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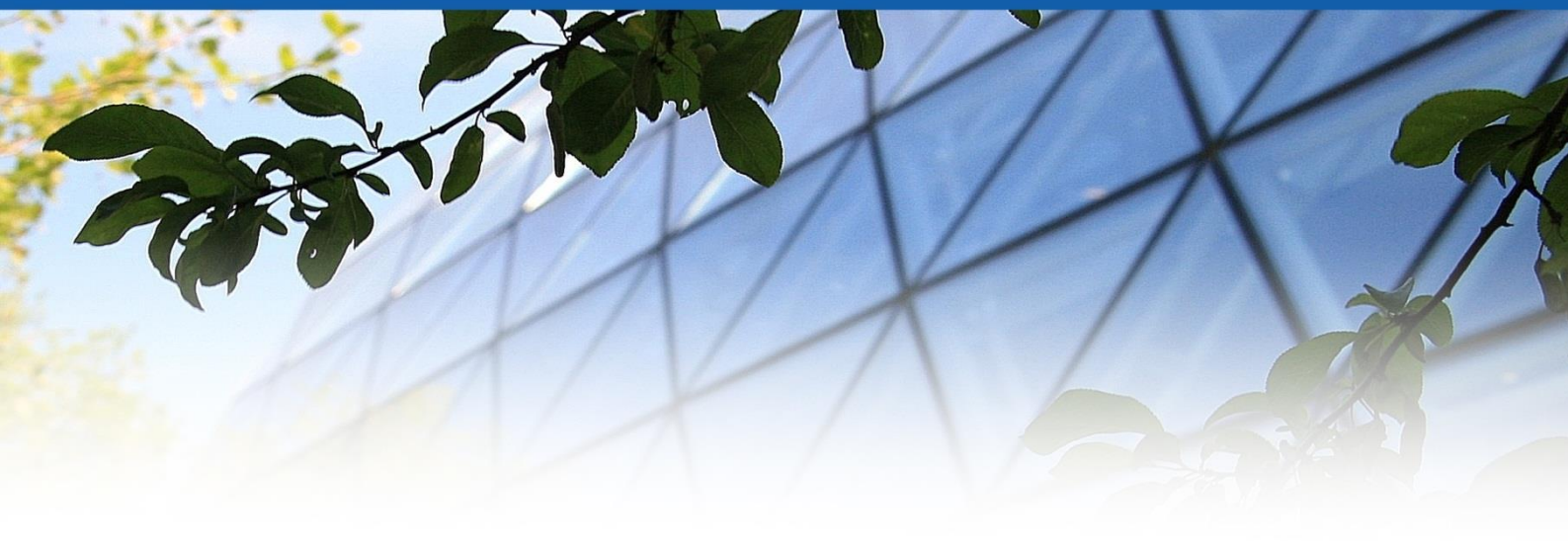

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THE CONCEPT OF COUPLEDOM IN SUCCESSION LAW

BRIAN SLOAN*

I. INTRODUCTION

Historically, English and Irish Law were both distinctly protective of marriage (still understood as an exclusively heterosexual institution)[1] as compared to other forms of adult relationship. In the 1950 English case of *Gammans* v. *Ekins*, it was famously deemed an "abuse of the English language" to say that an unmarried couple "masquerading" as husband and wife were members of the same family.[2] In its Constitution, meanwhile, the Irish state "pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack".[3] The powerfulness of this "pledge" can be seen from the fact that divorce was not possible in Ireland until a 1995 referendum resulted in a constitutional amendment.[4]

Both jurisdictions have nevertheless responded to social conditions and recognised a broader range of relationships for certain purposes. But in spite of their overlapping culture and geographical proximity, the recognition of adult relationships outside heterosexual marriage is proceeding at different rates in England and Wales on the one hand and in Ireland on the other. In England and Wales, legislation was passed in 1995[5] specifically to facilitate claims by unmarried cohabitants on their partners' estates. It took until July 2010 for the Republic of Ireland to enact such legislation,[6] which also introduced a marriage-like[7] registration scheme for same-sex couples[8]

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[1] *Wilkinson* v. *Kitzinger* [2006] EWHC 2022 (Fam), [2007] 1 F.L.R. 295; *Zappone and Gilligan* v. *Revenue Commissioners* [2006] IEHC 404, [2008] 2 I.R. 417 (the outcome of an appeal to the Irish Supreme Court is awaited). The Irish Coalition Government has pledged to set up a "Constitutional Convention" to consider same-sex marriage *inter alia*: Coalition Government of Ireland, "Government for National Recovery 2011-16" (Dublin 2011), p. 18.

[2] [1950] 2 K.B. 328, 331 per Asquith L.J.

[3] Constitution of Ireland, Article 41.3.1.

[4] Fifteenth Amendment of the Constitution Act 1995. See now Constitution of Ireland, Article 41.3.2.

[5] Law Reform (Succession) Act 1995, amending the Inheritance (Provision for Family and Dependants) Act 1975 (the "1975 Act").

[6] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (the "2010 Act"), s. 194.

several years after the United Kingdom did so.[9] That said, the Irish Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (the "2010 Act") in addition provides an "opt-out" statutory scheme for the *inter vivos* redistribution of unmarried[10] couples' property.[11] By contrast, and in spite of the efforts of the Law Commission and others,[12] in England and Wales such couples remain infamously reliant upon the general law of trusts to effect redistribution in the event of relationship breakdown.[13]

This article focuses on succession law, and specifically the claims now available to unmarried couples in both England and Wales and Ireland. It compares the eligibility criteria for such couples under the English Inheritance (Provision for Family and Dependants) Act 1975 (the "1975 Act") and the Irish 2010 Act before examining the recognition of a broader range of interdependent relationships in Australia. It argues that the 1975 and 2010 schemes cover a similar range of relationships in spite of using different methods of defining them, but suggests that both place undue weight upon whether or not the parties enjoyed a sexual relationship and held themselves out publically as a couple. In this respect, they both compare unfavourably to developments in several Australian states and territories.

Part II of the article provides an overview of succession law in Ireland and England and Wales, before Part III considers the respective definitions of a cohabiting couple used in the 2010 and 1975 Acts. It then argues that the recognition of non-conjugal relationships,[14] which occurs in

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[7] The 2010 Act does not ensure either formal or substantive equality with heterosexual marriage for same-sex civil partners. For example, the Law Reform Commission has said that the Act "does not address the relationship between same-sex couples and their children": Law Reform Commission of Ireland, "Legal Aspects of Family Relationships" (L.R.C. 101, Dublin 2010), para. [3.01]. The Coalition Government has promised to amend the 2010 Act in order to "address any anomalies or omissions, including those relating to children": Coalition Government of Ireland, "Government for National Recovery 2011-16" (Dublin 2011), p. 56.

[8] See, generally, 2010 Act, Parts 1-14. Most of the Act commenced on 1 January 2011: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Commencement) Order 2010, SI 648 of 2010.

[9] Civil Partnership Act 2004.

[10] The scheme also excludes couples in a same-sex civil partnership with each other: 2010 Act, section 172(1).

[11] 2010 Act, Part 15.

[12] Law Commission of England & Wales, "Cohabitation: The Financial Consequences of Relationship Breakdown" (Law Com. No. 307, London 2007). See also the ill-fated Cohabitation Bill 2009, introduced by Lord Lester of Herne Hill.

[13] See, e.g., S. Harris-Short and J. Miles, *Family Law: Text, Cases and Materials*, 2nd edn. (Oxford 2011), ch. 3.

[14] For a discussion of the extent to which a "conjugal" relationship and a "sexual" relationship are synonymous, see B. Cossman and B. Ryder, "What is Marriage-Like Like? The Irrelevance of Conjugality" (2001) 18 Canadian Journal of Family Law 269.

several Australian states and territories *inter alia*, is both preferable and justifiable in the particular context of succession law.

II. An Overview of the Relevant Succession Legislation

A. Ireland

Before the 2010 Act, Ireland operated a comparatively less flexible law of succession, influenced by civil law systems.[15] The Succession Act 1965 gave spouses a fixed entitlement to a share in the deceased's estate irrespective of the terms of the deceased's will[16] and allowed only legal children of the deceased[17] and former spouses[18] to bring a claim for discretionary provision. The spouse's "legal right" has been extended, with some qualifications,[19] to same-sex couples who have entered a civil partnership under the 2010 Act.[20]

The new Act also enables "qualified cohabitants" to seek succession-based relief upon the death of their partners for the first time, broadly implementing recommendations of the Irish Law Reform Commission.[21] In making its overall recommendations, the Commission sought to respond to the increasing numbers of cohabiting couples in Ireland,[22] while admitting at the time of its Report that the incidence of cohabitation outside marriage was less common in Ireland than elsewhere.[23] A stated objective was to balance "the notion of respect for autonomy and the right of individuals in cohabiting relationships to non-state involvement in their affairs" with "the concept of favouring substance over form".[24]

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[15] See, e.g., J.C. Brady, *Succession Law in Ireland*, 2nd ed. (Dublin 1995), paras. [7-01]-[7-04].

