Trusts of the Family Home, the 'Familialisation' of Property Law and the Potential for Judicial Development

GONELLA, SOPHIA,PATRICIA,FRANCESCA

Durham University
Durham Law School

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Sophia Patricia Francesca Gonella (LLB)(Dunelm)

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Abstract

This thesis seeks to critically evaluate the current law governing trusts of the family home and its application to ownership disputes between former cohabitants. This exploration will be examined through the theoretical lens of 'familialisation', a term coined by Dewar to describe the modification of property law principles to respond to the familial dimension of ownership disputes.[1] *To support this thesis in analysing the contemporary issues visible in the modern trusts framework, the thesis will assess the historical development of familialisation. It will draw upon recent academic scholarship to evaluate contemporary criticism of the process of 'familialisation' of property law and the modern common intention constructive trust. A central debate intertwined within this area is the relationship between rules and discretion, which has been utilised to characterise and rationalise the tension between property law and family-centric concerns. This thesis will therefore explore how the judiciary could continue to shape this familialisation process so as to protect economically vulnerable cohabiting parties. It will be argued that in order to ascertain the ideal balance between legal certainty, ensured through rules, and flexibility, offered by discretion, further structuring of judicial discretion should be undertaken. This would involve a re-evaluation of the principles considered when determining the acquisition and quantification of a beneficial interest of a party in the family home, providing guidelines for the judiciary whilst retaining a degree of latitude to accommodate the diverse needs of modern families owning and sharing property. Ultimately, this thesis will conclude that further judicial clarification is necessary to address the current deficiencies of trusts of the family home and simultaneously adapt the framework to better respond to the nature of home-sharing.*

[1] J Dewar, 'Land, Law, and the Family Home' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998) 327, 328.

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INTRODUCTION

Domestic relationships play a central role in the choices, circumstances and consequences involved in property ownership. Over recent years, cohabitation has become a widely accepted and common choice for couples.[2] This affects the level of interdependency between the cohabiting parties, although there is no statutory legal protection for their assets. Whilst married couples and civil partners can access financial relief through the Matrimonial Causes Act 1973, which offers legislative guidance on the division of assets and property between the separating parties,[3] cohabiting couples have no statutory recourse. Instead, trusts are utilised to determine their property interests. This thesis will analyse trusts as a mechanism of financial protection and will therefore not address proprietary estopped. These trusts enable the parties to acquire a beneficial interest in the property that they share, even if the property is vested in the name of one sole legal owner. This can occur through either a resulting trust, or the common intention constructive trust, which is now the preferred method.[4] In this context, these trusts are referred to as trusts of the family home. This thesis will explore how the modern trusts framework functions to effectuate the severance of property amongst separating cohabitants.

The gradual development of trusts to determine property ownership between couples evolved from marital relationships into extra-marital relationships. Over time there has therefore been wider acknowledgement of this 'relationship equivalence'[5] and the flexibility of the trust has enabled it to adapt to modern family needs. This process of moulding property principles to accommodate domestic needs is known as 'familialisation'. The process of familialisation has developed in a piecemeal fashion over time. Whilst familialisation can be seen in statutes, it has largely been judicially developed utilising discretion. This necessitates the question of

[2] Rebecca Probert, 'Common law marriage: myths and misunderstandings' (2008) 20 *CFLQ* 1.
[3] Matrimonial Causes Act 1973, ss23-25.
[4] *Jones v Kernott* [2011] UKSC 53, [2012] 1 FLR 45; [2010] 1 All ER 947; [2010] 3 All ER 423 (CA); [2009] EWHC 1713.
[5] Margaret Briggs, 'Rethinking Relationships' (2015) 46(3) *Victoria University of Wellington Law Review* 649, 663.

whether this is an appropriate and effective method for developing the relevant legal principles, given the fine equilibrium that must be maintained between clear principles and discretion.

Overview of the Current Trusts of the Family Home Framework

The modern trusts of the family home framework is of particular significance to cohabiting couples in resolving their property disputes and it is this context that this thesis will explore. These disputes often arise either upon relationship breakdown, when one cohabitant dies, or a third-party creditor or mortgagee seeks repossession in the event of mortgage default. English law has regard to the principle of separate property,[6] rather than family or community property, which is recognised in other countries.[7] Legislative intervention has been enacted to support married couples and civil partners divide their property and accordingly, the law has been 'singling out the family home for special treatment'.[8] In parallel, trusts of the family home have generally been effected to resolve ownership disputes between cohabiting couples and the history of this will be explored within the first chapter. When there is no express trust of land effected by the cohabiting parties,[9] implied trusts are utilised to qualify these general rules, insisting upon compliance with formalities. Courts may consider a resulting trust or a constructive trust. A resulting trust arises upon a direct payment of money towards the purchase price.[10] However, the more common and preferred trust of the family home is the constructive trust.

If the parties have joint legal ownership, the starting point is that equity follows the law and so joint legal ownership indicates a beneficial joint tenancy. However, this does not mean that the shares will be quantified proportionately to the parties' respective contributions. Since *Stack v Dowden*[11] and *Jones v Kernott*,[12] the court has considered factors that may rebut the

[6] Mary Shanley, *Feminism, Marriage and the Law in Victorian England* (Princeton University Press 1989).
[7] MA Glendon, *The Transformation of Family Law: State, Law and the Family in the United States and Western Europe* (University of Chicago Press 1989) 116.
[8] Dewar (n 1) 329.
[9] Law of Property Act 1925, s53(1)(b).
[10] *Dyer v Dyer* (1788) 2 Cox Eq Cas 92.
[11] *Stack v Dowden* [2007] UKHL 17.
[12] *Jones v Kernott* (n 4).

presumption of beneficial joint tenancy. These factors relevant to the quantification of beneficial interest have been criticised for their obscurity, with scholars such as Mee contending that the cases occasioned a 'blizzard' in the 'snow globe'.[13] Thus, whilst judicial recognition that 'context is everything'[14] offers flexibility, this has made it difficult to articulate clear principles. Consequently, the problematic relationship between flexibility and uncertainty, stemming from the equilibrium between discretion and rules, generates heightened debate within this field.

In sole ownership cases, the starting point is the assumption that the sole legal owner is the sole beneficial owner. To displace this presumption, the claimant must establish acquisition of a beneficial interest through evidencing a common intention between the parties to share the property deduced 'objectively from their conduct'.[15] Some agreements are evidenced through express discussions whilst others are inferred. In addition, the claimant must demonstrate detrimental reliance. Much of the evidence supporting detrimental reliance will consist of financial contributions and occasionally substantial non-financial contributions.[16] However, without evidence of discussions between the parties, the court can consider intentions inferred from conduct. Following this, quantification is the process through which the share of beneficial interest is decided. Here, the court is empowered to explore the parties' express, inferred and imputed intentions in relation to the property.

This process of acquiring and quantifying beneficial interest is multi-faceted, consisting of a plethora of different factors and contexts that are considered. As a result, this framework attracts several criticisms, and this thesis highlights two significant reasons. The first concerns its uncertainty and inconsistency owing to the discretion utilised by judges. The second concerns an apparent 'relationship blindness' of its principles[17] in failing to acknowledge the value of domestic contributions in acquiring property. These criticisms will be explored and evaluated throughout this thesis.

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[13] John Mee, 'Jones v Kernott: Inferring and Imputing in Essex' (2012) 76(2) *CPL* 167.
[14] *Stack v Dowden* (n 11) [69] (Baroness Hale).
[15] *Jones v Kernott* (n 4).
[16] *Cox v Jones* [2004] EWHC 1486 (Ch).
[17] A Bottomley, 'Women and Trust(s): Portraying the Family in the Gallery of Law' in S Bright and J Dewar, *Land Law: Themes and Perspectives* (OUP 1998).

Issues with the Current Framework

Having been shaped by the courts, the modern trusts framework receives criticism for failing to achieve the balance between rules and discretion. Judicial discretion, which has been central to the familialisation of property law, is a controversial feature as it has the ability to generate uncertainty. Rules and discretion have been polarised so that many regard them as opposing entities, which spurs academic discourse over the ideal equilibrium between the two. Judicial discretion has been perceived to be problematic for exposing the trusts framework to the values and sensitivities of the judges, particularly if expansive 'wide' discretion is adopted. Consequently, whilst discretion enables the law to provide 'tailor made solutions'[18] to family property disputes, such expansive discretion can prevent clear, definitive precedents from being made.[19] On the other hand, the framework cannot avoid discretion and the flexibility that it affords. Whilst a desire to preserve certainty within the law is important, in trusts of the family home disputes, the adaptability to individual needs is vital. This derives from the emotional complexity and gender dynamics associated with domestic relationships which influence the choices surrounding property ownership. A key aspect of this involves the impact that such property decisions have upon women, who have traditionally undertaken homemaking and caregiving tasks, which can prevent them from earning and contributing an equal amount to the property.[20] Although women have gained more rights and opportunities over time, the effects of these patriarchal standards can still be seen within society and there is still a need to acknowledge the detrimental impact that this has on female property ownership. Discretion enables the trusts framework to accommodate these needs. For this reason, it is important.

Cumulatively, these observations have generated the debate surrounding familialisation and whether it is an appropriate and coherent process to apply to the plethora of modern property ownership disputes. Central to this concern is the piecemeal development of familialisation,

[18] Lady Hale, 'What is a 21st Century Family?' (International Centre for Family Law, Policy and Practice, 1 July 2019) 11 <https://www.supremecourt.uk/docs/speech-190701.pdf> accessed 28 August 2021.
[19] Stephen Cretney, 'Trusting the Judges: Money After Divorce' (1999) 52 *Current Legal Problems* 286, 310.
[20] S Thompson, 'Feminist Relational Contract Theory: A New Model for Family Property Agreements' (2018) 45 *JLS* 617.

which will be explored throughout this thesis. Originating as a process to support married couples, familialisation acquired a new purpose in protecting cohabitants, developing incrementally and consequently becoming a fragmented process. This courts difficulty in grappling with the competing tensions associated with rule-based predictability and discretion-based flexibility throughout has created a tumultuous ebb and flow process. Since *Stack* and *Jones*, which attempted to elucidate the trusts framework and provide guidelines for the judiciary, this academic attention has largely dissipated despite the remaining uncertainty. For this reason, this thesis seeks to explore the criticisms of the modern trusts framework today through examining its history and fragmented development.

Research Questions

This thesis comprises of three research questions which intend to inform the recommendations for the future of familialisation. First, it will assess the judicial development of the trusts of the family home framework, analysing this through the lens of the familialisation process. Identifying the underlying principles behind this judicial intervention will shape this thesis' evaluation of how the law could continue to develop. It will consider the history of property law accommodating family needs, extending from marital to extra-marital relationships, and examine the reasons behind this evolution. This will support this thesis in gaining a deeper understanding of the original motivation and methods behind the familialisation of property law, laying the foundations for a thorough analysis of the modern trusts framework in later chapters. The second research inquiry will evaluate the contemporary criticisms of the familialisation of property law. In analysing judicial creativity in the context of trusts of the family home, judicial discretion will be highlighted as a key feature of familialisation and its associated criticisms will be scrutinised. This evaluation will seek to identify the chief concerns surrounding familialisation so that the final chapter may suggest potential routes for future innovation and judicial clarification of the framework. Accordingly, the final research question will examine how future development of judicial methodology could influence the framework to further accommodate the relationship dynamics that inform property ownership and address the criticisms identified.

Methodology

This thesis' assessment of the trusts framework will be conducted through a doctrinal methodology, incorporating historical and some comparative law perspectives into its analysis. In supporting a family-centric approach, which would encourage judicial cognisance of the intertwining of relationship dynamics within property ownership, this thesis will attribute due weight to familial interests in the search for the most appropriate method for developing the trusts framework.

The first chapter is a historical exploration into the evolution of trust principles in the context of interpersonal relationships. This will assist in uncovering why the judiciary have intervened in the past to develop property law and trusts and apply them in ownership disputes between couples. The principle of separation of property and the desire to financially protect economically vulnerable married women will be identified as a key factor in spurring this early judicial intervention. This key period, spanning from the 1948 case of *Re Roger's Question*[21] to the later cases of *Pettitt v Pettitt*[22] and *Gissing v Gissing*,[23] is referenced as the 'matrimonial property period'. Throughout this era, the judiciary demonstrated a recognition of the domestic context of property, reflecting a shift towards discretion-based property division. This precipitated a more progressive approach over time. Once married couples were granted a comprehensive regime for the division of assets upon divorce,[24] the courts gradually acknowledged property ownership disputes between those in cohabiting relationships. Following an evaluation of case law and academic commentary, the chapter will argue that the arrogation of judicial discretion has largely influenced the development of the law in a manner that better protects cohabitants.[25]

Chapter Two will explore the continued development of the trusts framework as well as the contemporary uses of judicial discretion when applying current trusts to disputes concerning

[21] *Re Roger's Question* [1948] 1 All ER 328.
[22] *Pettitt v Pettitt* [1970] AC 777.
[23] *Gissing v Gissing* [1971] A.C. 866.
[24] *GW v RW (Financial Provision: Departure From Equality)* [2003] EWHC 611 (Fam).
[25] G Battersby, 'Ownership of the family home: Stack v Dowden in the House of Lords' (2009) 20(2) *CFLQ* 255.

cohabitants. It will examine the cases that sought to modify the principles laid down in *Pettitt* and *Gissing* before establishing the high acquisition threshold in *Lloyds Bank v Rosset*[26] that informed the development of the modern trusts framework and spurred the divergence of acquisition and quantum principles exemplified in *Stack v Dowden.*[27] Throughout this period, the judiciary appeared to recognise the relationship dynamics behind property ownership that applied to both marital and extra-marital agreements. With few unmarried couples entering into express agreements, the courts have recognised a modern need to protect economically vulnerable cohabitants. These individuals are less likely to engage in contractual arrangements[28] and may also believe in the 'common law marriage myth', which is the erroneous belief that simply living together generates entitlements.[29] The gradual judicial recognition that 'in reality human relationships simply do not operate as if they were commercial contracts'[30] will be emphasised throughout this chapter.

In light of these observations, the third chapter will critically evaluate criticisms surrounding the protection afforded to cohabitants and the judicial methodology underpinning this. Academic scholarship will be engaged to reflect both sides of the contentious debate between injecting the law with more flexibility to adapt to the varying circumstances surrounding property ownership and the desire for legal certainty. Two main criticisms will be identified. The first relates to the argument that the application of judicial discretion has overstepped the mark in regulating ownership disputes between former cohabitants.[31] In scrutinising this contention, this thesis will argue that this apparent generosity derives from excessive discretion employed at the quantification stage. This means that if parties can evidence a beneficial interest, the quantification of that interest can be assessed generously and stretched to increase the award. However, simultaneously, very few people can access this remedy due to the high acquisition threshold. This prevents many non-moneyed parties, many of whom are women, from acquiring a beneficial interest and this therefore has the potential to disproportionately disadvantage women. These two issues have emerged from the fragmented process of

[26] *Lloyds Bank Plc v Rosset* [1991] 1 AC 107.
[27] *Stack v Dowden* (n 11).
[28] J Lewis, J Datta, S Sarre, *Individualism and Commitment in Marriage and Cohabitation* (London: Lord Chancellor's Department Research Series No 8/99, 1999) 80.
[29] Probert (n 2).
[30] *Jones v Kernott* (n 4) [90].
[31] M Dixon, 'The Never-Ending Story – Co-Ownership after Stack v Dowden' (2007) *CPL* 456.

familialisation and the struggle between rules and discretion, which will be expounded within this chapter.

The final chapter will address the criticisms raised in Chapter Three and explore potential avenues for judicial innovation. It will first consider the possibility of halting familialisation altogether considering the disadvantages highlighted, questioning whether this would encourage legislative reform. The impetus for reform primarily centres on the creation of a comprehensive regime of financial protections for cohabiting couples. Indeed, the judiciary have noted themselves that they can only tread so far,[32] stressing that 'the need for statutory intervention remains'.[33] Following this consideration, suggestions for how judicial methodology could continue to shape familialisation will be explored. The central proposal that this thesis champions is that of a dual-purpose approach, which would lower the acquisition threshold and simultaneously limit the discretion involved at the quantification stage. The first proposal would accept indirect financial contributions that relate to property as evidence of acquiring a beneficial interest. The second proposal would rank the factors considered at the quantification stage in order of importance, attaching the most weight to property-based conduct. It is argued that this approach would re-calibrate the trusts framework to allow more non-moneyed parties to gain access to financial relief whilst limiting the evaluation of the interest, and therefore the size of the award, that they receive. This would balance the modern framework through narrowing the disparity between the assessments of acquisition and quantum and proffer a solution that is a palatable alternative to legislative reform.

Ultimately, this thesis will conclude that lowering the acquisition threshold whilst curbing the discretion employed at the quantification stage is necessary to offer clarity whilst increasing judicial cognisance of relationship dynamics and the financial disadvantages that many women face following cohabitation. This thesis seeks to reach a compromise between rules and discretion and, while in favour of statutory reform, welcomes in the meantime the judicial development of a progressive approach to trusts of the family home.

[32] *Burns v Burns* [1984] Ch 317; [1984] 1 All E.R. 244.
[33] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) para 2.12.

CHAPTER ONE: THE ORIGINS OF THE FAMILIASIATION OF PROPERTY LAW

This Chapter will seek to analyse the concept of familialisation and explore its fundamental origins within property law. This will aid this thesis in acquiring a deeper understanding of the process of familialising property law, with a view to offering a comprehensive evaluation of modern trusts of the family home in subsequent chapters. The 'familialisation' of property law is a term coined by Dewar to express the process by which the general principles of property law have been softened and moulded to accommodate the specific needs of family members.[34] Thus, rather than family law supplanting property law, family-centric ideas have been interwoven within property law to develop trusts of the family home. These efforts may represent what Dewar termed 'allowances'[35] in the property framework. Their development was motivated by the need to recognise the emotional connections characteristic of interpersonal relationships.[36] The dichotomy between family and property law will therefore be explored within this chapter, and the apparent conflict between these two distinctive areas will be interrogated to identify the important debates surrounding their conflation within the familialisation of property law. The analysis will look at the precursors to the modern trusts of the family home framework. It will particularly emphasise the importance of the judiciary in exercising discretion to shape the early development of trusts of the family home. This early approach will be analysed with reference to case law spanning throughout the twentieth century. This historical survey will evaluate the influence of judicial discretion upon the transformation of implied trusts into a new subset of family property trusts, consequently evidencing this process of familialisation of property law.

This Chapter will examine the origins of the familialisation of property law, framing the term as a theoretical lens through which to explore trusts of the family home, before establishing its

[34] Dewar (n 1) 328.
[35] ibid.
[36] L. Fox, *Conceptualising Home: Theories, Law and Policies* (1st edn, OUP 2006).

scope and assessing the motivation and purpose of judges when engaging in familialisation. This will lay the groundwork for later critical analysis through establishing the parameters of this thesis. The second section will then explore the early development of familialisation, commencing with *Re Roger's Question*[37] in 1948, which Baroness Hale determined in *Stack v Dowden*[38] to mark the start of familialisation by way of recognising that decisions made in intimate relationships do not mirror those of commercial transactions. The subsequent early case law will be analysed, and it will be questioned as to whether these seemingly anomalous decisions did indeed constitute familialisation in this period. The third section will finally explore the modern trusts framework that developed from the 1970 and 1971 decisions of *Pettitt v Pettitt*[39] and *Gissing v Gissing*[40] to early cases following the enactment of matrimonial finance legislation. Ultimately, this Chapter will conclude that judicial discretion constituted a key element of the development of familialisation, as property law principles accommodated family-centric ideas to reflect the interdependencies of couples when sharing property.

[37] *Re Roger's Question* (n 21).
[38] *Stack v Dowden* (n 11).
[39] *Pettitt v Pettitt* (n 22).
[40] *Gissing v Gissing* (n 23).

The Concept of Familialisation

Familialisation is a term, coined by Dewar in his seminal work,[41] to express the process by which general property and trusts principles, which have been traditionally motivated by rights and entitlement,[42] have been modified to satisfy the needs of families. To support this thesis in critically examining familialisation, this section will trace the origins of this concept. In delineating its characteristics, a particular focus will be placed on the dichotomy between property and family law. The motivation and purpose behind familialisation will then be assessed with reference to its development in the twentieth century. Familialisation will be marked as a largely reactionary process, occurring in the absence of ancillary relief prior to the Matrimonial Proceedings and Property Act 1970. However, following *Pettitt v Pettitt*[43] and *Gissing v Gissing*,[44] the process shifted its focus to cohabitants as they gained more visibility in society and greater judicial acceptance. This meant that courts began to recognise the influence of a broader range of relationships upon property. This analysis will support this chapter in constructing a framework against which this thesis can assess the effectiveness of the modern trust framework in later chapters.

Familialisation: Defining the Term and Outlining the Scope

Dewar first delineated the term 'familialisation' as the 'process by which both judges and the legislature have modified general principles of land law or trusts to accommodate the specific needs of family members'.[45] This process can be deployed by the judiciary or exhibited in Acts of Parliament and has melded what many might consider 'rigid' property law principles with more malleable, sensitive family concepts. It is useful to explore this dichotomy to establish the foundations of familialisation and underlying arguments surrounding both its existence and use by the courts.

[41] Dewar (n 1) 328.
[42] Bottomley (n 17).
[43] *Pettitt v Pettitt* (n 22).
[44] *Gissing v Gissing* (n 23).
[45] Dewar (n 1) 328.

Characterising Familialisation

The familialisation of property law represents an analytical lens through which to view the apparent softening of property and trusts law principles through applying family-centric concepts which acknowledge the emotional and intimate nature of decisions made within a family. This therefore conflates both family concepts and property law, which have traditionally been characterised as two distinctive practices.[46] This was exemplified by the Law Commission, who have previously made repeated and implicit references to the contrast between a 'property law' approach and 'family law' approach.[47] To establish this conflicted dichotomy, it is useful to highlight the characteristics of property and family law. In introducing this, the apparent polarisation of property and family law will be highlighted. Whilst useful for this analysis, it is noted that these are by their very nature caricatures, and this thesis acknowledges that these perceptions have been inordinately magnified within the debate as to familialisation.

Miles asserts that property law and family law have become 'contentious caricatures'.[48] Property law has been perceived as an 'unpurposive and formalist'[49] practice requiring legal certainty and compliance with requisite formalities, maintaining an objective approach. However, this distilled perception of property law overlooks property doctrines such as proprietary estoppel, which is widely considered as flexible through recognising entitlement to property in the face of failure of compliance with formalities. By contrast, family law is viewed by Miles as 'forward-looking and discretion based',[50] acknowledging the relationships between parties and the emotional and economic consequences of those connections. Emotive and forceful language has been used to portray property law as conferring ownership status, creating economically significant individuals and 'rights-holders'.[51] By contrast, family law solutions are perceived as negatively characterising claimants as 'needy, dependent supplicants

[46] C Rotherham, *Proprietary Remedies in Context* (Hart 2002).
[47] Law Commission, *Sharing Homes: a discussion paper* (Law Com No 278, July 2002).
[48] Joanna Miles, 'Property Law v Family Law: Resolving the Problems of Family Property' (2006) 23(4) *Legal Studies* 624, 627.
[49] M Halliwell, 'Equity as Injustice: The Cohabitant's Case' (1990) 20 AALR 500.
[50] Miles (n 48) 627.
[51] Bottomley (n 17).

at the mercy of the court's benevolent discretion'.[52] Undertones of these caricatures can be found within the reasoning against the use of familialisation.[53] In their analogy of property-based 'crystals' and family-principled 'mud', Rose has argued that property has a signaling function which is 'heavily laden with hard-edged doctrines that tell everyone where they stand'.[54] Although this simplification helps scholars to dissect and comprehend familialisation, it risks overemphasising this distinction within the academic debate. It should be observed that in trusts of the family home, the law's 'constitutive' function has played a significant role in recognising the economic value of domestic contributions and the public perception of homemakers,[55] avoiding unflattering interpretations of 'needs'-based family law.[56]

Another key characterisation of familialisation that is interwoven into debates is the expansive interpretation of trust principles, engendered by courts to protect vulnerable parties. Whilst property law has been observed to be 'strict law', trusts have developed over time and grown to incorporate the more creative constructive trust, which Lord Denning observed was 'brought into this world by Lord Diplock' and something 'we have nourished'.[57] Lord Denning utilised this example to argue that trusts are continuously adapting and as a result, 'equity is not past the age of child-bearing',[58] adding to the debate surrounding the creative role of equity in the development of new principles and doctrines.[59] Thus, familialisation not only engages in the standard dichotomy of property and family law, but also blends concepts that originate in equity. Resultantly, this means that any discussion of familialisation has to engage with the longstanding debate as to the creativity of equity, as a body of principles created to soften the perceived harshness of the common law. Though academics have cautioned against the polarisation of property and family law,[60] it is important to acknowledge the existence of these

[52] Miles (n 48) 640.
[53] Ruth Deech, 'The Case against Legal Recognition of Cohabitation' (1980) 29(3) *ICLQ* 480.
[54] C Rose, 'Crystals and Mud in Property Law' (1987-1988) 40 *SLR* 577.
[55] M Oldham, 'Homemaker Services and the Law' in A Bainham, D Pearl and R Pickford (eds) *Frontiers of Family Law* (2nd edn, Chichester: Wiley 1995).
[56] R Bailey-Harris, 'Dividing the Assets on breakdown of relationships outside marriage: challenges for reformers' in R Bailey-Harris (ed), *Dividing the Assets on Family Breakdown* (Bristol: Family Law, 1998) 85.
[57] *Eves v Eves* [1975] 3 All ER 768; [1975] 1 WLR 1338, [1341].
[58] ibid.
[59] Mark Pawlowski, 'Is Equity Past the Age of Childbearing?' (2016) 22(8) *Trusts and Trustees* 892.
[60] John Mee, Property Rights and Personal Relationships: Reflections on Reform' (2004) 24 *Legal Studies* 414, 418.

assumptions and perceptions in prejudicing the debate surrounding the familialisation of property law, and this will be explored in Chapter Three.

Elements of Familialisation

To briefly explore the historical origins of familialisation, it must firstly be noted that English law adheres to the principle of separate property applicable to both spouses and parties in interpersonal relationships. Thus, the historical context in which Dewar was writing is important for this thesis to develop an understanding of the characterisation of familialisation. The Married Women's Property Act 1882 dismantled the ecclesiastical 'unity of person' doctrine,[61] which vested a wife's personal property absolutely in her husband.[62] Instead, it enabled women to acquire, hold and dispose of their separate property as a *feme sole* (single woman). In representing a 'rudimentary concept of sexual equality',[63] it also rejected community of property, a system that instigated automatic sharing of property and liabilities both during and following marriage.[64] As such, reformers concentrated on achieving formal equality without offering any answers to the important questions concerning matrimonial property ownership. Consequently, England and Wales possessed at that time no coherent regime of family property applicable upon marriage and similar to community property regimes,[65] instead applying the principle of separate property. Despite being triumphed as embodying 'emancipation and proclaimed equality of women with men',[66] this perceived equality was merely formal. It failed to acknowledge the lived realities of women derived from historically patriarchal standards,[67] which reduced female employment opportunities and encouraged women to remained at home whilst men worked.[68] Therefore, presupposing that both partners had an equal ability to work and legally acquire property was inherently flawed.

[61] G Williams, 'Legal Unity of Husband and Wife' (1947) 10(1) *MLR* 16.
[62] JH Baker, *An Introduction to Legal History* (Butterworths 2002) 483, 484.
[63] K Gray, *Reallocation of Property on Divorce* (Professional Books 1997) 50.
[64] E Cooke, A Barlow and T Callus, 'Community of Property: A Regime for England and Wales?' (Nuffield Foundation Report, London, 2006) 1.
[65] Glendon (n 7) 116.
[66] Cooke, Barlow and Callus (n 64) 4.
[67] Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Oxford: Hart 2015) 158.
[68] Clare Chambers, *Against Marriage: An Egalitarian Defence of the Marriage-Free State* (1st edn, OUP 2017).

Kahn-Freud accordingly criticised this approach for '[treating] as equal that which is unequal [which] may...be a very odious form of discrimination'.[69]

For married couples and civil partners, this apparent form of discrimination was ameliorated by access to a system of financial remedies upon relationship breakdown, formerly known as 'ancillary relief'. Such financial orders were permitted by the Matrimonial Proceedings and Property Act 1970, now consolidated by sections 23-25 of the Matrimonial Causes Act 1973. Similarly, civil partners also gain protection through Schedules 5 and 65 of the Civil Partnership Act 2004. Consideration of 'fairness',[70] in addition to the meta-principles of needs, compensation and sharing,[71] guide the court in crafting tailored financial orders which satisfy the requirements of both parties. This enables such 'allowances', as Dewar observed, to be made to reduce this apparent form of discrimination.

Dewar conceptualised familialisation as a system of allowances made by the judiciary when applying property principles, to recognise the relationship dimension of family property. The application of such allowances has gradually evolved from married couples, who previously accessed trusts prior to the enactment of matrimonial finance legislation, to cohabitants. Conversely, unlike married couples and civil partners, unmarried couples 'have no equivalent jurisdiction to turn to'[72] with regard to financial remedies following relationship breakdown. Instead, prior to the creation of the common intention constructive trust, they could only rarely achieve property acquisition through direct financial contributions to purchase price,[73] which disproportionately affected economically weaker parties. It has therefore been observed that judicial developments in the 'matrimonial property period', which for the purpose of this thesis spans from *Re Roger's Question*[74] in 1948 to 1970, saw the courts 'proactively developing matrimonial property principles as a means of softening the application of property law'.[75] This laid the groundwork for familialisation, which sought to acknowledge the existing

[69] Otto Kahn-Freud, "Matrimonial Property and Equality before the Law: Some Sceptical Reflections" (1971) 4 *HRJ* 493, 510.
[70] *White v White* [2001] 1 AC 596.
[71] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.
[72] Dewar (n 1) 330.
[73] H Bevan and F Taylor, 'Spouses as Co-Owners' [1966] *The Conveyancer* 355.
[74] *Re Roger's Question* (n 21).
[75] Andrew Hayward, '"Family Property" and the process of "familialisation" of property law' (2012) 24(3) *CFLQ* 284, 285.

inequality in property ownership and supplement pre-existing formal equality achieved via the 1882 Act. Thus, trusts of the family home were fashioned by the judiciary. As a result, familialisation could be viewed as manufactured, thereby attracting criticism.

Dewar observed that the gradual softening of property law principles created a 'highly complex and specialised branch of the law'.[76] Judicial discretion has been identified as the primary source of familialisation, as according to Dewar judges have 'piece[d] together a policy of their own'[77] through using discretion to interpret particular facts in a way that is more cognisant of the family dimension of disputes. Prior to 1970, much of this discretion stemmed from the judicial interpretation of section 17 Married Women's Property Act 1882. This provision enabled spouses to litigate entitlements and permitted a judge to 'make such order with respect to the property in dispute... as he thinks fit'. The jurisprudence on this provision, often linked to individual judicial personalities such as Lord Denning MR, saw the courts use discretion to mould property principles to fit the family context. For example, a trust principle would routinely look for financial contributions, as opposed to the relationship status of the parties, in order to establish ownership rights.[78] Conversely, familialisation has led to an acknowledgment of intimate relationships as influencing decisions in a manner incomparable to those made by commercial men.[79] However, the shift towards assessing intentions through the lens of familial sensitivity has resulted in the court searching for 'unexpressed and probably unconsidered intentions'.[80] This has even resulted in the discovery of 'imaginary express agreements' thereby evidencing results-orientated decisions.[81] Familialisation has therefore been viewed as a reactionary process lacking an underpinning rational due to its reliance on judicial discretion,[82] consequently attracting criticism which will be explored in Chapter Three. The following subsection will assess the basis of this argument, examining the motivation and purpose behind familialisation. This comprehensive understanding will support the following Chapters in evaluating the current trusts framework.

[76] Dewar (n 1) 328.
[77] John Dewar, 'Give and Take in the Family Home' [1993] *FL* 231.
[78] Miles (n 48) 627.
[79] *Stack v Dowden* (n 11) [42], citing *Re Roger's Question* [1948] 1 All ER 328.
[80] *Bernard v Josephs* [1982] Ch 391 (Ch) 404.
[81] Simon Gardner, 'A Woman's Work...' (1991) 54 *MLR* 126, 127.
[82] Hayward (n 75).

Motivations behind Familialisation

Having outlined the elements of familialisation and the apparent conflict between rules and discretion, the early motivations behind familialisation will be assessed to examine how this process has developed. It is submitted that this can be divided into two broad categories of societal developments and judicial perceptions. When combined, these generated recognition of the need for a more comprehensive system for the division of assets between spouses.

Societal Developments

A key motivation behind the trend towards familialisation prior to *Pettitt v Pettitt*[83] was the frustration with the separate property principle and desire a comprehensive system of ancillary relief. Whilst the Married Women's Property Act 1882 facilitated formal legal equality,[84] throughout the twentieth century, efforts to realise substantive female equality began to emerge. The Sex Discrimination Removal Act 1920 allowed women access to the legal profession and accountancy, the Law of Property Act 1925 permitted women and men to inherit properly equally, and the Second World War significantly influenced the number of women in the labour force.[85] Following the war, the number of women working part-time as a percentage of the total labour force rose from 12% in 1951 to 35% in 1971,[86] evidencing growth in women earning income.

The increase in female workers prompted the pooling of assets between couples and more widespread purchasing of the matrimonial home in joint names, or with both parties making financial contributions. However, a 'cult of domesticity'[87] was discernable, which confined women to domestic and caregiving responsibilities. This accentuated the lack of substantive equality despite women achieving formal equality vis-à-vis property ownership. The separate

[83] *Pettitt v Pettitt* (n 22).
[84] Shanley (n 6).
[85] Ministry of Defence, 'The women of the Second World War' (*Government News*, 16 August 2015) <https://www.gov.uk/government/news/the-women-of-the-second-world-war?> accessed 26 December 2020.
[86] Jane Lewis, *Women in Britain since 1945: Women, Family, Work and the State in the Post-war Years* (Oxford: Blackwell 1992) 65.
[87] Carl Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (OUP 1980).

property principle failed to recognise patriarchal standards, which predisposed women to perform homemaking tasks, resulting in 'derivative dependency'[88] on a spouse when sacrificing a career to carry out unpaid domestic work. This therefore discriminated against women who had not made contributions to trigger property entitlement and were unable to obtain full recognition for their contributions to the marriage or matrimonial home.[89] The dissatisfaction with separate property[90] prompted calls for further substantive equality in the form of ancillary relief. Moreover, Donzelot[91] and Cott[92] theorised that this new position of women drove emancipation further due to their influential 'function as ambassadresses of culture'.[93] Accordingly, female frustration with the principle of separate property fuelled a desire for a comprehensive system for the division of assets. It is submitted that this spurred divorce reform[94] and, subsequently, the familialisation of property law.

