

## **NATIONAL REPORT: ENGLAND & WALES**

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### **A. General**

**1. What kinds of formal relationships between a couple (e.g. different/same-sex marriage, different/same-sex registered partnership, etc.) are regulated by legislation? Briefly indicate the current legislation.**

In England and Wales, the following formal couple relationships are recognised and their formation is governed by legislation which sets out the formalities and requirements for:

- Heterosexual marriage – English Marriage Act 1949
- Same-sex marriage – English Marriage (Same-Sex Couples) Act 2013 which further amends English Marriage Act 1949
- Registered and exclusively same-sex Civil Partnership – English Civil Partnership Act 2004
- Divorce and nullity of all marriages is governed by the English Matrimonial Causes Act 1973 Part I.
- Dissolution and nullity of civil partnerships is governed by Chapter 2 of the English Civil Partnership Act 2004.<sup>1</sup>

**2. To what extent, if at all, are informal relationships between a couple regulated by specific legislative provisions? Where applicable, briefly indicate the current specific legislation. Are there circumstances (e.g. the existence of a marriage or registered partnership with another person, a partner's minority) which disqualify the couple?**

Informal cohabiting relationships between both different and same-sex couples are recognised in a number of legal contexts but on a piecemeal basis, with different definitions of who will be recognised as cohabiting applying in different situations and to different degrees in England and Wales. Providing the couple are each over 16 years of age (the age of consent to sexual intercourse), they will normally be able to access remedies available to cohabitants unless there is a more general reason for not permitting this (e.g. the minimum age for making an adoption application is 21). However a partner who is under 18 may need leave (permission) of the court, or may need an adult to take the legal action on their behalf. In some contexts, cohabitants

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<sup>1</sup> The only possible formal heterosexual relationship recognised is marriage. Different-sex civil partnerships are not permitted and were explicitly ruled out by the Coalition Government in 2013 (although in December 2014, it was announced that this is to be subject to challenge by way of judicial review in *R v Royal Borough of Kensington and Chelsea ex parte Steinfeld and Keiden* – see further [www.theguardian.com/lifeandstyle/2014/dec/02/couple-challenge-ban-heterosexual-civil-partnerships](http://www.theguardian.com/lifeandstyle/2014/dec/02/couple-challenge-ban-heterosexual-civil-partnerships) and is already subject to a challenge as part of an application to the European Court of Human Rights in *Ferguson & Others v UK*, File No. 8254/11, lodged on 2 February 2011).

are treated as identical to married couples and civil partners. In others, they are considered similar but have inferior rights and remedies. In yet other contexts, cohabitants are treated as completely separate and unrelated individuals. This situation causes confusion for those affected, who often falsely believe that cohabitants are treated as married in all contexts. This is sometimes referred to as the ‘common law marriage’ myth.<sup>2</sup>

The contexts where there is recognition are listed below:

- Means-Tested Social Security benefits and Tax Credits

All means-tested social security benefits and tax credits treat cohabiting couples as if they were married or civil partnered (the so-called ‘cohabitation rule’), assessing their financial eligibility and need together as a couple, even though there is no legal obligation between cohabitants to financially support each other.

The main benefits and tax credits with governing legislation are:

- Income Support, Housing Benefit & Council Tax Reduction – English Social Security Contributions and Benefits Act 1992;
- Income-related Employment and Support Allowance – English Welfare Reform Act 2007;
- Income-based Jobseeker’s Allowance – English Jobseekers Act 1995;
- Pension Credit – English State Pension Credit Act 2002;
- Child Tax Credit & Working Tax Credit – English Tax Credits Act 2002;
- Universal Credit – English Welfare Reform Act 2012.

The legislation which governs each of these benefits takes a partner’s income into account when assessing eligibility as if they were married or civil partnered. There are different but similar definitions of ‘living together’ for different benefits. The old terminology of ‘living together as husband and wife in the same household’ was developed in Social Security law (*Crake and Butterworth v SBC* 1980 (reported as SB/38)) which indicated that the fact that a man and a woman lived in the same household might raise the question as to whether they were living together as husband and wife but ruled that, in each case, it was necessary to find out why they lived in the same household. If there was an explanation which indicated that they were not there because they were living together as man and wife, they could not be so described for supplementary benefits purposes (paragraph 7). The phrase was extended to ‘living together as civil partners in the same household’ following the English Civil Partnership Act 2004 and the test now refers more generally to ‘living together as a couple in the same household’.

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<sup>2</sup> See further, A. BARLOW and G. JAMES, ‘Regulating Marriage and Cohabitation in 21<sup>st</sup> Century Britain’, *Modern Law Review*, Vol. 67, No. 2, 2004, pp. 143-176; A. BARLOW, S. DUNCAN, G. JAMES and A. PARK, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21<sup>st</sup> Century*, Hart Publishing, Oxford, 2005; N. LOWE and G. DOUGLAS, *Bromley’s Family Law*, Oxford University Press, Oxford, 2015, at chapter 24.

This approach has also been adopted in the Tax Credit legislation without further definitions or guidance. A 'couple' is defined as follows in S. 3(3) English Tax Credits Act 2002 which states that a claim for a tax credit may be made:

'(a) jointly by the members of a couple both of whom are aged at least sixteen and are in the United Kingdom [...]'

The Act then goes on, in Section 3(5), to define a 'couple' as:

- '(a) a man and woman who are married to each other and are neither –
- i. separated under a court order, nor
  - ii. separated in circumstances in which the separation is likely to be permanent,
- (b) a man and woman who are not married to each other but are living together as husband and wife,
- (c) two people of the same sex who are civil partners of each other and are neither
- i. separated under a court order, nor
  - ii. separated in circumstances in which the separation is likely to be permanent, or
- (d) two people of the same sex who are not civil partners of each other but are living together as if they were civil partners.'

The Tax authority (HMRC) state in their manuals<sup>3</sup> that they will use the criteria adopted by the Department for Work and Pensions (DWP) which administers social security for the purpose of deciding if a couple are living as husband and wife or as civil partners which include looking for the presence of one or more of the following:

- Living in the same household;
- Stability of relationship;
- Financial support;
- Dependent children;
- Public acknowledgement of the couple relationship;
- Sexual relationship.

- Domestic Violence

In this context, cohabiting couples are treated the same as married couples and civil partners in terms of personal protection, but legislation provides them with an inferior remedy in terms of regulation of occupation rights in the family home, unless the applicant is considered an 'entitled applicant' because they own, or jointly own, the family home or are a renting tenant or joint renting tenant of the home.

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<sup>3</sup> HMRC have four manuals which provide online guidance on the legislation. See for example, HMRC Tax Credits Claimant Compliance Manual, Section CCM15040, 'Undisclosed Partners: Couples who are Unmarried and not Civil Partners', available at [www.hmrc.gov.uk/manuals/ccmmanual/CCM15040.htm](http://www.hmrc.gov.uk/manuals/ccmmanual/CCM15040.htm).

The English Family Law Act 1996 Part IV extends domestic violence remedies of non-molestation orders and occupation orders to 'Associated Persons'. Section 62(3) Family Law Act 1996 defines this concept to include cohabitants:

'For the purposes of this Part, a person is associated with another person if [...]  
b) they are cohabitants or former cohabitants.'

Cohabitants are defined in S. 62(1) as follows:

'(a) 'cohabitants' are two persons who are neither married to each other nor civil partners of each other but are living together as husband and wife or as if they were civil partners;

(b) 'cohabit' and 'former cohabitants' are to be read accordingly, but the latter expression does not include cohabitants who have subsequently married each other or become civil partners of each other.'

In the domestic violence context, children (including those between 16 and 18 years of age who may be a cohabiting partner) can apply for non-molestation or occupation orders only with leave of the court (S. 43 English Family Law Act 1996). The court has power to deal with the matter as a child protection issue within such family proceedings.

- Statutory wrongful death suits

Here remedies for a bereaved cohabiting partner are available and may be the same as for married couples as in the English Pneumoconiosis (Workers' Compensation) Act 1979. This requires eligible claimants to be - 'a reputed spouse who was residing with the deceased' (S. 3(c)).

There is no minimum duration of that relationship specified.

However, S. 1(3) English Fatal Accidents Act 1976, as amended, which provides for compensation for negligent deaths, requires an eligible cohabitant partner to show that they - 'lived in the same household with the deceased for a period of at least two years immediately before the death as the husband or wife (or as the civil partner) of the deceased'.

A specified minimum duration of the cohabitation relationship of two years is applied here. Furthermore, unlike married and civil partner couples, cohabiting couples are excluded from the bereavement damages aspect of the claim (which provides compensation for loss of companionship with their deceased partner). Cohabitants therefore have an inferior remedy.

- Succession to rented tenancies of the family home

Here the rights and remedies vary according to the category of rented tenancy which applies to the family home. Broadly, tenancies granted in the private housing sector are governed by different legislation to those granted by local authorities in the public sector. Much social housing is now provided in the independent sector with different rules again. The rules governing a cohabiting

partner's eligibility to succeed to their deceased partner's tenancy therefore depends on which category of tenancy the family home falls into and whether a minimum duration of the cohabitation is required to have taken place in the home prior to the tenant's death.<sup>4</sup>

English Private Rent Act tenancies (of which there are now very few remaining) are governed by Schedule 1 to the English Rent Act 1977 as amended and private/independent sector 'assured' or 'assured shorthold' tenancies are governed by the English Housing Act 1988.

Here, in both cases, cohabitants are given identical rights to married and civil partner couples irrespective of the duration of the relationship.

A cohabitant is included within words 'spouse' and 'civil partner' which consequently entitles them to succeed to a statutory tenancy under Schedule 1 to the English Rent Act 1977:

'2(1). The surviving spouse or surviving civil partner (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall, after the death, be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence.

2(2). For the purpose of this paragraph,

(a) a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant, and

(b) a person who was living with the original tenant as if they were civil partners shall be treated as the civil partner of the original tenant.'

Cohabitants are similarly able to succeed to a private or independent sector 'assured periodic' tenancy (or in principle also to a short fixed term 'assured shorthold' tenancy which has little security of tenure) governed by S. 17 English Housing Act 1988 as amended, regardless of the duration of the relationship:

'For the purposes of this section –

(a) a person who was living with the tenant as his or her wife or husband shall be treated as the tenant's spouse, and

(b) a person who was living with the tenant as if they were civil partners shall be treated as the tenant's civil partner.'

