‘Cohabitation: the Financial Consequences of not being Normal’

It is a central point of this dissertation that in adjudicating on the beneficial ownership of the family home, the courts of Chancery ‘normalise’ the relationships which come before them. How closely the couple equate with the traditional marriage thus determines the approach the court will take, and has a profound effect on individuals, and the value attributed to their contributions to the home. This tendency of the courts to ‘normalise’ relationships is in direct conflict with the development of individualisation; the increasing rejection of traditional norms, and particularly the demand of women to live a life of their own. Equality demands that typically ‘female’ contributions are considered inherently valuable irrespective of the context in which they occur, for recognising them only when the parties have strongly adhered to traditional norms has the effect of reinforcing traditional stereotypes at precisely the time when these norms are being challenged.

Introduction

This dissertation concerns those cases in which the courts of Chancery adjudicate on the equitable ownership of the family home by way of constructive or resulting trust, or proprietary estoppel. The operation of these trusts, although worthy of analysis, are not considered in this essay. What will be considered is the courts approach to the relationships which come before them: how the judiciary’s own perception of what constitutes a ‘normal’ relationship affects their treatment of these couples, and the economic and symbolic affect this has on individuals, particularly women.

Part I of this dissertation examines the increasing trend toward individualisation in modern western societies: the rejection of traditional norms by individuals in favour of constructing their own unique identities, and the conflict this presents to traditional notions of marriage held by the courts and the legislature. Part II examines the Rosset and ‘holistic’ approaches of the courts, and describes the phenomenon of normalisation, the practice of the courts in equating couples with the traditional marriage, and argues that this is an unhelpful and inappropriate comparison in a modern individualised society. Part III involves an extensive case analysis
demonstrating the effect normalisation has on the approach taken by the courts, and explores issues which the holistic approach raises, including the privileged status of marriage, the dangers and benefits of discretion, and the effect of normalisation for gay couples. Part IV offers a feminist explanation of the courts differing approaches, its basis resting in the value accorded to typically ‘female’ contributions to the home, and argues that the effect of the courts normalising relationships leads to ‘female’ contributions being recognised as valuable only when the female contributor has adhered to traditional marital roles. The dissertation concludes by arguing that these ‘female’ contributions need to be recognised as inherently valuable independently of the context in which they are made, for this is the only way in which true equality between men and women can be achieved.

PART I

Individualisation

Legitimate strangeness and the traditional marriage model

Individualisation denotes the increased tendency in the modern western world toward people being seen as individuals. No longer content with being ‘one of the masses’\(^1\), individuals are ever more seeking out their own unique identity, something which sets them apart, making them ‘special’ and distinctive. Consequently, it is increasingly becoming the case that people can no longer be described as ‘normal’. As Hudson notes, we have each developed our own ‘legitimate strangeness’\(^2\), our own deviance from the norm. ‘Legitimate strangeness’ thus describes the inherent ‘oddness’ within modern western identities. Cut off from the social networks which once held us together, people are forced to rely on themselves; establish their own norms and negotiate their own lifestyles.\(^3\) Thus everyday life has become a kind of ‘balancing act’, a perpetual ‘do-it-yourself’ project.\(^4\)

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\(^1\) Giddens(1991).
\(^2\) Hudson(2004a), 8.
\(^3\) Bauman(2002), xviii.
\(^4\) Beck and Beck-Gernsheim(2002), 90.
It is suggested that the law needs to respond to this societal change by recognising people as individuals with unique motivations, life plans, goals and ways of conducting their lives. However, as will be demonstrated by the case analyses in Part III, the courts undoubtedly have a particular image of the family in mind when adjudicating, and a clear picture of how family members should conduct their lives and relationships.

Picture an idealised 1950s household. The mother, the housewife, wearing an apron edged with frills, whisks eggs for her latest cake. Scones sit on the worktop freshly out of the oven. The father comes home from a hard day at work, sits in his favourite chair and opens a newspaper. The wife rushes over to take off his shoes, put on his slippers, give him a cup of tea. The children, cheeks flushed from running around outside, appear at the back door, eager for the treat their mother has just made. This couple’s relationship is forever; they will not break up. They have several children. Their finances are held jointly, no, singularly, by the husband, who is the breadwinner of the house. The wife lives for her family, concerned only with the well-being of her husband and children, and dutifully serves their needs.

This is the model of the traditional marriage envisaged by the courts and the legislature as the norm.\(^5\) In equating people with this image, the law risks forcing individuals into the stereotyped roles of ‘wife’, ‘husband’, ‘mother’, ‘child’ and ‘father’. This tendency to judge individuals against this stereotype not only denies people their inherent value as *individuals*, but is also based on outdated notions of how people conduct their lives. Archaic notions of the traditional family are unworkable in a society characterised by fluidity, instability and change, where individuals are intent on challenging and reworking the norm. The traditional marriage may be seen as what Beck describes as a ‘zombie category’\(^6\), that is, a living dead category that is blind to rapidly changing realities within society. This is because, not only has unmarried cohabitation become widely practiced and accepted, but the institution of marriage itself has changed fundamentally.

The structure of the traditional marriage has been replaced by individual families negotiating their own forms of living. Individuals no longer see marriage as a necessary hallmark of a relationship, as statistical surveys show that unmarried cohabitation has become increasingly practiced and accepted. In 2000, the British

\(^5\) As will be demonstrated in Part III.
\(^6\) Beck and Beck-Gernsheim(2002), 203.
Social Attitudes (BSA) national survey found that 11% of respondents aged under 60 were cohabiting unmarried, and a further 25% of respondents had done so at some time in the past.\(^7\)

Marriage is now seen as more of a lifestyle choice rather than an expected part of life. In 2000, 67% of the British population agreed with the statement ‘it is all right for a couple to live together without intending to get married’.\(^8\) Indeed, Eekelaar and Maclean note that marriage is often only undertaken as a matter of ‘conformity’, particularly aimed at pleasing relatives,\(^9\) or as a mark of social status.\(^10\) Barlow et al observe that large numbers of people in Britain perceive and experience unmarried cohabitation as a type of marriage, ‘as good as married’\(^11\), suggesting that it is perhaps more accurate to say marriage is a variety of cohabitation. They propose, and this writer agrees, that maybe the very question of whether someone is married or not is becoming irrelevant to everyday life.\(^12\)

Marriage has also changed qualitatively; it is no longer seen as forever. Bauman states the romantic definition of love as ‘till death do us part’ is decidedly out of fashion.\(^13\) Indeed, the projected rate of divorce now stands at about 37%.\(^14\) Thus the traditional hallmark of a marriage, as a commitment for life, appears outdated and redundant in the modern individualised society.

With growing economic power and thus independence, individuals within modern relationships are no longer forced into the traditional roles which have defined them for so long. Individualisation has had a profound effect on women. In addition to greater economic freedom there have been vast changes in how they are perceived and perceive themselves. Beck and Beck-Gernsheim note that while work in the family is invisible, outside employment has a tangible result, which also gives people a certain power and ability to assert themselves in their immediate environment. Economic independence thus gives women greater power to assert their

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\(^7\) BSA(2000).  
\(^8\) BSA(2000).  
\(^10\) Barlow et al see marriage as increasingly commoditised. They point to the expense which modern weddings entail; their status as a public display, particularly useful in establishing social status. Barlow, Duncan, Grace and Park(2005), 719.  
\(^11\) This view is supported by the widespread belief in ‘common law’ marriage; the belief that unmarried cohabiting couples are treated by the law as if they are legally married, BSA(2000).  
\(^12\) Barlow, Duncan, Grace and Park(2005), 18.  
\(^13\) Bauman(2003), 4.  
\(^14\) Gibson(1994).
own rights and demands, rather than merely ‘living for others’.15 Women’s increased demands for a life of their own have resulted in the idea of equality within relationships, a sharing of not only economic contributions, but also housework and childcare. Each relationship has in consequence become ‘legitimately strange’; their meanings depend on negotiations between individuals who no longer have standard biographies or sets of externally determined rules governing their status or behaviour.16

But it must also be noted that whilst more and more women are economically active, men’s participation in housework is mostly still low, and the daily routine of running the house falls largely to women.17 Diduck notes that even those who wished their relationship to be based upon equality often find they have ‘slipped into’ the traditional division of labour.18 Women, even employed women, bear the primary responsibility for housework and childcare, and women’s paid work is still often viewed as secondary or marginal to household income. Men still tend to be viewed as the breadwinner rather than carer, their role as husband or father seen as secondary to their role as worker.19

This is not to say women blindly adhere to their traditional roles. Many are challenging preconceived norms and creating a life of their own outside of this paradigm, seeking to create their own unique identities, with a greater focus on a ‘life of their own’ rather than one lived merely for others. Greater economic independence has led to greater feelings of self-worth. This entails a greater recognition of women as individuals outside their role as wife or mother; one that does not exist primarily to care for and support other members of her family, but has a life of her own, her own friends, social activities, career and desires, which deserve respect. The law, in consequence, needs to rework its preconceptions of the structure of, and the traditional roles of individuals, and in particular women, within the family.

18 Diduck(2003), 151.
19 Diduck(2003), 150.
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What individualisation demands from the law

The traditional marriage envisaged by the courts and the legislature, as considered above, is unrealistic in the modern western world, and fails to capture the multiplicity of relationship forms, and the varying roles of those within these relationships. Marriage is no longer considered the only legitimate partnering form, with many couples choosing unmarried cohabitation as a valid alternative. Marriage is no longer forever, and the traditional division of labour between partners, the perceived roles of men and women, have changed due to the increased demand by women to be recognised as individuals and have a life of their own.