Early Judicial Recognition of the Domestic Context

A second motivation behind familialisation can be discerned. In response to this societal change and dissatisfaction with the principle of separate property, the Morton Commission[95] was established to make suggestions on financial provision reform. It argued that 'consequent of the spread of education, higher standards of living and the social and economic emancipation of women',[96] the complexity of family finance had augmented. The propositions were enacted into the Matrimonial Causes Act 1963 which gave the court power to order lump sum payments, promoting independence in a bid to reduce gender-based discrimination. Similar piecemeal activism developed within a string of cases involving the distribution of property between married couples. This included *Hine v Hine*[97] where Lord Denning suggested that section 17 Married Women's Property Act 1882 was 'entirely discretionary' and gave the courts

[88] Martha Fineman, 'Responsibility, Family and the Limits of Equality: An American Perspective' in Jo Bridgeman, Craig Lind and Heather Ketings (eds), *Taking Responsibility, Law and the Changing Family* (Ashgate, 2011) 7.
[89] Kahn-Freud (n 69).
[90] ibid.
[91] Jacques Donzelot, *The Policing of Families* (Pantheon 1979).
[92] Nancy Cott, *The Bonds of Womanhood* (YUP 1977).
[93] Michael Freeman, Christina Lyon, *Cohabitation Without Marriage* (Gower Publishing 1983) 17.
[94] Matrimonial Causes Act 1923, Matrimonial Causes Act 1937, Divorce Reform Act 1969.
[95] Home Office, *Royal Commission on Marriage and Divorce* (Cmd 9678, 1956) [132].
[96] ibid [45].
[97] *Hine v Hine* [1962] 1 W.L.R. 1124.

the power to 'make such order as appears to be fair and just in all the circumstances of the case'.[98] Efforts of the court to arrogate themselves discretion illustrated a judicial trend towards moulding property law in a manner to recognise the domestic context.

This shift towards acknowledging the family dimension of these disputes culminated in *Pettitt v Pettitt*[99] and *Gissing v Gissing*,[100] which developed the modern trusts framework with a particular emphasis on implied trusts. The cases overruled previous suggestions that section 17 of the Married Women's Property Act 1882 should confer a broad discretion on the courts to decipher the property consequences of divorce, instead favouring an approach that applied general rules of property law, albeit one that made certain 'allowances'.[101] Despite this progressive judicial activism taking place in the context of cases between married couples, it laid the groundwork for a principle that would later be applied in cases between cohabitants instead. This is because mere months later, the Matrimonial Proceedings and Property Act 1970 was introduced, enabling the court to make financial orders providing for property transfer and varying nuptial settlements to provide ancillary relief to spouses. This would consequently cover the types of disputes seen in *Pettitt* and *Gissing*. The Act, conferring wide 'power of appointment' over spousal property,[102] was viewed as necessary to temper the effects of the Divorce Reform Act 1969, which would liberalise divorce law.[103] This expansion of divorce grounds and subsequent introduction of comprehensive financial protection for spouses was linked to the perceived undesirability of cohabitation, which was viewed as a threat to the institution of marriage and, for some, an immoral practice.[104] Divorce was therefore a mechanism that enabled couples to 'remarry and live respectably'.[105] As Probert notes, divorce and remarriage was 'the lesser evil'.[106] Divorce was therefore encouraged to prevent extra-marital relations. Hence, divorce reform and financial provision for married couples, which was

[98] ibid 1127-1128.
[99] *Pettitt v Pettitt* (n 22).
[100] *Gissing v Gissing* (n 23).
[101] *Pettitt v Pettitt* (n 22).
[102] Kevin Gray, 'Equitable Property' (1994) 47(2) *CLP* 157, 171.
[103] Stephen Cretney and Judith Masson, *Principles of Family Law* (8th edn, Sweet and Maxwell 2008) 424.
[104] *Upfill v Wright* [1911] 1 K.B. 506, *Gammans v Ekins* [1950] 2 K.B. 328.
[105] *Inglis v Inglis and Baxter* [1968] P 639, [655].
[106] Rebecca Probert, *The Changing legal regulation of cohabitation: from fornicators to family, 1600-2010* (1st edn, CUP 2012) 153.

later extended to 'couples living together (as if married)',[107] paradoxically came about in an effort to diminish cohabitation. However, the indirect effect of this was to lay the foundations for a trust framework later applicable to cohabitants.

The Matrimonial Proceedings and Property Act 1970 then formed the basis of the Matrimonial Causes Act 1973, which represented a statutory discretion affecting both ownership and enjoyment of property concerned, guided by discretionary factors within section 25. Whilst this status-based legislation utilised discretion that was structured to support contextualised, fact-sensitive decisions for matrimonial property division, it did not apply to cohabitants, who still experienced property ownership disputes.

Familialisation in the context of cohabitants

Whilst statutory reform did not constitute familialisation, this activism in response to the absence of ancillary relief paved the way for familialisation of property law in respect of cohabitants. Cohabitation began to increase throughout the sexual revolution in the 1960s[108] as women gained more freedoms and some began to reject the traditional marriage contract and the perceived roles that it cemented. Weitzman criticised the traditional marriage model for removing 'choice in the degree of commitment and involvement in a relationship', observing that 'in our rapidly changing society not all people want the same degree of intensity in their personal relationships'.[109] Whilst accurate statistics do not exist, cohabitation appeared to be on the rise throughout the latter half of the twentieth century, with 10% of women admitting living with their husbands before marriage in a 1976 survey.[110] This number increased to 19% in 1979.[111]

[107] *Bernard v Josephs* (n 80).
[108] H. Cook, *The Long Sexual Revolution: English Women, Sex, and Contraception 1800-1975* (OUP 2004) 287.
[109] Lenore Weitzman, 'The Love, Honor and Obey - Traditional Legal Marriage and Alternative Family Forms' (1975) 24 *Family Coordinator* 547, 55.
[110] K Dunnell, 'Family Formation 1976' (HMSO, Office of Population Censuses and Surveys 1976), 2.4.
[111] A Brown and K Kiernan, 'Cohabitation in Great Britain: Evidence from the General Household Survey' (HMSO, Office of Population Censuses and Surveys 1981).

The extent of cohabitation outside of marriage was gradually acknowledged by the judiciary.[112] Indeed in *Dyson Holdings v Fox*,[113] Lord Justice Bridge recognised that the court must adapt to the changing social attitudes towards the concept of 'family', consequently extending the meaning of word to incorporate a cohabiting couple. This demonstrated a clear contrast from attitudes displayed in *Gammans v Ekins*[114] in 1950 where the Court of Appeal refused to recognise an unmarried man and woman cohabiting together as a family for the purpose of succession to a tenancy. Instead, a gradual recognition of cohabiting couples performing the similar functions and roles with respect to property ownership and homemaking tasks became apparent.[115] Nevertheless, Probert observed the 'complexity of a society in transition',[116] noting the strains between the traditional concept of marriage and the modern flexibility of cohabitation. Whilst divorce reform was readily accepted, this piecemeal familialisation in the 1970s onwards was controversial and reactionary, lacking a singular underpinning rationale.[117] This struggle between adhering to traditional trust principles and pushing this imperative was demonstrated in *Bernard v Josephs*.[118] Here, Lord Denning MR stretched financial provision to a woman within an illicit relationship, partially spurred by his will to achieve 'justice', an idea which was predicated on his assumption of female dependency.[119] At the time, commentators believed the case seized the opportunity to offer a new precedent enabling cohabitants to settle their disputes by reaching an agreement out of court and provided guidance as to the determination of beneficial ownership.[120] Other judges viewed marriage a mere formality,[121] and so believed that cohabiting couples acting as though they were married should be treated similarly.[122] This would reflect a functional approach, which proposes that relationship status, and consequently the protections afforded to the relationship, is determined

[112] E. Wilson, *Only Halfway to Paradise: Women in Postwar Britain 1945-68* (London: Tavistock Publications 1980) 137.
[113] *Dyson Holdings Ltd v Fox* [1976] Q.B. 503.
[114] *Gammans v Ekins* (n 104).
[115] *Eves v Eves* [1975] (n 57) [770], *Kokosinski v Kokosinski* [1980] 1 All ER 1106, [1117].
[116] Rebecca Probert (n 106) 142.
[117] Andrew Hayward (n 75).
[118] *Bernard v Josephs* (n 80).
[119] Jonathan Montgomery, 'Back to the Future: Quantifying the Cohabitee's Share' (1988) 14 *FL* 72, 73.
[120] Kevin Gray 'The Law of Trusts and the Quasi-Matrimonial Home' (1983) 42(1) *CLJ* 30, 31.
[121] *Campbell v Campbell* [1976] Fam 347, [352E].
[122] Freeman and Lyon (n 93) 88.

by the performance of relationship functions.[123] Generally, the courts concerned themselves with this perceived new 'social reality'[124] of cohabitation and, using momentum gained from financially protecting married couples, extended such provision to cohabitants in later cases.

Familialisation in the late matrimonial property period therefore occurred in response to the absence of ancillary relief for married couples and extended from marital to extra-marital relations. The judiciary employed various techniques to address dissatisfaction with separate property, including utilising discretion under section 17 of the Married Women's Property Act 1882 and incorporating family-centric principles into trust litigation prior to divorce reform. Having identified several factors spurring familialisation, the following section will explore the early development of the modern trust framework to elucidate upon these ideas and engage in case analysis to bolster these arguments.

[123] Margaret Briggs, 'Which Relationships Should be Included in a Property Sharing Scheme?' in Jessica Palmer, Nicola Peart, Margaret Briggs, Mark Henaghan (eds), *Law and Policy in Modern Family Finance* (CUP 2018) 37, 43.
[124] *Dyson Holdings v Fox* (n 113).

Early Development of Familialisation: Building the Scaffolding of the Trusts Framework

Early familialisation arguably commenced in the 1948 case of *Re Roger's Question.*[125] Lady Hale marked this as the starting point of judicial recognition of the intertwining of family relationships with proprietary decisions.[126] Accordingly, this section will explore this early period, surveying the presumption of resulting trust prior to and following *Re Roger's Question*[127] and evaluating the influence of this case on the development of the modern trust framework. Familialisation in the matrimonial property period will also be analysed with reference to admission of the family assets doctrine and expansive use of section 17 of the Married Women's Property Act 1882. This will exhibit the family-centric influences that began to shape judicial methodology and soften property principles. The section will assess case law, including *Newgrosh v Newgrosh*[128] and *Rimmer v Rimmer*,[129] and academic scholarship up to the influential 1970 case of *Pettitt v Pettitt*,[130] which will be discussed in the following final section of this chapter.

The Resulting Trust

In order to ascertain the impact that *Re Roger's Question*[131] had on the familialisation of property law and examine Lady Hale's argument that it marked a turning point for trusts of the family home, the previous trust mechanisms applicable to property must be outlined. Prior to 1948, the presumptions of the resulting trust and advancement worked as simple, mechanistic instruments to determine ownership between spouses.

[125] *Re Roger's Question* (n 21).
[126] *Stack v Dowden* (n 11) [42].
[127] *Re Roger's Question* (n 21).
[128] *Newgrosh v Newgrosh* (1950) 100 LT Jo 525.
[129] *Rimmer v Rimmer* [1952] 2 All ER 863 (CA).
[130] *Pettitt v Pettitt* (n 22).
[131] *Re Roger's Question* (n 21).

As marriage no longer affected property ownership between spouses following the Married Women's Property Act 1882, trust principles including the express trust and presumption of resulting trust would apply. An express trust would occur when beneficial ownership of land was 'manifested and proved' in writing between parties,[132] evincing clear intentions. However, this was often inapplicable due to lack of compliance with formalities. Moreover, common practice that saw men purchasing property in their sole name.[133] Instead, the presumption of resulting trust could apply[134] where one spouse transferred property to the other without gaining anything in return, and the transferee would hold that property on resulting trust for the transferor. This would operate in the context of a spouse directly contributing to the purchase price of property[135] and was the most common device utilised by courts to resolve disputes concerning the matrimonial home.[136] However, where a man was giving property to a relation such as a wife, fiancée, or child, the principle of advancement would be triggered. This meant that he would be presumed to do so as a gift, as observed in *Re Eykyn's Trusts*[137] and later *Moate v Moate*.[138] It was held that this principle would not apply to gifts by wives[139] or mothers,[140] and has therefore received criticisms for being discriminatory and anachronistic.[141] Further, there would be no presumption between a man and his mistress.[142] This embodied a simple, formulaic use of trusts stemming from the male duty to maintain.[143] Whilst there was limited flexibility through the operation of rebuttable presumptions, this was dismissed as mere fact-finding discretion[144] and arguably was not familialised. It thus failed to adapt to the modern needs of the family as women began to gain substantive equality and pooling of assets between spouses occurred more frequently.

[132] Law of Property Act 1925 (n 9).
[133] A Denning, *The Due Process of Law* (Butterworths 1980) 227.
[134] Law of Property Act 1925 (n 9).
[135] *Tinsley v Milligan* [1994] 1 AC 340 [371].
[136] E.F. George, 'Disputes over the Matrimonial Home' [1952] 16 *The Conveyancer* 27.
[137] *Re Eykyn's Trusts* (1877) 6 ChD 115.
[138] *Moate v Moate* [1948] 1 All ER 486.
[139] *Mercier v Mercier* [1903] 2 Ch 98.
[140] *Bennet v Bennet* (1879) 10 Ch D 474, 478.
[141] *Pettitt v Pettitt* (n 22).
[142] *Diwell v Farnes* [1959] 1 WLR 624.
[143] Jamie Glister, 'Is There a Presumption of Advancement?' (2011) 33(1) *Sydney Law Review* 39, 41.
[144] A Barak, *Judicial Discretion* (YUP 1989) 12.

A Shift Towards Discretion-based Property Division

The modern English case law recognising the distinctive nature of property division between individuals living together in intimate relationships commenced in 1948 with *Re Roger's Question*,[145] applying the established resulting trust between spouses. Whilst a case concerning husband and wife, it provides interesting analysis of the use of judicial discretion and its influence on the resulting trust, thereby signaling, it is argued, familialisation. The case involved a dispute over matrimonial property, 10% of which had been paid for by the wife, and 90% of which had been paid by the husband in the form of mortgage instalments and interest. The couple used section 17 procedurally to bring the issue to court. In assessing whether these contributions reflected the division of the beneficial interest, it was stressed that a judge should 'try to elude what at the time was in the parties' minds'[146] during the transaction. Whilst the Court Appeal did not search for shared ownership agreements, advancing an orthodox application of the resulting trust,[147] the case has been viewed much later by the House of Lords as developing 'this branch of the law of property'.[148] The case's significance is marked by its recognition that 'the interpretation to be put on the behaviour of people living together in an intimate relationship may be different from the interpretation to be put upon similar behaviour between commercial men'.[149] It therefore drew on the principle established in *Balfour v Balfour*,[150] that there should be a presumption against an intention to create a legally enforceable agreement when the agreement is domestic in nature. Yet, it indicated acknowledgement of the unique connection between family relationships and the division of matrimonial property. Thus, whilst the only new development was that the parties could bring this dispute using section 17 rather than through standard civil proceedings,[151] it evinced a new, more discretionary, approach that promoted fact-sensitivity, shifting the focus away from traditional fact finding.

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[145] *Re Roger's Question* (n 21).
[146] *Re Roger's Question* (n 21).
[147] H Lesser, 'The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot' (1973) 23 *University of Toronto Law Journal* 148.
[148] *Pettitt v Pettitt* (n 22) [819].
[149] *Stack v Dowden* (n 11) [42].
[150] *Balfour v Balfour* [1919] 2 KB 571.
[151] Andrew Hayward, 'Judicial Discretion in Ownership Disputes over the Family Home' (DPhil thesis, University of Durham 2013) 68.

Following this review of how the resulting trust operates in the domestic context, subsequent cases continued to appreciate the role that relationship dynamics play in acquiring and sharing matrimonial property. Lord Denning LJ's dissent in *Hoddinott v Hoddinott*[152] stressed the need for greater sensitivity towards emotional decisions made between couples involving property acquisition and the 'joint venture'[153] of marriage. This was echoed in *Newgrosh v Newgrosh*,[154] concerning furniture which was held to belong jointly to the husband and wife. Additionally, in *Rimmer v Rimmer*[155] Bucknill LJ endorsed the *Newgrosh* approach of 'palm tree justice', which gives effect to orders which are 'fair and just in the special circumstances of the case'.[156] In *Rimmer*,[157] the wife used section 17 to claim a share in the proceeds of sale of matrimonial property that was conveyed into the sole name of her husband. She had contributed £29 to the property. He had secured the remaining balance of £460 by a mortgage, payable by him, but paid instalments to which both parties contributed. Mr Rimmer deserted his wife and sold the matrimonial property, which had quadrupled in price. Evershed MR gave the leading judgment, asserting that the proceeds of sale should be divided equally, recognising the wife's financial contributions whereby money was 'saved by their joint efforts and applied for their common benefit'.[158] While this case was significant in displaying more generous engagement with discretion and weaving family-centric principles into the use of trusts, it is submitted that this did not reflect familialisation. Instead, it constituted a manipulation of the discretion afforded under section 17 to alter the outcome of the case as the judiciary arrogated themselves discretion rather than modifying the foundational property principles. Results-oriented decisions such as these have attracted criticism for lacking sound reasoning which will be explored in following chapters. Moreover, the decision to divide the property equally because 'it is not possible or right to assume some more precise calculation'[159] came as a practical response to an unforeseen situation where the parties had sustained an unexpectedly lucrative investment. It can therefore be viewed as a pragmatic decision, similar to that of *Jones v Maynard.*[160] This involved a joint bank account which was divided equally by Vaisey J to

[152] *Hoddinott v Hodinott* [1949] 2 KB 406, 416.
[153] ibid [414].
[154] *Newgrosh v Newgrosh* (n 128).
[155] *Rimmer v Rimmer* (n 129) [865].
[156] ibid.
[157] ibid.
[158] ibid [73].
[159] ibid [72].
[160] *Jones v Maynard* [1951] Ch 572.

avoid the complexity involved of separating a mixed fund. Consequently, these may represent anomalous examples of pragmatism that did not reflect familialisation. However, this period offered an insight into the judicial response to ownership disputes between former spouses, which academics including Sparkes and Hayward argue 'sowed the seeds of familialisation'[161] through better acknowledging relationship dynamics.

Section 17 played a significant role in influencing the development of discretion-based property division. As noted above, several early cases moulded this liberal discretion to facilitate pragmatic solutions. However, references to family-centric principles through recognising the effect of relationship dynamics on property ownership eventually precipitated more fulsome recognition of 'sharing' in *Cobb v Cobb*,[162] and economic partnership in *Fribance v Fribance.*[163] In *Fribance*,[164] a wife used section 17 to obtain an order for lease ownership, which she had contributed a share of 13% of the deposit, and consequently received an equal share of the beneficial ownership. Whilst the main reason for this was the court's inability to precisely calculate shares, Lord Denning LJ made reference to 'family assets'[165] and remarked that the 20-year relationship had been family-orientated and mutually dependent. Through merging the previous idea of equal division as a mechanism used when shares cannot be calculated together with the concept of 'family assets', Lord Denning LJ used his broad discretion under section 17 to lay the groundwork for clearer principles to be evinced in subsequent cases. This later became the 'family assets' doctrine. Wootton therefore submits that these 1950s cases represent the 'cornerstone of what might be termed the new thinking on matrimonial property cases'[166] showing greater cognisance of relationship dynamics.

Although section 17 had therefore been utilised as a procedural method of bringing ownership disputes to court, the discretion it conferred was subsequently manipulated throughout the 1950s and 1960s to offer greater fact-sensitivity. This permitted the contextualisation of cases, particularly in relation to their interpersonal dimension. Whilst this did not constitute

[161] Hayward (n 75) 290.
[162] *Cobb v Cobb* [1955] 1 WLR 731.
[163] *Fribance v Fribance* [1957] 1 All ER 357.
[164] ibid.
[165] ibid [387].
[166] AF Wootton, 'Judicial Discretion in the Division of Matrimonial Assets' (1959-1963) 1 *University of British Columbia Law Review* 452,456.

familialisation, it allowed for judicial activism through a string of cases exploring the relatively unchartered territory of pooling matrimonial assets. In this way, courts were perceived to be 'feeling their way towards a limited form of community of property between husband and wife'[167] in dissatisfaction with the separate property principle. However, this reactionary and unintuitive process occurring under section 17 prompted judicial scepticism,[168] for example by Lord Justice Romer in *Cobb*[169] and in *Short v Short.*[170] Perhaps it was Denning's characterisation of section 17 as 'entirely discretionary', 'transcend[ing] all rights, legal or equitable' in *Hine v Hine*[171] which ultimately resulted in it being restricted in scope by Lord Upjohn in *National Provincial Bank v Ainsworth.*[172] Despite this curtailing of broad discretion permitted by section 17 in 1965, judicial engagement with family property disputes laid the groundwork for familialisation, cementing the idea of 'family assets' and facilitating the movement towards equal division. Accordingly, this arguably reflected a 'momentous development in matrimonial property law'[173] and a catalyst for the early development of familialisation.

Familialisation in the Matrimonial Property Period: The Family Assets Doctrine

Section 17 spurred judicial acknowledgement of domestic property ownership realities and this matrimonial property period shifted judicial methodology, coining phrases such as 'family assets'. It is argued that this paved the way for familialisation in the context of implied trusts. The family assets doctrine played an important role in addressing the frustration with separate property explored in the first section.

Propagated by Lord Denning, the family assets doctrine was typified by its contextualised approach and fact sensitivity. It confronted the need for greater 'cognisance of the realities of

[167] Guest, 'The Beneficial Ownership of the Matrimonial Home' [1956] 20 *The Conveyancer* 467, 476.
[168] L. Rosen, 'Palm Tree Justice' [1966] 110 *The Solicitors' Journal* 239.
[169] *Cobb v Cobb* (n 162) [700].
[170] *Short v Short* [1960] 2 All ER 6.
[171] *Hine v Hine* (n 97) [347].
[172] *National Provincial Bank Ltd v Ainsworth* [1965] A.C. 1175 [1235]-[1236].
[173] W Friedmann, *Matrimonial Property* (Stevens and Sons Ltd 1955) 297.

family life and the workings of the lay mind'[174] when assessing property division. Family assets were originally defined as 'things intended to be a continuing provision for them during their joint lives, such as the matrimonial home and the furniture in it',[175] recognising the interpersonal element of property acquired and shared between a family. Following this, 'because a family asset is regarded as having special characteristics it is possible to recognise that contributions to its acquisition may also be special and in fact of a different character'.[176] This culminated in the court further exploring contributions, not just financial ones, but also non-financial.[177] This was exemplified in *Ulrich v Ulrich and Fenton*[178] in which indirect financial contributions were observed to be sufficient if this formed part of an agreement between spouses. Diplock LJ held that this agreement could be inferred from party conduct, based on what the common intention 'would have been had they put it into words before matrimonial differences arose between them'.[179] He elaborated that the orginal mathematical approach omitted 'the economic realities of modern mortgages of owner-occupied dwelling houses'[180] from consideration, insisting on judicial awareness of indirect financial contributions. Similarly, Denning in *Tully v Tully*[181] alluded to the need to recognise a 'common intention that it should be joint property as a family asset'.[182] This weaving of concepts and phrases such as 'family assets', 'common intention' and indirect financial contributions further embedded relationship dynamics within property law.[183] Moreover, it modified the application of the resulting trust so much so that a next logical step would be the development of the common intention constructive trust, as undertaken in *Gissing v Gissing.*[184]

Comprehensive review of 'family assets' took place in *Gissing,* whereby the Court of Appeal was seen to impute 'justice' through assigning the wife an equal beneficial share in a property, that she did not directly or indirectly contribute to, by virtue of her endeavours to purchase

[174] Wootton (n 166) 456.
[175] *Fribance v Fribance* (n 163) 359-360.
[176] Gareth Miller, 'Family Assets' (1970) 86 *LQR* 98, 126.
[177] *Richards v Richards* [1958] 1 WLR 1116.
[178] *Ulrich v Ulrich and Fenton* [1968] 1 All ER 67.
[179] ibid [71].
[180] ibid [72].
[181] *Tulley v Tulley* [1965] 109 *The Solicitors' Journal* 956.
[182] ibid.
[183] A Milner, 'Beneficial Ownership of the Matrimonial Home Again' (1958} 21 *MLR* 419.
[184] *Gissing v Gissing* (n 23).

shared furniture and financially support the parties' son. In order to prevent the husband from 'throwing her into the street and pocketing all the proceeds of the matrimonial home',[185] Lord Justice Phillimore sought to circumvent the potentially vulnerable position of the wife through conceptualising the matrimonial home as a family asset which should be divided equally. Furthermore, Lord Denning MR cemented the concept of family assets by referring to it as a doctrine,[186] promoting its status and arguably indicating a more structured use of judicial discretion.[187]

Overall, the family assets doctrine contributed to the early development of familialisation through acknowledging the increasing role that relationships played in the acquisition and use of matrimonial property. Through inserting a requirement of contributions and expanding this to include indirect financial contributions, it remained connected to the more established resulting trust yet revealed a tendency to assess notions of common intention, which indicated a shift towards valuing the parties' relationship.

[185] ibid [1048].
[186] J Brady, 'Trusts, Law Reform and the Emancipation of Women' (1984) *DULJ* 1, 9.
[187] Miller (n 176).

Developing the Framework of Familialisation: Implied Trusts and their Early Interpretation

Judicial activism in the matrimonial property period continued to influence the gradual process of familialisation. A key motivation for the development of family-centric concepts within property law lay in the dissatisfaction with the concept of separate property and concomitant desire for ancillary relief. Judicial discretion was a critical component in facilitating property division through the application of trusts. However, *Pettitt v Pettitt*[188] and *Gissing v Gissing*,[189] shortly prior to the statutory instruments that gave married couples financial protection, marked a turning point. The cases both dismantled previous precedents and framed the common intention constructive trust, which would later be used by cohabitants. Many academics determine this period as a catalyst of familialisation of the modern trusts framework.[190] Consequently, this is a pivotal period to explore which will support this chapter in analysing the emergence of the familialisation of property law.

Pettitt and *Gissing*

Viewed as 'the origins'[191] of the modern trust framework, *Pettitt* and *Gissing* created a significant shift in the context of property ownership disputes, recasting the judicial methodology to be applied in matrimonial property disputes. Both cases rejected the two influential mechanisms previously used in property ownership disputes, namely the substantive use of section 17 Married Women's Property Act 1882 and the 'family assets' doctrine. However, while the cases attempted to prevent expansive use of judicial discretion, the decisions did not offer doctrinal certainty. The limited factual basis of each claim restricted the analysis of the orthodox resulting trust,[192] opening the potential for future use of discretion to overcome these shortfalls.

[188] *Pettitt v Pettitt* (n 22).
[189] *Gissing v Gissing* (n 23).
[190] R Smith, *Property Law* (7th edn, Longman 2011) 182.
[191] ibid.
[192] John Mee, '*Pettitt v Pettitt* (1970) and *Gisssing v Gissing* (1971)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Oxford: Hart 2012).

The case of *Pettitt*[193] in 1969 concerned the claim of Harold Pettitt to beneficial ownership of the matrimonial cottage. He claimed this interest on the basis of his internal decoration which included building a wardrobe, in addition to his contributions to the garden through building an ornamental well and a brick side-wall.[194] The House of Lords held that the degree of renovation conducted was of an 'ephemeral character'[195] and therefore insufficient to constitute a direct financial contribution for the purposes of acquiring an interest in the property. Adopting a restrictive approach, section 17 was interpreted as procedural. Emphasis was placed on the 'unsatisfactory state'[196] of the law that previous expansive use of section 17 had created. For Lord Morris it was 'a question of wide general importance'[197] to firmly establish how it should be interpreted. The court subsequently restricted the meaning of section 17, determining that it was procedural in nature and did not confer discretion to alter existing property rights.[198] This dismantled the 'family assets' approach for obtaining a proprietary interest, which had developed through expansive use of section 17, as Lord Reid dismissed it as an unwelcome 'new conception into English law'.[199] The House of Lords unanimously rejected both the substantive application of section 17 and the family assets doctrine, although Lord Reid and Lord Diplock would have retained some important aspects. Lord Reid remained willing to impute an agreement to create a fictional contract, and Lord Diplock wished to create a form of common intention serving to constitute a trust. Nevertheless, Lord Morris insisted that the judiciary should not 'devise or invent a legal result'.[200] It is contended that in rejecting these doctrines in an effort to clarify the law, the House did not advance a new doctrinal approach, and the five different speeches left the law in a state of confusion.[201] This exposed this area to further modification and opened up potential avenues of familialisation.

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[193] *Pettitt v Pettitt* (n 22).
[194] ibid [805].
[195] ibid [796].
[196] ibid [819].
[197] ibid [797].
[198] ibid [793].
[199] ibid [795].
[200] ibid [804].
[201] S Cretney, 'No Return from Contract to Status' (1970) 32 *MLR* 570.

Shortly afterwards, *Gissing v Gissing*[202] was decided. That case emphasised the need to utilise property law to resolve these disputes and rejected discretionary resolution. However, the judgment was similarly met with opposition given that there was no Chancery judge present[203] and many options for the development of a new direction had previously been ruled out in *Pettitt*.[204] Moreover, as Lord Reid observed, 'much wider questions have been raised than are necessary for the decision of the case',[205] making the task of ascertaining a new direction with clarity even more difficult. The case involved a wife who applied, through an originating summons in the Chancery Division, for an order acknowledging beneficial ownership in the matrimonial property. The property was acquired through a mortgage secured in Mr Gissing's name, alongside a loan by his employer. His wife purchased furniture with her savings and laid a lawn, but she did not directly contribute to the acquisition of the property. She argued that her husband made statements indicating that the property would be hers upon the breakdown of their marriage and that he would continue to make mortgage payments. The House of Lords held that she was not entitled to share beneficial ownership as she had not contributed either directly or indirectly to the acquisition of the property. However, in applying trusts throughout their reasoning and rejecting substantive use of discretion under section 17, the case arguably 'invented'[206] the common intention constructive trust.

Both cases have attracted widespread criticism.[207] Despite seeking to clarify the law and restrict the substantive use of section 17, Hayward observes that *Pettitt* and *Gissing* effectively embedded the potential for discretionary resolution of property disputes.[208] This is because the cases left unresolved issues which would prompt further use of judicial discretion in order to address such deficiencies.[209] Moreover, with an absence of clear consensus within academic scholarship as to the ratio of the decisions,[210] it became apparent that the cases had generated

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[202] *Gissing v Gissing* (n 23).
[203] J Tiley, 'Family Property – No Community Yet' (1970) 28 *CLJ* 210, 210.
[204] Mee (n 192).
[205] *Gissing v Gissing* (n 23).
[206] A Barlow, 'Rights in the Family Home – Time for a Conceptual Revolution?' in A Hudson, *New Perspectives on Property Law, Human Rights and the Home* (Cavendish 2003) 61.
[207] TG Youdan, 'Equitable Transformations of Family Property Law' in S Goldstein, *Equity and Contemporary Legal Developments: Papers Presented at the First International Conference on Equity* (Jerusalem 1990) 531.
[208] ibid.
[209] Hayward (n 151) 142.
[210] C Harpum, 'Adjusting Property Rights between Unmarried Cohabitants' (1982) 2 *OJLS* 277.

unresolved ambiguity for a multitude of reasons. A prominent failure of the House of Lords was the distinct lack of clarity regarding how trusts would trigger proprietary rights. The melding together of 'resulting, implied or constructive'[211] trusts to describe the framework applicable to matrimonial property disputes resulted in both theoretical and practical confusion.[212] Moreover, the meaning of 'common intention' was not elucidated, despite its integral role in operating the 'resulting, implied or constructive' trust in *Gissing*.[213] These confusions led Mee to note that Lord Diplock had created a 'Frankenstein'[214] doctrine, that drew upon establishing intent via the resulting trust while at the same time endorsing the idea that ownership could be determined using common intention. Although these cases attracted criticism, they in fact provided for a class of litigants who would not have these principles applied to them. Married parties would soon be protected by the Matrimonial Proceedings and Property Act 1970. Nevertheless, these principles have later been applied to cohabitants, becoming the foundations of the modern trust framework. Given the vague and imprecise nature of these principles, the following string of cases engaged in more concerted efforts to familialise the framework. This gradual development will be explored in the following section.

The Aftermath of *Pettitt* and *Gissing*

In the aftermath of *Pettitt* and *Gissing*, a succession of cases further developed these trust principles. It is advanced that judicial discretion played a vital role in this process, and family-centric concerns permeated into judicial methodology throughout this period.

Falconer v Falconer[215] was handed down by the Court of Appeal in 1970 and evidenced some of the deficiencies engendered by *Pettitt* and *Gissing*. In this case, equal division of property was ordered by the Court of Appeal through inferring a trust created by a direct financial contribution to the purchase price and mortgage instalments. The plot of land, purchased in

[211] *Gissing v Gissing* (n 23) [896], [898], [901], [905].
[212] Hayward (n 151) 144.
[213] *Gissing v Gissing* (n 23).
[214] John Mee, *The Property Rights of Cohabitees: An Analysis of Equity's Response in Five Common Law Jurisdictions* (Oxford: Hart Publishing, 1999) 35.
[215] *Falconer v Falconer* [1970] 1 All ER 449.

the name of the wife, was paid for by contributions from her mother and a mortgage taken out in her name. During the construction process, her husband made payments which were used to discharge the mortgage. A second mortgage of the same format was then taken out on the flat that they had been living in which was paid for by a combination of the wife's earnings and contributions from her husband. In deciding the case, Denning was seen to exploit the ambiguities within *Pettitt* and *Gissing*, stating that previous case law would 'still provide good guidance',[216] seeing as cases other than *Appleton*[217] had not been explicitly overruled and *Pettitt* and *Gissing* left room for judicial interpretation.