In the case of a secure tenancy granted by a local authority and governed by S. 87 English Housing Act 1985 however, the surviving cohabitant partner is required to have – lived together 'as husband and wife' or 'as civil partners' for a period of 12 months in the property with the deceased as their only or principal home to be eligible to succeed to the tenancy. There is no time qualification period for spouses or civil partners to succeed. These same rules apply to succession to local authority

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<sup>4</sup> For further detail on different-sex cohabitants, see A. BARLOW, *Cohabitants and the Law*, Butterworths, London, 2001, at chapter 3; More generally, see A. ARDEN, A. DYMOND and C. HUNTER, *Manual of Housing Law*, Sweet & Maxwell, London, 2012.

or independent sector Introductory Tenancies under S. 131 & 140(1) English Housing Act 1996.

- Homelessness legislation

The homelessness legislation in the English Housing Act 1996 Part VII, as amended, places a statutory duty on local authorities to find accommodation for those not intentionally homeless and their families where appropriate. This defines a member of the family (S. 178(3)) to include spouses and civil partners and those who 'live together as husband and wife or as if they were civil partners' and provides identical rights to those who are formally married or civil partnered. It imposes no minimum duration qualification period for the relationship.

- Inheritance

Under the English Inheritance (Provision for Family and Dependants) Act 1975, as amended, cohabitants are eligible to apply for reasonable financial provision (limited to what is reasonable for their maintenance) from the estate of a deceased cohabiting partner whether different-sex or same-sex provided they lived for a period of two years prior to the date of the partner's death in the same household as the deceased as their husband or wife or as their civil partner (S. 1A & 1B). This remedy is inferior to that of spouses and civil partners whose claim is not limited to what is reasonable for their maintenance and is likely to be more generous where assets are available under the estate and is generally in line with the financial provision which would be provided on divorce or dissolution of the formal relationship.

- Adoption

Different and same-sex cohabiting couples are eligible to adopt a child in England and Wales provided they are over 21 (except where one of them is the parent of the child, in which case that partner need only be 18).

Section 144(4)(b) English Adoption and Children Act 2002 defines a couple as:

'two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.'

There is no requirement that the couple should be living in the same household and so the provision extends beyond cohabitants and could for example include couples Living Apart Together. There is also no statutory definition of 'enduring family relationship' but the adoption agency will be concerned to ensure that there is a stable relationship which has been in existence for some time and is likely to last.<sup>5</sup> In *Re T and M(Adoption)* [2010] EWHC (Fam) 964, [2011] 1 FLR 1487, a case concerning the application by a lesbian partner to adopt her partner's child with whom (for reasons relating to issues around the child's unusual health issues) she

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<sup>5</sup> The Suitability of Adopters Regulations 2005 (SI 2005/1712) state that in the case of any couple, the adoption agency must have regard to the need for stability and permanence in their relationship. See further LOWE and DOUGLAS, *Bromley's Family Law*, Oxford University Press, Oxford, 2015, at p. 705-6.

was not residing, Mr Justice Hedley indicated in his judgment that what was required to fall within the definition was firstly, an unambiguous intention to create and maintain a family life and secondly, a factual matrix consistent with that intention.

In none of these situations where the law recognises the informal cohabiting relationship does legislation specifically exclude a cohabitant who remains married or civil partnered to a former partner from the definition of cohabitant. However, this fact may in some circumstances influence the court which may, in the exercise of its discretion, decide to deny them the remedy applied for.

Living Apart Together couple relationships where there is no cohabitation within a joint household are not recognised as an informal family relationship as such in England and Wales. Such couples are not regulated in any specific way. They are generally treated as two separate, unrelated individuals. However, domestic violence personal protection remedies, such as the non-molestation order in S. 42 English Family Law Act 1996 may extend to them if they are 'associated' under S. 62 English Family Law Act 1996, as this includes couples who '[...] have or have had an intimate personal relationship with each other which is or was of significant duration'.

If there is financial dependency of one partner on the other and this can be proved, the dependant partner may be an eligible applicant who is then able to make a claim for financial provision (limited to maintenance) on the death of the other partner from the deceased partner's estate under the English Inheritance (Provision for Family and Dependents) Act 1975.

If they are judged to be living as partners in 'an enduring family relationship', they may also be eligible to adopt as a couple under the English Adoption and Children Act 2002.

**3. In the absence of specific legislative provisions, are there circumstances (e.g. through the application of the law of obligations or the law of property) under which informal relationships between a couple are given legal effect (e.g. through the application of the law of obligations or the law of property)? Where applicable briefly indicate the leading cases**

Although previously the English Law of Tort (obligations) had been used by informal, former cohabiting couples to obtain injunctions against their ex-partner for assault or harassment, the current domestic violence legislation (English Family Law Act 1996 Part IV) now covers this situation. In addition, the criminal and civil protection provided by the English Protection from Harassment Act 1997 which does not require proof of any relationship between the parties has also made this redundant and provides for restraining orders as well as criminal sanctions.

However, in the absence of any family law remedies governing family property on separation from cohabitation, property law is still applied and the law of trusts in particular has been actively used to fill the gap in family law. It is now most

commonly used in family home disputes between cohabiting partners on relationship breakdown. Where there are no children of the family, this is the only possibility where the non-owner cohabitant wishes to try and establish that they are entitled to a share of the equity (or of the beneficial as opposed to the formal legal ownership) in the family home owned by their partner.

Property law in England and Wales separates legal ownership from so-called 'beneficial' or 'equitable' ownership and it is the latter which will dictate how the property is owned and how ultimately the proceeds of sale from the property will be distributed between the owners. Usually, legal and beneficial ownership will coincide but will not do so if that presumption can be displaced by evidence of a different common intention which has been relied upon by the non-legal owner. The court has power to determine whether a cohabitant has a beneficial share in a property (typically the family home although it can be used in respect of any property) which is formally legally owned by their partner/former partner, and to declare the respective shares of each partner in the property. If shared beneficial ownership is established, then the formal legal owner holds the home on trust for themselves and their partner in the shares determined by the court.

Applications can be made under S. 14 of the English Trusts of Land and Appointment of Trustees Act 1996 for declarations as to the beneficial ownership of the family home (or indeed other property). This statutory provision and the criteria for determining applications in S. 15 are considered by the court alongside the law developed by the courts around common intention 'constructive trusts' and previously, and perhaps still where there is a mixed family and commercial investment involved, 'resulting trusts'.

Resulting trusts are relatively straightforward. The common intention to share beneficial ownership is evidenced solely by each partner's direct financial contributions to the purchase or acquisition of the property. Their respective shares in the property will then reflect the proportion of each partner's financial contribution. So if a couple are found to have contributed £80,000 and £20,000 respectively to their home which cost £100,000 and was purchased in the name of the larger contributor and legal owner, they will beneficially jointly own the home. The legal owner holds the home on trust for them both in respective shares of 80% to 20% of its current value.

Constructive trusts most typically arise where just one partner is the legal owner of the property and the non-owner wishes to get a declaration of joint beneficial ownership from the court. However, where the home is legally owned in joint names but no declaration has been made as to the beneficial shares of ownership, the court can make a declaration as to how the property is held beneficially under a constructive trust. The starting point with joint ownership situations is that it is owned in equal shares but this presumption can be rebutted.



The statutory criteria in S. 15(1) English Trusts of Land and Appointment of Trustees Act 1996 for set out the matters to which the court must have regard when exercising its S. 14 powers and include:

- the intentions of the person(s) who created the trust;
- the purpose for which the trust is held;
- the welfare of any minor who occupies or might reasonably occupy the trust property as his home and the interests of any secured creditor or any beneficiary.

The leading cases are:

- *Gissing v Gissing* [1971] AC 886 in which the House of Lords originally confirmed that beneficial interests could be founded under common intention resulting or constructive trusts;
- *Lloyds Bank plc v Rossett* [1991] 1 AC 107 in which the House of Lords categorised two types of common intention constructive trust. First, (known as *Rossett 1*) where it is shown there is an agreement or understanding between the parties to share the property despite the legal ownership being solely in one partner's name. This requires the non-owner partner to provide evidence that they have then relied on this agreement to their detriment. It covers situations where the owner partner has misrepresented the reason for putting the property in their sole name (e.g. the young age of the partner (*Eves v Eves* [1975] 3 All ER 768, CA; or complications for a divorce from an ex-spouse as in *Grant v Edwards* [1986] Ch 638 CA,) as well as where a promise such as 'Don't worry about the future because [the house] is half yours and I will always look after you' has been made by the legal owner (*Hammond v Mitchell* [1991] 2 All ER 109). However, there must be detrimental reliance referable to the promise or understanding such as significant expenditure or work on the property by the non-legal owner for a constructive trust to be found to exist.
- *Rossett 2* is where the common intention and the detrimental reliance is evidenced by the conduct of the parties and may typically comprise direct contributions to the purchase price or mortgage or significant work on the property. A small direct contribution may be sufficient as in *Midland Bank v Cooke* [1995] 4 All ER 562, CA, where the half share of a cash wedding present which became part of small deposit paid for the home was enough. Facilitating the payment of the mortgage was enough in *Le Foe v Le Foe and Woolwich plc* [2001] 2 FLR 970.
- *Stack v Dowden* [2007] UKHL 17; [2007] 2 AC 432 indicated that in joint ownership cases at least, resulting trusts were not appropriate to determine family home beneficial ownership. Rather, constructive trusts were the appropriate route. The case confirmed the starting point was a presumption that joint ownership meant a common intention to share ownership equally, but that this could be displaced in exceptional cases. The House of Lords urged that a wider view of what could amount to a contribution to the acquisition of the home should be taken and 'the whole course of dealing' between the partners looked at in order to quantify their respective shares. Yet it was stated that unlike in the divorce context, the overall aim was not to achieve fairness between the parties. It also remains the case that the acts must be referable to the purchase, so facilitating the mortgage payments will count but child care alone, for example, is unlikely to sufficient.

- *Jones v Kernott* [2011] UKSC 53; [2012] 1 AC 776 was another joint ownership case which sought to rebut the equal share presumption and did so successfully. Here, one partner had left the home and taken their share of the endowment life assurance policy proceeds, had left the other partner to pay the mortgage but had not formally transferred the home into her sole name or declared unequal shares. The Supreme Court here indicated that in quantifying the shares, the court's role was to determine a fair outcome and could infer what was intended in such a joint ownership case. Two Supreme Court Justices went as far as to indicate they could impute what the intentions of reasonable and just people would have been, had they thought about it at the time. Future cases may clarify the situation in time.

