LXBR BRAITHWAITE, M. Securing a fair share of the home for a mistress (or de facto husband)

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SECURING A FAIR SHARE OF THE HOME FOR A MISTRESS (or DE FACTO HUSBAND).

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I. INTRODUCTION.

Some recent English cases, adopted in New Zealand, have erected a species of trust, exact origin and character unknown, which gives a share in the home to a de facto spouse, when the couple separate regardless of the legal title. The court's ready intervention in the area of a man's (or woman's) private property is surprising. So is the post-war blossoming of the law of trusts in cases of matrimonial, or de facto's property. Such activity usually shows a defect in the law, or an inability to cope with social changes. This paper proposes to study the new use of trusts and how it affects the property of de facto spouses.

It will first seewhy this trust developed and what need it fulfilled. It will next consider the trust itself, and try to fit it into some traditional classification of trusts. It will study the terms of the new trust and see how successfully it copes with the problems which the law apparently could not handle. The paper will then move on to the particular situation of de facto spouses. It will examine the traditional approach to disentangling their property rights, and try to see how much change the new cases bring. It is proposed to look at de facto spouses in the light of broad policy, and try to decide whether they should share freely in each other's property. Finally, the paper will look at the trust and alternative methods of giving de facto spouses a share in the home. This necessarily involves consideration of what a fair share would be and how to achieve it in all the vastly different cases which come before the courts.

The paper tries to move from the cases to a broad open view and analysis of the legal position of the de facto spouse.

This was thought to be a more suitable approach than a rigorous case-analysis. The cases are as yet few, their rationes widely and often contradictorily phrased. The real question is the social one of how far the courts will take the law, not the strictly legal question of what the law is. It is more realistic, and more enlightening, to look at the cases in this way, and so to look directly at the questions the courts were considering.

The paper concentrates throughout on the home, since it is the major asset for the majority of couples. The same principles, however, apply to all the couple's property. Similarly, it is usually the mistress who is claiming, so some comments refer only to her. Exactly the same rules govern the male partner's claims, and men have successfully claimed shares from their mistresses.

The problem is essentially a practical one. The legal theory has been shaped and adapted to meet a practical need. So this paper will begin by looking at the case of an unmarried couple who have set up home together, to see how the law classifies and treats their situation. It will try to understand why so many difficulties and complications arise in this classification.

II THE PLIGHT OF THE DE FACTO SPOUSE : WHY WAS EQUITY INVOKED ?

The basic problem lies in the very nature of a couple's living together permanently, with or without benefit of wedlock, so it can never be solved or removed but only remedied. It has been repeatedly pointed out in the cases, (1) that when a couple set up house together they do not plan for their eventual separation. They work on the assumption that they will remain together, and pool their resources with little or no thought of who should have legal title to what. It is usually the man who is in charge of the couple's business affairs, so property may be conveyed into his name for convenience or because he can more easily raise finance. Living expenses or mortgage instalments may be paid by either, depending on convenience rather than ownership. If the couple do separate, there is a glorious muddle as to who owns or should own much of the property. Often the legal titles bear little relationship to the parties' contributions or their understanding of the situation.

The position for married couples is covered in New Zealand by the Matrimonial Property Act 1963 and the Matrimonial Proceedings Act 1963. These alleviate the harshness and injustice which would result from enforcing legal ownership by giving the court a wide discretion to distribute the property, and in particular the home, as it thinks fit. (2) The Matrimonial Property Bill 1975 would change the rationale of the court's intervention and by clause 49 would also apply to de facto spouses who have lived together for two or more years.

(1) Lord Denning M.R in his own inimitable way describes the position of legal spouses in Appleton v. Appleton [1965] 1.W.L.R.25; [1965] 1 ALLE.R.44 (C.A.) and of de facto spouses in Eves v. Eves [1975] 1 W.L.R. 1338; [1975] 3 ALL E.R. 768 (C.A.)

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It would provide for an automatic equal division of most of the couple's property, subject to proof that one had not done his fair share of the work. The rest of the "matrimonial" property would be split in proportion to contributions. The bill was aimed at recognising a wife's contribution in bringing up children and keeping house efficiently, so it redefines "contribution" very broadly to include these and other indirect contributions to assets. Until the bill becomes law, and for shorter relationships, de facto spouses must find their remedy in equity or common-law.

Couples in the past have typically resorted to equity for relief. A distinct class of implied trust developed to cover the matrimonial situation, where large numbers of people were affected by the injustice of the strict law, and was extended to the analagous situation of de facto spouses. That trust forms the subject for this paper. In view of its prevalence, a remarkable amount of uncertainty surrounds its nature. In the leading cases of Pettitt v. Pettitt (3) and Gissing v. Gissing (4) the House of Lords accepted that such a trust existed, but did not decide whether it was a resulting or constructive trust. (5) This is a vital point, since the two are quite different, giving the court different reasons and scope for intervening, and different remedies.

(2) Matrimonial Property Act 1963, SS. 5, 6. Matrimonial Proceedings Act 1963, SS. 41, 58.

(3) [1970] A.C. 777.

(4) [1971] A.C. 886.

(5) In Gissing, Lord Reid at 896, Lord Morris of Borth-y-Gest at 898, Viscount Dilhorne at 901, and Lord Diplock at 905 all left the question open. Lord Pearson at 902 said there was a resulting trust.

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Lord Upjohn in Pettitt clearly thought it was a resulting trust, since he studied the leading cases on resulting trusts in detail at 814-815 and treated them as authorities. The law-lords used the trichotomy " resulting constructive or implied trusts". This terminology is curious; the three categories are not mutually exclusive. The trust is not explicitly declared in the sort of cases we are considering, so it must be implied or else arise by operation of law if the latter, then it will be a constructive trust imposed by the court. If the former, then it will be a resulting trust, implied from the parties' behaviour.

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III A. CONSTRUCTIVE TRUSTS.

The problem may be partly due to the lack of a satisfactory definition of constructive trusts. The law on this point is in a state of considerable uncertainty (6), which this paper could not hope to determine. Mahon J. in Carly v. Farrelly (7) recently accepted as authoritative Edmund Davies L.J.'s formulation in Carl Zeiss Stiftung v. Herbert Smith (No. 2) (8) : the court would find a constructive trust when there was a want of probity in the trustee. This is rather an indication of the underlying principle than a test of the particular situations in which constructive trusts will be found, a seemingly arbitrary assortment. As yet this sort of family trust has not been authoritatively recognised as such a particular situation. The general principle requires some fault, or some use of a position of trust; the constructive trust is not a general remedy for injustice, as it is in America. It is imposed at the court's discretion, without reference to the parties' intentions. This makes it very flexible, but uncertain as to application and terms.