Changing social norms require recognition from the law. Blind adherence to zombie categories is not only unhelpful, but can exclude many people from the law’s protective framework. It will be argued in Part III that in failing to recognise the legitimacy of many new forms of living, the courts are in effect applying different sets of rules to different couples. This tends to favour those couples who adhere more strongly to the traditional marriage paradigm, putting those who do not readily accord with this paradigm at a disadvantage. Individualisation entails an increased trend in society to see people as individuals. The law must follow suit and recognise that human beings are separately valuable, and require recognition on their own merits without being forced into abstract categories. The law needs to recognise and attribute value/legitimacy to new forms of living apparent in the modern individualised world. Failure to do this will widen the growing gap between social reality and the legal abstractions which the courts employ.

The increasing trend toward individualisation in the modern western world demands a judicial response which is geared towards responding to people as unique individuals that cannot be constrained within traditional norms such as the ‘zombie category’ of the traditional marriage. However, as will be demonstrated immediately below, in complete opposition to the needs of an individualised society, the courts tend to ‘normalise’ the families with which they come into contact, favouring those who equate more readily with their model of the traditional marriage.
PART II

Normalisation

Explaining normalisation, property law and family law

It is suggested that in deciding upon the allocation of the equitable interest in the family home, the courts ‘normalise’ the relationships which come before them. Normalisation here refers to the judiciary’s attempt to make cohabiting relationships appear more ‘normal’ by judging them against the yardstick of the traditional marriage. Where the relationship has endured over a considerable period of time, where there are children, and the parties have adhered to traditional marital roles, the courts have been more willing to award an equitable interest in the house to the economically weaker partner, and achieve a more ‘just’ result; an approach more closely assimilated with that of the family courts. In these cases the court achieves a more ‘just’ result in that their decision will take account of, and accord value to the (non-financial or indirect financial) contributions of the economically weaker partner, generally the woman. This approach is to be contrasted with cases in which the court rigidly applies strict property rules, having regard only to financial contributions to the property, and not taking into consideration the wider context of the relationship.

Property law is a branch of the common law which focuses primarily on property ‘rights’; rights that are legally generated as a result of financial contribution or formal documentation. This tendency in property law is considered in a discussion of *Lloyd’s Bank v Rosset*, immediately below. Family law, in contrast, generally operates by allowing the judiciary a wide discretion when adjudicating cases, guided by principles such as ‘fairness’, ‘welfare’ and ‘needs’, which tend to focus on what would be most beneficial for the individual, regardless of formal rights. Family law has thus developed principles which achieve the best results for all members of the family without being limited to the recognition of pre-existing property rights, taking an approach which is far more closely linked to responding to the

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21[2006] UKHL 24, para 137.
22 Children Act 1989 s.1.
23[2006] UKHL 24, para 11.
circumstances and needs of family members than property law proceedings.\textsuperscript{24} This is necessarily a more ‘social’ approach to issues of property ownership.\textsuperscript{25} Indeed, property law appears merely to regard the family home as a piece of property, while family law recognises its nature and function as a home rather than a house. Hudson notes there is no more intensely personal context for the individual than the shelter and security of the home.\textsuperscript{26} Thus it may be argued that it is in the context of the family home that most strongly demands a ‘social’, family law approach, similar to the ‘holistic’ approach of the courts, considered below.

The conflict between normalisation and individualisation

The behaviour of the courts in normalising the relationships which come before them is in conflict with the lived reality of many modern relationships. As discussed earlier, individualised relationships are increasingly ‘legitimately strange’. Individuals within these relationships can no longer be dictated to by traditional norms. Marriage itself as an institution has altered fundamentally and no longer resembles what is conceived as the traditional marriage. The traditional marriage may thus be considered a ‘zombie category’, and equating modern relationships with this standard is outdated and inappropriate.

Comparing modern cohabiting relationships to the traditional marriage is not only unhelpful, but may leave many individuals in a vulnerable economic position. Where the court considers that the relationship before them does not adhere strongly enough to the traditional marriage, they may decide the case purely on the basis of financial contributions to the home and fail to recognise many indirect and non-financial contributions which might be considered valuable under the more flexible approach of the courts.\textsuperscript{27} Failure to recognise the value of these contributions degrades the contributor, making their work appear worthless, and in many cases leaves them in an economically weak position.

\textsuperscript{24} Thomas and Hudson(2004), 1700.
\textsuperscript{25} Lametti sees property as directly related to societal goals and values. He argues that rights based theories do not account for the fullness of private property institution, Lametti(2004), 39-41.
\textsuperscript{26} Hudson(2004a), 2.
\textsuperscript{27} Such as childcare, housework, the payment of utility bills etc.
Approaches of the Courts

The Rosset approach

The courts of equity were previously guided by the leading test of Lord Bridge set out in *Lloyd’s Bank v Rosser*\(^2^8\), in which the equitable interest in the family home could be founded on ‘express discussions’ between the partners, or, failing this, on ‘direct contributions to the purchase price by the partner who is not the legal owner.’ In Lord Bridge’s opinion it was ‘at least extremely doubtful whether anything less will do.’\(^2^9\)

This approach was criticised as favouring the economically stronger partner of the relationship, in many cases leading to unfairness between the parties.\(^3^0\) As the majority of couples will not have talked expressly of their respective shares in the home, the allocation of equitable interest in the home in many cases depended solely on direct financial contributions to the purchase price of the property. Hudson notes that principles which are based solely on financial contributions will tend to discriminate against people who have contributed by means of services to the family, or by contribution only to family expenses.\(^3^1\) This approach thus tends to deny property rights to women.

As considered earlier, despite the ideal of equal sharing within modern relationships, Diduck notes that individuals tend to ‘slip into’ traditional marital roles.\(^3^2\) Women tend to earn less than men and shoulder the majority of domestic work. Further, research on patterns of money management indicate that within heterosexual relationships men’s wages tend to be spent on mortgages and property development, while women’s earnings are used to purchase other commodities such as food and clothing, and paying utility bills.\(^3^3\) *Le Foe v Le Foe*\(^3^4\) is an example of the typical money division between a couple. Here, the court found the husband would not have been able to make the mortgage repayments if his wife had not paid the other bills in the house. Under the *Rosset* formula, as Mrs Le Foe had not contributed

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\(^3^0\) Law Commission(2007), 1.27.
\(^3^1\) Hudson(2007), 613.
\(^3^2\) Diduck(2003), 151.
\(^3^3\) Rotherham(2004), 274.
\(^3^4\) [2001] EWCA Civ 1870.
directly to the purchase price of the house she would have received nothing, despite making a similar monetary contribution to the family as Mr Le Foe did. Thus a test directed solely at financial contributions to the purchase price of the home will tend to discriminate against women’s traditional role within the family. 35 This approach has, on occasion, resulted in considerable injustice. 36 Indeed, in the Australian case *Bryson v Bryant* 37, Kirby P argued against ‘female’ contributions being given no value. He stated ‘Nor should those who have provided ‘women’s work’ over their adult lifetime … be told condescendingly, by a mostly male judiciary, that their services must be regarded as ‘freely given labour’… when property interests come to be distributed.’ 38 There is a real problem in women’s labour being labelled as worthless in this way, as this denies recognition of the inherent value of these contributions, and, as demonstrated above, has a direct economic affect on the individual.

The ‘holistic’ approach

Recently, the House of Lords in *Stack v Dowden* 39 appeared to approve the approach of Chadwick LJ in *Oxley v Hiscock* 40, which involved taking a more ‘holistic’ view of the relationship when establishing equitable interests in the home.

A holistic approach entails having regard to the ‘whole course of dealings’ between the parties. 41 The courts investigation here is thus not limited to direct financial contributions to the property, but the entire domestic context of the couple. 42 The court is empowered to take into account a variety of factors previously excluded by the *Rosset* test, 43 including financial contributions not directed toward the purchase price of the property, such as the payment of utility bills, money spent on clothing, food, holidays etc. The court can also consider non-financial contributions to the family such as domestic work, child care, the supervision of renovation works 44 and any other sacrifices made for the benefit of the family. This investigation will take

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35 Wong(2004); Lawson(1996); Barlow(2004).
36 See Burns v Burns [1984] Ch. 317 considered in Part IV.
37 (1992) 29 NSWLR 188.
38 Ibid, 188.
41 Ibid, para 69; approved in Stack v Dowden [2007] UKHL 17.
42 [2007] UKHL 17, para 69.
43 Ibid, para 69.
44 Which was not accepted in *Lloyd’s Bank v Rosset* [1991] 1 AC 107 but accepted in *Cox v Jones* [2004] EWHC 1486, considered in Part IV.
place against the backdrop of the court’s consideration of the nature of the parties’ relationship, from which it will infer the parties’ ‘common intention’ as to ownership of the family home.

This holistic stance was intended to combat the rigour of the *Rosset* test, ensuring that women’s financial and domestic contributions to the home were taken into account by the court. In *Stack v Dowden*, Baroness Hale noted that *Rosset* had ‘set the hurdle rather too high in certain respects,’ 45 and preferred the more ‘flexible’ 46 approach of *Oxley v Hiscock*. The holistic approach is clearly in conflict with traditional notions of property law, which recognise property rights only as a result of financial contribution or formal documentation. Indeed, the holistic approach closely mirrors that taken by the family courts when regulating the division of property upon divorce. Section 25 of the Matrimonial and Family Proceeding Act 1973 empowers the court to consider ‘all the circumstances’ surrounding the dispute, leaving judicial discretion to meet the needs of vulnerable family members, 47 i.e. children of the marriage and the economically weaker spouse. 48 The holistic approaches’ exercise of wide discretion and consideration of a variety of family contributions is thus clearly much more akin to the approach of the family, rather than property courts. However, it is not identical to the approach of the family courts; it does not entail simply treating parties to a dispute as if they were divorcing. The family law approach entails a much greater appreciation of the needs of the parties and the welfare of any children to the marriage, while the holistic approach appears more focused on compensating contributions made for the benefit of the family. Thus, under the holistic approach any needs generated as a direct result of the relationship, such as loss of earnings whilst caring for children, may be compensated, whilst any non-relationship generated needs, such as physical disability or illness, or even future loss of income due to childcare, would not be considered a justification for redistribution of property.