Another possibility although it overlaps with constructive trusts and is far less used is the doctrine of proprietary estoppel. In order to establish this, a claimant must show a representation made by one partner which is relied upon by the claimant who suffers detriment as a consequence.

In *Wayling v Jones* (1995) 69 P & CR 170; [1995] 2 FLR 1029, a gay couple ran a hotel together which was owned by one of them. The deceased owner had left this hotel to his partner in his will. Shortly before his death, the deceased had sold his hotel business and purchased another hotel where they both lived and which was run by the deceased's partner for little remuneration, to his detriment. Thus although the will left the original hotel which the deceased no longer owned to the partner, the court found that the estate was 'estopped' (prevented) from denying the gift to the surviving partner of the new hotel.

The steps to establishing proprietary estoppel set out above were summarised in *Thorner v Majors* [2009] UKHL 18; [2009] FLR 405.

#### **4. How are informal relationships between a couple defined by either legislation and/or case law? Do these definitions vary according to the context?**

Each statute defines cohabiting relationships differently, although there are common elements. In all cases, (except most recently for adoption which refers to a couple living 'as partners in an enduring family relationship' under S. 144(4)(b) English Adoption and Children Act 2002), it is required that the couple is living 'as husband and wife' or 'as civil partners'. In some contexts, living in a common household is also required (e.g. tenancy succession under the English Rent Act 1977 and the English Housing Act 1988) and in others, a minimum duration of the relationship is additionally required (as in secure tenancy succession under the Housing Act 1985 or the right to apply for financial provision on death as in the English Inheritance (Provision for Family and Dependents) Act 1975). The omission of a specified minimum duration in the adoption context in S. 144(4)(b) English Adoption and Children Act 2002 seems to have introduced a more flexible stability test for the informal relationship in this context.

#### **5. Where informal relationships between a couple have legal effect:**

**a. When does the relevant relationship begin?**

When the couple begin to cohabit in the same household. This is a question of fact which has to be determined in each case and proved on the balance of probabilities on the evidence adduced.

There are no explicit statutory provisions on this. However, if a couple do not agree the date, the court will have to take evidence and decide the date cohabitation began if this is relevant to the case, such as where a minimum period of cohabitation is specified to make a cohabitant eligible to make a claim.

**b. When does the relevant relationship end?**

When they separate and no longer live in the same household. This is a question of fact which has to be determined in each case and proved on the balance of probabilities on the evidence adduced.

There are no explicit statutory provisions on this. However, if a couple do not agree the date, the court will have to take evidence and decide the date cohabitation ended if this is relevant to the case, such as where a minimum period of cohabitation is specified to make a cohabitant eligible to make a claim.

**6. To what extent, if at all, has the national constitutional position been relevant to the legal position of informal relationships between a couple?**

Not at all.

**7. To what extent, if at all, have international instruments (such as the European Convention on Human Rights) and European legislation (treaties, regulations, and directives) been relevant in your jurisdiction to the legal position of informal relationships between a couple?**

With regard to same-sex couples European Convention on Human Rights (ECHR) arguments under the English Human Rights Act 1998 have been very significant and culminated in the Court of Appeal case of *Mendoza v Ghaidan* [2002] EWCA Civ 1533, [2003] Ch 380 which was subsequently confirmed by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557. This extended the same rights available to different-sex cohabiting couples to same-sex cohabiting couples in the Rent Act family home tenancy succession context. This extension of rights, along with amendment of all other statutes governing cohabitation relationships, was subsequently put on a statutory footing when the English Civil Partnership Act 2004 was passed, to avoid discrimination against same-sex cohabiting couples.

However, this trend to extend rights to same-sex couples had originally been started without reference to the ECHR. In point of fact the English Human Rights Act 1998 was not considered relevant in an earlier case on the same point *Fitzpatrick v Sterling*

*Housing Association* [2001] 1 AC 27 before the implementation of the English Human Rights Act 1998. Yet the later case of *Mendoza v Ghaidan* (confirmed on appeal in *Ghaidan v Godin-Mendoza*) found the right to private and family life combined with the non-discrimination principle (Art. 8 plus Art. 14 ECHR) decisive, given different-sex couples had already acquired the same rights as married couples in this context.

**8. Give a brief history of the main developments and the most recent reforms of the rules regarding informal relationships between a couple. Briefly indicate the purpose behind the law reforms and, where relevant, the main reasons for not adopting a proposal.**

Much of the developments in the heterosexual context were made through case law in Rent Act and Housing Act cases. This is a brief summary of how progress was made in legally acknowledging informal (mainly couple) relationships ‘as a member of the tenant’s family’ through the courts in the context of allowing the surviving partner to succeed to the tenancy of the family home:

- *Brock v Wollams* [1949] 2KB 388  
Accepted informally adopted daughter of tenant as a member of the family
- *Gammans v Ekins* – [1950] 2KB 328  
Rejected cohabitant with no children
- *Hawes v Evenden* – [1953] 2 All ER 737  
Accepted mistress of 12 years with children
- *Dyson Holdings Ltd v Fox* – [1976] QB 503  
Lord Denning accepted cohabitant with no children
- *Joram Developments Ltd v Sharratt* [1979] 1 WLR 928  
Quasi aunt and nephew members of household NOT a family
- *Watson v Lucas* – [1980] 3 All ER 607  
Accepted cohabitant lived with a man notwithstanding that he remained married to his wife
- *Chios Property Investment Ltd v Lopez* – [1988] Fam Law 384  
Confirmed Denning approach, stressing the importance of a ‘sufficient state of permanence and stability’ having been reached to constitute a family
- *Fitzpatrick v Sterling H A Ltd* – [2001] 1 AC 27  
House of Lords rejected same-sex cohabitant as ‘spouse’ but accepted him as ‘member of tenant’s family’ (despite *Harrogate BC v Simpson* [1986] 2 FLR 91 approved by ECHR in *S v UK* 47 DR 275 in the secure council tenancy context)
- *Mendoza v Ghaidan* – [2002] EWCA Civ 1533, [2003] Ch 380  
Court of Appeal accepted same-sex cohabitant as ‘spouse’ on the basis that not to do so was post-Human Rights Act 1998 in breach of Art. 8 and Art. 14 ECHR
- *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [2004] AC 557  
On 21<sup>st</sup> June 2004, the House of Lords dismissed the appeal and endorsed the decision of the Court of Appeal.

Other than the extension of the term ‘cohabitant’ to same-sex couples living as civil partners, which extended existing cohabitant rights to that community, the last substantive reforms extending new rights and remedies to different-sex cohabitants took place in the late 1980s to mid 1990s. The English Housing Act 1988 extended the

definition of spouse to cohabiting couples in the private and independent housing sector tenancy succession context. Subsequently, an amendment to the English Inheritance (Provision for Family and Dependents) Act 1975 by the English Succession (Reform) Act 1995 extended those eligible to apply for financial provision to cohabiting partners of the deceased on less generous terms than that available to spouses. The English Family Law Act 1996 extended occupation order rights to cohabitants in the domestic violence context and also for the first time enabled a non-tenant cohabitant to apply for the rented family home to be transferred into their sole name on relationship breakdown, although applied different criteria to the married context.

**9. Are there any recent proposals (e.g. by Parliament, law commissions or similar bodies) for reform in this area?**

Yes. There have been two recent Law Commission Reports which have recommended reform but both have been rejected by government for England and Wales, despite Scottish and Irish reform.

In 2007, the Law Commission for England and Wales recommended reform to provide a remedy for cohabitants on relationship breakdown to redress economic advantage and disadvantage incurred during the relationship, with a provision that couples could opt out of the scheme proposed and which was similar to Scottish legislation.<sup>6</sup> Their report<sup>7</sup> followed a thorough consultation process<sup>8</sup> and a previous attempt which rejected a property law-based reform and indicated that in their view, a family law-based reform of cohabitation law should be considered.<sup>9</sup> The 2007 proposals were formally rejected by the Coalition government in 2011. In 2011, the Law Commission published a further report regarding succession and proposed a cohabitant should succeed to a portion of a deceased cohabiting partner's estate on intestacy (see Intestacy and Family Provision Claims on Death, Law Com 331, London, TSO 2011). These proposals and the draft Inheritance (Cohabitants) Bill were rejected by the Coalition Government in March 2013.

A Private Members Cohabitation Bill put forward in 2009 by Lord Lester which aimed to provide a claim for the financial needs of a cohabitant partner against their former partners on relationship breakdown but this was rejected.

In 2014, another attempt was made through the Cohabitation Rights Bill 2014 which is Private Members Bill sponsored by Lord Marks. It has passed its second reading in the House of Lords and the planned legislation now proceeds to the committee stage, during which its provisions will be examined in greater detail by the House. If

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<sup>6</sup> The Family Law (Scotland) Act 2006 extended rights to cohabitants to redress economic disadvantage on relationship breakdown.

<sup>7</sup> Law Commission, *Cohabitation: the financial consequences of relationship breakdown*, Law Com. No. 307, CM 7182, TSO, London, 2007.

<sup>8</sup> See their consultation paper - Law Commission, *Cohabitation: the financial consequences of relationship breakdown*, Law Com No 179, TSO, London, 2006.

<sup>9</sup> Law Commission, *Sharing Homes: a Discussion Paper*, TSO, London, 2002.

passed, the bill would give cohabiting couples similar rights to married ones, although these would not be as extensive. Amongst other measures, they would gain the right to apply for a financial settlement within two years of a relationship ending. As it is a private members bill, it is unlikely this will become law.

## B. Statistics and estimations

**10. How many marriages and, if permissible, other formalised relationships (such as registered partnerships and civil unions) have been concluded per annum? How do these figures relate to the size of the population and the age profile? Where relevant and available, please provide information on the gender of the couple.**

### Number of marriages and civil partnerships formed in England and Wales 2000-2012

Source: ONS<sup>10</sup>

Table 1.

