, with judges taking account of any economic advantage derived by one party from the other’s contributions and any economic disadvantages suffered by either party in the interests of the other party or the family. Turning to the post-mortem context, the Law Society claimed that the current law provided adequate redress for cohabitants on the death of a partner, but recommended that same-sex couples have the same rights as opposite-sex couples when making a family provision claim under the Inheritance Act.

While no further action has been taken on these measures, they were nevertheless useful in stimulating debate on an already topical issue. Moreover, the proposals were intended to operate alongside a separate system of civil partnership registration, which the Law Society suggested should be created for same-sex couples to give them rights similar to those of married couples. This has now been achieved in Britain.

(iii) Creation of a New Civil Status: Proposals for Registered Partnerships

The Relationships (Civil Registration) Bill and the Civil Partnership Bill were introduced as private members’ bills before the British Parliament in October 2001 and January 2002, respectively. Like their

157. Proposals for Reform, ibid. at 59-61. This particular test was derived from the wording of the Family Law (Scotland) Act 1985 (U.K.), 1985, c. 37. Section 9(2) of that Act states that economic advantage means “advantage gained whether before or during the marriage and includes gains in capital, in income and in earning capacity” and that economic disadvantage should be construed accordingly.

158. Proposals for Reform, ibid. at 71-72.


161. The primary method of enacting legislation in the United Kingdom is by means of bills introduced by the government. However, there is also a procedure whereby private members of Parliament, or backbenchers, can initiate bills that may ultimately lead to legislation. The Relationships (Civil Registration) Bill was introduced in the House of Commons by Jane Griffiths MP, while the Civil Partnership Bill was introduced in the House of Lords by Lord Lester of Herne Hill, QC.
corresponding models in Manitoba and Nova Scotia, both Bills proposed systems for registering opposite and same-sex cohabiting relationships. Registration would trigger the conferral of substantive rights and duties similar to those associated with marriage, with provision for dissolution of the registered partnership and a consequent redistribution of property. The Civil Partnership Bill was the more far-reaching of the two in this respect, suggesting that "communal property" such as the home should be regarded as being held jointly by cohabitants, but with express powers for courts to make an "intervention order" requiring a property transfer or variation of a pre-existing property agreement on relationship breakdown. To this end, the Bill made specific reference to prescribed factors similar to those taken into account on dissolution of a marriage. Both Bills also proposed enhanced rights for registered cohabitants on the death of a partner, placing them in a similar position to spouses for the purposes of both intestacy distribution and family provision claims, albeit without any specific provision for the family home. However, neither measure was carried forward; the Relationships (Civil Registration) Bill fell victim to parliamentary time constraints, while the Civil Partnership Bill was withdrawn pending a government review of such schemes.

In November 2003, the Women and Equality Unit published a consultation paper detailing the government’s proposals for civil partnerships, but for same-sex couples only. It proposed the creation of a new legal status of “registered partner” for same-sex couples where both are at least 16, with registration conferring rights and obligations equivalent to those of married couples. The aim was to provide a framework “whereby same-sex couples could acknowledge their mutual

162. While the Civil Partnership Bill stipulated that both partners in the couple must have attained the age of 18 and must have lived together in the same household for at least six months before the application for registration, the Relationships (Civil Registration) Bill did not stipulate any qualifying period of cohabitation, stating merely that both parties must have attained the age of 16.


responsibilities, manage their financial arrangements and achieve recognition as each other's partner."\textsuperscript{165} Couples would be able to register and solemnize their relationship in a civil ceremony by signing a document in front of two witnesses and a registration officer, having given the requisite notice of registration.\textsuperscript{166} Registration would result in a series of specified rights and responsibilities, not only during the relationship, but on its breakdown or the death of a registered partner.\textsuperscript{167} The proposals also contemplated a formal, court-based dissolution process where the registered partnership had broken down irretrievably. In these circumstances, courts would have discretionary powers to deal with property disputes between the parties (such as those relating to the family home), taking account of their needs and the needs of any children, with the aim of providing the couple with "the property rights appropriate to family relationships."\textsuperscript{168} Where the relationship ended by death, registered partners would have the same rights on intestacy and family provision claims as married spouses. The Women and Equality Unit went to considerable lengths to stress that it was not proposing same-sex marriage, but a separate civil partnership registration scheme.\textsuperscript{169} By recommending a distinct scheme of analogous legal rights for same-sex couples, instead of simply allowing them to opt into existing matrimonial statutes (as in Nova Scotia), the proposals maintained the legal sanctity of marriage.