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45 [2007] UKHL 17, para 63.
46 Ibid, para 64.
47 Diduck (2003), 133.
48 Although the behaviour of the courts within family law also appear to favour marriages which accord more readily with the traditional notion of marriage. The Court in *White v White* [2001] 1 AC 596 made it clear that the court would take a more holistic approach to the assets of a long term marriage, whilst favouring the separation of finances when adjudicating upon the assets of the parties of a shorter marriage.
Normalisation in the holistic approach

The holistic approach is a welcome development in property law, as the court is empowered to take into account non-financial and indirect contributions to the home, and thus implicitly to the family, and so the court is free to achieve a more ‘just’ result, not being bound to apply rigid rules of property allocation. However, the application of this holistic stance appears determined by the court’s perception of the parties’ relationship, and how closely this may be assimilated to the traditional marriage.

Freeman and Lyon note that upon breakdown of the relationship of an unmarried couple, the courts of Chancery are more willing to grant rights equivalent to married couples in distributing their property, if their relationship can be characterised as ‘familial’. They note that the criteria the court consider important are the presence of children; the length of the relationship; and the behaviour of the parties. They argue that cohabitants will be given greater rights the closer they approximate to a ‘legitimate family’; where the parties have clearly adhered to the stereotype marital roles within a relationship enduring over a considerable period of time they have more easily attracted the courts sympathy.49 The closer the relationship corresponds to the model of the traditional marriage, the more likely the court is to adopt the holistic approach in allocating property. However, where the parties fall short of this ideal, the courts tend to apply rigid principles of property law, focusing only on financial contributions to the property, and fail to take into account other contributions, and the context of those in the family.

There thus appears to be a rift developing between the image of society prevalent in the courts, and the lived reality of many people. As discussed earlier, unmarried cohabitation is now not only widely practised, but is seen by many as a viable alternative to marriage.50 In failing to recognise the legitimacy of many modern relationships the courts are out of step with the views of society. Diduck describes this dichotomy as the ‘real’ families we live with, and the ‘virtual’ families we live by. She suggests ideological virtual families, represented by political and legal

50 Barlow, Duncan, Grace and Park (2005), 27.
institutions, are in conflict with the real families which represent the lived reality of many.\textsuperscript{51}

As considered in Part I, equating modern relationships with the traditional marriage is in conflict with the fragmenting tendencies of individualised society. It is wrong to assume that the traditional marriage is the basis on which to judge how all parties conduct their relationships.\textsuperscript{52} The traditional nuclear family has been largely replaced by a multitude of family structures. In addition, individuals can no longer be dictated to by traditional social norms, and instead engage in a process of constant renegotiation of their identity, and thus their role within their family structure.\textsuperscript{53} The increased economic independence of women has led them to demand a greater recognition of the right to have a life of their own, rather than one lived purely for others.\textsuperscript{54} Thus many reject traditional roles associated with being a ‘wife’ and ‘mother’;\textsuperscript{55} although sometimes lived reality falls short of their expectations. The traditional marriage is thus a wholly inappropriate comparison model for many modern relationships. However, despite the conflict between ‘virtual’ and ‘real’ families, the courts persistently normalise the relationships which come before them, thus failing to recognise the lived reality of many modern couples, as will be demonstrated below.

\textbf{PART III}

\textit{Stack v Dowden: a ‘very unusual’ case}

In \textit{Stack v Dowden}\textsuperscript{56} Baroness Hale considers the relationship to be ‘very unusual’. As it does not accord with her notion of a ‘normal’ relationship she decides the case purely on direct financial contributions to the property, ignoring the indirect contributions made by each party. Baroness Hale’s approach in this case is in direct conflict with the views she expresses in her earlier academic writing, in which she appears to advocate equal treatment of married and unmarried couples before the law. Yet in \textit{Stack} she takes an approach vastly different to that of the family courts,

\begin{small}
\textsuperscript{51} Diduck(2003), 212.
\textsuperscript{52} Barlow, Duncan, Grace and Park(2005) 46.
\textsuperscript{53} Giddens(1991), 14.
\textsuperscript{54} Beck and Beck-Gernsheim(2002), 63.
\textsuperscript{55} cf Lloyd’s Bank v Rosset [1991] 1 AC 107; Bryson v Bryant (1992) 29 NSWLR 188.
\textsuperscript{56} [2007] UKHL 17.
\end{small}
focusing rather on matters typically associated with property law, including direct financial contributions and formal documentation.

Normalising the relationship

*Stack v Dowden* concerned an unmarried couple who had been cohabiting for 18 years and had four children from the relationship. On the breakdown of the relationship, the dispute was to the extent of each party’s beneficial interest in the family home, the property being held in the joint names of both parties.

In this case the House of Lords appeared perplexed that although the parties ‘pooled their resources in the running of the household, in larger matters they maintained their financial independence from each other throughout their relationship.’ Baroness Hale considered this a ‘very unusual case’ and could not comprehend there would be many unmarried couples who had lived together for so long, had four children, and still retained separate finances.

Baroness Hale clearly felt that keeping separate finances indicated this was not a ‘normal’ relationship. It was not in accordance with her notion of a traditional stable marriage, which would appear to include pooling resources jointly in all areas of life; living as a single unit. She concluded that keeping separate finances was strongly indicative that the couple did not intend to share their property equally, and divided the equitable interest in favour of Ms Dowden, the primary financial contributor to the home. Indeed, Barnes notes that while Baroness Hale agrees that regard is to be had to the ‘whole course of dealings’ in relation to the property, the ‘holistic approach’, it is notable that in this case she very firmly asserted the primacy of direct financial contributions over wider, relationship-based ones, a test more akin to *Rosset* than any ‘just’ assessment of the parties contributions to the family.

In coming to her conclusion, Baroness Hale appears to rely strongly on her own notions of what constitutes a legitimate, valid relationship – one that justifies distributing property other than with regard to direct financial contributions – she compares their relationship to that of a traditional marriage. She criticises the trial

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60 *Ibid*, para 52.
61 Barnes(2008b).
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judge for focusing on their relationship, rather than on the factors relevant to ascertaining their intentions,\textsuperscript{62} and then proceeds to do just that; drawing conclusions as to the nature of their relationship from the arrangement of their finances.

This is an example of normalisation from Baroness Hale, generally considered a liberal judge. Her earlier academic writings advocate increased recognition of the value of ‘women’s work’ and the effect of relationship breakdown on children.\textsuperscript{63} Yet she does not appear to consider that in a society where women are more economically independent of their partners it may seem perfectly natural to the people concerned to retain separate finances. Indeed, Pahl argues that there is increasing individualisation of the control of money within couples, with each to some extent retaining control over his or her own income and being responsible for ‘his or her’ expenses.\textsuperscript{64} It is therefore suggested that the arrangement of the couple’s finances in this case had no relevance to the nature and strength of their relationship, but merely indicated Ms Dowden and Mr Stack had identities separate from their relationship to one another. Further, Baroness Hale’s approach in this case appears paradoxically at odds with the view she herself puts forward in her earlier academic writing, considered below.

Brenda Hale: the judge versus the academic

Baroness Hale’s decision in this case is interesting. In her earlier academic writing she states:

‘Intimate domestic relationships frequently bring with them inequalities, especially if there are children. They compromise the parties' respective economic positions, often irreparably. These detriments cannot be predicted in advance, they arise from the very nature of intimate relationships, so it is the relationship rather than the status of marriage that should matter.’\textsuperscript{65}

In advocating that ‘it is the relationship rather than the status of marriage that should matter’ Baroness Hale appears to be arguing for equal treatment of both married and unmarried couples, a stance that would imply family law-like regulation of unmarried relationships. Nevertheless, when sitting as a judge and given the opportunity to

\begin{itemize}
  \item \textsuperscript{62} [2007] UKHL 17, para 71.
  \item \textsuperscript{63} Hale(2004).
  \item \textsuperscript{64} Pahl(1989), 151-2.
  \item \textsuperscript{65} Hale(2004).
\end{itemize}
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change the law in this area, she supports different treatment of couples according to status. In *Stack* she explicitly rejects fairness as a guiding principle\(^{66}\), in contrast to her approach in the family courts, where she accepts fairness as the overarching goal to be achieved when dealing with divorcing couples.\(^{67}\) Indeed, her judgement in *Stack* appears rooted in strict notions of property law, rather than any ‘family law-like’ approach, with a predominant focus on direct financial contributions and formal documentation. Not only does she decide the case expressly on direct financial contributions to the property, but substantial portions of her judgement are dedicated to focusing on Land Registry forms, form TR1\(^{68}\) in particular, and how these give ‘good title’\(^{69}\) to property. This is far removed from the widely drawn principles of the family court’s approach to the issue, and appears to favour different treatment of married and unmarried relationships. This approach is, at best, illogical when viewed in context with her earlier academic writing.

Baroness Hale’s focus on purely direct financial contributions in *Stack* may be contrasted with the approach of Waite LJ. In both the cases analysed below, Waite LJ considers the indirect contributions of the female partners not only valuable, but valuable to the extent of deserving half the equitable interest in the property. It is suggested Waite LJ took this approach as the Cookes closely resembled a traditional married couple. Indeed, it appears Waite LJ rewards Mrs Cooke for acting as a ‘good’ wife, and approach he replicates in *Hammond v Mitchell*\(^{71}\).

*Midland Bank v Cooke: the importance of being a ‘good wife’*

In *Midland Bank v Cooke*\(^{70}\) Waite LJ awards Mrs Cooke half the equitable interest in the home despite the fact she made no direct financial contribution to the property. In reaching this conclusion Waite LJ values Mrs Cooke’s indirect contributions to the family, in contrast to cases in which property distribution is decided purely on financial contribution to the property. It is suggested Waite LJ took this approach as the Cookes closely resembled a traditional married couple. Indeed, it appears Waite LJ rewards Mrs Cooke for acting as a ‘good’ wife, and approach he replicates in *Hammond v Mitchell*\(^{71}\).