[16] Succession Act 1965, s. 111. This "legal right" relates to half of the estate where there are no children and one third of it where there are children, and the spouse can elect whether to take the "legal right" or any provision made for him in the will: section 115.

[17] Succession Act 1965, s. 118.

[18] Family Law (Divorce) Act 1996, s. 18.

[19] J. Mee, "Succession and the Civil Partnership Bill 2009" (2009) 14 Conveyancing and Property Law Journal 86, 86-88.

[20] See, generally, 2010 Act, Part 8, amending the Succession Act 1965.

[21] Law Reform Commission of Ireland, "Report: Rights and Duties of Cohabitants" (L.R.C. 82, Dublin 2006).

[22] The 2006 Census revealed a total of 121,800 family units consisting of cohabiting couples, as compared to 77,600 in 2002: Central Statistics Office, "Census 2006: Principal Demographic Results" (Dublin 2007), p. 21.

[23] Law Reform Commission of Ireland, "Report: Rights and Duties of Cohabitants", para. [1.06].

[24] Ibid., para. [1.14].

Section 194 of the 2010 Act specifically facilitates an application by a member of a cohabiting couple for provision out of the net estate of his partner. The court can make the provision that it "considers appropriate having regard to the rights of any other person having an interest in the matter".[25] It must be satisfied that "proper provision in the circumstances" was not made for the applicant during the deceased's life.[26] This idea of "proper" provision somewhat begs the question, although the concept is nevertheless used in the context of marital breakdown.[27] The 2010 Act itself provides limited guidance as to its interpretation, stipulating that the reason for the lack of such proper provision, leading to a potential claim under section 194, can be anything except "conduct by the applicant" that the court considers it "unjust to disregard".[28] The Act could therefore retrospectively uphold a cohabitant's decision to punish his partner for undesirable conduct by refusing to make otherwise proper provision for him during their joint lives.

The focus on provision made for the applicant during the joint lives of the parties may imply no expectation that a cohabitant will make *testamentary* provision for his partner. At first glance, this contrasts with English Law's focus on whether reasonable provision was made by will or the intestacy rules.[29] That said, the Explanatory Memorandum for the original Irish Bill expressly assumed that testamentary provision would be included in the definition of "proper provision…during the lifetime of the deceased",[30] and any such provision is clearly a relevant factor.[31]

When deciding whether to make an order, the court is instructed to consider all the circumstances of the case,[32] including any order that is available *inter vivos* already made in favour of the applicant,[33] any devise or bequest made to the applicant by the deceased (as noted above),[34]

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[25] 2010 Act, section 194(3).

[26] 2010 Act, section 194(3).

[27] Constitution of Ireland, Article 41.3.2.iii.

[28] 2010 Act, section 194(3).

[29] 1975 Act, section 1(1).

[30] Department of Justice, Equality & Law Reform (Ireland), "Civil Partnership Bill 2009: Explanatory Memorandum" (Dublin 2009), p. 26. Cf. Law Reform Commission of Ireland, "Draft Cohabitants Bill 2006" (Dublin 2006), cl. 11(2), which refers specifically to "adequate provision or no [provision] for the qualified cohabitant…whether by…will or otherwise".

[31] 2010 Act, section 194(4)(b).

[32] 2010 Act, section 194(4).

[33] 2010 Act, section 194(4)(a).

[34] 2010 Act, section 194(4)(b). Variations of such orders are also considered.

the interests of the beneficiaries of the estate,[35] and the same factors considered on an application for the orders available *inter vivos*.[36]

Only where the relationship ended before the death is an applicant for provision under section 194 *required* to demonstrate (prospective) financial dependence on the deceased.[37] The Explanatory Memorandum for the original Bill suggests that only a dependent cohabitant could make a claim,[38] but the subsequent insertion of the subsection dealing with relationships ending before death confirms that a claim could be made in the absence of dependence in the case of a subsisting relationship. Indeed, the Law Reform Commission considered a test of economic dependency to be unnecessary in succession cases where the parties had not ended their relationship, precisely because it was still subsisting at the time of death and a succession-based remedy could be said to give effect to the presumed intention of the parties.[39] In any case, a court is more likely to conclude that "proper provision" was not made where there was dependence, and the degree of financial dependence is considered when deciding whether the couple satisfied the definition of "cohabitants" in the first place.[40]

Section 194 is clearly affected by the constitutional protection afforded to marriage. Provision made under it may not exceed the value of that to which the cohabitant would have been entitled had he been party to a marriage or civil partnership with the deceased.[41] Moreover, the provision cannot affect the legal right of any surviving spouse,[42] or the entitlements of spouses or civil partners under the Succession Act 1965.[43] Unfortunately, the nature of the provision that the court can order does not appear to be the subject of further definition in the Act.

In addition to the specific claim for provision out of an estate, it is expressly permissible to make one of the predominantly *inter vivos* orders introduced by the Act, the "compensatory

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[35] 2010 Act, section 194(4)(c).

[36] 2010 Act, section 194(4)(d), cross-referring to section 173(3). For a list of these factors, see note **50**.

[37] 2010 Act, section 194(5)(a).

[38] Department of Justice, Equality & Law Reform (Ireland), "Civil Partnership Bill 2009: Explanatory Memorandum", p. 1.

[39] Law Reform Commission of Ireland, "Report: Rights and Duties of Cohabitants", para. [5.09]. This argument can justify a wider range of eligible applicants for testamentary as against *inter vivos* claims: see section **III.C.2** below.

[40] 2010 Act, section 172(2)(c).

[41] 2010 Act, section 194(7).

[42] 2010 Act, section 194(10).

[43] 2010 Act, section 194(11)(b)-(c). See J. Mee, "Succession and the Civil Partnership Bill 2009", pp. 91-92 for criticism of the breadth of these provisions.

maintenance order",[44] "during the lifetime of *either* of the cohabitants"[45] such that it may be relevant after the death of one party. Nevertheless, it seems that such orders are primarily intended for relationships ending otherwise than by death, since (for example) the court can preclude a future application for provision from an estate under section 194 when making one of the orders available *inter vivos*.[46] This is similar to the power possessed by English courts when disposing of applications for financial relief on divorce in relation to future applications for family provision.[47]

The criteria for the orders available *inter vivos*, designed to provide a "safety-net system",[48] are that the "qualified cohabitant" is "financially dependent" on the other cohabitant as a result of the relationship or the ending thereof, and that the court considers it "just and equitable" in "all the circumstances" to make the order.[49] In deciding whether the "just and equitable" test is satisfied, the court is instructed to have regard to a number of factors contained in section 173(3).[50]

Qualifying couples are expressly permitted to make an agreement governing what will happen to their finances *inter alia* where one of them dies, subject to various conditions.[51] A valid

[44] 2010 Act, section 175. Such an order can comprise periodical and lump sum payments. The sections concerning "property adjustment orders" (section 174) and "pension adjustment orders" (section 187) are less explicit in contemplating an application by a *surviving* cohabitant, although in any case the court is obliged to consider whether the needs of the applicant can practicably be met under sections 175 or 187 before making an order under section 174 (section 174(2)).

[45] 2010 Act, section 175(1).

[46] 2010 Act, section 173(7).

[47] 1975 Act, section 15.

[48] See, e.g., Law Reform Commission of Ireland, "Report: Rights and Duties of Cohabitants", para. [1.25].

[49] 2010 Act, section 173(2).

[50] These are the current and future "financial circumstances, needs and obligations" of the parties, the "rights and entitlements" of any current or former spouse or civil partner and of any dependent child or child from a previous relationship of the parties (given that that the court is not allowed to make an order that would affect "any right" of any person to whom the respondent is or was married: (2010 Act, section 173(5)), the relationship's duration, the basis on which it was entered and the degree of commitment involved in it, the past or likely future contribution made by each of the cohabitants to their collective or the other's welfare, including to the other's earning capacity, income or resources, their contributions "in looking after the home", the effect on their earning capacity of the division of responsibilities during their relationship, any disability suffered by the applicant, and the conduct of both parties if it is such that the court considers it "unjust" to disregard it.

[51] 2010 Act, section 202(1). The agreement must be in writing signed by both parties (section 202(2)(b)) and comply with the general law of contract (section 202(2)(c) although both parties must have received legal advice either independently or together (if they have waived their right to independent advice in writing: section 202(2)(a)).

agreement may bar applications for *inter vivos* or succession-based provision under the Act,[52] subject to the courts' power to vary or set aside the agreement "in exceptional circumstances, where its enforceability would cause serious injustice".[53]

The courts' approach to the available orders will doubtless provoke discussion, especially given the Act's complexity. The legislature was content to specify a wide range of factors but also to leave doubts about the meaning of some provisions. The concern of this article, however, is the definition of the "qualified cohabitant" for the purposes of succession law, and how it compares to its equivalent in English Law and to more inclusive provisions in Australia. The next section of the article outlines the English law of family provision as a precursor to that discussion.