III B. Resulting Trusts

This is a narrower and more straightforward concept. Anyone paying part of the price of property is presumed to be the beneficial owner under a resulting trust in proportion to his contribution. Payment is taken to show the intentions to acquire and to give a share, and the presumption is rebuttable only by evidence that the parties intended otherwise. (9)

(6) But for a lucid survey, see A.J. Oakley, "Has the Constructive Trust Become a General Equitable Remedy?" (1973) C.L.P. 17.

(7) [1975] 1 N.Z.L.R. 356, 367.

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(8) [1969] 2 Ch. 276, 300-301.

(9) Dyer v. Dyer (1788) 2 Cox 92; 30 E.R. 42.
Wray v. Steele (1814) 2 V. & B. 388.

Contributions after the purchase, such as paying mortgage installments, are relevant only as evidence of either a trust at the time of the purchase or a subsequent agreement to create a trust. Contributions do not give a share in themselves; only the intention does that. This is in marked contrast to constructive trusts.

III C. Which is the Matrimonial Trust?

Which sort of trust is being found in the matrimonial cases?

The House of Lords in Pettitt and Gissing insisted on an actual intention being necessary to found the trust. Shares were to be precisely calculated from contributions; the court was not to fix the shares it thought fair. This strongly suggests that the court was finding a resulting trust. Efstratiou v. Glantschnig (10) is a clear example of the resulting trust operating in a matrimonial situation, as found by the New Zealand Court of Appeal.

Yet the English Court of Appeal's readiness to intervene has led to suggestions that it is really using constructive trusts without admitting it. (11) This would explain the completely different approaches taken by it and the House of Lords. The Court of Appeal is much more flexible, seems to be bound by fewer or more nebulous rules, finds trusts more readily (12, and will fix shares with a freer hand. In Eves v. Eves (13), Lord Denning M.R. explicitly declared the trust was " a constructive trust of a new model".

(10) [1972] N.Z.L.R. 594, 598.

(11) Nathan and Marshall, The Law of Trusts (6 ed. 1975) p.p. 334, 335.

(12) Henry Lesser in "The Acquisition of Inter Vivos Matrimonial Property Rights in English Law, A Doctrinal Melting Pot" (1973) 23 Univ of Toronto L.J. 148 argues that constructive trusts are harder to find than resulting trusts since there is an additional requirement of proof of unconscionable behaviour. In practice, however, the Court of Appeal seems to have little trouble in finding this. It is not an additional but an alternative requirement, and much easier to assert.

(13) [1975] 1 W.L.R. 1338, 1341; [1975] 3 All E.R. 768, 771 (C.A.)

The facts of Eves were unique in this line of cases in that the man actually lied and "tricked" his mistress out of the property, giving some reason to find a constructive trust. It would be harder to find a want of probity in the usual case, such as Gissing. One could argue that Mr. Gissing would show a lack of probity in breaking the implied agreement that his wife have a share. This argument has all the disadvantages of a resulting trust, adds yet another artificial stage to the theory, and loses the resulting trust's certainty of quantification and existence.

The alternative reason is that the husband shows a lack of probity is not rewarding his wife's contributions. The House of Lords specifically delcared that this was not the courts' concern but Parliament's (14). I would agree. The reform needed in this area is basic to matrimonial law, and to our views of marriage and de facto unions. To smuggle it in under the guise of constructive trusts, in the present state of the law, involves pretending that one spouse is acting dishonourably, and would make for a strained and artificial matrimonial law. It would also distort the law of constructive trusts. They were never in New Zealand intended to be found whenever the courts thought the law would produce unjust enrichment of an inequity. This would make all law to uncertain, and too reliant so I would support recent attempts to make the constructive trust a general remedy (14a) on the court's unfettered moral judgements.

(14) Lord Dilhorne in Gissing at 901, Lord Reid in Pettitt at 795, 797, Lord Morris of Borth-y-gest at 803, Lord Hodson at 810-811, Lord Upjohn at 817.

(14a) e.g. Hussey v. Palmer [1972] 1 W.L.R. 1286; Binions v. Evans [1972] Ch, 359.

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Matrimonial property is one area where certainty is particularly desirable, so applying the constructive trusts to this sort of situation is not the most appropriate remedy. I would not go as far as Bagnall J., who in Cowcher v. Cowcher (15) equated justice with law, but I do agree with him that justice is best attained by applying sure and settled principles.

These questions will be discussed in greater detail later. Suffice it to note here that the House of Lords is still a higher authority than the Court of Appeal, and its view must be taken as the law. So the trust over a couple's property is not an unfettered constructive trust, as the law stands.

(15) [1972] 1 W.L.R. 425, 430; [1972] 1 All E.R. 943, 948.

IV The Basic Theory of the Trust.

Let us consider the case of a mistress who runs the home, brings up the children, and holds down a part-time job: can she claim a share in the home? Pettitt established that the couple must actually intend to found a trust (16). The court can only infer an implicit common understanding if there is some evidence to support this. It is not enough that reasonable spouses would have intended to share, nor that this couple would have if they had thought about it. This was a policy decision by the House of Lords, weighing individual justice against the undesirability of the courts' making law in this area.

The House will not draw inferences of intention very freely. Certainly merely spending money on the family does not raise a presumption of trust. Contributions to the price, by the law of resulting trusts, are presumed to show an intention to share. Doing repairs, renovations, or decoration does not in itself show an intention to share. The parties need not have been thinking of legal consequences or exact proportions, so long as they intended to share. Lord Diplock in Gissing was the most generous of the lawlords (17).

(16) Lord Morris of Borth-y-gest in Pettitt at 804.
Lord Hodson " " 810.
Lord Upjohn " " 818.
Lord Diplock at p. 823 took the contrary view. In Gissing at 904 he accepted that his former view was in a minority and that the majority view had become the law. Lord Reid also took the minority view in Pettitt at 795-6, but maintained it in Gissing at 895, 897. His view cannot be taken to represent the law.

(17) Except Lord Reid: see note 16.

He saw the trust as either a constructive trust imposed for bad behaviour (18) or else as a resulting trust, for which he would readily infer intentions: He defined intention, contractually, as that which a reasonable man would infer from the other's words and behaviour. Two intentions thus inferred would add up to a common intention (19). This formulation is almost a way of avoiding the need for intention, as Lord Diplock tried and failed to do in Pettitt. The other law-lords took fairly conservative attitudes to inferring intention. In the two cases which came before the House, the decisions of the Court of Appeal were unanimously reversed and no trusts were found. Mr. Pettitt, in particular, had spent £723 on his wife's house, and done much work, and yet no intention that he acquire a share was inferred from this. This was probably an accurate analysis of the couple's understanding, but produced an unfair result.