Heseltine v Heseltine[218] then engaged with the concept of a 'just' result. In his judgment, Lord Denning MR employed a broad interpretation of 'inequitable' from *Gissing* and focused on how it would be inequitable for the husband to claim the property for himself when, despite being vested in his name, the wife had paid 80% of the purchase price of the matrimonial property and contributed to mortgage payments on several other properties in his name. Consequently, the court held that where properties were purchased through joint resources, a trust recognising equal ownership would arise, although Denning noted that 'if some other division is more fair, the court will adopt it'.[219] Thus, Mrs Heseltine would be entitled to 75% of the beneficial interest in the matrimonial property and the husband was to hold all properties on trust for his wife. Emphasis on forming a just and equitable decision suggests that the court, particularly Denning, constructed the outcome to ensure it was fair for Mrs Heseltine, capitalising on the ambiguities left by the judicial reasoning in *Pettitt* and *Gissing*.

In 1972, another issue was presented in *Cooke v Head*,[220] where Lord Denning MR and Karminski LJ held that when assessing the beneficial interest of cohabitants, the appraisal should be similar to that applicable to married and engaged couples. Thus, the court should consider respective earnings, pooling assets and household contributions such as renovation efforts. This departed from the 1959 cohabitation case of *Diwell v Farnes*,[221] in which the court

[216] ibid [452].
[217] *Appleton v Appleton* [1965] 1 All ER 44.
[218] *Heseltine v Heseltine* [1971] 1 All ER 952.
[219] ibid [954].
[220] *Cooke v Head* [1972] 2 All ER 38; 1 WLR 518
[221] *Diwell v Farnes* (n 142).

defended a decision to prevent equitable interest proportionate to a widow's contributions to the mortgage by claiming that cases relating to married couples were inapplicable. This engagement with family-centric concerns reveals gradual recognition of the relationship dynamics of cohabitants.

Later that year, *Hussey v Palmer*[222] made further reference to 'justice and good conscience'.[223] In this case, a widow was invited to stay with her daughter and son-in-law, Mrs and Mr Palmer. She paid £607 for an extension to be built which would be her bedroom. After a disagreement with her daughter, 15 months later, Mrs Hussey claimed that she had lent the sum of £607 to the parties. Despite there being no agreement, declaration of trust or evinced intention to create a trust, the court held the extension was not a gift and it would be unconscionable to not make arrangements for its repayment. Lord Denning stated that the imposition of a trust in these cases 'is a liberal process, founded upon large principles of equity, to be applied where the legal owner cannot conscientiously keep the property for himself alone',[224] consequently creating a 'new model' constructive trust.[225] The property was held on resulting or constructive trust for the plaintiff proportionate to her payment. As one of the few cohabitation cases, this overt imposition of a trust to prevent an unfair outcome suggested that the decision was results-pulled. This case, it is argued, represented a significant step towards the recognition of family property and familialisation in the context of trusts of the family home.

Eves v Eves,[226] saw another attempt at imposing a trust on the basis of inequitable conduct, countering Diplock's formulation in *Gissing*. In this case, Miss Eves had moved into a property that Mr Eves had purchased. He assured her that the property was to be shared as 'their house for themselves and their children'.[227] However, the property was not vested in their joint names as he unjustifiably claimed she could not share legal ownership until she reached the age of 21. Even though she did not financially contribute to the property, Miss Eves raised their

[222] *Hussey v Palmer* [1972] 1 WLR 1286.
[223] ibid [1290].
[224] ibid [1289].
[225] Paul Friedman, Catherine Newman 'Remedial Constructive Trusts, Where To Next? Part II' (2000) 6(8) *Trusts & Trustees* 6.
[226] *Eves v Eves* (n 57).
[227] ibid [770].

daughter, performed homemaking duties and made extensive renovations to the home, including using a sledgehammer to dismantle concrete in the garden. The attention that Lord Denning gave to inequitable conduct appeared to form a motive for judicial intervention.[228] Brightman and Browne instead focused on common intention as Mr Eves had 'clearly led the plaintiff to believe that she was to have some undefined interest in the property'.[229] Miss Eves received a beneficial interest in the property, although Brightman mentioned that quantification was most complicated, particularly due to lack of guidance from *Gissing*.

Interwoven within this maturing trust framework was the growing acceptance of cohabitants as 'family' and appreciation of relationship dynamics between cohabitants. These cases arguably generated results-oriented decisions, as the judiciary sought to tackle inequitable conduct. It was even noted that Lord Denning utilised quotes that were 'selective and untypical' from *Pettitt* and *Gissing* in order to achieve this aim.[230] In *Re Evers Trust*[231] and *Dennis v McDonald*,[232] both courts justified extending cohabitants' property rights by reference to the underlying function of the property as a home for both parents and children. Both cases involved cohabitants with children where a party had applied for an order for sale under section 30 of the Law of Property Act 1925. Ormrod emphasised that the courts should analogise the discretion permitted under this section to that afforded by section 24 of the Matrimonial Causes Act 1973, stressing the purpose of providing a family home. This manipulation of statutory discretion mirrors other cases involving section 17. Thus whilst not constituting familialisation, it demonstrated gradual cognisance of relationship dynamics between cohabitants.

This succession of cases epitomised the conflict between adhering to the principles of *Pettitt* and *Gissing* and stretching trust principles to accommodate the nature of these disputes. Overall, it reflected an attempted process of clarification, primarily driven by judicial discretion, which was used to simultaneously exploit and rectify the deficiencies left from these

[228] A Morris, 'Equity's Reaction to Modern Domestic Relationships' in AJ Oakley, *Trends in Contemporary Trust Law* (Clarendon Press 1997).
[229] *Eves v Eves* (n 57) 774.
[230] G Battersby, 'How not to judge the quantum (and priority) of a share in the family home – Midland Bank v Cooke and Another' (1996) 8 *CFLQ* 261.
[231] *Re Ever's Trust* [1980] 3 All E.R. 403.
[232] *Dennis v McDonald* [1981] 2 All E.R. 632.

cases. Despite rejecting the 'family assets' approach and the use of section 17 as observed earlier in this chapter, the opaqueness of the decisions facilitated further use of discretion. Through expansive interpretations of trust principles, judicial discretion enabled person-specific innovation. Denning oversaw many of the cases throughout this period and it has been advanced that the 'St George of the law courts'[233] retained a pastoral view of England and idealised concept of the family as a locus of unity.[234] In offering context to enable fact-sensitivity, Denning's storytelling is evocative of loving families living in 'twee' matrimonial properties,[235] detailing cottage names such as 'Blue Shutters, Peckleton Lane, Desford' in *Falconer*.[236] It is asserted that his weaving of substantive discretion, family assets and notions of 'justice' and 'conscionability' can be attributed to his idyllic perception of a family, fuelling his desire to apply family-centric principles to property ownership disputes. As Master of the Rolls, his seniority could influence this direction of travel, too. *Pettitt* and *Gissing* facilitated these developments through lacking clarity, exposing property principles to future vulnerability with regard to familialisation. This enabled judicial sensitivities to seep into decisions, suggesting expansive discretion. Thus, greater emphasis on family-centric principles was exhibited, as guided by the judiciary, trickling from married couples to cohabiting couples throughout the 1970s. This observation of judicial sway will be explored further in Chapter Three where this form of expansive discretion will be scrutinised.

[233] John Mortimer, *Sunday Times* (2 March 1980) 43.
[234] Dennis Klinck, ''The Other Eden': Lord Denning's Pastoral Vision' (1994) 14(1) *OJLS* 25.
[235] Roger Sales, *English Literature in History 1780-1830: Pastoral and Politics* (New York: St Martin's Press, 1983) 315.
[236] *Falconer v Falconer* (n 215).

Conclusion

This Chapter has explored and evaluated the origins of the familialisation of property law. Ultimately, it has concluded that discretion has significantly contributed to the acknowledgement of relationship dynamics and family-centric concerns within judicial methodology when applying trust principles.

It was outlined that the concept of familialisation saw general property law principles modified and 'softened' via cognisance of family realities and subsequent accommodation of specific family needs. The Chapter then acknowledged that property and family law have been simplified into caricatures, and subsequently polarised to aid the understanding of familialisation. Whilst these caricatures should be discouraged, this is helpful to understand for the purpose of discerning how this polarisation has influenced debates in this field. The very nature of both fields has led to difficulty in determining ownership of matrimonial property, as seemingly 'complex, not well understood and...unfair'[237] property principles have been adapted to recognise the significant influence of relationship dynamics upon property acquisition. As demonstrated by this critique of case law, there are two distinct periods of familialisation which reflect the different motives behind this movement. Firstly, prior to *Pettitt* and *Gissing* and before the Matrimonial Proceedings and Property Act 1970, the courts sought to augment the possibilities of financial provision for married couples. It is submitted that the use of judicial discretion to facilitate this was brought about by societal change and the strive to achieve substantive gender equality. This analysis has shown that the judiciary employed various techniques to address dissatisfaction with separate property, including utilising discretion under section 17 Married Women's Property Act 1882 and incorporating family-centric principles prior to divorce reform in 1970. The second period, post *Pettitt* and *Gissing*, reflected the development of a trusts framework that would later be applied to cohabitants. Judicial activism persisted to address the financial needs of cohabitants as greater recognition of relationship dynamics within property disputes developed.[238] It is advanced that

[237] *Fowler v Barron* [2008] 2 FLR 1, [50].
[238] S Wong, 'Shared Commitment, Interdependency and Property Relations: A Socio-Legal Project for Cohabitation' [2012] *CFLQ* 60.

whilst *Pettitt* and *Gissing* sought to dismiss extensive application of judicial discretion, it left gaps in the court's methodology and consequently left itself vulnerable to further use of judicial discretion. Appreciation of family relationships within property disputes continued throughout the 1970s and familialisation in certain areas continued, motivating further calls for clarification that will be explored in the following Chapter.

CHAPTER TWO: JUDICIAL CREATIVITY AND THE EMERGENCE OF FAMILIALISATION

This chapter will assess the effectiveness of judicial innovations in the context of trusts of the family home and analyse this judicial creativity. Having established familialisation as a process of the gradual tempering of property principles to accommodate family needs, this chapter will expand upon this through analysing later case law that sought to refine these principles and dismiss Lord Denning's 'new model' constructive trust. An important development is the high acquisition threshold set in *Lloyds Bank Plc v Rosset,*[239] which this chapter will assess. It will then explore the notable cases of *Stack v Dowden*[240] and *Jones v Kernott*,[241] which called for, albeit in an obiter manner, a reinterpretation of *Rosset*[242] and entrenched the common intention constructive trust as central to trusts of the family home disputes.[243] A central theme of this chapter will be the reticence of the judiciary to embrace the family dimension of property law as they struggled to grapple with the balance between rules and discretion. Policy considerations will be identified as a potential reason for this. A second theme of this chapter will emphasise the divergence of the acquisition and quantification principles and how each element is approached. The judiciary's favour of fact-sensitivity will be explored through assessing the various uses of judicial discretion to quantify, and in some cases evidence acquisition, of a beneficial interest, before the chapter introduces the principal criticisms of this process. Having been criticised for producing 'palm tree justice'[244] and uncertainty, this method of adducing the common intention constructive trust will be critiqued and evaluated. This chapter will question the extent to which trust principles should be employed a mechanism for financially protecting cohabitants, enabling this thesis to explore and evaluate the principles underpinning familialisation and the modern trusts framework in Chapter Three.

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[239] *Lloyds Bank Plc v Rosset* (n 26).
[240] *Stack v Dowden* (n 11).
[241] *Jones v Kernott* (n 4).
[242] *Lloyds Bank Plc v Rosset* (n 26).
[243] *Jones v Kernott* (n 4) [25].
[244] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) 908.

Development of the Common Intention Constructive Trust

Having outlined the evolution of the common intention constructive trust through cases such as *Cooke v Head*,[245] *Hussey v Palmer*[246] and *Eves v Eves*,[247] Chapter One highlighted the problems associated with Lord Denning's 'new model'[248] constructive trust.[249] The decisions in these cases were predicated on the ideas of 'fairness' and 'justice', establishing a route to acquisition through an intention to share the property and detrimental reliance from the non-legal owner. This Chapter will seek to explore the modern case law aiming to modify and refine the principles laid down in *Pettitt v Pettitt*[250] and *Gissing v Gissing.*[251]

Burns v Burns[252] explored the meaning of conduct triggering an implied trust. This well-known case, which is often used to epitomise the unfair results that trust principles can create, involved a couple who presented themselves as married.[253] Valerie Burns used her partner, Patrick Burns' surname and they both cohabited for 17 years. Following their occupation of a series of rental properties, Mr Burns purchased a property and obtained a mortgage which he repaid. Mrs Burns used her limited earnings to pay for household expenses. Upon relationship breakdown, she claimed that she was entitled to a beneficial interest in the property through a resulting trust. However, her claim was dismissed. Fox LJ noted that her contributions of bringing up the children and undertaking domestic responsibilities could not 'carry with them any implication of a common intention that the plaintiff should have an interest in the

[245] *Cooke v Head* (n 220).
[246] *Hussey v Palmer* (n 222).
[247] *Eves v Eves* (n 57).
[248] A. J. Oakley, *Constructive Trusts* (3rd edn, London 1997) 69.
[249] J. Warburton, ''Trusts, Common Intention, Detriment and Proprietary Estoppel' (1991) 5 *Trust Law International* 9.
[250] *Pettitt v Pettitt* (n 22).
[251] *Gissing v Gissing* (n 23).
[252] *Burns v Burns* (n 32).
[253] John Mee, '*Burns v Burns*: The Villain of the Piece?' in J. Herring, S. Gilmore and R. Probert (eds), *Landmark Cases in Family Law* (Bloomsbury 2016) 175.

house'.[254] Emphasis was placed on the ''real' or 'substantial' financial contribution[s] towards the acquisition of the property'[255] necessary to establish a beneficial interest.

Burns was a notable case for exhibiting the lack of protection afforded to homemakers. Yet, as the outcome appeared consistent with authority, it highlighted the constraints of judicial discretion. As a result, it is an important case for epitomising the tension between rules to preserve legal certainty and the use of discretion to protect claimants. This approach in *Burns* ensures a higher degree of certainty through utilising objective factors. Nonetheless, it arguably undervalues and disadvantages the homemaker, who is statistically likely to be a woman.[256] Despite the dissatisfactory consequences and conservative view of 'common intention' evinced from the case, commentators assert that it correctly applied the case law.[257] Thus, it came as 'no real surprise' given the unsuccessful claim in *Gissing*[258] as similar to the outcome in *Gissing*, domestic contributions were insufficient to form the basis for an inference that there must have been a common intention between the parties to share ownership of the property. Consequently, whilst May LJ acknowledged that 'fate had not been kind to her', he asserted that the 'remedy for any inequity' was a 'matter for Parliament and not for this court' to decipher.[259] Fox LJ also evinced sympathy for Mrs Burns within his judgment, remarking that 'nevertheless she lived with him for 18 years as man and wife, and, at the end of it, has no rights against him',[260] reiterating the need for legislative intervention. In recognising the dissatisfactory consequences for Mrs Burns, the court demonstrated greater sensitivity to the domestic context whilst realising the unfortunate constraints of judicial discretion towards cohabitants. This curtailed approach therefore demonstrated allegiance to authority and dismissed Lord Denning MR's more generous 'new model' constructive trust proposal articulated in *Hussey.*[261]

However, the motivation behind this development becomes unclear when the bounds of

[254] *Burns v Burns* (n 32) [327]-[328].
[255] *Burns v Burns* (n 32) [345].
[256] Probert (n 2).
[257] Mee (n 253) 175.
[258] Lowe and Smith, 'The Cohabitants' Fate?' (1984) 47 *MLR* 341, 344.
[259] ibid [265].
[260] *Burns v Burns* (n 32) [332].
[261] *Hussey v Palmer* (n 222).

discretion are examined more closely. It is certainly possible that the courts could have utilised expansive discretion to reinvigorate Lord Denning MR's new model constructive trust. Given that the somewhat imprecise test for imposing or imputing a constructive or resulting trust pivoted on whether the parties 'by their joint efforts acquire property to be used for their joint benefit',[262] it is suggested that perhaps Mrs Burns may have succeeded to establish 'joint effort' if this test was employed. This judicial reluctance was scrutinised for causing 'injustice to cohabitants'.[263] One reason for this stringent approach is the court's desire to adhere to the doctrinal remedial foundation of genuine common intention and detrimental reliance.[264] The risk of finding a common intention that never existed undermines this foundation and would raise issues with predictability and floodgate concerns. Thus, *Burns* could be seen as an example of the judiciary trying to force the hand of Parliament through highlighting the dissatisfactory nature of trusts of the family home. In remaining consistent with the House of Lords authority of *Gissing*,[265] its firm stance arguably sought to 'provoke Parliament into legislative action' rather than to controversially extend the principles in *Gissing,*[266] particularly given that *Burns* was a Court of Appeal decision. However, this reform did not occur. The case was criticised at the time for failing to acknowledge the nature of family property disputes and academics emphasised the injustice that could arise.[267] Given the 'increasing frequency'[268] with which cohabitant property disputes were reaching courtrooms at this time, who like married couples often pooled assets, performed homemaking tasks and contributed to the purchase price of property, the lack of protection by trusts principles appeared unfair.

This case exemplified the fine balance that judicial discretion must maintain between adhering to property and trusts principles and modifying them for the benefit of a particular case. While Lord Denning MR's new model constructive trust would have employed vague principles such as justice and good conscience to resolve a dispute,[269] this methodology was dismissed in *Burns* in favour of a more orthodox approach. The case also revealed dissatisfaction with trusts of

[262] *Cooke v Head* (n 220) 520.
[263] David Allison, 'All Change?' (2007) 157 *NLJ* 386.
[264] Mee (n 253) 175.
[265] G Douglas, 'The Cohabitant's Fate?' (1984) 47 *Modern Law Review* 341, 344.
[266] R Ingleby, 'Sledgehammer Solutions in Non-Marital Cohabitation' (1984) 43(2) *CLJ* 227, 230.
[267] A Bottomley, 'From Mrs Burns to Mrs Oxley: Do Co-habiting Women (Still) Need Marriage Law?' (2006) 14 *Feminist Legal Studies* 181.
[268] *Burns v Burns* (n 32) [254].
[269] Mee (n 214).

the family home. Having originally induced familialisation in response to legislative inertia, perhaps the judiciary sought to highlight their discontent with the framework and the need for statutory intervention. As Mee noted, 'the law of trusts is not subject to some peculiarly lax regime in terms of the scope for its development'[270] and like many other areas of law, it is constrained by rules, principles, and policy concerns. *Burns* exemplified this sentiment and demonstrated judicial reticence towards developing the trusts framework further.

Evincing Common Intention

Several cases innovated the trust framework through developing new approaches to identify express common intention. Dewar uses *Grant v Edwards*[271] as a prime example of familialisation,[272] and the case has received favour for its clarification of the balance to be struck with regard to rules and discretion.[273] In this case, Miss Grant and Mr Edwards cohabited with their child in a property vested in the sole name of Mr Edwards. Similar to the unconscionability found in the *Eves* case, Mr Edwards persuaded Miss Grant not to acquire legal title, maintaining that it could prejudice her ongoing divorce proceedings. He had provided £1,043 for the property and acquired two mortgages summing £4,533, which Miss Grant assisted in repaying in addition to contributing to household expenses and providing for their two children. The Court of Appeal emphasised that the excuse given by Mr Edwards for sole legal title was unjustifiable, and if Miss Grant had not succumbed to this, she would have been a joint co-owner. This indicated common intention, although in line with *Eves*, the court stated that mere common intention alone was insufficient, and proof of detrimental reliance 'in the reasonable belief that by so acting she was acquiring a beneficial interest' must be demonstrated.[274] Once the common intention has been established, the detriment may be satisfied by any conduct 'on which [the claimant] could not reasonably be expected to embark unless she was to have an interest in the house'.[275] This would constitute any conduct referable

[270] Mee (n 253) 175.
[271] *Grant v Edwards* [1986] 2 All ER 426; [1986] Ch. 638.
[272] Dewar (n 1).
[273] KC Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1977) 15.
[274] *Grant v Edwards* (n 271) [437].
[275] ibid [433].

to the parties' joint lives together,[276] potentially taking the form of non-financial contributions, therefore expanding the use of trusts applied to these disputes. The court held that having demonstrated common intention and detrimental reliance, she should receive an equal share of beneficial ownership. Hence, previously vague principles resulting from 'practical problems' were both expressly acknowledged and refined in *Grant,* resulting in a decision 'characterised by analytical rigour and precision'.[277]

However, although Dewar argues that *Grant v Edwards*[278] encapsulated familialisation through broadening the concept of detrimental reliance,[279] it could be questioned as to whether *Grant* did exemplify familialisation. In the case itself, Mustill LJ denied the 'concept of family property, whereby people who live together in a settled relationship *ipso facto* share the rights of ownership in the assets acquired and used for the purposes of their life together'.[280] Moreover, the Court of Appeal rejected the 'flexible use of the constructive trust to do justice',[281] indicating an intended retreat from that approach to familialisation. Furthermore, members of the court were conflicted over both the definition of 'common intention' and how detrimental reliance could be demonstrated, leaving persisting uncertainty. Mustill LJ even suggested that common intention may represent a 'bargain, promise or tacit common intention', raising the possibility of imputing an unspoken agreement. This contradicted the approaches of *Pettitt* and *Gissing* and dangerously 'diluted such requirements [of proprietary written formalities] by virtue of equitable doctrines'.[282] Secondly, detrimental reliance acquired two definitions in *Grant*. Many favoured the approach of Browne-Wilkinson VC, who suggested that detrimental reliance could constitute 'any act done by her to her detriment relating to the joint lives' and the act would 'not have to be inherently referable to the house'.[283] This would have placed emphasis on the domestic context, enabling non-financial contributions as evidence, which would mitigate penalising economically weaker parties. However, Browne-Wilkinson VC was in the minority and Nourse LJ and Mustill LJ held that instead, it must comprise of conduct

[276] ibid.
[277] J Eekelaar, 'A Woman's Place–A Conflict between Law and Social Values' [1987] *Conveyancer and Property Lawyer* 93, 95.
[278] *Grant v Edwards* (n 271).
[279] Dewar (n 1).
[280] *Grant v Edwards* (n 271) [434].
[281] D Hayton, 'Equity and the Quasi-Matrimonial Home' (1986) *CLJ* 394, 394.
[282] ibid 397.
[283] *Grant v Edwards* (n 271) [438].

'on which she could not reasonably have been expected to embark unless she was to have an interest in the house'.[284] This focus on a change in position expressed less sensitivity to the domestic context and more emphasis on work for financial gain. Nevertheless, *Grant* and *Burns* did not conflict as they concerned fundamentally different situations.[285] Whereas an oral assurance of beneficial interest, such as the express promise in *Grant*, does not give rise to a resulting trust but rather a constructive trust, as per *Burns* a financial contribution creates an interest arising under a resulting trust and there is no need for a constructive trust to arise. It was argued at the time that to expand the ability of the courts to recognise beneficial interests through adopting the constructive trust approach could 'reduce the security of the legal owner to a mere sham'.[286] For this reason, the courts were hesitant to interfere with established property ownership through the use of trusts, asserting that this was a matter for Parliament to remedy. However, this did not occur and so later cases incrementally developed this common intention constructive trust. Overall, the courts were afforded little scope to do that following *Burns* and thus they did not possess the means to effectively address the dissatisfactory socioeconomic outcomes of these cases. Whilst the court in *Grant* did develop detrimental reliance, Dewar's use of this as evidence for demonstrating familialisation is potentially dubious as the majority reasoning did not actually embrace familialised concepts. Nevertheless, the case generally clarified the principles laid down in *Gissing* and further developed the framework for common intention constructive trusts.

Lloyds Bank v Rosset: Restricting the Acquisition Stage

Lord Bridge in *Lloyds Bank v Rosset*[287] provided what is widely regarded as the authoritative criteria for the common intention constructive trust.[288] The most notable element of the case was the restrictive approach to acquiring a beneficial interest, which persists today. Although the case involved a married couple, it also involved a creditor seeking possession and sale of

[284] ibid [434].
[285] Martin Dixon, 'Co-ownership Trusts in the United Kingdom – the Denning Legacy' (1988) 3 *Denning Law Journal* 27.
[286] ibid.
[287] *Lloyds Bank Plc v Rosset* (n 26).
[288] Dewar (n 1).

the matrimony property concerned. The property was purchased using Mr Rosset's family money and vested in his sole name. The couple renovated the house. Unbeknown to Mrs Rosset, Mr Rosset had charged the property to a bank in order to receive renovation funds. Mrs Rosset did not contribute to the purchase price or refurbishment costs, although she laboured to renovate and redecorate the home whilst raising their two children. Upon marital breakdown and failure to repay the loan, the bank sought possession and sale of the property. Mrs Rosset then argued that she had an overriding interest under section 70(1)(g) Land Registration Act 1925 as she not only occupied the property but had also acquired a beneficial interest. She asserted that she had detrimentally relied on the express common intention, based on conversations that the property would be owned jointly. In the House of Lords, Lord Bridge gave a sole judgment with which all other members agreed, rejecting the acquisition of an interest by Mrs Rosset. In assessing common intention, Lord Bridge set out a two-stage approach. This consisted of both acquisition for the purposes of establishing a beneficial interest and quantification of that interest, providing welcome structure and a singular statement of the law. He then outlined that a judge would need to assess whether the parties had 'entered into an agreement, made an arrangement, reached an understanding or formed a common intention that the beneficial interest in the property would be jointly owned'.[289]

Lord Bridge determined that there was no express intention as both parties were aware that the trustee would only lend funds to the husband if the property was vested in his name alone. Importantly, with reference to analysing conduct to infer common intention, Lord Bridge stated that 'neither a common intention by spouses that a house is to be renovated as a "joint venture" nor a common intention that the house is to be shared by parents and children as the family home throws any light on their intentions with respect to the beneficial ownership of the property',[290] ruling out expansive use of judicial discretion to infer common intention. It is suggested that this high acquisition hurdle and desire for bright-line rules is partially attributable to the fact that the case involved a third-party creditor, which weakened her claim further and suggested a clear policy motivation. As such, the court approached this dispute with caution, exerting a restrictive approach. Notably, the judge made a distinction between common intention based on an agreement evidenced by 'express discussion between the

[289] *Lloyds Bank Plc v Rosset* (n 26) [127].
[290] ibid [130].

partners, however imperfectly remembered and however imprecise their terms may have been',[291] and conduct including 'direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments...it is at least extremely doubtful whether anything less will do'.[292] This emphasis on monetary contribution to evidence conduct signaling common intention has been criticised for distilling the emotional complexity of family dynamics within property ownership into 'a stark balance sheet of monetary sums'.[293] Moreover, it was observed that this may handicap economically weaker parties who do not earn regular income.[294] This would particularly affect women looking after children and performing homemaking tasks.[295] This led to a surge of critical feminist literature urging for the courts to acknowledge of the lived experience of claimants[296] and address the unfair operation of these trusts on women.[297]

Rationalising Rosset

The commitment to precision employed within *Rosset* echoes the rigid approach of *Grant*, cementing 'a straightforward application of the principles first elaborated in *Pettitt v Pettitt* and *Gissing v Gissing* twenty years ago'.[298] *Rosset* therefore adopted an individualist mentality towards property ownership and sharing, drawing a distinction between property 'insiders', who own property and property 'outsiders' who do not.[299] From a political standpoint, this outcome naturally favours homeowners, reinforcing property law as a 'fortress of protection for the propertied insider'[300] and thus encouraging active citizenship by way of acquiring property. Another rationale for the outcome of the case lies in the desire to protect third party

[291] ibid [132].
[292] ibid [133].
[293] R. Yeo, 'The Presumptions of Resulting Trust and Advancement in Singapore: Unfairness to the Woman?' (2010) 24(2) *IJLPF* 123, 132.
[294] S Wong, 'Re-thinking Lloyds Bank v Rosset from a Human Rights Perspective' in A Hudson, *New Perspectives on Property Law, Human Rights and the Home* (Routledge Cavendish 2003) 79, 81.
[295] Law Commission, *Sharing Homes: A Discussion Paper* (Law Com No 278, 2002) para 2.108.
[296] A Lawson, 'The things we do for love: detrimental reliance in the family home' (1996) 16 *Legal Studies* 218; Halliwell (n 49).
[297] A Barlow and C Lind, 'A matter of trust: the allocation of rights in the family home' (1999) 19 *Legal Studies* 468.
[298] M Dixon, 'Acquiring an Interest in Another's Property' (1991) 50 *Cambridge Law Journal* 38, 40.
[299] L Fox O'Mahony, 'Property Outsiders and the Hidden Politics of Doctrinalism' (2014) 62 *CLP* 409.
[300] L Fox O'Mahony, 'The Politics of Lloyds Bank v Rosset' in Simon Douglas, Robin Hickey and Emma Waring (eds), *Landmark Cases in Property Law* (1st edn, Hart Publishing 2015) 193.

creditors, and consequently encourage their business practices. The litigation was triggered by the possession action brought by Lloyds Bank and it is submitted that the decision, which reflected favourably upon the creditor, reflected policy concerns.[301]

Tied to this is the desire for coherence and certainty. This ensures that all parties subject to litigation receive consistent advice from practitioners, who can accurately navigate this area of property law. Nevertheless, this pursuit of certainty prevents change, rendering this area of law static. Thus, instead of the 'status quo' defense of propertied individuals against the non-propertied,[302] the law should seek a more progressive approach to acknowledge the lived realities of cohabitants and ensure that parties can confidently receive fair treatment.[303] Principally, the case demonstrated the juxtaposition between discretion and certainty, highlighting the judicial reticence to provide greater flexibility for non-propertied cohabitants. At the same time, the failure to distinguish between resulting and constructive trusts left ambiguity that would only later be rectified. The journey from the early new model constructive trust cases to *Rosset* therefore reflects a process of judicial creativity, which was used to rectify the deficiencies left from *Pettitt* and *Gissing*. In an attempt to refine the framework applicable to both married couples and cohabitants, judicial reticence in employing discretion was evidenced here. In suggesting that only direct contributions would be sufficient to acquire a beneficial interest, the case certainly limited the number of applicants who could successfully evidence acquisition. Baroness Hale expressed the argument that *Rosset* 'set [the acquisition] hurdle rather too high in certain respects'[304] and this spurred the courts to look for other means of supporting non-moneyed parties in such property disputes, such as through expanding the factors considered at the quantum stage.

[301] ibid 193.
[302] E Rosser, 'The Ambition and Transformative Potential of Progressive Property' (2013) 101 *California Law Review* 107, 168.
[303] N Davidson, 'Property's Morale' (2011) *Michigan Law Review* 437.
[304] *Stack v Dowden* (n 11) [63].

Expanding the Common Intention Constructive Trust

Having established that *Rosset* created what is widely regarded as the authoritative criteria for the common intention constructive trust,[305] this section will analyse the case law developing this common intention constructive trust. Whilst the case set a high acquisition hurdle, curtailing the potential for judicial creativity, later case law called for a reinterpretation of *Rosset.*[306] The notable joint name cases of *Stack v Dowden*[307] and *Jones v Kernott*[308] entrenched the common intention constructive trust as central to trusts of the family home disputes.[309] This modern case law will be explored with reference to the judicial innovations that occurred throughout this period, enabling this thesis to evaluate how effective these modified trust principles are.

Applications of *Lloyds Bank v Rosset*

The first reported case following *Lloyds Bank v Rosset*[310] was the first instance case of *Hammond v Mitchell*,[311] which sought to deploy the principles of *Rosset* to a dispute between a cohabiting couple over the ownership of a bungalow. Whilst Mr Hammond was the sole legal owner of the property, the couple had two children and Ms Mitchell supported him in his business ventures. Waite J held that there had been an express discussion, albeit lacking in precision, which fell in line with the 'agreement, arrangement or understanding' criteria from *Rosset*. In assessing acquisition, the court found that the consent of Ms Mitchell to the possible loss of the bungalow amounted to detrimental conduct. Thus, she was awarded half of the total interest in the property. However, despite Waite J admitting that the process of

[305] Dewar (n 1).
[306] *Lloyds Bank Plc v Rosset* (n 26).
[307] *Stack v Dowden* (n 11).
[308] *Jones v Kernott* (n 4).
[309] ibid [25].
[310] *Lloyds Bank Plc v Rosset* (n 26).
[311] *Hammond v Mitchell* [1991] 1 WLR 1127.

quantification was 'detailed, time consuming and laborious',[312] the case offered limited analysis on this process. Commentators therefore stressed the 'confusions and complications which still linger'[313] post-*Rosset*.

Whilst caselaw prior to *Rosset* had primarily focused on developing the acquisition hurdle, the process of quantification had not received much attention from the courts. As observed in Chapter One, Lord Justice Brightman in *Eves v Eves*[314] noted the difficulty of quantification given the lack of clear guidance offered by Lord Diplock in *Gissing.* Moreover, in *Rosset*, Lord Bridge expressed that in the absence of an agreement or bargain, it was extremely doubtful whether indirect contributions alone would be sufficient. Thus, in the absence of discussion, conduct could only be accounted for under an orthodox purchase money resulting trust.[315] The predominant approach to quantification of a common intention constructive trust remained mathematical, which undermined domestic contributions and subsequently, the role of women in the home.[316] However a distinct shift in the judicial innovations regarding quantification occurred in the 1995 case of *Midland Bank v Cooke*,[317] which Hopkins suggests marks 'the re-introduction of an element of discretion at the stage of quantifying beneficial shares'.[318] This arguably typified familialisation, demonstrating judicial creativity in order to better recognise family dynamics and marking the divergence between the acquisition and quantification principles.

Midland bank v Cooke

The Court of Appeal in *Midland Bank v Cooke* explored whether, in the absence of any particular agreement as to the extent of the beneficial interest, such interest should be proportional to their contribution to the purchase price of the property.[319] This case involved a married couple who lived in a property conveyed into the sole name of the husband for

[312] ibid 1130.
[313] Anna Lawson, 'Acquiring a Beneficial Interest in the Matrimonial Home – Hammond v Mitchell' (1992) *Conveyancer and Property Lawyer* 218.
[314] *Eves v Eves* (n 57).
[315] Gray and Gray (n 244).
[316] N Hopkins, *Informal Acquisition of Rights in Land* (Sweet and Maxwell 2000) 118.
[317] *Midland Bank v Cooke & Anor* [1995] 4 All E.R. 562.
[318] Hopkins (n 316) 125.
[319] Patrick O'Hagen, 'Quantifying Interests Under Resulting Trusts' (1997) 60(3) *MLR* 420, 421.