B. England and Wales

Unlike in Ireland, English Law applies a default rule of full testamentary freedom, with no compulsory portions of the estate reserved in cases where the deceased left a will.[54] Family provision, now governed by the 1975 Act, is an important exception to that principle. It originally[55] allowed spouses[56] and certain dependent children[57] to bring a claim against a deceased person's

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[52] 2010 Act, section 202(3). The extent of the validity of equivalent contracts barring applications under the 1975 Act is unclear. Lowe and Douglas, for example, presume that (at least) a spouse cannot contract out of his right to make such an application except via a consent order made by a court: N. Lowe and G. Douglas, *Bromley's Family Law*, 10th edn. (Oxford 2007), p. 1124.

[53] 2010 Act, section 202(4).

[54] See, e.g., *Re Coventry (deceased)* [1980] Ch. 461, 474 per Oliver J.

[55] For a detailed discussion of the original Inheritance (Family Provision) Act 1938, see S.M. Cretney, *Family Law in the Twentieth Century: A History* (Oxford 2003), pp. 485-498.

[56] The relevant provision is now contained in the 1975 Act: section 1(1)(a), which, in its amended form, also includes civil partners (who must be of the same sex). Former spouses and civil partners who have not entered a subsequent marriage or civil partnership may also be eligible for provision (section 1(1)(b)), but it is rarely made: see, e.g., *Cameron* v. *Treasury Solicitor* [1996] 2 F.L.R. 716, 723 per Thorpe L.J.

[57] No dependency or age-based requirements are now imposed as regards the *eligibility* of the deceased's legal children (1975 Act, section 1(1)(c)), and those whom she treated as a child of the family in relation to a marriage or civil partnership are also able to make an application (section 1(1)(d)). Nevertheless, it has been recognised that "[a] person who is physically capable of earning his own living faces a difficult task in getting provision made for him…" (*Re Dennis (Deceased)* [1981] 2 All E.R. 140, 145 per Browne-Wilkinson J.). For a comparative analysis of claims by adult children who provide care for their parents in England and Wales and Ireland, see B. Sloan, "Testamentary Freedom and Caring Adult Offspring In England & Wales and Ireland" in K. Boele-Woelki, J. Miles and J.M. Scherpe

estate where any will and/or the rules of intestacy[58] failed to make reasonable provision for them.[59] Since the commencement of the 1975 Act, some unmarried couples in England and Wales have in practice been able to bring a claim alongside other factual dependants even though they lack a formal legal relationship with their deceased partners.[60] However, when claiming as a "dependant", a surviving member of a couple can be eligible for provision only if he manages to show that "the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of [the applicant]".[61] It was the narrowness of this category *inter alia* that led to the introduction of a specific category for cohabitants in 1995, which does not require dependence as far as eligibility is concerned.[62]

The "dependant" category nevertheless remains useful for those claimants who fail to satisfy the particular definition reserved for cohabiting couples in the Act, which is considered in Part III. In *Churchill* v. *Roach*, for example, the applicant was unable to satisfy the minimum duration requirement in order to apply as a member of an eligible couple, but the deceased was held to have been maintaining her before his death such that she could claim as a dependant.[63]

In any case, the link with maintenance is ever-present in the 1975 Act. In contrast to the position in Ireland, applicants other than spouses and civil partners[64] must always show that any will and/or the intestacy rules did not make reasonable provision *for their maintenance*.[65] That said, the courts have been generous in their interpretation of "maintenance" when considering eligible

(eds.), *The Future of Family Property in Europe: Proceedings of the 4th Conference of the Commission on European Family Law* (Cambridge 2011).

[58] The intestacy rules are contained in the Administration of Estates Act 1925, s. 46. The Irish equivalent of family provision for spouses and children applies only where the deceased died testate: Succession Act 1965, s. 109.

[59] 1975 Act, section 1(1).

[60] 1975 Act, section 1(1)(e).

[61] 1975 Act, section 1(3). The subsection provides that the applicant "shall be treated" as being maintained where its terms apply, and it was interpreted as imposing a condition that is both necessary and sufficient in *Re Beaumont (Deceased)* [1980] Ch. 444.

[62] Law Commission of England & Wales, "Distribution on Intestacy" (Law Com. No. 187, London 1989).

[63] [2002] EWHC 3230 (Ch), [2004] 2 F.L.R. 989.

[64] 1975 Act, section 1(2)(a-aa).

[65] 1975 Act, section 1(2)(b).

cohabitants,[66] and the English Law Commission has proposed the removal of the restriction for such applicants.[67]

A number of factors to which the court should have regard in determining whether reasonable provision has been made, and what provision should be made by the court if it has not otherwise been made, are specified in the Act. Some of these apply to all applicants,[68] while others apply to particular categories.[69] In the case of claims by members of cohabiting couples, who are not currently included in the intestacy rules,[70] the court is instructed to consider the applicant's age and the length of time for which he satisfied the eligibility criteria,[71] as well as "the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family".[72]

The court can make a range of orders for provision out of the estate. These are expressly contained in the 1975 Act, an advantage over the Irish provisions.[73] Available orders include periodical payments, lump sum orders and orders for the transfer of property.

The next part of the article considers the definition of relevant unmarried couples in both English and Irish succession law, before comparing them to the range of relationships recognised in some Australian states and territories.

III. DEFINING ELIGIBLE COUPLES

This part of the article begins by outlining the general approach to definition of a relevant couple in England and Wales and Ireland. It then critically examines the focus on sexual relations as a

[66] *Negus* v. *Bahouse* [2007] EWHC 2628 (Ch), [2008] 1 F.L.R. 381; cf. *Baker* v. *Baker* [2008] EWHC 937 (Ch); [2008] 2 F.L.R. 767, at [66] per Paul Girolami QC.

[67] Law Commission of England & Wales, "Intestacy and Family Provision Claims on Death: A Consultation Paper" (Consultation Paper 191, London 2009), para. [4.134].

[68] 1975 Act, section 3(1).

[69] 1975 Act, section 3(2)-(4).

[70] The same is true in Ireland: 2010 Act, Part 8. Cf. Law Commission of England & Wales, "Intestacy and Family Provision Claims on Death", ch. 4, which provisionally recommends a sliding scale of entitlement for cohabitants in England and Wales on the intestacy of their partners based on the length of the relationship concerned.

[71] 1975 Act, section 3(2A)(a).

[72] 1975 Act, section 3(2A)(b).

[73] 1975 Act, section 2.

qualifying factor in both jurisdictions before making a case for the recognition of a broader range of relationships.

A. Approaches to Definition

1. Ireland

Under the Irish 2010 Act, a "cohabitant" is defined by section 172 as "one of [two] adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship".[74] The cohabitants must not have been married to, or in a civil partnership with, each other,[75] and they must have been outside of the prohibited degrees in relation to each other.[76] In determining whether a couple satisfy the definition of "cohabitant", the court is instructed to consider "all the circumstances of the relationship", but with "particular" regard to a number of factors.[77] These are contained in section 172(2) of the 2010 Act, and they effectively serve as a checklist. This approach is followed in several Commonwealth jurisdictions,[78] and indeed the Law Reform Commission expressly cited the relevant New South Wales legislation when setting out its proposed list.[79]

The relevant considerations in the 2010 Act are the relationship's duration,[80] the "basis on which the couple live together",[81] the extent of any financial dependence of "either adult on the other" as well as any agreements concerning their finances[82] and the "degree and nature of any

[74] 2010 Act, section 172(1).

[75] 2010 Act, section 172(1).

[76] The prohibited degrees of relationship are defined (with reference to other enactments) in section 172(4) of the 2010 Act.

[77] 2010 Act, section 172(2).

[78] See, e.g., Family Law Act 1975, s. 4AA(2) (Commonwealth of Australia); Property (Relationships) Act 1976, s. 4 (NZ).

[79] Law Reform Commission of Ireland, "Report: Rights and Duties of Cohabitants", para. [2.07], n. 12, citing Property (Relationships) Act 1984, s. 4 (NSW) (which applies a near-identical definition of a *de facto* relationship to that used for the purposes of a family provision claim; see now Interpretation Act 1987, s. 21C (NSW), referenced in a note in Succession Act 2006, s. 57 (NSW)).

[80] 2010 Act, section 172(2)(a).

[81] 2010 Act, section 172(2)(b).

[82] 2010 Act, section 172(2)(c).

financial arrangements", expressed to include the joint purchase of property,[83] whether there are any dependent children[84] and whether one party cares for the children of the other,[85] and "the degree to which the adults present themselves to others as a couple".[86]

The Irish Law Reform Commission's Draft Cohabitants Bill contained the proviso that:

> No finding in respect of any of the matters mentioned in [the equivalent provision to section 172(2)], or in respect of any combination of them, is to be regarded as necessary for the purpose of determining that two adults are cohabitants; and in determining whether they are cohabitants, regard may be had to those matters, and to attach such weight to those matters, as is appropriate in the circumstances.[87]

Similar provisions are included, for example, in the equivalent New South Wales[88] and New Zealand[89] legislation. However, such a declaration has not been included in the eventual 2010 Act. This could have significant consequences when the Act comes to be interpreted by the judiciary if the absence of such a provision reinforces the notion that some factors must necessarily be present before the parties to a relationship are deemed to be "cohabitants".