The resulting \textit{Civil Partnership Act 2004}\textsuperscript{170} was passed in November 2004 and is due to come into force in late 2005. This is a significant achievement, given that other "homosexual positive" legislation has

\begin{itemize}
\item \textsuperscript{165} \textit{Ibid.} at 13.
\item \textsuperscript{166} \textit{Ibid.} at 23. There is no minimum requirement for the duration of the relationship. However, registration is prohibited where either party is already married or the parties in the couple are related "by close blood or half blood ties, adoption . . . or [are] related by degrees of affinity." \textit{Ibid.} at 19-20.
\item \textsuperscript{167} \textit{Ibid.} at Part B.
\item \textsuperscript{168} \textit{Ibid.} at 50.
\item \textsuperscript{169} \textit{Ibid.} at 13.
\item \textsuperscript{170} (U.K.), 2004, c. 33. The main provisions are contained in Part 2 of the Act, which prescribes the relevant formalities for registration and dissolution of registered partnerships in Britain and the various property and financial arrangements that apply.
\end{itemize}
been fiercely resisted in Britain in the past.171 The Act will impact significantly on ownership of the family home between same-sex couples: courts will be able to make property adjustment orders on dissolution of a registered partnership, while enhanced succession rights will give a surviving registered partner a greater chance of retaining the property where title is not in joint names. More generally, the proposals will vastly improve the position of same-sex couples by granting them legal recognition as a social group in their own right and essentially equating them to married couples. Same-sex couples will no longer be forced to invoke quasi-constitutional guarantees of equality under the Human Rights Act 1998172 as a means of challenging existing laws and thereby securing enhanced rights. Respect for individual choices is a key theme in the consultation paper. Like marriage, registered civil partnership is a voluntarily assumed legal status: same-sex couples must opt into the scheme. The government’s refusal to extend the proposals to opposite-sex couples is likewise premised on notions of autonomy: homosexual couples cannot avail themselves of the marriage option, whereas heterosexual couples can.

E. The Elusive Legal Panacea in Britain

In seeking to devise an appropriate legal framework for cohabitants, English law has been constrained by two factors noted above: respect for autonomy, and the perceived need to preserve the unique legal consequences of marriage. Neither sits easily with arguments for equating marriage and cohabitation on the basis of functional similarity. As far as the family home is concerned, there is also a struggle between property law, with its focus on past actions and contributions, and

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171. Emma Hitchings, "Mendoza v. Ghaidan: Two Steps Forward, One Step Back" (2003) 15 Child and Family Law Quarterly 313 at 325. Among other things, this article discusses attempts to repeal section 28 of the Local Government Act 1988 (U.K.), 1988, c. 9. The section prohibited local authorities from publishing material promoting homosexuality and from promoting the teaching in schools that homosexuality is acceptable.

family law, with its emphasis on status and future need. With respect to enjoyment of the family home, the emphasis has gradually shifted towards family law through statutory provisions that recognize its shelter and security aspects. However, the position is different with regard to ownership of the home. Here, English law has traditionally privileged property law over family law by its tendency to treat the home as any other asset, with the emphasis on land as a form of investment enshrined in the *Law of Property Act 1925* by virtue of the trust for sale. There is no specific legal framework for the home on the death of a spouse or partner, or in respect of *inter vivos* transactions by one spouse or cohabitant in favour of a third party. In this respect, Britain does not compare favourably with other common law jurisdictions, including Canada. During marriage, the state of title to the matrimonial home is relevant and there is no community of property regime; it is only on judicial separation or divorce that family law principles impact on ownership through the court’s redistributive powers. Yet, unmarried couples are at an added disadvantage, given that judges have no comparable discretionary powers for readjusting property entitlements in the family home when their relationship ends and are confined to the law of trusts.

The *Civil Partnership Act 2004* addresses some of these concerns in that it introduces redistributive powers for same-sex registered partners on relationship breakdown, as well as increased rights on the death of a registered partner. However, it does not solve all of the problems within the current legal framework. While intended to bring same-sex couples out of the legal wilderness in which they have languished for many years, gay rights groups have criticized the proposals for not going far enough.