Year	Marriages (heterosexual) <sup>11</sup>	Civil Partnerships	CP Male	CP Female
2000	267,961	-	-	-
2001	249,227	-	-	-
2002	255,596	-	-	-
2003	270,109	-	-	-
2004	273,069	-	-	-
2005 <sup>12</sup>	247,805	1,857	1,228	629
2006	239,454	14,943	9,003	5,940
2007	235,367	7,929	4,371	3,558
2008	235,794	6,558	3,536	3,022
2009	232,443	5,687	2,962	2,725
2010	243,808	5,804	2,868	2,936
2011	249,133	6,152	3,171	2,981
2012	262,240	6,362	3,138	3,224

#### Marriages:

The provisional number of marriages registered in England and Wales rose by 5.3% in 2012 to 262,240, compared with 249,133 in 2011. This increase in the provisional marriage figure for 2012 continues the recent upward trend, following the low number recorded for 2009 which itself followed 20 years of decline in the number of marriages.

<sup>10</sup> These data were compiled from tables in ONS 2013 on-line publications *Marriages in England and Wales (Provisional) 2012*, available at: [www.ons.gov.uk/ons/dcp171778\\_366530.pdf](http://www.ons.gov.uk/ons/dcp171778_366530.pdf) and *Civil Partnerships in the UK, 2012*, available at: [www.ons.gov.uk/ons/dcp171778\\_329457.pdf](http://www.ons.gov.uk/ons/dcp171778_329457.pdf).

<sup>11</sup> The figures for marriage relate to heterosexual marriage as same-sex marriage was only introduced in 2013 and no data are yet available.

<sup>12</sup> Same-sex civil partnership was introduced on 5 December 2005 in England and Wales.

The provisional male General Marriage Rate (GMR) in 2012 was 23.2 men marrying per thousand unmarried men aged 16 and over, compared with 22.1 in 2011 and 27.4 in 2002. The provisional GMR for women in 2012 was 21.0 women marrying per thousand unmarried women aged 16 and over, compared with 19.9 in 2011 and 23.9 in 2002.

Since 1972 the mean age at first marriage has increased by almost eight years for both men and women. In 2012 the provisional mean age at marriage for never-married men was 32.4 years, while for never married women it was 30.3 years. This compares with 24.9 years and 22.9 years respectively in 1972.

Provisional figures show that in 2012, 175,040 marriages in England and Wales were first marriages for both partners. This accounted for 67% of all marriages. This number peaked in 1940 at 426,100 when 91% of all marriages were the first for both partners. Remarriages for both parties accounted for 15% of all marriages in 2012. The remaining 19% of marriages were of couples where only one partner had been married previously. The proportion of marriages that were the first for both parties has gradually increased since 1996 (rise of 9.1 percentage points), while remarriages for one or both parties have decreased over the same period (fall of 4.6 percentage points for both).

#### Civil Partnerships:

The mean (average) age at formation of civil partnership in the UK fell slightly from 40.1 years in 2011 to 40.0 in 2012 for men, and for women from 38.3 years in 2011 to 37.6 in 2012. The average age at formation has been decreasing year on year as older couples who had waited for the introduction of the legislation took the opportunity to form a civil partnership early on.

In 2012, there were slightly more female civil partnerships (51%) in the UK than male, whereas in 2011 there were slightly more male civil partnerships (51%) than female. Initially the numbers of males forming civil partnerships were much higher than females, but the numbers of male and female civil partnerships converged in 2009/10.

### **11. How many couples are living in an informal relationship in your jurisdiction? Where possible, indicate trends.**

#### Cohabiting couples:

The most recent statistics published by ONS (ONS, *Families and Households 2014*<sup>13</sup>) in relation to informal cohabiting couples are, in contrast to data for marriage and civil partnership, only available for the whole of the UK (rather than England and Wales). Generally, however, although the trends in Northern Ireland are different due to far greater religious adherence than the rest of the UK, this is a small element of the UK population. Trends in England and Wales tend to coincide with those in Scotland

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<sup>13</sup> ONS, 2015, available at: [www.ons.gov.uk/ons/dcp171778\\_393133.pdf](http://www.ons.gov.uk/ons/dcp171778_393133.pdf).

and for the UK as a whole and would not be significantly different in the statistical sense from those described below.

There were nearly 6 million people cohabiting in opposite sex cohabiting couple families in 2014 or just under 3.0 million couples (more than double the 1996 figure of 1.5 million). In addition, there were 84,000 same-sex cohabiting couple families in the UK in 2014. Together cohabiting couple families account for 16.4% of all families in the UK. For opposite sex cohabiting couple families there has been a statistically significant increase from 13% of all families in 2004 to 16% in 2014. Same-sex cohabiting couple families as a percentage of all families also increased over the same time period but this was not a statistically significant change (0.4% to 0.5%).

Cohabiting couple families are the fastest growing family type in the UK.

Significant trends:

- The number of dependent children living in opposite sex cohabiting couple families doubled from 0.9 million in 1996 to 1.8 million in 2012.
- Over the same period, the percentage of people aged 16 or over who were cohabiting steadily increased, from 6.5% in 1996 to 11.7% in 2012. This makes cohabitation the fastest growing family type in the UK.
- Between 1996 and 2013 the number of same-sex cohabiting couples increased from around 16,000 to 89,000, which is an increase of around 450%. (However, note that this figure understates the true extent of growth in same sex couple families, because the introduction of civil partnerships means some same sex couple families are no longer recorded as cohabiting.)

In 2014, Table 2 below shows that 39% of all opposite sex cohabiting couple families had dependent children in the household, in contrast to only 11% of same-sex cohabiting couple families.

The largest group of opposite sex cohabiting couple families are those with no children in the household (61%). This could be associated with young couples choosing to cohabit before getting married and starting a family. However, some young cohabiting couples may choose to have a child before getting married; this is demonstrated in the age at first marriage being higher (30.3 years) than the average age of women at the birth of their first child (28.3 years).

The table below shows how families are spread across different family type within the UK.



**Table 2: Families in the UK: by family type in 2004 and 2014<sup>14</sup> (in thousands)**

Family type	2004			2014		
	With dependent children	Without dependent children <sup>15</sup>	Total	With dependent children	Without dependent children <sup>1</sup>	Total
Married couple family	4,689	7,521	12,210	4,751	7,725	12,476
Civil partner couple family <sup>16</sup>	N/A	N/A	N/A	12	49	61
Opposite-sex cohabiting couple family	885	1,412	2,298	1,163	1,812	2,975
Same-sex cohabiting couple family	... <sup>17</sup>	60	61	9	75	84
Lone parent family	1,869	817	2,685	1,981	1,024	3,005
All families	7,444	9,811	17,254	7,916	10,684	18,601

Note: Totals may not sum due to rounding.

Source: Labour Force Survey, Office for National Statistics.

The types of families in which dependent children live have changed significantly.

The biggest change is for dependent children living in opposite sex cohabiting couple families.

In 2004 11% of dependent children lived in such families, and this rose to 14% by 2014. Over the same period, the percentage of dependent children living in a married couple family fell by three percentage points to 63% by 2014. (The percentage of dependent children living in lone parent families changed little over the decade; 23% lived in lone parent families in 2014.)

<sup>14</sup> This table appears as Figure 1 in ONS, 2015, *Families and Households 2014*, available at: [www.ons.gov.uk/ons/dcp171778\\_393133.pdf](http://www.ons.gov.uk/ons/dcp171778_393133.pdf).

<sup>15</sup> Families without dependent children have only non-dependent children or no children in the household.

<sup>16</sup> Civil partnerships were introduced in the UK in December 2005.

<sup>17</sup> Indicates that estimates are not sufficiently reliable to be published.

**Living Apart Together Couples:**

A recent study using the nationally representative British Social Attitudes Survey 2011, estimates that 9% of the adult population of the UK classify themselves as 'Living Apart Together' and this confirms earlier findings from the British Social Attitudes Survey 2006. However, this study's use of a self-definition approach means that a wide range of relationships are likely to be included in this figure as the criteria for inclusion were not specified precisely by the study but rather left to whether people considered they were living in this style of relationship.<sup>18</sup>

**12. What percentage of the persons living in an informal relationship are:**

**a. Under 25 years of age?**

Of cohabitants, this was 18.8% in England and Wales according to the 2011 census.

**b. Between 26-40 years of age?**

Of cohabitants, this was 67.1% in England and Wales according to the 2011 census.

**c. Between 41-50 years of age?**

Of cohabitants, this was 27.2% in England and Wales according to the 2011 census.

**d. Between 51-65 years of age?**

Of cohabitants, this is 23.2% in England and Wales according to the 2011 census.

**e. Older?**

Cohabitants over 65 are 13.2% of that population in England and Wales according to the 2011 census.

The data above refers to opposite sex cohabitation relationships and are taken from the table below based on 2011 census analysis.

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<sup>18</sup> See further, M. PHILLIPS, S. DUNCAN, S. ROSENEIL, J. CARTER and M. STOILOVA, *Living Apart Together Sourcebook: National survey of people who Live Apart Together (LAT)*, Britain, 2011, available at: [www.applied-social-research.brad.ac.uk/current-projects/living-apart-together/](http://www.applied-social-research.brad.ac.uk/current-projects/living-apart-together/).

**Table 3.**

Age	2001	2011
16-19	3.4%	2.2%
20-24	17.3%	16.6%
25-29	25.5%	27.1%
30-34	19.0%	22.5%
35-39	13.8%	17.5%
40-44	10.4%	14.8%
45-49	8.3%	12.4%
50-54	6.3%	10.0%
55-59	4.7%	7.6%
60-64	3.4%	5.6%
65-69	2.4%	4.3%
70-74	1.7%	3.2%
75-79	1.3%	2.4%
80-84	1.2%	1.8%
85+	0.9%	1.5%

Source: Office for National Statistics, 2014.<sup>19</sup>

In terms of the proportions within the UK population who are cohabiting,<sup>20</sup> in 1996, 15% of people aged 25 to 34 were cohabiting, and this rose to 27% in 2012. This makes people in this age group the most likely to cohabit, often living together before getting married. The percentage of those in the 35 to 44 year age group who are cohabiting also increased, from 7% in 1996 to 15% in 2012. This may be related to the increasing age at marriage. Four-fifths of people marrying (80%) were living together before their marriage.

**13. How many couples living in an informal relationship enter into a formal relationship with each other:**

- a. Where there is a common child?
- b. Where there is no common child?