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\(^{66}\) [2007] UKHL 17, para 61.
\(^{67}\) Miller v Miller; MacFarlane v MacFarlane [2006] UKHL 24, para 137.
\(^{68}\) [2007] UKHL 17, para 52.
\(^{69}\) Ibid, para 50.
\(^{70}\) [1995] 4 AllER 562.
\(^{71}\) [1991] 1 WLR 1127.
Normalising the relationship

Midland Bank v Cooke concerned a married cohabiting couple, Mrs Cooke seeking to establish an equitable interest in the matrimonial home, and thus protect her equitable interest from a third party creditor by means of her actual occupation of that home. Although Mrs Cooke had made no direct financial contributions to the purchase of the house, the court held she was entitled to a one half beneficial interest in the property.

In apportioning Mrs Cooke an interest in the family home, the court found she ‘devoted much time and energy to the improvement of the house and garden’, and that she also paid a number of contractors and other bills out of her own earnings. Waite LJ emphasised the fact that Mrs Cooke worked full or part-time in addition to bringing up three children. He pointed out that when her husband wanted her to sign the consent form in respect of a second mortgage for the benefit of his business, she did so. Waite LJ commented that although there was no joint bank account, ‘One could hardly have a clearer example of a couple who had agreed to share everything equally.’ It was also pointed out that the couple had ‘chosen to introduce into their relationship the additional commitment which marriage involves.’ Waite LJ infers from this conduct that the intention of the couple was to share their property equally.

In normalising the relationship, Waite LJ clearly felt that the Cookes resembled a traditional married couple. The implication here is that Mrs Cooke is being rewarded for being a ‘good’ traditional wife. She does what she is told by her husband, and signs the consent form even though this causes her considerable ‘anxiety and distress’. She also works dutifully, maintaining the home, the garden, looking after the children, in addition to being employed as a teacher. Mrs Cooke devotes all her time to her family, and her conduct thus appears to fit in with the paradigm of the traditional marriage.

It is suggested Waite LJ may not have been so willing to grant Mrs Cooke an interest in the home had she lived a life more for herself than for others, by, for

72 Waite J found a joint wedding present entailed a financial contribution of Mrs Cooke of 7% of the purchase price, but she made no independent direct contribution.
73 Ibid, 917.
74 Ibid, 928.
75 Ibid, 928.
76 Ibid, 929.
77 Ibid, 928.
example, working less or demanding Mr Cooke look after the children so she had more time to spend on herself, to relax, go out regularly with her friends, pursue and develop her own identity separate from her role in the family. As it is Mrs Cooke does not live by the individualised ideal of equal sharing in a relationship and thus appears more ‘normal’, and as such is rewarded.

Hammond v Mitchell\textsuperscript{78} is also a good example of Waite J apportioning a generous interest in the family home to a ‘good wife’. Having made no direct financial contribution to the purchase of the family home Miss Mitchell was awarded one half of the equitable interest. Waite J stated Mr Hammond ‘operated principally from home, which was good for the relationship – not only because Miss Mitchell had his company but also because she thoroughly enjoyed sharing his business interests and helping him whenever she could…’ This suggests she lived a life purely for her family, dutifully helping his business ventures, looking after their two children, and working part-time trading.

\textbf{Contrast with Stack v Dowden}

In \textit{Midland Bank v Cooke} Waite LJ awarded Mrs Cooke a one half share in the home, even though she had made no financial contributions to the property. He valued her domestic and indirect financial contributions to the \textit{family}. This is in contrast with \textit{Stack v Dowden}, where Mr Stack, was awarded only 35\% share in the home, although he had contributed financially to the property, indeed, the property was held in joint names. Further, in \textit{Stack} the Baroness Hale found ‘a great deal of work was done on the [first] property’\textsuperscript{79} by Mr Stack, this included redecoration, repairs, alterations and improvements. However, Baroness Hale does not appear to credit Mr Stack’s DIY work with much value, stating any evidence that this or other contributions amounted to an interest in the property were ‘rather slim and unsatisfactory’\textsuperscript{80}. She concludes ‘[t]he one thing that can clearly be said is that … both parties knew that Ms Dowden had contributed far more to the cash paid toward [the second property] than had Mr

\textsuperscript{78} [1991] 1 WLR 1127.
\textsuperscript{79} [2007] UKHL 17, para 77.
\textsuperscript{80} \textit{Ibid}, para 79.
Stack⁸¹ and goes on to award Ms Dowden 65% of the property. Baroness Hale appears to give little weight to the indirect contributions of Mr Stack, whilst Waite LJ finds Mrs Cooke’s indirect contributions entitle her to one half of the property. The telling difference in approach, it is suggested, is the Cooke’s more closely resembled a traditional marriage, and thus Waite LJ was more willing to exercise his discretion, adopting the holistic approach, whilst the couple in Stack appeared more ‘unusual’ and so the decision was rooted in the consideration of financial contributions.

An interesting point to note is that, in contrast with Stack v Dowden, Waite LJ considered it irrelevant the parties held separate bank accounts. It thus appears that different members of the judiciary may have different ideas as to what constitutes a ‘normal’ relationship. It is suggested, however, that when viewed holistically, the fact the Cooke’s were married, and thus appeared a more traditional relationship, outweighed the unconventional behaviour of keeping separate accounts.⁸² Indeed, privileging the status of marriage appears to be a prevalent theme, not only within the courts, but throughout the entire legal system, as will be considered below.

**The meaning of marriage**

Marriage is accorded a privileged status throughout the legal system of England and Wales, justified on the basis of supporting family stability and protecting individual autonomy. However, these justifications appear weak when it is taken into account the prevalence of the belief in ‘common law marriage’, the inequalities that persist within private sphere, the affect of unequal treatment on children, and the fact that many consider the status of marriage irrelevant to notions of commitment and stability within the family. For law to truly reflect social reality the status of marriage should be considered irrelevant to the legal treatment of cohabitants.

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⁸¹ *Ibid*, para 89.
⁸² Another factor that must be borne in mind when considering Midland Bank v Cooke is that in this case the couple were not in dispute with one another, Mrs Cooke was attempting to protect her interest in the home from a third party creditor. This may have inclined Waite LJ to be generous in his apportionment of the equitable interest, not wanting to see the property fall into the hands of the creditors and Mrs Cooke and her children become homeless.
The emphasis placed on marriage

In *Midland Bank v Cooke* emphasis is placed on the fact the parties had given one another the commitment involved in marriage, and this influences the courts' conclusion they must have intended to own the property jointly.\(^{83}\) This may be contrasted with the decision in *Barton v Wray*\(^ {84}\) where the judge thought it was unlikely Ms Wray would have agreed to share the beneficial interest in the property as there had been no talk of marriage between the couple.\(^{85}\) Baroness Hale’s approach in *Stack* also appears to favour married cohabitants. She states that while ‘[t]he principles of law are the same, whether or not the couples are married … inferences to be drawn from their conduct may be different’.\(^ {86}\) Indeed, in virtually every case of this nature the court will make some reference to, or have some regard as to whether or not the parties have intended to marry. It is suggested that where cohabitants are married they correspond more readily with the traditional marriage, as they are seen as more ‘normal’. It is this that appears to determine the inferences that are drawn from their relationship.

The focus on marriage is not confined to the courts of Chancery, but is rather a prevalent theme throughout political and legal institutions. There is continuing support for one code of law dealing with married couples and very little comparative law dealing with unmarried couples.\(^ {87}\) Barlow et al note that marriage gives partners automatic legal benefits which do not extend to unmarried cohabitants, whose rights are ‘complex, confusing and nearly almost inferior.’\(^ {88}\) Parliament has shown increased support for promoting the institution of marriage by according married couples legal benefits which are not extended to unmarried couples. For example, whereas spouses on marriage automatically acquire occupation rights in the family home owned by their spouse, no such occupation rights extend to unmarried cohabitants.\(^ {89}\) Unlike a married father, an unmarried father does not automatically acquire parental responsibility for his child on birth, and thus cannot take formal

\(^{83}\) [1995] 4 AllER 562, 576.
\(^{85}\) Probert(2004), 41.
\(^{86}\) [2007] UKHL 17, para 40.
\(^{87}\) Except possibly in relation to children (Children Act 1989).
\(^{88}\) Barlow, Duncan, Grace and Park(2005,) 2.
\(^{89}\) s.30 Family Law Act 1996. An occupation order granting occupation rights to a ‘non entitled’ cohabitant can be made for a maximum total of 12 months, but this is an order likely to be sought when the relationship is breaking down, perhaps due to domestic violence.
decisions relating to his children, such as consenting to medical procedures or adoption. 90 Upon the death of one partner, only a spouse will automatically inherit all or some of their spouse’s estate where their husband or wife dies without making a will 91. A similar approach has been taken with regard to claims under the Fatal Accidents Act 1976, where an unmarried cohabitant is unable to recover statutory bereavement damages. Notably, one of the only areas in which unmarried cohabitants are regarded as if they were married is upon the application for any means-tested benefit; the legitimacy of their relationship is recognised only where this affects them adversely. The justifications given for according marriage this privileged status will be considered below.