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174. (U.K.), 1925, c. 20. Under the Act, sale was viewed as the primary goal of co-ownership with the emphasis on realizing the economic value of land. The trust for sale has now been replaced by the trust of land under the *Trusts of Land and Appointment of Trustees Act 1996*, so that co-owners retain an interest in the land itself rather than its capital value— for a useful overview, see L. Fox, “Living In A Policy State: From Trust for Sale to Trust of Land” (2000) 22 Liverpool Law Review 59.
enough; registered partnerships are viewed as qualitatively equivalent to marriage yet result in a separate and secondary legal status. While the Civil Partnership Act 2004 may remove same-sex marriage from the political agenda for the time being, it might still become an issue as it has in Canada. More generally, the Act will lead to a three-way approach towards property disputes involving the shared home in conjugal-type relationships: spouses can avail of the Matrimonial Causes Act 1973 on divorce or judicial separation; registered partners will have a similar mechanism for determining their respective property entitlements in the home on dissolution of the partnership; and both groups will have the full range of succession rights available to them on the death of a spouse or partner. However, same-sex couples who do not opt into the scheme and, more importantly, opposite-sex couples to whom it does not apply, are in exactly the same legal position as before and will find themselves at the bottom of a three-tiered system of regulation. The proposals have been criticized for placing homosexual couples in a much stronger legal position than unmarried heterosexual couples, who would also benefit from a definitive framework of interdependent rights and obligations instead of the current system of piecemeal statutory concessions.

The major policy issue in Britain in the future will likely be the rights of opposite-sex couples and, perhaps to a lesser extent, same-sex couples who have failed to register their relationships. Looking first at opposite-sex couples, what are the options for reform? One is to extend the civil partnership proposals to opposite-sex couples, but this is an unlikely scenario given the government's reluctance to include them in the scheme because of their alternative option to marry. That aside, the Nova Scotia experience suggests that few such couples would actually register their relationship even if they had the option. Another possibility mooted by Anne Barlow and Grace James is that of a

175. See Angelique Chrisafis, “Legislation for same-sex couples aimed at forcing culture change” The Guardian (1 July 2003), online: Guardian Unlimited <http://www.guardian.co.uk/gayrights/story/0,12592,988616,00.html>.


177. See Part II.E, above.

178. See Barlow & James, supra note 131 at 171-172.
looser French PaCS-style model, which would encourage couples to agree on the terms of their relationship while avoiding wholesale marriage-like rights and responsibilities. Under this model, opposite-sex cohabitants could subscribe to a form of committed “coupledom” (terminable on two months’ notice), which would attract marriage-like tax and succession rights and also allow property agreements to be registered while presuming joint ownership in default. However, the same basic problem would remain: couples who neglect to register their relationships, or cannot do so because one partner (often the economically stronger one) discourages registration, would be excluded.

The obvious alternative is to introduce a separate layer of regulation for unmarried couples in the form of specific rights and duties, which could also extend to same-sex couples who choose not to enter into a civil partnership. This could be done by giving these couples exactly the same legal entitlements as married spouses. Research suggests that there is strong support for assimilation. Recent figures showing a surprisingly widespread but mistaken belief in the existence of “common-law marriage” in Britain lend credence to these findings.

Another way is to extend certain spousal rights and obligations to unmarried couples, perhaps along the lines of the measures suggested by the Law Society, but stopping short of equating the two groups and thus preserving the notion of marriage as a legally distinct institution. Introducing a form of legislative “safety-net” would benefit vulnerable partners, as well as couples who were ignorant of the legal consequences of unmarried cohabitation or perhaps unable to formalize their relationship due to the existence of some legal impediment. It would have to set an appropriate threshold for legally recognized cohabitation—for example, living together for at least two years or procreation, either one serving as an indicator of stability and

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181. The most obvious example being where one of the couple is still married to someone else and has not yet divorced his or her spouse.
commitment within the relationship. This nebulous concept of qualifying cohabitation would require some intrusion into a couple’s living arrangements—for example, asking such questions as when exactly did cohabitation begin, and have the partners lived together for the relevant period? Any such framework would also have implications for third parties who may not know the extent of cohabitants’ rights, while more serious issues are raised by couples who are opposed to marriage and deliberately chose cohabitation as a means of avoiding the inter-dependent rights and obligations associated with it. Should arguments based on equality and the protection of economically weaker or emotionally vulnerable cohabitants outweigh the right to make autonomous choices, especially where couples are vehemently opposed to the imposition of quasi-spousal obligations? Stuart Bridge has remarked:

[t]his will require an assessment of the extent to which the autonomy of the parties to come to their own arrangements should be compromised by the necessity for paternalistic intervention—in short whether it is now necessary to impose on parties to a particular kind of relationship a legal status irrespective of their wishes.