This diffidence is in marked contrast to the Court of Appeal's readiness to infer agreements from very little evidence. The need for an intention is obviously undesirable. In theory, the court is rewarding these spouses calculating enough to sit down and reckon their respective shares. In practice, as Lord Reid pointed out in Gissing (20), it is penalizing honest couples who will admit they never thought about the matter, and rewarding those "sophisticated" enough to concoct evidence of an intention. It is an absurd test to apply to the intimacy of family dealings. Lord Hodson commented, "The conception of a normal married couple spending the long winter evenings hammering out agreements about their possessions appears grotesque..." (21)

The House was forced into this unsatisfactory approach by using the law of resulting trusts. The Court of Appeal, led by Lord Denning, simply ignored the law and the House of Lord's pronouncements.

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(19) This contractural view of intention was echoed by Megaw L.J. in Hazell v. Hazell [1972] 1 W.L.R., 301, 306, where he said that intention could be presumed where a reasonable sensible spouse would have realised the other was contributing in order to acquire a share.

(20) at 897.

(21) Pettitt, at 810; [1972] 1 All E.R. 923, 928 (C.A.)

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V Practical Problems.

These often arise in adapting the law of resulting trusts to the domestic situation.

V-A Contributions after purchase.

Contributions of money or work to the property after its purchase raise no presumption of resulting trust and are treated as a gift unless they can be referred to an agreement or unless there is estoppel (22). Jansen v. Jansen (23) shows what strong facts are necessary to refer contributions to an implied agreement. The husband gave up his work as a student to improve his wife's flats, and the Court of Appeal was prepared to imply from this an agreement that he have a share (24). Lord Denning M.R. in Button v. Button (25) tried to set up a trust, which was quoted with approval in the House of Lords : (26)

> "(The husband) should not be entitled to a share in the house simply by doing the 'do-it-yourself jobs' which husbands often do. He may, however, be entitled when the work is of a kind which normally a contractor is employed to do..."
> "The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which a wife does for the benefit of the family without altering the title to, or interests in the property."

(22) This is traditional trust doctrine as expounded by Lord Morris of Borth-y-gest in Pettitt at 804, Lord Hodson at 809, 810, Lord Upjohn at 818 and Lord Diplock at 822 (as revised by himself in Gissing). Lord Reid at 795 thought the same principles ought to apply for improvements as for money contributions. Lord Denning M.R. in Hazell v. Hazell at 304 rejected the requirement of referability and hoped to hear less of it in the future. He purported to be following Lords Reid and Pearson in Gissing. But Lord Pearson at 903 and Lord Reid at 896 themselves appear to require that contributions be referable to the acquisition of the property.

Lord Denning's words were strictly obiter, since on the facts of the case there was a clear link. Of the other two judges in the Court of Appeal, Stephenson L.J. merely agreed, and Megaw L.J. did not adopt Lord Denning's view. It is too widely out of line with the views of the House of Lords to be taken as the law. J.M. Eekelaar in "The Matrimonial Home in the Court of Appeal", (1972) 88L.Q.R.333 points out some of the problems which would result and deplores the breach between the Court of Appeal and the House of Lords.

(23) (1965) P. 478 (C.A.)

(24) The wife offered and the husband refused a fixed sum as payment for his services. In view of this, Lord Hodson in Pettitt at 809 and Lord Upjohn at 818 felt the presumption of agreement was rebutted. But Lord Reid at 796 and Lord Diplock at 826 felt the court was justified in implying a common intention since the strength of the presumption would override the evidence. The discussion turns on the interpretation of the facts; it is clear that all the lords thought non-monetary contributions could give a share in an appropriate case.

(25) [1968] 1 W.L.R. 457, 461-462; [1968] 1 All E.R. 1064, 1066-1067 (C.A.)

(26) Lord Reid in Pettitt at 796, Lord Hodson at 807, Lord Upjohn at 818.

As Dankwerts L.J. commented: (27)

> "... where the claim is based upon work done, it seems to me the matter is more problematical (than for money contributions) and it is more difficult to ascertain an intention to give any particular share."

This attitude is probably based on sound common-sense, since parties do not intend household chores to transfer title, and also on the administrative difficulty of evaluating all the minor contributions a couple make during their relationship.

V-B Indirect Contributions.

One party may contribute indirectly by relieving the other of expenditure. A wife or mistress may pay all the household expenses so that the man can put all his money to paying off the mortgage. The law of resulting trusts traditionally would not extend to this situation, though there is no logical reason why it should not. (28) The English Court of Appeal early declared that if a contribution was substantial, then it need not be direct to give a share in the property. (29) It is not clear how far the House of Lords endorses this view. It made no definite pronouncement on the point in Pettitt and Gissing and its dicta can be taken as hinting in either direction. (30) The Court of Appeal in subsequent cases has not felt that the House limited its style or scope.

(27) Button 463, 1068.

(28) The Supreme Court of Canada left the question of indirect contributions undecided in Murdoch v. Murdoch (1974) 41 D.L.R. (3d) 367, while accepting that logic required that services should be able to found a resulting trust.

(29) Tulley v. Tulley 109 Sol J. 956.

(30) Lesser at 194 argues that in Gissing the House of Lords said beneficial interests could not be acquired solely by indirect contributions.

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(30) Cont'd..

Cf. Peter Jacobson "Murdoch v. Murdoch: Just about what the ordinary rancher's wife does" (1974) 20 McGill L.J. 308, 316. I submit that Lord Diplock at 909, Lord Pearson at 903, and Lord Reid at 896 would allow indirect contributions to give a share, while Lord Morris of Borth-y-gest and Viscount Dilhorne are neutral.

In Falconer v. Falconer (31) Lord Denning M.R. declared: "So long as there is a substantial financial contribution towards the family expenses it raises the inference of a trust." He repeated this view in Hargrave v. Newton (32). This is a flat contradiction of Pettitt and Gissing, and cannot be reconciled with the law of resulting trusts. In Hazell v. Hazell he said the wife could get a share by reason of her contributions whether or not there was an agreement. This, too, is indirect opposition to the view expressed by the House of Lords. Bagnall J. in Cowcher v. Cowcher laboured heroically to reconcile the Court of Appeal with the House of Lords, producing some very strange interpretations of the former. In fact, the Court of Appeal was clearly contradicting the House. In so far as it did this, its pronouncements are not the law. Its view that indirect contributions referable to the home's acquisition give a prime facie share is reconcileable, and can be taken as the law unless overruled.