£8,500. The property was purchased through a pooling of financial contributions, including £1000 from Mr Cooke's savings, £1100 from a wedding present given by his parents, and a series of mortgages. In line with authority,[320] Mrs Cooke signed a waiver of any equitable right in the property in favour of the bank's security under the mortgage. However, the court understood that she was subject to the undue influence of her husband when signing this. In terms of contributions, Mrs Cooke worked as a teacher and her income supported household expenses. She performed work on the property including redecoration, repairs and improvements. The court held that the wedding gift could establish an equitable interest. However, in quantifying this interest, the court decided that rather than it resulting back to her in a proportionate share, which would be 6.47 per cent, she should be entitled to a 50 per cent share in the property through a constructive trust. In his sole judgment, Lord Justice Waite advanced that once she had evidenced some direct contribution, it was then the court's role to calculate the beneficial interest otherwise than in proportion to that direct contribution. In this sense, the case evidenced a plurality of 'common intentions',[321] the first of which relates to obtaining equitable interest and the second referring to the common intention to the extent of that interest. In this quantification process, he emphasised the need to evaluate the course of dealing between the parties holistically, and that this 'scrutiny will not confine itself to the limited range of acts of direct contribution...it will take into consideration all conduct which throws light on the question what shares were intended'.[322] This enabled the court to acknowledge the relationship dynamics of the couple and the indirect contributions of Mrs Cooke, including bringing up their three children while continuing to work, using her earnings to pay bills and undertaking joint liability on two second charges over the property. In doing so, the case improved the position of non-moneyed cohabitants through expanding the scope of judicial discretion permitted at the quantification stage. From Chapter One, familialisation was defined in terms of using judicial discretion to modify property principles to accommodate the needs of families, and this can be seen clearly in this case.

[320] *Williams and Glyn's Bank v Boland* [1981] AC 487.
[321] O'Hagen (n 319) 424.
[322] *Midland Bank v Cooke & Anor* (n 317) [574].

The Role of *Midland Bank v Cooke* in expanding quantum principles

Cooke was an important case facilitating judicial recognition of indirect contributions, which accordingly reflected an acknowledgment of the influence of family relationship dynamics on the acquisition and sharing of domestic property. However, *Cooke* was subject to criticism owing to the arguably excessive use of judicial discretion employed. Battersby criticised the judgment for reaching the conclusion that they had agreed to share everything 'in the teeth of the evidence that they never reached any agreement or common intention at all'.[323] Mrs Cooke had even stated that the couple had not made any agreement to share the property. The employment of plural 'common intentions' has also been argued by O'Hagan to evidence the 're-emergence of the doctrine of family assets'.[324] Similarly, Battersby opined that this reverts the legal framework 'to those years of palm-tree justice'[325] of the 1950s and 1960s through the use of expansive discretion.

Whilst there is a danger of searching for a common intention solely with the aim of protecting the non-moneyed cohabitant, it is argued that the high acquisition hurdle set by *Rosset* restricts the use of expansive discretion and palm-tree justice. Cooke remained in line with the principles laid down in *Rosset* as *Rosset* was not a quantification case. Thus, whilst Mrs Cooke appeared to receive a more favourable outcome, this was because of the facts of the case, and notably the wedding gift, which allowed her to meet the acquisition hurdle, so the court was able to discuss quantification. On the contrary, Mrs Rosset supervised building work and selected wallpaper, which was held to be insufficient to acquire a beneficial interest in the property. Thus, Mrs Cooke's direct financial contribution of 6.47 per cent enabled her to acquire a beneficial interest and so once this small financial contribution had been identified, the court could ascertain the quantum of that interest through assessing conduct that would not otherwise be considered at the acquisition stage. In employing judicial discretion at the quantification stage, the judiciary demonstrated a willingness to familialise through showing greater fact-sensitivity, resulting in Mrs Cooke acquiring a 50 per cent share. Whilst factually consistent with authorities, Battersby disapprovingly termed this as 'parasitic

[323] Battersby (n 230).
[324] O'Hagan (n 319) 424.
[325] G Battersby, 'Oxley v Hiscock in the Court of Appeal' [2005] 17(2) *CFLQ* 259, 263.

quantification'.[326] In quantifying Mrs Cooke's beneficial interest, the emphasis that the court placed on assessing the whole course of dealings between the parties expanded the scope of judicial discretion. This has been criticised for ignoring the point established by *Rosset* that beneficial interest must be acquired through the finding of an agreement or direct contribution, as the court cannot presume common intention, and ignoring the preference in *Gissing* for mathematical quantification.[327] However, whilst this exercise of discretion to accommodate this interpersonal context clashes with the individualism-based 'classic authorities approach'[328] of *Pettitt* and *Gissing*, such judicial innovations should be welcomed. The judicial creativity exemplified in *Cooke* remained in line with previous authorities yet provided a new outlook on quantification. It modified the principles to recognise the role of indirect contributions by the homemaker in the context of trusts of the family home. Employing this discretion when quantifying beneficial interests also supports financially disadvantaged cohabiting homemakers and child-carers, who are often women. In doing this, the case represented judicial innovation which capitalised on the omissions and ambiguities from previous cases such as *Rosset* in order to develop the trusts framework favouring the homemaker. The case accentuated the process of familialisation through expanding the use of judicial discretion at the quantification stage.

Le Foe v Le Foe

Following the elucidation of the quantification process in *Cooke*, the case *of Le Foe v Le Foe*[329] shed further light on the requirements of acquisition, seeking to temper the rigid framework laid out in *Rosset.* From *Rosset*, it was unlikely that indirect financial contributions would suffice when establishing a beneficial interest. This viewpoint was reinforced by Lord Justice Glidewell in *Ivin v Blake*,[330] which involved a beneficial interest claim based on indirect contributions. However, in *Le Foe*, Nicholas Mostyn QC, sitting as deputy High Court judge of the Family Division, interpreted Lord Bridge's dicta in *Rosset* to enable indirect contributions to suffice in exceptional circumstances. The case concerned a couple who had been married for over 40 years, and 12 years into their marriage purchased two leasehold flats

[326] Battersby (n 230) 264.
[327] ibid.
[328] S Gardner, 'Fin de Siècle chez Gissing v Gissing – Midland Bank v Cooke [1995] 4 All ER 562' (1996) 112 *LQR* 378, 383.
[329] *Le Foe v Le Foe* [2001] All ER 325.
[330] *Ivin v Blake* [1995] 1 FLR 70, 83.

in London in the sole name of the husband. The property was acquired with a mortgage, discharged using the husband's earnings whilst the wife's earnings supported household expenditures including renovations. When the husband left his wife, he embarked on a subterfuge to strip the majority of the equity out of the former matrimonial home, subsequently re-mortgaging the property without his wife's knowledge. Upon defaulting on the mortgage repayments, the bank sought repossession. The wife then claimed that she had a beneficial interest in the property. In applying *Rosset*, Mostyn announced that 'I do not believe that in using the words "direct contributions" Lord Bridge meant to exclude the situation which obtains here'.[331] He therefore interpreted the dicta to permit an indirect contribution in particular circumstances. Thus, she was awarded 50 per cent of what the assets would have been but for her husband's fraudulent actions. This recognition of indirect financial contribution reflected a trickle-down effect from acknowledging this form of contribution at the quantum stage to then taking it into account at the acquisition stage. This could be seen as results oriented, displaying judicial manufacturing of the outcome through manipulating the judgment from *Rosset*. Whilst this was a generous decision in favour of Mrs Le Foe, an argument against this would be policy. As observed in *Rosset*, a predominant motivation behind the clear yet rigid approach was the protection of the third-party creditor. Yet in *Le Foe*, the court took the opportunity to expand the potential contributions allowable and this is certainly consistent with the idea of familialisation, which is an intuitive, reactionary process that develops incrementally over time.

Nicholas Mostyn QC noted, albeit as obiter, that the family economy depended on the wife's earnings and that she indirectly contributed to the repayment of the mortgage, 'the principal of which furnished part of the consideration for the initial purchase price'.[332] This effectively capitalised upon the ambiguity left by *Rosset* and *Gissing*, as explored in the previous section, in order to broaden the variety of contributions which may be recognised when establishing a common intention to share a property beneficially. However, it is submitted that Mostyn did this with care and with caution, representing a principled use of judicial creativity to modify trust principles. It did not render all types of contribution capable of triggering a constructive trust, iterating that minor renovations and household expenses alone would not create a

[331] *Le Foe v Le Foe* (n 329) [47].
[332] ibid [10].

beneficial interest. Pawlowski commends this decision for broadening the circumstances in which a wife or cohabitant may claim an equitable share in property and forming a more robust approach, following *Cooke*, to recognising indirect contributions.[333] Furthermore, this approach was endorsed by the Law Commission of England and Wales[334] and Thompson commended the decision for its more sympathetic approach to family property.[335] Nevertheless, academics have criticised the theoretical basis of the common intention constructive trust and consider decisions broadening its availability artificial and strained.[336] Barnes further observed that the case made no reference to *Ivin v Blake*, contending that *Le Foe* could have been decided per incuriam. Moreover, support for this idea may arise from the subsequent orthodox approach laid down in *Oxley v Hiscock*.[337]

Oxley v Hiscock

Oxley v Hiscock[338] further developed the methodology of *Cooke*, confirming that non-financial and indirect contributions could be acknowledged during the process of quantifying an established beneficial interest. Hailed as an 'important breakthrough',[339] the case provided a full synthesis of trusts of the family home and adopted a holistic approach to quantum. This case involved a cohabiting couple who lived in a property, the purchase price of which they both contributed to and which was vested in the sole name of Mr Hiscock. Upon relationship breakdown, the property sold at an increased value yet there was no agreement or understanding between the two as to the extent of beneficial ownership. Having contributed 28 per cent of the purchase price, Ms Oxley complained when Mr Hiscock offered her one sixth of the proceeds of the sale. She used section 14 of the Trusts of Land and Appointment of Trustees Act 1996 to seek a declaration that the proceeds were held on trust in equal shares.

[333] M Pawlowski, 'Beneficial Entitlement – Do Indirect Contributions Suffice?' (2002) *Family Law* 190.
[334] Law Commission (n 295).
[335] MP Thompson, 'An Holistic Approach to Home Ownership' [2002] 66 *The Conveyancer* 273, 276.
[336] N.E. Glover and P.N. Todd, 'The Myth of Common Intention' (1996) 16 *Legal Studies* 325.
[337] *Oxley v Hiscock* [2004] EWCA Civ 546.
[338] ibid.
[339] Gray and Gray (n 244) 938.

The Court of Appeal held that Ms Oxley was entitled to a 40 per cent share in the proceeds of sale. This dismissed the principle in *Springette v Defoe*[340] that the court could only consider direct financial contributions when inferring shares. In quantifying the beneficial interest, Chadwick LJ stressed that 'each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property',[341] including mortgage contributions, utilities, repairs and housekeeping. As a result, Ms Oxley was awarded 40 per cent.

While the case reflected indirect contributions, moving away from *Rosset*,[342] it lacked clarity through using the concept of 'fairness' and attracted criticism for endorsing individualised justice.[343] Chadwick LJ attempted to restrict fairness, noting that it should be assessed by 'having regard to the whole course of dealing between [the parties] in relation to the property'.[344] However, in the later case of *Stack v Dowden*, Lord Neuberger criticised this formulation. He stated that assessing the whole course of dealings between the parties appeared to contemplate an imputed intention, generated imprecision and gave insufficient guidance as to exactly what dealings would be relevant.[345] The judgment permits 'broad brush quantification' which Battersby condemned as facilitating palm-tree justice.[346] Through expanding the discretion given to the judiciary, the process of quantification primarily relies on judicial instinct, indicating that this process of familialisation is both intuitive and reactionary. Whilst this admirably enables the courts to adapt to social change fairness runs the risk of creating inconsistency and uncertainty owing to the vague nature of this concept. Similar to *Cooke*, this approach applied solely at the quantification stage yet went further in permitting greater flexibility. These indirect financial contribution cases supported the process of familialisation and represented a clear shift in judicial methodology to recognise relationships within trusts of the family home at the quantification stage. This is what Hayward terms 'fragmented' familialisation, in that parallel streams were developing between acquisition

[340] *Springette v Defoe* [1992] 2 FCR 561.
[341] *Oxley v Hiscock* (n 337) [69].
[342] M Dixon, 'Resulting and Constructive Trusts of Land: The Mist Descends and Rises' [2005] *CPL* 79.
[343] ibid.
[344] *Oxley v Hiscock* (n 337) [73].
[345] *Stack v Dowden* (n 11) [144].
[346] Battersby (n 325).

principles and quantum principles. Whereas acquisition principles followed bright-line property tests following *Rosset*, quantum principles were now gaining flexibility, creating divergence between the two. Overall, *Oxley* confirmed this disparity whilst weaving flexible, familialised concepts into the developing trusts framework.

Fragmented Familialisation: The Divergence of Acquisition and Quantum Principles

The disparity between the principles adopted at the acquisition and quantum stage became more apparent in the case of *Stack v Dowden.*[347] This was an important step forward for the modern trusts of the family home framework, where the court applied family-centric principles, derived from *Oxley,* to disputes over jointly owned property. Whilst the House of Lords endorsed *Oxley*, observing that it 'has been hailed by Gray and Gray as "an important breakthrough"',[348] the court was cautious about the nebulous concept of 'fairness' and explored how best to quantify shares in family property. Ms Dowden and Mr Stack acquired a property, conveyed in Ms Dowden's sole name and using a mortgage in her name which she repaid in addition to paying all household bills. They maintained separate bank accounts, savings and investments. The couple had four children, made renovations to the property and sold the house for profit, subsequently purchasing a new property on Chatsworth Road in London. The new property was conveyed into the parties' joint names and there was no express declaration of trust, although Ms Dowden provided £128,000 of the £190,000 cost, the rest provided by a loan to both parties. This loan was secured by a mortgage and two endowment policies, one of which was in joint names and the other in Ms Dowden's sold name. In repaying the loan, Mr Stack contributed £27,000 and Ms Dowden £38,435. When the parties separated, the proceeds of property sale were split by equal division. The Court of Appeal then permitted Ms Dowden a 65 per cent beneficial share, which the court considered 'fair' in line with *Oxley v Hiscock*. Mr Stack appealed and the House of Lords unanimously dismissed this.

[347] *Stack v Dowden* (n 11).
[348] ibid [61].

The House of Lords agreed that where there is no express declaration of beneficial interest, yet the parties are co-owners of the property, the starting point is that equity follows the law.[349] Thus, a rebuttable presumption exists that the property is held on implied trust for the legal co-owners as beneficial joint tenants. While in the past the presumption could be rebutted easily through an unequal financial contribution, in cohabitation cases there now existed a strong or heavy presumption of beneficial joint tenancy. Baroness Hale (as she then was), Lord Hoffman, Lord Walker and Lord Hope then agreed that the presumption may be rebutted by contrary common intentions of the parties. Contrary to *Pettitt v Pettitt*, the presumption could not be rebutted by a resulting trust created through financial contributions to the acquisition of the property. Baroness Hale distinctively emphasised that the family home differs from a commercial property. Accordingly, unequal financial contribution should not override equal sharing through the common intention constructive trust and a departure from equality would be 'exceptional'[350] following an assessment of the parties' actual, imputed or inferred intentions regarding the property.

Baroness Hale provided fifteen factors that should be taken into account in ascertaining these intentions, including financial contributions, discussions at the time of transfer, financial arrangements and the nature of the relationship between the parties.[351] The court also reinforced the fact that the common intention constructive trust had been developing since *Pettitt* and *Gissing*. However, Lord Neuberger, whilst in agreement with the fact that equity follows the law, provided a dissenting opinion. His argument turned on the idea that where financial contributions are made, the starting point should be the presumption of resulting trust.[352] Then, if evidence of intention exists based on party conduct, this resulting trust could be 'rebutted and replaced, or (conceivably) supplemented, by a constructive trust',[353] permitting greater acknowledgment of the domestic context. Furthermore, he rejected the differentiation between the family and commercial context made by the majority and reasoned that the court should provide clarification through applying the principles of land, equity and contract that had been 'established and applied over hundreds of years'.[354] Overall, he arrived

[349] ibid [54].
[350] ibid [33].
[351] ibid [69]-[70].
[352] ibid [110].
[353] ibid [124].
[354] ibid [101].

at the same conclusion that the beneficial interest should be allocated on a 65:35 ratio in favour of Ms Dowden but through a different analysis. Despite arriving at the same conclusion, the stark difference between the constructive trust and the resulting trust analyses is crucial. The resulting trust analysis, which places significant weight upon the 'solid tug of money' and monetary contributions is detrimental to women, who are often homemakers, seeking to claim beneficial interest in the family home.[355] According to Piska, this 'entrenches the differential treatment of women' and may not account for the expectations and interests of the parties concerned.[356] Douglas, Pearce and Woodward's empirical research in 2007[357] also suggested that cohabitants were ill-informed as to the implications of their property division due to the opaque and uncertain nature of the law and concluded that the application of rigid principles could lead to unfairness. As a result, it is advanced that Lord Neuberger's preference for the resulting trust can be criticised for its narrowness in failing to adequately protect cohabitants and accommodate the needs of families acquiring property.

Stack v Dowden: 'Context is everything'

Stack v Dowden was important in embracing the need for a contextualised approach to trusts of the family home disputes. Baroness Hale's statement that 'many more factors than financial contributions may be relevant to divining the parties' true intentions' and that 'context is everything'[358] was key in broadening the scope of contributions that could be taken into account. It is advanced that this emphasis on context should be welcomed, particularly as Lord Hope recognised that:

> 'cohabiting couples are in a different kind of relationship. The place where they live together is their home. Living together is an exercise in give and take, mutual

[355] Law Commission (n 33) paras 4.1-4.21.
[356] Nick Piska, 'Intention, Fairness and the Presumption of Resulting Trust after Stack v Dowden' (2008) 71(1) *MLR* 120, 124.
[357] G. Douglas, J. Pearce and H. Woodward, *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (2007) paras 6.9-6.14 at http://www.bris.ac.uk/law/research/centres-themes/cohabit/cohabit-rep.pdf (accessed 13 March 2021).
[358] *Stack v Dowden* (n 11) [69].

> cooperation and compromise. Who pays for what in regard to the home has to be seen in the wider context of their overall relationship'.[359]

Nevertheless, this non-exhaustive list can be seen as a broad-brush approach to quantification, offering the judiciary expansive discretion, which has been criticised by Dixon as 'the property lawyer's equivalent of a Pandora's box – everything included without only a small hope that this will not lead to endemic uncertainty'.[360] Despite promoting judicial cognisance of the lived realities of families owning properties, *Stack* exhibited a lack of clarity in terms of the considerations that the court must evaluate. Baroness Hale affirmed the principle that the whole course of dealing should be evaluated holistically, searching for the parties' actual intentions rather than imputing intentions in the name of achieving fairness. This holistic approach lacks precision and the method of assessing these intentions lacks transparency. As highlighted by Lord Neuberger, this is an important distinction as 'imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend'.[361] As Piska notes, through accepting imputed intentions when quantifying beneficial interest, 'the majority clothe fairness in the language of intention without providing explicit guidance for determining the content of either',[362] which risks creating uncertainty and subjectivity. Thus, the case could be viewed as lacking doctrinal clarity as the majority sought to explicitly incorporate a notion of fairness when quantifying beneficial interests. This could perpetuate the ebb and flow process in struggling to achieve the balance between clear rules and flexible discretion.

Nevertheless, the case is important in reflecting greater judicial acknowledgement of relationship dynamics that inform property ownership, offering the potential for the court to exercise discretion stretching beyond mere fact-finding.[363] It is argued that the main uncertainty evolving from a holistic approach is due to the fact that these considerations were not structured. This theme will be explored throughout the following chapter. However,

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[359] ibid [3].
[360] M Dixon, 'Editors Notebook' [2007] *Conveyancer and Property Lawyer* 71.
[361] *Stack v Dowden* (n 11) [126].
[362] Nick Piska (n 356) 128.
[363] S Gardner, 'The Element of Discretion' in P. Birks, *The Frontiers of Liability* (OUP 1994) 186, 193.

overall, *Stack* was a welcome case that gave the House of Lords the opportunity to realise the importance of the domestic context, paving the way for further familialisation.

Injecting Further Flexibility into the Modern Trusts Framework

The Supreme Court in *Jones v Kernott*[364] sought to clarify the rules regarding the quantification of beneficial ownership and structure the use of judicial discretion in this context. However, it is submitted that it did not achieve this goal. The case gave the Supreme Court 'the opportunity to revisit the decision of the House of Lords in *Stack v Dowden*'[365] and has been remarked as being 'driven by policy considerations and the special facts that normally apply in the dealings between those living in an intimate relationship'.[366] The case emphasised that the resulting trust is inappropriate to use in cases involving trusts of the family home.[367] The case was the first of its kind in considering post-separation conduct. The former cohabitants had been separated for fifteen years prior to the sale of the property. It notably repeated the principle that in joint name cases, the starting point is that equity follows the law, but highlighted that in sole legal ownership instances, acquisition poses more of a problem for the non-legal owner attempting to establish beneficial interest. Thus, it highlighted the stark disparity between the high acquisition threshold and the flexible approach taken to quantification, reflecting fragmented familialisation.

Miss Jones and Mr Kernott cohabited together in a home purchased under joint names, financed through the proceeds of sale of Miss Jones' caravan and a mortgage, also taken out in joint names. Miss Jones paid the household expenses and the mortgage using her income and contributions from Mr Kernott. Mr Kernott met most of the cost of an extension for the house and the couple had two children. When Miss Jones left the family home in 1993, she continued to repay the mortgage, the endowment policy premiums and the household expenses whilst raising their two children, receiving limited financial maintenance from Mr Kernott. The couple attempted to sell the house. When this proved unsuccessful due to the housing

[364] *Jones v Kernott* (n 4) [25].
[365] ibid [1].
[366] *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619 at [85] (Etherton LJ).
[367] *Jones v Kernott* (n 4) [25].

market, Miss Jones and Mr Kernott cashed in a joint life insurance policy, which Mr Kernott then used the proceeds of to acquire a property of his own. There was no discussion about how the couple's affairs would be resolved until Mr Kernott served a notice of severance in relation to the joint property in 2006. Miss Jones then applied, under section 14 of the Trusts of Land and Appointment of Trustees Act 1996, for a declaration seeking her entitlement of the property, which by 2008 had significantly appreciated in value.

The lower courts faced difficulty in applying the principles of *Stack v Dowden*, and at trial Judge Peter Dedman concluded that Mr Kernott should only receive a 10% share in the property. The reasoning for this allocation was that whilst the initial intention of the couple was to establish and share a family home, the intentions of Mr Kernott had changed when he left the property for over fourteen years. During this time, the property had significantly increased in value to £245,000, and he had benefitted from being able to buy another property of his own. Given that there were no clear expressions of intentions, Judge Dedman held that Miss Jones should acquire a 90% beneficial interest as this was 'fair and just',[368] imputing the familiar opaque terms that have been criticised throughout this thesis thus far.

On appeal in the Chancery Division of the High Court, Nicholas Strauss QC agreed with the trial judge that 'in the absence of any indication by words or conduct as to how they should be altered, the appropriate criterion was what he considered to be fair and just'.[369] His interpretation of the majority view in *Stack* was that this should occur in exceptional circumstances. He reinforced that 'the court should not override the intention of the parties, in so far as that appears from what they have said or from their conduct, in favour of what the court itself considered to be fair'.[370] This accords with the concerns raised in the previous section, that in giving the judiciary power to quantify the beneficial interest against the standard of 'fairness', there is a risk of imputing intentions and overriding the original interests of the parties. Nevertheless, Nicholas Strauss QC agreed with the approach of Judge Dedman. The decision did not override any different intentions and so remained 'in accordance with the common intention of the parties'.[371] However, a problem with this fact-sensitivity approach

[368] ibid.
[369] ibid [49].
[370] ibid [959].
[371] ibid [963].

lies in the difficulty in unravelling intentions, which are rarely transparent. This therefore risks the court engaging in a rigorous process of fact-finding to establish common intention. Without structured guidance as to how to assess this, discretion could be employed in a manner that reflects personal assumptions. This will be explored in the following section where it will be asserted that recently, a more forensic approach has been taken in order to assess the intentions of the parties, which has rendered the law more uncertain due to over-reliance on fact-sensitivity.

In the Court of Appeal, Mr Kernott's beneficial interest was quantified at 50%, concluding that the fourteen years assuming all responsibilities for the joint property was insufficient to adjust the parties' beneficial interests in the home. Wall LJ stated that he was unable to alter the equal division of beneficial interests given the lack of intentions regarding the parties' affairs, reiterating that the court could not 'spell such an intention out of their actions'.[372] He emphasised that whilst fairness was a concept applied under the Matrimonial Causes Act 1973, it did not apply to trusts of the family home.[373]

The Supreme Court then restored the original conclusion of Judge Dedman in the lower courts, finding that Mr Kernott has acquired a 10% beneficial interest in the property. Lord Walker and Lady Hale concluded that it was a reasonable inference that the parties had intended their shares to crystallise in 1993 when the couple separated. While Lord Kerr and Lord Wilson agreed with the division of beneficial interest overall, they contended that inferring a change of intention from conduct was inappropriate. Nevertheless, the court explained that the rationale behind the presumption of beneficial joint tenancy was the acknowledgment that a family home was 'a strong indication of emotional and economic commitment to a joint enterprise'[374] and that this would be displaced if an alternative common intention could be deduced. In quantifying the beneficial interest, Lady Hale and Lord Walker stated that 'each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property',[375] taking non-financial considerations into account. *Jones v Kernott* also dismissed the resulting trust for joint-legal ownership family

[372] ibid [62].
[373] ibid [55].
[374] ibid [19].
[375] ibid quoting *Oxley v Hiscock* [2004] EWCA Civ 546 [69] (Chadwick LJ).

home disputes, reinforcing the principles laid down in *Stack*. Thus, the case affirmed that in joint-name property cases, the court must consider any changes of the parties' intentions in order to rebut the presumption of joint ownership that arises when there is an absence of an express trust in a joint legal title case.[376]

The role of *Jones v Kernott* in perpetuating the ebb and flow process

Jones v Kernott refined the trusts of the family home framework, providing a clearer outline of the special regime that applies in these disputes. Where the court is unable to find an agreement as to shares, the factors outlined in *Stack v Dowden* may be employed to ascertain a common intention, with fairness utilised as an exceptional fall-back, only to be used where an express or inferred agreement as to shares is not found. The strong role that 'fairness' played in *Jones*[377] received criticism for 'blurring the traditional distinction' between married and unmarried couples,[378] although this was restricted to a confined set of circumstances. Moreover, the presumption of beneficial joint tenancy was argued to resemble the 'yardstick of equality'[379] created by the House of Lords in *White v White*[380] when assessing the division of matrimonial assets following divorce. This has led commentators to question *Jones*' perception as 'the new *White*'[381] and critique the case for rendering shares in family property 'not a matter of property law at all'.[382] Referred to as a 'more holistic, broad brush, highly contextualised assessment of parties' common intentions',[383] the case therefore raises possible concerns as to what extent the court would be permitted to adjust or circumvent an express declaration of trust.[384] To this end, the constructive trust in the family home must resist the danger of overriding express declarations. Nevertheless, this has not occurred post-*Kernott* and

[376] ibid [51].
[377] Nigel Gravells, *Landmark Cases in Land Law* (Oxford: Hart Publishing 2013) 230.
[378] T Ross, 'Unmarried couples granted new legal protection by courts' *The Telegraph* (London, 9 November 2011).
[379] J Miles and R Probert, 'Sharing Lives, Dividing Assets: Legal Principles and Real Life' in J Miles and R Probert, *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart Publishing 2009) 12.
[380] *White v White* (n 70).
[381] R Bailey-Harris and J Wilson, 'Hang on a Minute! (Or is Kernott the New White)' (*Family Law Week*, 10 February 2011) <https://www.familylawweek.co.uk/site.aspx?i=ed79632> accessed 17 March 2021.
[382] M Dixon, 'Land Law' (2012) 65 *Student Law Review* 48, 49.
[383] C Bevan, 'The Search for Common Intention: The Status of an Executed, Express Declaration of Trust post-Stack and Jones' (2019) 135 *LQR* 660.
[384] ibid.

it is argued that rather than these cases transposing family law into this area, the acknowledgement of the emotional dynamic intertwined within domestic property disputes has added a new dimension that should be welcomed. However, this is a key discussion within the debate surrounding trusts of the family home which will be further evaluated within the next chapter in order to assess the extent to which the familialisation of property law should be further encouraged.

In attempting to clarify the decision of the courts in *Stack*, the Supreme Court explored the distinction between an inference and imputation, deciding that it would be permissible to impute intentions with regard to the parties' shares where it is clear that the parties intended to share the property. As noted by Roche, if an agreement to share is identified, then imputing intentions when the couple had not outlined how the property would be shared is perfectly sensible[385] to assist the parties in separating. This demonstrates that whilst the courts held the bright-line high threshold for acquisition, quantification was receiving more flexibility and thus being further 'familialised', demonstrating fragmented familialisation. One issue with imputation is that, as noted by Yip, it should be informed by policy concerns, and 'the court must be careful not to infuse broad family law policy concerns into this exercise because the common intention constructive trust is not the proper place to do so'.[386] This is because such an expansive use of discretion to address broad-brush policy concerns would be subject to criticism for reflecting an abuse of judicial power. This would consequently undermine the benefits and nuances of judicial discretion in the context of disputes over the family home, exposing the modern trusts framework to further manipulation and eroding the incremental development developed by the courts. Nevertheless, *Jones* offered a clear framework for trusts of the family home cases, particularly in respect of joint name cases. Only Lady Hale and Lord Walker commented on the implications for disputes involving sole legal ownership of the property, affirming that the non-legal owner would have to demonstrate acquisition of beneficial interest. However, the judges did not expressly limit the conduct that could be used to evidence common intention to the types stipulated in *Rosset*, and the fact that *Rosset* was

[385] Roche, 'Kernott, Stack, and Oxley made simple: a practitioner's view' (2011) 75 *Conveyancer and Property Lawyer* 123, 129.
[386] M Yip, 'The rules applying to unmarried cohabitants' family home: Jones v. Kernott' (2012) 2 *Conveyancer and Property Lawyer* 159, 162.

not cited with reference to this point is disapproved of by Sloan.[387] Having been criticised in *Stack* and arguably dwindled in its effect over time, it has been suggested that *Jones v Kernott* should have discussed *Rosset* in order to 'confront the issue head-on, which would be of general benefit to the law and parties to future disputes'.[388] However, whilst this decision generated much academic commentary,[389] *Jones* affirmed and clarified the principles underpinning common intention constructive trusts.

To conclude, this section has assessed a key period in the evolution of familialisation and trusts of the family home. In particular, the maturation of the common intention constructive trust and its rise to the forefront of the trusts framework was a significant materialisation. The progressive recognition of indirect contributions to evidence common intention further reflected judicial recognition of the family context, although it was observed that this could generate a process of 'fact-finding'. Overall, following *Lloyd's Bank v Rosset*, case law began to engage in a process of clarification and refinement, beginning with the modification of *Rosset* through acknowledging indirect financial contributions, before eventually cementing the common intention constructive trust and outlining the process of acquisition and quantification in *Stack* and *Kernott*. These developments provided a welcome elucidation upon trusts of the family home and marked a turning point in familialisation as courts began to ascribe family-centric ideologies to caselaw, indicating a shift in judicial dynamism. This will be further explored in the following section, which will evaluate the case law post-*Kernott* and the impact that these cases have had on the modern trusts framework.

[387] Brian Sloan, 'Keeping up with the Jones case: establishing constructive trusts in 'sole legal owner' scenarios' (2015) 35(3) *Legal Studies* 226, 233.
[388] ibid.
[389] Dixon (n 382) 49.

Familialisation Today

Stack v Dowden and *Jones v Kernott* were both prime examples of familialisation.[390] Following the development of quantification principles and fragmented familialisation within these cases, the final section of this chapter will provide an evaluation of the case law post-*Kernott*. This will enable this thesis to evaluate the effectiveness of the development of trust principles as applied to cohabitants and the effect of these judicial innovations upon modern caselaw. The cases both simultaneously clarified and confused the approach to be adopted when the judiciary use discretion to fact-find. This chapter also observed that this further strained the relationship between property law and family-centric concerns, with many criticising this familialisation process.[391] This dynamic will be further explored within this section to ascertain how familialisation has evolved and continues to be visible in trusts of the family home disputes.

The Impact of *Jones v Kernott* on the Modern Trusts Framework

While *Jones v Kernott* elucidated aspects of the common intention constructive trust, Miles notes that 'the contours have arguably become no easier to discern'.[392] Sloan contends that case law was divided in its approach to Jones when compared with Rosset. Some of these cases ignored the possible impact of *Jones* in moving beyond *Rosset*. In other cases, *Jones* appears to have produced a novel result in a sole title case, whereas in other sole legal title cases, the influence of *Jones* was recognised but the outcome would have been permissible following *Rosset*.[393] As discussed, the inability of *Stack* and *Kernott* to address *Rosset* posed a problem for the courts in that it could possibly be argued that the law at this point treated sole name and joint name cases differently. However, this distinction would lack clarity and judicial justification. Thus, the following cases offered an insight into the application of *Jones* and its compatibility with the decision in *Rosset*.

[390] J Miles, R George, S Harris-Short, *Family Law: Text, Cases and Materials* (4th edn, OUP 2019).
[391] Dixon (n 382).
[392] J Miles, 'Lessons for the South from North of the Border?' (2012) *CLJ* 492.
[393] Sloan (n 387) 235.

Initial reluctance of the courts to apply *Jones v Kernott*

There were several cases in which the decision in *Jones v Kernott* was ignored, including *Garwood v Ambrose*[394] and *Rezaiepoor v Arabhalvai.*[395] It is argued that this is because *Jones* failed to expressly address *Rosset*, rendering it susceptible to disregard. Whilst *Rezaiepoor* cited *Rosset* and not *Jones*, another potential reason for omitting reference to *Jones* could be that the earlier judgment was handed down several months before the Supreme Court judgment of *Jones*. Thus on appeal in February 2012 there was little reason to engage with the case. Nevertheless, the High Court decision of *Garwood v Ambrose* also expressly ignored and failed to follow *Jones*, despite the fact that the case involved a joint legal ownership dispute, to which *Jones v Kernott* should have applied. Sloan argued that it is 'odd to say the very least that Judge Leaver QC failed expressly to follow the approach in *Jones v Kernott*'.[396] This signified a lack of clarity as courts struggled to grapple with the relationship between these two cases. There were also several cases that did acknowledge *Jones*, but failed to apply this to the question of acquisition, including *Re Ali*,[397] *Ullah v Ullah*[398] and *Serious Organised Crime Agency v Coghlan.*[399] The focus on financial contributions and restrictive approach did 'not reflect a realisation of *Jones*' possible implications in 'sole name' cases as compared to *Rosset*'.[400] It is therefore submitted that *Jones* did not fully clarify the law, and in failing to sufficiently address *Rosset*, left gaps in the judicial methodology which consequently damaged the coherence of the law.