Marriage and stability

Marriage is officially presented as the best means of ensuring family stability, an institution that needs to be preserved and supported. 92 The Labour Government’s 1998 paper, Supporting Families, stated: ‘[M]arriage does provide a strong foundation for stability for the care of children. It also sets out rights and responsibilities for all concerned. It remains the choice of the majority of people in Britain. For all these reasons, it makes sense for the Government to do what it can to strengthen marriage.’ 93 There is a pervasive theme here of marriage signifying a committed, stable and long-lasting relationship. There have been fears that extending legal protection and benefits to unmarried couples would ‘weaken the institution of marriage’, providing a ‘cut price’ or ‘reduced’ version of marriage, which would have serious consequences for society. 94

However, Barlow et al argue that their studies have shown little difference in expressions of commitment between cohabiting and married couples. 95 Indeed, large

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90 s.2 Children Act 1989 Although parental responsibility can be acquired with the mother’s consent, on registration of the birth of the child, or via court order.
91 s.46 Administration of Estates Act 1925. Although an unmarried cohabitant of at least 2 years standing does have the right to make a claim for financial provision the claim will be limited to such financial provision ‘as it would be reasonable in all the circumstances for the applicant to receive for his maintenance’ (s.2 Inheritance Act 1975). A spouse’s entitlement, in contrast, will not be limited to ‘maintenance’.
92 Barlow, Duncan, Grace and Park(2005), 88.
93 Home Office(1998), para 4.8. It must also be noted that unmarried cohabitation was not considered in any detail in this policy document.
94 The Evangelical Alliance in Law Commission(2007), 27.
95 Barlow, Duncan, Grace and Park(2005), 57-58.
numbers of people in Britain perceive and experience unmarried cohabitation as a type of marriage, ‘as good as married’,\(^9^6\), it thus appears the formality is marriage is becoming irrelevant in everyday life. Further, there is evidence that legal considerations do not feature strongly in decisions to marry or to cohabit outside of marriage.\(^9^7\) Many cohabitants think that it would be wrong to marry for legal or financial reasons. It is also debatable whether people actually know the different legal regimes that apply to married and unmarried couples. The persistence of the ‘common law marriage’ myth\(^9^8\), the idea that unmarried cohabiting couples have similar, if not identical rights to married couples, supports the proposition that legal reasons do not predominantly feature in decisions to marry. It is thus arguable that according similar legal regulation to unmarried and married couples will not weaken the institution of marriage in any significant way.\(^9^9\)

Indeed, it has been shown that in many jurisdictions greater regulation of unmarried couples has actually increased the rate of marriage.\(^1^0^0\) The decision to marry entails the agreement of two people. A legally-aware economically stronger partner may be disinclined to marry, knowing that financial repercussions that may arise on divorce. Indeed, Smart and Stevens found in their study that more men, who are generally the stronger economic party in a relationship, were against marriage in principle than were women.\(^1^0^1\) Where there is increased regulation of unmarried couples, the economically stronger party’s financial situation is not greatly affected by a decision to marry and so the individual may be more willing to do so.

Marriage and autonomy

\(^9^6\) This view is supported by the widespread belief in ‘common law’ marriage; the belief that unmarried cohabiting couples are treated by the law as if they are legally married, BSA(2000).

\(^9^7\) Hibbs et al’s survey of engaged couples found that 42% gave ‘love’ as the reason for marriage, 13% stated it was a sign of commitment, 9% a sign of progression of their relationship, only 4% mentioned children, less than 1% mentioned religion and none gave legal reasons for getting married. Hibbs, Barton and Beswick(2001).

\(^9^8\) The national survey showed that 59% of cohabiting people think that cohabitation gives rise to a legally recognised ‘common law marriage’. They thought this began after a period of time, varying from 6 months to 6 years, BSA(2000).

\(^9^9\) Cooke states that ‘arguments that less helpful provisions should be made for cohabitants than is available for married couples so as to not undermine the sanctity of marriage should be ignored as ridiculous, Cooke(2005).

\(^1^0^0\) Kiernan Barlow and Merlo(2006).

\(^1^0^1\) Smart and Stevens(2000).
A further argument supporting the different treatment of unmarried couples is that the law should not seek to impose rights and duties where such were never the reasonable expectation of the parties.\(^{102}\) This argument seeks to preserve the autonomy of unmarried individuals. It is felt that it is unfair to impose legal obligations and duties where the parties have deliberately decided not to marry and enter into the according legal regulations.

Scherpe, however, argues that the ‘positive’ decision to cohabit long-term itself entails responsibility and obligations, and this should not be negated by the ‘negative’ step of choosing not to marry. He argues it is absurd to assume that in choosing not to marry individuals have decided they want no legal regulation.\(^{103}\) There are some situations, particularly in relation to cohabiting couples, where the need to protect the weaker party is so strong it overrides the private autonomy of the other party.

The autonomy argument also appears weak when it is considered that many individuals assume they do undertake legal obligations when deciding to undertake a long term cohabiting relationship, as is evidenced by the widespread belief in common law marriage.

**Marriage and children**

One major argument against the privileged status accorded to marriage concerns children. Freeman and Lyons note that differences in the treatment of unmarried and married parents will affect children of the relationships. They argue that there can never be true equality between children born of marriage and children born of an unmarried cohabiting couple unless there is equality of treatment between the parents.\(^{104}\) Common standards of fairness would suggest that children of an unmarried couple should not suffer simply because their parents chose not to get married. Where a property dispute between unmarried cohabitants is decided under strict rules of property law it is likely the primary carer of the child will be in an economically weaker position than if they were married. This may disadvantage the child, as Baroness Hale notes, ‘the security and stability of children depends in large

\(^{102}\) Freeman and Lyon(1983), 183.

\(^{103}\) Scherpe(2005), 211.

\(^{104}\) Freeman and Lyon(1983), 159-160.
part upon the security and stability of their primary carers’.\textsuperscript{105} The welfare of children is not considered at all under the \textit{Rosset} test, and this is seen as unfair by many.

\textbf{The irrelevance of marriage}

Indeed, focusing on whether the parties are married may not demonstrate anything significant as to the nature of their relationship. The traditional marriage as it is held out by political and legal institutions may be regarded as a ‘zombie category’. As considered in Part I, with the rise of individualisation marriage has changed in both form and content; unmarried cohabitation is seen as a realistic alternative to, or variety of marriage. Marriage is now often undertaken only as a matter of conformity or mark of social status.\textsuperscript{106} Whether or not a couple are married therefore appears to have little significance to how committed and durable a relationship is, and the courts and the legislature are misled when attributing greater stability and commitment to the institution of marriage. It is suggested that the marital status of a cohabiting relationship should be considered irrelevant by both the courts and the legislature. However, they persist in according special treatment and privileged status to marriage, a practice that may be considered out of touch with social reality.

\textit{Oxley v Hiscock: fairness for all?}

Chadwick LJ’s description of the holistic approach in \textit{Oxley v Hiscock}\textsuperscript{107} raises questions regarding the basis on which judicial discretion is to be exercised. This highlights the dangers of affording the judiciary a wide discretion in this area, as the use of ‘fictions’ such as the ‘common intention’ can be used to cloak value judgements and as such give root to the prejudices of the courts.

\textbf{Formulation of the holistic approach}

In \textit{Oxley v Hiscock}, Chadwick LJ adopted the holistic approach, with reference to the ‘entire course of dealings’ between the parties. However, he limited this

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\textsuperscript{105} [2006] UKHL 24, para 128.
\textsuperscript{106} Eekelaar and Maclean(2004).
\textsuperscript{107} [2004] EWCA Civ 546.
\end{flushright}
approach to situations where both parties contributed to the purchase price of the property.\textsuperscript{108}

It is suggested that limiting the holistic approach to situations where both parties have contributed financially to the property will exclude many individuals who only contribute to the family in other ways. Research on patterns of money management indicate that men’s wages tend to be spent on the mortgage and property development, whilst women’s wages tend to be spent on other expenses such as food, clothes and the payment of utility bills.\textsuperscript{109} Chadwick LJ’s formulation thus unnecessarily discriminates against women’s traditional role as homemaker, and may be said to place too much emphasis on the ‘solid tug of money’\textsuperscript{110}. Further, it is unclear the basis on which the courts discretion is to be exercised.

In his judgement Chadwick LJ states:

‘what the courts are doing in cases of this nature, is to supply or impute a common intention as to the parties’ respective shares … on the basis of that which, in the light of all the material circumstances (including the acts and conduct of the parties after the acquisition) is shown to be fair …’\textsuperscript{111}

Chadwick LJ thus proposes a wide discretion to be used when dealing with ‘cases of this nature’\textsuperscript{112}. However, one may be forgiven for being confused regarding the basis on which this discretion is to be used. In aiming to ‘supply’ or ‘impute’ a common intention, the court is not in fact giving effect to, as the court purports, what the parties intended, but to what the court thinks is fair.\textsuperscript{113} This necessarily entails the court giving effect to its own value judgements. Indeed, Hudson notes that all cases involving rights in the home involve value judgements, but that these judgements tend to be kept concealed behind a cloak of technicalities, such as the notion of a ‘common intention’.\textsuperscript{114} If in fact the court here is giving effect to what it considers to be fair, there is a danger in hiding behind the ‘fiction’ of the common intention.

\textsuperscript{108} Ibid, para 68.
\textsuperscript{109} Rotherham(2004), 274.
\textsuperscript{110} [1965] NZLR 685, 800 per Woodhouse J.
\textsuperscript{111} [2004] EWCA Civ 546, para 66.
\textsuperscript{112} Ibid, para 68.
\textsuperscript{113} Hudson(2007), 661-2.
\textsuperscript{114} Hudson(2004a), 30.
The fiction of common intention

The requirement of common intention entails the court conducting an investigation into the history of the parties’ relationship in order to ascertain what the parties intended in the way of property ownership - and such an investigation is necessary for the successful resolution of any property dispute of this kind. The common intention requirement has been heavily criticised as artificial; an ‘unnecessary’ or ‘unrealistic’ fiction.\textsuperscript{115} It is suggested it is unrealistic in that ‘there will inevitably be numerous couples, married or unmarried, who have no discussion about ownership and who, perhaps advisably, make no agreement about it.’\textsuperscript{116} In Oxley itself, Chadwick LJ accepts a common intention never existed between the parties.\textsuperscript{117} The reality is that many couples will not have come to a common agreement as to the respective shares in their home, which is why the issue has come to the court for resolution. Contemplating relationship breakdown and subsequent division of property at a time when the couple are together is at best awkward and at worst devastating to the relationship. Further, Bauman observes that in an individualised society, being in a relationship means perpetual uncertainty, the relationship being composed of individuals constantly negotiating their roles and identities.\textsuperscript{118} Any attempt to establish a fixed ‘common intention’ between parties thus appears an impossible task amid the constant negotiation and renegotiation that many relationships now entail. Consequently, the courts must ‘supply’ or ‘impute’ the common intention between the parties, drawing inferences from the couple’s conduct as to what they seemingly intended.