Hazell shows that this is the fairer view. After the husband bought the house, the couple discussed how it was to be paid for, and the wife agreed to take reduced housekeeping money and to go out to work. Her pay was thereafter spent on the family, his on the mortgage. So her contributions were clearly referable to the purchase, and she worked at least as hard as him, running the home and holding down a job. Surely it should be presumed that this contribution entitled her to a share. The Court of Appeal thought so.

(31) [1970] 1 W.L.R. 1333, 1336; [1970] 3 All E.R. 449, 452 (C.A.)

(32) [1971] 1 W.L.R. 1611; [1971] 3 All E.R. 866, (C.A.)

Logically, it seems desirable that indirect contribution can be taken to give a share. Since the theory of resulting trusts is that the court is trying to establish the parties' intentions, substantial indirect contributions referable to the house's acquisition should, in common sense, raise the same rebuttable presumption of intention as direct ones. They will still be harder to prove, and harder to relate to the acquisition of the house. Once a spouse has conquered these hurdles, it is harsh and unfair to impose a further requirement. There is no theoretical need to do so, not to fina a trust prima facie shown. It may well be artificial to infer an additional intention but no more so than for direct contributions.

V-C Indirect Non-Financial Contributions.

As we have seen, direct non-financial contributions can give a share in the property, although they are not covered by the traditional doctrine of resulting trusts and must be fairly substantial to be considered. There is no reason in principle why indirect non-financial contributions cannot equally found a share.

Proof will be harder: the contribution must be referable to the house's acquisition, and the claimant must perform more than the normal wifely or husband's duties so there is no fear of opening the floodgates.

There is no relevant case concerning de facto spouses, but cases on matrimonial property show the court's approach. Where a wife works in her husband's business (33), or takes in a lodger (34), and the profits are used to buy a home, she has been awarded a share. Her contribution may be valued as one half (35), but the court will give a greater share to the initial owner of the business, even after 30 years of working on it together (36).

So, though indirect non-financial contributions are a rather rare class, they can and do give a share.

(33) Nixon v. Nixon [1969] 1 W.L.R. 1676; [1969] 3 All E.R. 1133, Muetzel v. Muetzel [1970] 1 W.L.R. 188; [1970] 1 All E.R. 433, Re Cummins [1971] 3 W.L.R. 580; [1971] 3 All E.R. 782.

(34) Muetzel v. Muetzel.

(35) Re Cummins.

(36) Nixon v. Nixon.

VI The Traditional Position of the De facto Spouse.

This, roughly, was the law of trusts as it developed with reference to married couples. In Cooke v. Head (37) the Court of Appeal applied it to give a mistress a third share in the home. The Court had traditionally taken an unsympathetic view of such claims. (38)

In Diwell v. Fames (39) the court said that mistresses were not to be treated like wives. (40) One reason was that the court thought spouses were subject to special considerations, (41) so that the maxim "equity is equity" could be applied more readily to them. The House of Lords in Pettitt later dispelled this theory and disapproved of this use of the maxim. Hodson L.J. (42) said that spouses were to be treated differently because they do not in most cases regulate their business dealings formally. But on the facts, this couple had clearly regulated their dealings as informally as any spouses. Their relationship lasted sixteen years, and to treat them as strangers is unrealistic. Their lives and their property were completely merged. They thought of their interests as joint, of their property as shared. In any event, the House of Lords made it clear that marriage does not affect property rights. Husbands and wives, too, are treated as legal strangers. The relationship is relevant only as evidence of what the couple's actions would have meant to each other.

(37) [1972] 1 W.L.R. 578; [1972] 2 All E.R. 38, (C.A.)

(38) e.g. Rider v. Kidder (1805) 10 Ves. 360; 32 E.R. 884.

(39) [1959] 1 W.L.R. 624; [1959] 2 All E.R. 379, (C.A.)

(40) W.L.R. at 627, 628, 635, 641; All E.R. at 381, 382, 387, 391-2.

(41) W.L.R. at 627, 628, 632, 633, 636, 637, 639, 641, All E.R. at 381, 382, 384, 385, 388, 389, 390, 391-2.

(42) Diwell 627-9, 381-3.

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Ormerod L.J. (43) and Willmer L.J. (44) said that even if there were evidence of a common intention to share, this would depend on an agreement or contract. Such a contract would be unenforceable, since made for immoral consideration. I submit that this reasoning is fallacious. In New Zealand, at any rate, there need be no consideration for a declaration, express or implied, of trust (45). Moreover, the parties were agreeing to pool their property and work for their mutual benefit. The mistress would contribute her money and in return receive a beneficial interest in the property. While their immoral relationship may well have been the motive for their agreement, it formed no part of the consideration, which was fairly balanced on both sides. It may be that the mistress contributed most. I would submit that this should be reflected in the proportion of the house she gets. It is absurd to postulate that her contribution was made solely in consideration of the husband having sex with her. The agreement which she was alleging was exactly contrary to this. Equally, to claim that the only consideration for him was sex is just not borne out by the facts. Since the couple were living together before the house was bought, and there was no suggestion of their relationship ending, the sex could not have been the consideration for entering into a new agreement. Buying the house was a business and property venture to which the couple's sexual relationship was not material. Their case is the same as that of members of a family entering into a deal out of natural affection. (46) So long as there is consideration from both sides, the contract is binding. The affection is not part of the deal. It is motive not consideration.

(43) pp. 630 - 1, 384.

(44) P. 636, 388.

(45) In U.K. the Law of Property Act s. 5.3 (1) (b).

(46) e.g. Bull v. Bull [1955] 1 Q.B. 234 (C.A.)
Dewar v. Dewar [1975] 1 W.L.R. 1532; [1975] 2 All E.R. 728.

Mr. Diwell and his mistress first rented a house, she providing 2/3 of the rent, and then as sitting tenants bought it very cheaply. The house was bought on mortgage in his name for £900 with no deposit, but she made all the mortgage payments till it was resold, i.e. £81. It fetched £2300 and another house was bought out-right with the proceeds. The Court, Willmer L.J. dissenting, held that the mistress's contributions to the rent were not a contribution to the price of the first house. Her share was therefore the proportion £81 formed to the first house's price, i.e. 9%. Willmer L.J. thought that contributing to the tenancy should be included in the price, since the tenancy enabled them to buy the house for considerably less than its real value. Ormerod L.J. thought that if the tenancy was to be considered, he would have agreed with Willmer J. in finding the shares too difficult to calculate. Then, since they would be roughly equal, the court would have applied the maxim "equality is equity".