Successful Applications of *Jones v Kernott*

However, there are numerous cases which have successfully applied *Jones v Kernott* and demonstrated judicial acknowledgement of the lived realities of cohabitants sharing property. *Thompson v Hurst*[401] involved a couple who acquired a home using a right-to-buy discount

[394] *Garwood v Ambrose* [2012] EWCH 1494.
[395] *Rezaeipoor v Arabhalvai* [2012] EWHC 146.
[396] Sloan (n 387) 233.
[397] *Re Ali* [2012] EWHC 2303 (Admin).
[398] *Ullah v Ullah* [2013] EWHC 2296 (Ch).
[399] *Serious Organised Crime Agency v Coghlan* [2012] EWHC 429 (QB).
[400] Sloan (n 387) 239.
[401] *Thompson v Hurst* [2012] EWCA Civ 1752.

purchased by Ms Hurst. The couple wished to buy the property jointly but were advised that Ms Hurst should acquire the mortgage in her sole name due to Mr Thompson's variable employment history. Accordingly, it was purchased in her sole name. Lord Justice Etherton believed that the common intention should be inferred from the original intention regarding the sharing of legal ownership but found that he was unable to disturb Judge Spencer's original conclusion, despite having 'some difficulty in understanding' it.[402] The judge held that the parties had not established a common intention in relation to quantification as there was a distinction between express discussions as to legal, and equitable, ownership. Mr Thompson was to have a beneficial interest, but there was an absence of common intention regarding the extent of the beneficial interest. The judge therefore ascertained what would be fair having regard to the whole course of dealing between the parties, apportioning Mr Thompson a 10% beneficial interest. *Gallarotti v Sebastianelli*[403] also demonstrated a successful claim utilising the principles laid out in *Jones*. The case involved a flat vested in the sole name of Mr Sebastianelli, purchased in 1997 by way of deposit and a mortgage. The parties agreed that they would have equal shares in the flat but Mr Gallarotti would pay more towards the mortgage in order to compensate Mr Sebastianelli for his large contribution to the purchase price. The friendship ended and Miss Recorder Michaels QC held that the parties had an equal beneficial interest in the flat. However, in the Court of Appeal, Mr Gallarotti was found to have made 'no real contribution at all'[404] to the mortgage, so 'the agreement for 50/50 sharing was at an end'.[405] Thus, he was awarded 25% beneficial interest reflecting their financial contributions. However, *Gallarotti* permitted the court to consider whether or not the parties still intended their agreement to apply and to find that some alternative agreement could be inferred from their conduct. This promoted fact-finding, which broadens the scope for discretion and accordingly, perpetuates uncertainty. Here, *Gallarotti* represented welcome judicial acknowledgement of the domestic context, although similar to *Stack*, due to the lack of structured guidance as to the factors to be considered, significant weight was placed on the parties' changing intentions.

[402] ibid [23].
[403] *Gallarotti v Sebastianelli* [2012] EWCA Civ 865.
[404] ibid [23].
[405] ibid [26].

Jones, *Stack* and *Rosset* - tackling the acquisition threshold

The lower courts have demonstrated reluctance to favour the factors of *Jones* and *Stack* over those from *Rosset* owing to the failure of the cases to sufficiently analyse *Rosset*.[406] Sloan advances that another Supreme Court decision is necessary to 'remove the straitjacket of *Rosset* from the establishment of an interest in a shared home via a constructive trust'.[407] Following *Stack* but prior to *Jones*, in *James v Thomas*[408] in 2007 the courts refused to interpret the *Rosset* criteria more flexibly in assessing the acquisition hurdle. The case concerned a cohabiting couple who shared 'The Cottage'. This was vested in the sole name of Mr Thomas, having previously belonged to his parents. Mr Thomas had inherited a one third share in the property and bought the remaining shares from his siblings prior to meeting Miss James. After several years, she moved into the cottage and proceeded to make a 'near Herculean'[409] effort to undertake unpaid work in the family business. Miss James sought to establish a common intention, claiming a beneficial interest. Despite assurances that she would 'be well provided for' in the event of Mr Thomas' death, these assurances were insufficient to constitute an express common intention. Additionally, her failure to directly contribute to the purchase price meant that the court was reluctant to modify the acquisition routes for such a trust. However, in *Abbott v Abbott,*[410] the acquisition hurdle was met as Baroness Hale disagreed with the lower courts' reliance on the *Rosset* interpretation. She instead interpreted a gift to a married couple as assumed for the benefit of both parties, similar to *Cooke*. This meant that Mrs Abbott could acquire a beneficial interest in the matrimonial home. The court then went on to account for the parties' whole course of conduct, including the evidence that they held joint bank accounts and assumed joint liability for the mortgage, as well as the fact that the husband had himself accepted that Mrs Abbott had beneficial interest. This resulted in the court quantifying a 50% interest in the property, reflecting a willingness to accommodate family-centric principles within the constraints of *Rosset*.

[406] *Smith v Bottomley* [2013] EWCA Civ 953, *Geary v Rankine* [2012] EWCA Civ 555.
[407] Sloan (n 387) 250.
[408] *James v Thomas* [2007] EWCA Civ 1212 (CA).
[409] ibid, [11] (Chadwick).
[410] *Abbott v Abbott* [2007] UKPC 53 at [4] (Baroness Hale).

The courts adopted a lenient approach as they continued to acknowledge the domestic context. The Court of Appeal decision in *O'Kelly v Davies*[411] affirmed that illegality would not bar a cohabitant from acquiring an equitable interest in the property and in *Marr v Collie*[412] the court expanded trusts of the family home to recognise domestic relationships with a commercial facet. *Collie* therefore disputed Dewar's previous assertion that 'the relevant doctrine as it now stands has no significant application outside the family home context'[413] and the *Laskar* principle that the presumption in *Stack* applies only in a domestic consumer context.[414] The case provided welcome clarification on the approach to be considered if cohabitants jointly own property for investment purposes. Whilst the court acknowledged that intentions may change over time, Lord Kerr attempted to resolve this through stating that if the property is purchased in joint names by parties in a domestic relationship the presumption of joint beneficial ownership would apply, but if it was purchased in a non-domestic context, the presumption of a resulting trust would apply. Particularly in light of modern relationships and the growth in family business and entrepreneurship,[415] the expansion of trusts of the family home to recognise domestic relationships with a commercial facet is welcome.

In terms of assessing the contributions that would evidence acquisition, recent case law has attempted to clarify this, and the court still appears to place reliance on direct financial contributions. However, the court may additionally consider whether the contributions were merely for the purpose of demonstrating a commitment to the relationship or whether they displayed a common intention to acquire an interest in the property. This reflects a general shift towards looking at the domestic nature of the relationships, although it will be noted that these considerations are of a subjective nature and attributing weight to them could create uncertainty. A long-awaited analysis of the *Stack*, *Jones* and *Rosset* principles was attempted in the 2018 decision of *Culliford v Thorpe.*[416] The case concerned Jocelyn Thorpe, who wished to establish a proprietary interest in the property that he shared with the late Rodney

[411] *O'Kelly v Davies* [2014] EWCA Civ 1606.
[412] *Marr v Collie* [2017] UKPC 17.
[413] Dewar (n 1), (n 77).
[414] *Laskar v Laskar* [2008] EWCA Civ 347.
[415] Yusuf Berkan Altun, 'Pandemic Fuels Global Growth of Entrepreneurship and Startup Frenzy' (*Forbes*, April 9 2021) < https://www.forbes.com/sites/forbestechcouncil/2021/04/09/pandemic-fuels-global-growth-of-entrepreneurship-and-startup-frenzy/?sh=24a431eb7308> accessed 9 September 2021.
[416] *Culliford v Thorpe* [2018] EWHC 426 (Ch). It should be noted that the case also considered the distinction between proprietary estoppel and the common intention constructive trust.

Culliford, vested in Culliford's sole name. In considering general principles from *Rosset*, that there must be an agreement to share and detrimental reliance, and the concession from *Jones v Kernott* that the shares in the property may be varied over time, HHJ Matthews held that despite the informal agreement between the two unmarried partners, Mr Thorpe did demonstrate detrimental reliance. This occurred through undertaking significant work to the property including removing carpets and laying wooden floors, replacing radiators, installing a new kitchen and working on design ideas. This increased the value of the property by £30,000 and a constructive trust was formed, enabling Mr Thorpe to receive a 50% share of the net sale proceeds. As this significantly increased the value of the property and Mr Thorpe evidenced expenditure for the building works he did, this demonstrated direct financial contributions that signified his reliance on their common intention to share the property.

The court has since moved to distinguish between contributing to the domestic property to demonstrate a commitment to the relationship as opposed to a common intention to acquire an interest in the property. In *Dobson v Griffey,*[417] again Judge Matthews emphasised that that whilst Ms Dobson, the non-legal owner, had made a 'real contribution'[418] to the property, it was undertaken not for the purpose of receiving financial gain, but for the benefit of 'her home, and that of her children'.[419] Therefore, as she had not contributed to the purchase price or mortgage, she had not relied on any agreement, failing to evidence a common intention to share the property. One notable element of this case is the judicial discussion regarding Ms Dobson's credibility and character, which arguably played a significant role in the determination of the case. Ms Dobson claimed that Mr Griffey had assured her that this would be her 'home for life', however Judge Matthews was discouraged by the quality of her evidence, describing her as an 'intelligent, well-educated person' but 'prone to exaggeration' and 'utterly convinced she was right'[420] as opposed to the 'quietly spoken and rather reticent' Mr Griffey.[421] It is contended that the oral evidence provided by the parties undermined Ms Dobson's credibility. This demonstrates a high level of fact-sensitivity when examining these cases, placing greater weight on principles such as the intentions of the parties and their relationship

[417] *Dobson v Griffey* [2018] EWHC 1117 (Ch).
[418] ibid [64].
[419] ibid [76].
[420] ibid [32]-[33].
[421] ibid [40].

dynamic to determine the existence of a common intention. As a result, *Dobson v Griffey* represents a highly nuanced decision, founded upon the established principles of the common intention constructive trust and signals a family-centric approach within the modern trusts framework.

In the most recent case of *Amin v Amin & Ors*,[422] Mrs Amin was sole legal owner of a house at 104 Gladstone Park Gardens in London and she considered herself to have full legal and equitable interest in the property. Her husband, who she was merely religiously, as opposed to legally, wed to, and two sons counterclaimed that they were entitled to a 100% equitable interest. The county court judge held that Mrs Amin held the property on constructive trust for Mr Amin and her sons. On appeal, Lord Justice Nugee dismissed the appeal and similarly to Dobson, the credibility of Mrs Amin was doubted as 'the judge found her oral evidence to be confused and imprecise'.[423] Nugee LJ also highlighted the original judge's doubts about her allegations of domestic abuse,[424] although these were 'not directly relevant to the proceedings'.[425] This wider judicial perspective concerning the credibility of the witnesses and the desire of the courts to evaluate the relationships dynamics of the parties concerns presents an interesting and emotionally complex new dimension to such cases.

As family-centric considerations have incrementally gained support within the modern trusts framework, it appears that the courts have now adapted to consider the very nature of the relationships themselves in order to evaluate common intention. This can be demonstrated in the recent case of *Oberman v Collins & Anor*.[426] This involved a property dispute over a property empire consisting of forty properties in London and Kent, which Nicola Oberman asserted she acquired an interest in. Shaun Collins was imprisoned in 1997 for six months for false accounting, and his letters from prison promised Nicola a share in their business. The couple had agreed to share twenty-eight properties. Ms Oberman sought a beneficial interest in the remaining twelve properties registered in his sole name. Tom Leech QC, sitting as judge of the Chancery Division, found Mr Collins an unsatisfactory witness, his evidence being

[422] *Amin v Amin & Ors* [2020] EWHC 2675 (Ch).
[423] ibid [8].
[424] ibid [11].
[425] ibid.
[426] *Oberman v Collins & Anor* [2020] EWHC 3533 (Ch).

inconsistent with key documents, and upon consideration of the facts, he awarded Ms Oberman a 50% interest in seven of the twelve properties.

This thesis submits that this evaluation of the whole course of dealing between the parties should be encouraged. The property acquisition of a family and the subsequent disputes over the property when determining its division are greatly influenced by the emotionally complex relationship dynamics that spur such actions, choices and consequences. It is therefore vital for the court to acknowledge this dynamic interrelationship in order to gain a broad and deep understanding of the parties' changing intentions. However, assessing personal conduct through assessing witness credibility and the nature of the parties' relationship can be overly subjective. Nevertheless, these cases have demonstrated that post-*Stack* and *Jones*, whilst *Rosset* remains in force and judicial methodology has evolved very little, the courts have shown a willingness to incorporate family-centric principles into their decisions.

Conclusion

This Chapter has explored and evaluated the extent of judicial creativity in the context of trusts of the family home, concluding that judicial methodology has incrementally developed to clarify and refine principles underpinning the modern trusts framework as applied to cohabitants. The development of the common intention constructive trust was firstly assessed by reference to case law following Lord Denning's 'new model' constructive trust observed in *Cooke v Head*, *Hussey v Palmer* and *Eves*. Through analysing the cases of *Burns*, *Grant v Edwards* and eventually *Lloyds Bank v Rosset*, this chapter observed that familialisation has been fragmented. In both expounding upon, and subsequently refining, the principles guiding the common intention constructive trust, the courts have crafted a trusts framework, applicable to ownership disputes between cohabitants, that has the ability to evolve. The later cases of *Stack v Dowden* and *Jones v Kernott* provided welcome clarification of these principles, asserting the potential to consider non-financial contributions, and offering a holistic, contextualised approach to assessing beneficial interest. However, they could not overrule *Lloyds Bank v Rosset* and failed to expressly address how the cases would coexist. This resulted in a struggle for the lower courts, and it is contended that a Supreme Court decision would be necessary to address this.

The Chapter has also observed that the drive to further familialise the framework has lost momentum since *Jones v Kernott*, yet the modern trusts framework still continues to apply family-centric concepts to family property disputes. In capturing a holistic view of the conduct and intentions of the parties concerned, assessment of the relationship dynamic between the couple has become a prominent method of achieving this and this is beneficial in gauging the common intentions of the couple. Judicial cognisance of the complex emotional dynamic associated with family property is a welcome dimension to judicial innovation. However, attempting to fact-find through placing excessive emphasis on personal conduct, for example through assessing witness credibility and the nature of the parties' relationship could create arbitrary results. This raises concerns of uncertainty which will be explored within the following chapter.

CHAPTER THREE: CONTEMPORARY CRITICISMS OF THE 'FAMILIALISATION' OF PROPERTY LAW

This chapter will provide an evaluation of the process of the 'familialisation' of property law, considering the criticisms of the modern trusts framework and the uses of discretion which have supported its development. A key debate canvassed in this chapter concerns the issue of judicial discretion and the extent to which it should be deployed.[427] As noted in Chapter Two, a distinct shift occurred when discretion was introduced at the stage of quantifying beneficial interest,[428] leading to a more expansive use of judicial discretion. This has proven to be particularly controversial and is accused of representing broad-brush 'palm-tree justice'.[429] Whilst space precludes a theoretical critique of discretion more generally,[430] this Chapter seeks to examine the discretionary 'technique of family law'[431] and the way in which it exhibits itself within trusts of the family home. The competing spheres of family and property law within the trusts framework has drawn in academic scholarship which will be considered to examine the role that this plays within the criticisms of familialisation. After identifying the key deficiencies of judicial discretion, the following section will highlight the importance of accommodating the domestic context by implied trusts to prevent 'relationship blindness'.[432] In light of the inherent limitations of discretion, the Chapter will advance employing a more structured, rule-based discretion which reduces the risk of uncertainty whilst encouraging judicial cognisance of relationship dynamics. This will enable the final chapter of this thesis to identify a method to achieve this.

[427] Keith Hawkins, *The Uses of Discretion* (OUP 1995).
[428] Hopkins (n 316) 125.
[429] Battersby (n 325).
[430] Hawkins, (427).
[431] Gardner (n 363) 199.
[432] Bottomley (n 17).

The Inherent Limitations of Judicial Discretion

Judicial discretion has been central to the development of the familialisation of property law. Subsequently, the relationship of discretionary powers with rules marks one of the key debates surrounding this process. The polarisation between discretion and rules has guided much of the academic scholarship, with many regarding them as opposing entities, even though the two are symbiotic.[433] As observed in earlier chapters, discretion has been utilised as a method of fashioning the modern trusts framework. This occurred following its use in the 1950s onwards, which saw the judiciary create a 'discretionary jurisdiction for the assistance of married claimants, in the days before the divorce reforms in 1969'.[434] It was established that this discretionary approach influenced the implied trusts framework in the 1970s as applied to cohabitants, growing 'organically from marital to extra-marital relationships'.[435] This emphasis on discretion leads many to argue that this has formed a distinctive feature of family property cases, departing from traditional property principles.[436] Consequently, it has attracted criticism for diluting the 'purity and logic of the law of property,'[437] which is considered rule-based, as judicial methodology has sought to accommodate the domestic dimension through arrogating discretion to themselves. Consequently, a key theme underpinning the criticisms of judicial discretion is the relationship between rules and discretion, which has been viewed as a fault line between property law and family law which will be explored in the following section.[438]

Criticisms of Judicial Discretion

Discretion has clearly helped the judiciary in carving out the modern trusts framework. Nevertheless, discretionary powers have attracted criticism, more broadly within law as a

[433] Hawkins (n 427) 35.
[434] E Cooke, *Land Law* (OUP 2012) 87.
[435] P Sparkes, 'Morality, Amorality and Equity' [1990] 5 *Denning Law Journal* 91, 103.
[436] Dixon (n 31).
[437] R Probert, 'Cohabitation: Current Legal Solutions' (2009) 62 *Current Legal Problems* 316.
[438] W.T. Murphy and H Clarke, *The Family Home* (Sweet and Maxwell 1983), R. Probert, 'Family Law and Property Law: Competing Spheres in the Regulation of the Family Home' in A Hudson, *New Perspectives on Property Law, Human Rights and the Home* (Routledge Cavendish 2003) 37.

discipline, for resembling 'the law of tyrants'[439] and a 'corrupting force'[440] that brings with it the potential for injustice.[441] To identify the weaknesses and merits of the familialisation process, it is necessary to scrutinise the limitations of judicial discretion more generally before considering how it supports the development of the trusts of the family home framework. Three main criticisms are considered. First, in applying trust principles in a more discretionary manner, the judiciary can influence decisions through injecting their own values, and potentially their own prejudices, into judgments. Second, despite discretion enabling flexibility, it also creates uncertainty and inconsistency. This tension must be examined to decipher the ideal balance. Third, discretion risks judges attaching excessive weight to particular facts, such as the interaction between the parties, to evidence common intention. Combined with the fact that judges lack guidance on how to approach these particular facts, unlike the direction given by the Matrimonial Causes Act 1973, cases are exposed to potentially subjective assessments based on 'judicial hunch'.[442] As a result, the suggestion of a structured list of factors to consider, such as those highlighted within paragraph 69 of *Stack v Dowden*,[443] will be evaluated with reference to the advantages of rule-based discretion. These three main concerns of judicial discretion will therefore be examined and addressed throughout this section.

(i) The Values, Sensitivities and Accountability of Judges

A first notable criticism of judicial discretion is that in arrogating themselves more discretion to resolve property ownership disputes between couples, judges are susceptible to making decisions reflecting their own values and principles and, potentially, prejudices. This is a well-established and prominent criticism of judicial discretion which cuts across all branches of law. However, it is of particular importance to trusts of the family home, as Chapters One and Two established, because judicial discretion, influenced by the fact trusts originated from equity, has been a key feature in the development of the modern trusts framework.

[439] *Doe v Kersey* (1765) (CP) Unreported) noted in R.C. Post, 'The Management of Speech: Discretion and Rights' (1984) *Supreme Court Review* 169, 208.
[440] R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 571.
[441] Davis (n 273).
[442] Battersby (n 325) 264.
[443] *Stack v Dowden* (n 11) [69].

Previously, financial contributions were assessed to establish the resulting trust. However, the modern implied trusts framework considers a plethora of factors and scrutinises relationship dynamics. A significant form of discretion facilitated by *Stack* and *Kernott* involved the identification of particular circumstances which would enable judges to exercise their own discretion.[444] Whilst this appears progressive in aligning the law with social practice, the inherent lack of structure evinces a controversial approach. In creating distinctions between cases based on their contextual background, the framework is susceptible to inconsistency as interpretations may vary from judge to judge. This broad discretion opens up the possibility of the judiciary making subjective assessments, encouraging potential bias.

The exercise of discretion can be affected by the social status of parties involved in legal disputes and the social background of the legal personnel involved in the process.[445] Consequently, excessive reliance on particular facts in cases and the discretion available to judges to interpret these facts runs the risk of judicial prejudice. Statistically, judges are well-educated members of the upper and middle classes[446] who are unelected by society. Waldron criticises this as a method of disenfranchising ordinary citizens.[447] In restricting the diversity of the judiciary, this may stagnate any fresh perspectives, and this may hamper the development of a progressive trusts of the family home framework.

Tying these ideas together, principles created using discretionary powers, as opposed to rules, may be subject to judicial manipulation in order to create results-pulled decisions. As observed in *Gissing* for example, judicial discretion was used to search for an agreement reflecting a common intention with the aim of protecting the non-moneyed cohabitant. This offered the judiciary considerable scope when it came to interpretation. It has been observed that judges do contribute their own unique outlook to decisions, and this may impact the outcome of judgments and consequently the development of caselaw. For example, Chapter One noted that Lord Denning, who was involved in many of the cases from the 1950s onwards, possessed

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[444] ibid.
[445] M. P. Baumgartner, 'The Myth of Discretion' in Keith Hawkins (ed), *The Uses of Discretion* (OUP 1995) 152.
[446] John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 *California Law Review* 353, 369.
[447] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *YLJ* 1346.

an idyllic conception of a family.[448] He encouraged the incorporation of principles such as 'unconscionability' and 'justice' when determining beneficial interests in the family home and other areas such as the equity of a deserted wife.[449] His interweaving of family-centric concepts when determining disputes between spouses arguably stemmed from his own values, and his seniority as Master of the Rolls enabled him to influence the direction of caselaw through employing judicial discretion. In *Eves* Lord Denning emphasised the work that Ms Eves had performed, including breaking up concrete in the garden with a sledgehammer and carrying the pieces to a skip. Referring to the 'strict law', he sought to find a beneficial interest, noting that 'equity is not past the age of childbearing'.[450] Indeed, emphasis was placed on the fact that Miss Eves had been unconscionably misled into not vesting the property into joint names. As a result, empathy was shown towards Miss Eves and the discretion offered was utilised to support her in achieving a result that was favourable to her. However, this form of judicial influence is not necessarily negative. The introduction of familialised principles, resulting from results-oriented decision-making, could be viewed as constructive and forward-thinking. Previous chapters have considered the advantages of adapting property principles to modern social practice. Judgments based on the recognition of social practice and standards of fairness could therefore be seen as proactive.

Another results-driven decision was seen in *Midland Bank v Cooke,*[451] where a more holistic, discretionary approach was adopted for quantifying beneficial interests. This resulted in a small monetary contribution, reflecting 6.47% of the acquisition, generating a 50% beneficial interest. Although the case was consistent with the leading authority of *Rosset,*[452] which confined evidence of acquisition to direct financial contributions, *Cooke* expanded the use of judicial discretion applicable at the quantification stage to circumvent this restrictive approach. Although *Rosset* had omitted to specify how quantification should be approached, *Cooke* was criticised for stretching the remedies available to non-moneyed cohabitants through exploiting this oversight.[453] The decision is thus viewed as results-oriented, partially driven by judicial values. Waite LJ determined in that case that the court was 'free to attribute to the parties

[448] Sales (n 235) 315.
[449] *Falconer v Falconer* (n 215).
[450] *Eves v Eves* (n 57) 1341.
[451] *Midland Bank v Cooke & Anor* (n 317) [574].
[452] *Lloyds Bank Plc v Rosset* (n 26).
[453] Battersby (n 230).

an intention to share the beneficial interest in some different proportions'[454] and concluded that the couple had agreed to share everything equally. By ignoring the method of mathematical quantification preferred in *Gissing*, Waite LJ placed emphasis on *Grant v Edwards*[455] in which Browne-Wilkinson V-C and Nourse LJ examined the common intention to quantify beneficial interest. However, as observed by Battersby, in *Grant* the judges relied heavily on the evidence of common intention between the parties such as payment of insurance policies into a joint bank account.[456] Instead, this assessment of common intention appeared to be motivated by the desire to achieve a favourable result for Mrs Cooke. In *Cooke*, there was no evidence to attest a joint common intention that beneficial interest would be equal. This was therefore dubbed as 'parasitic quantification',[457] as the minimal interest acquired could then be increased by conduct that would otherwise be irrelevant to the proceedings. The case demonstrated a clear desire of the court to stretch trusts principles to increase Mrs Cooke's share to 50%. The motivation is arguably an attempt to reinsert a degree of fairness within the proceedings. Waite LJ perceived the emotive consequences of such an inflexible property framework left by *Rosset*, asserting that it was guilty of generating 'human heartache as well as public expense'.[458] He alluded to the reduced ability for women and mothers to consistently offer direct financial contributions and how childcaring obligations 'necessarily affect the future earning capacity of the wife'.[459] This emphasis on looking at the nature of the relationship holistically and recognising gendered disadvantage marked an attempt to reassert fairness in this context and avoid the rigid application of *Rosset*.[460] In actively circumventing *Rosset* and questionably applying *Grant*, it is argued that Waite LJ was keen to inject fairness into the framework, indicating his own views in the process. This approach has been criticised as creating 'palm-tree justice'.[461] Combined with the notion that decisions based on discretionary powers may be influenced by the qualities of the judges themselves, concerns arise as to how trusts of the family home have been and should be shaped by judicial discretion.

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[454] *Midland Bank v Cooke & Anor* (n 317) 926.
[455] *Grant v Edwards* (n 271).
[456] G Battersby (n 230) 264.
[457] ibid.
[458] *Midland Bank v Cooke & Anor* (n 317) 736.
[459] ibid 744.
[460] Georgina Collins, 'Unmarried Cohabitation and the Constructive Trust: An Exercise in Flawed Equality' (DPhil thesis, Lancaster University).
[461] Battersby (n 325) 263.

Another example of potential judicial influence was seen in *Le Foe v Le Foe*,[462] which attempted to bypass the unaccommodating framework laid out in *Rosset*. Despite *Rosset*, and later *Ivin v Blake*,[463] strongly discouraging the acceptance of indirect financial contributions to acquire a beneficial interest, Nicholas Mostyn QC interpreted Lord Bridge's dicta in *Rosset*[464] in a way that did not necessarily exclude such contributions. In this sense, judicial activism was utilised to distinguish the case from its authority and avoid following these precedents, shielding the decision from criticism. Sitting as deputy High Court judge of the Family Division, Nicholas Mostyn QC has been known for his 'passionate view[s]' of the law that led the Court of Appeal to fear, in one instance, were 'distorting' his judgment.[465] His family law background appeared to influence the decision of *Le Foe*, which was critiqued for broadening the scope of common intention constructive trusts in an artificial and unprincipled manner.[466] Similar to *Cooke*, the decision was viewed as one which was also motivated by a need to secure a result for a weaker party.

Thus, as these cases demonstrate, unlike the role of discretion within traditional common law functions, the discretion involved in the familialisation of property law exemplify the tension between individualised family circumstances and generalised property principles. In transposing family ideologies onto the canvas of property law, the judiciary must navigate the tension between these competing concepts by identifying exceptions and gaps within the framework. It is advanced that this is to create results-oriented decisions, driven by the desire to acknowledge relationship dynamics. Whilst this compels the judiciary to engage in thoughtful, individualised reasoning, the discretion offered is broad. However, decisions constructed around the outcome, when founded upon logical reasoning, propel the development of the trusts framework in a progressive manner as it moulds itself to tackle social norms. An issue that is more problematic concerns the *breadth* of this discretionary power, which risks judicial influence. In placing too much emphasis on the disadvantaged situation of one party and tailoring decisions to manufacture an outcome that the court deems appropriate, a

[462] *Le Foe v Le Foe* (n 329).
[463] *Ivin v Blake* (n 330) [83].
[464] *Lloyds Bank Plc v Rosset* (n 26) 133.
[465] Ian Johnston 'High Court Judge removed from second case this year over his 'passionate' views' (*The Independent*, 22 October 2015) < https://www.independent.co.uk/news/uk/home-news/high-court-judge-removed-second-case-year-over-his-passionate-view-law-a6705001.html> accessed 6 June 2021.
[466] Glover and Todd (n 336).

subjective assessment is incorporated. Despite its progressive approach, this could create considerable legal uncertainty. As will be argued in the subsequent chapter, this eventuality could be mitigated by courts structuring and refining their exercise of discretion, perhaps through attaching more weight to objective factors yet still acknowledging the context of these cases.

In addition to influencing the application and development of the law, judicial discretion also enables judges to achieve policy goals, which some academics have condemned as 'legalized politics'.[467] In *Rosset*, a key feature of the case interested a third-party creditor. It was therefore suggested in Chapter Two that a primary rationale behind entrenching the stringent trusts framework was a policy motivation to protect and benefit creditors.[468] This may reflect an intention of the judiciary to achieve policy goals through exercising their discretionary powers, although it could be argued that this effectively balances criticisms of familialisation as a generous use of judicial discretion. Particularly in *Rosset*, this exercise of judicial discretion sought to establish coherent principles and clarify the law. However, this thesis submits that in attempting to delineate the trusts framework, many of these cases simultaneously created further uncertainty. A problematic feature of the type of discretion applicable to trusts of the family home is the use of context within which principles and factors are enumerated. Whilst *Rosset* evidences one type of limited discretion to clarify principles with a view to benefiting third-party creditors, another more controversial version of discretion sees judges permitting, or arrogating themselves, much greater flexibility. For example, in *Stack* and *Kernott*, the judges outlined the parameters of the context necessary for the judiciary to step in and use their discretionary powers. In doing this, they expressly arrogated themselves discretion to determine issues that fell within that particular ballpark in a discretionary manner.

On the whole, judges have limited flexibility to radically alter legal principles and are acutely aware of the limitations of their exercise of discretion. This is echoed in the appellate system and the oath taken by Lord Chancellors to respect the rule of law and defend the independence of the judiciary,[469] verifying the restrictions imposed on such actors. This was further

[467] Ronald Dworkin, *A Bill of rights for Britain* (London: Chatto and Windus 1990) 23.
[468] O'Mahony (n 300) 193.
[469] Constitutional Reform Act 2005, s17(1).

exemplified in *Burns*, whereby the judiciary acknowledged the unfortunate position of the claimant yet admitted that this was a matter for Parliament,[470] marking a realisation by the judges that the law was out of step with society. In *Cowcher v Cowcher*,[471] Justice Bagnall observed that his decision was premised on the settled principles that had been developed and could not be decided on the basis of fairness. Whilst *Stack* could be considered a radical decision, the concepts delineated from the case were later refined and pulled back, reflecting the natural process of English judicial reasoning. It is therefore submitted that the risk of influencing case law with personal opinion is minimal and is outweighed by the need for flexibility to promote familialisation. It is advanced that the underlying tension between rules and discretion maintains this ebb and flow process, ensuring that discretion does not become too extensive and unfocused. This both facilitates the soft influence of more proactive, outcome-based decisions and ensures that judicial subjectivity is checked.

(ii) Unpredictability versus Flexibility

Unpredictability has been a concern associated with discretion, as some believe that legal officials employing discretion act 'according to the dictates of their own judgment and conscience, uncontrolled by the judgment and conscience of others'.[472] This permits individual decisions reflecting the special circumstances of cases. Bingham argues that inflexibility would 'make no allowance for the exceptional case...which would itself be a source of injustice'.[473] This is particularly applicable to the continuously changing and dynamic field of family property, an area in which there is a well-documented mismatch between social practice and the law itself. Thus, adaptability should be encouraged. Chapters One and Two observed that a discretionary system enables courts to avoid rigidity, which has been associated with primitive legal orders[474] and criticised for its 'mechanical matching of rules to incidents'[475] without acknowledging the interpersonal dimension of property ownership. These are general views embodied within the perennial debates surrounding the political and ethical implications of discretion. Many of these arguments centre around the observation that in the human

[470] *Burns v Burns* (n 32).
[471] *Cowcher v Cowcher* [1972] 1 WLR 425.
[472] H. C. Black, *Black's Law Dictionary* (St Paul, Minn: West Publishing Company 1968) 553.
[473] Tom Bingham, *The Rule of Law* (2nd edn, Penguin 2011) 60.
[474] Henry Maine, *Ancient Law* (first published 1875, CUP 2013).
[475] Baumgartner (n 445) 129.

sciences such as law and in legal systems, no general rule will ever be valid for all cases.[476] In relation to familialisation, discretion facilitates much needed flexibility in order to adapt to inject creativity into the law[477] and tailor legal solutions to the unique choices and consequences of couples who live together. However, this flexibility is not without unpredictability. Scholars such as Baumgartner observe the tension between permitting flexible justice, in which judgments are tailored to each case, and the significant measure of unpredictability which prevails.[478] The positivist approach to discretion, advanced by Jeremy Bentham[479] and furthered by Austin,[480] disagrees with the creative role of judges, arguing that it brings uncertainties into the law. To resolve this conflict, it is necessary to find the optimum degree of fine-tuning with reasonable certainty without losing flexibility.[481] As Julius Stone points out, this may never be achieved, so the real question lies in what is possible within the inherent constraints of discretion itself.[482] As a result, this thesis seeks to explore this tension with the aim of identifying the constraints of discretion and the most ideal solution which balances uncertainty and flexibility. Accommodating the domestic dimension of property through the use of discretion is vital in the context of trusts of the family home, and therefore any prevailing uncertainty should be considered a compromise to the flexibility offered.