There does not appear to be data collected on this at the point of marriage/civil partnership. We know what proportion of those who marry were living together before marriage (80%) but no further information seems to be available.

However, research cited by ONS by Beaujouan and Bhrolcháin published in 2011 and based on the General Household Survey (GHS) suggests that around 40% of cohabiting couples are estimated to marry within 5 years, based on cohabiting unions

<sup>19</sup> The census analysis informs Figure 8 in the ONS paper, 'How Have Living Arrangements and Marital Status in England and Wales Changed Since 2001?', published online, available at: [www.ons.gov.uk/ons/dcp171776\\_356002.pdf](http://www.ons.gov.uk/ons/dcp171776_356002.pdf).

<sup>20</sup> These figures are UK wide, refer to heterosexual cohabitation and taken from ONS, *Short Report: Cohabitation in the UK, 2012*, 2012, available at: [www.ons.gov.uk/ons/dcp171776\\_284888.pdf](http://www.ons.gov.uk/ons/dcp171776_284888.pdf).

which started between 2000 and 2004.<sup>21</sup> They go on to say that after 10 years cohabitation, 50% of these unions have converted to marriage.

There is no information about separating cohabitants with and without children at marriage or civil partnership entry. However, in 2012, the majority of cohabitants (56%) had no children in their household, while 4% had only non-dependent (adult) children. We also know from Table 2 above<sup>22</sup> that 39% of all different sex cohabitants in the UK had dependent children living with them.

**14. How many informal relationships are terminated:**

**a. Through separation of the partners?**

There is no record of separation from informal cohabitation.

It is estimated by Beaujouan and Bhrolcháin, (2011) that of couples who began cohabiting between 2000-2004, 38% of cohabitants had separated after 5 years and 50% had separated after 10 years, based on data from GHS, 2000-2007.

**b. Through the death of one of the partners?**

There are no data on this. The mortality statistics only record death by formal marital status and a cohabitant is not entitled to register the death. There do not seem to be any estimates. However, the biggest percentage increase in cohabitation is found in the over 65 age group, indicating that death of a partner is likely to become a more common reason for a cohabitation relationship to end.

**15. What is the average duration of an informal relationship before its termination? How does this compare with the average duration of formalised relationships?**

The nationally representative British Social Attitudes Survey showed that the mean average length of a cohabitation relationship for those cohabiting in 2006 was 7 years as compared with 6.5 years in 2000. For cohabitants with children this increased to 8.5 years (with a median of 7 years).<sup>23</sup> The average length of a marriage which does not end in divorce is calculated by ONS to be 32 years.<sup>24</sup>

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<sup>21</sup> See E. BEAUJOUAN and M. BHROLCHÁIN, 'Cohabitation and Marriage in Britain since the 1970s', *Population Trends* no. 145, 1-25, 2011, available at: [eprints.soton.ac.uk/198915/1/06poptrends145beaujoua\\_tcm77-227428.pdf](http://eprints.soton.ac.uk/198915/1/06poptrends145beaujoua_tcm77-227428.pdf).

<sup>22</sup> This is taken from ONS, 2015, *Families and Households 2014*, ONS, 2015, available at: [www.ons.gov.uk/ons/dcp171778\\_393133.pdf](http://www.ons.gov.uk/ons/dcp171778_393133.pdf).

<sup>23</sup> A. BARLOW, C. BURGOYNE, E. CLERY and J. SMITHSON, 'Cohabitation and the law: myths, money and the media', in: A. PARK, J. CURTICE, K. THOMSON, M. PHILLIPS, M. JOHNSON, E. CLERY (eds.), *British Social Attitudes: the 24th report.*, Sage, London, 2008, pp. 29-52.

<sup>24</sup> See, ONS 2014, *Divorces in England and Wales 2012*, available at: [www.ons.gov.uk/ons/dcp171778\\_351693.pdf](http://www.ons.gov.uk/ons/dcp171778_351693.pdf).

The average length of a marriage which does end in divorce is 11.5 years.<sup>25</sup>

**16. What percentage of children are born outside a formal relationship? Of these children, what percentage are born in an informal relationship? Where possible, indicate trends.**

47.4% of all live births were born outside a formal relationship in 2013<sup>26</sup>, of which 75% are to parents who live at the same address and are assumed to be cohabiting. The trends show an annual increase in the number of births outside marriage. In 2000, 40% of all births were outside marriage.

In 2012, 39% of opposite sex cohabiting couples had dependent children, compared with 38% of married couples.<sup>27</sup>

**17. What is the proportion of children living within an informal relationship who are not the couple's common children (excluding foster children)?**

There are no available data or estimates on this for England and Wales or the UK.

**18. How many children are adopted within an informal relationship:**

- a. By one partner only?
- b. Jointly by the couple?
- c. Where one partner adopted the child of the other?

There are no data that reveal this. Court statistics are collected according to whether adopters are a male and female couple, a same-sex couple or a sole adopter.

According to ONS, the Adopted Children Register does not hold any information on the marital status of the adopting parents. Consequently, it is not possible to measure the impact of the implementation of the English Adoption and Children Act 2002 on 30 December 2005 which for the first time allowed civil partners, same-sex couples and unmarried couples (if in an enduring relationship) to adopt.

**19. How many partners in an informal relationship have been in a formal or an informal relationship previously?**

This varies by age. Of those under 35, the vast majority of cohabitants (over 95%) are single and never married. Of those, 35-44, 25% are divorced; of those aged 45-54 - 50% are divorced and of the over 65s, 66% are divorced.

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<sup>25</sup> See ONS 2014, *Divorces in England and Wales 2012*, available at: [www.ons.gov.uk/ons/dcp171778\\_351693.pdf](http://www.ons.gov.uk/ons/dcp171778_351693.pdf).

<sup>26</sup> ONS 2014, *Births in England and Wales 2013*, available at: [www.ons.gov.uk/ons/dcp171778\\_371129.pdf](http://www.ons.gov.uk/ons/dcp171778_371129.pdf).

<sup>27</sup> See ONS 2012, *Short Report: Cohabitation in the UK 2012*, available online at: [www.ons.gov.uk/ons/dcp171776\\_284888.pdf](http://www.ons.gov.uk/ons/dcp171776_284888.pdf).

There are no data on what percentage have had a previous informal relationship, but this is likely to increase over the age bands, other than perhaps the over 65s.

**Table 4: Percentage of cohabiting people in each age group in the UK by marital or civil partnership status, 2012**

Marital or civil partnership status	Age group					
	16-24	25-34	35-44	45-64	65-74	75+
Single	99.5%	95.7%	74.8%	41.3%	13.1%	2.0%
Married/civil partnership (separated)	0.3%	0.9%	4.4%	6.8%	3.2%	2.2%
Divorced/dissolved civil partnership	0.3%	3.3%	20.3%	48.5%	64.5%	44.6%
Widowed/survived civil partner	0.0%	0.1%	0.5%	3.4%	19.2%	48.0%

Source: Labour Force Survey, Office for National Statistics

### C. During the relationship

**20. Are partners in an informal relationship under a duty to support each other, financially or otherwise:**

**a. Where there are no children in the household?**

No.

**b. Where there are common children in the household?**

No, although it is possible to claim financial provision for the benefit of the child (in addition to child support) which can include an element for the other parent's care of the child or the cost of child care so that the partner can work, under Schedule 1 English Children Act 1989; *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865.

**c. Where there are other children in the household?**

No.

**21. Are partners in an informal relationship under a general duty to contribute to the costs and expenses of their household?**

No.

**22. Does a partner in an informal relationship have a right to remain in the home against the will of the partner who is the owner or the tenant of the home?**

They do not have such a right but that partner can apply for an occupation order under S. 36 English Family Law Act 1996. This is commonly used where there is domestic violence although in theory violence is not a pre-requisite. The court is guided by the criteria in S. 36(6), namely, it must have regard to all the circumstances including:

- each party's housing needs and resources and of any relevant child;

- the financial resources of each of the parties;
- the likely effect of the decision of the court on the health, safety or well-being of the parties and any relevant child;
- the conduct of the parties;
- the length of time since they lived together;
- the nature of the parties relationship and the level of commitment involved in it;
- the length of the cohabitation;
- whether they have children together; the length of time since they separated, and
- the existence of any Children Act 1989 or property proceedings.

Only if they successfully apply for an occupation order to remain in the home, which can only be granted for a maximum of 12 months (6 months with a possible extension for a further maximum of 6 months) if the cohabitant is not a joint owner (or tenant), can they remain in the home. The only other possibility is to apply for a transfer of tenancy order.

- Rented family home

Schedule VII English Family Law Act 1996 also allows applications for a transfer of tenancy order between cohabitants of the rented family home on relationship breakdown. This is also at the discretion of the court. A big issue is that this needs to be filed at court before the tenant or joint tenant partner gives notice to quit the tenancy to the landlord as this will determine the tenancy. (If the home is jointly rented either partner can give notice and terminate the whole tenancy.) The court applies the same criteria as for an occupation order under S. 36(6) above plus the circumstances in which the tenancy was granted and the suitability of the parties as tenants must be considered.

- Owner-occupied family home

With regard to the owner occupied home, the only possibility of the non-owner remaining in occupation longer term is to show they have a beneficial interest in the home under a constructive trust by making an application under S. 14 of the English Trusts of Land and Appointment of Trustees Act 1996 and even then, it will be difficult to remain in the home as the court will be likely to order sale and a division of the proceeds, particularly if there are no children.

This statutory provision and the criteria for determining applications set out in S. 15 are considered by the court alongside the law developed by the courts around common intention constructive trusts and previously, (and perhaps still where there is a mixed family and commercial investment) resulting trusts, where the respective proportion of the parties' financial contributions alone would indicate the likely shares, to determine whether a cohabitant has a beneficial share in a property which is formally legally owned by their partner/former partner. (This is typically the family home although it can be used in respect of any property). If this is established, then the formal legal owner holds the home on trust for themselves and their partner in the shares determined by the court. This beneficial interest gives a right of occupation.

Where there are children of the relationship under 18, applications can be made under S. 15 and Schedule 1 English Children Act 1989 for a transfer of property order or a settlement of property for the benefit of the child.