The case seems very unfair. The mistress contributed all the money and in return received 9% of the value of their second house. If this was sold for its purchase price of £1250 shw would have made a profit of £31.10s. The husband's estate would make £1137.10s just from the use of his name on the title and mortgage. Perhaps the injustice arises from the way the court assessed the relative value of money contributions and legal liability. They did not really come to terms with mortgages. Their decision seems, however, to have been influenced by a distaste for <u>de facto</u> marriages.

On their view of the matter, this was a resulting trust. The mistresse's share would grow bigger each time she paid a mortgage installment, till she could eventually acquire the whole house.

Would a new trust arise every time she made a payment, and altered her proportionate contribution? Or would there be one resulting trust, with the parties intending their shares to be shifting? The Court did not consider these questions.

The doctrine of resulting trusts was designed to achieve rough justice between the parties by erecting a rebuttable presumption that contributions were intended to be proportionate to shares. I would submit that the facts of this case rebut the presumption, quite apart from the difficulties in evaluating contributions. The couple's behaviour, and in particular their letters, showed an intention to hold the house equally together. Two of the four judges - i.e. Willmer L.J. and the county court judge - would have given the mistress a half-share. Willmer, L.J., however, would not have given effect to a mere agreement without consideration between de facto spouses, such as a postulate, since he would say immorality was the consideration, not generosity. This is the traditional view, and forms an additional obstacle for de facto spouses. He found the evidence raised a resulting trust for roughly equal shares from roughly equal contributions, so gave equal shares to settle the uncertainty. Since the resulting trust arises from a presumption as to the parties' intentions, it is curious that none of the judges thought that this presumed agreement was tainted by the immorality. They must have felt that so long as there was adequate consideration, the immorality was no part of it and was therefore irrelevant.

VII Cooke v. Head - A new departure.

The Court of Appeal in Cooke paid little attention to Diwell's reasoning. Lord Denning M.R. noted (47) that the majority looked at actual financial contributions, but that Willmer L.J's approach was "more in accord with recent developments" ..(48) a comment which does not take into account the very traditional line of Willmer L.J.'s reasoning. Basically the court went its own way, The judgements show how far the Court of Appeal had gone beyond the House of Lords. It held that the same principles were applicable to husband wife as to man and mistress (49). This accords with the House of Lords insistence that spouses are to be treated in the same way as everyone else. Karminski L.J. did say..."

> "The principles of law in a case of this kind between a man and his mistress when they intend to set up a home together and intend also to marry when they are free is in no way different from the principles applicable in the cases of husband and wife." (50)

But it is hard to see how his requirement of an intention to marry can be justified. If the parties intend to live together permanently, they are as likely to intend to share the house as a married couple. Even if they do not intend this, the evidence may still show an intention to share.

The part of the judgements which is really open to attack is their interpretation of the general principles which are to be applied to legal and de facto spouses. Lord Denning stated "It is now held that, whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust ." (51) This seems to be virtually a resurrection of the doctrine of family assets. The Court took a wide discretion on itself, as when Lord Denning declared ".. we should decide what the shares should be..." (52) The House of Lords said the court had no discretion to do what it thought fair.

(47) at 42, 521

(48) at 41, 520

(49) P.42, 521

(50) P.43, 522.

(51) P.41, 520.

(52) P.42, 522.

Again he said,

> " I do not think it is right to approach this case by looking at the money contributions of each and dividing up the beneficial interest according to those contributions. The matter should be looked at more broadly, just as we do in husband and wife cases. We look to see what the equity is worth at the time when the parties separate. We assess the shares as at that time". (53)

He quoted Lord Diplock at page 909 of Gissing in support of this. Lord Diplock was apparently considering the situation where the parties had agreed roughly on the formula by which shares were to be calculated, but had agreed to leave the actual calculation to be made when the house was sold or the mortgage paid. They had set up a trust with certain terms, though the parties had agreed to leave the calculation till later. This does not mean that the court can award shares however it feels is fair. The court can only carry out the quantification on the formula envisaged by the parties. This formula may be fairness, it may be in direct proportion to contributions, it may be whatever the couple choose. Lord Diplock was the only law lord to postulate this sort of delayed agreement between parties. The House of Lords can not have envisaged that it would be very common. All the law lords said that the court could not alter the terms of the trust, once fixed, in the light of later circumstances. The court is not entitled to do what it thinks just in the changed circumstances, only to enforce the trust. Lord Diplock himself said at page 906, that the parties' behaviour after the trust was made was relevant only as evidence of it. It did not create new rights. So the wide language of Cooke v. Head went beyond its authorities.

(51) P.41, 520.
(52) P.42, 522.
(53) P.42, 521.

VIII Eves v. Eves: More Lord Denning.

In Eves v. Eves (54) the court went further still. Unlike Cooke, there was no financial contribution at all. The mistress, Janet, stripped wallpaper, and painted woodwork, cabinets and brick-work. She used a 14lb sledgehammer to break up concrete which covered the front garden, and put the pieces in a skip. She worked in the garden and helped to demolish and replace a shed. There was an understanding between the couple that she was to have a share in the house, but it was bought in his name. Love he told her was because she was a minor, but admitted in court that he had used this as an excuse, and never intended to share the ownership. At first instance, Pennywick, V.C. said that she made sufficient contribution to found a resulting trust, but he could not link her contributions to their agreement. In the Court of Appeal, Brightman J, with whom Browne L.R. concurred, found that there was a common understanding and agreement. He felt able to enfer that the mistress worked as a result of the agreement.

Lord Denning went further. He said (55) that there was a constructive, not a resulting trust. The man had made a declaration of trust, and should be held to it because to do otherwise would be inequitable. Her share was whatever the court thought fair. (56). He fixed this at a quarter. This figure was apparently plucked from the air, and not justified by any of the judges. In view of the little work she did, it seems remarkable that she got so much. She did no more than Mr. Pettitt.

The court appeared to be impressed that a woman could wield a sledgehammer. This is an unrealistic attitude enough, since many young couples do much physical labour on their houses. Janet's contribution, I submit, is not "much more than many wives would do". It is too unrealistic to say she would not have worked except for a share of the house.

(54) [1975] 1 W.L.R. 1338; [1975] 3 All E.R. 768.
(55) P. 1341, 791 (56) P.1342, 772.

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Many people will break up concrete as a favour to a friend. There was some evidence of an agreement to share here, this is unusual. If a resulting trust was found, as Browne L.J. and Brightman J seem to have done, then Janet would need to have made a contribution equivalent to one quarter of the house's value. If it was a constructive trust, then no precise evaluation of contributions and no agreement is necessary.