Whether English law decides to abandon individual responsibility in favour of such collective intervention remains to be seen, though there are tentative signs of government support for the latter approach. The fact that 61 percent of those questioned in a recent survey assumed that unmarried couples have the same legal rights as spouses has prompted a government-funded campaign to dispel this myth and to advise cohabitants of the limitations on their rights, especially on death and

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182. The two year period is the outer time limit favoured by the Law Society and which occurs in various statutes regulating unmarried cohabitation, including the Inheritance Act.

183. In terms of what constitutes living together in the same household, for example, Judge Norris QC proposed the following guideline in Churchill v. Roach, [2004] Fam. L.R. 989, [2003] W.T.L.R. 779 (Ch. D.): “It seems . . . to have elements of permanence, to involve a consideration of the frequency and intimacy of contact, to contain an element of mutual support, to require some consideration of the degree of voluntary restraint upon personal freedom which each party undertakes, and to involve an element of community of resources.”

184. Bridge, supra note 149 at 392.
relationship breakdown. In the meantime, the government has asked the Law Commission to look at the rights of unmarried heterosexual couples and to draw up fundamental reforms, including inheritance rights and support obligations. Where this leaves same-sex couples who fail to register their relationship under the forthcoming civil partnership scheme is far from clear.

There is no single solution to the many issues raised by unmarried cohabitation, and Britain may have to experiment with a variety of legal mechanisms to get the best result, perhaps using a combination of opt-in rights and rights that are attained automatically upon reaching a specified threshold, which is similar to the situation in Manitoba. This seems to be happening, in light of the proposals for registered partnerships and the more recent referral to the Law Commission. It is interesting that both of these are proactive government measures and not merely reactions to legal challenges. However, such challenges are now a distinct possibility in the wake of the Human Rights Act 1998, which incorporated the European Convention on Human Rights into British law. The following section looks at the key provisions of the Convention, and discusses how unmarried couples—in particular, opposite-sex cohabitants—might be able to use these fundamental rights as a means of arguing for legal parity with married couples with respect to certain legal entitlements.

F. The Family Home and the European Convention on Human Rights

The European Convention on Human Rights was agreed by the Council of Europe in Rome on November 4, 1950, in response to the violation


186. However, more conservative newspapers have denounced the plans as undermining the sanctity of marriage. See e.g. Matthew Hickley “Yet Another Labour Reform Moves to Damage Marriage” Daily Mail (16 July 2004), online: Factiva <http://global.factiva.com/en/eSrch/ss_hl.asp>.


188. U.N.T.S. 222. [Convention].

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of fundamental human rights that engulfed the continent during World
War II. Before October 2000, the Convention's status in English law
was that of an interpretative aid which could be used, for example, to
construe ambiguous legislation, but was not binding on domestic courts.
The Human Rights Act 1998, which came into effect on October 2, 2000,
incorporated the provisions of the Convention into English law. As a
result, it has assumed the status of a quasi-constitutional instrument, as
domestic courts are now bound to act in accordance with and to uphold
Convention values. While some commentators have argued that the
Convention has a purely "vertical effect," being concerned specifically
with relations between an individual and the state, the bulk of opinion
suggests that it also has a "horizontal effect" and will influence disputes
of a purely private nature. The impact of the Convention on property