The most common order under Schedule 1 English Children Act 1989 is for the home to be retained by the owner but held on trust to permit the occupation by the ex-partner and children of the family until the youngest child reaches the age of 18 or finishes their full-time education. This is known as a *Mesher* order and is at the discretion of the court. At the end of the *Mesher* period, the home will revert to the owner partner and the non-owner partner can gain no share in the home. It does provide for occupation after the separation where the resources of the parties permit this.

**23. Are there specific rules on a partner's rights of occupancy of the home:**

**a. In cases of domestic violence?**

Yes – under S. 36 English Family Law Act 1996 the non-owner may apply to remain in occupation and to exclude the partner. If the grounds are made out, occupation/exclusion can be ordered for up to 12 months - 6 months renewable for a further maximum period of 6 months.

The criteria are set out in S. 36(6): the court must have regard to all the circumstances including:

- each party's housing needs and resources and of any relevant child;
- the financial resources of each of the parties;
- the likely effect of the decision of the court on the health, safety or well-being of the parties and any relevant child;
- the conduct of the parties; the length of time since they lived together;
- the nature of the parties relationship and the level of commitment involved in it;
- the length of the cohabitation;
- whether they have children together;
- the length of time since they separated, and
- the existence of any Children Act 1989 or property proceedings.

The court must also have regard to the 'balance of harm test' to consider whether the applicant or child will suffer significant harm attributable to the respondent ex-partner if the order is not made; and whether the harm suffered by the applicant or child is likely to be as great or greater than the harm attributable to the conduct of the respondent ex-partner or child.

**b. In cases where the partner owning or renting the home is absent?**

It is a matter of speculation whether an application under S. 36 English Family Law Act 1996 could be made outside the domestic violence context, for example, upon the basis of the owner's absence. Whilst the Act does not specifically require violence or threats to have occurred to make an occupation order, the court must apply the



criteria in S. 36(6) and consider the balance of harm test. This is a matter which is in the discretion of the court but it is likely to be more difficult to establish a successful claim outside the domestic violence context generally. More specifically the likelihood of significant harm attributable to the respondent ex-partner within the balance of harm test, may be difficult to show. The order can only last for a maximum of 12 months.

**24. Are there specific rules on transactions (e.g. disposal, mortgaging, subletting) concerning the home of partners in an informal relationship:**

The owner occupied family home is not considered special property as such in England and Wales outside the married/civil partnership context. General property law applies although in the owner occupied context the law of trusts can sometimes be used to establish a beneficial interest in the family home on behalf of the non-owning spouse.

The rented family home can be transferred between partners at the end of a cohabitation relationship regardless of ownership providing the tenancy is still in existence and at the discretion of the court, in accordance with the statutory criteria in Schedule 7 English Family Law Act 1996.

**a. Where the home is jointly owned by the partners?**

Joint ownership requires both partners' consent to sell, dispose or mortgage the home. In the absence of consent, an order of the court must be obtained. In joint ownership cases of dispute, the court has power to decide whether to order a sale and the presumption is that sale will be ordered (English Trusts of Land and Appointment of Trustees Act 1996). Sale or other disposal can be delayed when there are children and a Schedule 1 English Children Act 1989 application is possible seeking to transfer the home to one partner for the benefit of the child. The grant of an occupation order can delay the sale where there are grounds under S. 33 English Family Law Act 1996, which applies to joint owners and is typically applicable in the domestic violence context. Here, the fact of joint ownership means in principle that the court can make an order excluding the other partner indefinitely, although this is not normally considered good practice.

**b. Where the home is owned by one of the partners?**

The sole owner has the right to sell or mortgage the home although if a partner is in 'actual occupation' they may have an overriding interest to remain in occupation where a third party is seeking to repossess the property as decided in *Williams & Glyn's Bank v Boland* [1981] AC 487. As a consequence of this rule, a partner will normally be asked to consent to any disposal or sale as the owner will be required to give vacant possession on sale and the mortgagee will want clarification of the occupant's rights if any in the home before proceeding. However, on relationship breakdown, if the non-owner's partner's permission/licence to occupy is terminated by their partner which is easy to do, they can be evicted by them. Only under a S. 36

English Family Law Act 1996 application, can this be delayed if there is an occupation order granted. Normally this will be for 6 months or 12 months absolute maximum and is most likely where there is domestic violence.

**c. Where the home is jointly rented by the partners?**

Joint tenancy rented homes – either joint tenant can terminate the tenancy of the family home by giving notice to quit to the Landlord as decided in *Hammersmith and Fulham BC v Monk* [1992] 1 AC 478. The tenancy of the home can be transferred to one cohabitant partner who is a joint tenant, depriving the other partner of their tenancy on relationship breakdown under Schedule 7 English Family Law Act 1996. This is at the discretion of the court when one cohabiting partner makes an application under the Act. However, this must be filed at court before the joint tenant partner gives notice to quit the tenancy to the Landlord, or there will be no tenancy left in existence to transfer. The court applies the same criteria as for an occupation order under S. 33(6) and, in addition, must have regard to the circumstances in which the tenancy was granted and the suitability of the parties as tenants.

The S. 33(6) criteria include:

- each party's housing needs and resources and those of any relevant child;
- the financial resources of each of the parties;
- the likely effect of the decision of the court on the health, safety or well-being of the parties and any relevant child;
- the conduct of the parties;
- the length of time since they lived together;
- the existence of any Children Act 1989 or property proceedings.

**d. Where the home is rented by one of the partners?**

Sole tenancy rented homes:

Schedule 7 English Family Law Act 1996 also allows applications for transfer of tenancy order between cohabitants of the rented family home on relationship breakdown in cases where the tenancy of the home is rented in the sole name of the other partner. This is also at the discretion of the court. Similarly, the application needs to be filed at court before the tenant partner gives notice to quit the home to the Landlord as this will extinguish the tenancy. The court applies the same criteria as for an occupation order under S. 36(6) as well as having regard to the circumstances in which the tenancy was granted and the suitability of the parties as tenants.

The S. 36(6) criteria are more extensive than those in s33(6) applying to joint tenant partners and require greater scrutiny of the relationship. They include:

- each party's housing needs and resources and those of any relevant child;
- the financial resources of each of the parties;
- the likely effect of the decision of the court on the health, safety or well-being of the parties and any relevant child;
- the conduct of the parties;

- the length of time since they lived together;
- the nature of the parties relationship and the level of commitment involved in it; the length of the cohabitation;
- whether they have children together;
- the length of time since they separated, and
- the existence of any Children Act 1989 or property proceedings.

**25. Under what circumstances and to what extent can one partner act as an agent for the other?**

There is no special rule of agency and so one partner can act as an agent for the other partner if he or she has the other's formal consent. Joint owners of property can usually act as agent for both owners in some matters but not for the sale or disposal of real property (i.e. immovable property) such as the owner occupied family home.

**26. Under what circumstances can partners in an informal relationship become joint owners of assets?**

Joint ownership of assets is an accepted form of ownership between two or more individuals and is simple to achieve and very common. Joint purchase will normally result in joint legal and beneficial ownership of any asset including real property such as the family home (although if legal ownership is not in joint names, a declaration of trust by the court will be needed based on proof of joint contribution to acquisition costs or other express agreement between the parties). For real property, the transaction must be recorded in writing in the proper form, subject to the possibility of an implied common intention constructive or resulting trust being proved to the satisfaction of the court showing joint beneficial ownership.

**27. To what extent, if at all, are there specific rules governing acquisitions and/or transactions in respect of household goods? In answering this question briefly explain what is meant by household goods.**

There are no rules which relate to cohabitants in informal relationships other than the general rules of sole or joint ownership in relation to household goods. There is no separate law relating to household goods.

**28. Are there circumstances under which partners in an informal relationship can be regarded as joint owners, even if the title belongs to one partner only?**

Yes. If an express trust or an implied common intention constructive or resulting trust is shown to exist to the satisfaction of the court then the owning partner holds the property on trust for the other to the extent of their beneficial share. With regard to personal (i.e. movable) property, resulting trust principles, which look at the proportionate contributions of the parties and reflect that in shares of beneficial ownership, are likely to apply. The non-owner would normally have to prove that they contributed to the purchase or provide other proof that there was a common intention to share ownership and that that has been relied upon to their detriment, in

which case a constructive trust could be found. In *Rowe v Prance* [1999] 2 FLR 787 a man used the proceeds of sale from his former matrimonial home to purchase a yacht in his sole name, but falsely told his new partner she could not own it jointly with him as she did not have an Ocean Master's Certificate. He promised her that they were going to sail around the world together which caused her to give up the tenancy of her home and put her furniture in storage. He then left her but on her claim for a declaration as to the ownership of the yacht, the court decided that the man held the yacht on trust for both of them in equal shares, giving her a 50% beneficial interest. In another case *The 'Up Yaws'* [2007] EWHC 210 (Admlty), [2007] 2 FLR 444 the woman of a cohabiting couple had purchased the home in her sole name and her partner had purchased a boat in his sole name. He then sold the boat, purchasing another more expensive boat with the help of monies from a mortgage raised in the woman's sole name. The fact they had not discussed how the second boat would be owned resulted in the court finding a resulting trust under which they owned the second boat in proportion to their respective financial contributions.

**29. How is the ownership of assets proved as between partners in an informal relationship? Are there rebuttable presumptions?**

Proof of purchase of any asset by one partner or property purchased with joint monies for the personal use of one partner will be presumed to be the property of that partner. However, this can be rebutted by proof of contributions to the purchase price for property for joint use by the other partner. The standard of proof is on the balance of probabilities and the burden of proof is on the non-legal owner partner. Evidence will be taken in court on the issue in the normal way, examining receipts, hearing from witnesses including the couple to enable the court to make a declaration of trust relating to the joint beneficial ownership if proven.

Jointly purchased property or property of which the title is vested in joint names is presumed to be owned in equal shares unless a contrary common intention is proved. Gifts are owned by the donee.

In the case of real property, the title deeds will evidence legal ownership and the law presumes that the beneficial ownership is the same, unless an implied common intention resulting or constructive trust is proved to the satisfaction of the court.

**30. How is the ownership of assets proved as regards third parties? Are there rebuttable presumptions?**

Ownership of gifts from third parties depends on the donor's intention but the normal rule is that the donee will own a gift made to them. Otherwise the third party has to go to court for a declaration of ownership if this is not clear and is in dispute. The court will rule on the beneficial ownership under trust law if legal ownership is claimed not to reflect the beneficial ownership and is challenged.