On either view, the law requires that the claimant has contributed, above and beyond performing what the average de facto wife does as her share of the relationship. The court must find that both parties consciously thought over their property rights and planned to alter their legal position. This is a strict requirement which most couples will not satisfy. So, as here, the court will seize on any contribution to prove these absurd hypotheses and do substantial justice. In this case, Mr. Eves had remarried and was not paying maintenance for the children. As A. Bissett-Johnson coyly asked: "Could it be that the decision to find the implied trust might have been influenced by a subconscious desire by the court to be able to make a secured affiliation order or (sic) order for a lump sum?" (57)

(57) "Mistress's Right to a Share in the 'Matrimonial Home'". (1975) 125 New L.J. 614, 615.

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IX Another View.

The case of Richards v. Dove (58) is interesting because, like Cowcher, it was not decided by Lord Denning. On the facts, Walton J. decided that the mistress had not contributed to the house. Nonetheless, he considered some broad general principles. (59) He appeared to accept Lord Denning's proposition that when two people acquire property by their joint efforts for their joint use, the court may find a trust. Yet in practice his view of the proposition is closer to the House of Lords, since the claiming party's efforts must be aimed at the acquisition, not just at every-day sharing. So substantial indirect contributions, such as paying housekeeping expenses, would give a share only if they are made with the aim of acquiring an interest.

Merely contributing substantial sums is not enough. Likewise, he accepts Lord Denning's view that the time for determining shares is when the parties separate, but only because all the parties' behaviour till this point may be evidence of their intentions. He distinctly rules out the possibility of a "wavering equity", whereby the shares would change in different circumstances,(60) as the court thought fit.

He takes a more conservative view of mistresses. He accepts that the same principles apply to them, but says that applying the principles may produce different results for de facto and legal spouses. This is because the husband has legal duties to maintain his wife. I would submit that since the trust relies purely on intention, the fact that both parties know the husband has duties may well affect their intentions. When the husband is doing no more than his duty, extra contribution by a wife may tend to show an intention that she have a share.

(58) [1974] 1 All E.R. 888

(59) p. 894.

(60) This was what Lord Denning was apparently envisaging in such a case as Heseltine.

But the relationship is relevant only insofar as it affects the parties' intentions. On the facts as he found them Walker J.'s view of the parties' rights is clearly correct. Miss Richards did not even try to appeal.

Clearly, the law is in a state of flux and uncertainty. The courts are using the law of trusts to help de facto and legal spouses to acquire shares in the property. This is perhaps unfortunate since it conceals the true problem which is peculiar to couples living together. The real issue is the changing roles of the sexes in the family (61). The law is moving from a position where a woman has rights only through her husband, to a position where a couple are more like equal partners, equally capable of owning property and with mutual duties. It is more in accord with a twentieth century view of marriage to say that the couple both own the house. During the last century it was probably generally felt that the house was the husband's, though he owed the wife duties. Yet equality is not yet so generally accepted that the wife will be prima facie assumed to have a half-share. The Matrimonial Property Bill 1975 shows the law merging towards this view. The provisions for joint family homes was a warningof change to come.

Changing patterns of land-holding are also relevant. The average couple will both work before marriage, and maybe at the beginning of it, or until they have children. They will both need to save to afford a house. The house will be bought with the help of a mortgage, and even if the wife does not work for money it will be rarely that she is not called on to contribute in some way. Couples often to their own decorating and improvements. They need to work together on the house, and it seems fair that both should get a share of it in return for the work they have done. So there has been a general trend towards recognising and directly rewarding such contributions by women. Where a woman felt that she should be rewarded in the same way as him. The trend has now continued with pressure to recognise women's indirect and non-monetary contributions.

(61) See Lord Hodson in Pettitt at 811. The wife's lack of rights in the property is compensated by the husband's duty to maintain her. Lord Denning in Button at 461, 1066 said that the husband, in return for his work, received rent-free lodgings and did not need to provide a home for his wife.

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> These sorts of arguments show how ones whole understanding of property rights rests on assumptions about what marriage means.

Is the plight of the de facto spouses such that they too need the law's help? The law has traditionally been reluctant to protect them for reasons of public policy. It feared that giving them rights would attack the sanctity of marriage. Lately there has been a growing social recognition of de factos, and their position is more and more being equated with that of married couples. De facto relationships of one year are recognised for tax privileges, social security, superannuation and accident compensation.

There has been a world-wide shift in attitudes to marriage and the sexes. This is one area in which the law seems to be following this trend and recognising de factos. I would submit that this is the more realistic view. The law must reflect society's values. If de factos are becoming acceptable, the law must recognise this when it assesses their dealings. The law may disapprove, but it is not entitled to penalise them by depriving them of what is generally thought should be theirs. Moreover, the argument that if the law protects de facto marriages, then no one will get married is unrealistic. The modern view is that marriage for such reasons should not be encouraged. It is not a usual motive. When a couple plan to live together permanently they are not deterred by property considerations. They think the problem will not arise because they will stay together. They behave just like spouses. The law cannot stand alone against the tide and assess property rights by values which society no longer holds. It must, and has, already begun to accept the facts and try to treat them as the average citizen would feel as fair.

The New Zealand case of Fraser v. Gough (62) was, like Richards v. Dove, decided before Eves. The couple had lived together for fifteen years, during which they parted three times.

(62) [1975] 1 N.Z.L. R.138 (S.C.)

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They were disputing the ownership of three properties registered in Miss Fraser's name. She had contributed £1170, he £500. Both had worked to improve the properties and contributed equally to the costs of improvements. She planned and managed the venture. The court have him a third share.

White J. purported to follow Cooke v. Head, quoting Lord Denning's words at page 41, 520, criticised above. Yet he himself gave a conservative analysis of the law. He found a resulting trust in proportion to the parties' contributions, (63) and nearly in proportion to their monetary contributions. He found there was actually an intention to share in proportion to contributions. (63)

He took into account contributions after purchase in fixing the share. He may have thought these showed a new trust had been formed. He may have thought that this trust was formed with the intention that these contributions should be made. He may have thought that this was the sort of trust Lord Diplock had visualised: the parties fixed a formula of shares in proportion to contributions but left calculation till later. It is not clear which alternative White J. intended; he does not discuss this point.

Perhaps the most remarkable feature of the case is that the plaintiff never even alleged that the immorality would make the trust void. One possible reason is that there were three properties and the parties treated them as a business venture. It is more appropriate and easy to imply a conscious intention to share in such a case (e.g. Jansen). A second reason may be that here the man was claiming a share. It is less easy to imply that he gave immoral consideration for his share than that a woman did.