189. See generally Pieter van Dijk & Godefridus. J.H. van Hoof, Theory and Practice of
the European Convention on Human Rights, 3d ed. (Boston: Kluwer Law International,
1998), c. 1.
190. See generally Dominic McGoldrick, "The United Kingdom's Human Rights Act
Rev. 493.
Public Law 423; Gavin Phillipson, "The Human Rights Act, 'Horizontal Effect' and the
Common Law: a Bang or a Whimper?" (1999) 62 Mod. L. Rev. 824; William Wade,
"Horizons of Horizontality" (2000) 116 Law Q. Rev. 217; Nicholas Bamforth, "The True
'Horizontal Effect' of the Human Rights Act 1998" (2001) 117 Law Q. Rev. 34. S. 3(1) of
the Human Rights Act 1998 (U.K.), 1998, c. 42 stipulates that "primary legislation and
subordinate legislation must be read and given effect in a way which is compatible with
the Convention rights." This suggests that the Convention applies to all statutes whether
public or private in nature and would include legislation relating to the home. See
Phillipson cited above. However, the extent to which the Convention impacts on disputes
governed exclusively by the common law has been the subject of much debate. Section
6(1) of the Human Rights Act 1998 makes it unlawful for a "public authority" to act in a
manner that is incompatible with a Convention right, while s. 6(3)(a) specifically includes
a "court or tribunal" within this definition. Despite suggestions that courts will be
obliged to develop legal principles in accordance with the Convention ("direct" horizontal
effect as suggested by Wade), the bulk of opinion suggests that it will have a less pervasive
effect, with judges merely being influenced by Convention rights and values in developing
the common law ("indirect" horizontal effect as suggested by the other authors cited,
ibid.).
disputes between cohabitants and, in particular, those relating to the family home are far from clear. Article 14 states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, birth or other status."

This list of potential grounds of discrimination is not an exhaustive one. However, unlike section 15 of the Canadian Charter and its general guarantee of equality, Article 14 is parasitic in nature; a claimant must first invoke another Convention right before alleging discrimination with respect to the exercise of that right.193 When considering the family home, the most obvious example is Article 8, which states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. 194

Article 8(1) contemplates effective enjoyment of the home, while Article 8(2) prescribes the circumstances in which legitimate interference by the state will be permissible.195 Moreover, in

193. However, judicial opinions have been divided as to whether there must be an actual violation of the substantive right claimed in conjunction with Article 14 before the court can make a finding of discrimination (see Botta v. Italy (1998), 26 E.H.R.R. 241; Smith and Grady v. United Kingdom, [2000] 29 E.H.R.R. 493), or whether it is sufficient that the relevant claim merely falls within the material scope of one of the Convention rights notwithstanding the absence of any breach in order for Article 14 to be engaged. See Belgian Linguistic (No. 2) (1985), 1 E.H.R.R. 252; Abdulaziz, Cabales and Balkandali v. United Kingdom (1985), 7 E.H.R.R. 471.
determining what constitutes a home, the essential feature is not ownership, but living in the property as a home. At first glance, it might seem that Article 8, whether invoked on its own or in conjunction with Article 14, could provide an effective means of challenging inconsistencies between the treatment of spouses and cohabitants within the existing legal framework. However, this has not been borne out in practice. The focus to date has instead been on conferring specific legal rights on certain groups, with an indirect impact on the shared home.

Until recently, transsexuals in Britain who were cohabiting with a member of their original sex would have been regarded as a same-sex couple. The decision in *Corbett v. Corbett* stated that the sex of a transsexual is that assigned at birth, irrespective of subsequent surgical intervention. However, in *Goodwin v. United Kingdom*, the European Court of Human Rights held that the U.K.'s failure to recognize legally the reassigned gender of a male to female transsexual in relation to marriage, employment, social security and pension rights breached the applicant's right to respect for her private life under Article 8 of the Convention, as well as the fundamental right of a man and woman to marry under Article 12. The government responded to the decision in *Goodwin* by amending domestic law accordingly under the *Gender Recognition Act 2004*. Thus, transsexuals can enter into a valid

196. *Gillow v. United Kingdom* (1989), 11 E.H.R.R. 335. In terms of physical structure, the obvious example would be a dwelling house, although a caravan has been treated as a "home" for the purposes of Article 8: *Mabey v. United Kingdom* (1996), 22 E.H.R.R. 123. However, the notion of "home" in Article 8 does not extend to property on which it is intended to build a house for residential purposes, nor does it cover an area of a state in which an individual has grown up and where his or her family have roots. *Loizidou v. Turkey* (1997), 23 E.H.R.R. 513. See also Ian Loveland, "When is a House Not a Home under Article 8 ECHR?" (Summer 2002) P.L. 221.