The succession-related reforms in the Act do not apply even to all those who do satisfy its definition of "cohabitant". It therefore further defines the "qualified cohabitant" by setting down minimum durations for which he and his partner must have lived as a couple.[90] The relevant duration is two years where the cohabitants are both the parents of at least one dependent child,[91] and five years otherwise.[92] A child is considered dependent if he is under 18, under 23 and in full-time education, or "incapable of taking care of his or her own needs because of a mental or physical

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[83] 2010 Act, section 172(2)(d).

[84] 2010 Act, section 172(2)(e).

[85] 2010 Act, section 172(2)(f).

[86] 2010 Act, section 172(2)(g).

[87] Law Reform Commission of Ireland, "Draft Cohabitants Bill 2006", cl. 3(3).

[88] Property (Relationships) Act 1984, s. 4(3) (NSW); see also Interpretation Act 1987, s. 21C (NSW).

[89] Property (Relationships) Act 1976, s. 2D(3) (NZ).

[90] 2010 Act, section 172(5). According to section 206, an application for one of the orders mentioned in section 173 cannot be made unless the relationship ended (by death or otherwise) after the legislation commenced (in January 2011), but the length of the relationship is measured to include time before commencement. Section 206 does not expressly mention applications under section 194 for provision out of an estate, but section 173(7) does so in passing.

[91] 2010 Act, section 172(5)(a).

[92] 2010 Act, section 172(5)(b).

disability".[93] The final Act is therefore restrictively applied to couples without dependent children of their own. A three-year minimum duration was set down for such childless applicants in the original Bill,[94] mirroring the Law Reform Commission's proposal.[95] But the Justice Minister himself introduced the five-year amendment in the Committee stage, apparently following lobbying from the Irish Farmers Association.[96] While economic disadvantage is more likely to accrue where children are present and the redistribution of property *inter vivos* raises difficult issues in shorter relationships, five years is an excessive period before which a cohabitant can even be eligible to seek provision from an estate of which his deceased partner has no subsisting need.

The Act also takes a conservative approach to cohabiting parties with subsisting marriages to third parties. Whatever the duration of the relationship, if either party to the relationship was married to (but apparently not in a civil partnership with) someone else, neither cohabitant will be "qualified" unless each married party lived apart from his spouse for at least four in the previous five years.[97] This restriction was not proposed in the Law Reform Commission's Draft Bill.[98] It eventually[99] took the view that while the entitlements of a current or former spouse of a cohabitant should be taken into account and notice of the proceedings should be given to such a person, "an existing marriage should not be a bar to an application under the proposed redress model".[100]

Part of the conservatism in the Act can be explained by Irish divorce law itself, which sets down the same separation period before a divorce can be granted as for qualified cohabitants who are still married,[101] and by the constitutional protection afforded to marriage in Ireland.[102] It will already be apparent that anxiety about the potential to conflict with the Constitution permeates the Act's passing. In an example from a different context, on the advice of the Attorney General the Justice Minister opined that "to comply with the Constitution, it is necessary to differentiate the

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[93] 2010 Act, section 171.

[94] Civil Partnership Bill 2009 (as introduced), cl. 170(5)(b).

[95] Law Reform Commission of Ireland, "Draft Cohabitants Bill 2006", cl. 3(4)(a).

[96] Select Committee on Justice, Equality, Defence and Women's Rights, "Civil Partnership Bill 2009: Committee Stage (Resumed)", 27 May 2010 <http://debates.oireachtas.ie/JUS/2010/05/27/00003.asp>.

[97] 2010 Act, section 172(6).

[98] Law Reform Commission of Ireland, "Draft Cohabitants Bill 2006", cl. 3.

[99] Cf. Law Reform Commission of Ireland, "Consultation Paper on the Rights and Duties of Cohabitees" (L.R.C. C.P. 32, Dublin 2004), para. [1.24].

[100] Law Reform Commission of Ireland, "Report: Rights and Duties of Cohabitants", para. [2.22].

[101] Constitution of Ireland, Article 41.3.2. Civil partners are able to gain a decree of dissolution in less restricted circumstances: 2010 Act, section 110.

[102] Constitution of Ireland, Article 41.3.1.

recognition being accorded to same-sex couples who register their partnership with the special recognition accorded under the Constitution to persons of the opposite sex who marry".[103] Moreover, when writing about *de facto* relationships Walsh and Ryan were conscious that "too ready an equation between marriage and other alternative family forms may amount to an attack on marriage" for the purposes of the Constitution.[104] Many would question the extent to which it is necessary to withhold rights from those who do not marry in order to protect those who do,[105] but caution was inevitable against the backdrop of a written Constitution protecting heterosexual marriage.

In a departure from the Irish Law Reform Commission's proposal,[106] however, the minimum period prescribed by the 2010 Act does not have to end with death. This may be said to be justifiable on the basis of the *inter vivos* liability imposed by the Act. A qualified cohabitant can make an application under section 194 where the relationship ended up to two years before the death of his partner. Even if the relationship ended more than two years before the death, an application can still be made where the applicant was in receipt of periodical payments,[107] or an application for an *inter vivos* order[108] (or for a variation of such an order)[109] had previously been made and the proceedings were pending or any order was not executed by the time of death. That said, an application under section 194 is less likely to succeed where the relevant relationship ended before the death of one of the partners.[110] A claim is barred if the applicant has subsequently entered a marriage or civil partnership,[111] and even if he has not done so, as discussed above, he must satisfy the court that he "is financially dependent on the deceased"[112] according to a subsection employing rather questionable usage of the present tense.

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[103] Parliamentary Debates, Dáil Éirann, Vol. 697, No. 1 (Thursday 3 December 2009), p. 109 (Deputy Dermot Ahern).

[104] J. Walsh and F. Ryan, *The Rights of De Facto Couples* (Dublin 2006), p. 82.

[105] See, by analogy, *M* v. *Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 A.C. 91, at [114] per Baroness Hale.

[106] Law Reform Commission of Ireland, "Draft Cohabitants Bill 2006", cl. 11(1).

[107] 2010 Act, section 194(2)(a).

[108] 2010 Act, section 194(2)(b).

[109] 2010 Act, section 194(2)(c).

[110] See Mee, "Succession and the Civil Partnership Bill 2009", pp. 89-90 for criticism of the original Bill's apparent failure adequately to distinguish between claims where the relationship ended before death and where it subsisted at the point of death.

[111] 2010 Act, section 194(5)(b). The same bar applies to a foreign marriage or registered partnership recognised under section 5 of the Act.

[112] 2010 Act, section 194(5)(a).

2. England and Wales

English Law, of course, is untrammelled by constitutional protection of marriage. The 1975 Act adopts a similar definition of the relevant cohabitation relationship to that used in Ireland, albeit with an approach to the minimum duration that is both less nuanced and significantly less conservative than the 2010 Act. The 1975 Act allows claims by applicants who did not formalise the relationship but "during the whole of the period of two years ending immediately before the date when the deceased died" lived "in the same household as the deceased" as either his spouse[113] or his civil partner,[114] whether or not either party has a subsisting marriage or civil partnership to a third party[115] and without any special provision for couples with children. There is one respect in which the approach to definition in the English and Irish schemes could become closer in the future, since the English Law Commission recently suggested the removal of the marriage and civil partnership analogies and an alternative test of whether the deceased and the applicant were "living as a couple in a joint household".[116] But another of the recommendations in its 2009 Consultation Paper could increase the distance between the schemes, since it proposed the removal of the minimum duration requirement for cohabitants who were both the legal parents of one or more children, apparently without reference to the dependency of such children.[117]

The requirement that the relationship ends with death in the 1975 Act provides one respect in which the range of cohabitational relationships covered appears narrower than under the 2010 Act, although it has been seen in a previous section that restrictions are placed on claims by parties to Irish relationships that have ended before the other party dies. Moreover, significant flexibility has surrounded the interpretation of the two-year period ending with death in English cases where, for example, the now-deceased cohabitant spent a significant period in hospital[118] or the parties underwent a temporary separation before the death.[119]

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[113] 1975 Act, section 1(1A).

[114] 1975 Act, section 1(1B).

[115] The deceased putative cohabitant in *Churchill* v. *Roach* [2002] EWHC 3230 (Ch) had a subsisting marriage at the time of his death as a result of his estranged wife's opposition to divorce. This fact had no effect on the claimant putative cohabitant's eligibility under the 1975 Act (although she was deemed ineligible for other reasons).

[116] Law Commission of England & Wales, "Intestacy and Family Provision Claims on Death", para. [4.112].

[117] Ibid., at para. [4.123].

[118] See, e.g., *Re Watson (Deceased)* [1999] 1 F.L.R. 878, 883 per Neuberger J.

[119] See, e.g., *Gully* v. *Dix* [2004] EWCA Civ 139, [2004] 1 W.L.R. 1399 at [16] per Ward L.J.