In facilitating piecemeal development of trusts of the family home, judicial discretion generated uncertainty that it later sought to rectify. This created an ebb and flow process. For example, the notable cases of *Pettitt* and *Gissing* sought to clarify the law and restrict the expansive use of section 17. Yet 'common intention' as the basis of the law was not sufficiently defined and the blurring of 'resulting, implied or constructive'[483] trusts generated confusion. The cases therefore created further potential for a discretionary approach to ownership of property disputes.[484] Similarly, Lord Denning's 'new model' constructive trust,[485] created through

[476] Aristotle, 'Book V: Justice' in Lesley Brown and David Ross (eds), *Nicomachean Ethics* (OUP 2009) 80.
[477] Davis (n 273) 25.
[478] Baumgartner (n 445) 129.
[479] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (first published 1789, Jonathan Bennet 2017).
[480] John Austin, *The Province of Jurisprudence Determined* (1st edn 1832).
[481] Davis (n 273) 3.
[482] Julius Stone, *Social Dimensions of Law and Justice* (Stanford University Press 1966) 721.
[483] *Gissing v Gissing* (n 23) [896], [898], [901], [905].
[484] Hayward (n 151) 142.
[485] Warburton (n 249).

employing judicial discretion, was criticised for injecting vague principles predicated on the concepts of 'fairness' and 'justice'[486] into the trusts framework. Whilst this provided the courts with general flexible principles to apply to cases, the uncertainty caused renders trusts of the family home vulnerable to further modification and confusion. This is particularly pertinent to familialisation as unlike common law, family centric ideas are inserted into property principles which creates a more tumultuous ebb and flow process. This is owing to the judiciary experimenting with trust principles as they seek to achieve the balance between certainty and adaptable standards to meet the needs of the modern family. As discretion allows judges to 'take into account a wide array of information, which may be of questionable accuracy, reliability, or relevance',[487] it is likely that individual judgments will vary as 'different minds can reach different conclusions'.[488] As a consequence, discretion should be 'exercised with a reasonable degree of consistency'[489] and so 'enshrining certain principles into guidelines may steer the judiciary away from inconsistency'.[490]

Nevertheless, it is submitted that the uncertainty created from a decision is generally minimal in comparison to the uncertainty resolved by the same decision. The fragmented process of familialisation has consisted of 'periodic waves of reform during which...equity introduces life and flexibility into the law' before over time 'equity gets hardened and reduced to rigid rules, so that, after a while, a new reform wave is necessary.'[491] This cyclical process has been noted by Rose who argues that such periods of time can be likened to rules or 'crystals', which are then softened to mud through being 'made fuzzy by the courts.'[492] This creates a natural ebb and flow to the development of the modern trusts framework, slowly creating and rectifying uncertainty in an attempt to maintain adaptability. Flexibility is critical in contextualising the circumstances and choices of couples, enabling the judiciary to 'respond expeditiously to society's evolving preferences and choices'.[493] Particularly in cases involving limited assets and

[486] *Cooke v Head* (n 220), *Hussey v Palmer* (n 222), *Eves v Eves* (n 57).
[487] Hawkins (n 427) 11.
[488] *White v White* (n 70) [25-26] (Lord Nicholls).
[489] ibid [58].
[490] Sophia Gonella, ''Alimony Drones' and 'Gold-Diggers': Protecting Economic Vulnerability Through Spousal Maintenance Orders' (2021) 6(1) *Durham Law Review*.
[491] M.R. Cohen, *Law and Social Order* (1933) 261.
[492] Rose (n 54) 585.
[493] Carl Schneider, 'The Tension Between Rules and Discretion in Family Law: A Report and Reflection' (1993) 27 *Family Law for the Next Century* 229, 235.

properties of less value, it is vital that the courts recognise the family dimension of property ownership and the impact that rigid property principles have on non-moneyed parties. Property lawyers are less likely to assess this future need and thus judicial cognisance of such relationship dynamics is welcomed. Any prevailing ambiguity is a concession offered in return for this flexibility.[494]

Overall, applying judicial discretion to trusts of the family home is a cyclical process, comprising of the introduction of new and unchartered principles to accommodate couples followed by a gradual process of clarification and rectification. In particular, familialisation exemplifies this process with an underlying policy rationale. The modern trusts framework is consequently underpinned by a tension between the potential for expansive use of discretion and the judicial reticence to employ this owing to the unpredictable nature that it possesses. Nonetheless, this is outweighed by the need to accommodate and acknowledge the domestic context within the modern trusts framework, which will be further explored below.

(iii) Fact-sensitivity

Fact-sensitivity is highly beneficial in terms of permitting the courts to make thorough, holistic decisions on the property disputes between couples. However, combined with the potential for judicial prejudice and the fact that any approximation of beneficial interest is 'impossible to ascertain with any degree of certainty',[495] overreliance on facts can be problematic.

The courts have placed greater emphasis on the facts of a case over time due to the structural prioritisation of common intention. The assessment of common intention requires judges to examine party conduct and this thesis believes that emphasis on this should be minimised. Examining party conduct often leads to a problematic assessment of the parties' relationship and an evaluation of witness credibility. A key problem with this is the difficulty that judges face in uncoupling conduct relating to the relationship itself and conduct relating to property. For example, in the recent case of *Amin v Amin & Ors*[496] Lord Justice Nugee disapproved of

[494] Alison Diduck and Helena Orton, 'Equality and support for spouses' (1994) 57(5) *MLR* 681, 696.
[495] Robert Collins, 'The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony' (2001) 24 *HWLJ* 23, 25.
[496] *Amin v Amin & Ors* (n 422).

the oral evidence of Mrs Amin, judging her to be 'confused and imprecise'[497] and remarking that at times she showed an inability to 'recall any precise detail contained in her witness statement'.[498] This evaluation of the credibility of Mrs Amin demonstrated the court's excessive fact-sensitivity as it magnified evidence relating to the parties and their relationship to divine common intention. This is highly subjective evidence, the accuracy of which is often compromised as individual accounts may be exaggerated or self-serving. Consequently, making-broad brush assumptions on the credibility of the parties concerned creates the risk of uncertainty and amplifies minute details to support a conclusion. In *Dobson v Griffey*,[499] Judge Matthews remarked upon Ms Dobson's character, alleging that she was 'prone to exaggeration' and 'utterly convinced she was right'.[500] This was used to contend that she lacked credibility, which played a significant role in the outcome of the case. This gives judges a wide breadth of discretion, empowering them to insert their own values and prejudices mentioned in the previous section.

It is still important that judges pay attention to party conduct to contextualise cases and ensure that trusts principles adapt to modern social practices. For this reason, this thesis advocates for a system whereby party conduct is acknowledged but attaches minimal weight in the general assessment of common intention. Examining party conduct prevents outcomes that perhaps fail to recognise the value of domestic contributions such as that in *Burns v Burns*,[501] a case which the Law Commission considers to be the paradigm of unfairness.[502] Judicial discretion was restricted to solely consider objective factors, with emphasis placed on 'real' and 'substantial' factors such as financial contributions towards the property. Thus, whilst 'fate had not been kind to her',[503] Fox LJ expressed that the 'unfairness of that is not a matter which the courts can control.'[504] Consequently, it is argued that assessing party conduct may be beneficial in preventing dissatisfactory outcomes such as that seen in *Burns*, which was dubbed as 'injustice to cohabitants'[505] for failing to consider contextualised factors

[497] ibid [8].
[498] ibid.
[499] *Dobson v Griffey* (n 417).
[500] ibid [84].
[501] *Burns v Burns* (n 32).
[502] Law Commission (n 33).
[503] Lowe and Smith (n 258) 344.
[504] *Burns v Burns* (n 32) 332.
[505] Allison (n 263).

at the acquisition stage. Whilst magnification of certain facts and party conduct exposes cases to judicial prejudice and subjectivity, the harsh outcomes that would result from the judicial assessment of solely property-based contributions would overlook the needs and expectations of modern cohabiting couples. Acknowledging the emotionally complex role that relationships play in the decisions concerning property ownership is crucial in order to meet the needs of modern couples. Yet, the judiciary should not place excessive weight on the personal conduct relating to the relationship between the when making their assessments. As a consequence, personal conduct should be acknowledged but property-based conduct should be prioritised.

Behaviour relevant to property-based decisions is a more effective way of identifying common intention. Following *Stack v Dowden*,[506] it was stressed that a holistic approach should be taken to establish a common intention. As this intention could be actual, inferred or imputed from conduct, this development permitted the court to inspect the parties' conduct in the round. As mentioned, separating cohabitants who disagree as to beneficial interest are often acrimonious, rendering relationship evaluations potentially unreliable. Excessive focus on witness credibility with a view to determining common intention could permit judges to inject their own values and prejudices into their assessments. There is therefore a strong argument for reducing this possibility and refining the framework. This would involve a structuring, or prioritisation, of the facts to be considered, attaching greater weight to property-based conduct than personal relationships generally assessed through witness credibility.

To conclude, whilst the use of discretion runs the risk of judicial bias, uncertainty, and overreliance on fact-sensitivity, it also facilitates the creation of adaptable principles. These support the contextualisation of decisions through injecting flexibility into the trusts framework. This section has argued that judicial prejudice is minimal if discretionary powers are sufficiently regulated. This could be achieved through structuring factors. It is important that judges do not mould case law with idiosyncratic opinions and subjective assessments.[507] As such, without sacrificing creativity and innovation,[508] discretion could be restricted to

[506] *Stack v Dowden* (n 11).
[507] Davis (n 273) 5, S Wexler, 'Discretion: The Unacknowledged Side of Law' (1975) 25 *University of Toronto Law Journal* 120, 124.
[508] C.E. Clarke and D Trubek, 'The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition' (1961) 71 *YLJ* 255.

prevent overreliance on conduct relating to personal relationships. Overall, flexibility is 'purchased at the price of some uncertainty' due to the 'delicate social issues involved [which] make it desirable to leave the decision to the judge's discretion'.[509] In maintaining a flexible trusts framework it must continuously adjust to meet the needs and standards of cohabitants. However, it has been observed that the judiciary do draw upon personal opinions and sympathies, constituting improper considerations, and this arguably becomes a more prominent concern when assessing the relationship of the parties based on courtroom exchanges and witness credibility. Consequently, this Chapter advocates for a minor curb of the exercise of discretion when considering factors at the quantification stage. This would involve limiting the assessments of the parties' relationships and prioritising objective, property-based conduct. This will achieve the desired balance that is noted by Stone,[510] and which this thesis seeks to produce. Having established the criticisms and dangers of discretion, the following section will evaluate judicial discretion more specifically as a method of accommodating the domestic context within trusts of the family home disputes. This will support this Chapter in identifying and analysing the benefits and flaws of familialisation as a process.

[509] N.S. Marsh, 'Principle and Discretion in Judicial Process' (1952) 68 *LQR* 226, 236.
[510] Stone (n 482) 721.

Accommodating the Domestic Context

It has been recognised that discretionary powers have played a significant role in the familialisation of property law. Whilst this has enabled family law principles to infiltrate trusts law,[511] it has offered flexibility at the cost of uncertainty. At the heart of this debate lies the polarisation between property law and family law concerns, which often involves the apparent conflict between rules and discretion. It is important to observe the purpose of judicial discretion in accommodating the domestic aspect of property ownership. This particularly concerns cohabitants who do not have access to statutory financial relief.[512] This section will seek to justify why it is important to familialise and accommodate the domestic dimension to family property disputes while appreciating that this will affect certainty. This section will firstly stress the importance of judicial recognition of the role that relationship dynamics play within property law. This will then enable the Chapter to explore how judicial discretion could continue to shape this in a way which avoids the pitfalls noted in the previous section.

The Importance of Accommodating the Domestic Context

The domestic dimension of property ownership disputes between couples is an important aspect that, by virtue of judicial discretion and the flexibility that it affords, property law has sought to acknowledge. Some of the most prominent arguments for recognising the interplay of relationships within property ownership are predicated on the notions of fairness and equality, particularly towards women, who are often financially disadvantaged from undertaking homemaking in relationships.[513] As highlighted in Chapter One, familialisation grew from the dissatisfaction with the principle of separate property[514] and the desire for financial protection in the form of ancillary relief for women. This culminated in gradual judicial recognition of the exigencies of married couples. Accordingly, trusts of the family home have been stimulated by

[511] R Probert, 'Trusts and the Modern Woman' (2001) 13(3) *CFLQ* 275.
[512] Matrimonial Causes Act 1973.
[513] Judith Treat and T. Van Der Lippe, 'The Happy Homemaker?: Married Women's Well-Being in Cross-National Perspective' (2011) 90(1*) Social Forces* 111, 116.
[514] Kahn-Freud (n 69).

judicial acknowledgement of the influence of emotionally complex relationships on the decisions involving property ownership.

The intertwining of relationship dynamics with property ownership is an inexorable and growing phenomenon. Over the last 10 years in the UK, the proportion of families containing a cohabiting couple increased to 18.4% from 15.3%, representing the fastest growing and second largest family type.[515] This is more common at younger ages with 69.2% young adults aged 16 to 29 years cohabiting.[516] Particularly in light of enforced national lockdowns in response to the Covid-19 pandemic,[517] cohabitation has increased dramatically and these statistics are likely to increase significantly over the next few years.[518] This has led to recent calls for reform, including an inquiry launched by the Women and Equalities Committee which seeks inter alia to explore the possibility of giving cohabiting couples the same rights and protections as married couples and civil partners.[519] Resolution, an organisation of family justice professionals, similarly campaign for reform based on the 'widespread ignorance and justice'[520] for cohabiting couples. A prominent argument for reform involves the common law marriage 'myth'. Nigel Shepherd, the former Chair of Resolution, believed that the current cohabitation framework is 'failing to provide [cohabitants] with the rights some of them mistakenly think they have'.[521] Underpinning these calls for reform is the desire, in the meantime, for further judicial acknowledgment of family-centric concepts within property law in light of the growing numbers of cohabiting parties in the UK. Whilst some campaign for legislative reform, this thesis considers how judicial discretion could continue to develop in default of legislative intervention whilst addressing the criticisms highlighted above.

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[515] Office for National Statistics, *Families and Households in the UK* (2017).
[516] ibid.
[517] Coronavirus Act 2020.
[518] Charlotte Coyle, 'How to advise unmarried, cohabiting couples' (*FT Adviser*, 4 January 2021) <https://www.ftadviser.com/your-industry/2021/01/04/how-to-advise-unmarried-cohabitating-couples/> (accessed 7 May 2021).
[519] Committees, 'Inquiry launched into the rights of cohabiting partners, the fastest growing family type in England and Wales' (*UK Parliament*, 28 April 2021) < https://committees.parliament.uk/committee/328/women-and-equalities-committee/news/154929/inquiry-launched-into-the-rights-of-cohabiting-partners-the-fastest-growing-family-type-in-england-and-wales/> (accessed 9 May 2021).
[520] Coyle (n 518).
[521] Matthias Mueller, 'Cohabitation remains fastest growing relationship in UK' (*Family Law*, 4 November 2016) <https://www.familylaw.co.uk/news_and_comment/cohabitation-remains-fastest-growing-relationship-in-uk> accessed 7 June 2021.

It is important to recognise that familial elements of property ownership do not simply aim to appease the growing numbers of cohabitants, but work towards achieving substantive equality. In this sense, it is necessary to reflect on how and why property is acquired and address these modern needs within legal reasoning. Women often face particular financial hardship in the context of family property disputes. As with marriage, cohabitation involves family-centric property decisions which can encourage gender-stereotyped roles being formed. Many women in both marriage and cohabitation take on the supportive role of homemaking and caregiving. This may maximise the wage-earner's earning capacity.[522] Unfortunately, this is a gendered concept imbued with historical patriarchal standards[523] and the hierarchical idea that husbands were wage-earners whilst women undertook domestic duties.[524] Consequently, normative pressures have resulted in many married and unmarried couples maintaining these standards even today, resulting in many men becoming the primary breadwinner of the household.[525] Over time, this leaves women with what is known as 'derivative dependency'[526] on the wage earner owing to their unpaid caregiving work which may stifle their career. It is therefore vital for the modern trusts framework to acknowledge and rectify this substantive gender inequality.

The '*Burns*' Woman: A Hidden Figure in the Trusts Framework

The memorable, and for some infamous, case of *Burns* has been widely cited as the paradigm of unfairness.[527] The Court of Appeal failed to recognise the value of domestic contributions such as homemaking and childcare, iterating that such conduct failed to form the basis of an acquisition claim. Consequently, the law 'discriminates against those who do not earn income from employment'[528] as exemplified by Mrs Burns, who received nothing after sharing the family property for 17 years. Most of the academic literature and case law portrays women as

[522] Cynthia Starnes, 'Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation under No-Fault' (1993) 60(1) *The University of Chicago Law Review* 67, 72.
[523] Thompson (n 67).
[524] Chambers (n 68).
[525] Office for National Statistics, *Families and the Labour Market: UK* (2019).
[526] Fineman (n 88) 7.
[527] Mee (n 253).
[528] Law Commission (n 295).

mostly seeking to acquire a beneficial interest in the property owned by a male. Whilst cohabitation has become more frequent amongst both mixed- and same-sex couples, it remains clear that women are more often at a disadvantage with regard to property ownership. Probert suggests that taking account of a wide range of financial and non-financial contributions at the quantification stage somewhat balances this.[529] However, this does not create substantive equality owing to the requirement of direct financial contributions to establish acquisition. This is a key issue advanced by this thesis.

The Women's Budget Group report in 2020 recorded the median home in England as costing over twelve times women's annual salary as opposed to eight times for men, and the majority of statutory homeless adults in the UK are women.[530] This, in part, stems from the social pattern of women bearing and raising children at the cost of their career.[531] As presented above, property law has traditionally favoured the economically dominant partner, which has more often been the male. In disregarding socio-economic vulnerability resulting from the responsibilities of a relationship, the law reiterates 'well-worn patterns of discriminatory attitudes.'[532] Eekelaar observes that the trusts framework has made it so that 'a woman's place is often still in the home, but if she stays there, she will acquire no interest in it.'[533] Although the notion of the judiciary actively supporting the non-moneyed party in a cohabiting relationship has been criticised for interfering with individual autonomy[534] and forming a 'patronizing picture of an ill informed and economically/emotionally vulnerable woman,'[535] this thesis contends that it is important to adopt a relational approach. This would acknowledge women as disproportionately affected by such financial detriment and the specific disadvantage resulting from sharing property.[536] This would also help in moving towards achieving substantive equality. This would not urge for a 'realist' extension of legislative

[529] R Probert, 'Equality in the Family Home?' (2007) 15 *Feminist Legal Studies* 341, 349.
[530] Women's Budget Group, *2020 WBG Briefing: Housing and Gender*, (UK Policy Briefings, March 2020).
[531] J Martin and C Roberts, *Women and Employment* (OPCS 1984).
[532] Joan Tronto, *Caring Democracy: Markets, Equality and Justice* (NYUP 2013) 31.
[533] Eekelaar (n 277) 94.
[534] Jess Mant, 'Neoliberalism, Family Law and the Cost of Access to Justice' (2017) 39(2) *JSWFL* 246.
[535] Bottomley (n 267).
[536] Jonathan Herring, *Vulnerable Adults and the Law* (1st edn, OUP 2016) 8.

matrimonial finance provisions to cohabiting couples,[537] because this would undermine the framework of marriage and heavily interfere with party autonomy.[538] Moreover, libertarian individualism would argue that imposing a potential cost upon a party in a cohabiting couple would excessively interfere with domestic relationships.[539] Additionally, the prospect of regulating such a regime creates difficulty and confusion. However, this thesis champions working towards substantive equality through acknowledging the role of domestic relationships in the property sphere. As observed in the previous section, the potential uncertainty created through integrating flexible principles risks inconsistency. Subsequently, it is maintained that under a *structured* regime, this problem would be minimalised. This thesis encourages the contextualisation of family property disputes to understand the structural position of some female cohabitants, incorporating a relational element.

There are two main criticisms of the current trusts framework that prevent it from sufficiently accommodating the domestic dimension of property ownership. First, the requirement of direct financial contributions to acquire a trust interest and secondly, the requirement of common intention.

The high acquisition threshold: requirement of direct financial contributions

Under *Rosset*, a direct financial contribution to the original purchase price, or post-acquisition conduct, may evidence a common intention and enable a common intention constructive trust to be formed. However, indirect financial contributions are not recognised, as confirmed in *Buggs v Buggs*.[540] As Probert observes, this has the potential to discriminate against women on two bases.[541] The first is that in requiring direct financial contributions to establish acquisition of a beneficial interest, women may be disadvantaged due to their reduced earning

[537] A Barlow and S Duncan, 'Family Law, Moral Rationalities and New Labour's Communitarianism. Part I' *Journal of Social Welfare Law* 22/1 (2000a) 23, A Barlow and S Duncan, 'Family Law, Moral Rationalities and New Labour's Communitarianism. Part II' *Journal of Social Welfare Law* 22/2 (2000b) 129.
[538] Bottomley (n 267).
[539] Eekelaar (n 277) 101.
[540] *Buggs v Buggs* [2003] EWHC 1538 [48]-[49].
[541] Probert (n 511).

capacity, meaning that they are less likely to pay direct contributions.[542] Second, money earned by women is often used to pay bills and domestic expenditures as opposed to the mortgage.[543] Nevertheless, once the acquisition threshold has been met, domestic responsibilities may be accounted for and thus Probert asserts that the fact a party contributes less financially can be 'offset by the fact that they perform a greater proportion of the household tasks'.[544] Whilst these litigants may obtain recognition of domestic tasks at the quantification stage, this argument overlooks the high acquisition threshold. The iconic figure of Mrs Burns, who used her limited earnings for family expenses and the children, failed to meet this acquisition hurdle. Due to her domestic responsibilities, she had not been able to take up consistent paid employment and the case demonstrated the financial barrier that many women face when claiming a beneficial interest in shared property.

Whilst critics such as Bottomley question whether the Mrs Burns figure would still exist today,[545] this Chapter suggests that this figure does remain in existence today, and possibly with more prevalence. With 47% of individuals believing that the 'common law marriage' myth persists[546] and with cohabitation on the rise, there is a risk that many non-moneyed individuals sharing property expect, or mistakenly believe, they possess legal protection equivalent to that resulting from marriage. In this sense, many will act to their detriment through undertaking the homemaking and caregiving role at the expense of their career and subsequently fail to provide direct financial contributions capable of acquiring a beneficial interest. Although Probert suggests that women are likely to have made even a small financial contribution,[547] this assumption fails to consider the likelihood of such contributions being indirect, in the form of domestic expenditures, which, despite indirectly supporting the acquisition of the property, do not meet this hurdle. Coupled with the common law marriage 'myth' and the lack of information surrounding cohabitation rights, assuming that women make a direct financial contribution is flawed. Even if they do, it is not guaranteed that they will receive a quantified

[542] J Scott and S Dex, 'Paid and Unpaid Work: Can Policy Improve Gender Inequalities' in R Probert and J Miles, *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart 2009).
[543] P. Hunt, 'Cash Transactions and Household Tasks: Domestic Behaviour in Relation to Industrial Employment' (1978) 26(3) *Sociological Review* 555.
[544] Probert (n 511).
[545] Bottomley (n 267).
[546] J Curtice, E Clery, J Perry, M Phillips and N Rahim (eds), *British Social Attitudes: The 36th Report* (London: National Centre for Social Research 2019).
[547] Probert (n 529).

interest which is representative of their contributions, both indirect financial and domestic. In *Graham-York v York and Others*[548] the parties cohabited for over thirty-three years until the death of the male partner. Throughout this period, the female claimant raised their child, contributed to the mortgage repayments and paid for domestic expenditures. Whilst this met the acquisition hurdle, the Court of Appeal decided not the impute a common intention of beneficial ownership, focusing on the direct financial contributions to award a modest 25% share in the proceeds of the property. Accordingly, a direct financial contribution does not necessarily mean that domestic contributions will be adequately valued through quantification. In consequence, the assertion upon which Probert's argument is predicated has been disproven in recent years and it is vital that the courts acknowledge the social and political backdrop behind family property. Requiring direct financial contributions to acquire a beneficial interest is inflexible and fails to adequately support non-moneyed parties who perform domestic duties and contribute indirect payments. In recent cases such as *Thomson v Humphrey*,[549] the acquisition hurdle prevented Ms Thomson from establishing a beneficial interest, despite claiming that she gave up her job to support Mr Humphrey and undertook work for his business in addition to performing homemaking tasks. The role of the traditional 'wife' that Ms Thomson therefore undertook was not recognised by the court and she received no beneficial interest. Warren J observed that the 'matters on which she relies are simply not enough – these matters are leaving her job, working in the business, project management, housekeeping and looking after the mother [of Mr Humphrey] ...they simply are not of the type and category that are capable of giving rise to a successful passing of the first hurdle'.[550] This unfortunate result reflects the disadvantages that the Mrs Burns-type litigant faces. Thus, requiring direct financial contributions to establish acquisition disproportionately affects and overlooks the value of domestic contributions. Instead, this reduces the trusts framework to a 'stark balance sheet of monetary sums'[551] and has led members of the judiciary to consider that the 'law of property can be harsh on people, usually women.'[552] It is therefore important to recognise this and lower the acquisition hurdle to enable women in this situation to gain access to beneficial interest. However, the need to preserve the balance between flexibility and certainty is

[548] *Kamarah Kathleen Inessah Graham-York v Adrian York (Personal Representative of the Estate of Norton Brian York) and Others* [2015] EWCA Civ 72;[2016] 1 FLR 407.
[549] *Thomson v Humphrey* [2009] All ER (D) 280.
[550] ibid [98].
[551] Yeo (n 293) 132.
[552] *Curran v Collins (Permission to Appeal)* [2013] EWCA Civ 382 [9] (Toulson LJ).

important. From this, it could be argued that recognising indirect financial contributions would acknowledge the domestic context whilst retaining certainty. Indirect financial contributions would remain quantifiable and so this form of familialisation of the acquisition hurdle would not necessarily be at the cost of certainty.

Ambiguity in establishing common intention

The second criticism of the current trusts framework with regard to accommodating the domestic context is the requirement of common intention. The notion of common intention has been criticised[553] and viewed as capable of disadvantaging women. Probert observes that first, it is unrealistic to suppose that couples discuss their property rights in depth and second, men and women may differ in the conclusions that they make from these conversations,[554] acting to their detriment in believing that there is a common intention to share the property. Unfortunately, as establishing beneficial ownership is grounded in the proven intentions of the parties,[555] identifying a common intention is difficult. Gray and Gray assert that this has, in turn, 'exerted a stranglehold over the development of a rational law of family or domestic property'.[556] As observed in *Jones v Kernott*, the reality of common intention is that 'in the real world unmarried couples seldom enter into express agreements into what should happen to property should the relationship fail'.[557] Since the parties are unlikely to have reached an agreement as to their respective interests in the property, common intention is rarely to be found.[558] Moreover, due to the difficulty that the courts have with identifying common intentions, often the intention of only one person is necessary to create a trust. This was exemplified in *Grant v Edwards* and *Eves v Eves* where inventive approaches were adopted to find common intention. The courts encounter difficulty in divining common intention due to the lack of guidance given by Lord Bridge in *Rosset*. Gardner argues that consequently, 'agreements are in reality found or denied in a manner quite unconnected with their actual presence or absence'.[559] As highlighted in the previous section, this requirement of common

[553] U. Riniker, 'The Fiction of Common Intention and Detriment' [1998] 62 *CPL* 202.
[554] Probert (n 511).
[555] Gray and Gray (n 244) 872.
[556] ibid 876.
[557] *Jones v Kernott* (n 4) [90].
[558] Eekelaar (n 277) 95.
[559] S Gardner, 'Rethinking Family Property' (1993) 109 *LQR* 263, 264.

intention has triggered judges to strenuously search for it, incorporating arbitrary party conduct and witness credibility as evidence. This consequently creates an inconsistent framework which may result in arbitrary decisions. Unfortunately for the non-moneyed partner, common intention is rarely found due to lack of express discussions and the judicial reticence previously highlighted in Chapter Two.

Commitment to legal certainty and clear principles are arguably hallmarks of property law[560] and thus the bar to informal acquisition of interests has been set high.[561] However, when infused with family law concerns, these principles can become blurred. This was exemplified when personal factors were deemed relevant when considering the intentions in *Stack v Dowden*.[562] Whilst a joint ownership case, Baroness Hale outlined that 'parties' individual characters and personalities may also be a factor in deciding where their true intentions lay'.[563] Although this is an 'ambiguous enquiry',[564] Baroness Hale asserted that in ascertaining the intentions of the parties, the court should not 'abandon that search in favour of the result which the court itself considers fair'.[565] Nevertheless, as shown in the previous section, the courts have gone too far in assessing the parties' characters and personalities and it is submitted that too much emphasis is placed on character analysis of the parties in assessing common intention.

Overall, accommodating the domestic context is needed in property law. Implementing family-centric concepts through discretionary powers assist in the evolution of the trusts framework. However, the two main criticisms detailed above leave certain litigants in an uncertain, and often unfortunate, position. The most important criticism is the requirement of direct financial contributions to acquire a beneficial interest in the property, which neglects the family dimension of property ownership and the value of the homemaker and caregiver. Whilst these are reflected in the process of quantification, this is insufficient acknowledgement of this domestic role at the acquisition stage. It is advanced that recognition of indirect financial

[560] P Birks, 'Before We Begin: Five Keys to Land Law' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998) 457.
[561] Hopkins (n 316).
[562] *Stack v Dowden* (n 11).
[563] ibid [69].
[564] Probert (n 529).
[565] *Stack v Dowden* (n 11) [61].

contributions would rectify this. In order for property law to adapt to the modern needs of families, judicial cognisance of gender inequality as well as a wider acknowledgement of family property choices must occur. However, as observed in the previous section of this Chapter, this comes at the cost of some certainty. Nevertheless, it is advanced that the benefit of recognising domesticity is greater than the cost of consistent 'bright line' rules. Underpinning this debate between flexible discretion and fixed rules is the polarisation of property and family law within academia, which this thesis argues is overstated and unnecessary.

Recognising Domesticity – The Polarisation of Property and Family Law

Having established the need to accommodate the domestic dimension of property ownership and the failures of the current trusts framework to sufficiently achieve this, the relationship between property and family law must be further explored. This will support this thesis in suggesting how the judiciary could further shape the familialisation process.

In modern academic scholarship, property law and family law are viewed as opposing fields,[566] and therefore the meeting of property law with family-centered ownership disputes could be seen as incongruous.[567] As Chapter One noted, property law has gained an association with formalism and legal certainty[568] whilst family law is sometimes characterised as discretion-based.[569] As such, the two have been viewed as 'binary opposites'[570] and drive the debate surrounding the familialisation of property law as to how these two areas can and should coalesce. A prominent argument against familialisation is the dilution of clear property rules with discretion-based family law concepts, rendering the trusts framework uncertain and open to inconsistency. As 'discretionary resolution is par excellence the technique of family law',[571] the disadvantages associated with judicial discretion, observed above, are transposed onto 'family law' and 'familialisation' to form the argument against familialisation. However, it is advanced that firstly, rules and discretion are not necessarily antagonistic and secondly, family

[566] Murphy and Clarke (n 438).
[567] Probert (n 438) 37.
[568] Halliwell (n 49).
[569] Miles (n 48) 627.
[570] Post (n 439) 169.
[571] Gardner (n 363) 199.

and property law both incorporate elements of rules and discretion. Thus, caution must be exercised when situating them as oppositional. This section contends that this overemphasised polarisation influences the criticism of familialisation.

The relationship between rules and discretion is arguably symbiotic. Discretion has existed alongside rules to aid with their interpretation and implementation.[572] In outlining a rule, there are allusions to standards such as 'reasonable', 'necessary' and 'exceptional',[573] which offer scope for adjustment and flexibility. Moreover, discretion is rarely unfettered but may be structured,[574] so as to create a coherent regime similar to a routine and prevent judicial prejudice and uncertainty.

It is crucial to dispel the traditional simplistic view of property law characterised by rules and family law denoted as discretionary. The 'contentious caricatures'[575] that have been sketched to represent property and family law do not accurately reflect these two dynamic fields. Both property and family law principles can incorporate rules and discretion. Family law can be rule-based, with instruments such as the Marriage Act 1949 providing a coherent framework of marriage formalities. Similarly, property law incorporated elements of discretion through section 17 of the Married Women's Property Act 1882, which permitted the judge to assess the disposition of property between married couples as he thought fit. Naturally, discretion is an 'inevitable' feature of legal systems which need rules to be interpreted by the judiciary.[576] Although the emotional and complex nature of family law lends itself to the use of judicial discretion and property law seeks to achieve maximum legal certainty and efficiency through rules, both fields of property and family law employ rules and discretion and this should not be overlooked when assessing their relationship.

Whilst it is essential to observe the characteristics of property law and family law and how rules and discretion interplay within these characteristics, attempts should not be made to polarise the two when assessing the nuances the familialisation of property law. This Chapter

[572] PS Atiyah, 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law' (1980) *Iowa Law Review* 1249, 1255.
[573] C Harlow and R Rawlings, *Law and Administration* (Weidenfeld and Nicolson 1984).
[574] Gardner (n 363) 186.
[575] Miles (n 48) 627.
[576] Hawkins (n 427) 11.

submits that the polarisation of property and family law has been utilised as a simplification of the process of familialisation and the ebb and flow process resulting. In recognising the domestic dimension of property ownership and cohabitation, judicial discretion has supported the development of the trusts framework. Whilst this has involved judicial cognisance of family dynamics through the incorporation of family-centric principles, property law and the discretion that it affords has assisted this evolution.

This section has emphasised the importance of accommodating the domestic context of family property disputes and highlighted the current failures of the current trusts framework in accomplishing this. It is advanced that the flexibility offered by judicial discretion facilitates familialisation and stimulates the piecemeal development of trusts of the family home, characterised by an ebb and flow process. This results from the tension between rules and discretion, which the judiciary have grappled with whilst incorporating family-centric principles when tackling property law disputes. Whilst this thesis seeks to avoid the polarisation of family and property law, these two fields possess distinctive features that have over time revealed an ebb and flow process. Accordingly, this has developed the slow development of the modern trusts framework and this thesis advances further familialisation.