199. Article 12 states: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

marriage with a person of the opposite sex to their reassigned gender, while couples who choose to cohabit can have access to the various statutory rights and duties conferred on persons "living together as husband and wife."201 The exclusion of same-sex couples from this apparently gender-specific definition202 has also been challenged under the Human Rights Act 1998. Mendoza concerned a claim under the Rent Act 1977203 by a homosexual partner to succeed to a statutory tenancy of a dwelling house originally held by his deceased partner. That Act stipulates that the applicant must have been living with the deceased "as his or her wife or husband."204 The Court of Appeal held that the exclusion of homosexual cohabitants constituted discrimination under Article 14 of the Convention when read in conjunction with Article 8, which extends to legislation relating to the family home. Sexual orientation was an impermissible ground of discrimination and, in order to make the Rent Act 1977 compatible with the Convention, it had to be construed as including persons in a same-sex relationship. Accordingly, the reference in the relevant provision to living together "as his or her wife or husband" should read "as though his or her wife or husband."205

Article 8 of the Convention creates a much more explicit form of recognition and protection for the home than does the Canadian Charter. Yet, while it protects enjoyment of the home, there has been little movement in terms of ownership and substantive property rights. The right to respect for the home under Article 8 is not a property-conferring right, and it cannot be used to grant the claimant a proprietary interest in the home where none already exists.206 Any

201. This phrase is taken from the language of the FLA, supra note 92.
202. See Part II.E, above.
203. (U.K.), 1977, c. 42.
204. Ibid., Sch. 1, at para. 2(2). There is no specific requirement for the length of the time that the parties must have been living together.
205. While the House of Lords in Fitzpatrick, supra note 115 had previously rejected a similar claim under the Rent Act 1977 on the basis that the parties had to be a male and a female, the decision was rejected in Ghaidan v. Mendoza as pre-dating the implementation of the Human Rights Act 1998 (U.K.), 1998, c. 42.
potential impact on ownership of the home is more likely to occur indirectly, through the conferral of other entitlements affecting the home of persons in intimate relationships. Following Goodwin, transsexuals can enter into a legally valid marriage in Britain and thus avail themselves of associated spousal entitlements on relationship breakdown and death, including those that relate to the home. Meanwhile, same-sex couples could use the decision in Mendoza to challenge other legislation that assumes a heterosexual definition of cohabitation, such as the Inheritance Act, which allows claims for financial provision from a deceased partner's estate. However, the coming into force of the Civil Partnership Act 2004 suggests that this course of action will be taken only by same-sex couples who fail to register their relationship and cannot avail themselves of the more comprehensive rights available to registered partners.

Both Goodwin and Mendoza also illustrate the potential for using Article 8 in conjunction with Article 14 to challenge discrepancies in the relevant legal frameworks governing marriage and cohabitation. It "may only be a matter of time" before the functional similarities between the two social groups raise allegations of discrimination, especially in relation to unmarried heterosexual couples, who will find themselves at the bottom of a three-tiered hierarchy when the Civil Partnership Act 2004 takes effect. The absence of a specific statutory framework on relationship breakdown or special consideration on bankruptcy for opposite-sex cohabitants might be open to challenge, as could be their exclusion from the intestacy regime where a spouse's statutory legacy can include the home if title is not in joint names. Statutory provisions aside, Article 8 and Article 14 might also influence the development of the existing property law framework for resolving disputes surrounding ownership of the home. For example, non-owning female cohabitants asserting a beneficial interest in the home could argue that the rules of resulting and constructive trusts, with their emphasis on financial contribution, constitute gender discrimination. This of course assumes that English courts will favour equal treatment for married and

Simone Wong, "Re-Thinking Rosset from a Human Rights Perspective" in Hudson, supra note 136 at 88.
207. Barlow & James, supra note 131 at 169.
unmarried couples. As the decision of the Supreme Court of Canada in *Walsh* illustrates, this may not always be the case. While the right to marry is enshrined in Article 12 of the *Convention*, cohabitants can still choose not to marry, and it is doubtful whether courts in Britain would allow quasi-constitutional guarantees of equality to encroach on property entitlements in the home. Another potential argument under Articles 8 and 14 is for same-sex marriage. Notwithstanding the proposals for registered partnerships, the fact that same-sex couples cannot marry might be challenged under Article 12 and Article 14, despite case-law holding that the existing prohibition on same-sex marriage does not violate Article 12. The fact that similar restrictions have recently been declared unconstitutional in Canada may eventually re-open the debate in Britain.