The rebuttable presumptions around ownership are the same as for a dispute between the couple.

**31. Under what circumstances, if any, can partners in an informal relationship become jointly liable for debts?**

Only by jointly incurring those debts but they can be and typically are made liable for the whole debt (joint and several liability) when a joint debt is incurred.

**32. On which assets can creditors recover joint debts?**

The assets on which they have secured their credit or against which the court permits them to recover a debt through a charging order or other means of enforcement available to the court will be available. A creditor can recover a debt against the assets owned by either or both of them if the debt liability is joint and several which is the normal rule, providing a court order for enforcement has been obtained.

**33. Are there specific rules governing the administration of assets jointly owned by the partners in an informal relationship? If there are no specific rules, briefly outline the generally applicable rules.**

No.

**D. Separation**

**34. When partners in an informal relationship separate does the law grant maintenance to a former partner? If so, what are the requirements?**

No.

**35. What relevance, if any, upon the amount of maintenance is given to the following factors/circumstances:**

- a. **The creditor's needs and the debtor's ability to pay maintenance?**
- b. **The creditor's contributions during the relationship (such as the raising of children)?**
- c. **The standard of living during the relationship?**
- d. **Other factors/circumstances (such as giving up his/her career)?**

There is no maintenance or other financial provision for the partner but financial provision in the form of capital lump sums or transfer or settlement of property orders for the benefit of a child under 18 can be made on an application under Schedule 1 English Children Act 1989 and is separate from child support.

The criteria specified in para. 4 of the Schedule include having regard to all the circumstances and specifically to:

- the income and financial needs and resources of each parent and those of the child;
- any disability of the child and the manner in which the child was expected to be educated or trained.

- The standard of living of the couple when they were together is not specified (in contrast to the divorce context) and giving up a career would be irrelevant.

However, in case law, it has been held that the sum awarded to the partner caring for the child can include a care allowance element which can take account of the child care costs until the child is 18 or can be used by the carer to compensate for loss of employment (see *Re P (Child: Financial Provision)* [2003]EWCA Civ 837, [2003] 2 FLR 865).

**36. What modes of calculation (e.g. percentages, guidelines), if any, apply to the determination of the amount of maintenance?**

None.

**37. Where the law provides for maintenance, to what extent, if at all, is it limited to a specific period of time?**

Not applicable.

**38. What relevance, if any, do changed circumstances have on the right to continued maintenance or the amount due?**

Not applicable.

**39. Is the maintenance claim extinguished upon the claimant entering:**

- a. Into a formal relationship with another person?
- b. Into an informal relationship with another person?

Not applicable.

**40. How does the creditor's maintenance claim rank in relation to:**

- a. The debtor's current spouse, registered partner, or partner in an informal relationship?
- b. The debtor's previous spouse, registered partner, or partner in an informal relationship?
- c. The debtor's children?
- d. The debtor's other relatives?

Not applicable.

**41. When partners in an informal relationship separate, are specific rules applicable to the determination of the ownership of the partners' assets? If there are no specific rules, which general rules are applicable?**

There are no specific rules relating to the property and assets of couples in informal relationships. General laws of determining legal ownership apply whereby the title deeds of the property or proof of purchase in one partner's name will provide

evidence of ownership. In cases of dispute, the English Trusts of Land and Appointment of Trustees Act 1996 provides a mechanism for challenge whereby the non-owner can provide evidence that they contributed to the purchase or had an agreement with the legal owner that they would share beneficial ownership. If satisfied, the court can declare that there is a common intention resulting or constructive trust.

**42. When partners in an informal relationship separate, are specific rules applicable subjecting all or certain property (e.g. the home or household goods) to property division? If there are no specific rules, which general rules are applicable?**

In general there are no specific rules of property division. Each partner will own their own property separately and jointly owned property (or its value) will normally be divided equally between the couple. This can be subject to challenge where it is claimed that legal ownership does not reflect beneficial ownership and the non-owner can seek a declaration of trust under S. 14 of the English Trusts of Land and Appointment of Trustees Act 1996 where the court will consider if a constructive or resulting trust has been proved to exist.

The rented family home can be transferred on application to the other partner on relationship breakdown under Schedule 7 English Family Law Act 1996 at the discretion of the court.

Applications to the court for financial provision for the benefit of the child under Schedule 1 English Children Act 1989 in the form of lump sum or property transfer orders or property settlement orders can be applied for where there is a child of the parties under 18. Any order is at the discretion of the court.

**43. Do the partners have preferential rights regarding their home and/or the household goods? If so, what factors are taken into account when granting these rights (e.g. the formal ownership of the property, the duration of the relationship, the needs of each partner, the care of children)?**

No. There are no preferential rights and formal ownership will normally apply. There is the ability to apply for various possible remedies in the circumstances below:

- Financial provision for the benefit of the child

Financial provision in the form of capital lump sums or transfer or settlement of property orders for the benefit of a child under 18 can be made on an application under Schedule 1 English Children Act 1989. This is separate from child support.

The criteria specified in para. 4 of the Schedule include having regard to all the circumstances and specifically to:

- the income and financial needs and resources of each parent and those of the child;

- any disability of the child and the manner in which the child was expected to be educated or trained.

By ordering a settlement of the home or other property, the court can provide that it can be occupied or used by the partner caring for the child until the child is 18 or finishes full time education. See for example *Re P (Child: Financial Provision)* [2003]EWCA Civ 837, [2003] 2 FLR 865.

- Rented family home

Schedule 7 English Family Law Act 1996 allows applications for transfer of tenancy order between cohabitants of the rented family home on relationship breakdown in cases where the tenancy of the home is rented. This is at the discretion of the court. The court applies the same criteria as for an occupation order under either S. 33(6) where the home is in joint names or S. 36(6) where it is rented in the other partner's sole name. The court must take into account the circumstances in which the tenancy was granted and the suitability of the parties as tenants.

The S. 36(6) criteria are fuller than those in S. 33(6) applying to joint tenant partners and require greater scrutiny of the relationship. In both cases they include:

- each party's housing needs and resources and those of any relevant child;
- the financial resources of each of the parties;
- the likely effect of the decision of the court on the health, safety or well-being of the parties and any relevant child;
- the conduct of the parties;
- the length of time since they lived together.

In addition, in S. 36(6) applications the court must also have regard to:

- the nature of the parties relationship and the level of commitment involved in it;
- the length of the cohabitation;
- whether they have children together;
- the length of time since they separated; and
- the existence of any Children Act 1989 or property proceedings.

- Challenging legal ownership

Under trust law (S. 14 of the English Trusts of Land and Appointment of Trustees Act 1996), a declaration of trust can be sought in order to challenge legal ownership of any property by proving shared beneficial ownership under a common intention resulting or constructive trust. This remedy is not specific to cohabitation relationships and has been more fully discussed in answer to Question 3.

**44. How are the joint debts of the partners settled?**



Parties can agree or can mediate to reach agreement as to how to repay joint debts. In default of agreement, a court can decide, although creditors can proceed for the whole amount against either party or both parties for a joint debt as there will be joint and several liability.

Most commonly, creditors take action to recover the goods or recover the debt from the party with the greater or most accessible assets. This leaves it to the parties to claim back the other partner's share of the debt from them which they can do through mediation or litigation. There is no special family law jurisdiction in this regard.

**45. What date is decisive for the determination and the valuation of:**

**a. The assets?**

Generally the respective share of the assets owned by each party will be that prevailing at the date of separation. However the valuation of the assets is normally at the date of realisation of those assets, that is, at the date of sale or deemed sale as decided by the Court of Appeal in *Turton v Turton* [1988] Ch 542.

**b. The debts?**

Date of separation with adjustments for post separation payments or default in payment would be the normal rule.

**46. On what grounds, if any, and to what extent may a partner upon separation claim compensation upon the basis of contributions made or disadvantages suffered during the relationship?**

None in the cohabitation context. It is assumed that they did this willingly as a fully consenting adult unless there is a written cohabitation agreement which shows a contrary intention and an agreement on how this is to be compensated. If that is the case, the agreement can usually be enforced as confirmed in *Sutton v Mishcon De Reya* [2003] EWHC 3166 (Ch), [2004] 1 FLR 837. Contributions to the purchase of property legally owned by the other partner may give rise to beneficial shared ownership under a resulting or constructive trust as discussed in Question 3 above.

**E. Death**

**47. Does the surviving partner have rights of inheritance in the case of intestate succession? If yes, how does this right compare to that of a surviving spouse or a registered partner, in a marriage or registered partnership?**

No. There is no right unless a will has been made in their favour.

**48. Does the surviving partner have any other rights or claims on the estate (e.g. any claim based on dependency, compensation, or maintenance) in the case of intestate succession?**

Yes. They can make a claim under the English Inheritance (Provision for Families and Dependants) Act 1975 as an eligible applicant as defined in S. 1A and S. 1B. The couple must have lived together for at least 2 years in the same household as husband wife or as civil partners. The claim is for 'such financial provision as it would be reasonable for the applicant to receive for his maintenance' (S. 1(2)(b)).

**49. Are there specific rules dealing with the home and/or household goods?**

No.

**50. Can a partner dispose of property by will in favour of the surviving partner:**

**a. In general?**

Yes.

**b. If the testator is married to or is the registered partner of another person?**

Yes but it is likely to be challenged by the spouse/civil partner under the English Inheritance (Provision for Families and Dependants) Act 1975.

**c. If the testator has children?**

Yes. However children can challenge the will by court action under the English Inheritance (Provision for Families and Dependants) Act 1975. Minor children will normally succeed on such a claim but adult children are less likely to do so unless they can show dependency or a moral obligation towards the adult child, as the freedom of the testator will normally take precedence. This was discussed in *Espinosa v Bourke* [1999] 1 FLR 747, CA. Claims by children are also limited to what is reasonable for them to receive for their maintenance.

**51. Can partners make a joint will disposing of property in favour of the surviving partner:**

**a. In general?**

This can be done by means of mutual wills. English law does not permit parties to make joint wills as such.

**b. If either testator is married to or is the registered partner of another person?**

Yes, although only mutual wills rather than joint wills are possible and this is subject to challenge by the spouse or civil partner under the English Inheritance (Provision for Families and Dependants) Act 1975.