As noted above, the application of the requirement of common intention can be considered a means of the courts surreptitiously employing value judgements. However, this subterfuge is unnecessary. There is nothing wrong with value judgements, as long as the bases for these decisions are made clear. Indeed, Hudson notes that the success of the Canadian approach in this area is precisely due to its explicit acceptance of such value judgements.\textsuperscript{119} The danger in not being explicit as to the grounds on which a case is decided is that technicalities may serve to hide judicial

\textsuperscript{115} [2004] EWCA Civ 546, 71; Wong(2004), 80.
\textsuperscript{116} [1995] 4 AllER 562, 575.
\textsuperscript{117} [2004] EWCA Civ 546, para 66.
\textsuperscript{118} Bauman(2003), 12-13.
\textsuperscript{119} Hudson(2004a), 33-34, the Canadian approach will be considered in more detail in Part IV.
preconceptions and assumptions (such as the normalisation of relationships), which, if not made explicit, cannot be addressed. For all the injustice of the Lord Bridge’s test, at least the methodology of Rosset did not leave the judges scope to do whatever they liked, nor to favour their own views of what is ‘normal’ behind a cloak of technicalities.

Discretion and uncertainty

Hiding the basis on which a decision is made may also increase uncertainty, neither future litigants nor judges being clear which principles are to be followed in future cases. Dixon describes the judgement in Stack v Dowden as the property lawyer’s equivalent of Pandora’s Box, ‘everything included with only a small hope that this will not lead to endemic uncertainty.’\(^{120}\) In his view the lack of certainty in the holistic approach of the courts will result in increased litigation, and thus increased costs and contention between the parties.\(^ {121}\) Dixon also argues this will promote uncertainty for third parties dealing with real property.\(^ {122}\) The benefit of the Rosset test is that it provides clear and comprehensive guidance on the decision the court will come to, ensuring that like cases are treated alike. However, the disadvantage of this approach, as considered in Part II, is that any test which is rigid necessarily creates the possibility for unfairness.\(^ {123}\) The benefit of the discretion-based system is that it can apply unique solutions that may better fit the circumstances of individual parties. Indeed, this is the approach taken by the family courts. As Baroness Hale stated, ‘flexibility … avoids the straightjacket of rigid rules which can apply harshly or unfairly in an individual case.’\(^ {124}\) But, as highlighted by the Law Commission, the investigation of the court into the history of the relationship is time-consuming and expensive.\(^ {125}\) It may, however, be argued that it is in the very nature of equity to adopt a flexible case-by-case approach.

Hudson notes that the nature of equity is such that it promises to set aside strict common law and statutory rules in order to achieve conscionable results in individual cases, but that these principles are becoming ever more rigid and less discretionary.

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\(^{120}\) Dixon(2007b), 353.
\(^{121}\) Dixon(2007a), 460.
\(^{122}\) Dixon(2007b), 353.
\(^{123}\) Hudson(2007), 637.
\(^{124}\) [2006] UKHL 24, para 122.
\(^{125}\) Law Commission(2007,) para 1.27.
he argues the courts of Chancery must be doing something different to the common
law.\textsuperscript{126} It may be suggested therefore, that it is in the realm of equity that the law
could be most suited to addressing the individual contexts of parties to disputes,
operating with a wide discretion.

Further, a wide discretion may be more suited to an individualised society than
rigid rules that appear more akin to the common law. Indeed, in the individualised
society, amid the ‘pluralisation’\textsuperscript{127} of lifestyles and family forms, it is important the
courts have flexibility to meet the different circumstances of individuals who come
before them, recognising the independent and differing life projects of each person. It
could be said that individualisation is itself uncertain, and this requires a legal
response that is geared to responding to individual situations.

The inflexible nature of the Rosset test has, on occasion, resulted in
considerable injustice.\textsuperscript{128} We have seen with the development of the ‘holistic’
approach that in circumstances where rigid rules have been imposed on family
situations the courts themselves rebel. As Dixon notes, in recent cases ‘it seems our
most senior judges are determined to introduce more flexibility into the law.’\textsuperscript{129}

Consequences of Relationship Breakdown}, outlined a statutory framework for
establishing unmarried cohabitant’s rights in the family home. The Commission
proposed a ‘weak’ discretion in these cases, in contrast with the ‘strong’ discretion
afforded to the family courts. The benefit of their approach is the court’s discretion
would be guided by family law-like principles, providing a clear basis for their
decisions, which include the welfare of any minor; the financial needs and obligations
of both parties; and the extent and nature of the financial resources which each party
has or is likely to have in the foreseeable future. It is suggested this approach is to be
favoured over one in which the courts have the opportunity to hide the basis for their
decisions behind abstract technicalities. Although discretion is needed in these cases,
it must be a discretion exercised on a basis which is a clear and transparent, so as to
prevent judicial practices such as the normalisation of relationships.

\textsuperscript{126} Hudson(2004a), 17.
\textsuperscript{127} Beck and Beck-Gernsheim(2002), 16.
\textsuperscript{128} See Burns v Burns [1984] Ch. 317 considered in Part IV.
\textsuperscript{129} Dixon notes that in \textit{Abbott v Abbott} [2007] UKPC 53, Baroness Hale, speaking for the Privy
Council, was at pains to point out that Lord Bridge’s test was outdated and ought not to be followed
strictly, the proper approach was to take a holistic view, Dixon(2007a), 460.
**Wayling v Jones: the non-existence of same-sex relationships**

As the homosexual relationship in *Wayling v Jones*\(^{130}\) proved impossible to equate with the judiciary’s perception of the traditional marriage the court denied the existence of the relationship and decided the case on strict principles of proprietary estoppel, rather than any ‘holistic’ assessment of the circumstances. Similarly in *Tinsley v Milligan*\(^ {131}\) the court has difficulty in relating the lesbian relationship with a ‘normal’ heterosexual relationship. The practice of normalisation, of trying to mould homosexual relationships into more recognisable heterosexual relationships, also appears to occur through the process of ‘gay marriage’, after which the couple’s relationship is recognised as legitimate and deserving of more ‘just’ legal treatment.

**Normalising the relationship**

*Wayling v Jones* concerned a male homosexual couple that had lived together in various establishments owned by Mr Jones for a period of 16 years before his death. Throughout this period Mr Wayling had devoted his time to working in and managing these establishments for a minimal ‘pocket money’, and cared for Mr Jones as his health deteriorated.

The court in this case declined to even consider the nature of their relationship, believing the case to be based on whether or not Mr Wayling had worked in the establishments for the purpose of acquiring an interest in them. It is suggested that in normalising the relationship between Mr Jones and Mr Wayling, the court decided that as it could in no way be considered ‘normal’ in the sense of the traditional marriage, it did not exist. The court, rather than referring to Mr Wayling as Mr Jones’ romantic partner, repeatedly referred to him as a ‘chauffer and companion’\(^{132}\), treating the relationship between the parties as one that was purely contractual, desexualising and thus denying the plaintiff a vital element of his connection with the deceased.

Mr Wayling seemingly devotes all his time to the care of Mr Jones and the maintenance of his businesses, yet his contributions are not recognised as having an *inherent* value in themselves. This is in contrast with the treatment of Mrs Cooke’s

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\(^{130}\) [1995] 2 FLR 1029.
\(^{131}\) [1994] 1 AC 340.
\(^{132}\) *Ibid*, 171.
contributions in *Midland Bank v Cooke*, where devoting her time to her family was considered valuable and equivalent to a one half share in the property. While Mrs Cooke was considered a ‘good wife’ Mr Wayling is considered neither a ‘good wife’ nor a ‘good partner’. Holding the relationship up against the yardstick of the traditional marriage, the court, in finding the relationship between Mr Jones and Mr Wayling could not equate with this standard, denies its existence. Not being ‘normal’ in this case resulted in the court applying rigid rules of proprietary estoppel, the implication being the court required further justification, in addition the fact of Mr Wayling’s contributions to the family, in order to transfer the property to him. This is as an example of the courts’ failure to recognise as valid a form of family, in this case a same sex relationship, which did not appear ‘normal’ as it did not readily equate with the traditional marriage.

Similarly, in *Tinsley v Milligan*, the court appeared nervous in addressing the lesbian relationship between the parties. Lords Keith, Lowry and Browne-Wilkinson did not mention the nature of the relationship at all. Lord Jauncy merely referred to the fact the parties had ‘lived together for some years’, while Lord Goff coyly stated that ‘[Miss Tinsley] and the defendant Miss Kathleen Milligan were, to use the [trial] judge's expression, lovers for about four years.’ Lord Goff went on to explain that Miss Milligan ‘was the dominant character’ in the relationship. The court is clearly struggling here. Lord Goff is trying to explain who is the ‘man’ in the essentially man-less relationship. He fails to take account of the relationship as it is, and tries to explain it by reference to a heterosexual relationship, it is suggested, normalising the relationship so it appears more traditional, conventional, ‘normal’. Indeed, Auchmuty suggests what is most fascinating about this judgment is that the word ‘lesbian’ is never used. She sees this omission as following in the long

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133 Mrs Cooke had made no direct financial contribution to the property and her equitable apportionment reflected the time she put into bringing up the children, working part time and maintaining the home.
134 If the court had compared Mr Jones and Wayling’s relationship with that of a heterosexual couple they probably would have concluded Mr Wayling was the ‘wife’ as he is the economically weaker partner and also the one who provides ‘caring’ role in the relationship. See the courts analysis of Tinsley v Milligan below.
139 Auchmuty(2003), 172.
tradition of silence around the existence of lesbian sexuality in English law.\textsuperscript{140} The affect of normalisation on gay couples can further be seen in regard to ‘gay marriage’, considered below.