An apparently more significant difference is that the 1975 Act does not elaborate upon its definition using a checklist, leaving judges to flesh it out when deciding cases. But in spite of the formal differences between the English and Irish legislation and the fact that the Irish Law Reform Commission did not explicitly cite any English family provision cases in its final report, English case law has deemed many of the factors listed in the 2010 Act to be important in determining whether or not a couple have lived in the same household as spouses or civil partners. For example, when considering what it meant for a couple to live in the same household in *Churchill* v. *Roach*, and although he was conscious of the dangers of seeking to define such a relationship conclusively, Judge Norris QC opined:

> It seems to me to have elements of permanence, to involve a consideration of the frequency and intimacy of contact, to contain an element of mutual support, to require some consideration of the degree of voluntary restraint upon personal freedom which each party undertakes, and to involve an element of community of resources.[120]

An analysis of the extent to which any given relationship exhibits these features is likely to be similar to one undertaken when applying the Irish Act. Some of the overlapping features, including whether the relationship is "intimate" and "committed", form part of the basic definition of cohabitants under the 2010 Act. Several of the section 172(2) factors, namely the basis and duration of the relationship and the parties' financial dependence and arrangements, are also entirely consistent with Judge Norris QC's conception of a household shared by a couple. Responsibilities towards children were not at issue in the particular case of *Churchill*, but they are also likely to be given significant weight in English Law.[121]

Despite these different methods of defining the relevant relationship, it therefore seems that the two pieces of legislation will cover similar sorts of association, although the differences in the relevant lengths of association are significant. If anything, the Irish *method* of definition is to be preferred (even if its conservatism as regards relationship length is not) since it prevents the court from having to make a value judgment about what a spousal relationship (or its civil partnership equivalent) should look like for the purposes of comparison. Indeed, the Irish Law Reform Commission deliberately sought to avoid an analogy with marriage when proposing the definition

[120] [2002] EWHC 3230 (Ch), [2004] 2 F.L.R. 989, 1004. This passage was cited with apparent approval in *Baynes* v. *Hedger* [2008] EWHC 1587 (Ch), [2008] 2 F.L.R. 1805 at [117] per Lewison J. and *Lindop* v. *Agus* [2009] EWHC 1795 (Ch), [2010] 1 F.L.R. 631 at [6] per HHJ Behrens.

[121] See, e.g., *Lindop* v. *Agus* [2009] EWHC 1795 (Ch), at [37] per HHJ Behrens.

of a relevant "cohabitant",[122] and its counterpart in England and Wales has since acknowledged the weakness of such an analogy.[123]

Inevitably, however, the model contained in the 2010 Act does present the difficult task of prioritising a diverse range of considerations, and the English Law Commission has expressed concern about the possibility that such a list could introduce a "box-ticking mentality".[124] Overall, the checklist approach does at least provide substantive and explicit guidance on the nature of the relationship that is the subject of regulation, and is advantageous provided a flexible approach is adopted by the judiciary and no factor is considered necessary or sufficient without strong justification. The next section of this article considers an aspect of the relevant relationship, namely the sexual element, in respect of which neither the new Irish legislation nor the English case law exhibits enough flexibility.

B. The Sexual Nature of Coupledom

1. Ireland

Unlike the Law Reform Commission's Draft Bill,[125] the list of factors in section 172(2) of the Irish 2010 Act makes no specific reference to the presence or absence of *sexual* intimacy as a pertinent consideration regarding eligibility. Nevertheless, section 172(3) of the Act states "[f]or the avoidance of doubt" that a relationship does not "cease" to qualify as one of cohabitation "merely because it is no longer sexual in nature". There is therefore a clear assumption that two "cohabitants" will have engaged in sexual activity at some point over the course of the relationship. That assumption is reinforced by the exclusion of those within the prohibited degrees of relationship from the definition of "cohabitant", and from the absence of any proviso that no one factor is to be regarded as necessary for the purposes of establishing the existence of a relevant cohabitation relationship. The Act also makes reference to the public nature of coupledom by including "the degree to which the adults present themselves to others as a couple" among the checklist factors.[126] While a publicly-acknowledged couple-based relationship is not an absolute requirement on the

[122] Law Reform Commission of Ireland, "Report: Rights and Duties of Cohabitants", paras. [2.04]-[2.05].

[123] See, e.g., Law Commission of England & Wales, "Intestacy and Family Provision Claims on Death", para. [4.49].

[124] Ibid., para. [4.55].

[125] Law Reform Commission of Ireland, "Draft Cohabitants Bill 2006", cl. 3(2)(c).

[126] 2010 Act, section 172(2)(g).

face of the legislation, it is open to the judiciary to render it so in the future in spite of the degree of flexibility inherent in the Act.

The Act's lack of application to non-conjugal relationships[127] and the prospect of courts examining the intimate details of the parties' sexual lives (or lack thereof)[128] were raised with concern during the Parliamentary debates, to no immediate avail. Even a member of the Dáil Éirann who raised the issue of non-conjugal relationships admitted that the Act may not have been "the most appropriate vehicle" through which to provide for them.[129] This is consistent with reaction to the "wrecking amendment" proposed as the English Civil Partnership Bill passed through the House of Lords, which would have opened up civil partnership registration to certain people within the prohibited degrees.[130] Nevertheless, as argued below,[131] such concerns are attenuated in the particular context of succession law. Moreover, the inclusion of informal relationships in an opt-out scheme should raise fewer questions of status than the provision of a marriage-like institution for same-sex couples.

Even following the 2010 Act, then, Irish law remains wedded to the marital or at least conjugal tie as a pre-requisite for judicial intervention in property matters where the parties are not parent and child, whether the intervention occurs while both parties are still alive or after one of them dies. This is in spite of the lack of priority given to testamentary freedom in Ireland in the first place as a result of the spouse's "legal right", the potential for parents, siblings and other blood relatives to inherit under the intestacy rules,[132] and the relief from inheritance tax granted to non-conjugal cohabitants in certain circumstances.[133]

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[127] See, e.g., Parliamentary Debates, Dáil Éirann, Vol. 697, No. 1 (Thursday 3 December 2009), p. 116 (Deputy Charles Flannagan).

[128] See, e.g., Parliamentary Debates, Dáil Éirann, Vol. 699, No. 3 (Thursday 21 January 2010), pp. 892-893 (Deputy Alan Shatter).

[129] Parliamentary Debates, Dáil Éirann, Vol. 697, No. 1 (Thursday 3 December 2009), 116 (Deputy Charles Flannagan).

[130] See L. Glennon, "Displacing the Conjugal Family in Legal Policy – A Progressive Move?" (2005) 17 Child & Family Law Quarterly 141 for an account.

[131] See section **III.C.2**.

[132] Succession Act 1965, Part VI.

[133] Capital Acquisitions Tax Consolidation Act 2003, s. 86. Cf. *Burden* v. *United Kingdom* (Application no. 13378/05) [2008] 2 F.L.R. 787 (Grand Chamber of the European Court of Human Rights), concerning the lack of similar provision in England & Wales.

2. England and Wales

English family provision law appears to make similar assumptions about sexual intimacy forming part of the essence of coupledom. While the prohibited degrees of relationship[134] are not specifically referenced in the definition of the relevant relationship, it is extremely unlikely that the judiciary would hold that two people within the prohibited degrees could be "living…as" spouses or civil partners.[135] In *Re Watson (Deceased)*,[136] it was held that an elderly couple who shared neither a bedroom nor a sexual relationship while they lived together did in fact satisfy the requirements of section 1(1A) of the 1975 Act. Neuberger J. noted that the couple had shared a common domestic life for over a decade. On the other hand, the judge was apparently influenced by the fact that they had enjoyed a sexual relationship at an earlier stage in their lives, albeit before they lived together, and that they had been prevented from setting up home together at that point due to obligations owed towards their respective parents. Neuberger J. also rejected the suggestion that it was sufficient to show that the deceased and the applicant had a relationship that could potentially be enjoyed by a husband and wife.[137]

Thus, while both the English case law and section 172(3) of the 2010 Act have made concessions to old age as regards the importance of sexual ties, it is unlikely that a couple who have never engaged in a sexual relationship will qualify under the cohabitation provisions of either the 2010 or the 1975 Acts.

Moreover, in line with the Irish legislation, emphasis was placed on the public nature of coupledom in the unfortunate English case of *Baynes* v. *Hedger*.[138] In that case, although he had already decided that the deceased and her putative same-sex cohabitant did not share a household in any event, Lewison J. also concluded that it was "not possible to establish that two persons have lived together as civil partners unless their relationship as a couple is an acknowledged one".[139] He therefore decided that the two elderly women had not lived together as such because their relationship as a couple was not openly acknowledged. This is unsurprising since, for example, their

[134] Marriage Act 1949, sch. 1; Civil Partnership Act 2004, sch. 1.

[135] 1975 Act, section 1(1A), section 1(1B).

[136] [1999] 1 F.L.R. 878 (Ch).

[137] [1999] 1 F.L.R. 878 (Ch), 883.

[138] [2008] EWHC 1587 (Ch). The appeal ([2009] EWCA Civ 374, [2009] 2 F.L.R. 767) did not address this aspect of the case.

[139] [2008] EWHC 1587 (Ch), at [150]. For criticism, see S. Choudhry and J. Herring, *European Human Rights and Family Law* (Oxford 2010), p. 424.