(63) P. 144.

Even so, it is significant that the point was not argued. The court casually commented:

> " Considered as a question of fact as between this man and this woman, as would be the case if the parties had been man and wife..." (64) "... It is not surprising to find parties to 'a former de facto union now terminated' in much the same position as the parties to a broken marriage." (65)

This shows the rapid shift in attitudes to sex and marriage in the last twenty years.

There is still, however, a vast legal and social difference between married and unmarried couples. The law should recognise this. For one thing, the parties are not under the same legal duties to each other. No maintenance can be awarded for a de facto spouse. De facto relationships are intrinsically different from marriages in that the parties have not been prepared to make the final commitment to each other of marriage, of taking on legal duties towards each other and of binding themselves and all their worldly goods to each other for life. This could be taken to show that the couple intend to keep their property rigidly separate, or else that any major contribution to the other's property must have been made in return for a share. This latter interpretation seems to me to rate the couple's generosity too low and their legal awareness to high. It involves the undesirable position of interest. The cases show that the former explanation is not always true. De facto unions may involve a total merging of property or none at all.

So de facto marriages can not be treated in exactly the same way as legal marriages, but the parties need some legal protection and redistribution of property rights.

(64) P. 141.

(65) P. 144.

XI Is the Trust A Suitable Method?

The real question is whether the law of trusts is an appropriate solution to the problem, which the cases show exists. I submit, and have tried to show in this paper, that the law of trusts was not designed to cope with the unique problems of matromonial or de facto property and is not very well adapted to it.

XI-A The Present Law-Resulting Trusts.

Resulting trusts are obviously unsuitable. They give definite shares, subject to the minor problem of evaluating non-financial contributions, but they rely on the parties' intentions. The House of Lords has refused to dispense with this requirement. As Lord Evershed M.R. pointed out in Silver v. Silver (66)any attempt to ascribe to spouses living together an intention to allocate to each other stated proportions of a home is surrounded by "a certain air of unreality." It forces the courts into injustices or fictions. It is also positively unfair. A "sophisticated" claimant will recover where an honest one would fail, as Lord Reid points out in Gissing. The success of a claim may well depend on the judge's willingness to infer an agreement, on whether he is "strong" or "weak". Moreover, intention really ought not to be relevant. The court should not award a remedy to those couples who thought the matter out, but not reward a hard-working, trusting and not legally-minded spouse. Resulting trusts have a very valid place in law, but they are not adequate to deal with the peculiarly complex and informal position of de facto spouses.

(66) [1958] 1 W.L.R. 259, 262; [1958] 1 All E.R. 523, 525 (C.A.)

One of the strongest indications of the unsuitability of the present law of trusts, in effect the law of resulting trusts, is its widespread evasion and distortion by the courts. As long as the law does not protect de facto spouses adequately, they will appeal to the courts to misinterpret the law and do them justice. Notwithstanding judicial warnings or yearnings for theoretical purity, the lower courts at least will help. It is undesirable that the court has to resort to twisted misinterpretations of the facts or devious reasoning to achieve what it, as representative of the average citizen, sees as justice. The present law of resulting trusts is riddled with fictions. What is worse, these do not always achieve justice. Sometimes, black is so obviously black that even Lord Denning could not interpret it as white.

An anomaly under the present law is the effect of fault. Once a trust has been declared the parties' conduct is irrelevant. So adultery or other matrimonial offences will not affect a spouse's title. This is the position under the Matrimonial Property Act 1963, but not under the Matrimonial Proceedings Act 1963. The modern trend is away from emphasis in fault, to merely splitting property by reference to contributions which are directly relevant to the property. Unmarried couples do not have the same legal duties to each other, so it is harder for them to sin against each other in law and fault becomes irrelevant to the law. It is nonetheless anomalous that a spouse can be penalised for misconduct, while a de facto spouse cannot. I would submit that conduct should only be relevant to maintenance, not to property rights. But if one wanted to resolve the anomaly by making conduct, or glaring misconduct, relevant to the division of de factos' property, one could imply a term in the trust penalising fault. I would regard this as not only undesirable, but as heaping unreality upon unreality.

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No couple, surely, would calculate their property interests and also the effect on them of different kinds of faults.

The law of resulting trusts has been vastly extended from its original application purely to direct financial contributions. It is still not a suitable or satisfactory solution to the problems of de facto spouses. To persevere in using it is a disservice to the couples concerned, and could also confuse the law of resulting trusts.

XI-B The Constructive Trust.

Pettitt and Gissing fixed definite limits on the use of resulting trusts as a remedy for de facto or married couples. Eves v. Eves saw the court turning instead to constructive trusts. The House of Lords spoke with reference to a trust between couples, which might be either resulting or constructive. On their face, the judgements would therefore apply to any development of the trust between couples. It is rather legalistic, but perfectly possible, to argue that the law-lords were speaking of the usual sort of trust between couples, which had most of the features of resulting trusts. One could then postulate the birth of a new and different sort of trust between couples - the constructive trust. This would not be affected by the limitations imposed by the House of Lords. Eves v. Eves may well be the start of such a development.

Is the law of constructive trusts a feasible method of dealing with the problems of de facto spouses' property? At the present, the law of constructive trusts consists of various separate categories, into one of which a claimant must fit himself. As D. Wilson described it,

> "The instances in which a constructive trust is found may represent no more than a collection of unrelated examples of equity's tendency to legal gymnastics in the search for justice". (67)

(67) "The Constructive Trust" research paper, Victoria University of Wellington 1975, P.13.

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He ultimately concluded that all the classes of constructive trust were based on a breach of fiduciary relationship. (68) This view requires such a wide definition of "fiduciary", to cover cases like Hussey v. Palmer, that it must become almost meaningless. This happens to any attempt to pin down the essence of a constructive trust to one simple test. Let us abandon the search and look at the categories instead. The categories are not closed, but the court is fairly to extend them.

So in Eves v. Eves, Lord Denning commented:

> "Equity is not past the age of child bearing. One of her latest progeny is a constructive trust of a new model." (69)

To which the locical reply is Bagnall J's:

> "(Equity's) progeny must be legitimate - by precedent out of principle." (70)

If the courts have the power to extend the law of constructive trusts to include the category of couples' property, the question becomes whether they should. A. Bissett-Johnson sums up one side of the argument:

> " if the court wants to extend the law of trusts to ... give mistresses a share in the home to which they are not entitled under the ordinary law of trusts, then these matters, which involve important questions about marriage and society, are better left to Parliament than to judicial law reform."