‘Gay marriage’ and normalisation

In \textit{Wayling v Jones} denying validity to the relationship affected the manner in which the court decided the case; rather than holistically considering the parties’ relationship the case fell to be decided on strict principles of proprietary estoppel. In this case Mr Wayling succeeded in his claim on appeal. However, in many situations the application of strict principles will result in injustice, many contributions to the relationship not being taken into account.

Same sex partners may be offered a more ‘just’ result on the breakdown of their relationship if registered as civil partners, the dispute being dealt with by the family courts under the Civil Partnership Act (CPA) 2004 in the same way in which the family courts deal with property division on divorce. The Civil Partnership Act, in introducing ‘gay marriage’, has been criticised by some as an attempt to ‘normalise’ same sex relationships. Auchmuty argues the gay marriage movement takes the focus away from \textit{gay} (with all its associations with sexual \textit{difference}) and places it instead on the hitherto \textit{heterosexual} preserve of matrimony.\textsuperscript{141} She argues that focus on similarity and assimilation, the ‘we are the same as you’ approach, fails to recognise the essential difference between gay and heterosexual relationships.\textsuperscript{142} The implication of the CPA is that where a same-sex couple are registered as civil partners they appear more ‘normal’, equating more readily with traditional heterosexual notions of stability and commitment, and so the nature of the parties’ relationship is recognised and considered deserving of more ‘just’ legal treatment, in which the court will take into account ‘all the circumstances’ surrounding the dispute.\textsuperscript{143}

\begin{footnotes}
\item As evidenced by Parliament’s reluctance to criminalize lesbian acts in the Criminal Law Amendment Bill of 1921, or indeed at any time, except in the armed forces.
\item Auchmuty(2003), 178.
\item For Auchmuty, this is the absence of socially enforced gender dynamics or expectations within the relationship, Auchmuty(2003), 181-182.
\item In \textit{Mendoza}, [2004] UKHL 30, the court interpreted the Rent Act to read ‘as if they were living as husband and wife’ in order to include a same sex relationship. This has the effect of ‘normalising’ the relationship, placing it in the same category as the more readily acceptable and understandable institution of marriage. Diduck notes that the \textit{Mendoza} case regulates by requiring the non-traditional
\end{footnotes}
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The rise of individualisation has brought with it an increase in unconventional relationships. These relationships may include not only same-sex couples, but any relationship which does not readily correspond to the judiciary’s concept of what is ‘normal’. Denying the validity of these relationships results in many people being excluded from the holistic approach of the courts, and suffering the unfairness that application of strict property rules entails. What is needed is an approach which accepts the legitimacy of many relationships without passing judgement on how ‘normal’ they appear. An example of such an approach is that of Mann J, outlined below.

Cox v Jones: accepting the chaos

The above cases may be contrasted with the approach of Mann J in Cox v Jones, who considers the relationship to have a bearing on the case, but declines to consider how ‘normal’ it is, accepting the chaos that relationships increasingly entail.

A preferable approach

Cox v Jones involved an unmarried, but formerly engaged, cohabiting couple with a particularly volatile and tempestuous relationship, beset by jealousy, tensions and violence, in addition to periods of great closeness. On the breakdown of the relationship there were disputes as to the ownership of various items of property including a Fiat car; an engagement ring; money spent on a shopping spree in New York; a flat in Islington; and more relevantly, whether Miss Cox had an equitable interest (and if so to what extent) in the couple’s former home.

Mann J considers the nature of the relationship to have a bearing on the existence of a beneficial interest for Miss Cox. However, rather than judging their relationship by reference to what he considers evidence of a ‘normal’ relationship, he relies on the statements of the parties as to the nature of their relationship, preferring

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144 [2004] EWHC 1486.
145 Ibid, para 25.
146 Ibid, para 67.
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Miss Cox as the more credible witness.\textsuperscript{147} Mann J appears to accept the chaos that this relationship entails, without passing judgement on its strength and character with reference to traditional notions of a ‘normal’ marriage.

Indeed, Hudson argues that it is vital for the courts of Chancery to appreciate and address the ‘intrinsic chaos in our social relations’\textsuperscript{148} that has been exacerbated as a result of individualisation. He warns that we must resist the temptation to impose too much order on what is, and will remain, a fundamentally chaotic universe.\textsuperscript{149} The acceptance of chaos is something familiar to the family courts, as it was the appreciation of the impossibility of creating models to meet all family situations that resulted in the development of widely drawn, flexible principles.\textsuperscript{150} In order to better serve (rather than dictate to) the individuals who come before them, the courts need to accept the chaos and uncertainty that are common characteristics of most disputes brought before them.\textsuperscript{151} It is not that there is some ‘right’ answer which the law is generally failing to reach, but that when dealing with these cases it is important, if not vital, to recognise the reality of everyday life. Mann J’s approach is to be applauded because it entails recognition of the legitimacy (if not ‘normalness’) of many forms of modern relationship. As discussed earlier, comparisons with traditional notions of the family are not always helpful in the post-modern era. Giving recognition to new forms of relationship not only enforces a positive recognition of the parties as individuals, with independent life projects, motivations and goals, but also ensures that these individuals are not excluded from the protective framework of the holistic approach of the courts. This recognition has a profound effect on women, considered below in Part IV.

\textsuperscript{147} Ibid, para 34.
\textsuperscript{148} Hudson(2007), 1200.
\textsuperscript{149} Ibid.
\textsuperscript{150} Indeed, in commenting on the inconsistent and sometimes contradictory nature of family law, Dewar argues this chaos is in fact normal, reflecting the chaos inherent in the individualised connections between people, Dewar(1998), 485.
\textsuperscript{151} Hudson(2007), 1183.
PART IV

**Feminist perspectives on the approach of the courts**

Changing perceptions of women

In *Cox v Jones* Miss Cox received recognition for the work she did in supervising the renovation of the couple’s home. This is in direct contrast to the approach of *Lloyd’s Bank v Rosset*, in which Mrs Rosset’s supervision of renovation works was considered merely a ‘wifely duty’, and not recognised by the court as having any inherent value. Mrs Rosset was thus denied any equitable interest in the family home.

This demonstrates the disparity between the *Rosset* and holistic approaches. Under the *Rosset* approach the court is limited to considering direct financial contributions to the purchase price of the property, and it is ‘at least extremely doubtful whether anything less will do.’\(^{152}\) This excludes consideration of non-financial contributions, such as the supervision of renovation works, the care of any children of the relationship and housework, and also any indirect financial contributions, such as the payment of utilities bills, the purchasing of food, clothes and furnishings for the family in general. The holistic approach, however, enables the court to have regard to all these contributions, and thus entails what is considered by many a more ‘just’ outcome. The effect of exclusion from the holistic approach may result in severe hardship for the economically weaker partner. One example is *Burns v Burns*,\(^ {153}\) in which after 19 years unmarried cohabitation, during which Miss Burns raised two children, worked part time and paid some of the household bills, she was unable to establish an interest in the home and left the relationship with nothing.\(^ {154}\)

The basis of these differing approaches may in fact be a direct response to the judiciary’s changing perception of women and their role within the family. In *Rosset* Lord Bridge considered it ‘the most natural thing in the world for any wife, in the absence of her husband abroad, to spend all the time she could spare and to employ any skills she might have … to accelerate progress of the work quite irrespective of

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\(^{152}\) [1991] 1 AC 107, 132-133.

\(^{153}\) [1984] Ch 317.

\(^{154}\) Except a washing machine which she had paid for!
any expectation she might have of enjoying a beneficial interest in the property.' 155

Lord Bridge considered Mrs Rosset’s extensive supervision of the renovation works, painting and decorating, planning, and obtaining and delivering building materials of a value ‘so trifling as to be almost de minimis’ 156. He seemed to place no or little value on her contributions to the property, and indeed, did not address her contributions to the family, the fact she brought up two children, maintained the home etc. Similarly, in Burns v Burns Mrs Burn’s contributions were accorded no value, and she left the relationship with nothing. The court stated, ‘If the woman makes no ‘real’ or ‘substantial’ financial contributions … then she is not entitled to any share in the beneficial interest in that home even though over a number of years she may have worked just as hard as the man in maintaining the family’ 157. The court’s use of the word ‘real’ here implies that although they recognise Mrs Burns may have worked just as hard as Mr Burns, her work is not ‘real’ in that it has no inherent value. Diduck and Kaganas see this as the invocation of the public/private dichotomy. Work done in the private sphere is not considered of value, whereas work done in the public, that which can earn wages, is. 158 This approach, whilst based on egalitarian, gender-neutral principles, in effect discriminates against the non-earning partner or economically weaker partner, usually the woman. 159

The approach in Rosset and Burns v Burns is in contrast with the approach in Cox v Jones, where Mann J states that in supervising the renovation work on the house Miss Cox’s contribution was ‘very significant’ 160. Although he refers to the limited funds she contributed to the project, he comments ‘her real contribution was the large amounts of time and energy that she put into it’ 161, and goes on to accord her 25% of the property 162. There is a clear shift here in the value given to what was generally considered ‘women’s work’. Indeed, in Hammond v Mitchell, Waite J, 155 [1991] 1 AC 107, 131.  
156 Ibid, 131.  
159 This understanding of value is not only reflected in the law; it is evident in the attitudes of many men and women. In one US study it was found that divorcing men discuss with their lawyers way to ‘keep’ their property and women discuss ways to ‘get’ those assets. Gray and Merrick(1996), 243. However, the correct view should be, as elaborated by Lord Nicholls, is that ‘it is not the case of ‘taking away’ from one party and ‘giving’ to the other property which belongs to the former.’ [2006] UKHL 24, para 9.  
161 Ibid, para 79.  
162 However Mann J did place weight on the fact Miss Cox gave up her legal practice to devote time to the renovation works. His award may in some sense have been compensation for this loss of financial earnings rather than recognition of the inherent value of the supervision work.
applying the holistic approach, held that ‘when Miss Mitchell’s contribution as mother/helper/unpaid assistant and at times financial supporter to the family prosperity generated by Mr Hammond’s dealing activities is judged for its proper effect, it seems right to me that her beneficial interest in the bungalow show be one half’\(^{163}\). No longer are contributions traditionally associated with women taken for granted as ‘the most natural thing in the world’ but are beginning to be recognised as inherently valuable. Indeed, this is a view that has been long adhered to in the family courts. In *Miller; MacFarlane*\(^{164}\), Lord Nicholls emphasised that ‘there is no place for discrimination between a husband and wife and their respective roles … there should be no bias in favour of the money-earner and against the home-maker and child-carer.’\(^{165}\) He accords both forms of work ‘equal value’.\(^{166}\) Yet despite much judicial and academic support for this approach, it is not without its limitations.