50-year "loving relationship"[140] began at a time when private and consensual sexual activity between two *males* remained a criminal offence.[141] Lewison J. drew his conclusion in spite of Neuberger J.'s opinion, expressed in *Re Watson*, to the effect that both "internal" and "external" elements are relevant when considering the nature of the relationship and, if anything, internal elements are more important.[142] The New South Wales Law Reform Commission specifically addressed the difficulty present in *Baynes* v. *Hedger* by recommending that the equivalent legislation there should require the court to consider "possible reasons for parties not holding themselves out publicly as a couple, arising from the social context in which their relationship existed" to address this difficulty.[143] At a time when the acceptance of same-sex relationships remains far from universal,[144] this pragmatic suggestion has much to commend it. As will become clear below, however, the law of family provision in New South Wales is much less focussed on conjugal coupledom in any event.[145]

It has been seen that English Law does attempt to recognise a form of dependence *per se*, without reference to a sexual relationship, using a specific category of applicant.[146] This is true even if the applicant must demonstrate *material* dependence on the deceased, and if interpretations of the relevant statutory provisions have on occasion suggested that the more an applicant has done for the deceased, the less likely it is that his claim will succeed.[147] This is because the "full valuable consideration" that the applicant must avoid providing for the maintenance has been interpreted as including benefits conferred otherwise than under a contract, such that the contributions of the claimant and the deceased must be balanced.[148] In *Plumley* v. *Bishop*, however, Butler-Sloss L.J. considered it important to avoid "fine balancing computations involving the value of normal exchanges of support in the domestic sense".[149] Building on this, the English Law Commission has recommended an approach based on factual dependency on the relationship itself rather than on a

[140] [2008] EWHC 1587 (Ch), at [35] per Lewison J.

[141] Cf. Sexual Offences Act 1967.

[142] [1999] 1 F.L.R. 878, 883.

[143] New South Wales Law Reform Commission, "Relationships" (Report No. 113, Sydney 2006), p. 49.

[144] See, e.g., P. Riddell, "Sizeable Minority remains Hostile to Same-Sex Relationships", *The Times*, 27 June 2009.

[145] See Section **III.C.1**.

[146] 1975 Act, section 1(1)(e), discussed in the text to notes **60-61**.

[147] R. Kerridge, *Parry and Kerridge: The Law of Succession* 12th edn. (London 2009), para. [8.79].

[148] See, e.g., *Re Beaumont (Deceased)* [1980] Ch. 444; *Re Wilkinson (Deceased)* [1978] Fam. 22. For criticism, see J. Dewar, "Cohabitees: Contributions and Consideration" [1982] Family Law 158.

[149] [1991] 1 W.L.R 582 (C.A.), 587. See also *Jelley* v. *Iliffe* [1981] Fam. 128 (C.A.); *Bouette* v. *Rose* [2000] Ch. 662 (C.A.); *Lindop v Agus* [2009] EWHC 1795 (Ch).

"flow of benefits" from the deceased to the applicant.[150] This suggestion should be welcomed, since it avoids the difficult question of which party is truly dependent on the other.[151] Moreover, where a provider of a domestic or other service has been promised testamentary provision by the deceased, the doctrine of proprietary estoppel may be able to provide a remedy irrespective of (and perhaps strengthened by)[152] the lack of a familial or conjugal relationship with the deceased.[153] But for the moment, albeit to a lesser extent than for its Irish equivalent, a sexual relationship remains a key feature of eligibility under the 1975 Act where the applicant was not related by blood or marriage/civil partnership[154] to the deceased.

C. The Case for Greater Inclusion

1. Lessons from Australia

The focus on *conjugal* couples (who are publically recognised as such) present in both English and Irish succession law differs significantly from the position in Australia.[155] A number of Australian states and territories have recognised non-conjugal relationships for various purposes, including the distribution of property *inter vivos* and on death, often on the basis of the presence of care and support.[156] For example, various rights were attached to "domestic relationships" in New South

[150] Law Commission of England & Wales, "Intestacy and Family Provision Claims on Death", para. [6.27].

[151] See, e.g., J. Herring, "Where are the Carers in Healthcare Law and Ethics?" (2007) 27 Legal Studies 51, 72-73.

[152] In *Lissimore* v. *Downing* [2003] EWHC B1 (Ch), [2003] 2 F.L.R. 308 Judge Norris QC opined that statements made by one conjugal cohabitant to another, such as one to the effect that "she did not need to worry her pretty little head about money", were "to be contrasted with statements made to unpaid or underpaid workers or business partners, encouraged to work on because they would be 'treated right', and for whom a commensurate reward could be objectively assessed" (at [18]).

[153] See, e.g., *Jennings* v. *Rice* [2002] EWCA Civ 159, [2003] 1 F.C.R. 501. Such a claim is also possible in Ireland: see, e.g., *A* v. *C* [2007] IEHC 120.

[154] It should be noted that a "child of the family", though not related by blood, must in a sense be related via a parent's marriage or civil partnership: 1975 Act, section 1(1)(d).

[155] See also, e.g., Adult Interdependent Relationships Act 2002 (Alberta); I. Curry-Sumner, *All's Well that Ends Registered? The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe* (Antwerp 2005), ch. 3, which provides a (now dated) account of Belgium's statutory cohabitation scheme open to family members.

[156] For a summary of the recognition of "domestic relationships" across the various states and territories, see B. Fehlberg and J. Behrens, *Australian Family Law: The Contemporary Context* (Melbourne 2008), pp. 138-141. However, their account is already out of date: see, e.g., the Relationships Amendment (Caring Relationships) Act 2009

Wales in 1999.[157] The concept of a "domestic relationship" includes not only a *de facto* (conjugal) relationship[158] but also a "close personal relationship".[159] The recognition of the "close personal relationship" sought to provide "an avenue for redress for people who suffer some detriment (and are not compensated for it) because of the care and support they provide to another, be it an elderly or ailing parent or friend or neighbour, for no fee or reward".[160] Such a relationship exists "between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care".[161] A party to a close personal relationship can override testamentary freedom by bringing a claim for discretionary provision out of the other party's estate under the Succession Act 2006[162] provided the relationship

(Victoria). For a comparative study of the position of the "informal carer" in private law, see B. Sloan, *Informal Carers and Private Law* (Oxford forthcoming 2012).

[157] Property (Relationships) Legislation Amendment Act 1999 (NSW).

[158] In New South Wales, a non-exhaustive checklist of factors is used to determine whether the applicant and the deceased "have a relationship as a couple living together". In line with the judicially developed principles in England and the statutory factors in Ireland, these factors include "whether a sexual relationship exists" and "the reputation and public aspects of the relationship": see now Interpretation Act 1987, s. 21C (NSW). A registration scheme for *de facto* relationships in New South Wales is provided by the Relationships Register Act 2010 (NSW). The Family Law Amendment (*De facto* Financial Matters and Other Measures) Act 2008 (NSW) federalises much of the law relating to the property and maintenance affairs of *de facto* (conjugal) couples. See, generally, H. Baker, "In Practice: New Cohabitation Law in Australia" [2009] Family Law 1201; *Kneen* v. *Crockford* [2011] FMCAfam 372, at [9] per Lindsay F.M. The Act does not purport to cover the categories of non-conjugal relationship discussed in this article: see G. Watts, "The *De facto* Relationships Legislation" (2009) 23 Australian Journal of Family Law 122, 135. Relationships ending by death are also excluded from its scope (Watts, "The *De facto* Relationships Legislation", p. 135).

[159] Property (Relationships) Act 1984, s. 5(1) (NSW).

[160] New South Wales Law Reform Commission, "Relationships", para. [3.21].

[161] Succession Act 2006, s. 3(3) (NSW) (as amended). A claim is precluded, however, if the domestic support or personal care is provided "for fee or reward" or "on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation)": Succession Act 2006, s. 3(4).

[162] The jurisdiction was originally contained in the Family Provision Act 1982 (NSW), but was transferred and amended by the Succession Amendment (Family Provision) Act 2008 (NSW). The Succession Act 2006 governs family provision against the estates of persons who have died since 1 March 2009: Succession Act 2006, sch. 1, cl. 11(2); *Smith* v. *Daniels* [2010] NSWSC 604 at [36] per Slattery J.

subsisted at the time of death[163] and "having regard to all the circumstances of the case (whether past or present) there are factors which warrant the making of the application".[164]

The requirement of subsistence at the time of death for a "close personal relationship" is more restrictive than the Irish criteria for a "qualifying cohabitant" and the "living together" requirement imposes an additional hurdle as compared to the English "dependants" category (albeit that the English category is restrictive in other respects).[165] But the New South Wales Court of Appeal has suggested that the common residence requirement might be "somewhat more attenuated" for the purposes of a close personal relationship than for a *de facto* relationship,[166] and it is clear that a wide range of relationships are included so long as the amount of support and care provided is significant. As McColl J.A. said in the Court of Appeal case of *Hayes* v. *Marquis*, "if two adults lived together fulltime and one provided domestic support and personal care to the other only once or twice a year, it would be difficult to say that a close personal relationship had been established".[167]

Taking an alternative approach, albeit one affecting the intestacy rules and not family provision,[168] Tasmania has introduced a registration scheme for "caring relationships".[169] Some consequences can flow from such relationships even if they are not registered.[170] While Graycar and Millbank point to the apparent lack of use of the registration scheme and claim that there is "no empirical evidence to demonstrate an unmet legal need for any broadly-based recognition of non-couple relationships",[171] they admit that that lack of public information may be a factor.[172] Inevitably, many of the problems with opt-in schemes for unmarried cohabitants are likely to apply

[163] Succession Act 2006, s. 57(1)(f) (NSW).