Conclusion

This chapter has considered the contemporary criticisms of the familialisation of property law and the modern trusts framework that has developed as a result, with a particular focus on the use of judicial discretion. Three main criticisms of judicial discretion were evaluated. Firstly, the risk of influencing decisions with the values and prejudices of individual judges, secondly, legal uncertainty, and thirdly, potential overreliance on case facts such as consideration of the parties' characters. Discretion, if exercised with caution, significantly benefits trusts of the family home in offering flexibility that enables the judiciary to accommodate the modern needs of families sharing property. However, this flexibility is at the cost of some certainty, which raises the question as to how the balance should be struck between these two concepts. This Chapter therefore stressed the importance of flexibility when accommodating the domestic dimension of property ownership, calling attention to the relationship dynamics underpinning the family home.

Particular emphasis was placed on the role of the homemaker and caregiver, and it was asserted that such domestic roles should be valued further at the acquisition stage of claiming a beneficial interest in the property. It has been advanced that given the increasing numbers of cohabitants, many relationship sacrifices are made without reference to the financial consequences following relationship breakdown, leaving non-moneyed parties economically vulnerable. It was noted that requiring direct financial contributions to establish acquisition discriminates against women, who are statistically less likely to earn as much income as men and more likely to contribute to the relationship through domestic tasks and expenditures. Moreover, the arbitrariness of ascertaining a common intention resonates with the earlier criticism of overreliance on the parties' characters and relationships. This risks judicial prejudice. Having established the need for the trusts framework to accommodate the domestic context, the Chapter then briefly considered the dangers of polarising rules and discretion, emphasising the need for recognition, but not overemphasis, of the dichotomy between property and family law principles. Overall, the familialisation of property law was distinguished as a piecemeal process of ebb and flow over time as it grappled with the tensions between rules and discretion. This tension persists today, and it is necessary to account for this when proposing future judicial innovation. Chapter Three therefore advances that it

remains important to accommodate the domestic context, particularly at the acquisition stage, and the quantification principles should be refined to prevent excessive reliance on personal factors which create uncertainty. The final Chapter will now consider how this balance could be better achieved, examining the potential for judicial development to address the criticisms raised within this Chapter.

CHAPTER FOUR: RECTIFYING THE DEFICIENCIES OF THE TRUSTS FRAMEWORK

This thesis has considered the piecemeal construction of the modern trusts of the family home framework and the associated criticisms of the familialisation of property law. With this development in mind, this final Chapter will seek to identify potential routes for future innovation and judicial clarification of the framework. The central argument of this thesis is that the judiciary must acknowledge the relationship dynamics that inform property ownership between couples. Whilst familialisation has broadly facilitated this movement, Chapter Three highlighted several deficiencies which this Chapter seeks to address.

A three-pronged criticism was identified, relating to both the acquisition and quantification stages of establishing beneficial interest. The first concern related to the risk of judicial influence, particularly in relation to the assessment of common intention. The second issue involved the potential for legal uncertainty at the cost of flexibility and thirdly, the potential overreliance on case facts in the assessment of common intention. Threaded through these overarching criticisms is the need to achieve balance between rules and discretion, which has been discussed extensively throughout this thesis. At its current state, it is argued that the legal framework fails to align with modern trends in home-sharing. This disproportionately affects non-moneyed cohabitants, many of whom are women and these shortcomings of the current law render the modern trusts framework ripe for development. Consequently, this Chapter analyses how judicial creativity could tackle these limitations and improve the trusts framework for economically vulnerable cohabitants.

In fully considering the prospective routes for amendment of the framework, this Chapter will review the impetus for statutory reform[577] and consider the option of halting familialisation in order to force the hand of Parliament to intervene. However, this thesis

[577] The Cohabitation Rights Bill (2017-2019), Law Commission (n 33), Committees (n 519).

does not seek to provide a thorough exploration of potential legislative reform, so will advocate a more nuanced approach which continues to adopt the incremental process of familialisation. The Chapter will therefore make recommendations for a dual approach involving expanding the acquisition stage whilst constraining the discretion permitted at the quantification stage. It is asserted that this would be a palatable method of further accommodating the domestic context whilst quelling concerns of excessive generosity towards non-moneyed parties in addition to discretion and legal uncertainty.

Rejecting Familialisation?

Having undertaken a critical examination of familialisation in previous Chapters, several criticisms have been identified. It has been highlighted that there is a divergence between the current framework and social perceptions. Consequently, this discrepancy will be evaluated to determine whether familialisation can effectively modify the trusts framework that keeps up with social developments. In considering this, the prospect of halting familialisation altogether will be contemplated.

The tension between family-centric ideologies and property principles has often exhibited itself in the form of tension between rules and discretion.[578] This tension, resulting in a natural ebb and flow process, has prompted criticisms for its unpredictability, which some academics assert fails the legal system as rules become difficult to comprehend.[579] Continuous development of the law brings with it concerns of 'a real risk of new and unforeseen uncertainties and unfairnesses'.[580] Combined with ambiguous assessments of property disputes owing to judges arrogating themselves further discretion,[581] the framework can generate inconsistency. By virtue of this fluctuation, the process of familialisation is often associated with uncertainty. Permitting such inconsistency and unpredictability could fundamentally undermine the rule of law.[582] For this reason, the continuation of familialisation has been challenged. There are two main motivations behind abandoning familialisation. Firstly, the uncertainty perpetuated from excessive employment of discretion. Secondly, the struggle that familialisation faces in keeping up with modern social practice.

[578] Birks (n 560) 457, see also Rose (n 54).
[579] Lon Fuller, *The Morality of Law* (London: YUP 1969) 39.
[580] *Stack v Dowden* (n 11) [102] (Lord Neuberger).
[581] ibid.
[582] *Knauer v Ministry of Justice* [2016] UKSC 9; [2016] AC 90 at [21] (Lord Neuberger).

The Need for Legislative Reform: Excessive Discretion

First, it could be argued that the judiciary go too far in utilising discretion to generate particular outcomes in these disputes. Remarkably, a key motivation behind this is the lack of statutory reform, which has caused the judiciary to exert discretion as an interim solution. It was even expressed in *Stack v Dowden* that in the absence of legislation, 'the evolution of the law of property to take account of changing social and economic circumstances will have to come from the courts rather than Parliament'.[583] This has been criticised for blurring the line between adjudicating and legislating,[584] arguably encroaching on an area that Parliament should preside over. Whilst the judiciary have expressed their desire to further progress the family trusts framework, there is an argument that courts are not the best placed to facilitate this. It is suggested that if they were to cease such judicial innovations, legislative intervention might occur. Denunciation of familialisation, and particularly the exercise of discretion that this process encompasses, pivots on the idea that the judiciary should not manufacture beneficial interests on a remedial or discretionary basis.

It could be argued that over recent years, discretion has become so broad that it has led to inconsistency and risks interfering with party autonomy.[585] Since *Stack*,[586] a key theme of the trusts framework is the recognition of 'context.'[587] In such joint name cases, in order to quantify a beneficial interest, 'more factors than financial contributions are now apparently relevant'.[588] This not only includes advice and discussions which shed light on the parties' intentions, but also a vast array of considerations such as the parties' 'individual characters and personalities'[589] and how the parties arranged their finances. Yet this is 'not an exhaustive list'.[590] Such factors could inevitably change over time, rendering these considerations even more sweeping and vulnerable to discretionary interpretation. The use of discretion exemplified

[583] *Stack v Dowden* (n 11) [69].
[584] Michael Lower, 'Marriage and acquisition of a beneficial interest in the family home in Hong Kong' (2016) *Conv* 453, 458.
[585] Deech (n 53).
[586] *Stack v Dowden* (n 11) [46].
[587] A Hayward, 'Finding a Home for 'Family Property': Stack v Dowden & Jones v Kernott' in Nigel Gravells, *The Landmark Cases in Land Law* (Oxford: Hart Publishing 2013) 230.
[588] A J Cloherty and D M Fox, 'Providing a Trust of a Shared Home' (2007) 66 *CLJ* 517, 519.
[589] *Stack v Dowden* (n 11) [69].
[590] ibid.

in *Stack* has attracted concern. Moreover, the case failed to outline when the court should depart from the presumption that beneficial ownership reflects legal title. This raised several questions, namely whether judges are permitted to impute intentions to the parties which they never actually had.[591] Despite Baroness Hale expressing that the court should search for the parties 'actual, inferred or imputed intentions' but not abandon this search in favour of the 'result which the court itself considers fair',[592] these guidelines remain ambiguous. This has resulted in recent cases, such as *Amin*[593] and *Oberman v Collins & Anor,*[594] assessing witness credibility and the nature of the parties' relationships in order to divine common intention. This thesis maintains that without guidelines and sufficient structuring, this becomes an excessive application of discretion. Unfortunately, its relatively unrestricted nature generates unnecessary subjectivity.

These problems lead several scholars to believe that 'questions of legal rights and liability should ordinarily be resolved by the application of the law and not the exercise of discretion'.[595] Whilst judges have a 'legitimate law-making function' to keep 'the law abreast of current social conditions and expectations',[596] expansive discretion, akin to 'strong discretion' envisaged by Ronald Dworkin,[597] is criticised for creating uncertainty and sees the judiciary overstepping their role. This tendency has gathered academic disapproval[598] and provides the impetus for legislative reform to avoid this excessive use of discretion. This provides a basis for halting familialisation, which would curtail the extremities of strong discretion and prevent any further unpredictability, simultaneously encouraging Parliament to intervene

However, it should be noted that this argument is predicated on the notion of 'strong discretion'. Dworkin's 'doughnut' analogy supposes that discretion represents the hole in a doughnut, which 'does not exist except as an area left open by a surrounding belt of restriction'[599] which can be tightened or loosened to create 'strong' or 'weak' discretion. It

[591] Robert H George, 'Cohabitants' Property Rights: When is Fair, Fair?' (2012) *CLJ* 71(1) 39, 40.
[592] *Stack v Dowden* (n 11) [60].
[593] *Amin v Amin & Ors* (n 422) [11].
[594] *Oberman v Collins & Anor* (n 426).
[595] Bingham (n 473) 48.
[596] *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680 (HL) [32] (Lord Nicholls).
[597] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press 1978) 24, 31.
[598] Battersby (n 325).
[599] Dworkin (n 597) 31.

could therefore be possible to confine and structure this discretion to achieve desired results.[600] For centuries, the judiciary have exhibited an ability to restrict discretion[601] and there are certain methods to achieve this. For example, structuring factors for the courts to consider and controlling the parameters of judicial interpretation facilitate this process. Moreover, in response to the supposition that excessive discretion and concomitant uncertainty would violate the rule of law, it must be reaffirmed that 'absolute' discretion does not exist.[602] As a result, this interference is not a concern. The main concern with broad discretion, namely inconsistency within the trusts framework, may be resolved through structuring it and statutory reform would not be necessary for this process to happen. Particularly in the context of trusts of the family home, property law has traditionally encompassed principles of certainty and security of proprietary interests.[603] Accordingly, it naturally leans towards 'weak', curtailed discretion, favouring 'bright line' rules and thus, structuring the trusts framework should come naturally. Even since *Stack*, subsequent cases have attempted to restrict and structure the generous discretion envisaged. *Dobson v Griffey*[604] sought to differentiate between conduct performed with the intention of receiving financial gain and that which benefited the relationship of the parties and subsequently, the claimant failed as they could not evidence common intention. This type of restricted discretion could be continued instead of legislative reform.

Moreover, this argument overlooks the benefits that discretionary principles provide, particularly the power to change over time and adapt to a variety of circumstances, an aspect which is vital when considering a multitude of family arrangements. Importantly, statutory reform would not necessarily overcome the issues associated with excessive discretion, particularly due to its static and interpretive nature. Crafting legislation to replace the current trusts framework would firstly, need to be carefully drafted so as to clarify the governing principles and secondly, need to include discretionary elements so as to remain up to date and contemporaneous. To avoid the inherently static nature of a statute, interpretive elements would likely be incorporated to allow for the diverse range of family circumstances covered by

[600] Davis (n 273), Wexler (n 507) 124.
[601] Lord Bingham, 'The Discretion of the Judge' [1990] 5 *Denning Law Journal* 27, 27.
[602] Barak (n 144) 19.
[603] AJ van der Walt, *Property in the Margins* (Hart 2009).
[604] *Dobson v Griffey* (n 417).

the Act. Discretion would therefore be the primary method of applying, interpreting and modifying such legislation in order to keep it up to date and sufficiently flexible. As has been established, this is necessary when dealing with family property. From this, it can be seen that dismissing familialisation on the basis of excessive judicial discretion in favour of statutory reform is inherently flawed. Legislative intervention could equally lead to excessive deployment of judicial discretion, inducing similar problems of uncertainty. Whilst a potential statute would seek to carefully curb this discretion, there is no reason why this limitation cannot come from the courts through further familialisation. Thus, the fact that statutory intervention would also seek to employ judicial discretion, combined with the idea that discretion could be further harnessed to curtail its sweeping effects, prompts this thesis to scrutinise the strength of this argument. The potential for discretion to self-structure and the effects of this will be further contemplated later within this Chapter.

The Need for Legislative Reform: Insufficient Acknowledgement of Modern Social Practice

This section will now turn to consider a second argument supporting ceasing familialisation. This supposes that, at present, courts do not go far enough to acknowledge the realities of modern social practice and thus statutory intervention should rectify this. The flaws of the trusts framework have been considered 'failures', by the likes of the Law Commission, to 'respond to the realities of family life.[605] Whilst there is a genuine argument, as emphasised within Chapter Three, to support the idea that many non-moneyed cohabitants are left in a vulnerable position following requirements such as that of a direct financial contribution, it is countered that this is not a compelling argument in favour of halting familialisation.

It has been noted that the current trusts framework 'discriminates against those who do not earn income from employment'.[606] In practice, this particularly applies to women, who are often homemakers and provide domestic or indirect financial contributions. In requiring direct contributions to acquire a beneficial interest, it 'reduces the complex interplay of mutual

[605] Law Commission (n 33) 2.4.
[606] Law Commission (n 295) 2.108.

sacrifice which characterises family relationships into a stark balance sheet of monetary sums'.[607] Coupled with the court's arbitrary assessment of common intention, the trust principles 'sit badly beside the social phenomena which they attempt to regulate'.[608] This failure to adapt to the modern needs of families has created the impetus for statutory reform, and recent cases have exemplified the inability of the court to recognise the value of domestic contributions. Whilst this thesis has focused on women primarily, this negatively impacts all non-moneyed cohabiting parties. In the recent case of *Sandford v Oliver*,[609] the claimant failed to acquire a beneficial interest as the renovation works to the property over the years had been undertaken with the aim of improving family life as opposed to in the hope of financial gain. This distinction employed by Dovar J was made on the basis that Mr Sandford could not claim that the works were undertaken to his detriment. The judge further held that giving up work to look after the parties' children, combined with paying the household bills, could not amount to a detriment to give rise to a constructive trust. The plethora of cases that this thesis has engaged with demonstrates the disproportionate affect that this places on homemakers. From the renowned *Burns* case to the restrictive approaches of *James v Thomas* which held that contributions must not be explicable on other grounds,[610] *Eves* highlighting those contributions must be 'exceptional'[611] and *Thompson v Humphrey* referring to the extensive caretaking responsibilities undertaken by the claimant as 'normal domestic chores',[612] the acquisition threshold is significantly high. The current framework therefore disproportionately affects homemakers. The precarious position of many cohabitants renders the law ripe for reform and many modern lawyers and academics urge Parliament to enact this.[613] The judiciary themselves have made it clear that familialisation now occurs 'in the absence of statutory provisions'.[614] Following this, discretion has been utilised in a broad fashion to address this, which has attracted the previously observed criticism for generating uncertainty. Judges have

[607] Yeo (n 293) 132.
[608] Gray and Gray (n 244) 876.
[609] *Sandford v Oliver* [2019] UKFTT 451 (PC).
[610] *James v Thomas* (n 408).
[611] *Eves v Eves* (n 57).
[612] *Thomson v Humphrey* (n 549) [44].
[613] Jemma Thomas and Michael Gouriet, '2020 in family law: Why cohabitants need legal reform' (*Withersworldwide,* 9th December 2019) < https://www.withersworldwide.com/en-gb/insight/2020-in-family-law-why-cohabitants-need-legal-reform> (accessed 15th July 2021).
[614] *Stack v Dowden* (n 11) [107] (Lord Neuberger).

noted that reform was 'a matter of policy for Parliament'[615] to intervene and provide any 'remedy for inequity,' as seen in *Burns*.[616] Whilst many commentators believed over the time that cases such as *Burns* would 'provoke Parliament into legislative action',[617] this has not materialised. As a result, it could be argued that if the judiciary halt the process of familialisation altogether, this may force the hand of Parliament into enacting statutory reform. As surmised by Harding, given the reluctance of Parliament to act, the judiciary should show even more hesitancy when dealing with cohabitation cases.[618]

Despite this contention, it is submitted that the courts have a unique power to develop the law incrementally[619] which supports the ability of the framework to adapt to social and economic practices. With this in mind, familialisation has the ability to rectify this deficiency without the need for statutory intervention. In particular, the central issue regarding the lack of acknowledgement of modern social practice relates to how the courts deal with the acquisition threshold. This will be further analysed within the next section of this Chapter, where it will be advanced that expanding this acquisition stage will support the trusts framework in developing to accommodate the modern needs of families.

Whilst a thorough evaluation of potential legislative intervention is not discussed within this project,[620] it is submitted that firstly, it is not guaranteed that ceasing familialisation would trigger statutory reform and secondly, this may do more harm than good. Halting familialisation in favour of encouraging reform is not only a risk but threatens the development of the protection offered to cohabitants. Despite cases such as *Burns* attempting to encourage Parliament to legislate, and Baroness Hale issuing a pointed statement in *Stack* that such evolution 'will have to come from the courts rather than Parliament',[621] no such development has occurred. It is therefore unlikely that legislative reform will occur anytime soon. Yet, the trusts framework is ripe for development and further delay of this will be to the detriment of

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[615] *Pettitt v Pettitt* (n 22) [810] (Lord Hodson).
[616] *Burns v Burns* (n 32) [265] (May LJ).
[617] Ingleby (n 266) 230.
[618] M Harding, 'The Limits of Equity in Disputes over the Family Home' in J Glister and P Ridge, *Fault Lines in Equity* (Hart 2012) 213.
[619] Stephen Gilmore, *The Landmark Cases in Family Law* (Oxford: Hart Publishing 2011) 187.
[620] Further information: Women's Budget Group (n 530).
[621] *Stack v Dowden* (n 11) [46].

cohabitants. In light of the growing number of cohabitants in the wake of the Covid-19 pandemic[622] further trusts cases may occur in the near future and the framework must respond to these disputes. However, at its current state, owing to the criticisms discussed, the framework is unable to effectively acknowledge the lived realities of homemakers. This thesis therefore recommends that in the absence of any imminent statutory reform, familialisation should continue to adapt and address these criticisms. A theme that this thesis has observed has been the continuous ebb and flow process of rectifying and creating deficiencies as familialisation continues to adapt to different cases. As a result, familialisation could rectify its own deficiencies through further development. In particular, given the lack of Supreme Court decision for over a decade[623] and retirement of the main architects of familialisation,[624] a Supreme Court decision would be welcomed to commence this process of rectification. Overall, it is contended that ceasing familialisation altogether with a view to encouraging Parliament to introduce legislation is a flawed method of achieving reform. This thesis will not consider statutory reform proposals, although it is submitted that, whilst a statute would be preferable, it is not necessary to halt familialisation with this. Whilst this section has recognised the merits of encouraging statutory reform, it advances that continuous development of the modern trusts framework should be maintained in order to protect non-moneyed cohabitants.

[622] Coyle (n 518).
[623] *Jones v Kernott* (n 4)
[624] Supreme Court, 'Valedictory ceremony for Lady Hale' (*The Supreme Court,* 18 December 2019) https://www.supremecourt.uk/news/valedictory-ceremony-for-lady-hale.html (accessed 14 October 2021), Family Law Week, "Lord Wilson of Culworth retires as a Supreme Court Justice' (Family Law Week, 10 May 2020) <https://www.familylawweek.co.uk/site.aspx?i=ed210905> (accessed 14 October 2021), UKSC Blog Feaures, 'Lord Walker's Valediction' (UKSC Blog, 19 March 2013) http://ukscblog.com/lord-walkers-valediction/ (accessed 14 October 2021).

The Future of Familialisation

Having dismissed the suggestion that familialisation should be halted in favour of encouraging legislative reform, this thesis will now examine possibilities for judicial innovation of the trusts of the family home framework. A key condition of this amelioration is balancing the competing interests of 'bright line' rules associated with property law and more discretionary concepts that acknowledge family dynamics. As highlighted in Chapter Three, this thesis advanced that flexibility, facilitated by the use of discretion, is of utmost importance in order to acknowledge and accommodate the domestic dimension of property disputes. Therefore, when considering potential routes for future familialisation, flexibility will be prioritised at the cost of some certainty. However, this thesis recognises the need for a palatable solution that achieves this fine equilibrium.

There are two main criticisms of familialisation to which this Chapter seeks solutions. The first relates to the acquisition stage. This argues that there is insufficient recognition of the role that relationships play within property ownership choices and consequences. Specifically, domestic contributions are not valued, leaving non-moneyed cohabitants, many of whom are women, economically vulnerable. The second considers the process of quantification and the current assessment of common intention undertaken by the courts. The recent reliance on context to dissect and evaluate the intentions of the parties in a relationship has become excessive and this risks inconsistency and subjectivity.

In order to remedy these faults, a dual solution will be proposed. This will involve simultaneously expanding the acquisition stage to allow for non-moneyed parties to gain access to financial relief whilst structuring the discretion employed at the quantification stage. It is advanced that this will address the problems discussed and provide a palatable and satisfactory alternative to statutory reform. Accordingly, this section will examine the potential to expand the acquisition stage before considering how to structure discretion and refine the search for common intention at the quantum stage.

1) Expanding Acquisition: Judicial Recognition of Indirect Financial Contributions

Having criticised the high acquisition threshold in Chapter Three, this proposition advocates for increased recognition of domestic contributions for the purposes of demonstrating an inferred common intention for the non-moneyed party to acquire a beneficial interest. It is important to acknowledge the interplay of relationship dynamics within property law and how this informs choices about ownership. For the law to keep 'abreast of current social conditions and expectations',[625] the trusts framework must acknowledge the impact of such traditional gender roles and associated domestic obligations that influence relationship dynamics. Inequalities still exist within modern cohabiting relationships which 'permeate the relationship and the decision-making process'.[626] Whereas divorcing parties can access statutory financial remedies and property division,[627] cohabiting parties cannot. Instead, they rely on the trusts framework to support them. Yet, women are often financially disadvantaged by the financial consequences of separation, regardless of whether they are married[628] or cohabiting.[629] As highlighted in Chapter Three, it is suggested that the '*Burns* figure', a woman who regularly undertakes domestic responsibilities at the sacrifice of consistent paid employment and therefore fails to offer direct financial contributions to a property, still exists today as a result of broader gender norms and structural inequality. Homemaking is often undertaken disproportionately by women,[630] and these domestic responsibilities create financial disparity between many men and women.[631] With this in mind, there should be judicial cognisance of these social factors underpinning relationships and financial circumstances. There is therefore a strong case for valuing such domestic tasks. The high acquisition hurdle that disallows indirect financial contributions[632] subsequently devalues the caring and homemaking role, primarily affecting women. Despite caselaw stressing that property law should 'take account

[625] *Re Spectrum Plus Ltd* (n 596) [32] (Lord Nicholls).
[626] Thompson (n 20) 618.
[627] Matrimonial Causes Act 1973 (n 3).
[628] H Fisher and H Low, 'Recovery from Divorce: Comparing High and Low Income Couples' (2016) 30 *International Journal of Law, Policy and the Family* 338.
[629] M Brewer and A Nandi, 'Partnership Dissolution: How Does it Affect Income, Employment and Well-Being?' (2014) 30 Institute for Social and Economic Research.
[630] ONS (n 525), ONS 'Women Shoulder the Responsibility of 'Unpaid Work'' (2016).
[631] Thompson (n 67).
[632] *Buggs v Buggs* (n 540)[48]-[49].

of changing social and economic circumstances',[633] the high acquisition threshold arguably contradicts this. As observed in Chapter Three, the framework needs to modify itself to fix this. This thesis promotes the lowering of this acquisition threshold to accept indirect financial contributions, such as monetary payments for household expenditures and bills, as sufficient to acquire a beneficial interest. This would seek to modernise the trusts framework to acknowledge the current social climate which affects the ability of parties to financially contribute, reflecting a relational approach.[634] Moreover, it would consider indirect financial contributions which a court would be able to trace and identify, reducing subjectivity.

A common argument against valuing homemaking contributions at the acquisition threshold relates to the uncertainty which this brings. Domestic contributions, such as looking after children and performing household tasks, are treated differently to financial contributions because they are difficult to value and there is a resistance to viewing caring as paid work.[635] Bannister[636] questions whether such domestic contributions should be commodified, which is a social process by which something becomes considered a commodity.[637] As commodification of care occurs routinely in the form of paid childcare and care for the elderly and those with disabilities, it is questioned whether domestic work should be commodified so that the courts appreciate its value. A conceptualised example is that of the home, which has a commodified physicality but the emotional attachment to it is non-commodified and therefore has no value, so the 'home' = 'house' + x where $'x'$ is some added factor that makes a house a home.[638] This added factor often comprises of family life, homemaking and caretaking. Bannister suggests that as money has not corrupted the 'essence of care' undertaken by many paid carers, commodifying domestic contributions through the concept of enrichment would not affect social perceptions of care.[639] However, this argument dilutes the intense value specific to care of close family members and children and it would be incredibly difficult to quantify the value of caretaking and homemaking within the central family home. The primary argument against

[633] *Stack v Dowden* (n 11) [46] (Baroness Hale).
[634] J Herring, *Relational Autonomy and Family Law* (Springer 2014).
[635] D Stone, 'For Love nor Money: The Commodification of Care' in M Ertman and J Williams (eds), *Rethinking Commodification* (NYUP 2005).
[636] Samuel Bannister, 'Domestic contributions as unjust enrichments: commodifying love?' (2021) 33(3) *CFLQ* 264.
[637] M Radin, *Contested Commodities* (HUP 1996)
[638] L Fox O' Mahony, *Conceptualising Home* (Hart, 2007).
[639] Bannister (n 636).

the commodification and judicial acknowledgement of childcare relates to the traditional perception of child-rearing as a natural and expected responsibility.[640] Whilst this is a valid argument, it is clear that social perceptions have changed over time and this is not necessarily the case. A more compelling justification for the refusal of acknowledging childcare concerns the legal uncertainty that this would entail. In practice, evaluating domestic activities such as childcare would prove problematic and potentially controversial. Moreover, assessing whether such contributions are sufficient to acquire a beneficial interest adds a subjective element, which may involve the court scrutinising each parties' intentions through analysing the level of care and homemaking provided. This would mirror the current flaws of the courts' approach to quantification, which has been criticised in this thesis for deploying excessive discretion. Consequently, this thesis would not go as far as to consider domestic contributions at the acquisition stage. Instead, it is suggested that the acquisition threshold should be lowered to allow for indirect financial contributions.

In order to value domestic contributions in a constructive way that ensures certainty, indirect financial contributions should be recognised as a method of acquiring a beneficial interest. The high acquisition threshold has attracted criticism, primarily because, as Eekelaar stressed 'a woman's place is often still in the home, but if she stays there, she will acquire no interest in it'[641] despite the contributions that she makes. In spending her limited earnings or savings on household charges in the home in which her and her partner cohabit, she is supporting the acquisition and maintenance of the house. For example, the payment of bills by a non-moneyed party would relieve the legal owner from paying bills so that they can direct their earnings towards repaying the mortgage. As such, the non-moneyed party is indirectly contributing towards mortgage payments. Without this, the couple may not be able to maintain of finance the property. These expenditures are indirectly contributing to the acquisition of the property and so the trusts framework should acknowledge this through valuing such contributions.

This idea has been supported in the past. Previously, the law has seen a movement indicating appreciation of indirect financial contributions. For example, in *Tulley v Tulley*,[642] Lord

[640] S Hays, *The Cultural Contradictions of Motherhood* (YUP 1998).
[641] Eekelaar (n 277) 94.
[642] *Tulley v Tulley* (181).

Denning noted that if the 'husband paid all the instalments and the wife by her earnings paid all the household expenses, she would indirectly be contributing to the acquisition of the house and the court might well say or infer that the common intention was that it should be joint property as a family asset'.[643] This was further echoed by Diplock LJ in *Ulrich*,[644] who stressed that the mathematical approach of direct monetary payments failed to recognise 'the economic realities of modern mortgages of owner-occupier dwelling houses'.[645] However, Probert notes that 'the logic of accepting that a common intention can be inferred from indirect contributions also points in favour of accepting domestic contributions as generating intention'.[646] It is countered that there is a significant difference between domestic chores that support a relationship and domestic financial contributions that indirectly support the acquisition of the home. These can be distinguished by inspecting conduct relating to property and it is suggested that financial contributions that relate to the property itself should be recognised. One issue that would arise here is the type of evidence that would need to be adduced to demonstrate whether such a financial contribution indirectly supported the acquisition of the property. Here, it would be proposed that to qualify as an 'indirect financial contribution' the contribution should firstly, possess a monetary nature and secondly have a causal link to the acquisition of the property. For example, financial contributions towards household bills, repairs and maintenance demonstrate not only an interest in the upkeep of the property, but relieve the other party of this obligation, enabling them to channel their money directly towards acquiring the property for the family. Domestic chores such as childcare, cleaning and gardening would have little to no financial impact on the other party. Therefore, this distinction could be drawn to decipher indirect financial contributions from purely domestic contributions and facilitate clarity. Even *Burns* hinted at the acceptance of indirect contributions relating to property acquisition on condition that they were not solely for the purpose of family life,[647] drawing a distinction between property-based and family-centric conduct. This approach is justifiable. Given the need for clarity, permitting indirect financial contributions that relate to property acquisition would reflect the valuation of domestic contributions whilst preserving certainty. In line with the re-structuring of common intention,

[643] ibid.
[644] *Ulrich v Ulrich v Fenton* (n 178) (Diplock LJ).
[645] ibid.
[646] Probert (n 437) 342.
[647] *Burns v Burns* (n 32) (Fox LJ).

this Chapter advances that valuing homemaking through recognising indirect financial contributions would provide welcome guidance and allow homemakers to acquire a beneficial interest. Consideration would therefore be attributed to household bill payments, redecoration and renovation expenditures. These are quantifiable factors that do not require broad interpretation, enabling the trusts framework to remain coherent.

2) Restricting Quantum Factors: Structuring Discretion and Refining the Search for Common Intention

The second aspect of this thesis' proposal involves restricting discretion through modifying the factors used at the quantification stage. This seeks to compliment the expansion of the acquisition stage in order to establish a balance that tempers the ebb and flow process of familialisation in a palatable way. In restricting the factors taken into account at this stage, discretion would be structured to account for property-based conduct, reducing uncertainty. Whilst the acquisition stage should be expanded to ensure that the interpersonal dimension of such cases is recognised, holding quantification to a more objective standard should bolster this and proffer a more agreeable solution in the round. The first section will outline this before detailing this revised approach to quantification, which consists of three strands. The proposed factors will first be determined, before then turning to consider how these factors could be structured, where the notion of a factual hierarchy will be introduced. Finally, the use of 'fairness' and its influence on imputing intentions will be assessed, with a view to minimising the imputation of fictitious common intention.

The justification for structuring discretion through modifying quantification factors

As previous Chapters have identified, a central debate surrounding the familialisation of property law is the tension between rules and discretion, which fuel competing property and family interests. The current trusts of the family home framework attracts criticism for undermining the certainty and stability of property law.[648] For this reason, structuring the

[648] Mary-Ann Glendon, 'Fixed Rules and Discretion in Contemporary Family Law and Succession Law' (1985) 60 *Tulane Law Review* 1165.

trusts framework is desirable. Some academics even call for the return to resulting trusts in order to resolve family property disputes.[649] However, although it is agreed that further structuring is necessary, the resulting trust would not provide ample protection of non-moneyed parties. As expressed in this Chapter, accommodating the domestic context through lowering the acquisition threshold is a vital aspect of this thesis' proposition. Therefore, whilst resulting trusts have been praised for their well-established roots and associated predictability,[650] they do not reflect the interpersonal dimension of family trusts cases and are therefore not suitable. Nevertheless, it is possible to restrict discretion whilst maintaining this interpersonal dimension. It is proposed that the common intention constructive trust remains appropriate and should be structured at the quantum stage. A key method of doing this is through modifying the factors used at this stage to limit the discretion available to judges.

Dworkin's view of 'strong' structured discretion would encompass 'certain standards of rationality, fairness and effectiveness',[651] which confine the exercise of discretion. This would help dissipate concerns over the lack of predictability surrounding familialisation. Moreover, unlike rigid rules which may hamper the evolution of the law, this form of structured discretion enables 'courts to adjust incrementally to changing social ideas instead of being confined to legislative standards that are not readily altered'.[652] So far, this thesis has dismissed the possibility of halting familialisation in favour of legislative reform. Yet, it has also acknowledged the need for certainty within the trusts framework. Hence, this would provide the ideal solution in order to balance the competing needs of property law and the family.

A point in favour of this solution is that structured discretion has been prevalent since the inception of the trusts of the family home framework. This fact provides a strong basis for its continuation today. Despite being labelled as 'palm tree justice',[653] the 1952 case of *Rimmer v*

[649] Yee Ching Leung, 'Rethinking the Common Intention Constructive Trusts in Stack v Dowden and Jones v Kernott – should the Resulting Trusts be Preferred?' (2019) 6(1*) IALS Student Law Review* 26, 30.
[650] James Penner, 'Resulting Trusts and Unjust Enrichment: Three Controversies' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Oxford: Hart Publishing 2009) 237.
[651] Dworkin (n 597) 33.
[652] CE Schneider, 'Discretion and Rules: A Lawyer's View' in K Hawkins, *The Uses of Discretion* (OUP 1991) 47, 64.
[653] *Rimmer v Rimmer* (n 129) [865] (Evershed MR).