**Limitations of the holistic approach**

The holistic approach is not accepted by all as the best means of resolving these disputes. The increased regulation it entails is seen by some as undermining the sanctity of marriage\(^{167}\) and threatening individual autonomy.\(^{168}\) The discretion the approach entails has been criticised as being dangerously uncertain. Indeed, in *Stack v Dowden*, Lord Neuberger points to the importance of ‘certainty and consistency’\(^{169}\). He criticises the holistic approach as ‘too imprecise’, giving ‘insufficient guidance’\(^{170}\), ‘a recipe for uncertainty, subjectivity, and a long and expensive examination of the facts’\(^{171}\), and advocates a return to strict property principles. Despite these criticisms, much of the judiciary appears in favour of adopting the holistic approach for the future. In *Abbot v Abbot*\(^{172}\), a recent decision of the Privy Council, Baroness Hale cautioned that Lord Bridge’s test was outdated and ought not

\(^{163}\) [1991] 1 WLR 1127, 1137.
\(^{165}\) Ibid, para 1.
\(^{166}\) Ibid, para 84.
\(^{167}\) The Evangelical Alliance in Law Commission(2007), 27.
\(^{168}\) Freeman and Lyon(1983), 183.
\(^{169}\) [2007] UKHL 17, para 106.
\(^{170}\) Ibid, para 144.
\(^{171}\) Ibid, para 146.
\(^{172}\) [2007] UKPC 53.
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to be followed strictly.173 However, in addition to the dangers of uncertainty, a further limitation of the holistic approach is the courts tendency, when faced with such discretion, to ‘normalise’ the relationships which come before them.

The holistic approach appears to place more weight on, indeed, to expressly recognise the value of ‘wifely’ contributions. The hurdle has thus been lowered for many women. However, in the majority of cases it appears that for these contributions to be valued they must occur within the paradigm of what the judiciary perceive as the traditional marriage. For example, in Hammond v Mitchell and Midland Bank v Cooke Waite J recognises the contributions of both women, although his apportionment of an equitable interest in the home may be seen more as a reward for being a ‘good wife’, rather than any recognition of the inherent value of the contributions. In other cases the courts have seemed more reluctant to recognise indirect and non-financial contributions where the parties behaved ‘unconventionally’. So in Stack v Dowden Baroness Hale did not consider the domestic contributions of Ms Dowden at all, and placed little or no value on Mr Stack’s renovation work on the property; a result which appears premised on the fact she considered it a ‘very unusual case’, the keeping of separate finances an indication the couple did not act as a ‘normal’ couple and so did not intend to share the property equally. She therefore based her decision on the financial contributions of the parties. Barnes notes that ‘a 27 year relationship and the raising of four children carried little or no weight in comparison with the disparity in the parties’ capital contributions.’174 Similarly in Wayling v Jones the unconventional nature of the relationship negated the value of Mr Wayling’s contributions in their own right. Rather, it had to be demonstrated they were referable to obtaining an interest in the property. Recognising typically ‘female’ contributions only where they occur within the paradigm of the traditional marriage forces women into stereotyped roles of ‘wife’ and ‘mother’ - wholly inappropriate given the increased demand of women to have ‘a life of their own’ outside of these roles.175

And this practice of normalisation has occurred despite Commonwealth jurisdictions encountering similar problems much earlier.

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175 Beck and Beck-Gernsheim(2002), 63.
Comparisons with Canada

In 1993 the Supreme Court of Canada, in *Peter v Beblow*\(^\text{176}\), recognised that household and childcare services ‘are of great value, not only to the family but to the other spouse’\(^\text{177}\). They stated the notion that these services are not worthy of recognition systematically devalues the contributions which women tend to make to the family economy, contributing to the ‘feminisation of poverty’.\(^\text{178}\) The Canadian courts recognised *15 years ago* that there was a need to recognise the value of ‘women’s’ contributions to the family. However, Boyd has suggested that, progressive as these Canadian decisions appear to be, they tend to reinforce stereotypes of ‘traditional family forms’, so that if a woman conforms to the dependant role within the family, she is more likely to receive compensation for her contributions.\(^\text{179}\) The Canadian approach thus appears to have experienced the same problem as the holistic approach; in effect ‘normalising’ the women, the court being more likely to compensate their contributions where they appear to have behaved as ‘good’ traditional wives, mothers and carers. There is a real difficulty in recognising traditional female contributions whilst not reinforcing these same stereotypes.

The affect of normalisation on women

Limiting the application of the holistic approach to those couples which appear ‘normal’ or conventional is liable to adversely discriminate against the child carer or homemaker, generally the woman, as their contributions to the family may be considered worthless where they do not fit this mould. Probert notes this argument has less force than it once had, given the rise in property ownership among women and their enhanced ability to make financial contributions to the family home.\(^\text{180}\) And indeed, *Stack v Dowden* may be seen as a great example of an economically independent mother of four, who not only contributes financially to the purchase price of the house but contributes significantly more than her partner. An apportionment based primarily on financial contributions to the property thus worked in her favour.

\(^{176}\) [1993] 3 WWR 337.
\(^{177}\) Ibid, 346.
\(^{178}\) Ibid.
\(^{179}\) Boyd(1994).
\(^{180}\) Probert(2004), 40.
However, it must be borne in mind that despite women’s increased entry into the labour market, they continue to bear the burden of the majority of housework and childcare and tend to be paid less, either as a result of being employed part time or because of career breaks taken to have children. In Stack, as a result of the couple not being considered ‘normal’ Ms Dowden’s domestic and indirect financial contributions were not considered to have any bearing on the extent of her equitable ownership of the property. If this had been considered a more ‘normal’ relationship, the court might have attributed value to these contributions, an approach which would have resulted in a more favourable outcome for Ms Dowden.

These contributions need to be recognised. As noted above, research on patterns of money management indicate that men’s wages tend to be spent on the mortgage, whilst women’s wages tend to be spent on other expenses such as food, clothes and the payment of utility bills.\textsuperscript{181} Thus formulas based only on direct financial contributions will not reflect the reality of the division of expenditure within many couples. This is a problem that has been highlighted recently by the Law Commission.

\textbf{Law Commission response}


The Commission advocated principles requiring an assessment of the economic impact of contributions made by the parties to their relationship. ‘Qualifying contributions’ are proposed to be drawn widely to include non-financial contributions, and future contributions. The court would focus on any ‘retained benefit’ or ‘economic disadvantage’ accrued by one of the parties. Economic disadvantage would arise where one party gave up work, or went part time in order to look after a child. This disadvantage would be shared equally between the parties. Retained benefit includes capital and income which has been acquired, retained, or

\textsuperscript{181} Rotherham(2004), 274.
\textsuperscript{182} Law Commission(2007).
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enhanced, usually stemming from a financial contribution. This benefit would be reversed.\textsuperscript{183}

This approach is welcomed as it recognises the value of childcare and domestic work, and importantly, where there are children involved the Commission’s scheme also takes account of future losses in the form of earning capacity or the cost of childcare. However, the Government has decided to postpone any moves to implement the Law Commission’s proposals,\textsuperscript{184} and so the problems with the courts’ current approach remain.

\textbf{Conclusion}

In the absence of any pending legislation in this area the courts will have to develop and refine the holistic approach. In particular, it is suggested the courts need to become explicit regarding the basis on which their decisions are made. Reliance on the ‘common intention’ is clearly artificial, unhelpful, and may exacerbate the uncertainty caused by the wide discretion of this approach. Principles like those advocated by the law commission\textsuperscript{185}, or those used by the family courts\textsuperscript{186} may be an appropriate response.

Furthermore, the courts need to recognise that in many respects their own treatment of the relationships which come before them is inappropriate. Although the hurdle has been lowered for women, in that their contributions to the family may be taken into account, this only occurs where the relationship appears sufficiently ‘normal’, and the conduct of the wife sufficiently ‘traditional’. The increased desire of women to live a life of their own rather than one merely ‘lived for others’ means there will be fewer and fewer cases in which the women that come before the court will be considered ‘good wives’. And indeed, it is questionable whether the courts should attempt to support ‘right’ ways of behaving while women are intent on reworking the norm and demonstrating their own ‘legitimate strangeness’. The exclusion of these ‘unconventional’ women from the holistic approach of the court is discriminatory, unfair, and in conflict with the trend toward individualisation within society.

\textsuperscript{183} Bridge(2007).
\textsuperscript{184} Press Release, http://www.familylawweek.co.uk/library.asp?i=3455
\textsuperscript{185} Considered in Part III.
\textsuperscript{186} [2006] UKHL 24, para 137.
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The hurdle needs to be lowered further so that ‘female’ contributions are recognised by the courts as inherently valuable *per se*, and not only when they occur within the paradigm of the traditional marriage. As Bauman explains, where security is missing, individuals are stripped of the confidence without which freedom can hardly be exercised\(^{187}\) and security cannot exist without equality before the law.\(^{188}\)

The ability for women truly to be able to live a life for themselves, separate from the constricting stereotyped roles of ‘wife’ and ‘mother’, exists only where there is real, and not merely formal, equality before the law. This inevitably necessitates recognition of ‘women’s work’ as valuable in itself, for it is only when there is *true* equality that we will have the security and confidence to be able to experience freedom.

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\(^{187}\)Bauman(2005), 36-37.

\(^{188}\)Hudson(2004a), 11.
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