[164] Succession Act 2006, s. 59(1)(b) (NSW).

[165] See, e.g., *Richardson v Kidd* [2002] NSWSC 306. The Law Reform Commission has recommended its removal: New South Wales Law Reform Commission, "Relationships", para. [3.23].

[166] *Hayes* v. *Marquis* [2008] NSWCA 10, at [79] per McColl J.A.

[167] [2008] NSWCA 10, at [84].

[168] Administration and Probate Act 1935, s. 44 (Tasmania); Testator's Family Maintenance Act 1912, s. 3A (Tasmania).

[169] Relationships Act 2003, s. 11 (Tasmania). For a general discussion of relationship registration schemes in Australia, see O. Rundle, "An Examination of Relationship Registration Schemes in Australia" (2011) 25 Australian Journal of Family Law 121.

[170] R. Graycar and J. Millbank, "From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition" (2007) 24 Washington University Journal of Law and Policy 121, 149.

[171] Ibid., at p. 153.

[172] Ibid., at p. 150.

in this context,[173] and it may be unreasonable to expect a significant number of people formally to register "caring relationships" for cultural reasons.[174]

Although the New South Wales Law Reform Commission similarly reported that few claims have been brought by people in "close personal relationships" under the non-registration scheme there and that claims tend to be presented as falling within another category of applicant instead,[175] that is not always true. In *Hughes* v. *Charlton*, for example, "the evidence point[ed] to the [applicant] being a housekeeper for the deceased", and the applicant was therefore eligible for family provision only as a result of the "close personal relationship" category.[176]

2. Policy Arguments

The Australian models considered above demonstrate that it is at least possible to allow succession claims by parties to relationships primarily characterised by domestic support rather than blood, marital, or conjugal ties. This section attempts to address some of the policy arguments against the inclusion of such applicants (or applicants whose lives are otherwise intertwined except by virtue of a sexual relationship) within or alongside the couple-based provisions of the 1975 and 2010 Acts.

It has been said that "[t]here is very little research in Ireland or elsewhere on non-conjugal relationships".[177] But any uncertainty surrounding the level of need for recognition of non-conjugal relationships should not be allowed to detract from the problems of principle with focusing on sexual intimacy (whether or not it produces children) as a necessary factor triggering inclusion, as distinct from a factor affecting the success of a given claim. Indeed, several scholars have questioned the relevance of sexual intimacy to relationship recognition.[178] For example, Wong has

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[173] See, e.g., Law Commission of England & Wales, "Cohabitation: The Financial Consequences of Relationship Breakdown", paras. [2.82]-[2.94]; J.M. Scherpe, 'The Legal Status of Cohabitants – Requirements for Legal Recognition' in K. Boele-Woelki (ed.), *Common Core and Better Law in European Family Law*, (Antwerp 2005), pp. 283-294

[174] That said, the Burden sisters, who unsuccessfully challenged the exclusivity of the UK's inheritance tax exemption for spouses and civil partners, told the Grand Chamber that they would have become civil partners had the choice been open to them: *Burden* v. *UK* (Application no. 13378/05) [2008] 2 F.L.R. 787, at [53].

[175] New South Wales Law Reform Commission, "Relationships", para. [3.7].

[176] [2008] NSWSC 467, at [47] per Macready As.J.

[177] Working Group on Domestic Partnership, "Options Paper" (Dublin 2006), para. [9.01.5].

[178] Aside from those cited elsewhere, see, e.g., N. Barker, "Sex and the Civil Partnership Act: The Future of (Non) Conjugality?" (2006) 14 Feminist Legal Studies 241; J. Herring, "Sexless Family Law" (2010) 11 Lex Familiae, Revista Portugesa de Direito da Familia 3. Cf. S. Cretney, "Comment – Sex is Important" [2004] Family Law 777 and

argued that there is "no logical reason to limit access to the law to only couple-based relationships" in a conjugal sense.[179] Baroness Deech has emphasised that "sexual activity itself does not cause dependency",[180] and Choudhry and Herring note that two people who live together and have a sexual relationship do not *per se* "provide any particular benefit to the rest of society".[181]

By contrast, those who provide domestic and other support to each other, without necessarily being in a conjugal relationship, do provide a benefit to society and each other.[182] Indeed, Fineman considers society to be dependent on the "caretaking labor"[183] of "derivative dependants", i.e. those who assume or are assigned responsibility for the care of someone who is inevitably dependent on others.[184] She criticises the fact that most of the costs of care are borne by the people providing the care themselves rather than being distributed amongst the true beneficiaries of care, whether institutional or individual. Fineman's writings have been said to require a recognition of "desert" in allocating resources.[185] Citing Fineman's work, Choudhry and Herring discuss an "alternative vision" based on a "carer-dependant" paradigm, albeit admitting that it would produce "a very different kind of family law".[186] Whether the relevant relationship is properly characterised as "dependent" or "interdependent",[187] and whatever precise factors may justify its recognition or non-recognition, many legal systems reflect a reluctance to move "beyond conjugality"[188] as far as such recognition is concerned.[189] Fineman has warned of the dangers of

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N. Bala and R.J. Bromwich, "Context and inclusivity in Canada's evolving definition of the family" [2002] International Journal of Law, Policy and the Family 145.

[179] S. Wong, "Caring and Sharing: Interdependence as a Basis for Property Redistribution" in A. Bottomley and S. Wong (eds.), *Changing Contours of Domestic Life, Family and Law: Caring and Sharing* (Oxford 2009), p. 54.

[180] R. Deech, "Sisters Sisters – and Other Family Members" [2010] Family Law 375, p. 377.

[181] Choudhry and Herring, *European Human Rights and Family Law*, p. 426.

[182] See, eg, B. Sloan, "The Benefits of Conjugality and the Burdens of Consanguinity" [2008] C.L.J. 484.

[183] M.A. Fineman, *The Autonomy Myth: A Theory of Dependency* (New Press, New York, 2004), p. xvii.

[184] Fineman, *The Autonomy Myth: A Theory of Dependency*, pp. 35-36.

[185] M. Eichner, "Dependency and the Liberal Polity: on Martha Fineman's *The Autonomy Myth*" (2005) 93 California Law Review 1285, 1291.

[186] Choudhury and Herring, *European Human Rights and Family Law*, p. 426.

[187] See, e.g., J. Herring, "Where are the Carers in Healthcare Law and Ethics?", pp. 72-73 on the difficulty of distinguishing the carer and the care recipient.

[188] This phrase is taken from Law Commission of Canada, "Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships" (2001). See Glennon, "Displacing the Conjugal Family in Legal Policy – A Progressive Move?", pp. 152-156 for discussion and criticism of that report.

[189] See, e.g., A. Diduck, "Shifting Familiarity" (2005) 58 Current Legal Problems 235, 238.

"duplicating the privileged form" of marriage even when recognising non-marital relationships,[190] although it is worth noting that in English Law a sexual relationship is not an absolute requirement of a valid marriage and is not a requirement of a valid civil partnership at all.[191] This only strengthens the argument in favour of abandoning sexual ties as a necessary feature of a recognised relationship outside of marriage.

Of course, it is important to consider public expectations with regard to which sorts of relationship are likely to be the subject of regulation and which are not,[192] even if the intention of the deceased person is not conclusive in the context of succession and family provision law.[193] Consideration of the deceased's expectations about the range of claims on his estate may go some way towards justifying an invasive inquiry into the sexual habits of a couple. Peart has criticised the uncertainty surrounding the parameters of the default and distinctly fixed property division scheme applied both *inter vivos* and on death to unmarried couples in New Zealand,[194] where a sexual relationship is neither necessary nor sufficient to bring a partner within the relevant definition. In *Scragg* v. *Scott*,[195] for example, it was confirmed that two people who never lived together or had a sexual relationship but regarded themselves as a "close and devoted couple"[196] could be within the property division legislation.[197] Nevertheless, definitional difficulties are an inevitable feature of schemes regulating informal relationships and should not preclude attempts at reform. Moreover, the fact that *succession* claims for non-conjugal couples would in all likelihood be subject to more discretion in England and Wales or Ireland than in New Zealand itself reduces the potential injustice caused by uncertainty in the eligibility criteria. The law should be more

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[190] M.A. Fineman, *The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies* (New York 1995), p. 143.

[191] A lack of consummation renders a marriage voidable at worst: Matrimonial Causes Act 1973, s. 12(a)-(b). Non-consummation is not a ground of nullity for civil partners: Civil Partnership Act 2004, s. 50.

[192] G. Douglas *et al*, "Inheritance and the Family: Public Attitudes" [2010] Family Law 1308 report a focus on those with blood or conjugal ties to the deceased within public views on succession law.