Rimmer[654] actually exhibited an element of structured discretion. Lord Justice Denning highlighted that the lack of guidance issued by Parliament regarding section 17 of the Married Women's Property Act 1882 meant that the court was 'left to work out the principles themselves'[655] and thus commencing a structuring process of principles. Consequently, broad discretion has historically led to the courts framing its use through self-imposed restrictions,[656] creating 'rule-building' discretion.[657] This was also exemplified in *Fribance*[658] where section 17 was further structured and the case 'added some precision to the limits of the discretion' conferred by statute.[659] This led to the perception that the exercise of discretion was becoming 'structured'[660] through the courts' efforts to establish clear principles to guide the deployment of statute as applied to married couples. In this sense, the courts were moving away from the presumptions of resulting trust in favour of using structured discretion.[661] As a result, academics viewed this progression positively.[662] Cases such as *Cooke* and *Oxley* largely provided a thorough analysis of quantification, employing structured discretion to apply refined principles to this process. However, over time, structured discretion has taken a backseat in favour of results-oriented decisions. As noted by Hayward,[663] since the cases of *Pettitt* and *Gissing*, there has been an observable transition from 'overt statutory discretion' to a more implicit, fact-finding discretion. This centred around the interpretation of principles and can be illustrated by the expansive discretion required to ascertain common intention, which has been criticised throughout this thesis for its open-textured nature. Whilst these may be commended for attempting to accommodate the domestic context and address the needs of modern families, this has created uncertainty driven by judicial preference for certain outcomes. It is therefore proposed that this discretion should be curtailed, yet the advantages of accommodating the domestic context would not be removed as this thesis proposes that such indirect contributions should be recognised at the acquisition stage instead. Over time,

[654] ibid.
[655] ibid [868] (Denning LJ).
[656] Barak (n 144) 19.
[657] Schneider (n 652).
[658] *Fribance v Fribance* (n 163).
[659] O Stone, 'Matrimonial Property – The Scope of Section 17' (1957) 20 *MLR* 281.
[660] Davis (n 273).
[661] MDA Freeman, 'Towards a Rational Reconstruction of Family Property Law' (1972) *Current Legal Problems* 84, 85.
[662] Miller (n 176) and RE Megarry, 'Rimmer v Rimmer' [1953] 69.
[663] Hayward (n 151) 156.

discretion has been utilised to inject flexibility into the trusts framework to accommodate the needs of families. Chapter Three remarked that this had occurred in several cases such as *Cooke* and *Le Foe*. However, in the process, this has created uncertainties and deficiencies which discretion has then been used to overcome, generating an ebb and flow process. Cretney observes that this 'judicial pusillanimity'[664] and reticence to properly consider the use of structured discretion has spurred the need for constant judicial (re)interpretation. It has been remarked that this results in an ebb and flow process, generating uncertainty. To temper this, facilitating rule-based discretion through structuring the factors for the courts to consider is recommended and the method of achieving this will now be considered.

Reconstructing the quantification factors

The need to structure the discretion allowable at the quantification stage inevitably means that the factors considered by the judiciary need to be assessed and re-constructed. A notable criticism of the current trusts framework that needs to be resolved is the assessment of common intention. A common intention constructive trust requires common intention between the parties to share beneficial interest in the property in addition to detrimental reliance on that shared intention by the non-moneyed party. Labelled a 'prisoner of its own dogma,' common intention 'must be grounded in proven intentions of the parties'.[665] However, intentions are difficult to prove, and this obliges courts to investigate subjective factors such as the discussions between couples regarding property ownership. It has been noted that cohabiting couples rarely expressly discuss decisions regarding property ownership. This is both because cohabitation is often informal, and cohabitation agreements can be commonly perceived as 'inflexible', 'cold' and 'defeatist'.[666] For these reasons, many couples avoid making cohabitation agreements or expressly discussing their property decisions. This renders any evidence of intentions virtually non-existent. This has compelled judges to strenuously search for common intention through engaging in a rigorous process of fact-finding, which is criticised for exceeding the limits of discretion. In *Bernard v Josephs*, Griffiths LJ expressed that this involves an 'air of unreality' in searching for 'unexpressed and probably unconsidered intentions'.[667] Jacob LJ

[664] Cretney (n 201) 575.
[665] Gray and Gray (n 244) 872.
[666] Lewis, Datta and Sarre (n 28).
[667] *Bernard v Josephs* (n 80) [404].

in the more recent case of *Jones v Kernott* reiterated that couples rarely enter into express agreements regarding property division if their relationship fails, as relationships 'do not operate as if they were commercial contracts' as 'life is untidier than that'.[668] This therefore makes it difficult for judges to identify tangible evidence of a common intention. Deciphering facts is the primary use of discretion and the wide room for interpretation offered to judges means that this results in expansive discretion, which leads to uncertainty. Moreover, the outcome of a case is often dependent on the finding of particular facts and the individual fact-finder, rendering it flawed and inconsistent. The uncertainty that this feature perpetuates has even led Mee to compare it to 'one of the imaginary beasts dreamed up by bored medieval minds, a nightmare synthesis of a number of real creatures'.[669] This arbitrary assessment of common intention could disadvantage the non-moneyed party, who is often a woman, so it is necessary to resolve this unfairness and uncertainty.

The difficulty in ascertaining common intention lies behind the lack of guidance and expansive discretion given to judges following recent judicial developments. As highlighted in Chapter Three, one of the problems with this assessment of common intention derives from its opaque definition by Lord Bridge in *Rosset*, who failed to elucidate upon the type of communication between the parties that would evidence common intention. As a consequence, this lack of structure has encouraged the use of expansive discretion and resulted in courts adopting inventive approaches to establish a shared intention.[670] Subsequently, it is advanced that structuring the approach taken towards common intention would reduce the risks involved in order to create rule-based discretion and minimalising the uncertainty associated with this as a result. It should firstly be noted that the courts have attempted to structure such requirements over recent years. Whilst this should be applauded and encouraged, this thesis asserts that these previous attempts to provide structure have included imprecise or subjective factors which have required interpretation and broad discretion. As previously observed, in paragraph 69 of *Stack v Dowden*, Baroness Hale, as she then was, attempted to lay down several factors to guide the court in quantification. However, critics have expressed that these

[668] *Jones v Kernott* (n 4) [90] (Jacob LJ).
[669] Mee (n 214)) 118.
[670] Examples of this can be found in *Eves v Eves* (n 57) and *Grant v Edwards* (n 271).

considerations are 'not necessarily reliable indicators of the parties' intention'.[671] For example, examining the nature of the parties' relationship poses difficulty as this involves a retroactive assessment which may be tainted by the animosity between the separated parties. Consequently, trying to pick out objective facts as evidence of the nature of a relationship is often unattainable. This leads judges into transposing particular details onto a preconceived factual matrix in order to evidence common intention. As a result, the way that common intention is assessed needs to be re-evaluated.

There is an imperative need to restrict the assessment of common intention and prioritise more objective factors, such as property-based conduct. As previously emphasised, there is a strong argument for excluding conduct relating to the parties' relationship to establish common intention. *Stack* has made it hard for the judiciary to distinguish between party conduct directly relating to the acquisition of property and party conduct that 'reflects the normal obligations' of their life and relationship.[672] To this end, personal conduct relating to the relationship has been investigated in recent cases, heavily influencing the assessment of the parties' intentions.[673] It is argued that trying to distil the coloured and emotional nature of any relationship is impossible and inevitably leads to misunderstanding and misrepresentation. For example, examining witness credibility and observing the interaction between cohabitants may be obscured by the fact that many of these are acrimonious disputes, tainting the parties' actions and intentions. Questioning the nature of a relationship and how the parties set out to live their lives therefore becomes subjective. Then translating this into quantification leads to endemic uncertainty and unreliability on what is meant to be a sound framework. On top of this, using these assessments as primary bases from which to quantify property interests is unpredictable. Such vague assessments should not form the basis of deciphering proprietary interests. To preserve certainty and to structure common intention effectively, conduct relating to the property should perhaps retain the most weight with regard to establishing common intention. As highlighted within this Chapter, the arbitrary assessment of the discussions and actions of the parties is insufficient to evidence a shared intention with any degree of certainty.

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[671] G Douglas, J Pearce and H Woodward, 'Money, Property, Cohabitation and Separation: Patterns and Indications' in R Probert and J Miles, *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart 2009) 141.
[672] Dixon (n 31).
[673] *Amin v Amin & Ors* (n 422).

Permitting personal conduct to be scrutinised could allow judges to infuse their own values and biases into their decisions, rendering the trusts framework vulnerable to further subjectivity.

Whilst structured discretion has been commended throughout this Chapter for providing certainty and simultaneously retaining an element of flexibility, the blending of structured discretion with opaque factors could be troublesome. The problem here is that not only are relationship-based factors uncertain, but both property-centric and relationship-based factors are ascribed relatively equal weighting. A majority of these interpersonal factors require the judiciary to interrogate the intentions of parties, often based on their characters, which are subjective elements that can never appropriately be ascertained or quantified. Consequently, this leads to 'endemic uncertainty'[674] as some of the factors included 'have little direct connection with the property',[675] as noted in *Jones v Kernott*. Accordingly, the amalgamation of factors referring to conduct relating to the property and conduct linked to the relationship makes it difficult for a judge to distinguish between the two. As Dixon expressed, this risks the judiciary considering actions reflecting the normal obligations of everyday life – conduct which would ordinarily be disallowable in court proceedings.[676] Thus, whilst the list of considerations represents a pragmatic response to address expansive discretion, the factors themselves are indefinable and elusive. This may result in judges employing further discretion to interpret the considerations and engage in a fact-finding process, undermining the objectivity and certainty of the assessment. For this reason, property-based factors and relationship-based factors should be disentangled, with priority given to objective property-based considerations.

Nonetheless, this thesis does not propose that such subjective factors are eradicated. Instead, it is suggested that they are given less weight and, in some cases, reformulated, to narrow the room for interpretation and thus the ambit of discretion afforded to them. This would result in a hierarchical structure. Prioritising property-based conduct, at face value, fails to acknowledge the modern needs and expectations of cohabiting couples and the relationship

[674] Dixon (n 360).
[675] *Jones v Kernott* (n 4) [19] (Nicholas Strauss QC).
[676] Dixon (n 31) 458.

dynamics behind property ownership choices. There is a contention that this would detrimentally impact women, who are less likely to contribute towards the property and therefore examining solely property-based conduct would restrict many non-moneyed women from have their beneficial interest recognised. For example, *Burns*[677] and *James v Thomas*[678] exemplify the rigid approach of considering purely property-based conduct and financial contributions. The previously mentioned '*Burns* figure' could face disadvantage if common intention was solely assessed through property-based conduct. In *Thomson v Humphrey*, Ms Thomson's efforts in 'leaving her job, working in the business, project management, housekeeping and looking after the mother [of Mr Humphrey]'[679] were insufficient to establish a common intention upon which she relied. Thus, there is a danger that in restricting the scope of allowable conduct to property-related actions, non-moneyed parties, who have contributed to the property and relationship through other means, will fail to meet this hurdle and be financially disadvantaged. For this reason, this thesis does not seek to restrict the quantum factors to solely property-based ones, but instead create a hierarchy where these factors are prioritised. In this manner, relationship-based conduct can still be assessed but less weight will be given to it. Furthermore, these potential problems of exclusivity and discrimination would be rectified through valuing indirect financial contributions at the acquisition stage. This would result in a greater number of non-moneyed parties acquiring a beneficial interest, preventing the disadvantageous effects of these cases. However, in order to streamline trusts of the family home and prevent excessive generosity and potential floodgate effects, certainty would be preserved at the quantification stage, which would be more restrictive. Thus, whereas the current framework sets a high acquisition threshold combined with a generous approach to quantification for the few that manage to acquire a beneficial interest, this proposed approach would lower the acquisition threshold and adopt a more measured approach to quantum. The benefits of this dual approach would not only improve the position of non-moneyed parties and women, but also allay fears of those who argue that the common intention constructive trust is too generous. Moreover, it would seek to reflect the intentions of the parties in a more accurate manner – through familial sharing, but with a view to reflecting property-based contributions to decipher the quantity of that share. The advantages of pairing these two

[677] *Burns v Burns* (n 32).
[678] *James v Thomas* (n 408).
[679] *Thomson v Humphrey* (n 549) [98] (Warren J).

elements will be further considered in the final section of this Chapter. It is acknowledged that the need to value homemaking and caregiving responsibilities within the trusts of the family home framework is vital. This will therefore be accounted for. Nonetheless, in terms of structuring common intention at the quantum stage, property-based conduct should be prioritised in order to provide clarity and consistency, reducing the scope for judicial interpretation and associated expansive discretion. Having established that property-based conduct should be prioritised, the next section will look at how such factors can be worded and structured to divine the most effective assessment of quantum.

Wording and hierarchy of quantification factors

Having advanced the need to reconstruct the quantification factors, stressing the importance of reducing the emphasis placed on common intention in favour of prioritising property-based conduct, the structure of these factors will now be considered. An example of structuring can be identified in paragraph 51 of *Jones v Kernott,*[680] which provided helpful guidance on this. A similar summary would support the structuring of this discretion. This provided a starting point that 'equity follows the law' before outlining how this presumption would be displaced. In stressing the need to examine how the words and conduct of each party were understood, *Jones v Kernott* emphasised the assessment of changing intentions over time. However, the case also encouraged adopting a 'broad meaning' in relation to what the court considers fair regarding property-based conduct. In commencing with a starting point followed by a chronological order of factors to be taken into account, *Jones* provided helpful and practical guidance. This structure of approach, combined with incorporating more precise factors such as those in *Stack*, would provide comprehensive guidance to the judiciary. An example of factors to consider can be found in paragraph 69 of *Stack v Dowden.*[681] This offered a non-exhaustive list of factors to consider when faced with quantification in a joint ownership case to aid judges in ascertaining the 'true' intentions of the parties. This method is effective and could be applied to single ownership cases. The factors in *Stack* included;

[680] *Jones v Kernott* (n 4) [51].
[681] *Stack v Dowden* (n 11) [69].

> 'any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses'.[682]

Scrutinising these considerations more closely, most of them include phrases which are not expressed with clarity. It is not clear exactly how considerations such as 'advice or discussions', 'nature' of the relationship and 'reasons why' would directly impact the outcome of the case. Furthermore, such wording forces judges to try to ascertain subjective and emotional factors. Additionally, whilst the factors above are listed as deliberations, the case failed to accurately explain the precise type of discussion, conduct or intentions that the judiciary should be looking for. This has led judges to pursue a variety of different avenues, including witness credibility when assessing the parties' intentions. The resulting imprecision was exemplified in *Amin v Amin & Ors* and *Dobson v Griffey*, which Chapter Three discussed as over relying on fact sensitivity through placing too much weight on the relationship between the parties and their statements made in court proceedings. As a consequence, the personal characteristics of the claimant played a significant role in the outcome of the case, potentially prompting judicial bias. Accordingly, clearer guidelines would support the assessment of common intention through reducing uncertainty and the expansive discretion that it facilitates. Instead of considering the personal qualities and characteristics of parties, it is advanced that the judiciary should attach more weight to objective factors.

The list would therefore place the strongest emphasis on quantifiable property-related factors and the subjective, personalised *Stack* factors should acquire the least weight. These personalised factors would be the 'bottom' tier. These include the first three; 'any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons

[682] *Stack v Dowden* (n 11) [69] (Baroness Hale).

why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys' and the fifth; 'nature of the parties' relationship'. With regard to 'any advice or discussions', whilst this factor should still be included as it may, in exceptional cases, reveal important information, it is arbitrary and relies on the accurate and honest recollection of the parties. As this is difficult to obtain, particularly in acrimonious separations, less weight should be attributed to this factor. Similarly, the second consideration of 'reasons why' the home was acquired in, in this case, single names, requires the parties to proffer a reason for this decision. This can be arbitrary and force parties to create reasons for the sake of the court. As established, cohabitation is often informal and parties rarely discuss their proprietary arrangements and reasons, so this is tricky to establish. Nevertheless, it is an important question and if there are clear reasons, such as one party is significantly more wealthy than the other, or unconscionability is present, then this should be accounted for. Accordingly, this should still hold some weight, although not as much as property-based considerations. As discussed, assessing the 'nature of the parties relationship' should be given the least weight owing to its subjective nature.

The 'mid' tier factors which should attribute more, but not significant, weight would be those factors that are not strictly-property based but from which property decisions can be inferred. These would include those such as 'whether they had children for whom they both had responsibility to provide a home', which does not directly interrogate the financing of the property, but strongly evidences the intention to utilise the property as a family home. Even 'the purpose for which the home was acquired' maintains neutrality and leads to a simple answer, for instance for the purpose of family life, or one parties' business address. Additionally, 'how the parties arranged their finances, whether separately or together or a bit of both' would also provide a factual insight into the level of sharing, from which the court can infer an intention of the parties to share the property. Adding to the *Stack* factors, other factors might include the occupancy of the property, for example if one party regularly left to stay elsewhere, which could reveal whether the parties intended to live in and share the property at all times. Further considerations could include whether the parties intended to have children together that they would be responsible for and perhaps how domestic tasks, such as upkeep of the property, redecoration and refurbishment, were divided between the parties. These 'mid' tier factors do not directly relate to the financing of the property, but they should still retain some

weight as they provide a strong basis from which to infer parties' intentions. This is primarily due to their objectivity and neutrality.

Finally, the factors which should attribute the most weight, the 'top' tier factors, would be property-based. The *Stack* paragraph 69 factors which encompass the financing of the property and how the property and domestic expenditures were financed are more precise and objective factors that can be evidenced. This is by virtue of their clarity and more verifiable nature. Determining 'how the purchase was financed, both initially and subsequently' is a factual and quantifiable consideration that requires no interpretation and therefore minimal discretion. Furthermore, the element of change over time is accounted for, allowing for consideration of mortgage instalments which a non-moneyed party may have contributed to. This clarity on the quantum is further supported by the consideration of 'how they discharged the outgoings on the property and their other household expenses'. This is important and relates to indirect financial contributions. In evaluating this factor, the assessment of quantification avoids the trap of the resulting trust and still accommodates the domestic context.

Thus, structuring should occur to guide the judiciary through their assessment of common intention, and it is suggested that such considerations should be set out in order of weight and importance, with more weight being given to property-based factors. This hierarchy preserves the advantages of contextualised decisions although curbs the discretion available at the quantum stage through reducing the weight attributed to suggested factors. This reduces uncertainty and addresses the particular concerns relating to the assessment of common intention. Whilst preserving certainty, a hierarchical structure ensures that courts efficiently prioritise the factors that they take into consideration. Thus, a hierarchy promotes clarity and streamlines the property factors, facilitating tailored decisions owing to the weight that the various factors hold. Although some may argue that this restriction fails to properly account for the realities of lived cohabitants and undervalues domestic contributions, this thesis proposes to expand the acquisition stage so as to recognise indirect financial contributions. This dual approach seeks to provide a palatable balance and the reasons for this will be considered in the following section.

The 'fairness' standard: finding the right balance

A final issue to address is the use of fairness as a standard when evaluating shares. On one hand, it has been seen to drive results-based decisions as the courts impute their own assessment of what is fair, yet on another hand, it adds another layer of protection through acknowledging relationship dynamics. Since *Stack* outlined that the intention could be actual, inferred or imputed from conduct, *Jones* then understated the distinction between an inference and an imputation and the standard of 'fairness' was alluded to by the judges.[683] This has prompted academics to share concern over the elusive 'fairness' factor which may be used to impute intentions, leading to subjective evaluations.[684] This concept not only gives the judiciary an additional method of exercising their discretionary powers, but the term itself is nebulous and incorporates a subjective standard. Arguably, it undermines the stability of the trusts framework, a concern which is prominent within familialisation debates.

A primary concern is that fairness has amalgamated with intentions, which leads to imputation of intentions. As encapsulated by Piska, 'the majority clothe fairness in the language of intention without providing explicit guidance for determining the content of either'.[685] On the surface, using the principle of fairness to adjust quantum decisions could be perceived as a mechanism available to judges to impute their own views and create a results-oriented outcome. An example of this was seen in *Cooke*, which stretched Mrs Cooke's share at the quantum stage from a 6.47% financial contribution to a 50% beneficial interest in the property. Waite LJ rationalised that the couple had agreed to share everything equally, despite Mrs Cooke stating herself that they never reached an agreement to share the property. For this reason, the case was dubbed 'parasitic quantification'.[686] It is clear that fairness was used as an overarching principle here to generate a particular outcome. This led to the imputation of intentions. Throughout the judgment, Waite LJ referred to the inflexibility of the framework left by Rosset, causing 'human heartache as well as public expense'[687] in addition to the precarious financial position of many homemakers and caregivers as such responsibilities

[683] *Jones v Kernott* (n 4) [74] (Lord Wilson).
[684] Gravells (n 377) 230.
[685] Piska (n 356) 128.
[686] Battersby (n 230) 264.
[687] *Midland Bank v Cooke & Anor* (n 317) 736.

'necessarily affect the future earning capacity of the wife'.[688] Whilst this is true, utilising fairness to impute intentions in order to rectify dissatisfaction with the framework is not appropriate. This is because largely, such judgments are unsubstantiated due to the difficulty in identifying precise indicators of fairness. Although more recent cases have confirmed that the courts should search for the parties' actual intentions rather than imputing them[689] the blurring of the lines between actual, inferred and imputed intentions persists from both *Stack* and *Jones*. The conflation of these means that it is difficult to refrain from incidentally imputing fairness under the guise of inference. Whilst the courts still need to clarify the distinction between these forms of intention, it is suggested that fairness could return to its original more conservative approach found in *Oxley*. In *Oxley v Hiscock*, fairness was expressed as relating to 'the whole course of dealing between [the parties] in relation to the property'.[690] Potentially returning to this stricter approach will offer more clarity with regard to property-based conduct and imputed intentions. While Lord Neuberger in *Stack*[691] criticised analysing the 'whole course of dealing', believing that it generated imprecision, steering this towards looking at conduct in relation to the property adds precision as this is more quantifiable.

Transposing fairness onto a clearer trusts framework is an effective method of permitting the flexibility to accommodate family needs whilst structuring it to reduce uncertainty. However, as fairness is applied throughout sections 23-25 of the Matrimonial Causes Act 1973 to divorce and dissolution, there is an argument that this application of fairness may blur the distinction between married and unmarried couples.[692] Nevertheless, curbing the deployment of fairness in this way would prevent this comparison. Overall, it is contended that fairness has great value in facilitating the accommodation of relationship dynamics and modern family. The judiciary should therefore continue to consider this principle in relation to examining intentions relating to the property.

[688] ibid 744.
[689] *Stack v Dowden* (n 11) [3].
[690] *Oxley v Hiscock* (n 337) [73].
[691] *Stack v Dowden* (n 11) [144].
[692] Ross (n 378).

Expanding Acquisition and Curtailing Quantum: A Dual Approach

This Chapter has proposed a dual approach to expanding the contributions sufficient to acquire a beneficial interest whilst simultaneously curtailing the discretion exercised at the quantum stage. This seeks to address many of the criticisms raised in order to achieve a balance between rules and discretion and certainty and flexibility in a palatable way. It is asserted that the two individual propositions complement each other. A theme underpinning the debates surrounding the familialisation of property law has been the desire to achieve the fine equilibrium between rules and discretion. Holistically, expanding acquisition and restricting the quantum factors accomplishes this through reducing the disparity between the way both elements are assessed. Historically, as observed in Chapter One, the moulding of property principles to accommodate families has developed incrementally and this has resulted in what Hayward terms 'fragmented familialisation'.[693] As a consequence, the modern trusts framework comprises of many different complex and intricate elements that have been discussed. Yet, the interplay of these elements can render the framework disjointed and it is necessary to look at the framework in its entirety.

Narrowing the disparity between the way that the acquisition and quantum stages are assessed seeks to provide more clarity and consistency. The restrictive acquisition stage currently prevents non-moneyed parties who fail to directly contribute to the property from attaining a beneficial interest. This results in women such as Miss James in *James v Thomas,* who made a 'near Herculean'[694] effort to undertake unpaid work in the family business, and Ms Dobson's 'real contribution'[695] to the property in *Dobson v Griffey,* failing to meet the acquisition hurdle. The court's emphasis on the need to evidence financial contributions in order to demonstrate detrimental reliance and an intention to share the property fails to appreciate the nature of family life. Whilst domestic contributions such as homemaking and childcare should not be 'commodified'[696] to financially equate those contributions to mortgage contributions or purchase price payments, indirect financial contributions should be valued. Indirect financial contributions can be quantified and therefore represent an objective standard at the same time as recognising the domestic dimension of property ownership. The criticism of this is that it

[693] Hayward (n 75).
[694] *James v Thomas* (n 408) [11] (Sir Chadwick).
[695] *Dobson v Griffey* (n 417) [64].
[696] Bannister (n 636).

would allow an increased number of claimants to gain a beneficial interest in the property, giving rise to a generous trusts framework that may appear paternalistic. For this reason, limiting the discretion afforded at the quantum stage would prevent this argument in addition to resolving the uncertainty surrounding the assessment of common intention. Thus, it would oppose perpetuating 'palm tree justice',[697] which saw the amplification of small financial contributions into a 50% share in the property as seen in cases such as *Cullifordv Thorpe*, where Mrs Thorpe increased the property value by £30,000, and *Midland Bank v Cooke*[698] where Mrs Cooke had contributed 6.47% of the price. Restricting the factors considered at the quantum stage to prioritise property-based conduct would limit the ambit of discretion afforded to judges when quantifying beneficial interest. Moreover, it would diminish fact-sensitivity when assessing common intention, which has been criticised throughout this thesis. Overall, subjective, relationship-based considerations would attribute less weight, thus reinforcing certainty and predictability. As a result, this pairing rectifies both the deficiencies of insufficient acknowledgement of domestic contributions as well as broad discretion and uncertainty in an efficient way. It is hoped that this would be a palatable solution which incorporates both rules and discretion, seeking to appease academics on either side of this debate. Furthermore, as a consequence, owing to this new balance between rules and discretion, the ebb and flow process should temper to a level more consistent with other areas of law. It has been noted that due to the particularly fragmented development of familialisation in a continuously progressing and emotional facet of law, the tugging of rules and discretion has been more aggravated. This cyclical process of continuously creating and rectifying deficiencies has been a hallmark of the familialisation process. It is submitted that achieving a balance between rules and discretion would minimise this, and this is what this thesis has sought to achieve.

[697] *Rimmer v Rimmer* (n 129) [865] (Evershed MR).
[698] *Midland Bank v Cooke & Anor* (n 317).

Conclusion

This chapter has promoted a dual approach to rectifying the main deficiencies of the current trusts framework. This involves firstly, expanding the available methods of acquiring a beneficial interest in property to recognise indirect financial contributions. This would allow for more non-moneyed parties to gain an interest through having their domestic contributions recognised in a structured manner. Secondly, the factors considered when assessing the quantification of common intention would be reconfigured and structured in a hierarchical way to limit the amount of discretion at the court's disposal. From Chapter Three, judicial discretion was identified as a problem in three ways. Whilst it offers the flexibility to accommodate the domestic dimension of property ownership, it risks relying on the values and prejudices of judges, legal uncertainty, and potential over-consideration of particular facts such as witness credibility. Thus, the balance between rules and discretion is important to preserve and this underpins the tension between property law and family-centric ideologies discussed in the first chapter. In addressing these criticisms, it was considered as to whether familialisation as a process should halt in favour of legislative intervention. It was concluded that this would not be a feasible option given the need to reform the trusts framework imminently and protect non-moneyed cohabitants. In the absence of statutory reform, this thesis agrees with the Law Commission, which in 2002, suggested that the development of the trusts framework could be achieved through judicial rather than legislative methods.[699]

In light of these conclusions, this Chapter then considered how the judiciary could continue to shape trusts of the family home. Firstly, the judiciary only marginally recognise the value of homemaking and caregiving at the acquisition stage, exclusively in relation to evidence of detrimental reliance. This general dismissal of such contributions prevents many non-moneyed parties and women from acquiring a beneficial despite all of their homemaking efforts. Equally, there is a need to preserve certainty and so domestic responsibilities cannot be widely construed. Consequently, the trusts framework should permit indirect financial contributions that relate to the property as conduct capable of acquiring such an interest. This would acknowledge domestic contributions through quantifiable factors that relate to the property

[699] Law Commission (n 295).

itself. It would support the development of familialisation in a structured manner, balancing rules with discretion and the need for recognition of modern family dynamics. The second proposition is that the factors considered at the quantification stage should be modified and be attributed different weights, so that they are ranked in order of importance. A key issue that this would address at the quantum stage is the way the courts assess common intention. Due to its opaque yet limited definition, the judiciary engage in a rigorous process of fact-finding to create results-oriented judgments. Modifying these factors and prioritising property-based conduct would therefore reduce the potential to produce such results-based decisions. This hierarchy would prioritise property-based conduct over personalised factors which can often be subjective and vague. A hierarchical structure would also avoid completely ignoring the relationship dynamics between the couple but reduce their influence over the case in order to limit discretion and promote certainty. Structured discretion is therefore the most beneficial method of retaining a degree of certainty and predictability whilst permitting the flexibility to accommodate the domestic context of property disputes.

The assessment of 'fairness' was also considered in relation to its application to trusts of the family home cases and it was asserted that its use should be restricted. Whilst it is a valuable concept, it is suggested that it should return to its orthodox approach of considering the whole course of dealing between the parties in relation to the property. This would seek to regulate the impact that it has on assessing personal family relationships and intentions. Overall, the pairing of expanding acquisition and reducing the discretion afforded at the quantification stage is complementary as it simultaneously permits more non-moneyed parties to access financial remedies but adopts a stricter approach towards the quantity of that amount. This therefore acknowledges the lived realities of cohabitants, who have decided to live together and share their lives but without the financial commitment of marriage, which often involves pooling assets, reflecting a middle ground between independence and complete sharing. The proposed solution seeks to achieve the balance between rules and discretion and provide a palatable alternative to legislative reform.

CONCLUSION

This thesis has examined the familialisation of property law and how the judiciary have utilised discretion to modify property law principles to accommodate the modern needs of families. In particular, it has assessed the relationship between rules and discretion, which underpins the tension between property law principles and family-centric concerns. Having identified this as a central theme of the debates surrounding familialisation, discretion has been scrutinised as a key method of familialisation which offers both flexibility and, at the same time, uncertainty. The need to ascertain an appropriate balance was identified as the most vital consideration when making recommendations for the future judicial development of the trusts framework. This thesis sought to offer a thorough analysis of how judicial discretion has shaped the modern trusts framework to discern how future use of discretion could address the deficiencies of these trusts. It concluded that a dual-purpose approach should be adopted. This would lower the acquisition threshold and structure the factors considered when quantifying a beneficial interest in order to provide a palatable solution to the problems identified.

In addressing the research questions set out at the start of this thesis, it was first argued that the use of judicial discretion to support non-moneyed parties in the context of property disputes stemmed from section 17 Married Women's Property act 1882 and dissatisfaction with the separation of property principle. The desire of the courts to intervene emanated from the gradual recognition of the discretion afforded to the judiciary through this legislation and the progressive appreciation of the family context of property disputes. The early trusts framework primarily supported married couples in the absence of any divorce legislation and financial provision. This re-calibration of property principles to align with family values revealed a desire for comprehensive legislation enabling spouses to divide assets. Once this legislative reform occurred, the trusts framework grew 'organically from marital to extra-marital relationships'.[700] Judicial activism continued into the latter half of the twentieth century, marking a turning point in judicial recognition of domestic property ownership.

[700] Sparkes (n 435) 103.

Through analysing case law post *Pettitt* and *Gissing*, it was observed that the judiciary sought to grapple with the tension between rules and discretion. This created an ebb and flow process as the courts attempted to tackle the competing demands of property law and the emotional, interpersonal dimension of these property disputes. This created fragmented familialisation, whereby the law developed incrementally and more intensively in some areas, notably at the quantification stage, than others. It was observed that the courts have struggled to reconcile the various concepts derived from cases and the trusts framework would need some clear guidelines in order to minimise the perpetuating uncertainty.

Providing this detailed overview of the development of familialisation led the thesis to consider the second research question, which evaluated the contemporary criticisms of the trusts framework. This resulted in a two-pronged critique of trusts of the family home. Firstly, judicial discretion was examined and it was highlighted that discretion may create uncertainty and potential overreliance on particular facts in a case. Applied to trusts of the family home, expansive discretion may create inconsistency within the framework as judges have more latitude to create results-oriented outcomes. Moreover, arbitrary assessments such as that of common intention requires judges to engage in a rigorous process of 'fact finding' in order to identify conduct that may evidence a common intention between the parties for both to hold a beneficial interest in the property. Consequently, this was highlighted as a feature of the trusts framework that is ripe for reform.

Trusts were revealed to be inadequate at protecting many non-moneyed cohabitants, many of whom are women. This is owing to the high acquisition hurdle which fails to value domestic contributions and homemaking tasks, excluding these claimants from gaining a beneficial interest in the shared property. Such domestic responsibilities and contributions should be valued more. Having highlighted these criticisms, the final chapter then sought to respond to the third research question, which endeavoured to discern suitable recommendations for future judicial innovation. It was advanced that ceasing familialisation with a view to prompting legislative reform is neither a necessary nor appropriate response. Instead, the courts should continue to adopt judicial creativity to fashion trusts of the family home in a structured manner to reduce uncertainty. This would require a re-evaluation of the way that common intention

is assessed and need greater consideration of property-based conduct to establish acquisition. A dual approach was recommended, involving lowering the acquisition threshold to allow indirect financial contributions to evidence acquisition, in addition to limiting the discretion employed to considerations at the quantification stage through attaching more weight to property-based conduct when assessing quantum. This would provide a palatable solution, ensuring that certainty is preserved within the trusts framework whilst affording flexibility, striking the most appropriate balance between rules and discretion. Permitting indirect financial contributions at the acquisition stage would acknowledge the value of domestic contributions through quantifiable, and objective, factors that relate to the property itself such as contributions to household bills and payments. Thus, whilst allowing more non-moneyed parties to gain access to an interest in the shared property, it will do so in a structured manner. The second proposition would modify the factors considered at the quantification stage so that the factors are ranked in order of importance, with property-based conduct attributing the most weight. This would prioritise conduct relating to the property itself over personal conduct, which has led to uncertainty in the past. Such a hierarchical structure would therefore still acknowledge relationship dynamics, although reduce their weight to limit discretion and uncertainty. Overall, it is argued that this form of structured discretion is the most appropriate vehicle to achieve the correct balance on the rules-discretion spectrum. It will retain a degree of certainty and consistency, enabling the judiciary to better navigate the trusts framework, whilst also facilitating flexibility for the courts to accommodate the modern needs of families sharing property. A significant result of this new balance would see the temperance of the ebb and flow process to a level more consistent with other areas of law. These recommendations for judicial innovation would not only comprehensively address the dual desire for both legal certainty and support for non-moneyed parties, but also create reform which can be realised in practice. The creative process of familialisation can then continue in a measured way, providing a palatable alternative to legislative reform.

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