**c. If either testator has children?**

Yes, although only mutual not joint wills are possible which can be challenged by children making a claim under English Inheritance (Provision for Families and Dependants) Act 1975. This will succeed if there are minor children but not usually if there are adult children as a testator is free to leave their estate to whoever they please once dependants have been provided for.

**52. Can partners make other dispositions of property upon death (e.g. agreements as to succession or gifts upon death) in favour of the surviving partner:**

**a. In general?**

No. Dispositions on death are made under will except for property owned as ‘joint tenants in law and in equity’ which passes by operation of law to the other joint tenant.

**b. If either partner is married to or is the registered partner of another person?**

No. Dispositions on death are made under will except for property owned as ‘joint tenants in law and in equity’ which passes by operation of law to the other joint tenant.

**c. If either partner has children?**

No. Dispositions on death are made under will except for property owned as ‘joint tenants in law and in equity’ which passes by operation of law to the other joint tenant.

**53. Is the surviving partner entitled to a reserved share<sup>28</sup> or to any other rights or claims on the estate (e.g. any claim based on dependency, compensation, or maintenance) in the case of a disposition of property upon death (e.g. by will, joint will, or inheritance agreement) in favour of another person?**

No. There is no concept of reserved shares for cohabitants. Where a spouse or civil partner dies intestate (without making a will), the surviving partner is entitled to a statutory share of the estate under S. 46 English Administration of Estates Act 1925, the size of which depends on the size of the estate and the presence or absence of other beneficiaries such as children. Where a cohabitant dies intestate, there is no such entitlement for the surviving partner who will receive nothing under the intestacy rules. Instead, the estate will pass to the deceased’s next of kin as prescribed by the statutory rules (- to their children or otherwise their parents or siblings). If there are no surviving relatives, the estate will pass *bona vacantia* to the Crown rather than to the surviving cohabitant partner.

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<sup>28</sup> See Regulation no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession [2012] OJ L 201/107.

However, a surviving cohabitant is entitled to make a claim against the estate under the English Inheritance (Provision for Families and Dependants) Act 1975 for reasonable financial provision limited to maintenance where no such provision has been made for them in a will or where their partner died intestate. This is an important recognition of informal cohabiting relationships.

In 2011, the Law Commission recommended reform of the statutory rules on intestacy to allow some statutory succession to the estate by a cohabitant in certain circumstances but this was rejected by the Coalition Government.

**54. Are there any statistics or estimations on how often a relationship is terminated by the death of one of the partners?**

There do not appear to be any statistics or estimations on this point for England and Wales.

**55. Are there any statistics or estimations on how common it is that partners in an informal relationship make a will in favour of the other partner?**

Research conducted by Barlow et al. as part of the nationally representative British Social Attitudes Survey 2006 indicated that only 12% of cohabitants had made a will.<sup>29</sup>

**56. Are there any statistics or estimations on how common it is that a partner in an informal relationship is the beneficiary to the other partner's life insurance?**

There do not appear to be any statistics or estimations on this point for England and Wales and there is no mechanism for centrally registering or recording such interests.

**F. Agreements**

**57. Are there specific rules concerning agreements between partners in an informal relationship? Where relevant, please indicate these specific rules. If not, which general rules apply?**

There are no specific statutory rules and the law. Although for many years cohabiting couples could not be sure that their cohabitation agreements would be enforceable, the law has recently been clarified to an extent by case law (see *Sutton v Mishcon De Reya* [2003] EWHC 3166 (Ch), [2004] 1 FLR 837), although there is still no statutory confirmation of the position as had been requested by the Law Commission in their 2007 report. The current position is that cohabiting couples are free to make agreements; but how enforceable they are on relationship breakdown may depend on how the agreement has been drafted and what the subject matter of the agreement

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<sup>29</sup> A. BARLOW, C. BURGOYNE, E. CLERY and J. SMITHSON, 'Cohabitation and the law: myths, money and the media', in: A. PARK, J. CURTICE, K. THOMSON, M. PHILLIPS, M. JOHNSON and E. CLERY (eds.), *British Social Attitudes: the 24th report*, Sage, London, 2008, pp. 29-52.

is. Generally, they can make enforceable agreements relating to real and personal property provided they are drawn up and signed in the proper format where appropriate. Thus for real property (i.e. immovable property) the agreement would need to be in the form of a declaration of trust which is signed as a deed.

Contracts which have immoral consideration would still be void as in *Sutton v Mishcon De Reya* [2003] EWHC 3166 (Ch), [2004] 1 FLR 837 itself and so the agreement must be drafted so as to avoid any suggestion of this. Cohabitation agreements are, according to the legal profession, becoming more common but a couple may require several agreements to cover different assets and then separate wills are needed to leave valid gifts on death.

**58. Are partners in an informal relationship permitted to agree on the following issues:**

**a. The division of tasks as between the partners?**

Yes this can be agreed and would normally form part of the agreement's recital but this cannot be specifically enforced.

**b. The contributions to the costs and expenses of the household?**

Yes.

**c. Their property relationship?**

Yes.

**d. Maintenance?**

Yes.

**e. The duration of the agreement?**

Yes.

**59. Are partners in an informal relationship permitted to agree on the legal consequences of their separation?**

Yes.

**60. Are the agreements binding:**

**a. Between the partners?**

Yes if drawn up in the correct way and not avoiding other legal duties (e.g. payment of child support). The division of tasks would not in itself be binding.

**b. In relation to third parties?**

This would not be binding unless the third party joins the agreement and specifically agrees to its terms in so far as it relates to their interests.

**61. If agreements are not binding, what effect, if any, do they have?**

They can show common intention which may prove the foundation of a constructive trust or influence the discretion of the court in relation to proceedings for financial provision for the benefit of the child (Schedule 1 English Children Act 1989) in which it might be considered as one of the circumstances of the case.

**62. If specific legislative provisions regulate informal relationships, are the partners permitted to opt in or to opt out of this specific regulation?**

There are no opt-in provisions for informal couples. General principles mean that they should not be able to opt out unless specifically provided for by statute but we have not adopted this style of legislation to date (although it was proposed by the Law Commission in their 2007 report).

**63. When can the agreement be made (before, during, or after the relationship)?**

At any time.

**64. What formal requirements, if any, govern the validity of agreements:**

**a. As between the partners?**

Generally it is advisable for the agreement to take the form of a deed to avoid problems surrounding contractual consideration.

**b. In relation to a third party?**

This will depend on the nature of the contract or transaction. Normal rules of law will apply.

**65. Is independent legal advice required?**

It is advisable but not required. Lack of it may make the agreement less likely to be enforced if there is any sign of undue influence by one partner on the other according to general principles.

**66. Are there any statistics or estimations on the frequency of agreements made between partners in an informal relationship?**

No. Anecdotal evidence from members of the legal profession and practitioner organizations such as Resolution (the Solicitors' Family Law Association) indicate they are increasing in popularity.

**67. Are there any statistics or estimations regarding the content of agreements made between partners in an informal relationship?**

No. Although on purchase of the family home in joint names a declaration of trust as to the parties' interest will be asked for by their legal advisor for Land Registry purposes.

**G. Disputes**

**68. Which authority is competent to decide disputes between partners in an informal relationship?**

Cohabitants' property disputes are governed by the English Civil Procedure Rules 1998 rather than the English Family Procedure Rules 2010 and can be heard by the by the County Court or the Chancery Division of the High Court depending on the value of the property.

Where there is also a claim under Schedule 1 English Children Act 1989 for financial provision for the benefit of the child, case law and practice following *Goldstone v Goldstone* [2011] EWCA Civ 39, [2011] 1 FCR 324 provides that both matters should be heard together by the Family Division of the High Court and this is reflected in a Practice Direction under the English Civil Procedure Rules.<sup>30</sup> If there is just a dispute under Schedule 1 English Children Act 1989 this will normally be heard by the new Family Court which replaces the County Court and Magistrates or Family Proceedings Courts in all family matters and enables High Court judges to hear cases sitting in the Family Court, if appropriate.

**69. Is that the same authority as for spousal disputes?**

The Family Court normally decides all spousal issues including property disputes.

**70. Can the competent authority scrutinise an agreement made by the partners in an informal relationship? If yes, what is the scope of the scrutiny?**

Not in advance of relationship breakdown or other event which triggers the terms of the agreement being enforced.

**71. Can the competent authority override or modify the agreement on account of fairness towards a partner, the rights of a third party, or on any other ground (e.g. a change of circumstances)?**

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<sup>30</sup> Practice Direction 2B made under the Civil Procedure Rules at para. 3.2. In *Goldstone, Hedley J stated* 'The principle underlying these rules is very clearly that it is desirable to equip a single court with the means of deciding all relevant connected issues within the same proceedings and to avoid a multiplicity of different and potentially conflicting proceedings. Although the FPR do not contain general provisions for joinder, they are entirely consistent with this principle.'

Not in advance of relationship breakdown or other event which triggers the terms of the agreement being enforced. If it is successfully challenged at that time (e.g. due to undue influence) then, yes, it can override the agreement.

**72. What alternative dispute-solving mechanisms (e.g. mediation or counselling), if any, are offered or required with regard to disputes arising out of informal relationships?**

Mediation is available to cohabiting couples on separation and is mainly used in relation to children disputes and simple property matters. There is no legal aid other than for mediation to resolve private family law disputes (except in domestic violence cases) since the implementation of the English Legal Aid, Sentencing and Punishment of Offenders Act 2012. Complex property disputes in the unmarried context are not usually mediated and are more likely to be settled by solicitor negotiation or at court as the property law concerned is complex and far from clear. However, in a recent cohabitation property dispute in *Seagrove v Sullivan* [2014] EWHC 4110 (Fam), Holman J refused to proceed to hear the case in the manner proposed, and criticised the ‘disproportionate’ costs and adversarial approach taken to litigation under the English Trusts of Land and Appointment of Trustees Act 1996, indicating that even where the law and evidence is complex and property value is high, there is increasing pressure to resolve disputes out of court and keep costs within reasonable bounds.

**73. What are the procedural effects of an agreement on ADR between partners in an informal relationship? Can any partner seize the competent authority in breach of the ADR clause?**

Following mediation or negotiation, a consent order has to be drawn up and approved by the court before the agreement reached is enforceable. The agreement then becomes a court order and can be enforced by either party in the usual way.

**74. Are there any statistics or estimations on how common it is that partners in an informal relationship include an ADR clause in their agreement?**

No.