[193] See Kerridge, *Parry and Kerridge: The Law of Succession*, para. [8-31] for discussion. In the Irish Supreme Court case of *EB* v. *SS*, for example, Keane J. opined that "the clearly expressed wish of the testatrix in this case to treat all her children equally, although not a decisive factor, is not entirely irrelevant" ([1998] 2 I.L.R.M. 141, at [29]).

[194] N. Peart, "*De Facto* Relationships (or Maybe Not) in New Zealand" [2008] International Family Law 130.

[195] [2006] NZFLR 1076.

[196] This was said of the couple in *Horsfield v Giltrap* [2001] NZCA 179, at [7] per Blanchard J.

[197] *Scragg v Scott* [2006] N.Z.F.L.R. 1076, at [37] (judgment of the court), applying the Property (Relationships) Act 1976 (NZ) as amended. The same definition of "*de facto* partner" is used for the purposes of family provision claims from an estate: Family Protection Act 1955, s. 2(1) (NZ).

interested in whether the parties to a relationship have become economically interdependent or whether there is some similar factor (such as the provision of care and domestic support) justifying redistribution, and less interested in the nature of the parties' sex lives.

In this context, it is significant that a wider range of applicants can apply for provision on death under the English 1975 Act than during the lives of the parties. Indeed, in spite of the political difficulties in securing statutory *inter vivos* redistribution of unmarried couples' property,[198] the reforms accommodating such couples within the 1975 Act were described as in Parliament a "useful and uncontroversial measure of law reform".[199] This discrepancy is justifiable for a number of reasons, notwithstanding the fact that the absence of a comprehensive[200] statutory remedy in England and Wales facilitating redistribution of conjugal couples' property when relationships end other than by death (even on a subtler basis) is illogical.[201] Although testamentary freedom is an important principle in the common law world, it is already diluted in Ireland and Borkowski has noted that English testators were substantially unencumbered for only about a century.[202] It is clear as a matter of logic that a deceased person no longer has any substantial need of his property, and this contrasts sharply with the situation where property is divided *inter vivos*. Peart has acknowledged that "the preservation and security of the family" is one of the purposes of succession law,[203] and it could be said that a broad understanding of "family" should be permitted for this purpose.[204] A testamentary claim need not require the "breakdown" of a relationship, with all its conjugal connotations, and such a claim is more likely to reflect the intention of the parries than where a relationship *has* broken down *inter vivos* and a remedy is sought.[205] Eekelaar is also more willing to contemplate a succession claim than an *inter vivos* one in the context of an altruistic

[198] See, e.g., Ministry of Justice, "Response to Paper on Cohabitation and Relationship Breakdown" (6 March 2008) <http://www.justice.gov.uk/news/announcement060308a.htm>.

[199] HC Deb. vol. 265, col 199 (31 October 1995).

[200] Cf., e.g., Children Act 1989, sch. 1, using which a court can make provision for the children of such couples.

[201] See, e.g., Law Commission of England & Wales, 'Cohabitation: The Financial Consequences of Relationship Breakdown. A Consultation Paper' (Consultation Paper 179, London 2006), paras. [4.56]-[4.58].

[202] A. Borkowski, *Textbook on Succession*, 2nd ed., (Oxford 2002), p. 258.

[203] N. Peart, "The Direction of the Family Protection Act 1955" [1994] New Zealand Recent Law Review 193, 210.

[204] Cf. N. Peart, "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 Common Law World Review 356.

[205] See, e.g., R. Probert, "Cohabitation in Twentieth Century England and Wales: Law and Policy" (2004) 26 Law & Policy 13, 28.

friendship-based relationship,[206] and Mee has accepted that for the purposes of recognising non-marital relationships it is "certainly arguable that the same qualifying criteria should not apply across all areas of the law".[207]

The distinction between *inter vivos* and succession claims is borne out in practice in New South Wales. Although *inter vivos* claims are available to people in "close personal relationships",[208] the Law Reform Commission has said that few such claims are brought.[209] By contrast, a significant number of cases involving testamentary claims by parties to "close personal relationships" have been reported.[210]

An Options Paper commissioned by the Irish Department of Justice, which eventually led to the introduction of the Civil Partnership Bill (later renamed), concluded that more research was necessary before proposals encompassing non-conjugal relationships could be made.[211] The Paper cited the Irish Law Reform Commission's conclusion that "it is not possible to devise a single scheme for the determination of legal rights and duties which can operate fairly and evenly across a spectrum of relationships ranging from on the one hand 'marriage like' relationships to familial or platonic relationships on the other".[212] This is similar to the English Law Commission's conclusion, made during its "Sharing Homes" project, that "[i]t is not possible…to devise a statutory scheme for the ascertainment and quantification of beneficial interests in the shared home which can operate fairly and evenly across the diversity of domestic circumstances which are now

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[206] J. Eekelaar, *Family Law and Personal Life* (Oxford 2006), p. 48; see also pp. 49-51 on "friendship plus", where Eekelaar acknowledges that that any compensatory obligation owed between those who share a common life plan should not require a sexual relationship.

[207] J. Mee, "A Critique of the Law Reform Commission's Consultation Paper on the Rights and Duties of Cohabitees" [2004] Irish Jurist 74, 80. It is unclear whether he would regard a family provision claim primarily as a right that "accrue[s] on the termination of the relationship between the parties", for which more restrictive criteria would be appropriate in his view, or a right "of a more facilitative nature", which he is more content to grant to non-conjugal couples.

[208] Property (Relationships) Act, 1984, s. 5(1) (NSW).

[209] New South Wales Law Reform Commission, "Relationships", para. [3.22].

[210] See, e.g., *Jurd* v. *Public Trustee* [2001] NSWSC 632; *Hughes* v. *Charlton* [2008] NSWSC 467; *Woodland* v. *Rodriguez* [2004] NSWSC 1167; *Richardson* v. *Kidd* [2002] NSWSC 306; *Bogan* v. *Macorig* [2004] NSWSC 993.

[211] Working Group on Domestic Partnership, "Options Paper" (Dublin 2006), ch. 9. In a reference to the name of the Working Group's Chairperson, the paper is often referred to as the "Colley Report".

[212] Law Reform Commission of Ireland, "Consultation Paper on the Rights and Duties of Cohabitees", para. [1.07]. See also Law Reform Commission of Ireland, "Report: Rights and Duties of Cohabitants", paras. [1.02]-[1.04]. Mee was not fully convinced by this stance: see Mee, "A Critique of the Law Reform Commission's Consultation Paper on the Rights and Duties of Cohabitees", pp. 80-82.

to be encountered",[213] which was itself cited by the Law Reform Commission.[214] Again, however, this attitude need not apply with regard to succession law, and factual dependants had been eligible family provision applicants for decades in England and Wales when the Law Commission there drew its conclusion. Conversely, the fact that the both the Irish Law Reform Commission and the final 2010 Act rejected a threshold of economic dependency for the purposes of claims in relationships ending with death, as opposed to *inter vivos* claims, demonstrates an acknowledgement that testamentary claims involve distinctive considerations and throws into doubt the need for a "single scheme".

Undoubtedly, a large number of relationships where provision out of an estate is justified will satisfy the eligibility criteria contained in the 2010 Act as well as the 1975 Act. But the assumptions about the importance of sexual intimacy made even by the succession aspects of the 2010 Act as well as (to a lesser extent) by the English 1975 Act deserve to be challenged.

IV. CONCLUSION

It took 35 years for Ireland to follow England and Wales in allowing family provision claims by applicants other than spouses and children of the deceased. But although the Irish 2010 Act and the English 1975 Act clearly take different approaches when defining a relevant cohabiting couple for the purposes of their succession provisions, the significantly varying duration requirements and provisions governing those in subsisting marriages may well turn out to be the most crucial causes of discrepancy as regards eligibility between the two Acts. While it will be difficult definitively to analyse the definition of a "qualified" cohabitant contained in the new Irish legislation until a significant number of judgments are issued on the point, it seems that the 2010 Act in substance reflects much of what has been said in the English case law concerning cohabitants bringing a claim against their deceased partners' estates.

Of course, the fact that the two pieces of legislation produce similar results does not mean that those results are correct. This article has suggested that both place a significant and undue amount of weight on the presence or absence of sexual intimacy, even if the English Act counterbalances this to some extent with a "dependants" category that could soon be the subject of

[213] Law Commission of England & Wales, "Sharing Homes: A Discussion Paper" (Law Com. No. 278, London 2002), p. 85.

[214] Law Reform Commission of Ireland, "Report: Rights and Duties of Cohabitants", para. [1.02].

further reform. Whatever the uncertainties and empirical background, there are other relationships worthy of protection via succession law whose parties are less likely to fall within the relevant definitions of "cohabitant" under either Act, and it is not clear why a sexual relationship should be a pre-requisite for eligibility (even if it ultimately becomes relevant when a given claim is evaluated). Both England and Wales and Ireland should follow the lead taken by the Australian states and territories in recognising a wider range of non-conjugal relationships in their family provision laws. It is particularly disappointing that Ireland failed to do so given that reforms to its succession law were undertaken so recently. Until it facilitates a wider range of family provision claims, the Irish state could be accused of taking an unhealthily strong interest in the sex lives (or lack thereof) of its citizens via the succession provisions of the 2010 Act.