The extent to which the *Convention* will impact on ownership of the home in Britain will also depend on how it develops within domestic law in general. While the *Convention* does not yet enjoy the almost iconic status of the Canadian *Charter*, the former has only been part of national law for a relatively short time. Both judges and legislators have not yet fully adapted to the burgeoning human rights culture in Britain and are still cautiously feeling their way with respect to implementing the *Convention*. While it has been used essentially as a reactive means of challenging deficiencies in the existing law, as in *Goodwin* and *Mendoza*, there is also the possibility that the *Convention* could adopt a more proactive role in the future. As the jurisprudence develops, the rights enshrined in the *Convention* may become interpretive principles that influence the ongoing development of the law relating to the family home, in the same way that *Charter* values have shaped the development of the common law in Canada. Thus, the rhetoric of constitutionally protected values and human rights discourses may eventually prove to be as useful a tool for promoting change in Britain as substantive rights-based challenges under the *Convention*. 

Conclusion

Both Britain and Canada have been struggling to deal with the emergence of unmarried cohabitation as an alternative family form to marriage, and the associated strain that this has placed on existing mechanisms for deciding property rights in the family home. Recent legislative initiatives in both jurisdictions have focused on same-sex couples, with proposals for same-sex marriage in Canada and registered partnerships in Britain, as well as associated statutory provisions for determining property entitlements in the home. While these measures will solve some of the problems in the current law, the question remains: how and to what extent should the respective governments regulate cohabiting relationships between couples, whether same-sex or, especially, opposite-sex, who have neglected or declined to avail themselves of formal regulatory mechanisms?

The ongoing policy debates in Britain and Canada proceed on the basis that the comparable legal yardstick for cohabitation is marriage. Britain and the common law Canadian provinces have already extended certain spousal rights and duties to unmarried couples, particularly in the context of economic benefits such as social security entitlements and compensation payments. However, when we turn to property rights and ownership of the family home, there is an inherent reluctance to grant cohabitants the same legal entitlements as spouses. Despite statutory concessions in relation to occupation of the property, ownership of the family home as between unmarried couples is based largely on the law of trusts, with its evidential difficulties, inherent gender bias and unpredictable results. At the heart of this lies a fixation on property law and a longstanding resistance, particularly in British jurisprudence, to the idea that need-inflected “family” considerations should intrude into this hallowed domain. Notwithstanding judicial attempts in both Britain and Canada to “familialize” the law of trusts to allow for the social realities of cohabitation and associated domestic arrangements, judges have in a sense developed the law as far as they can. Since judges cannot impose a specific and cohesive property regime for cohabitants, substantive reform is an issue for the legislature to
address. Yet, while the consensus seems to be that change is necessary, deciding what form it should take has proven difficult.

Any successful legal regime for determining property entitlements in the family home between unmarried cohabitants must meet a range of diverse objectives. On the one hand, there is the notion of respect for autonomy and the right of individuals in conjugal-type relationships to opt into state regulation of their affairs. On the other hand, there is the concept of promoting equality, both within relationships and between different social groups, and preventing discrimination on the grounds of marital status, sexual orientation or gender. Against this background, we have to consider how the law should protect vulnerable family members, such as economically dependent cohabitants, and whether paternalistic state intervention is justified in order to achieve this aim. There is also the issue of how best to promote lifelong, exclusive relationships and to ensure stability and continuity in family life. These are important issues in Canada and Britain, where the respective governments see "stable" families as crucial to a sustainable society. Personal choice has traditionally been regarded as paramount, and arguments for reform based on constitutional or quasi-constitutional guarantees of equal treatment seem to be on hold in both England and Canada.

Withdrawal of the constitutional prod in cases such as Walsh and in the jurisprudence from the European Convention on Human Rights should not cause legislatures to ignore the issue, however. At a minimum, cohabitants need a legislated regime for post-separation allocation of possessory rights in the family home that is based on the best interests of any children. In Britain, this has already been achieved to some extent by the Children Act 1989, as well as in Manitoba and Saskatchewan, and there are strong arguments for similar statutory frameworks to be introduced throughout Canada. However, this is only one small part of the bigger legal picture. The need for a legislative regime for relationship breakdown in general cannot be overlooked, with the equality debate re-emerging as one of the driving forces for reform. Questions also surround the fate of the family home on death and the legal protections for cohabitants and the home against third parties.Introduced with much fanfare, the domestic partnership or civil union model is far from a panacea, especially for opposite-sex
cohabitants. Nicholas Bala, writing in 2000 (before the Supreme Court’s decision in Walsh), suggested that the development of a more comprehensive legal regime for cohabitants was “inevitable.” That may be true, but if so, it will come about through the slow drip of legislative process rather than a judicially administered jolt of espresso.