While this is very well in theory, if Parliament shows no signs of activity, or if the court can do as good a job as Parliament, then there is no objection to it doing so. In New Zealand, The Matrimonial Property Bill 1975 saw Parliament tackling the problem, at least in some respects. Moreover, the courts would not, I submit, be as competent as Parliament to tackle the problem.

(68) ibid, P.38

(69) P.13 41, 771.

(70) Cowcher v. Cowcher 430, 948.

Any solution would need to be fairly certain, to avoid litigation and contention, while the constructive trust is essentially discretionary. In New Zealand, family problems have usually been dealt with by giving the court a wide discretion. This has obvious advantages, especially where personality is the vital question, as in custody or guardianship cases. Sometimes it is unavoidable. Since New Zealand will not directly limit a testator's right to dispose of his property, every case where this right is limited must be treated as an individual exception under the Family Protection Act 1955. The frequent granting of wide discretion doubtless reflects the individualism of the common-law.

Yet the drawbacks, principally uncertainty and increased litigation, sometimes outweigh the advantages. This was recognised by the Matrimonial Property Bill 1975. In the field of matrimonial property, the confusion became such that definite satisfactory rules for division, on the continental mould, were felt to be preferable. Property is one of the more straightforward and least personal of family problems. It is therefore particularly suited to codification. This is as true for de facto couples as for married ones.

The solution must establish clear but flexible rules, which take all the relevant factors into account. These would include the couple's understanding, their needs, and their contributions. To achieve any certainty, the courts would need to work out a formula which included and balanced all these factors. This would take time, as the courts developed their theories from case to case. Parliament could achieve such a formula instantly.

These obstacles are not insuperable. The constructive trust could doubtless be used as a remedy for de facto spouses.

But they are good reasons for preferring statutory intervention. Perhaps the most powerful obstacle of all is legal conservatism. The courts are unlikely to extend constructive trusts in the immediate future. Lord Denning's attempts to do so have been disapproved of in cases such as Carly v. Farrelly. This reluctance to make radical changes is one of the exasperating strengths of the judicial system, the concomitant of its stability. While O. Kahn-Freund lamented the decisions in Pettitt and Gissing, he admitted:

> "The courts cannot, and perhaps ought not to be the agents of this reform. Pettitt v. Pettitt and Gissing v. Gissing have shown the inability of the courts so to apply the existing legal framework as to make it a reliable tool for the necessary adjustment." (72)

(72) "Recent Legislation on Matrimonial Property" (1970) 33 M.L.R. 601, 628.

XII Alternative Solutions.

If the present law of trusts is not suitable, and constructive trusts should not or will not be used instead, what form should statutory intervention take? This concluding section of the paper considers what aims are desirable. It looks at the Matrimonial Property Bill 1975, the pending legislation which deals with de facto spouses' property rights.

De facto relationships vary widely, far more so than marriages. They range from brief passionate affairs to stable unions of many years with grown-up children. So an automatic division of de factos' property may be widely unsuitable. Neither of the parties may have wanted or visualised this. It is probably some such consideration which has led judges to think that an intention to marry is relevant. It may show an intention to share, and negate a clear acknowldgement of the couple's separate legal and property interests.

The Matrimonial Property Bill 1975 tries to recognise the differences by applying only to couples who have lived together for two or more years. This blanket distinction dodges the questions. Any relationship of two years would give property rights, subject to an unfettered discretion in the judge. This is not fair to the judge, who must do what he thinks just but has no guide-lines as to even which factors are relevant. It will inevitably create a muddled and uncertain law. I would also quarrel with fixing the limit at two years. Quite a few relationships of this length do not imply commitment, permanence or any merging of property and interests, nor do they put the couple in any insuperable position of mutual dependence. Marriages of under three years would not suffice to transfer property rights (73), so it is anomalous that de facto relationships should.

(73) clause 12 (2) (a).

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The bill is in this respect inconsistent and does not consider the problems fully. It makes a clumsy sweeping change in the law, but leaves the judges to work out its rules and applications. The bill must rest on a generalisation about the average de facto spouses;, I am complaining that it is too inflexible and does not validly reflect even the majority of cases.

How, then, can the line be drawn? Which de facto spouses' need or deserve help? I would submit that any de facto spouse who contributed to the couple's prosperity deserves a share of it.

The simplest method to achieve this is to redefine by statute "contributions" where family trusts are concerned, much as the Matrimonial Property Bill 1975 does. This would not help those de facto spouses who did not contribute even to the extent of being a good housekeeper or bringing up the children. And I feel that as a general rule this is just. When two people live together, with no undertaking to share everything, and one makes no great contribution, the law should not interfere to give him one.

This generalisation must now be qualified. A major contribution of money or labour in even a short relationship should give a share. Housekeeping, contributing money, or making any other long-term and steady contribution, should give a share only if it is performed over a sufficient period of time for the contribution to amount to something substantial. Furthermore, even a non-contributing de facto spouse may be entitled to a share if he has given a large part of his life to the relationship. This is not a question of rewarding effort fairly. Rather it is to say that when a long-standing joint venture and relationship breaks up, the parties must be adequately provided for.

One could argue that a contribution of twenty, or even ten years is in itself major, but the real justification is necessity. The Bill's definition of "contribution" could be amended to give effect to this.

My main criticism of the Bill, then, is its readiness to hand over property. The basic assumption, I feel, is a good one, that family property must be dealt with by different rules. I would submit that the better approach would be to require a de facto claimant to prove contributions, as at the present, but to define them roughly as the Bill does. This would prevent automatic upheavals in property rights from shorter relationships, if any de facto spouse could prove he had contributed in any way, such as by raising the children, he would be entitled to a share. Evaluating the contribution would be something of a problem and a source of contention. For long-term relationships, it would be suitable to reverse the onus and assume the parties had contributed equally. This could be done after five or ten years of continuous living together. Contributing, say ten or twenty years to a relationship should, except in exceptional circumstances, be deemed a contribution.

Even if the terms of the state are fixed differently from this suggestion, some sort of statutory intervention is necessary to sort out the present confusion. While the courts' intentions were pure, and their actions no doubt approximated more closely to justice than inaction would have, the present form of trust is really not a suitable remedy for the de facto spouse's problems.

Where the couple has agreed on a solution themselves, the court should respect this. Such a view is in accordance with the court's policy of encouraging private settlements of disputes. It is the law for married couples.

Moreover, it is surely fair. If the couple carried on their relationship on the basis of a certain legal understanding, they should honour their undertakings. If necessary, the court should force the reluctant partner to do so.